*** OVERRULED IN PART by *Oakland Unified School District* (2024) PERB Decision No. 2906 ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,	)	
Charging Party,	)	Case No. S-CO-145
v.	)	PERB Order No. IR-49
SACRAMENTO CITY TEACHERS ASSOCIATION, CTA/NEA,	)	February 17, 1987
Respondent.	)	

Appearances: Littler, Mendelson, Fastiff & Tichy by Terry Filliman, for Sacramento City Unified School District; Diane Ross, Attorney, California Teachers Association, for Sacramento City Teachers Association.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION AND ORDER

HESSE, Chairperson: The Sacramento City Unified School District (District) filed an unfair practice charge alleging that the Sacramento City Teachers Association (Association) violated the Educational Employment Relations Act[1] (EERA or

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[1]EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise listed.

Section 3543.6(c) and (d) state:

> 3543.6. UNLAWFUL PRACTICES: EMPLOYEE ORGANIZATION
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> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

Act) section 3543.6(c) and (d) when it commenced a strike against the District on January 20, 1987. In addition to filing the unfair practice charge, the District seeks injunctive relief pursuant to the Public Employment Relations Board's (PERB or Board) authority to seek such relief under EERA section 3541.3(j).[2] As a defense, the Association asserts that it is striking in response to the District's unfair practices. Indeed, the Association filed a charge with the Board on the first day of the strike, alleging that the District was conditioning settlement on the Association withdrawing its previously filed charges and grievances.[3]

In this decision,[4] we do not rule on the merits of the

> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[2]Section 3541.3(j) states:

> 3541.3. POWERS AND DUTIES OF BOARD
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> (j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

[3]On January 21, 1987, the Association filed a new unfair practice charge, alleging that the District violated EERA section 3543.5(c) by failing to negotiate in good faith concerning substitutes' pay. Certainly, this charge, even if true, could not serve as provocation for the strike as the payment of substitutes arose only because of the need to hire substitutes because of the strike. The Association has not alleged that its members struck because of the substitutes' rate of pay.

[4]This opinion memorializes the January 21, 1987 decision of the Board to seek injunctive relief.

underlying unfair practice charges, except insofar as we must decide whether there is reasonable cause to believe an unfair practice has occurred. (PERB v. Modesto City Schools District (1982) 136 Cal.App.3d 881.) Rather, we leave for a full evidentiary hearing the determination of whether there is merit to the District's and to the Association's charges.

Instead, we address the sole issue of whether injunctive relief should be sought on behalf of the District to halt the work stoppage now in progress.

This Board has previously ruled that a strike that occurs prior to the exhaustion of impasse procedures creates a "rebuttable presumption" that the employee organization is either refusing to negotiate in good faith and/or refusing to participate in impasse procedures. (Fremont Unified School District (1980) PERB Decision No. 136; Westminster School District (1982) PERB Decision No. 277; San Mateo City School District (1985) PERB Order No. IR-48.) In this case, the parties were engaged in mediation at the time of the strike, and the mediator had not yet certified the matter to factfinding.[5] (EERA sec. 3548.1; PERB Regs. 32797, 32798.) Thus, without more, we would have no trouble in concluding that the standard under PERB v. Modesto City Schools District, supra, requiring a showing that there is reasonable

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[5]The mediator certified the matter to factfinding on January 22, 1987. The parties were scheduled to have their first factfinding meeting on February 3, 1987.

cause to believe it is more likely than not that an unfair practice has been committed, has been met.

The Association, however, has countered by alleging that this strike was provoked by the District's conduct. Specifically, the Association argues that the District has committed an unfair practice by conditioning settlement of the contract on the Association's withdrawal of pending unfair practices and grievances. Certainly, to so condition settlement (or to insist to the point that the parties reach impasse on the issue) would be an unfair practice. (Modesto City Schools, supra; Fremont Unified School District, supra; Lake Elsinore School District (1986) PERB Decision No. 603.)

As noted above, we do not rule on the ultimate merits of the Association's charge. Rather, we need examine only whether the Association's charge, if true, was sufficient provocation to excuse the work stoppage.

In Westminster School District, supra, Modesto City Schools (1980) PERB Order No. IR-12, aff'd PERB v. Modesto City Schools District (1982), supra, and Rio Hondo Community College District (1983) PERB Decision No. 292, this Board evaluated the defense of provocation for an otherwise unlawful strike. In Westminster, the Board found that the strike was not excused, even though the employees were frustrated at the slow pace of negotiations. The association in that case did not file an unfair charge. The Board ruled that the strike was, therefore,

economic in nature and thus was violative of EERA because the parties had not exhausted the negotiations procedures.

In Modesto (IR-12) and Rio Hondo, however, charges were filed against the employer. In Modesto, the district took unilateral action and instituted its final offer without sufficient bargaining. The Board found the strike to be provoked by this conduct, and it ordered the district to rescind its unilateral action.[6] In Rio Hondo, the district was accused of several unfair practices. The Board concluded, however, that the association failed to show a causal connection between the unfair practice and the strike. The Board specifically found that the association's purpose in striking was to exert pressure to secure a favorable contract and to protest the stalled negotiations to that point. At no time did the association indicate to its members or anyone else that the root cause of the strike was the district's unlawful conduct. Therefore, the strike was not provoked by the employer and was an unlawful economic strike.

In this case, the Association has alleged that the strike was in response to the District's own unfair practices, chiefly, conditioning bargaining on withdrawal of pending

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[6]We note that, once the district rescinded its final offer, the provocation for the strike no longer existed. The association was then ordered to return to work.

unfair practice charges.[7] Assuming arguendo this allegation to be true, we find it unlikely, considering all the circumstances, that the strike was in fact provoked by conditional bargaining.

As set forth in Fremont Unified School District, supra,[8] in examining the Association's conduct, this Board will examine whether (1) the totality of the Association's conduct raises an inference of bad faith and (2) whether the work stoppage was provoked by the District's own unlawful conduct and was undertaken as a last resort. Without an evidentiary hearing, we cannot rule on the totality of conduct by the parties here. We do not need to so rule, however, because we find that the strike does not appear to have been provoked by the District, and the strike was not undertaken as a last resort.

The Association feels frustration at what it perceives to be the District's unfair practice of conditioning settlement on withdrawal of pending unfairs. Yet the Association only filed

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[7]In its paper filed in superior court, the Association alleged several unfair charges as the provocation for its strike. Unfairs that have been deferred to arbitration obviously arose under a prior contract and had no connection to these negotiations. Several other charges were either dismissed or settled. The only outstanding charge that appears connected to this set of negotiations is the charge filed on January 20, 1987, concerning conditional bargaining. Given the timing and circumstances of the remaining unfair charges, they do not appear to have had any cumulative provocative effect.

[8]In an unpublished opinion, the Court of Appeal reversed the Board's finding that the District committed an unfair practice. However, it did not disturb the rule of law stated therein nor the Board's finding that the strike was protected. (See Fremont Unified School District (1982) PERB Decision No. 136a.)

the unfair practice charge on January 20, the first day of the strike, long after the alleged conditional bargaining took place. This belies any assertion that the District's "conditioning" was provocative. Also, there is evidence of Association delay in proceeding to factfinding. Clearly, the Association has not given the statutory processes an opportunity to resolve the dispute in a manner that would address the parties' concerns without the need to resort to the extreme action of a strike.

Our decision today does not address whether this Board will no longer find any strikes in response to an unfair practice to be protected. Rather, we rule that, even in the presence of an employer's alleged unfair practice, the employee organization must show a causal connection between the employer's action and the strike. Where the employer's unfair practices arguably provoked the strike, we will also look to see if other means, short of a strike, are available to resolve the dispute. Here, the strike does not appear to have been provoked, but we also note that the Association has not availed itself of all Board procedures which might redress its dispute, nor did it satisfactorily explain its delay in seeking factfinding. We therefore order the General Counsel to seek an injunction to halt the strike.

Member Craib joined in this decision. Member Porter's concurrence begins on page 8.

Porter, Member, concurring: I concur in granting the petition to seek injunctive relief. I write separately to express my belief, and the reasons for it, that EERA does not grant to public school employees the right to strike, and that engaging in a strike is an unfair practice and unlawful under EERA.

This matter raises two issues. First, does the Educational Employment Relations Act (EERA) grant public school employees the right to strike? Second, does a strike by public school employees constitute an unfair practice under EERA?

I. INTRODUCTION TO ANALYSIS

Present at the threshold step of construing any legislative enactment are certain basic assumptions. First, in enacting a statute the Legislature knew and was familiar with: (a) the California Constitution; (b) existing and related statutes, and the acts of previous legislatures; (c) judicial decisions which have construed the words, phrases and provisions of the California Constitution and the statutes; and (d) the common law. Second, the Legislature enacted the statute in light of such knowledge. (Estate of McDill (1975) 14 Cal.3d 831, 837-839 and cases cited therein; Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board (1976) 16 Cal.3d 1, 7; Keeler v. Superior Court (1970) 2 Cal.3d 619, 625; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad

Trainmen (1960) 54 Cal.2d 684, 688-689; Buckley v. Chadwick (1955) 45 Cal.2d 183, 200 and cases cited therein; Sutter Hospital v. City of Sacramento (1952) 39 Cal.2d 33, 38; Rosenthal v. Cory (1977) 69 Cal.App.3d 950, 953; Favalora v. County of Humboldt (1976) 55 Cal.App.3d 969, 973; American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 260, hg. den.; People v. Welch (1971) 20 Cal.App.3d 997, 1002; and see Civ. Code, sec. 13; Code Civ. Proc., sec. 16.)

These assumptions with respect to the Legislature's knowledge of relevant constitutional, statutory and decisional law are inextricably tied to the application of other fundamental rules of statutory construction. Namely, the intent of the Legislature should be ascertained so as to effectuate the purposes of the law. (Tripp v. Swoap, Director of Department of Social Welfare (1976) 17 Cal.3d 671, 679; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230; West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 607; Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Code Civ. Proc., sec. 1859.) And in determining such intent, the starting point is the language used by the Legislature in the statute. (Leroy T. v. Workmen's Compensation Appeals Board (1974) 12 Cal.3d 434, 438; Moyer v. Workmen's Compensation Appeals Board, supra, 10 Cal.3d 222, 230; Consumer Product Safety Commission v. GTE Sylvania (1980) 447 U.S. 102, 108.) Moreover, the provisions of a statute must be construed

together, significance being given to every word, phrase, sentence and part of an act in pursuance of the legislative intent and purpose. (Turner v. Board of Trustees, Calexico Unified School District (1976) 16 Cal.3d 818, 826; Moyer v. Workmen's Compensation Appeals Board, supra, 10 Cal.3d 222, 230.)

Thus, before attempting to analyze and apply the relevant statutes, we must first examine what the existing constitutional, statutory, and decisional law was with respect to the public school system and to the rights of public employees--more specifically, public school employees--to engage in strikes at the time the Legislature enacted the Educational Employment Relations Act (EERA) in 1975.

The Public School Education System

In analyzing any legislative enactment affecting the operation of our public schools, one must recognize and be ever mindful of the predominant position of the public school system within California's constitutional and statutory scheme, as well as its premier role in the public policy of this State. (Cal. Const., art. IX; Serrano v. Priest (1971) 5 Cal.3d 584, 604-610, 619, appeal after remand 18 Cal.3d 728 cert. den. 432 U.S. 907; Hartzell v. Connell (1984) 35 Cal.3d 899, 906-909; Piper v. Big Pine School District (1924) 193 Cal. 664, 669; Hall v. City of Taft (1956) 47 Cal.2d 177, 179-181; Turner v. Board of Trustees, Calexico Unified School District,

supra, 16 Cal.3d 818, 825; Myers v. Arcata Union High School District (1969) 269 Cal.App.2d 549, 556, hg. den.; Akin v. Board of Education of Riverside Unified School District (1968) 262 Cal.App.2d 161, 167, cert. den. 393 U.S. 1041; In re Shinn (1961) 195 Cal.App.2d 683, 686-687; People v. Oken (1958) 159 Cal.App.2d 456, 461, hg. den.; Gonzales v. State of California (1972) 29 Cal.App.3d 585, 590.)

The education of the children of this State is an obligation which the State took over to itself by adoption of the California Constitution. (Piper v. Big Pine School District, supra, 193 Cal. 664, 669) The California Legislature has the constitutional duty to provide for the education of California's children and has the constitutional duty and power in connection therewith to maintain and operate a system of free public education in this State. (Cal. Const., art. IX; Whitmore v. Brown (1929) 207 Cal. 473; Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549, 556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167.) Thus, as was stated in Hall v. City of Taft, supra, 47 Cal.2d 177, 179:

> The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment, regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto.

This constitutional duty to maintain and operate a public school system is discharged through the public school

districts. (Gonzales v. State of California, supra, 29 Cal.App.3d 585, 590.)

The unique and predominant status of the public school system in California public policy and within the public sector is expressively set forth by the Supreme Court in the seminal decision of Serrano v. Priest (1971) 5 Cal.3d 584, appeal after remand 18 Cal.3d 728 (1976) cert. den. 432 U.S. 907 (Serrano I). In Serrano I, the Supreme Court not only recognized public school education as a fundamental interest of individuals and society but also that the delivery of public school education services is perhaps the most important function of state and local government, even exceeding public safety services in its impact on the welfare of the people of California. In the Serrano I decision, after first concluding that the property-based school financing system discriminated on the basis of the wealth of a district and its residents, the Supreme Court declared in pertinent part:

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Education as a Fundamental Interest

> But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests--rights of defendants in criminal cases [citations] and voting rights [citations]. Plaintiffs' contention--that education is a fundamental interest which may not be conditioned on wealth--is not supported by any direct authority.

We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. "(T)he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (Note, Development in the Law--Equal Protection (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions--while not legally controlling on the exact issue before us--are persuasive in their accurate factual description of the significance of learning.

The classic expression of this position came in Brown v. Board of Education (1954) 347 U.S. 483, which invalidated de jure segregation by race in public schools. The high court declared: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstate our recognition of the importance of education

to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . ." [Citation.]

The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. . . .

When children living in remote areas brought an action to compel local school authorities to furnish them bus transportation to class, we stated: "We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the sine qua non of useful existence . . . . In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education." (Fn. omitted.) (Manjares v. Newton (1966) 64 Cal.2d 365, 375-376.)

And long before these last mentioned cases, in Piper v. Big Pine School Dist., supra, 193 Cal. 664, where an Indian girl sought to attend state public schools, we declared: "(T)he common schools are doorways opening into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are

often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied." (Id. at p. 673). . . .

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote--two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "(E)ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which--to the state--have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society--participation, communication, and social mobility, to name but a few." (Fn. omitted.) (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. 305, 362-363.)

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights. . . ." [Citations.] The drafters of the California Constitution used this same rationale--indeed, almost identical language--in expressing the importance of education. Article IX, section 1 provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement." (See also Piper v. Big Pine School Dist., supra, 193 Cal. 664, 668.) At a minimum, education

makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny." (McCollum v. Board of Education (1948) 333 U.S. 203, 216, 231 (Frankfurter, J., concurring).) In Abington School Dist. v. Schempp (1963) 374 U.S. 203, it was said that "Americans regard public schools as a most vital civic institution for the preservation of a democratic system of government." (Id. at p. 230 (Brennan, J., concurring).)

We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."[26]

First, education is essential in maintaining what several commentators have termed "free enterprise democracy"--that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.

Second, education is universally relevant. "Not every person finds it necessary to call upon the fire department or even the police in an entire lifetime. Relatively few are

on welfare. Every person, however, benefits from education. . . ." (Fn. omitted.) (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. at p. 388.)

Third, public education continues over a lengthy period of life--between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. at p. 389.) "(T)he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." [Citation.]

Finally, education is so important that the state has made it compulsory--not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. . . .

. . . . . .

. . . Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.

By our holding today we further the cherished idea of American education that in

> a democratic society free public schools shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal immutable principle of natural law, or natural ethics,--a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man. . .which proves the absolute right to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. . ." (Original italics.) (Old South Leaflets V, No. 109 (1846) pp. 177-180 (Tenth Annual Report to Mass. State Bd. of Ed.), quoted in Readings in American Education (1963 Lucio ed.) p. 336.)

Footnote 26, supra, set forth:

> The uniqueness of education was recently stressed by the United States Supreme Court in Palmer v. Thompson (1971) 403 U.S. 217, where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court decision which refused to permit the closing of schools to avoid desegregation, the court stated: "Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.' Brown v. Board of Education, supra, at 493." (Id. at p. 221.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." (Id. at p. 229.)
> (Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619)

In 1984, the Supreme Court reinforced its recognition in Serrano I of the vital importance of the operation of the public school system in Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909. In rejecting an attempt by a high school district to require students to pay fees for participation in extracurricular music and sports activities, the Supreme Court stated (Id. at pp. 906-913):

> . . . this court must examine the role played by education in the overall constitutional scheme. Because the nature of the free school concept has rarely been addressed by the courts, it will be necessary to explore its underpinnings in some depth.
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> The free school guarantee was enacted at the Constitutional Convention of 1878-1879. Also adopted was article IX, section 1, which proclaims that "[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ." (Original italics.) Joseph W. Winans, chairperson for the convention's Committee on Education, elaborated: "Public education forms the basis of self-government and constitutes the very corner stone of republican institutions." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1087 [hereafter Proceedings].) [Fn. omitted.] In support of section 1, delegate John T. Wickes argued that "a liberal education . . . breaks down aristocratic caste; for the man who had a liberal education, if he has no money, if he has no wealth, he can stand in the presence of his fellow-men with the stamp of divinity upon his brow, and shape the laws of the people . . . ." (Proceedings, at p. 1088.)
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> This theme runs like a unifying thread through the writings of our forefathers. In

1786, Thomas Jefferson wrote from France, then a monarchy: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom, and happiness. . . . Preach, my dear Sir, a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that the people alone can protect us against these evils [of kings, nobles, and priests]." (Jefferson, Letter to George Wythe, in The Portable Thomas Jefferson (Peterson edit. 1979) pp. 399-400.)

John Swett, California's most prominent free school advocate at the time section 5 was adopted, warned: "Our destruction, should it come at all, will be . . . . [f]rom the inattention of the people to the concerns of their government . . . . I fear that they may place too implicit confidence in their public servants and fail properly to scrutinize their conduct . . . . Make them intelligent, and they will be vigilant; give them the means of detecting the wrong, and they will apply the remedy." (Quoted in Cloud, The Story of California's Schools (194?) p. 20.) Without education for all, a majority of the people would be--in the words of Horace Mann--"the vassals of as severe a tyranny, in the form of capital, as the lower classes of Europe are bound to in the form of brute force." (Mann, Twelfth Annual Report, in Educational Ideas in America: A Documentary History (Rippa edit. 1969) p. 199.)

Perhaps the most eloquent expression of the free school idea came not from a political leader or educator, but from the poet, Ralph Waldo Emerson: "We have already taken, at the planting of the Colonies, . . . the initial step, which for its importance might have been resisted as the most radical of revolutions, thus deciding at the start the destiny of this country,--this, namely, that the poor man, whom the law does not allow to

take an ear of corn when starving, nor a pair of shoes for his freezing feet, is allowed to put his hand into the pocket of the rich, and say, You shall educate me, not as you will, but as I will: not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts." (Emerson, Education, in Educational Ideas in America: A Documentary History, supra, at p. 176.)

The contribution of education to democracy has a political, an economic, and a social dimension.

As this court has previously noted, education prepares students for active involvement in political affairs. (Serrano v. Priest (1971) 5 Cal.3d 584, 607-608 [96 Cal.Rptr. 601, 487 P.2d 1241, 481 A.L.R.3d 1187] [hereafter, Serrano I].) [Fn. omitted.] Education stimulates an interest in the political process and provides the intellectual and practical tools necessary for political action. Indeed, education may well be "the dominant factor in influencing political participation and awareness." (San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 114, fn. 72 [36 L.Ed.2d 16, 90, 93 S.Ct. 1278] (dis. opn. of Marshall, J.).) With the rise of the electronic media and the development of sophisticated techniques of political propaganda and mass marketing, education plays an increasingly critical role in fostering "those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion" (Wieman v. Updegraff (1952) 344 U.S. 183, 196 [97 L.E. 216, 225, 73 S.Ct. 215] (conc. opn. of Frankfurter, J.)). Without high quality education, the populace will lack the knowledge, self-confidence, and critical skills to evaluate independently the pronouncements of pundits and political leaders. Moreover, education provides more than intellectual skills; it also supplies

> the practical training and experience--from communicative skills to experience in group activities--necessary for full participation in the "uninhibited, robust, and wide-open" debate that is central to our democracy (New York Times Co. v. Sullivan (1964) 376 U.S. 254, 270 [11 L.Ed.2d 686, 701, 84 S.Ct. 710, 95 A.L.R.2d 1412]).
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> Not only does education provide skills useful in political activity, it also prepares individuals to participate in the institutional structures--such as labor unions and business enterprises--that distribute economic opportunities and exercise economic power. Education holds out a "bright hope" for the "poor and oppressed" to participate fully in the economic life of American society. (Serrano I, supra, 5 Cal.3d at p. 609.) And, it is "an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency." (San Antonio School District v. Rodriguez, supra, 411 U.S. at p. 115, fn. 74 [36 L.Ed.2d at p. 91] (dis. opn. of Marshall, J.).)
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> Finally, education serves as a "unifying social force" among our varied population, promoting cohesion based upon democratic values. (Serrano I, supra, 5 Cal.3d at p. 608; see also Ambach v. Norwick (1979) 441 U.S. 68, 77 [60 L.Ed.2d 49, 56, 99 S.Ct. 1589].) The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together "'in harmony and mutual respect.'" (Washington v. Seattle School Dist. No. 1 (1982) 458 U.S. 457, 473 [73 L.Ed.2d 896, 909, 102 S.Ct. 3187, 3196].)

The court continued by discussing the importance of extracurricular activities, describing them as constituting "an integral component of public education" and "generally recognized as a fundamental ingredient of the educational

process." (Id. at p. 909.) Consequently, the court held that such activities fall within the free school guarantee of the Constitution, and no fee may be imposed for participation in those activities. Thus, it is clear from the court's discussion that extracurricular activities stand in no different stead than does the regular instructional program in terms of importance to the provision of public education. The court concluded by saying:

> Finally, defendants warn that, if the fees are invalidated, many school districts may be forced to drop some extracurricular activities. They argue that invalidation would--in the name of the free school guarantee--produce the anomalous result of reducing the number of educational opportunities available to students.
>
> This court recognizes that, due to legal limitations on taxation and spending (see ante, fn. 1), school districts do indeed operate under difficult financial constraints. However, financial hardship is no defense to a violation of the free school guarantee. . . .
>
> Perhaps, in the view of some, public education could be more efficiently financed by peddling it on the open market. Under the California Constitution, however, access to public education is a right enjoyed by all--not a commodity for sale. Educational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers. This fundamental feature of public education is not contingent upon the inevitably fluctuating financial health of local school districts. A solution to those financial difficulties must be found elsewhere--for example, through the political process. . . . (35 Cal.3d at pp. 912-913.)

It is therefore evident that the operation of public schools occupies a preeminent position in California, and the right to an education has been determined by the Supreme Court to be a fundamental interest. In looking at the relevant provisions of the California Constitution which bear on any statutes--including EERA--that could affect the operation of the public school system, such provisions must be viewed in light of section 26 of article I of the Constitution which prescribes: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Cal. Const., art. I, sec. 26.) In State Board of Education v. Levit (1959) 52 Cal.2d 441, 460, our Supreme Court pointedly emphasized the necessity of adhering to this constitutional mandate with respect to article IX provisions:

> Before examining further the provisions of section 7, article IX of the Constitution, it should be noted that the Constitution of 1879 provides in section 22 [now sec. 26] of article I, as follows: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." As early as January 1881 this court held in Matter of Maguire, 57 Cal. 604, at page 609, as follows: "The Constitution furnishes a rule for its own construction. That rule is that its provisions are 'mandatory and prohibitory, unless by expressed words they are declared to be otherwise.' (Art. I, sec. 22.) We find no such express words in the Constitution. This rule is an admonition placed in this the highest of laws in this State, that its requirements are not meaningless, but that what is said

> is meant, in brief, 'we mean what we say.' Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject matter under consideration." Thereafter, in 1886, in Oakland Paving Co. v. Hilton, 69 Cal. 479, this section was referred to and at page 512 it was held: ". . . (U)nder our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. (Art. 1, sec. 22.) This section, in our judgment, not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited. Under the stress of this rule, it is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said." . . . In Santa Clara County v. Superior Court (1949) 33 Cal.2d 552, this court again held in no uncertain terms at page 554, as follows: "Unquestionably, it must be recognized that our Constitution (art. I, sec. 22) makes its provisions 'mandatory and prohibitory, unless by express words they are declared to be otherwise'; that this declaration applies to all sections of our Constitution alike, and every one subject to its mandate--county authorities as well as departments of the state government--must comply." The provisions of section 22 of article I are therefore binding upon this court in its construction of the provisions of the Constitution. (52 Cal.2d at 460-461.)

This clear command of section 26 of article I is binding upon all branches of state government, including this Board. (Mosk v. Superior Court & Commission on Judicial Performance

(1979) 25 Cal.3d 474, 493, fn. 17; Jenkins v. Knight, Governor of State of California (1956) 46 Cal.2d 220, 224; Unger v. Superior Court of Marin County (1980) 102 Cal.App.3d 681, 685, cert. den. 449 U.S. 1131.)

With the foregoing in mind, we begin with section 1 of article IX of the Constitution which provides that:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement. (Cal. Const., art. IX, sec. 1, emphasis added.)

Moreover, the public policy expressed and mandated in section 1 of article IX is to support, maintain and strengthen the public school system. (Whitmore v. Brown, supra, 207 Cal. 473.)

Next, and of major significance in any analysis of EERA provisions relevant in the instant matter, are the mandates of section 5, article IX:

> The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established. (Cal. Const., art. IX, sec. 5, emphasis added.)

Section 6 of article IX prescribes annual minimum salaries[1] for full-time teachers in the public school

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[1]This constitutionally mandated minimum annual salary for full-time teachers may not be reduced by contract. (See 26 Ops.Cal.Atty.Gen. 27, 28 (1955).)

system. Section 6 also mandates the Legislature to yearly add to the State School Fund an amount not less than $180 for every pupil in average daily attendance (ADA) in a school district during the preceding school term and to apportion the entire State School Fund each fiscal year to the school districts and other agencies maintaining the public schools, including to each school district a minimum of $120 per pupil in ADA in the school district[2]. The State School Fund has priority on all state revenues. Section 8 of article XVI of the Constitution prescribes that "(f)rom all state revenues there shall first be set apart the monies to be applied by the state for support of the public school system and public institutions of higher education." (Cal. Const., art. XVI, sec. 8.) Over fifty percent (50%) of California's state budget each year is budgeted for and committed to the public schools, with billions of tax dollars being spent every year to maintain and operate the schools. (Serrano v. Priest (1977) (Serrano III) 20 Cal.3d 25, 46, fn. 18.)

To implement the constitutional mandates of section 5 and other sections of article IX, the Legislature enacted a comprehensive Education Code and delegated to the school

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[2]The ADA sum per pupil is actually much higher due to legislative supplements designed to equalize, maintain and improve school operations, including increasing the number of instructional days, reducing class sizes, etc. (See Serrano v. Priest, supra, (Serrano I) 5 Cal.3d 584, 591-595.)

districts the operation of the public schools. (Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549, 556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167; California Teachers Association v. Board of Trustees of Fullerton Union High School District (1978) 82 Cal.App.3 244, 254, hg. den.)

In complying with the constitutional mandate of section 5 that the public schools be maintained and operated "at least six months in every year" (Cal. Const., art. IX, sec. 5; California Teachers Association v. Board of Education of the Glendale Unified School District (1980) 109 Cal.App.3d 738, 744, hg. den.; Slayton v. Pomona Unified School District (1984) 161 Cal.App.3d 538, 548), the Legislature has statutorily prescribed in Education Code section 41420 that a school district must maintain regular school days for at least 175 days during the year. Education Code section 37201 provides that a "school month" is 20 school days or 4 weeks of 5 school days each, thus the minimum 175 days mandated by section 41420 equates to 35 school weeks or 8 and 3/4 school months, nearly 9 school months.

The Legislature also enacted the Compulsory Education Law (Ed. Code, secs. 48200-48324) requiring full-time attendance during the district's school days for all persons between the ages of 6 and 16 years (Ed. Code, sec. 48200), subjecting to arrest as a truant any minor who is away from home and absent

from school during school hours (Ed. Code, sec. 48264; In re Miguel G. (1980) 111 Cal.App.3d 345, 349-350, hg. den.), and making it a crime for any parent, guardian or other person having custody or charge of any minor to violate the Compulsory Education Law (Ed. Code, sec. 48293).

The importance of the Compulsory Education Law to those constitutional mandates which require the Legislature to provide for and maintain public schools in each school district for at least six months of each year was emphasized in In re Shinn, supra, 195 Cal.App.2d 683, a truancy case in which the parents had prevented their children from attending public school because they felt the children were of superior intelligence and could benefit more by a home education program involving correspondence courses. In affirming the lower court's judgment making the children wards of the juvenile court and ordering the parents, under bond, to deliver the children to public school and to keep them in public school during the school year, the court stated (195 Cal.App.2d at 686-687):

> The people of California recognize the maintenance of a democratic form of government depends in part upon an educated citizenry and declared in their Constitution that a general diffusion of knowledge and intelligence was essential to the preservation of the rights and liberties of the people. They made it the duty of the Legislature to encourage by all suitable means intellectual, scientific, moral and agricultural improvement. (Cal. Const., art. IX, sec. 1.) As a means of achieving a

> general diffusion of knowlege and intelligence, the Legislature was directed to provide for a public school system of common free schools. (Cal. Const., art. IX, secs. 5, 6, 7 and 14.) In obedience to the constitutional mandate to bring about a general diffusion of knowlege and intelligence, the Legislature, over the years, enacted a series of laws. A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and nation as a means of protecting the public welfare. (Gabrielli v. Knickerbocker, 12 Cal.2d 85, 92.) The Supreme Court of the United States, in the case of Pierce v. Society of Sisters, 268 U.S. 510, held that: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." Included in the laws governing the educational program were those regulating the attendance of children at school and the power of the state to enforce compulsory education of children within the state at some school is beyond question. (Meyer v. Nebraska, 262 U.S. 390; Ex parte Liddell, 93 Cal. 633, 640.) The basic compulsory education law is set forth in Education Code, section 12101, reading: "Each parent, guardian, or other person having control or charge of any child between the ages of 8 and 16 years, not exempted under the provisions of this chapter (commencing at section 12101), shall send the child to the public full-time day school for the full time for which the public schools of the city, city and county, or school district in which the child lives are in session."

Nor is this enforced compulsory school attendance by

California's children for at least 8 and 3/4 months of each year as mandated by the Constitution and the Legislature all one-sided. California's children (as well as their parents and the People of this State) are constitutionally and statutorily guaranteed the legal right to have the public schools in operation, open to their attendance, and providing uninterrupted instruction and educational activities for the minimum mandated school term each year. (Cal. Const., art. IX; Ed. Code, secs. 41420, 48200-48324; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610.) These constitutional and statutory educational prescriptions and rights are succinctly summarized in Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, at 548-549:

> . . . California has extended the right to an education by virtue of two constitutional provisions, one calling for legislative encouragement of education (Cal. Const., art. IX, sec. 1) and the other requiring the Legislature to create a system of "free schools" in each district of the state (Cal. Const., art. IX, sec. 5). It has also extended the right to an education by a statutory prescription for a compulsory full-time education for all persons between the ages of 6 and 16 (Ed. Code, sec. 48200). The early case of Ward v. Flood (1874) 48 Cal. 36, considered the provisions of the Constitution of 1849 relative to educational affairs which, in all material respects, were similar to the present Constitution. The Supreme Court said: "The opportunity of instruction at public schools

> is afforded the youth of the state by the statute of the state, enacted in obedience to the special command of the constitution of the state, directing that the legislature shall provide for a system of common schools, by which a school shall be kept up and supported in such district, at least three months every year, etc. (art. XIX, sec. 3). The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is therefore, a right--a legal right--as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor." (48 Cal. at p. 50, italics added; quoted in Piper v. Big Pines School Dist. (1924) 193 Cal. 664, 670.)

To provide for the mandatory nine months of public school education, the Education Code requires school districts to employ teachers, instructors, and other nonteaching personnel, and establishes in connection therewith "a complete system dealing with the credentials, employment, tenure, leave, salaries, dismissal, retirement, and other employee rights and obligations applicable to public school employees." (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools (1969) 272 Cal.App.2d 514, 529, hg. den.) Insightful is the decision in Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District (1985) 165 Cal.App.3d 82, hg. den., where, in dealing with the issue of whether the constitutional debt limitation barred the payment by the school district of a

negotiated retroactive salary increase, the court observed (165 Cal.App.3d at 92-95):

> C. California Law Imposes a Specific Duty on the Compton College District to Employ Teachers and Not to Reduce Their Compensation During the Contract Year.
>
> The Duty begins with the California Constitution which makes education one of the highest priorities of state and local government. (Cal. Const., art. IX, secs. 1, 5; art. XVI, sec. 8; Serrano v. Priest (1976) 18 Cal.3d 728, 763-767, cert. den. Clowes v. Serrano (1977) 432 U.S. 907.) Education Code section 72290 requires each district to employ and assign instructors and other personnel. Nor is a district free to hire anyone it wants as instructors, sections 87211, 87274-87277 and 87289-87290 describe the qualifications and certification required of persons a district employs to educate its students. Government Code section 3543.2 makes the duty still more specific. It requires community college districts to set salary schedules after engaging in good faith bargaining about "wages, hours of employment, and other terms and conditions of employment." (San Mateo City School District v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 856.)
>
> Thus, the Compton College District had a specific duty to employ the teachers needed to provide education to its citizens and to pay them according to a set salary schedule. This is not a case like City of Petaluma, where the District had a choice whether to engage in the activity which triggered the state-mandated expenditure. Here the District had a statutory duty to provide education and to employ those needed to carry out that function. . . .
>
> . . . . . .

> It makes no difference how the board arrives at the salary levels for the year--whether by negotiations with a union or by contracting with individual teachers on a case by case basis or by establishing a standard salary schedule. Once the amount is set, it cannot be reduced during that year. . . .

In relation to construing any statutory rights of public school employees, the paramount right of California's children to attend the public schools and obtain for themselves and society the benefits thereof is cogently recognized in McGrath v. Burkhard (1955) 131 Cal.App.2d 367, 377. In that case, in dealing with educational statutes and a teacher's contract of employment, the court observed:

> . . . It must be borne in mind that the respondent school authorities are entrusted with the responsibility of administering the affairs of the school district and that as stated in Bates v. Board of Education, 139 Cal. 145, at page 148:
>
> > "The public schools were not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils and the resulting benefit to their parents and the community at large."
>
> And as stated in Knickerbocker v. Redlands High School District, 49 Cal.App.2d 722, at page 727:
>
> > "The whole system of legislation regulating the educational machinery is based upon the consideration of the welfare and best interests of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered

> and regulated, but the fundamental purpose and primary object of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with our education system." (Emphasis added.)

In the same vein is the pronouncement of our Supreme Court in Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825 (emphasis added):

> In considering the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 years, the Legislature may determine whether a teacher's vested right shall be granted, postponed or denied. (Board of Regents v. Roth (1972) 408 U.S. 564, 577.) Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system. While refusal to grant total job security at the time of initial hiring may be repugnant to those pursuing a teaching career, repeated statutory amendments relating to probationary teachers' rights [citation] reveal that the Legislature has been well aware of the delicate balancing necessary to accommodate these sometimes competing interests.

Consequently, in construing any legislation which could affect the operation of the public schools, a lodestar which we must keep in view is the affording of educational services to, and the welfare of, the children. (Centinela Valley Secondary Teachers Association v. Centinela Valley Union High School District (1974) 37 Cal.App.3d 35, 42, hg. den.; San Mateo City

School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 863; Santa Barbara Federation of Teachers v. Santa Barbara High School District (1977) 76 Cal.App.3d 223, 234, hg. den.; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911, 921-922; Knickerbocker v. Redlands High School District (1942) 49 Cal.App.2d 722, 727, hg. den.; Serrano v. Priest, supra, 5 Cal.3d 584, 605; Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825; Crawford v. Board of Education of City of Los Angeles (1976) 17 Cal.3d 280, 297.)

Thus, in analyzing any statute which relates to or could affect the operation of the public schools, we must remain cognizant--as we must assume the Legislature was--of the predominant position of the public school system as established by our Constitution and implemented through the Education Code (Cal. Const., arts. IX and XVI, sec. 8; Ed. Code, secs. 1-99176; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Crawford v. Board of Education of City of Los Angeles, supra, 17 Cal.3d 280, 297; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-913; California Teachers Association v. Board of Trustees of Fullerton Union High School District, supra, 82 Cal.App.3d 244, 254), the required operation of the public schools for a minimum school year term of at least 6 months as mandated by the Constitution (Cal. Const., art. IX, sec. 5; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538,

548-549; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738, 744) and which has been statutorily mandated at nearly 9 months by the Legislature, with attendance by those of 6 to 16 years of age being compulsory (Ed. Code, secs. 41420, 48200), and the constitutionally guaranteed rights of California's children to attend and receive such education during the mandated school year term (Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; California Teachers Association v. Board of Education of Glendale Unified School District, supra, 109 Cal.App.3d 738, 744-745; Serrano v. Priest, supra, 5 Cal.3d 584, 604-608; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-913; Ward v. Flood (1874) 48 Cal. 36, 50; Piper v. Big Pine School District, supra, 193 Cal. 664, 670).

And we must bear in mind that it is the shining star of the children's education which is at the apex of the statutory educational pyramid formed by article IX and the Education Code, and that any and all statutes affecting the public schools must be in support of and subservient thereto. (Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-916; McGrath v. Burkhard, supra, 131 Cal.App.2d 367, 377; Centinela Valley Secondary Teachers Association v. Centinela Valley Union High School District,

supra, 37 Cal.App.3d 35, 42; San Mateo City School District v. Public Employment Relations Board, supra, 33 Cal.3d 850, 863; Santa Barbara Federation of Teachers v. Santa Barbara High School District, supra, 76 Cal.App.3d 223, 234; Knickerbocker v. Redlands High School District, supra, 49 Cal.App.2d 722, 727; Serrano v. Priest, supra, 5 Cal.3d 584, 605; Crawford v. Board of Education of City of Los Angeles, supra, 17 Cal.3d 280, 297.)

The Law With Respect to Strikes by Public Employees

To understand the statutory labor law enactments of the California Legislature, and to put them in their proper context, it is helpful to outline the development of both private and public sector labor laws.

In 1932, Congress enacted the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. sec. 102) dealing with the injunctive relief jurisdiction of the federal courts in labor matters and which set forth statutory language expressing public policy that employees should be free: (1) to organize, join and assist labor organizations; (2) to engage in collective bargaining through their chosen representatives; and (3) "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." There then followed section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 198), section 7 of the National

Labor Relations Act of 1935 (NLRA, the Wagner Act, 49 Stat. 449, 452), and section 7 of the Labor Management Relations Act of 1947 (LMRA, the Taft-Hartley Act, 61 Stat. 136, 140, 29 U.S.C. sec. 157), all of which set forth in identical statutory language in granting to employees these same three rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (29 U.S.C. sec. 157; July 5, 1935, ch. 372, sec. 7, 49 Stat. 452; June 23, 1947, ch. 120, tit. 1, sec. 101, 61 Stat. 140; emphasis added.)

These employee section 7 rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" were then--and are now--protected under the NLRA by section 8(a)(1) which provides:

> (a) It shall be an unfair practice for an employer . . .
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (29 U.S.C. sec. 158(a)(1); 49 Stat. 452, ch. 372, sec. 8).

In 1937, the California Legislature enacted chapter 1, "Contracts Against Public Policy," of part 3 (Privileges and

Immunities), division 2 of the Labor Code. Within chapter 1 was--and is--Labor Code section 923 which covered the three sets of rights which had been granted to employees under the NLRA (i.e., organize and join labor organizations, collectively bargain through chosen representatives, and engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection):

> In the interpretation and application of this chapter, the public policy of this State is declared as follows:
>
> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capitol control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in his designation of such representatives or in self-organization or <u>in other concerted activities for the purpose of collective bargaining or other mutual aid or protection</u>. (Lab. Code, sec. 923; Stat. 1937, ch. 90, emphasis added.)

The aforesaid "<u>other concerted activities</u>" which employees

had the right to engage in "for the purpose of collective bargaining or other mutual aid or protection" were held to mean and include strikes,[3] picketing, and boycotts. (United Auto Workers v. O'Brien (1950) 339 U.S. 454, 456-457; Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board (1951) 340 U.S. 383, 389-390; James v. Marinship Corp. (1944) 25 Cal.2d 721, 728-729; Park & Tilford Import Corp. v. International Brotherhood of Teamsters (1946) 27 Cal.2d 599, 603-613; and G. C. Breidert Co. v. Sheet Metal Workers International Association (1956) 139 Cal.App.2d 633, 638-639, hg. den.) Addressing this particular provision in United Auto Workers v. O'Brien, supra, 339 U.S. 454 at 456-457, the U.S. Supreme Court held:

> In the National Labor Relations Act of 1935, 49 Stat. 449, ch. 372, 29 U.S.C.A. sec. 151, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136, ch. 120, 29 U.S.C.A. sec. 141, Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike.

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[3]Strikes within the meaning of "other concerted activities" include "economic strikes" in connection with collective bargaining, "sympathy strikes," and strikes in response to an employer's unfair labor practices, the so-called "unfair practice strikes." (NLRB v. Peter Cailler Hohlor Swiss Chocolate Co. (2nd Cir. 1942) 130 F.2d 503 [10 LRRM 852, 854-855]; NLRB v. City Yellow Cab Co. (6th Cir. 1965) 344 F.2d 578 [59 LRRM 2001, 2006]; NLRB v. Louisville Chair Co. (6th Cir. 1967) 385 F.2d 922 [66 LRRM 2698, 2703], cert. den. 390 U.S. 1013.)

And as succinctly set forth in G. C. Breidert Co. v. Sheet Metal Workers International Association, supra, 139 Cal.App.2d 633 at 638-639:

> Section 7 of the National Labor Relations Act, as amended by the Labor Management Relations Act provides that, "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."
>
> These "concerted activities" protected by Section 7 of the Federal Act clearly include the right to strike, peacefully picket, and boycott for purposes and by methods not prohibited by Section 8. (Federal citations.)

California appellate decisions have consistently held that Labor Code section 923's provisions--including the "other concerted activities" proviso--codify and prescribe the public policy toward, the rights of, and the concomitant protections for employees in California's private sector (C. S. Smith Metropolitan Market Co. v. Lyons (1940) 16 Cal.2d 389, 400; Park & Tilford Import Corp. v. International Brotherhood of Teamsters, supra, 27 Cal.2d 599, 603-613; In re Porterfield (1946) 28 Cal.2d 91, 115-118; Adams v. Wolff (1948) 84 Cal.App.2d 435, 443, hg. den.; City of Los Angeles v. Los Angeles Building and Construction Trades Council (1949) 94 Cal.App.2d 36, 45, hg. den.; Elsis v. Evans (1958) 157 Cal.App.2d 399, 408-409, hg. den.; Newmarker v. Regents of the University of California (1958) 160 Cal.App.2d 640, 647;

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689; Glenn v. Clearman's Golden Cock Inn (1961) 192 Cal.App.2d 793, 795-798, hg. den.; Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal.2d 766, 769, cert. den. 380 U.S. 906; Annenberg v. Southern California District Council of Laborers (1974) 38 Cal.App.3d 637, 644, 646; Knopf v. Producers Guild of America, Inc. (1974) 40 Cal.App.3d 233, 246-247; Escamilla v. Marshburn Brothers (1975) 48 Cal.App.3d 472, 481-482; Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal.App.3d 745, 759-760).

California appellate decisions have also consistently held that Labor Code section 923's provisions do not apply to public employees in California's public sector. (Nutter v. City of Santa Monica[4] (1946) 74 Cal.App.2d 292, 296-303, hg. den.; Adams v. Wolff, supra, 84 Cal.App.2d 435, 443; City of Los Angeles v. Los Angeles Building and Construction Trades Council, supra, 94 Cal.App.2d 36, 45; State of California v. Brotherhood of Railroad Trainmen (1951) 37 Cal.2d 412, 417;

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[4]This 1946 case dealing with Labor Code section 923 involved an unsuccessful attempt by the Brotherhood of Railroad Trainmen to require the City of Santa Monica to negotiate a contract concerning the terms and conditions of employment of the city's bus operators. See the subsequent 1960 decision in Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, post, involving the 1957 Los Angeles Metropolitan Transit Authority Act.

Newmarker v. Regents of the University of California, supra, 160 Cal.App.2d 640, 647; Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 294; Berkeley Teachers Association v. Board of Education of Berkeley Unified School District (1967) 254 Cal.App.2d 660, 671-672, hg. den.)

In the twenty year period preceding enactment of EERA, 1955 to 1975, the Legislature adopted no less than twenty-two (22) public employer-employee relations acts. These acts included a wide range of labor relations provisions, and demonstrate that the Legislature knows the language to use when it wants to confer a right to strike on public employees.

In 1955, the Legislature enacted the Transit District Law (Stats. 1955, ch. 1036; Pub. Util. Code, secs. 24501-27509) authorizing a two-county public transit district to meet a transit problem in Alameda and Contra Costa counties. Existing public and private transportation facilities in the two counties could be acquired by the public transit district with "special provisions relating to" such transfers "and to the employees of these facilities." (Pub. Util. Code, sec. 24561; Behneman v. Alameda-Contra Costa Transit District (1960) 182 Cal.App.2d 687, 692, hg. den.)

In this transit district law, dealing with the acquisition of the facilities of existing public and privately owned utilities, the Legislature set up a statutory scheme of labor relations providing for the transit district board's adoption

of a personnel system including the establishment of positions along with salary and wage schedules for the public and private transportation employees of the facilities acquired. The Law also provides for employee representation by a labor organization and for negotiations between such a labor organization for the transit district board "to reach agreement on the terms of a written contract governing wages, salaries, hours, working conditions and grievance procedures," and for mutually-agreed-to "binding interest arbitration" on matters the parties are unable to resolve. (Pub. Util. Code, secs. 24886, 25051-25053; Grier v. Alameda-Contra Costa Transit District (1976) 55 Cal.App.3d 325, 331-332, hg. den.; and see Stockton Metropolitan Transit District v. Amalgamated Transit Union (1982) 132 Cal.App.3d 203, 207, 210, 213-214, hg. den.) Significantly, there is no provision in this transit district law authorizing the employees to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (See Pub. Util. Code, secs. 25051-25053.)

Two years later, in 1957, the Legislature enacted two additional public transit district acts. The first of these was the Los Angeles Metropolitan Transit Authority Act of 1957 (Stats. 1957, ch. 547; Pub. Util. Code, appen. 1, secs. 1.1-13.1) which provided for a "public corporation" transit authority to operate transportation facilities in four southern

California counties. The two principal transit companies in the Los Angeles metropolitan area at the time were privately owned public utilities with private employees who were exclusively represented by the Brotherhood of Railroad Trainmen and who had the right to strike under Labor Code section 923. In section 3.6(c) of the Los Angeles Act, the Legislature prescribed the following rights for the employees:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Act also provided for a civil service system, representational elections, collective bargaining, and mutually-agreed-to binding arbitration for unresolved disputes. (Secs. 3.6, 4.24.)

After the transit authority acquired the privately owned transit companies and their employees, it brought a declaratory relief action to obtain a judgment that the employees did not have the right to strike because they were now public employees of a public employer. The trial court so held, and the Brotherhood of Railroad Trainmen appealed. Thus came to the Supreme Court the issue of whether the Legislature had statutorily authorized and granted to the public employees of the Los Angeles Metropolitan Transit Authority the right to strike, and in its 1960 decision in Los Angeles Metropolitan

Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, our Supreme Court definitively held that the Legislature had statutorily granted these public employees the right to strike:

> In the absence of legislative authorization public employees in general do not have the right to strike (see 31 A.L.R.2d 1142, 1159-1161), and the questions presented here are whether the act creating the transit authority gave its employees such a right. . . .
>
> Subdivision (c) of section 3.6 of the act provides: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....Notwithstanding any other provision of this act...the authority...shall enter into a written contract with the accredited representative of its employees governing wages, salaries, hours and working conditions...." (Italics added.)
>
> Language identical with the italicized words of subdivision (c) first appeared in section 2 of the Norris-LaGuardia Act (47 Stat. 70; 29 U.S.C., sec. 102), and it has been contained in section 923 of our Labor Code since 1937. [Fn. omitted.] The identical language was also used in section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 198), section 7 of the National Labor Relations Act of 1935 (the Wagner Act, 49 Stat. 449, 452), and section 7 of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act, 61 Stat. 136, 140; 29 U.S.C., sec. 157). The courts have uniformly interpreted these words as including the right to strike peacefully to enforce union demands with respect to wages,

hours, and working conditions. (Weber v. Anheuser-Busch, Inc. (1955) 348 U.S. 468, 474-475; Amalgamated Association etc. M.C.E. v. Wisconsin Employment Relations Board (1951) 340 U.S. 383, 398; International Union of United Automobile etc. Workers of America v. O'Brien (1950) 339 U.S. 454, 456-457; Collins Baking Co. v. National Labor Relations Board, 193 F.2d 483, 486; National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505; G.C. Breidert Co. v. Sheet Metal etc. Association, 139 Cal.App.2d 633, 638.) The cases have applied the language to a number of specific stituations and have determined that it includes other activities as well as strikes but does not sanction all collective conduct of workingmen or all kinds of strikes; for example, sit-down strikes have not been included within the right to engage in other concerted activities. (See International Union of United Automobile etc. Workers of America v. O'Brien (1950) 339 U.S. 454, 457-459; International Union etc. A.F.L. v. Wisconsin Employment Relations Board (1949) 336 U.S. 245, 255 et seq.; Park & T.I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 604-605.)

When legislation has been judicially construed and a subsequent statute on the same or an analogus subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes. (Scripps etc. Hospital v. California Emp. Com., 24 Cal.2d 669, 677; Holmes v. McColgan, 17 Cal.2d 426, 430; Union Oil Associates v. Johnson, 2 Cal.2d 727, 734.) Although the cases which have interpreted the italicized words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been

> repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts.
>
> Terms such as "concerted activities" are commonly used by courts as well as legislative bodies to refer to strikes. This court, for example, on a number of occasions has used the words "concerted action" as an inclusive term referring to strikes, picketing and boycotts. (See, e.g., Petri Cleaners Inc. v. Automotive Employees etc., Local No. 88, 53 Cal.2d 455, 469 et seq.; Park & T.I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 603; James v. Marinship Corp., 25 Cal.2d 721, 729.) Our codes provide that technical words and phrases, and others which have acquired "a peculiar and appropriate" meaning in law, are to be construed according to such meaning. (Civ. Code, sec. 13; Code Civ. Proc., sec. 16.) (54 Cal.2d 684, at 687-689, emphasis added except the court's italizing of the "16 words" on page 687.)

Significant too in the Los Angeles Metropolitan Transit Authority decision is the Supreme Court's rejection of the contention that the Legislature had engaged in discriminatory classification by granting the transit authority's employees the right to strike while statutorily withholding the right from public employees of other transit systems:

> The fact that statutes creating other transit systems do not contain provisions similar to the one involved here with respect to the right to strike cannot be a proper basis for a claim that subdivision (c) is discriminatory. Section 1.1 of the act provides that because of the "unique problem" presented in the Los Angeles metropolitan area and the facts and circumstances relative to the establishment

> of a mass rapid transit system there, the adoption of a "special act" and the creation of a "special authority" are required.
>
> If any state of facts can reasonably be conceived which would support a classification made by the Legislature, the existence of that state of facts is presumed, and one who challenges the classification has the burden of showing that it is arbitrary. (State v. Industrial Acc. Com., 48 Cal.2d 365, 371-372; City of Walnut Creek v. Silveira, 47 Cal.2d 804, 811.) The Legislature could have concluded that conditions existing in the area relating to the availability of transit workers made it necessary to give plaintiff's employees the right to strike in order to obtain an experienced and efficient working force. For example, at the time the act was adopted in 1957, transit service was principally provided in the area by privately-owned utilities whose employees were represented by labor unions and had the right to strike, and many of these employees might have refused to work for plaintiff if deprived of that right. The act contemplated that plaintiff would acquire such utilities and, as we have seen, provided that their employees should not suffer any loss of benefits. Plaintiff has made no showing that the conditions which exist with respect to other transit systems are the same as those in the Los Angeles area. (54 Cal.2d at 694.)

During the very same 1957 legislative session in which it had enacted the Los Angeles Metropolitan Transit Authority Act, the Legislature also enacted the San Francisco Bay Area Rapid Transit District Act of 1957 ("BART" Stats. 1958, ch. 1056; Pub. Util. Code, secs. 28500-29757) prescribing similar labor provisions as those set forth in the 1955 Alameda-Contra Costa Transit District Act (Pub. Util. Code, secs. 24501-27509)

including: personnel system, representation by a labor organization, collective bargaining, and mutually-agreed-to binding interest arbitration (Pub. Util. Code, secs. 28767, 28850-28855). There is, however, no provision in the 1957 BART Act authorizing BART's employees to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (see particularly Pub. Util. Code, sec. 28852 setting forth the employees' rights; and see San Francisco Bay Area Rapid Transit District v. Superior Court (1979) 97 Cal.App.3d 153, 157-165, hg. den.; Rae v. Bay Area Rapid Transit Supervisory & Professional Association (1980) 114 Cal.App.3d 147, 151-153).

In 1959, in response to firefighters' concerns over having been barred from organizing or even joining a labor organization,[5] and against the statutory background of a long-established public safety policy against any interruption or interference in the delivery of fire fighting services,[6]

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[5]See International Association of Fire Fighters, Local No. 1319, AFL-CIO v. City of Palo Alto (1963) 60 Cal.2d 295, 300; International Association of Fire Fighters, Local No. 1396, AFL-CIO v. County of Merced (1962) 204 Cal.App.2d 387, 390; Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, 288-289, 294; and see Perez v. Board of Police Commissioners of the City of Los Angeles (1947) 78 Cal.App.2d 638, hearing denied.

[6]See Penal Code section 148.2, subdivisions (1) and (4) (former Pen. Code, sec. 385 enacted in 1872 and former Health and Saf. Code, sec. 13006 (Stats. 1939)); Public Resources Code, sec. 4165; and 53 Ops.Cal.Atty.Gen. 324, 326-327 (1970).

the Legislature enacted what has since been referred to as the Firefighters Act. (Stats. 1959, ch. 723; Lab. Code, secs. 1960-1963.) This Act gave firefighters the right "to join any bona fide labor organization of their own choice" (Lab. Code, sec. 1960), and the rights to form, organize join, and assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to their public employer, and to discuss such matters with their public employer through such labor organizations (Lab. Code, sec. 1962). However, no provision in the Firefighters Act authorizes firefighters to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and the last section of the Act, Labor Code section 1963, states that the enactment of the Firefighters Act "shall not be construed as making the provisions of Section 923 of this code applicable to public employees" (Lab. Code, sec. 1963). Also, to make absolutely certain that there was no confusion regarding the right of firefighters to strike or observe a picket line, the Act expressly states that firefighters shall not have the right to "strike, or to recognize a picket line of a labor organization while in the course of the performance of their official

duties." (Lab. Code, sec. 1962.)[7]

In Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, the defendant City of Los Angeles contended that the Firefighters Act was invalid in that it singled out and treated firefighters differently from all other public employees (60 Cal.2d at 288), to which our Supreme Court responded:

> In enacting the instant Labor Code sections the Legislature undoubtedly had in mind many logical distinctions between firefighters and other public employees. By Government Code sections 3500-3509, inclusive, it granted to all public employees the right to join labor unions, but therein provided that the employing agencies might except police from the operation of the statute. No one can doubt that the denial of the overall benefits to the police was a reasonable denial of benefits and privileges to a class of persons charged with duties which might be inimicable to union membership. At the same time the Legislature stated (Gov. Code, sec. 3508) that firefighters should not be subject to the same exceptions as provided in the case of police. Realizing that the duties of firefighters differed sufficiently from those of public employees in general, and yet not sufficiently to except them in toto from the benefit of organization, the Legislature set forth their rights and obligations in a similar (but slightly different) legislative enactment (Lab. Code, secs. 1960-1963). It cannot be said that the distinctions therein are any more

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[7]With respect to the Legislature preventing firefighters' strikes and/or picketing from being labor disputes or controversies, see 53 Ops.Cal.Atty.Gen. 324, 325-327 (1970); California Emergency Services Act (Gov. Code, secs. 8550-8668, former Cal. Disaster Act of 1943); Military and Veterans Code, section 1505.

> arbitrary or without reasonable basis than the many other legislative distinctions predicated upon specific occupations. (60 Cal.2d at 289.)

In 1961, the Legislature enacted the George Brown Act (Stats. 1961, ch. 1964; Gov. Code, secs. 3500-3509[8]) which authorized local public employees "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" (Gov. Code, sec. 3502), including having such organizations represent them in conferring with local governing bodies as to the terms and conditions of their employment (Gov. Code, secs. 3504, 3505; Glendale City Employees' Association, Inc. v. City of Glendale, supra, 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles, supra, 168 Cal.App.3d 685, 687). Government Code section 3502, which prescribes the rights granted to local public employees (and which rights are protected by Gov. Code, sec. 3506), does not include the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The

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[8]The George Brown Act was amended and expanded in 1968 and then became known as the Meyers-Milias-Brown Act (MMBA) (Stats. 1968, ch. 1390; Gov. Code, secs. 3500-3510). See discussion post. The primary change in 1968 was the legislative authorization for local public labor and management representatives "not only to confer but to enter into written agreements for presentation to the governing body." (Glendale City Employees' Association, Inc. v. City of Glendale (1975) 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683, 687, hg. den.)

last section of the Act, Government Code section 3509, declared that its enactment "shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." Lastly, Government Code section 3508 authorized the governing body of a public agency to limit or prohibit the right of law enforcement employees to form, join or participate in employee organizations where it is in the public interest to do so, but exempted therefrom employees (firefighters) who were subject to the provisions of Labor Code sections 1960-1964 (Gov. Code, sec. 3508; Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, 289).

In 1961, the Legislature also enacted the Fresno Metropolitan Transit District Act of 1961 (Stats. 1961, ch. 1932; Pub. Util. Code, appen. 2, secs. 1-11) to provide a transit district for the City of Fresno and parts of Fresno County. Section 4.1 of the 1961 Act provided certain rights for employees of a public or private utility acquired by the transit district, but did not grant such employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[9]

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[9]The Fresno Act was amended in 1971, post, and the Legislature at that time specifically granted the district's employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Stats. 1971, ch. 1335; Pub. Util. Code, appen. 1, sec. 4.1.)

In 1963, the Legislature enacted the Stockton Metropolitan Transit District Act of 1963 (Stats. 1963), ch. 839; Pub. Util. Code, secs. 50000-50507) to provide a transit district for the Stockton metropolitan and San Joaquin County area. In its labor provisions, the Stockton Act provides for a personnel system for the employees including accrued credits for employees of a public utility acquired by the district (Pub. Util. Code, sec. 50122), and that when a majority of employees are represented by a labor organization, then the transit district and the labor organization are to engage in collective bargaining, with mandatory binding interest arbitration on unresolved disputes (Pub. Util. Code, sec. 50120; Stockton Metropolitan Transit District v. Amalgamated Transit Union, Local 276, AFL-CIO, supra, 132 Cal.App.3d 203, 206-207, 210, 214). The Stockton Act does not grant the employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the First Extraordinary Session of 1964, the Legislature enacted three acts involving public employees and labor relations. The first of these 1964 acts was the Southern California Rapid Transit District Act (Stats. 1st Ex. Sess. 1964, ch. 62; Pub. Util. Code, secs. 30000-31520) providing for an enlarged rapid transit district in the Los Angeles area and for the inclusion and merger of the Los Angeles Metropolitan Transit District (Stats. 1957, ch. 547; Los Angeles

Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687) into the new district (Pub. Util. Code, secs. 31000-31005, 30750(b)). This new Southern California Act provided for: a personnel system for positions not represented by a labor organization (Pub. Util. Code, sec. 30257), for assumption of all existing labor contracts upon acquisition of the Los Angeles Metropolitan Transit District (Pub. Util. Code, sec. 30750(b)), collective bargaining (Pub. Util. Code, secs. 30750(a) and (c), 30755), mutually-agreed-to binding arbitration (Pub. Util. Code, sec. 30750(d)) and, if no mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (Pub. Util. Code, sec. 30756[10]). Public Utilities Code section 30755 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis added.)

The second 1964 act was the Marin County Transit District

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[10]Public Utility Code section 30756 was amended in 1974 (Stats. 1974, ch. 51) to provide for a 60-day fact-finding period, with the final report to the Governor followed by a 10-day "cooling off" period.

Act of 1964 (Stats. 1st Ex. Sess. 1964, ch. 92; Pub. Util. Code, secs. 70000-80019) involving a transit district for Marin County. Public Utilities Code section 70120 of the Marin Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Marin Act further provides for mutually-agreed-to binding arbitration in case of unresolved disputes and, if no such mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (Pub. Util. Code, sec. 70120).

The third 1964 act was the West Bay Rapid Transit Authority Act (Stats. 1st Ex. Sess. 1964, ch. 104; Pub. Util. Code, appen. 2, secs. 1.1-14.3) to provide for an interurban rapid transit system in the County of San Mateo. In its labor provisions, the West Bay Act provides for a personnel system for the employees (secs. 13.90(a), 13.97), for accrued credits for employees of an acquired public utility (sec. 13.92), and that when a majority of employees choose to be represented by a labor organization, then the transit authority and the labor organization are to engage in collective bargaining (sec. 13.90(a)), with mutually-agreed-to binding arbitration on

unresolved disputes (sec. 13.90(c)) and, if no such mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (sec. 13.96). Section 13.95 of the West Bay Act prescribes the following employee rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

In 1965, the Legislature enacted four acts involving public employees and labor relations. The first 1965 act was the Santa Barbara Metropolitan Transit District Act of 1965 (Stats. 1965, ch. 1835; Pub. Util. Code, secs. 95000-97100) enacted to provide a single public transit district in Santa Barbara County. In its labor provisions, the Santa Barbara Act provides for a personnel system for the employees including accrued sick leave, vacation and seniority credits for employees of a public utility acquired by the district (Pub. Util. Code, sec. 95652), and that when a majority of the employees choose to be represented by a labor organization, then the transit board and the labor organization are to engage in collective bargaining (Pub. Util. Code, sec. 95650), with mandatory binding arbitration on unresolved disputes (Pub. Util. Code, sec. 95650). The Santa Barbara Act does not grant

the employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The second 1965 act enacted by the Legislature was the Orange County Transit District Act of 1965 (Stats. 1965, ch. 1899; Pub. Util. Code, secs. 40000-40617) to provide for an interim transit district in Orange County pending Orange County's possible inclusion in the Southern California Rapid Transit District (Pub. Util. Code, secs. 40010, 40600-40617). Under its labor provisions, the Orange County Act does not grant the employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mututal aid of protection." The Act does provide for employee representation by labor organizations, for collective bargaining and for binding arbitration in dispute resolution. The 1965 enactment further provided that if binding arbitration was not agreed to, then referral to the State Conciliation Service, followed by the appointment of a fact-finding commission by the Governor, a 30-day fact-finding period, a final fact-finding report to the Governor, and a 30-day "cooling off" period thereafter[11] (Pub. Util. Code, sec.

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[11]Public Utilities Code section 40120 was amended in 1981 (Stats. 1981, ch. 493) to specify mutual agreement for binding arbitration and to repeal the State Conciliation, fact-finding report to the Governor, and 30-day "cooling off" provisions.

40120; and see Stockton Metropolitan Transit District v. Amalgamated Transit Union, Local 276, AFL-CIO, supra, 132 Cal.App.3d 203, 214). Public Utilities Code section 40123 prescribes that the transit district is to assume and observe all existing labor contracts of public utilities it acquires; and sections 40127 and 40130 provide for a retirement system under the Orange County Employees Retirement System if no retirement system is bargained collectively.

The third 1965 enactment by the Legislature was the San Diego County Transit District Act of 1965 (Stats. 1965, ch. 2039; Pub. Util. Code, secs. 90000-93017) to provide a transit system covering the San Diego metropolitan area and southern San Diego County (Pub. Util. Code, secs. 90020, 90050). Public Utilities Code section 90300(a) of the San Diego Act prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The San Diego Act further provides for mutually-agreed-to binding arbitration to resolve disputes and, if no mutual agreement, referral to the State Conciliation Service, followed by a report to the Governor, appointment by the Governor of a fact-finding commission within 10 days, a 30-day period for fact-finding, a final fact-finding report to the Governor and

then a 30-day "cooling off" period (Pub. Util. Code, sec. 90300(a)). The transit district is required to assume and observe all existing labor contracts of any public utilities it acquires, and accrued sick leave, vacation, seniority and pension credits for employees of such acquired public utilities (Pub. Util. Code, sec. 90300(c)).

The fourth relevant 1965 legislative enactment was the so-called "Pre-Winton Act"[12] (Stats. 1965, ch. 2041) dealing with employer-employee relations in the public school system, and which added former Education Code sections 13080 through 13088 to the Education Code. Education Code section 13082 prescribed the following public school employee rights:

> Except as otherwise provided by the Legislature, public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer.

This section did not grant public school employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

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[12]The 1965 enactment carried no common name designation, but upon its amendment in 1970, was designated the "Winton Act" (Stats. 1970, ch. 1413, former Ed. Code, sec. 13089).

Education Code section 13086 protected public school employees in their exercise of rights granted under section 13082. The pre-Winton Act also provided that the public school employer was to "meet and confer" with the employee representatives on all matters relating to employment conditions, including wages, hours and other terms and conditions of employment, as well as conferring with representatives of certificated[13] employees on certain educational objectives (Ed. Code, secs. 13084, 13085). Education Code section 13085 further provided that when there was more than one employee organization representing certificated employees, then there was to be a "negotiating council" composed of representatives of the various certificated employee organizations--in a proportioned number--to "meet and confer" with the public school employer. To "meet and confer" did not authorize collective bargaining but afforded public school employees the right to voice their views and concerns through recognized representatives and have such views and ideas considered by the public school employer. (Berkeley Teachers Association v. Board of Education of the Berkeley Unified School District, supra, 254 Cal.App.2d 660, 671-672; California Federation of Teachers, AFL-CIO v. Oxnard

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[13]"Certificated employees" are those public school employees required by the Education Code to possess certification (e.g., teachers) as opposed to noncertificated personnel--the "classified" employees (e.g., clerical, bus drivers, cafeteria employees, etc.).

Elementary Schools, supra, 272 Cal.App.2d 514, 523-525, 534-535, 538-540; Westminster School District of Orange County v. Superior Court & Westminster Teachers Association (1972) 28 Cal.App.3d 120, 128, hg. den.) Lastly, Education Code section 13088 prescribed that: "(t)he enactment of this article shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees."

In 1967, the Legislature enacted the Santa Cruz Metropolitan Transit District Act of 1967 (Stats. 1967, ch. 978; Pub. Util. Code, secs. 98000-98407) to provide a transit district for the Santa Cruz metropolitan area. In its labor provisions, the Santa Cruz Act prescribes the establishment of a civil service merit system for the district's employees (Pub. Util. Code, sec. 98160), and that employees of an acquired public utility were to be given credit for accrued sick leave and vacation credits, seniority, and pension rights (Pub. Util. Code, secs. 98163, 98164). Public Utilities Code section 98162 authorizes the district employees to associate together in connection with their employment, and to "designate representatives of their own choosing and collectively or individually they may exercise their right of petition to the transit district board concerning wages, hours, or other conditions of employment." The Santa Cruz Act does not grant the district's employees the right to engage "in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection."

In 1968, the Legislature amended the local public employee law (George Brown Act, Stats. 1961, ch. 1964; Gov. Code, secs. 3500-3509), with the amended Act being designated the Meyers-Milias-Brown Act (MMBA) (Stats. 1968, ch. 1390; Gov. Code, secs. 3500-3510). As amended in 1968, the MMBA "authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (Glendale City Employees' Association, Inc. v. City of Glendale, supra, 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles, supra, 168 Cal.App.3d 683, 687; Chula Vista Police Officers' Association v. Cole, City Manager (1980) 107 Cal.App.3d 242, 247-248.) While authorizing collective bargaining for local public employees, the amended MMBA does not grant them the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (see Gov. Code, secs. 3502, 3505, 3505.1; Stationery Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 797, 801), and Government Code section 3509 proscribing the MMBA from being construed to give local public employees Labor Code section 923's rights and protections was retained by the Legislature and not changed.

In 1969, the Legislature enacted the Santa Clara County Transit District Act of 1969 (Stats. 1969, ch. 180; Pub. Util.

Code, secs. 100000-100500) to deal with public transit problems in Santa Clara County. In its employee provisions, Public Utilities Code section 100300 grants the following rights to district employees:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Santa Clara Act provides for collective bargaining (Pub. Util. Code, sec. 100302), mediation from the State Conciliation Service (Pub. Util. Code, sec. 100304), mutually-agreed-to binding arbitration, including "interest arbitration," for dispute resolution (Pub. Util. Code, sec. 100305) and, if no such mutual agreement, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission within 10 days, a 30-day period for fact-finding, then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 100306). Public Utilities Code section 100350 further prescribes that the transit district shall assume and observe all existing labor contracts of any public utilities it acquires.

In 1971, the Legislature enacted two acts involving public employees and labor relations and amended a third such act. The first of these 1971 acts was the Greater Bakersfield

Metropolitan Transit District Act[14] (Stats. 1971, ch. 1161; Pub. Util. Code, secs. 101000-101372) to meet public transit problems within the city of Bakersfield and adjacent Kern County areas. In its labor provisions, Public Utilities Code section 101340 grants the following district employee rights:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Greater Bakersfield Act provides for collective bargaining (Pub. Util. Code, secs. 101340, 101348), mutually-agreed-to binding arbitration for dispute resolution (Pub. Util. Code, sec. 101341) and, if the parties do not mutually agree to binding arbitration, referral to the State Conciliation Service for mediation, then to the Governor for the appointment of a fact-finding commission, 30-days for fact-finding, then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 101342). Public Utilities Code section 101345 prescribes that the transit district shall assume and observe all existing labor contracts of public utilities it acquires.

The second 1971 enactment by the Legislature was the

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[14]In 1973, the Act was amended and was designated as the Golden Empire Transit District Act (Stats. 1973, ch. 590).

Sacramento Regional Transit District Act (Stats. 1971, ch. 1374; Pub. Util. Code, secs. 102000-102700) to meet mass and rapid transit needs of the Sacramento region. In its employee relations provisions, Public Utilities Code section 102400 grants the following employee rights:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Sacramento Act provides for collective bargaining (Pub. Util. Code, secs. 102401, 102407) and for mutually-agreed-to binding arbitration, including interest arbitration, in dispute resolution (Pub. Util. Code, sec. 102401). Public Utilities Code section 102404 prescribes that the transit district shall assume and observe all existing labor contracts of public utilities it acquires, and shall give employees of acquired public utilities their accrued sick leave, seniority, vacation and pension credits. Lastly, Public Utilities Code section 102410 prescribes that if the employees choose an exclusive collective bargaining representative, then the provisions of the MMBA (Gov. Code, secs. 3500-3510) are not applicable to the district and its employees.

The public employee law amendment enacted by the Legislature in 1971 is particularly significant. The Legislature amended the Fresno Metropolitan Transit District Act of 1961 (Stats. 1961, ch. 1932) to specifically grant to

the District's employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Stats. 1971, ch. 1335; Pub. Util. Code, appen. 1, sec. 4.1; and see Anderson v. I. M. Jameson Corp. (1936) 7 Cal.2d 60, 67-68.)

In 1974, the Legislature enacted the San Mateo County Transit District Act (Stats. 1974, ch. 502; Pub. Util. Code, secs. 103000-103700) as an urgency measure to meet public transit problems in San Mateo County. In its employee relations provisions, Public Utilities Code section 103400 grants the following employee rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The San Mateo Act provides for collective bargaining (Pub. Util. Code, sec. 103402), mediation by the State Conciliation Service (Pub. Util. Code, sec. 103404), mutually-agreed-to binding arbitration, including interest arbitration, for dispute resolution (Pub. Util. Code, sec. 103405) and, if the parties do not agree to binding arbitration, referral to the State Conciliation Service, a fact-finding commission appointed by the Governor, a 30-day period for fact-finding, and then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 103406). Public Utilities Code sections 103420 and 103421 further provide for

appointment without examination of employees of acquired public utilities, and that such employees be credited with their accrued sick leave, seniority, vacation and pension credits.

In 1975, the year the Legislature enacted the Educational Employment Relations Act (EERA) (Stats. 1975, ch. 961), it also enacted two other acts involving public employees and labor relations, and one act involving private employees. The first of these was the Mills-Deddeh Transit Development Act (Stats. 1975, ch. 294; Pub. Util. Code, secs. 120000-120702) to provide for public mass transit guideways in the City of San Diego and portions of southern San Diego County. In its labor provisions, Public Utilities Code section 120500 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities as permitted under the Federal Labor Management Relations Act, 1947, as amended, for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Mills-Deddeh Act provides for collective bargaining (Pub. Util. Code, secs. 120501, 120506), mutually-agreed-to binding arbitration for dispute resolution (Pub. Util. Code, sec. 120502) and, if no such mutual agreement, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission within 10 days, 30-days for fact-finding, and then a 30-day "cooling off" period following the submission of the fact-finding report to the Governor (Pub.

Util. Code, sec. 120503). Public Utilities Code sections 120520 and 120521 further prescribe that employees of acquired privately or publicly owned corporations or utilities shall be appointed without examination and shall be credited with accrued sick leave, vacation, seniority and pension credits, and that the district board shall assume and observe all existing labor contracts of the acquired corporations or utilities.

In 1975, the Legislature also enacted the North San Diego County District Development Board Act (Stats. 1975, ch. 1188; Pub. Util. Code, secs. 125000-125561) for transit systems in northern San Diego County. In its labor provisions, Public Utilities Code section 125520 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The North San Diego Act also provides for collective bargaining (Pub. Util. Code, sec. 125522), mediation by the State Conciliation Service (Pub. Util. Code, sec. 125524), mutually-agreed-to binding arbitration, including interest arbitration, for dispute resolution (Pub. Util. Code, sec. 125525) and, if no mutual agreement on binding arbitration, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission, 30-days

for the fact-finding, and then a 30-day "cooling off" period following the submission of the fact-finding report to the Governor (Pub. Util. Code, sec. 125526). Public Utilities Code sections 125540 and 125541 further provide that employees of acquired publicly or privately owned utilities shall be appointed without examination and shall be credited with accrued sick leave, vacation, seniority and pension credits, and that the transit board shall assume and observe all existing labor contracts of the acquired utilities.

Finally, in 1975, after the enactment of the Mills-Deddeh and the North San Diego acts, and subsequent to its enactment of EERA in 1975, the Legislature enacted the Agricultural Labor Relations Act (ALRA) (Stats. 3d Ex. Sess. 1975, ch. 1; Labor Code, secs. 1140-1166.3) covering private agricultural employees and establishing a state Agricultural Labor Relations Board (ALRB). Labor Code section 1152 prescribes the agricultural employees' rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." (Emphasis added.)

The agricultural employees' right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is protected by Labor Code section 1153(a) which protects agricultural employees "in the exercise

of the rights guaranteed in Section 1152."

In summary, between 1955 and 1975[15]--and not counting EERA or ALRA--the Legislature enacted twenty-two (22) public employer-employee relations acts, rich and varied in their provisions, and covering a wide range of labor relation and resolution matters, including: (1) right to organize, join, assist and participate in labor organizations; (2) representation by labor organizations; (3) bargaining units; (4) elections of representatives; (5) "exclusive" representatives; (6) right to "meet and confer" with public employer; (7) right to engage in collective bargaining with public employer; (8) right to engage "in other concerted activities (including strikes) for the purpose of collective bargaining or other mutual aid or protection;" (9) mutually-agreed-to binding arbitration; (10) mandatory binding arbitration for dispute resolution, including interest arbitration; (11) mediation by the State Conciliation Service; (12) when binding arbitration not mandatory and parties do not agree to binding arbitration: (a) mediation by State

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[15]Subsequent to the enactment of EERA in 1975, the Legislature enacted two other major public employer-employee acts: the State Employer-Employee Relations Act (SEERA) (Stats. 1977, ch. 1159; Gov. Code, secs. 3512-3524) and the Higher Education Employer-Employee Relations Act (HEEERA) (Stats. 1978, ch. 744; Gov. Code, secs. 3560-3599). In both SEERA and HEEERA the Legislature did not grant the covered state employees and higher education employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Conciliation Service, (b) fact-finding commission appointed by governor, (c) fact-finding, and (d) final fact-finding report to Governor with 30-day "cooling off" period thereafter; and (13) personnel systems, including merit/civil service, with "absorbed" former private employees being appointed without examination and receiving accrued credits, etc.

A comparison of the provisions of the various public employee acts shows that the Legislature granted the right to strike in eleven (11) of the twenty-two (22) acts. Originally, the Legislature did not grant the right to strike to Fresno Metropolitan Transit District public employees (Stats. 1961, ch. 1932) but ten years later, in 1971, amended the Fresno Act (Stats. 1971, ch. 1335) specifically to give them the right.

Act	Code	Right to Strike "16 Words"
Stats. 1955, ch. 1036 (Transit Dist. Law)	PUC 24501 - 27509	No
Stats. 1957, ch. 547 (L.A. Met. Authority)	PUC Append. 1	Yes
Stats. 1957, ch. 1056 (S.F. Bay R.T.)	PUC 28500 - 29757	No
Stats. 1959, ch. 723 (Firefighters)	Lab. 1960 - 1963	No
Stats. 1961, ch. 1964 (Brown Act - Local)	Gov. 3500 - 3509	No
Stats. 1961, ch. 1932 (Fresno Met. Transit)	PUC Append. 2	No

Stats. 1963, ch. 839 (Stockton Met. Transit)	PUC 50000 - 50507	No
Stats. 1964, ch. 62 (So. Calif. R.T.)	PUC 30000 - 31520	Yes
Stats. 1964, ch. 92 (Marin County Transit)	PUC 70000 - 80019	Yes
Stats. 1964, ch. 104 (West Bay R.T.)	PUC Append. 2	Yes
Stats. 1965, ch. 1835 (Santa Barbara Met.)	PUC 95000 - 97100	No
Stats. 1965, ch. 1899 (Orange County Transit)	PUC 40000 - 40617	No
Stats. 1965, ch. 2039 (San Diego Co. Transit)	PUC 90000 - 93017	Yes
Stats. 1965, ch. 2041 (Public Schools)	Ed. 13080 - 13088	No
Stats. 1967, ch. 978 (Santa Cruz Met. Tran.)	PUC 98000 - 98407	No
Stats. 1968, ch. 1964 (MMBA - Local)	Gov. 3500 - 3509	No
Stats. 1969, ch. 180 (Santa Clara County)	PUC 100000 - 100500	Yes
Stats. 1971, ch. 1161 (Gt. Bakersfield Met.)	PUC 101000 - 101372	Yes
Stats. 1971, ch. 1374 (Sacramento R.T.)	PUC 102000 - 102700	Yes
Stats. 1971, ch. 1335 (Fresno Met. - Amend)	PUC Append. 1	Yes
Stats. 1974, ch. 502 (San Mateo County)	PUC 103000 - 103700	Yes
Stats. 1975, ch. 294 (Mills-Deddeh Transit)	PUC 120000 - 120702	Yes
Stats. 1975, ch. 1188 (North San Diego Co.)	PUC 125000 - 125561	Yes

We turn now to the statutory provisions of EERA, keeping in mind the Legislature's knowledge of and familiarity with the constitutional and statutory mandates with respect to the operation of the public schools and its knowledge and familiarity with the statutory language granting the right to strike (Estate of McDill, supra, 14 Cal.3d 831, 837-839 and cases cited therein; Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board, supra, 16 Cal.3d 1, 7; Keeler v. Superior Court, supra, 2 Cal.3d 619, 625; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 65 Cal.2d 684, 688-689; Buckley v. Chadwick, supra, 45 Cal.2d 183, 200 and cases cited therein; Sutter Hospital v. City of Sacramento, supra, 39 Cal.2d 33, 38; Rosenthal v. Cory, supra, 69 Cal.App.3d 950, 953.)

II. PUBLIC SCHOOL EMPLOYEE RIGHTS GRANTED AND PROTECTED BY THE EDUCATIONAL EMPLOYMENT RELATIONS ACT (EERA)

Various appellate court decisions ably identify, describe and trace the status of public school employees with respect to: (1) organizing; (2) bargaining collectively through their chosen representatives; and (3) engaging "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (specifically, the right to strike), in the years preceding and up to the enactment of the Educational Employment Relations Act (EERA) in 1975 (Stats. 1975, ch. 961.)

In California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools (1969) 272 Cal.App.2d 514, the court dealt with an attack on the constitutionality of the Winton Act (former Ed. Code, secs. 13080-13088). The Winton Act (which was repealed and superseded by EERA) prescribed certain rights to public school employees and provided for a "negotiating council" when there was more than one employee organization. The Oxnard decision, in discussing the constitutionality of the Winton Act, first considered the subject matter, history and legislative purpose of the statute:

> California in 1933 declared its legislative policy concerning the regulation of employment relations in private industry (Lab. Code, secs. 920 et seq.). The common law policy of the state was codified in Labor Code section 923, revised in 1937, as follows: ". . . Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This section . . . guarantees to private employees the right to organize, to engage in collective bargaining (Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 385), and to participate in concerted activities to secure legitimate employment benefits. (Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra, 53 Cal.2d 455, 469-471.) Labor Code section 923 does not, however,

impose upon the employer the legal duty to engage in collective bargaining (Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra, p. 474) and it has been judicially determined that specific legislation is required to extend to public employees the right to bargain collectively which would "establish an entirely new system in the field of public employment." (Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 301; City of Los Angeles v. Los Angeles etc. Council 94 Cal.App. 2d 36, 46; State of California v. Brotherhood of R.R. Trainmen, supra, 37 Cal.2d 412, 417, cert. den. 342 U.S. 876.)

Since the policy underlying Labor Code section 923 had no necessary application to public employees, who occupy a status in relation to their employer different from that of their private counterparts, separate and distinctive legislative treatment has been accorded the regulation of their employment relations. The Legislature, acceding to the demands of public employees for a more effective and substantial voice in the determination of the terms and conditions of their employment, has only recently been confronted with the need to reconcile those elements which differentiate the position of public employees relative to their employer from that of private employees. In attempting to formulate statutes to extend to public employees appropriate opportunitites to participate in determinations relating to the terms and conditions of their employment, the Legislature has been compelled to reevaluate procedures such as collective bargaining, exclusive representation, and strikes which fulfill a traditional role in private labor negotiations with respect to the appropriateness of their application not only to the public sector generally, but to the wide variety of occupations and professions encompassed within the field of public employment.

The separate treatment of public school system employees under the Winton Act should be viewed in its sociological and historical perspective. It was not the first legislative attempt to govern public employment relations in California but evolved through a series of enactments designed to regulate separately various aspects of public employment. The first of these was the Los Angeles Metropolitan Transit Authority Act of 1957 (Stats. 1957, ch. 547, p. 1609) which extended to employees of the then newly organized Los Angeles Metropolitan Transit Authority the right to form labor organizations and to engage in collective bargaining and was held constitutional in the face of charges of arbitrary classification. (Los Angeles Met. Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal.2d 684, 694 [8 Cal.Rptr. 1, 355 P.2d 905].) The California Fire Fighters Act (Lab. Code, secs. 1960-1963), which in 1959 extended to the fire fighters the right to self organization to present to their employer grievances and recommendations relating to their working conditions but specifically proscribed to them the policies of Labor Code section 923, was subsequently held constitutional against similar charges. (Professional Fire Fighters Inc. v. City of Los Angeles, 60 Cal.2d 276, 287 [32 Cal.Rptr. 830; 384 P.2d 158].)

In 1961 the Brown Act (Gov. Code, secs. 3500-3509) extended to employees of "the various public agencies in the State" (Gov. Code, sec. 3500) the right to form and to join employee organizations which had as one of their primary purposes the representation of such employees in their relations with the public agency employer, and to be represented by such employee organizations or to represent themselves individually (Gov. Code, secs. 3501, 3502), but again Labor Code section 923 was specifically rendered inapplicable. The Winton Act (Ed. Code, secs. 13080-13087) passed in 1965, was patterned upon and is in many respects similar to the Brown Act, and it contains

the same limitation with respect to Labor Code section 923. (Ed. Code, sec. 13088.) It removes from the application of the Brown Act and treats separately the employees of public school systems, both certificated and noncertificated, and declares that its purpose is, inter alia, to provide recognition of the right of public school employees to be represented by organizations in their professional as well as their employment relationships, and "to afford certificated employees a voice in the formulation of educational policy." (Ed. Code, sec. 13080.) Although the Brown Act was amended in 1968 (Stats. 1968, ch. 1390) to require that the governing body of a public agency should "meet and confer in good faith" and should reduce its employment agreements to writing (Gov. Code, sec. 3505) only the Los Angeles Metropolitan Transit Authority Act, supra, has adopted and applied to employees in public service in California the collective bargaining concepts of the National Labor Relations Act or similar state statutes. The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment.

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It is generally acknowledged that essential distinctions exist between educational public agencies and general, non-educational public agencies, and for this reason educational agencies have traditionally received separate legislative treatment. (See Minneapolis Fed. of Teachers, Local 59 v. Obermeyer (1966) 275 Minn. 347 [147 N.W.2d 358].) The Education Code accordingly establishes a complete system dealing with the credentials, employment, tenure, leave, salaries, dismissal, retirement, and other employee rights and

obligations applicable to public school employees. (Ed. Code, secs. 12901-13777; 24201-24324.) This legislation, separate from statutes relating to state, county and other public agency employees, differentiates certificated employees (Ed. Code, secs. 13101-13575.7) from noncertificated employees (Ed. Code, secs. 13580-13756) in the public school and junior college systems and, consistently, differentiates academic from non-academic employees in the state colleges. (Cal. Admin. Code, tit. 5, secs. 42700-43700.) . . . .

. . . . . .

The Winton Act is constructed upon the premise that all groups concerned with the subject matter (teachers and other school employees as well as administrators and school board members) are genuinely and primarily interested in the welfare of schools and pupils and are willing, given appropriate means, to work harmoniously in order to secure the legitimate demands of school employees <u>without detriment to the educational institutions</u> . . . .

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The local public school board, which is traditionally composed of elected interested lay personnel, currently finds itself in a singular position relative to its functions. It must respond on the one hand to its constituents, on the other to its legislative peers, and it is confronted in every direction by organizations of certificated employees which have recently risen to contend for teachers the same rights to self determination of their employment conditions as their counterparts in private industry. The board is, as heretofore mentioned, charged by legislative mandate with conducting the affairs of the local school district according to the comprehensive statutory scheme of regulating salaries, leaves, certification, tenure, and

other circumstances affecting teaching personnel. It is elected to determine, elucidate and implement the district's policy considerations and, at the conclusion of general open discussion and the presentation of recommendations, the board is left with the ultimate decision. While giving consideration to the recommendations of the majority as well as the participating minority organizations among its certificated employees, the board must nonetheless continue responsive to the will of the local electorate and the legislative dictates relating to employment conditions and curriculum requirements within this state. Finally, it is by the Winton Act directed to listen and respond to the suggestions of employee organizations and it must tread carefully in its attempt to reconcile all these imperatives in an equitable manner. Clearly, the board in its effort to negotiate these hurdles, is compelled to rely upon the recognition on the part of the district's highly educated and trained, certificated employees, that their professional obligation to the community demands of them a high degree of cooperation, <u>responsibility to render continuing services, and to refrain from interference with the essential operation of educational institutions even in times of conflict</u>. It is assumed that certificated personnel, dedicated to their occupational goals, will in good faith participate in whatever statutory procedures may reasonably be established to assure a free exchange of communication, both interorganizational and between the board and the employee organizations competing within the District.

"Teachers are earnest and devoted people with a high degree of professional training and experience. They know children and what goes on in the classroom and in the learning process. A lay board should make full use of their willingness, and their knowledge and experience in matters of vital concern to both. Their voices should be heard and their recommendations thoughtfully

considered. This should be rudimentary in good procedure. If boards and superintendents aren't doing this, they should. The critical question now is this: Is the superimposing of the already outgrown and inadequate industrial bargaining theory and techniques upon this quite different set of conditions the best way to achieve our purposes? Is this the desired spirit and procedure? Is industrial type 'bargaining' the way to select a reader for the third grade, or decide whether to introduce the new math for the eleventh, or whether the class size shall be 22 or 27, or which teacher shall teach in which school? Can't we find a better way, in a different context, to solve difficult professional questions that must be reasoned and analyzed and decided, but not 'bargained' in this ritualistic sense?" (Hatcher, Alexander F. Morrison Lecturer, 42 State Bar J., pp. 50-51)

The air is stirring with the demands of public employees for recognition and the right to organize in the interests of influencing their employment conditions, and they are entitled to have these demands acknowledged and accorded to them within reasonable statutory bounds and limitations. Our Legislature in its inimitable wisdom has responded to the challenge by evolving the negotiating council, which incorporates provision for representation by appointed members of various minority organizations, in order to encourage the free exchange of ideas and the resolution of internal conflicts between these novice entries into the labor negotiation arena. It is the aim of such legislation to encourage the peaceful coexistence of employee organizations representing different philosophies and to allow for the voice of dissent, minimizing the coercion of minorities to the majority will. "The Legislature is uniquely able to amass economic data and hold hearings where it can give heed to many representatives of the public besides parties to a

> controversy." (Messner v. Journeymen Barbers etc. International Union, 53 Cal.2d 873, 882 [4 Cal.Rptr. 179, 351 P.2d 347].) Having carefully considered the problem of employment relations in the public school systems the Legislature arrived at a sound statutory determination of its tentative solution. This court has, under the circumstances, the duty and obligation to sustain the validity of the statutory scheme and to enjoin upon appellants the responsibility to cooperate and participate in good faith in order to enhance the declared appropriate legislative objectives. (272 Cal.App.2d at 519-540, emphasis added.)

Three years later, in Westminster School District of Orange County v. Superior Court & Westminster Teachers Association (1972) 28 Cal.App.3d 120, 127-129, the Court of Appeal stated:

> The background and history of the California Legislature's attempts to deal with public employer-employee relations in this state, including the background and reasons for enactment of the Winton Act, are admirably reviewed and discussed in California Federation of Teachers v. Oxnard Elementary Sch., 272 Cal.App.2d 514, 520-524, 529-530, 532-535, 538-540 [77 Cal.Rptr. 497] (see also Berkeley Teachers Assn. v. Board of Education, 254 Cal.App.2d 660, 663-664 [62 Cal.Rptr. 515]), and it would serve no useful purpose to repeat here what is there set forth. Suffice it to summarize as follows. "The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment." (California Federation of Teachers v. Oxnard Elementary Sch., supra, 272 Cal.App.2d at p. 523.)

> The Winton Act does not embody the concept of collective bargaining. (Ed. Code, sec. 13088; California Federation of Teachers v. Oxnard Elementary Sch., supra, 272 Cal.App.2d at pp. 523, 534, 538-540; Berkeley Teachers Assn. v. Board of Education, supra, 254 Cal.App. 2d at p. 671.) Its provisions make clear that the right conferred upon certificated public school employees is to voice their views and ideas through recognized representatives and to have these views and ideas considered by the public school employer but that all final decisions are left to the public school employer. (Secs. 13085, 13088.)

While the Winton Act afforded certain limited rights to public school employees, it also contained Education Code section 13088 which prescribed that: "The enactment of this article [Winton Act] shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees."

Appellate decisions prior to 1975 were unanimous in their holdings that public employees--including public school employees--do not have the right to strike unless statutorily authorized by the Legislature. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687; Newmarker v. Regents of the University California, supra, 160 Cal.App.2d 640, 646-647, ; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 36-38, hg. den.; City of San Diego v. American Federation of State, County and Municipal Employees (1970) 8 Cal.App.3d 308, 310-311, hg. den.; Trustees of California State Colleges v. Local 1352,

San Francisco State Teachers (1970) 13 Cal.App.3d 863, 867, hg. den.; Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142, 145-146, hg. den.; Berkeley Teachers Association v. Board of Education (1967) 254 Cal.App.2d 660, 671, hg. den.)

In 1975, the Legislature repealed the Winton Act and enacted the Educational Employment Relations Act (EERA) (Stats. 1975, ch. 961; Gov. Code, secs. 3540-3549.3). EERA section 3540 sets forth the intent and purpose of the Legislature in enacting EERA, including "recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy." EERA sections 3543.3, 3543.2 and 3540.1(h) provide for collective bargaining between the public school employer and the exclusive representative of a public school employees unit as to matters within the scope of representation.

As to whether the Legislature has granted public school employees the right to strike under EERA, there are two pertinent EERA statutes: Government Code sections 3543 and 3549. EERA section 3543 prescribes:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7 no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and may have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.
> (Gov. Code, sec. 3543.)

Significantly, EERA section 3549 provides in pertinent part: "The enactment of this chapter [EERA] shall not be construed as making the provisions of section 923 of the Labor Code applicable to public school employees . . . ." (Gov. Code, sec. 3549, emphasis added.)

Conspicuously absent and intentionally omitted by the Legislature from the rights granted to public school employees in Section 3543 is the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Keeping in mind the Legislature's knowledge of the California Constitution, of existing and related statutes, and judicial decisions construing those statutes, in addition to the governing rules of statutory construction, it is patently clear that the Legislature withheld and did not grant to public school employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," which includes, of course, the right to strike.

The Legislature's ommission from EERA section 3543 of the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," must be construed as intentional, not inadvertent. Where statutes referring to one subject contain a critical word or phrase, omission of that vital word or phrase from a similar statute on the same or related subject is presumed to have been deliberate by the Legislature and expressing a different legislative intent. (Estate of Simpson (1954) 43 Cal.2d 594, 600; Richfield Oil Corp. v. Crawford (1952) 39 Cal.2d 729, 735; People v. Valentine (1946) 28 Cal.2d 121, 142; Signal Oil & Gas Co. v. Bradbury (1960) 183 Cal.App.2d 40, 51, hg. den.;

Craven v. Crout (1985) 163 Cal.App.3d 779, 783; Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal.App.3d 814, 821; Estate of Trego (1978) 81 Cal.App.3d 530, 534; Marsh v. Edwards Theatres Circuit Inc. (1976) 64 Cal.App.3d 881, 891, hg. den.; Hennigan v. United Pacific Insurance Co. (1975) 53 Cal.App.3d 1, 8; City of Burbank v. Metropolitan Water District (1960) 180 Cal.App.2d 451, 461-462; and see Judson Steel Corp. v. Workers' Compensation Appeals Board (1978) 22 Cal.3d 658, 666; Balboa Insurance Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1007, hg. den.; County of Los Angeles v. Department of Social Welfare (1953) 41 Cal.2d 455, 459.)

Not only do we have the selective grant by the Legislature of the "16 words" concerted activities right in various statutes prior to 1975 (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d. 684, 687-689; Pub. Util. Code, secs. 30755, 70120, 90300(a) 100300, 101340, 102400, 103400), but in 1975, the very same year the Legislature enacted EERA, it also enacted two other public employee acts (Stats. 1975, ch. 294; Stats. 1975, ch. 1188) in which it granted the "16 words" concerted activities right to the covered public employees (Pub. Util. Code, secs. 120500, 125520.) Also in 1975, subsequent to the enactment of EERA, the Legislature enacted the Agricultural Labor Relations Act (ALRA - Stats. 1975 3d Ex. Sess, ch. 1; Lab. Code, secs. 1140-1166) which granted private agricultural

employees (who were not covered by the federal NLRA) the rights to organize, to bargain collectively through their chosen representatives and to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (Lab. Code, sec. 1152). Appellate decisions have reiterated that the right to engage in "concerted activities" granted to agricultural employees under Labor Code section 1152 includes the right to strike, picket, and participate in other types of "concerted activities" for the purpose of collective bargaining or other mutual aid or protection. (Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 71; Nash-DeCamp Co. v. ALRB (1983) 146 Cal.App.3d 92, 95, 104-112; ALRB v. California. Coastal Farms, Inc. (1982) 31 Cal.3d 469, 482; George Arakelian Farms, Inc. v. ALRB (1980) 111 Cal.App.3d 258, 274-277 hg. den.)

The Legislature circumspectly reinforced its intent that public school employees were not to have the right to strike for the purpose of collective bargaining or other mutual aid or protection by placing in EERA section 3549 which proscribes EERA from being construed so as to make Labor Code section 923 provisions applicable to public school employees. Since EERA itself grants to public school employees all of the rights provided by Labor Code section 923 save and except the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," the

prohibitory purpose of section 3549 with respect to public school employee strikes is unmistakable.

The statutory evidence is overwhelming that the Legislature did not grant to public school employees the right to strike.

Furthermore, any attempt to otherwise interpret or read into EERA a right of public school employees to strike or engage in other concerted activities interfering with or having a disruptive effect on the operation of the public schools would bring EERA into direct conflict with the California Constitution and the Education Code. Article IX of our Constitution mandates the Legislature to operate the public schools at least six months each school year, and the Legislature, through the Education Code, has extended the minimum operation of the public schools to almost nine months each school year. (Cal. Const., art. IX, sec. 5; Ed. Code, secs. 41420, 48200; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738, 744; Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District, supra, 165 Cal.App.3d 82, 92-93; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610; In re Shinn, supra, 195 Cal.App.2d 683, 686-687.)

We may not presume that the Legislature would statutorily

authorize public school employees to engage in concerted activities, such as a strike, which could violate the constitutional and statutory mandates concerning the operation of the public schools and the constitutional rights of California's children to attend and receive their education. For if the Legislature were to grant public school employees the right to strike, then public school employees could lawfully engage in work stoppages which interfere with and disrupt the operation of the public schools. And, if public school employees may lawfully engage in a work stoppage for one day, they may lawfully extend it to one week; and, if a week, then a month; and, if a month, then two months; and so on. However, any such interference and disruption in the operation of the public schools directly contravenes the constitutional and statutory mandates concerning the operation of the schools and the constitutional rights of the children. (Cal. Const., art. IX; Ed. Code, secs. 41420, 48200-48324; Hartzell v. Connell, supra, 36 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548; California Teachers Association v. Board of Education, Glendale Unified School District, supra, 109 Cal.App.3d 738, 744.)

Case law has firmly established that, even where the operation of the schools is constitutionally defective due to racial or financial discrimination, schools must nevertheless

remain in operation and continue to provide services without interference or disruption while the discrimination is being remedied. (Serrano v. Priest, supra, 5 Cal.3d 584, 619; Crawford v. Board of Education of the City of Los Angeles, supra, 17 Cal.3d 280; N.A.A.C.P. v. San Bernardino City Unified School District (1976) 17 Cal.3d 311; People v. Serna (1977) 71 Cal.App.3d 229, 233, hg. den.) This is due to the preeminent importance of the uninterrupted and continued operation of public schools to the constitutional rights of the students and the welfare of the people of this State. Certainly, no less is true when an unresolved labor dispute threatens such an interruption or interference. (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514, 532, 539.)

Nor may this Board, should it believe that the right to strike is a necessary adjunct to meaningful collective bargaining in the public sector, insert such an omitted right into EERA under the guise of statutory interpretation and rewrite the statute to conform to an assumed legislative intention that does not appear in the language of the statute. This is particularly so in the instant matter where the Legislature has not only intentionally omitted the "concerted activities" right from the statute but has also simultaneously enacted EERA section 3549 which statutorily proscribes this Board from construing or interpreting the enactment of EERA's

provisions so as to afford such a right to public school employees. (Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO (1985) 168 Cal.App.3d 937, 942, 944-945; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978; Estate of McDill, supra, 14 Cal.3d 831, 838; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51; Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 371-372, 375-377, hg. den.; Kaiser Steel Corp. v. County of Solano (1979) 90 Cal.App.3d 662, 667, hg. den.; Hennigan v. United Pacific Insurance Co., supra, 53 Cal.App.3d 1, 7-8; Vallerga v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 313, 318; Rowan v. City of San Francisco (1966) 244 Cal.App.2d 308, 314, hg. den.; Hutchins v. Waters (1975) 51 Cal.App.3d 69, 73; People v. Knowles (1950) 35 Cal.2d 471, 475; People v. One 1940 Ford V8 Coupe (1950) 36 Cal.2d 471, 475; Seaboard Acceptance Corp. v. Shay (1931) 214 Cal. 361, 369; Richardson v. City of San Diego (1961) 193 Cal.App.2d 648, 650-651, hg. den.; Blair v. Pitchess (1971) 5 Cal.3d 258, 282; Shaughnessy v. Wilsona School District of Los Angeles County (1972) 29 Cal.App.3d 742, 749; Orlandi v. State Personnel Board (1968) 263 Cal.App.2d 32, 36-37; Wilcox v. Enstad (1981) 122 Cal.App.3d 641, 653; Wisdom v. Eagle Star Insurance Co. (1963) 211 Cal.App.2d 602, 605; Kirkwood v. Bank of America (1954) 43 Cal.2d 333, 341; and see Vogel v. County of

Los Angeles (1967) 68 Cal.2d 18, 25-26; Goins v. Board of Pension Commissioners (1979) 96 Cal.App.3d 1005, 1009-1010, hg. den.; In re W.R.W. (1971) 17 Cal.App.3d 1029, 1032-1033; Buss v. J. O. Martin Co. (1966) 241 Cal.App.2d 123, 132-133; MacLead v. City of Los Altos (1960) 182 Cal.App.2d 364, 369; Code Civ. Proc., sec. 1858.)

From the foregoing, it is manifest that the Legislature has not authorized nor granted to public school employees the right to engage in strikes for the purpose of obtaining their collective bargaining goals or for other mutual aid or protection purposes, and that any such strikes or concerted activities are not protected by EERA.

Prior Board Decisions

Earlier decisions of this Board have held that an "economic strike"[16] engaged in prior to the completion of statutory impasse procedures violates EERA subsections 3543.6(c) and (d), since it constitutes a refusal to negotiate in good faith. (Fresno Unified School District (1982) PERB Decision No. 208, pp. 9-14; Westminster School District (1982) PERB Decision No. 277, pp. 14-17.)

PERB has not yet directly ruled on whether public school

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[16]See discussion, infra, at pages 114-115 for definitions of pre-impasse and post-impasse economic strikes and unfair practice strikes.

employees have the right--and thereby the concomitant protection--under EERA to engage in economic strikes after statutory impasse procedures have been exhausted. (San Ramon Valley Unified School District (1984) PERB Decision No. IR-46, p. 10; Modesto City Schools (1983) PERB Decision No. 291, p. 64, fn. 35.) PERB has ruled that "unfair practice strikes" engaged in by public school employees in response to alleged unfair practices by public school employers are rights authorized by the Legislature in EERA section 3543 and are protected by EERA regardless of when they may occur in the bargaining process. (Modesto City Schools, supra, PERB Decision No. 291; San Ramon Valley Unified School District, supra, PERB Decision No. IR-46; and see Fresno Unified School District, supra, PERB Decision No. 208; Westminster School District, supra, PERB Decision No. 277; Rio Hondo Community College District (1983) PERB Decision No. 292.)

In Modesto City Schools, supra, PERB Decision No. 291, this Board held that EERA section 3543 authorized work stoppages (strikes) by public school employees. After concluding that there was no statutory language in EERA directly prohibiting strikes, this Board stated:

> Even though EERA does not prohibit strikes, the Board cannot hold that a work stoppage is protected unless there is language in EERA which actually authorizes such a decision. We find that there is.
>
> Neither the NLRA or section 923 of the Labor

> Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to strike is protected. As the Court points out in San Diego Teachers Association, supra, at p. 6, and as the U.S. Supreme Court has held pursuant to the NLRA, a legislative "declaration that workers are to be free from employer interference in 'concerted activities . . . or other mutual aid or protection' is generally understood to confer a right to strike." (See, e.g., NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610]; NLRB v. Thayer Co. (1st Cir. 1954) 213 F.2d 748 [34 LRRM 2250], cert. den. (1954) 348 U.S. 883 [35 LRRM 2100].)
>
> EERA contains no reference to concerted activities. It does, however, in section 3543, guarantee public school employees the right, free from employer interference, "to form, join, and participate in the activities of employee organizations of their own choosing. . . ."
>
> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543. Similarly, work stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages. (Modesto City Schools, No. 291, pp. 61-62.)

Such an interpretation and administrative rewriting of EERA section 3543 by this Board so as to insert into the statute a

right intentionally omitted by the Legislature ignores the applicable and governing rules of statutory construction, the relevant provisions of our Constitution and related statutes, the proscription of EERA section 3549, and the applicable appellate decisions. We must assume "that the Legislature was cognizant of the correct meaning and use of the terms and that it drafted its enactment in the light of the code provisions and decisions of the courts of this state relating thereto." (Anderson v. I. M. Jameson Corp., supra, 7 Cal.2d 60, 67; Estate of McDill, supra, 14 Cal.3d 831, 837-839; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board, supra, 16 Cal.3d 1, 7; Keeler v. Superior Court, supra, 2 Cal.3d 619, 625; Buckley v. Chadwick, supra, 45 Cal.2d 183, 200; Sutter Hospital v. City of Sacramento, supra, 39 Cal.2d 33, 38.) The aforesaid is particularly true where, as here, the use of particular words or phrases has acquired a particular meaning in law and the Legislature has placed them in some statutes but omitted them from others. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 689; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51.)

On point is the recent decision in Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO, supra, 168 Cal.App.3d 937, involving an issue of whether the Higher Education

Employer-Employee Relations Act (HEERA - Gov. Code, sec. 3560 et seq.) had granted to "nonexclusive" employee organizations the right to advance notice and discussion of employer work-rule changes. This Board interpreted the statute so as to find such a right. The Court of Appeal reversed and set the Board's decision aside:

> The University contends . . . HEERA contains no language conferring a right of representation upon nonexclusive representatives. The University suggests that the Board, in interpreting HEERA, "divines an implied legislative intent to include that which was omitted from HEERA." The University argues that an interpreter of a statute, whether a court or an administrative agency, cannot supply what the Legislature has omitted in an attempt to make the statute conform to a presumed intent of the Legislature which is not expressed in the statutory language.
>
> . . . the Board reasoned . . . that HEERA's language and overall statutory scheme indicated that the Legislature intended to expand representational rights, not to "consign nonexclusive representatives to a state of powerless limbo." The Board found that HEERA's express provisions indicated a legislative intent to preserve representational rights for the employees and employee organizations until such time as an exclusive representative was selected.
>
> . . . . . .
>
> We agree with the Board's conclusion that a non-exclusive union may play a significant role before selections of an exclusive representative. <u>We disagree with the Board's creation of a "right to represent" where the Legislature failed to establish such a right</u>.
>
> . . . . . .

HEERA is significant not so much for what it provided as for what was omitted.
Beginnning in 1971 with the George Brown Act, the Legislature established a pattern of providing for the employees' rights and the employee organizations' rights in two successive code sections: first, the employees' right to ". . . form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . ." (sec. 3527); and then, in the next code section, that the "[e]mployee organizations shall have the right to represent their members in their employment relations, . . ." (sec. 3528.) This quoted language was used again in sequential code sections in EERA (adopted in 1975) (secs. 3543, 3543.1) and in SEERA (adopted in 1977) (secs. 3515, 3515.5). In each case other portions of the sections differed, but the operative langauge quoted above was identical.

HEERA, adopted one year after SEERA, used the quoted language to establish the right of employees to form, join, and participate in employee organizations (sec. 3565), but omitted entirely the provision establishing the employee organization's right to represent. . . . Later in the Act, the Legislature revealed that it had not forgotten the formula for its three previous public employment enactments, because it again used the quoted language from the George Brown Act, amending it to apply to "supervisory employees." It established both the supervisory employees' right to "form, join, and participate" (sec. 3581.1) and the organization's right to represent supervisory employees in higher education (sec. 3581.2).

We cannot agree with the Board's conclusion that HEERA's ommission of a "right to represent" was without significance. It is true that we must accord great respect to an administrative agency's interpretation of the statute it is charged with enforcing

> [citations]. But upholding such a reading would go well beyond respect for the agency's interpretation. It would authorize the Board to rewrite the statute to suit its notion of what the Legislature must have intended to say about organizational rights. It would do this in the face of strong evidence of a contrary legislative intent: the Legislature's use of the same constructions in four different pairs of statutes, and its failure to use that construction in the statute under scrutiny. (168 Cal.App.3d at 941-945, emphasis added.)

Likewise, in Westminster School District of Orange County v. Superior Court & Westminster Teachers Association, supra, 28 Cal.App.3d 120, the Court of Appeal had before it a provision of the Winton Act involving the formation of a three-member "persistent disagreement committee" as authorized by former Education Code section 13087.1. To aid in the resolution of persistent disagreements between a school district and its employees, the statute prescribed that each party (the school district and the employee council) would designate a committee member and the two designated members would then select the third member. The statute provided no procedure for selecting the third member if the two designees could not agree. In Westminster, the two designees could not agree and the employee council sought to have the superior court appoint the third member, which the superior court did. On appeal, the employee council contended that the statute created a substantive right to the formation of a persistent disagreement committee and that if the parties could not agree

on the third member of the committee that "the court must have the power to fashion a remedy for the appointment of a third member under such circumstances because, otherwise, the statutorily created right would be meaningless." (28 Cal.App.3d at 127). In rejecting the employee council's contention and reversing the superior court, the Court of Appeal set forth:

> Having carefully considered the problem of employment relations in the public school systems, the Legislature has enacted the Winton Act as a unique, experimental procedure representing a tentative solution [citation]. The act provides for the selection of a persistent disagreement committee of three members by agreement of the parties and their representatives. (Sec. 13087.1.) Obviously, it was foreseeable to the Legislature that the parties might not be able to agree upon the selection of the third member of such committee [citations], yet the Legislature has provided no procedure for imposing on either party a member of such committee selected by the court. Both the philosophy underlying the act and the Legislature's refusal to adopt measures designed to establish such a procedure persuade us that the omission was intentional, not inadvertent. It is inappropriate for the courts to alter a comprehensive, unique, experimental scheme enacted by the Legislature by interjecting therein procedures intentionally omitted by the Legislature. (28 Cal.App.3d at p. 129)

We must assume that the Legislature knew what it was saying and meant what it said; that the Legislature knew what it was authorizing in EERA section 3543, and knew what, by omission, it was not authorizing. The Legislature knew the "formula" or "16-word" language to use if it wanted to authorize public school employees to engage in strikes. Had this been its

intent, it would have given them the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689.) It did not do so. Furthermore, the Legislature's intent in this respect is further emphasized and reinforced by its simultaneous enactment of EERA section 3549, which expressly prohibits this Board from construing EERA so as to find such a right. We may not by administrative interpretation insert into the statute that which the Legislature has omitted. (Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO, supra, 168 Cal.App.3d 937, 942-945; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978; Estate of McDill, supra, 14 Cal.3d 831, 838; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51; Cadiz v. Agricultural Labor Relations Board, supra, 92 Cal.App.3d 365, 371-372, 375-377; Kaiser Steel Corp. v. County of Solano, supra, 90 Cal.App.3d 662,667; Hennigan v. United Pacific Insurance Co., supra, 53 Cal.App.3d 1, 7-8; Vallerga v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 313, 318; Rowan v. City of San Francisco, supra, 244 Cal.App.2d. 308, 314; Hutchins v. Waters, supra, 51 Cal.App.3d 69, 73; People v. Knowles, supra, 35 Cal.2d 471, 475; People v. One 1940 Ford V8 Coupe, supra, 36 Cal.2d 471, 475; Seaboard Acceptance Corp. v Shay, supra, 214 Cal. 361,

369; Richardson v. City of San Diego, supra, 193 Cal.App.2d 648, 650-651; Blair v. Pitchess, supra, 5 Cal.3d 258, 282; Shaughnessy v. Wilsona School District of Los Angeles County, supra, 29 Cal.App.3d 742, 749; Orlandi v. State Personnel Board, supra, 263 Cal.App.2d 32, 36-37; Wilcox v. Enstad, supra, 122 Cal.App.3d 641, 653; Wisdom v. Eagle Star Insurance Co., supra, 211 Cal.App.2d 602, 605; Kirkwood v. Bank of America, supra, 43 Cal.2d 333, 341; Riebe v. Budget Finance Corp. (1968) 264 Cal.App.2d 576, 585; Woodmansee v. Lowery (1959) 167 Cal.App.2d 645, 652, hg. den.; and see Vogel v. County of Los Angeles, supra, 68 Cal.2d 18, 25-26; Goins v. Board of Pension Commissioners, supra, 96 Cal.App.3d 1005, 1009-1010; In re W.R.W., supra, 17 Cal.App.3d 1029, 1032-1033; Buss v. J. O. Martin Co., supra, 241 Cal.App.2d 123, 132-133; MacLead v. City of Los Altos, supra, 182 Cal.App.2d 364, 369; Code Civ. Proc., sec. 1858.)

Aside from its failure to adhere to the applicable rules of statutory construction, the Modesto City Schools decision has other analytical flaws. First, Modesto City Schools adopted an initial premise that "[n]either the NLRA or section 923 of the Labor Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to strike is protected." This initial premise failed to recognize the long-standing appellate decisions holding that the specific "16 words" language granting employees the right

to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is the Legislature's explicit term or proviso for the right to strike. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689; United Auto Workers v. O'Brien (1950) 339 U.S. 454, 456-457; Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board, supra, 340 U.S. 383, 389-390; James v. Marinship Corp., supra, 25 Cal.2d 721, 728-729; Park & Tilford Import Corp. v. International Brotherhood of Teamsters, supra, 27 Cal.2d 599, 603-613; G. C. Breidert Co. v. Sheet Metal Workers International Association, supra, 129 Cal.App.2d 633, 638-639.)

Second, not finding any right to strike or right to engage in "concerted activities" language in EERA, this Board in Modesto City Schools then asserted that the only difference between the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and Government Code section 3543's right "to form, join, and participate in the activities of employee organizations of their own choosing . . ." is that the latter language is simply "plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process." And, since "work stoppages must also

qualify as collective actions traditionally related to collective bargaining," Government Code "section 3543 authorizes work stoppages." (Modesto City Schools, supra, PERB Decision No. 291, pp. 61-62.) However, Modesto City School's quote omitted a portion from the section 3543 right: "to form, join, and participate in the activities of employee organizations of their own choosing . . ."; that is, it is "for the purpose of representation on all matters of employer-employee relations." (Gov. Code, sec. 3543, emphasis added.) Moreover, the quoted language is identical to, and comes from, the rights language contained in the predecessor Winton Act (Stats. 1965, ch. 2011, amended Stats. 1970, ch. 1412; former Ed. Code, secs. 13080-13088) in which former Education Code section 13082 prescribed:

> Except as otherwise provided by the Legislature, public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . . (Emphasis added.)

Thus, the "plainer and more universally understood language" relied on by Modesto City Schools as authorizing work stoppages by public school employees, comes in haec verba from the rights granted to public school employees in the predecessor 1965 Winton Act, which did not even provide a right to engage in collective bargaining, much less a right to engage in work stoppages. (San Mateo City School District v. Public

Employment Relations Board, supra, 33 Cal.3d 850, 860; California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514, 519-540; Westminster School District of Orange County v. Superior Court and Westminster Teachers Association, supra, 28 Cal.App.3d 120; Berkeley Teachers Association v. Board of Education of Berkeley Unified School District, supra, 254 Cal.App.2d 660, 671.)

This Board's decision in Modesto City Schools, supra, PERB Decision No. 291 is clearly incorrect and should be overruled insofar as it interprets EERA section 3543 as authorizing work stoppages by public school employees for the purpose of collective bargaining or other mutual aid or protection.

Likewise, San Ramon Valley Unified School District, supra, PERB Decision No. IR-46 is also incorrect and should be overruled insofar as it follows Modesto City Schools and holds that public school employees have a protected right under EERA to engage in unfair practice strikes. (San Ramon Valley Unified School District, supra, pp. 9-10.)

County Sanitation District No. 2

In the recent tort case, County Sanitation District No. 2 of Los Angeles v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564 (County Sanitation), a local public agency employer had obtained a tort damages judgment against a local public employee union for the

union's tortious involvment in a labor strike which had damaged the public employer. In reversing the tort damages judgment, a plurality of a divided and splintered court held that the common law prohibition against public employee strikes should no longer be recognized in California and, accordingly, that public employee strikes are not tortious under California common law.

Three members of the court, with the Chief Justice concurring, formed the plurality opinion which concluded that "the common law prohibition against public sector strikes should not be recognized in this state" and "[c]onsequently, strikes by public sector employees in this state as such are neither illegal or tortious under California common law". (38 Cal.3d at 592-93, emphasis added.) Two members of the court, in a separate opinion, reversed the tort damages judgment on the basis that peaceful strikes did not give rise to a tort cause of action under existing California law and that it was not necessary to reach the question of whether such strikes were legal or illegal under California common law. (38 Cal.3d at 592-593.) The Chief Justice, in a separate opinion, contended that employees have a constitutional right to strike. (38 Cal.3d at 593-609.) One Justice dissented from all of the foregoing opinions. (38 Cal.3d at 609-613.)

In addressing the common law prohibition against public employee strikes, the plurality opinion also considered the

Meyers-Milias-Brown Act (MMBA; Gov. Code, secs. 3500-3511) which by statute--as compared to common law--deals with part of the employment relations between local public agency employers and local public employees. In concluding that the MMBA did not expressly prohibit strikes by local public employees, County Sanitation's plurality opinion was dealing with whether local public employee strikes were prohibited and thus tortious, under the statutory provisions of the MMBA. County Sanitation did not deal with or determine whether the MMBA grants a right to strike to local public employees, much less whether public school employees have a right to strike under EERA and/or whether public school employee strikes constitute unfair practices under EERA.

But even though County Sanitation is neither applicable nor controlling on the issue of whether public school employees have a right to strike under EERA, it is still appropriate that we examine the plurality opinion's analysis of what it deemed the Legislature's position to be with respect to public employee strikes, as well as the plurality's interpretation of MMBA provisions which are similiar to EERA provisions. For, if the plurality's reasoning is persuasive as to the Legislature's position on public employee strikes, it could affect this Board's interpretation of EERA.

Prior to the commencement of its common law discussion, the plurality asserts that, except as to legislation regarding

firefighters, the Legislature has chosen to remain silent as to any general prohibition against public employee strikes (38 Cal.3d at 571), that with respect to local public employees the Legislature in enacting MMBA had left the issue "shrouded in ambiguity" by intentionally avoiding the inclusion in MMBA of any provision which could be construed as either a blanket grant or prohibition of a right to strike (38 Cal.3d at 572-573), and thus that "In the absence of clear legislative directive on this crucial matter, it becomes the task of the judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort." (38 Cal.3d at 573, emphasis added.)

Upon judicially examining and judicially rejecting the policy reasons advanced for the common law prohibitions against public employee strikes (38 Cal.3d at 573-583), and after reasserting that the Legislature has been silent (38 Cal.3d at 584), the plurality opinion concludes "that the common law prohibition against public sector strikes should not be recognized in this state" and "[c]onsequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law." (38 Cal.3d at 585, emphasis added.) However, the plurality opinion places a limiting condition on this judicial modification of common law:

> . . . strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike

> creates a substantial and imminent threat to the health or safety of the public. (38 Cal.3d at 586, emphasis added.)

It is readily apparent that the plurality's judicial reversal of the California common law prohibition against public employee strikes was based on the plurality's assumption that the Legislature has been silent as to either any general authorization for, or prohibition against, public employee strikes, and that the Legislature has not--on behalf of the people--statutorily expressed itself on the right of public employees to strike.[17]

But, did the plurality opinion proceed from an invalid premise as to the Legislature's silence? Has the Legislature been silent?

Early in the plurality opinion, in referring to prior decisions of the Supreme Court to show that the Supreme Court itself had not ruled on whether public employee strikes were lawful, the plurality opinion cited Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-688. After describing as "dictum" the

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[17]As discussed post, the judiciary may change or modify the common law where the Legislature has been silent, provided that the judicial change is not repugnant to or inconsistent with the Constitution and statutes, and does not nullify existing legislation or frustrate legitimate legislative policy. (Civ. Code, sec. 22.1; Ferguson v. Keays (1971) 4 Cal.3d 649, 654; Rodriquez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 394-395; Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 814; Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal.App.2d 222, 229, hg. den.; City of Rohnert Park v. Superior Court (1983) 146 Cal.App.3d 420, 427-428; Lowman v. Stafford (1964) 226 Cal.App.2d 31, 39, hg. den.; Corcoran v. City of San Mateo (1953) 122 Cal.App.2d 355, 359, hg. den.)

court's statement that "[i]n the absence of legislative authorization public employees in general do not have the right to strike, . . ." the plurality then observed that Los Angeles Metropolitan Transit Authority did hold "that a statute affording public transit workers the right 'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection' granted these employees a right to strike." (38 Cal.3d at 570, emphasis added.) But in later concluding that the Legislature had been silent, the plurality inexplicably failed to remember the Supreme Court's recognition in Los Angeles Metropolitan Transit Authority of the Legislature's clear statutory grant of the right to strike. Nor did the plurality recall the Supreme Court's response in Los Angeles Metropolitan Transit Authority in answer to the contention raised therein that the Legislature had engaged in discriminatory classification by granting the transit authority's public employees the right to strike while statutorily withholding that right from public employees of other transit systems. The Supreme Court had held that differing circumstances faced by public employers would justify the Legislature's selective granting or withholding of the right to strike among various groups of public employees. (54 Cal.2d at 694.)

This recognition by the Supreme Court in Los Angeles Metropolitan Transit Authority, that the Legislature has

necessarily taken a selective rather than a general approach to public employee strikes, was more fully elaborated upon in the previously cited case (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514) that addressed public school employee rights under the Winton Act (former Ed. Code, secs. 13080-13088).

As cited earlier in this opinion, the court in Oxnard reviewed the evolution of labor statutes in this state, concluding that the Legislature's treatment of public employee labor relations reflected its careful consideration of the applicability of traditional private sector procedures, such as collective bargaining, exclusive representation, and the right to strike, to the relationship between public employees and their employers. Not only did the Legislature evaluate the appropriateness of these procedures for public employees generally, but it also considered the "wide variety of occupations and professions encompassed within the field of public employment." The Winton Act, with its separate treatment of public school employees, "evolved through a series of enactments designed to regulate separately various aspects of public employment." (Oxnard, supra, at p. 522.) The court then compared various acts, some of which granted the right to strike, and some of which withheld it. In those in which the Legislature did not grant the right to strike, it also specifically stated that the Act shall not be interpreted so as

to make Labor Code section 923 applicable. The Winton Act fell into this latter category. The court stated:

> The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment. (272 Cal.App.2d at 523, emphasis added.)

In accord with the foregoing recognition of the Legislature's selective approach to the employment relations between the various and diversified public employers and public employees are: Westminster School District of Orange County v. Superior Court & Westminster Teachers Association, supra, 28 Cal.App.3d 120; Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 289.

This selective rather than general approach of the Legislature to the difficult questions and problems concerning which, if any, public employees should be granted the right to strike, could explain why the County Sanitation plurality asserted that the Legislature had been silent as to an authorization for or prohibition against public employee strikes. However, there appears to be no explanation for the County Sanitation plurality's having ignored the selective approach of the Legislature in its extensive and definitive granting or withholding of the right to strike in conjunction

with a multitude of public employee labor relations enactments. Such statutory prescriptions and proscriptions involve numerous public employers and public employee groups, and exhibit a sophisticated legislative approach to rights, remedies and procedures in various appropriate combinations involving: the forming, joining and participating in employee organizations; representation by employee organizations; "meeting and conferring" with public employers; bargaining units; representation elections; exclusive representation; collective bargaining; "other concerted activities (including strikes) for the purpose of collective bargaining or other mutual aid or protection"; mutually-agreed-to binding interest arbitration; mandatory binding interest arbitration; mediation; referral of unresolved issues to the Governor for appointment of a fact-finding commission; 30-day "cooling off" period after the fact-finding report has been submitted to the Governor; "impasse" procedures; unfair labor practices; a public employment relations board to administer and enforce various acts; etc. (Stats. 1955, ch. 1036 (Pub. Util. Code, secs. 24501-27509); Stats. 1957, ch. 547 (Pub. Util. Code, appen. 1 secs. 1.1-13.1); Stats. 1958, ch. 1056 (Pub. Util. Code, secs. 28500-29757); Stats. 1959, ch. 723 (Lab. Code, secs. 1960-1963); Stats. 1961, ch. 1964 (Gov. Code, secs. 3500-3509); Stats. 1961, ch. 1932 (Pub. Util. Code, appen. 2, secs. 1-11); Stats. 1963, ch. 839 (Pub. Util. Code, secs. 50000-50507);

Stats. 1964, 1st Ex. Sess., ch. 62 (Pub. Util. Code, secs. 30000-31520); Stats. 1964, 1st Ex. Sess., ch. 92 (Pub. Util. Code, secs. 70000-80019); Stats. 1964, 1st Ex. Sess., ch. 104 (Pub. Util. Code, appen. 2); Stats. 1965, ch. 1835 (Pub. Util. Code, secs. 95000-97100); Stats. 1965, ch. 1899 (Pub. Util. Code, secs. 40000-40617); Stats. 1965, ch. 2039 (Pub. Util. Code, secs. 90000-93017); Stats. 1965, ch. 2041 (Ed. Code, secs. 13080-13088); Stats. 1967, ch. 978 (Pub.Util. Code, secs. 98000-98407); Stats. 1968, ch. 1964 (Gov. Code, secs. 3500-3509); Stats. 1969, ch. 180 (Pub. Util. Code, secs. 100000-100500); Stats. 1971, ch. 1161 (Pub. Util. Code, secs. 101000-101372); Stats. 1971, ch. 1374 (Pub. Util. Code, secs. 102000-102700); Stats. 1971, ch. 1335 (Pub. Util. Code, appen. 1, sec. 4.1); Stats. 1974, ch. 502 (Pub. Util. Code, secs. 103500-103700); Stats. 1974, ch. 51. (Pub. Util. Code, sec. 30756); Stats. 1975, ch. 294 (Pub. Util. Code, secs. 120000-120702); Stats. 1975, ch. 1188 (Pub. Util. Code, secs. 125000-125561); Stats. 1975, ch. 961 (Gov. Code, secs. 3540-3549.3); Stats. 1975, 3d Ex. Sess., ch. 1 (Lab. Code, secs. 1140-1166.3); Stats. 1976, ch. 961 (Gov. Code, secs. 3540-3549.3); Stats. 1977, ch. 1159 (Gov. Code, secs. 3512-3536); Stats. 1978, ch. 744 (Gov. Code, secs. 3560-3599).)

Of the twenty-eight (28) public employer-employee acts enacted and amended by the Legislature prior to County Sanitation, the Legislature specifically granted the right to

strike to the public employees covered by twelve (12) of the acts, while withholding the right to strike from the remainder, which includes the MMBA (local public employees), EERA (public school employees), SEERA (state employees), and HEERA (higher education employees).

It would thus appear that the County Sanitation plurality proceeded on an invalid premise as to the Legislature's silence with respect to public employee strikes.[18]

Turning to the County Sanitation plurality's treatment of MMBA section 3509 (Gov. Code, sec. 3509), which is similar to EERA section 3549 (Gov. Code, sec. 3549), the plurality concluded that section 3509 does not prohibit strikes by local public employees. The plurality's interpretation was based on two factors. First, while an identical provision was included in the Firefighters Act, the Legislature also included therein an express prohibition against strikes. Second, in San Diego Teachers Associationn v. Superior Court (1979) 24 Cal.3d 1, 13, the court had stated that the similar EERA section 3549 specifically did not prohibit strikes. (County Sanitation, supra, 38 Cal.3d at 573.)

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[18]The only such possible "legislative silence" prior to County Sanitation was its silent acquiescence to the unanimous chain of appellate decisions holding that all public employee strikes were illegal unless statutorily authorized by the Legislature. (See City & County of San Francisco v. United Association of Journeymen of United States & Canada (1986) 42 Cal.3d 810, Lucas, J. dissenting at p. 819.)

As to the Firefighters Act (Lab. Code, secs. 1960-1963), the plurality opinion contains no analysis of the circumstances under which the Firefighters Act was enacted in 1959. Prior to its enactment, and in furtherance of the long-established public safety policy against any interruption or interference in the delivery of firefighting services, firefighters had been barred from organizing or even joining a labor organization. (International Association of Fire Fighters, Local 1319, AFL-CIO v. City of Palo Alto, supra, 60 Cal.2d 295, 300; International Association of Fire Fighters, Local No. 1396, AFL-CIO v. County of Merced, supra, 204 Cal.App.2d 387, 390; Professional Fire Fighters, Inc, v. City of Los Angeles, supra, 60 Cal.2d 276, 288-289, 294; and see Perez v. Board of Police Commissioners of the City of Los Angeles (1947) 78 Cal.App.2d 638, hg. den.; Pen. Code, sec. 148.2, subds. (1) & (4), former Pen. Code, sec. 385 enacted in 1872, and former Health & Saf. Code, sec. 13006 (Stats. 1939); Pub. Resources Code, sec. 4165; 53 Ops.Cal.Atty.Gen. 324, 326-327 (1970); Cal. Emergency Services Act, Gov. Code, secs. 8550-8668, former Cal. Disaster Act of 1943; Mil. & Vet. Code, sec. 1505.)

In response to the insistent demands of firefighters that they be allowed to join labor organizations, the Legislature enacted the Firefighters Act. (Lab. Code, sec. 1960-1963.) The Act begins with Labor Code section 1960, which proscribes the state, counties and cities from prohibiting, denying or obstructing "firefighters" from joining "any bona fide labor

organization of their own choice." Labor Code section 1962 then prescribes that "employees" (defined by Lab. Code, sec. 1961 as employees of fire departments and fire services):

> . . . shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages salaries, hours and working conditions to the governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties. (Lab. Code, sec. 1962, emphasis added.)

Lastly, Labor Code section 1963 proscribed the enactment of the Firefighters Act as being construed so as to make the provisions of Labor Code section 923 applicable to public employees.

The Legislature was clearly concerned that, in granting firefighters the right to organize and become involved with labor organizations, there be no resultant disruption or interference in the delivery of firefighting services by way of strikes or in the on-duty observance of picket lines. In this 1959 enactment--which was prior to the definitive 1960 decision of the Supreme Court in Los Angeles Metropolitan Transit Authority, supra, 54 Cal.2d 684, concerning legislative language with respect to the right to strike--the Legislature obviously acted with an overabundance of statutory caution in this very volatile area of firefighting services. That under such circumstances the Legislature was so circumspect in Labor Code section 1962 does not equate to the Legislature not

intending to prohibit such strikes and picket line observances as part of its Labor Code section 1963 proscription insofar as such type of activities were authorized by the provisions of Labor Code section 923.

With respect to San Diego Teachers, supra, and its interpretation of EERA section 3549 as not prohibiting strikes, again there is a lack of any analysis by the majority in San Diego Teachers as to the role of section 3549 in EERA. The majority opinion annulled contempt orders against the teachers association on the basis that PERB has exclusive initial jurisdiction to determine whether a strike is an unfair practice under EERA and if so, what remedies, if any, should be pursued. Early in the decision, the majority states at page 6:

> The trial court also relied on section 3549, which states that the EERA "shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees." Labor Code section 923's declaration that workers are to be free from employer interference in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" is generally understood to confer a right to strike. (Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 687-688.)
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> Petitioners [teachers' association] contend that the ERRA, though excluding Labor Code section 923's protection of the right to strike, does not itself prohibit strikes. The exclusion may be explained, it is argued, by a concern that the wholesale introduction of rules protecting collective bargaining in the private sector into the public sector might conflict with tenure and other aspects of public employment that fall outside the negotiating process mandated by

> the EERA. (Secs. 3540, 3540.1, subd. (h).) Petitioners further contend that strikes by public employees have been outlawed in the past because there were no provisions for public employment collective bargaining [citations]. They argue that the EERA's guarantee of the right to participate in organizational activities for "representation on all matters of employer-employee relations" (sec. 3543) and for the negotiation of written contracts between public school employers and employee organizations (sec. 3540.1, subd. (h)), implies legality of strikes to make the negotiation effective and meaningful. (Emphasis added.)

The majority then proceeded to discuss PERB's exclusive initial jurisdiction. And, later in the opinion in response to an amicus contention that PERB had no exclusive initial jurisdiction since strikes violate section 3549, the majority, without any analysis or discussion, stated in response:

> . . . As pointed out above, however, section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities." (24 Cal.3d at p. 13, emphasis added.)

The only previous mention of section 3549 in the decision was merely the summary of petitioner's arguments, which the court neither adopted, rejected nor even discussed. The lack of analysis in support of the foregoing statement by the majority is cogently observed by Justice Richardson in his dissenting opinion (concurred in by Justice Clark and the late Justice Wiley Manuel):

> Conversely, it also has been held that legislation which purports to deprive a particular class of employee of the right to

engage in concerted activities, or which withholds the applicability of the provisions of Labor Code section 923, demonstrates a legislative intent to withhold the right to strike. (Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra, 72 Cal.App.3d. 100, 106; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 37-38.)

The majority acknowledge that the EERA, under section 3549 of the Government Code, expressly provides that "The enactment of this chapter (regarding meeting and negotiating in public educational employment) shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees. . . ." (Italics added.) Because section 923 declares as a public policy the right of a private worker to engage "in other concerted activities," judicially defined as including the right to strike (Los Angeles Met. Transit Authority, supra, at p. 689) it seems to me inescapable that the foregoing language of section 3549 conclusively establishes the Legislature's intent to deny this weapon to public school employees. Indeed, this very language was held in Pasadena to constitute a legislative affirmance of an intent "to withhold the right to strike from public educational employees." (72 Cal.App.3d 100, 106-107; see Almond v. County of Sacramento, supra, 276 Cal.App.2d 32, 37-38.)

The majority's disposition of section 3549 is wholly unsatisfactory in its insistence that ". . . section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities." (Ante, p. 12.) In my view, the argument is manifestly wrong, as the above quoted Pasadena holding indicates. To the contrary, by withholding the protection of section 923 the Legislature necessarily retained the preexisting prohibition against all public employment strikes.

> Therefore, in examining those sections of EERA relied on by the majority, we should bear in mind that, under EERA's own provisions, public school strikes remain unlawful. (24 Cal.3d at p. 19, emphasis court's.)

It may also be observed that County Sanitation's interpretation of MMBA section 3509--to the effect that the section merely denies the protection afforded by Labor Code section 923 for concerted activities--leaves treacherous shoals in its wake for local public employees who, in mistaken reliance on County Sanitation, may sail out on strike waters. In dealing with whether MMBA section 3509 prohibits local public employee strikes and would thus constitute a statutory basis for a tort cause of action, and in holding that section 3509 did not so prohibit, the plurality did not hold that the MMBA grants the right to strike to local public employees. Inasmuch as local public employees do not have the right to strike under the MMBA, they accordingly have no MMBA protection for any strike in which they engage. (Gov. Code, secs. 3502, 3506; Stationary Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796, 801; Healdsburg Police Officers Association v. City of Healdsburg (1976) 57 Cal.App.3d 444, 451-452.) So, if they engage in strikes, although they are no longer potentially liable for tort damages under the common law, they will nonetheless be placing their government jobs in jeopardy by engaging in conduct unprotected by the MMBA (as well as unprotected by Lab. Code, sec. 923).

Thus, while County Sanitation is applicable and controlling as to public employee strikes no longer being tortious under California common law (unless they affect public health or safety), the assumption of the plurality opinion as to the Legislature's intent and silence with respect to public employee strikes, as well as its reasoning concerning MMBA section 3509 is unpersuasive and does not alter our determination that public school employees do not have a right to strike under EERA.

III. THE STATUS OF A STRIKE BY PUBLIC SCHOOL EMPLOYEES AS AN UNFAIR PRACTICE UNDER EERA

Since public school employees do not have the right under EERA to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," strikes by public school employees are not protected by EERA (Gov. Code, sec. 3543.5). There remains then the question of whether public school employee strikes constitute an unfair practice under EERA.

In relation to the collective bargaining process under EERA, there are three types of strikes[19] in which public school employees might engage: (1) the "pre-impasse economic strike," a strike engaged in to achieve bargaining goals prior

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[19]Strikes may involve various types of work stoppages such as: a one-day strike, a "rolling" or intermittent strike, a continuous strike, a "sick out," a work slowdown, etc.

to impasse or before the exhaustion of the statutory impasse procedures (Gov. Code, secs. 3548-3548.5); (2) the "post-impasse economic strike," a strike engaged in to achieve bargaining goals after the exhaustion of the statutory impasse procedures (Gov. Code, secs. 3548-3548.5); and (3) the "unfair practice strike," a strike engaged in purportedly in response to an alleged unfair practice by the public school employer, and which may occur pre-impasse, during impasse, or post-impasse.

As to "pre-impasse economic strikes," this Board has already held that public school employee strikes engaged in to achieve bargaining goals and undertaken prior to impasse or before the exhaustion of the statutory impasse procedures constitute unfair practices under EERA in that the public school employees are thereby failing or refusing to meet and negotiate in good faith. (Gov. Code, sec. 3543.6(c) and (d); Fresno Unified School District, supra, PERB Decision No. 208, pp. 9-14; Westminster School District, supra, PERB Decision No. 277, pp. 14-17; and see El Dorado Union High School District (1986) PERB Decision No. 537a.)

As to the "unfair practice strikes," which may occur pre-impasse, during impasse, or post-impasse, this Board has heretofore held that public school employees have a right under EERA to engage in such strikes and, accordingly, that such strikes are not unfair practices because employee rights under EERA are protected by EERA. (Modesto City Schools, supra, PERB

Decision No. 291, pp. 52-65; and see San Ramon Valley Unified School District, supra, PERB Decision No. IR-46, pp. 9-10.) But as already discussed, supra, EERA section 3543 does not grant public school employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Therefore, Modesto City Schools was incorrectly decided as to public school employees having a right under EERA section 3543 to engage in "unfair practice strikes." The public school employees' remedy to an unfair practice by the public school employer would be to file an unfair practice charge with this Board against the employer. (Gov. Code, secs. 3541.5, 3543.5.) If the public school employer's unfair practice is of a nature necessitating immediate relief, the public school employees may also petition this Board to seek injunctive relief. (Gov. Code, sec. 3541.3(j); PERB Regs. Cal. Admin. Code, tit. 8, secs. 32450-32470; and see Stationery Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796, 801.)

There remains the "post-impasse economic strike" engaged in by public school employees to force from the public school employer a change or changes in wages, hours, duties and/or other terms and conditions of employment which they have not been able to achieve at the bargaining table. This Board has not previously ruled on whether such post-impasse economic strikes constitute unfair practices under EERA. (San Ramon

Valley Unified School District, supra, PERB Decision No. IR-46, pp. 9-10.)

Before examining the situation of the collective bargaining status quo of public school employers and employees following the exhaustion of the statutory impasse procedures, a brief discussion may be in order with reference to a contention sometimes raised by public school employees following the expiration of a collective bargaining agreement, that they have been working "without a contract," apparently mimicking their counterparts in the private sector. To be accurate, they could say they have been working without a collective bargaining agreement, but the law is well-established that this does not mean they do not have a "contract." Due to the nature of their public employment, and the statutory and constitutional protections afforded them, they are indeed under contract and their failure to perform can theoretically be deemed a breach of contract.

It has long been held by the courts of California that, the tenure laws notwithstanding, the employment relationship between a teacher and the school board is contractual. Once a teacher achieves permanent status, he/she acquires a vested right to teach as a permanent instructor and may only be removed from the position for cause pursuant to statutory procedures, but such right "attaches" to the contract.

As stated by the California Supreme Court in Abraham v. Sims (1935) 2 Cal.2d 698, 710-711:

> The result of these enactments [the laws regulating tenure] was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broadest sense of being annexed by operation of law to the contract and have been said to be "in the nature of a civil service regulation." [Citations.] One of the consequences is a permanent right to teach so long as the board's reasonable regulations are complied with. . . . The right to teach is an incident to classification as a permanent teacher and after three [now two] consecutive years of employment and service, and reelection by the board for the next succeeding school year, the law as of the beginning of that year automatically effects the classification and nothing more is required to accomplish it . . . [N]o affirmative action of the board is requisite to accomplish such reemployment . . . and a permanent teacher need not even notify the board of his acceptance. . . . The manifest implication is that unless he notifies the board to the contrary or fails to appear for the purpose of teaching at the opening of the school year, he must be deemed to have accepted the reemployment.

The Court of Appeal stated in Frates v. Burnett (1970) 9 Cal.App.3d 63, 69:

> It has been held that "rules and regulations adopted by a board of education are, in effect, a part of a teacher's employment contract and the teacher is entitled to their enforcement." [Citation.] Although this rule has been made on behalf of teachers, no distinction is seen between a teacher and a classified employee of the district.

With the advent of collective bargaining, July 1 may pass without a resolution of the terms of a new or successor collective bargaining agreement. While there are no specific cases on point, presumably the employees' individual contracts remain in effect until there is a mutual agreement to alter those terms reached by the exclusive representative and the governing board. However, once an agreement is reached, the employees are entitled to enforcement of the terms of the agreement. (Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District, supra, 165 Cal.App.3d 82, 95.) Thus, it can be said that, while the collective bargaining agreement establishes various terms and conditions of employment within scope, it is but a mere overlay to the actual contract of employment created by operation of law and renewed annually, with no further action required by either the employer or the employee to make it enforceable, presumably by either party.

This ongoing contractual relationship creates a significant distinction between private sector employees whose collective bargaining agreement has expired, and public school employees in the same situations. So, after the expiration of an agreement, public school employees may be working without a new agreement, but they are not "working without a contract."

And, while private sector employees--and certain statutorily authorized public employees--have a protected right

to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and thus may engage in post-impasse economic strikes to obtain their bargaining goals without committing an unfair practice under the respective California and federal labor laws applicable to them (see, e.g., Lab. Code, secs. 923, 1152, 1153(a); Pub. Util. Code, secs. 30755, 70120, 90300(a), 100300, 101340, 103400, 120500, 125520; 29 U.S.C.A., sec. 157), public school employees do not have such a protected right under EERA.

Work Stoppages as an Unlawful Unilateral Change

An attempt by public school employees to gain their collective bargaining goals by engaging in post-impasse work stoppages, or by refusing to attend to or perform one or more of the existing terms and conditions of their employment, obviously changes the then-existing status quo as to their hours, duties and/or other terms and conditions of their employment. Relevant to whether such changes in hours, duties and terms and conditions of employment constitute unfair practices under EERA are the two EERA unfair practice sections 3543.5 and 3543.6 which prescribe in pertinent part:

> 3543.5 It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .

(e) Refuse to participate in good faith in the impasse procedure set forth in article 9 (commencing with sec. 3548).

3543.6 It shall be unlawful for an employee organization to:

. . . . . .

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in article 9 (commencing with sec. 3548).
(Gov. Code, secs. 3543.5, 3543.6; emphasis added.)

Prior decisions of this Board concerning whether unilateral changes in the status quo as to wages, hours, or other terms and conditions of employment constitute unfair practices have dealt with unilateral changes in the status quo by the public school employer. The status quo is the existing wages, hours, duties, and other terms and conditions of employment in the employment relationship between the public school employer and the public school employees as established by the applicable provisions of the Education Code, the last executed collective bargaining agreement and/or the established past practice of the parties. (Davis Unified School District (1980) PERB Decision No. 116, p. 9; Grant Joint Union High School District (1982) PERB Decision No. 196, p. 8.)

This Board has held that the public school employer commits an unfair practice in violation of EERA section 3543.5 if it

unilaterally acts to change the status quo as to wages, hours, duties, or other terms and conditions of employment within the scope of representation. The public school employer may not so unilaterally act at any time, whether it be during the life of an existing collective bargaining agreement or during the pre-impasse, impasse, or post-impasse stages of the bargaining over a successor agreement. (Modesto City Schools, supra, PERB Decision No. 291, p. 12; Oakland Unified School District (1983) PERB Decision No. 367, p. 22.) The only exception is that the public school employer may, post-impasse, unilaterally act to implement its last best offer. (Modesto City Schools, supra, at pp. 32-32, 38; Gov. Code, sec. 3549.) Should the employer otherwise unilaterally change the status quo with respect to wages, hours, duties, or any other term or condition of employment, it has committed an unfair practice in violation of EERA section 3543.5(c) in that it has not first successfully negotiated the change with the public school employees.

What then of the public school employees? Having failed to negotiate their desired changes in wages, hours, duties or other terms and conditions of their employment, may they, post-impasse, unilaterally change the status quo in their hours, duties, or other terms and conditions of their employment in order to pressure the public school employer and achieve their bargaining goals? As to unilaterally changing the status quo with respect to their wages, or achieving some

other change in the status quo which they could not effect and which would necessitate employer action or funds, the answer is obviously no. (See Associated Musicians Local 802 (1967) 164 NLRB 23 [65 LRRM 1048], affd. sub nom. Cutler v. NLRB (2d Cir. 1968) 395 F.2d 287 [68 LRRM 2317, 2319].) On the other hand, by engaging in a work stoppage, public school employees do make and effect a unilateral change in the status quo as to their hours, duties, and other terms and conditions of their employment. This is so in that by striking, such employees are quite clearly and effectively unilaterally changing the status quo as to their hours (from x hours to zero hours), their duties (absenting themselves from the classroom, instruction, etc.), and their other terms and conditions of employment which they are obligated to perform.

If a unilateral change in the status quo by the public school employer constitutes an unfair practice in violation of EERA section 3543.5(c), then so too must a unilateral change in the status quo by public school employees constitute an unfair practice in violation of EERA section 3543.6(c). Changes in the status quo must be by bilateral, negotiated agreement between the parties. Public school employees may not unilaterally change or reduce--much less cease performing at all--their working hours, duties and other terms and conditions of their employment when they are unable to successfully negotiate a desired change in salary or other term and condition of employment.

That employees may commit a unilateral change cognizable as an unfair labor practice is by no means a novel proposition. The National Labor Relations Board (NLRB) has likewise held that private sector employees commit unfair practices under the federal law when they unilaterally change the status quo without having first successfully negotiated such a change, or when they unilaterally change the status quo in order to achieve a bargaining goal. As recognized in basic labor law texts:

> Although for obvious reasons, the charge of refusal to bargain by taking "unilateral action" on wages and working conditions is normally leveled at the employer, there are rare cases in which a union has been found to violate section 8(b)(c)[20] by forcing a change in working conditions without bargaining with the employer. (Gorman, Labor Law (1976 ed.) p. 442.)[21]

Initially it may be observed that this "rarity" of unfair unilateral changes by private employees--particularly with respect to post-impasse changes in the status quo--is the result of private employees having a protected right under the

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[20]29 U.S.C.A. section 158(b)(3):

> (b) it shall be an unfair labor practice for a labor organization or its agents--(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . .

[21]And see: 1 Morris, The Developing Labor Law (2d ed. 1983) pages 564-566; BNA, The Developing Labor Law, 2d ed., First Supplement 1982-1984 (1985) pages 147-148.

federal act[22] to engage "in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Accordingly, strikes and other concerted activities of private employees which unilaterally change the status quo in their hours, duties, and working conditions are not unfair labor practices under the federal act because of the private employees' protected right to engage in "post-impasse strikes" and/or "unfair practice strikes" to obtain their bargaining goals or to protect themselves from an employer's unfair practice.

In System Council T-6, International Brotherhood of Electrical Workers (1978) 236 NLRB 1209 [98 LRRM 1497] enforcement granted NLRB v. System Council T-6 (1st Cir. 1979) 599 F.2d 5 [101 LRRM 2413], the employer had an established practice of temporarily assigning unit members to supervisory positions. After unsuccessfully attempting to get the employer to stop the practice, the union promulgated an internal union rule prohibiting union members from accepting such temporary assignments. The NLRB held that such union action affected the existing status quo and thus constituted an unfair labor practice in that the union had failed to negotiate the change. And while there was also contractual recognition of the

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[22]29 U.S.C.A., section 157.

employer's right to make such temporary assignments, the NLRB cogently observed:

> Furthermore, even if we were to find no contractual recognition of the Company's right to make temporary management assignments, the Union's conduct would still violate the Act. Company appointment of bargaining unit employees to temporary supervisor slots is a common and established practice. Consequently, by promulgating the ban on such assignments, the Union unilaterally changed a term and condition of employment over which they were required to bargain.
> (236 NLRB at 1210.)

Accord Communication Workers of America, Local 1170 (1972) 194 NLRB 872 [79 LRRM 1113] enforcement granted NLRB v. Communication Workers of America, Local 1170 (2d Cir. 1972) 474 F.2d 778, 780-782 [82 LRRM 1201]).

In Bay Counties Council of Carpenters, Local 478 (1964) 145 NLRB 1775 [55 LRRM 1219], remanded Associated Home Builders v. NLRB (9th Cir. 1965) 352 F.2d 745 [60 LRRM 2345], a collective bargaining agreement between an employer group and a union group contained no provision or mention concerning any production limitation. The unions unilaterally and internally established production quotas and fined union members by deducting the fines from their union dues if they exceeded the quotas. The NLRB held that the unions' application of the dues to the imposed fines constituted an interference with the employees' rights and an unfair practice. The employers appealed on a separate issue, contending that the NLRB had not

addressed or rendered a decision on whether the unions' action also constituted an unfair practice in that it unilaterally changed the terms and conditions of employment. The federal appeals court agreed that it was such a unilateral change and--indicating that the unions' unilateral change was a significant unfair practice against the employers--remanded the case back to the NLRB for further appropriate proceedings, findings and remedy. (60 LRRM at 2350-2353.)

See also, IATSE, Local 702 (1972) 197 NLRB 937 [80 LRRM 1820] [after unsuccessful effort to negotiate change in employer's right to transfer irrespective of union seniority, union's invocation of internal seniority rule constituted unlawful unilateral change in terms and conditions of employment]; Teamsters Local 100 (1974) 214 NLRB 1094 [88 LRRM 1036], enforcement granted NLRB v. Teamsters Local 100 (6th Cir. 1975) 526 F.2d 731 [90 LRRM 3310] [union's order to members not to perform other assigned work violated provision of the collective bargaining agreement, and was held to constitute an unlawful unilateral change in the terms and conditions of employment]; Brotherhood of Painters, New York District Council No. 9 (1970) 186 NLRB 964 [75 LRRM 1465], enforcement granted New York District Council No. 9 v. NLRB (2d Cir. 1971) 453 F.2d 783 [79 LRRM 2145], cert. den. 408 U.S. 930 (1972) [after failing to achieve production quota in negotiations, union's internal adoption of production quota

constituted an unlawful unilateral change in terms and conditions of employment]; International Chemical Workers Union, Local 29 (1977) 228 NLRB 1101 [94 LRRM 1696] [union's insistence on recording grievance meeting, which violated established practice, found to constitute unlawful unilateral change]; Stayton Canning Company Cooperative, supra, 275 NLRB No. 127, p. 13 [119 LRRM 1236]; Halle Brothers Co. (1981) 253 NLRB 1090 [106 LRRM 1201], enforcement den. sub nom. NLRB v. Teamsters (9th Cir. 1982) 650 F.2d 85 [109 LRRM 3226]; Brotherhood of Teamsters, Local 70 (1972) 198 NLRB 552 [80 LRRM 1727] sub nom. Nabisco, Inc. v. NLRB (2d. Cir. 1973) 479 F.2d 770 [83 LRRM 2612]; United Mine Workers (1967) 165 NLRB 592, 593-594 [65 LRRM 1450]; Sheet Metal Workers International Association, Local 141 (1965) 153 NLRB 537, 543 [5 LRRM 1512]; United Plumbers, Local 420 (1981) 254 NLRB 445 [106 LRRM 1183]; and Communication Workers of America, Local 1122 (1976) 226 NLRB 97 [93 LRRM 1161].)

In the absence of a negotiated, agreed change in their hours, duties, and/or other terms and conditions of their employment, public school employees may not change or refuse to abide by the status quo in their hours, duties, and terms and conditions of employment (Gov. Code, sec. 3543.6(c)), anymore than the public school employer may unilaterally change the status quo (other than by post-impasse adoption of its last best offer). (Gov. Code, sec. 3543.5(c).) Unilateral changes

in the status quo by the public school employees engaging in work stoppages are just as destablizing and disorienting to employer-employee affairs as are unilateral changes in the status quo committed by the public school employer. (San Mateo Community College District (1979) PERB Decision No. 94, pp. 14-17.)

Acquiring Agreement Through the Use of Work Stoppages

Our analysis does not end with our conclusion that a strike constitutes an unlawful unilateral change in the employees' terms and conditions of employment. Independent of that unfair practice there is a second, separate basis upon which to find that post-impasse strikes constitute unfair practices in violation of Government Code section 3543.6(c). Since public school employee strikes are contrary to public policy, a negotiated agreement secured in part on the basis of the striking employees returning to work and/or not renewing their work stoppage is based on unlawful consideration, and the union that employs such unlawful consideration has failed to negotiate in good faith.

A collective bargaining agreement is a contract and is subject to the applicable contract laws of this State. California Civil Code section 1607 prescribes as to contracts:

> The consideration of a contract must be lawful within the meaning of section sixteen hundred and sixty-seven.

And Civil Code section 1667 prescribes:

> That is not lawful which is:
>
> 1. Contrary to an express provision of law;
>
> 2. Contrary to the policy of express law, though not expressly prohibited; or
>
> 3. Otherwise contrary to good morals. (Emphasis added.)

Thus, to be lawful, a contract cannot be based on unlawful consideration, that is, consideration that is contrary to public policy.

The public policy of this state resides first with the people of California as expressed in their Constitution, and then with the representatives of the people--the Legislature--as expressed in the statutes. (Civ. Code, secs. 22, 22.1;[23] Jensen v. Traders & General Insurance Co. (1959) 52 Cal.2d 786, 794; Brunzell Construction Co. v. Harrah's Club (1967) 253 Cal.App.2d 764, 775; Nevcal Enterprises Inc. v. Cal-Neva Lodge, Inc. (1961) 194 Cal.App.2d 177, 180, hg. den.) Then, the public policy may also be found in the common law and judicial modifications thereto, to the

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[23]The Civil Code states:

> 22. Law is a solemn expression of the supreme power of the state.
>
> 22.1 The will of the supreme power is expressed:
> (a) By the Constitution
> (b) By the statutes.

extent they are consistent with the express provisions of the Constitution and statutes and the underlying policies.[24] However, as expressed by a unanimous Supreme Court in Ferguson v. Keays, supra:

> . . . the court should only exercise those common law powers which are not otherwise repugnant to or inconsistent with our Constitution and statutes; inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy. (4 Cal.3d 649, 654.)

Thus, if the Constitution and the statutes are silent on the subject, then the common law, including its modifications by the courts (Muskopf v. Corning Hospital District, supra, 55 Cal.2d 211; Rodriguez v. Bethlehem Steel Corp., supra, 12 Cal.3d 382, 394-395; Li v. Yellow Cab Co., supra, 13 Cal.3d 804-814; Victory Oil Co. v. Hancock Oil Co., supra, 125 Cal.App.2d 222, 229), expresses public policy, but only so far as it is not repugnant to or inconsistent with other provisions of our Constitution or statutes. (Ferguson v. Keays, supra, 4 Cal.3d 649, 654; City of Rohnert Park v. Superior Court, supra, 146 Cal.App.3d 420, 427-428; Lowman v.

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[24]Civil Code section 22.2 states:

> 22.2 The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State. (Emphasis added.)

Stafford, supra, 226 Cal.App.2d 31, 39; Corcoran v. City of San Mateo, supra, 122 Cal.App.2d 355, 359; Civ. Code, sec. 22.2.)

While it is true that where the Constitution and statutes are silent on a subject, the judiciary may declare what they perceive the public policy to be (Safeway Stores v. Retail Clerks International Association (1953) 41 Cal.2d 567, 574-575; Altschul v. Sayble (1978) 83 Cal.App.3d 153, 162; Kinner v. World Savings & Loan Association (1976) 57 Cal.App.3d 724, 728-729, hg. den.), when the Constitution declares the public policy or the Legislature statutorily addresses the subject, the courts may not declare the public policy (Breaux v. Gino's, Inc. (1984) 153 Cal.App.3d 379, 382).

Turning to the California Constitution and the state statutes, the public policy is clear with respect to the uninterrupted operation of the public schools and to strikes by public school employees.

At the zenith of California's constitutionally expressed public policy, is the operation of the public schools, including the mandate that they be operated for a minimum of six months each year. (Cal. Const., art. IX; art. XVI, sec. 8; art. I, sec. 26; State Board of Education v. Levit, supra, 56 Cal.2d 441, 460; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; Slayton v. Pomona Unified School District, supra,

161 Cal.App.3d 538, 548-549; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738-744.) This constitutional mandate is carried out by the Legislature through the public school districts and is implemented and reinforced through the Education Code's comprehensive statutory scheme which includes the minimum school year of nearly nine months, and compulsory full-time school attendance. (Ed. Code, secs. 1-99176; California Teachers Association v. Board of Trustees of Fullerton Union High School District, supra, 82 Cal.App.3d 244, 254; Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549-556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167; In re Shinn, supra, 195 Cal.App.2d 683, 686-687.)

Furthermore, this constitutional public policy, with respect to the operation of the public schools and compulsory full-time school attendance, is mirrored by the recognized constitutional right of California's children to attend school and to receive such public school education. (Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610.)

Since strikes or other concerted work stoppages by public school employees necessarily interfere with and disrupt the operation of the public schools, they are clearly contrary to

the constitutionally and statutorily established public policies of California concerning the operation of the public schools.

Moreover, the Legislature has enacted a series of successive acts addressing public school employer-employee labor relations; the former pre-Winton and Winton Acts (former Ed. Code, secs. 13080-13088) and the present EERA (Gov. Code, secs. 3540-3549.3). In these acts, the Legislature has specifically withheld from public school employees the right to strike. (See former Ed. Code, sec. 13082 and present Gov. Code, sec. 3543; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689.) To insure that there be no doubt as to its intent regarding public school employee strikes, the Legislature specifically prohibited EERA from being construed so as to give public school employees the right to strike granted to other employees by Labor Code section 923. (Gov. Code, sec. 3549; and see former Ed. Code, sec. 13088; Westminster School District v. Superior Court & Westminster Teacher Association, supra, 28 Cal.App.3d 120, 128.) Since Labor Code section 923's granting of the right to strike to private employees is a statutory declaration of public policy (Lab. Code, sec. 923; Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, supra, 61 Cal.2d 766, 769; Glenn v. Clearman's Golden Cock Inn, supra, 192 Cal.App.2d 793, 796-797;

Annenberg v. Southern California District Council of Laborers, supra, 38 Cal.App.3d 637, 644; Holayter v. Smith, supra, 29 Cal.App.3d 326, 333; Elsis v. Evans, supra, 157 Cal.App.2d 399, 408-409), the deliberate ommission by the Legislature from Government Code section 3543 of the right to strike and the Legislature's proscription in Government Code section 3549 against construing EERA so as to give public school employees the right to strike are, similarly, statutory declarations by the Legislature of the public policy against public school employee strikes (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689, 694).

As to County Sanitation's holding that public employee strikes are no longer illegal and tortious under California common law, that decision did not address whether public school employees have a right to strike under EERA. Such a judicial reversal of the California common law, that is, that all public employee strikes are no longer illegal and tortious, can neither override nor subvert the public policy as declared by the Constitution and the Legislature. (Cal. Const., art. IX, art.I, sec. 26; Ed. Code, secs. 41420, 46200-46300, 48200-48810; Gov. Code, sec. 3549; Civ. Code, sec. 22.2; Ferguson v. Keays, supra, 4 Cal.3d 649, 654; City of Rohnert Park v. Superior Court, supra, 146 Cal.App.3d 420, 427-428.) Accordingly, County Sanitation cannot, and did not, change the

constitutional and statutory public policies with respect to the operation of the schools and public school employee strikes.

Given then that public school employee strikes are contrary to public policy, forebearance from striking cannot act as consideration for a contract, and thus their use to achieve negotiation demands constitutes bad faith bargaining.

To obtain a lawful change in their wages, hours, duties and/or other terms and conditions of employment, public school employees must meet and negotiate in good faith--including the proferring of lawful consideration to the public school employer--in order to obtain a lawful agreement securing a change or changes in their wages and working conditions. If they fail to obtain such lawful contractual changes in the pre-impasse bargaining (Gov. Code, secs. 3540.1(h), 3543.2, 3543.3, 3543.5(c), 3543.6(c), 3543.7) or in the statutory impasse proceedings (Gov. Code, secs. 3548-3548.4, 3543.5(e), 3543.6(d)), public school employees are left post-impasse with the unchanged status quo in their wages and working conditions.[25] Either the public school employer or the public school employees will have to make some positive, lawful "movement" in their respective bargaining positions in order to

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[25]Save and except for "last best offer" changes by the public school employer such as implementing a percentage wage increase and/or a health and welfare benefits increase which constituted the employer's last best offer. (Modesto City Schools, supra, PERB Decision No. 291.)

have the parties return to the bargaining table and achieve a mutual agreement as to any changes. (Modesto City Schools, supra, PERB Decision No. 291, pp. 52-65.)

But public school employees may not engage in concerted activities which are contrary to public policy in order to pressure and coerce the public school employer to give in and yield to the contract changes they seek in return for the public school employees ending their strike and the concomitant interference and disruption in the operation of the public schools.

In Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290, a pre-EERA case occurring under the Winton Act (former Ed. Code, secs. 13080-13088), public school teachers had engaged in a four and one-half week strike to obtain a written agreement between the teachers' Negotiating Council (former Ed. Code, sec. 13085) and the Los Angeles Unified School District. The court held that California school districts were not authorized under the Winton Act to enter into binding agreements with teachers' negotiating councils. (31 Cal.App.3d at 300-305.) The court also held that notwithstanding that the agreement was unauthorized, the agreement was invalid in that part of the consideration for the agreement was the teachers' termination of the strike. Public school strikes being contrary to public policy, the termination of the strike in partial exchange for the school district's

agreement to the teachers' demands constituted unlawful consideration and invalidated the agreement. As set forth in Grasko in 31 Cal.App.3d at 297-298:

> The Agreement Was Properly Enjoined as Contrary to Public Policy
>
> The trial court found that had the illegal teachers' strike not occurred, the board of education would not have consented to enter into the agreement herein involved . . . .
>
> In view of the length of the strike, the number of teachers involved, and the effect of the strike upon the school district, it is readily apparent that the termination of the strike formed a substantial part of the consideration for the proposed agreement, as the court's findings clearly imply.
>
> The agreement is invalid since the consideration was not lawful. (Civ. Code sections 1607, 1667.)
>
> We think the reasoning of the Wyoming Supreme Court in Campbell v. Prater, 64 Wyo. 293 (191 P.2d 160), is particularly apropos here. . . .
>
> . . . . "It has been said that 'just as a contract may be invalid because it is contrary to public policy in its substance and purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement.' Salmond on Contracts, 1947 Ed., 286, quoted from an earlier edition in Mutual Finance v. John Wetton & Sons (1937) 2 K.B. 389. See, also, Restatement of Contracts, section 578." (Italics added.) (64 Wyo. at p. 311, 191 P.2d at p. 166.)
>
> The parallel is obvious, and we hold that it was contrary to public policy for public school employees who were conducting an illegal strike to exact a consideration for the cessation of that illegal activity. The

> subject agreement was therefore void (not merely voidable) and the trial court properly enjoined its threatened consummation.[26]

This invalidity of agreements when the consideration is unlawful with respect to public policy was recently expressed in Kallen v. Delug (1984) 157 Cal.App.3d 940, 949-950:

> A contract may be illegal or in contravention of public policy either in its apparent substance and purpose [citation] or in the consideration upon which it is based [citations]. Unlawful consideration is that which is: "1. Contrary to an express provision of law; 2. Contrary to the policy of express law though not expressly prohibited; or, 3. Otherwise contrary to good morals." (Civ. Code, secs. 1607-1667.) The concept of unlawful consideration embraces a promise to refrain from wrongful conduct directed at the promisee or a third person [citations]. As Campbell noted in a different factual context, illegal consideration encompasses such a promise because it is contrary to law or public policy for an individual who has acted wrongfully to the injury of another to exact a consideration for relinquishing such conduct. In other words, the law finds repugnant the coercion inherent in a promise which carries the implied threat that, without acquiescence in the return promise exacted, the wrongful conduct will continue. [Citations.]

In like principle, if public school employees seek to secure an agreement to their bargaining demands by engaging in a strike

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[26]Grasko was questioned, but not overruled, in County of Los Angeles v. Superior Court (1975) 13 Cal.3d 721, 728-729; City and County of San Francisco v. Cooper)1075) 13 Cal.3d 898, 916-917. Cf East Bay Municipal Employees Union v. County of Alameda (1970) 3 Cal.App.3d 578, 584.

with its concomitant interference and disruption in the operation of the public schools, and the strike's cessation or nonrenewal forms part of the consideration for the public school employer's acquiescence to the employees' demands, the agreement so obtained would be invalid as being based in part on unlawful consideration. (Cal. Const., art. IX; Civ. Code, secs. 1607-1667; Ed. Code, secs. 41420-48200; Serrano v. Priest, supra, 4 Cal.3d 584, 604-610; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738-744; City & County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 916-918; Kallen v. Delug, supra, 157 Cal.App.3d 940, 949-950; Grasko v. Los Angeles City Board of Education, supra, 31 Cal.App.3d 290, 297-298).

Accordingly, it is an unfair practice under EERA for public school employees to engage in strikes or other public school work stoppages to force the public school employer to capitulate to their demands in order to keep the public schools in operation. By engaging in such conduct, public school employees are failing and refusing to negotiate in good faith to obtain their bargaining goals. (Gov. Code, sec. 3543.6(c).) They are "negotiating" away from the bargining table by engaging in a concerted action which is clearly contrary to public policy and are presenting the public school

employer with an unlawful consideration (stopping the strike) to obtain their demands. (Civ. Code, secs. 1607, 1667; Kallen v. Delug, supra, 157 Cal.App.3d 940, 949-950; Grasko v. Los Angeles City Board of Education, supra, 31 Cal.App.3d 290, 297-298.)

Public school employee strikes thus constitute unfair practices and are unlawful under EERA in that the employees are failing or refusing to meet and negotiate in good faith when they: (1) make a unilateral change in the status quo and/or (2) attempt to acquire an agreement to their demands through the use of unlawful consideration. (Gov. Code, sec. 3543.6(c).)

IV. PUBLIC SCHOOL EMPLOYEE STRIKES ARE INJURIOUS TO THE OPERATION OF THE PUBLIC SCHOOLS

Having concluded that public school employee strikes constitute unfair practices and are unlawful under EERA, PERB has exclusive initial jurisdiction to seek injunctive relief to halt such unlawful activity. (San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d 1, 14.) In seeking such relief, the courts have established a two-prong inquiry. First, PERB must determine that it is likely that an unfair practice has been committed. That aspect has been demonstrated above. Second, PERB must show that injunctive relief is just and proper. (Public Employment Relations Board v. Modesto City Schools District, supra, 136 Cal.App.3d 881, 896.)

The operation of the public schools is constitutionally and statutorily so important to the State and to California's children (Cal. Const., art. IX; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; In re Shinn, supra, 195 Cal.App.2d 683, 686-687; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549) that any interference or disruption in the operation of the public schools and the continuity and quality of educational services is per se injurious.

Public school employee strikes interfere with and disrupt the operation of the public schools, including the attendance of the children and the delivery of educational services to the children, and are thus injurious.[27] There is, therefore, per se just and proper cause for their enjoinment.

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[27]This Board may take official notice of its records and of judicial decisions with respect to public school employee strikes and their concomitant disruption and interference in the operation of the public schools and in the continuity and quality of educational services to the students. (For example: Sacramento City Unified School District (1987) PERB No. IRR-251; Oakland Unified School District (1986) PERB No. IRR-230; Pleasanton Joint Elementary School District (1986) PERB No. IRR-244; San Mateo City School District (1985) PERB No. IR-48; Burbank Unified School District (1980) PERB No. IR-15; San Francisco Unified School District (1979) PERB No. IR-10; El Rancho Unified School District v. National Education Association (1983) 33 Cal.3d 946, 948; Grasko v. Los Angeles City Board of Education, supra, 31 Cal.App.3d 290, 294; and see San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d 1, 11.)