STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY TEACHERS ASSOCIATION, Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2966-E PROPOSED DECISION (August 23, 2021)

Appearances: California Teachers Association by Jacob Rukeyser, Attorney, for Sacramento City Teachers Association; Lozano Smith by Erin Hamor, Attorney for Sacramento City Unified School District.

Before Jeffrey R. A. Edwards, Administrative Law Judge.

INTRODUCTION

This case is about a resolution the Sacramento City Unified School District (District) adopted in March 2019 in anticipation of a strike by the Sacramento City Teachers Association (SCTA). SCTA, which is the exclusive representative of the District's certificated employees, alleges that the resolution interfered with employee and organizational rights in violation of the Educational Employment Relations Act (EERA)[1] by offering increased pay to non-striking bargaining unit employees and that

[1] The EERA is codified in California Government Code section 3540 et seq. All statutory references are to the Government Code, unless otherwise indicated. Public Employment Board (PERB or Board) Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the District unilaterally changed rules for sick leave when it adopted the resolution. The District denies any wrongdoing.

For the reasons explained below, I find and conclude that the District's resolution interfered with employee and organizational rights and unilaterally changed terms and conditions of employment.

PROCEDURAL HISTORY

On April 19, 2019, SCTA filed a charge with PERB against the District.

On May 29, 2019, the District filed a position statement in response to the charge.

On July 8, 2020, the PERB Office of the General Counsel issued a complaint alleging that the District made unlawful unilateral changes to SCTA members' pay and working conditions when it adopted a resolution in anticipation of a strike. The complaint also alleged that the resolution unlawfully authorized premium pay for bargaining unit members who worked during the strike.

The District filed an answer to the complaint on July 28, 2020, denying the substantive allegations and asserting affirmative defenses.

A telephonic informal settlement conference was held on September 24, 2020, but the matter was not resolved.

A virtual prehearing conference was held on March 1, 2021.

The parties participated in a virtual formal hearing on March 4 and 5, 2021 and each party had the opportunity to present evidence and cross-examine witnesses. The case was submitted for decision on May 7, 2021, after receipt of post-hearing briefs.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). It is a large, urban school district serving more than 40,000 students. About 70% of students qualify for free or reduced-price meals, 15% have disabilities, and approximately 500 are homeless or in foster care. The District provides many students their meals and other important services. Jorge Aguilar is the superintendent.

SCTA is the exclusive representative within the meaning of EERA section 3540.1, subdivision (e). SCTA represents certificated personnel in several classifications including teachers and substitute teachers. John Borsos (Borsos) is the Executive Director of SCTA. There are about 2,500 teachers in the District, including about 600 substitute teachers. Substitute teachers typically receive day-by-day assignments to cover for a teacher who is sick or otherwise absent from work.

During the relevant period, teachers and substitute teachers were paid according to a salary schedule. The salary schedule included several different "daily rates" of pay, largely depending on a teacher's length of service and level of education. For teachers, daily rates ranged from $258.65 for entry level teachers whose credential was still in progress to $557.88 for senior teachers who had completed significant graduate level work. The daily rate for substitute teachers was $133.67 for the first five days of work on an assignment and $203.25 for each full day thereafter. The salary schedule also specified "Extra Pay" in varying amounts for different extra duties such as Department Chairperson and Newspaper Advisor.

In 2017, SCTA and the District entered into a collective bargaining agreement, which provided, among other things, for sick leave. The sick leave provision, section 9.6, allowed employees to use sick leave for "Employee Illness" or for "Compelling Personal Importance." The section on employee illness states that an employee must provide a physician's statement verifying the illness if the absence exceeds ten consecutive workdays. The provision also provides, "Nothing shall be deemed to prevent the superintendent or designee from requiring a doctor's verification as to the employee's claimed illness in any situation in which there is reasonable cause to believe that no valid grounds exist for the employee's claim of sick leave."

The section on Compelling Personal Importance allows use of sick leave for reasons described as "reasons of compelling importance." This includes a death or serious illness in a unit member's family, and observance of a religious holiday. It also includes weddings, accidents, the inability to get to work for reasons outside the employee's control, and attending to legal or business matters among other reasons. This section expressly excludes, "engaging in a strike demonstration, picketing, lobbying, rally, march, campaign meeting, or any other activities relating to work stoppage or political campaigning." This section does not require prior approval before employees can use sick leave for approved purposes and does not provide for verification of the purpose of the leave.

On March 15, 2019, SCTA notified the District that its members had authorized an unfair practice strike. District administrators immediately began preparing for a possible strike. The District's Human Resources Director, Dr. Tiffany Smith-Simmons

(Smith-Simmons), was one of two "strike commanders" in charge of managing the District's response to a possible strike. She was in charge of implementing a plan to keep the schools open during the strike, including the hiring of "Emergency Replacement Teachers" (ERTs) to work in place of striking teachers. She expected 100% of the teachers to honor a strike.

On March 18, 2019, District employee Sheila Domondon e-mailed Borsos a copy of the board packet for the next scheduled school board meeting on March 21, 2019. The packet did not include a copy of Resolution 3073, which is discussed below. At some point later, the District updated the board packet to include the Resolution, but did not e-mail the updated board packet to SCTA.

On March 21, 2019, the District held a board meeting. Borsos did not attend the meeting. A SCTA representative, Nikki Milevsky, attended part of the meeting, but the evidence does not indicate whether she received a copy of the updated board packet. Ms. Milevsky did not testify at the hearing.

During the board meeting, the District adopted Resolution 3073, titled "Resolution in the Event of a Concerted Refusal to Work by Employees." Resolution 3073 gave the superintendent broad authority to manage a strike. At issue here, it included authorization to pay replacement workers and limit use of sick leave. Specifically, the Resolution stated:

> "[T]he Superintendent is hereby authorized to employ Replacement Teachers to be paid whatever rate he deems necessary to assure availability of Replacement Teachers. Such rate shall not exceed $500 per day unless otherwise approved by the Board;
> . . . [T]he Superintendent is hereby authorized to employ Replacement Teachers or other substitute employees with

bilingual certifications, or other evidence of fluency in the Spanish language deemed sufficient by the Superintendent, at a daily rate that shall not exceed $500 unless otherwise approved by the Board[.]"

It also stated:

"[U]nless otherwise permitted by law, personal necessity leave may only be used by Sacramento City Teachers Association members in accordance with section D of Article 9.6 of the collective bargaining agreement. Under that section, personal necessity leave may be used only for the following purposes:
1. Death of a member of a unit member's immediate family. This would be in addition to bereavement leave as granted under the terms of this agreement. Members of the immediate family are defined as the following relatives of the unit member or his/her spouse: mother, father, grandmother, grandfather, son, daughter, niece, nephew, aunt, uncle, grandchild, brother, sister, any relative or person sharing the immediate household of the unit member, or a close friend;
2. Serious illness of a member of the unit member's immediate family as identified in section 2a, or accident involving his/her person or property, or the person or property of a member of his/her immediate family as identified in section 2a;
3. Placement of a child with the unit member through adoption or foster care; or
4. Observance of a religious holiday of the unit member's faith.
District employees who take personal necessity leaves during a strike for one of the above reasons may be required to file with the Board satisfactory evidence of entitlement to such leave.
. . .
a. In the event there is a suspected concerted withdrawal of services by employees, it shall be District procedure to require a physician's certification from any employee who is absent on the date of said suspected withdrawal of the

> services and who files a claim for sick leave benefits or other entitlements for the absence.
> b. Said certificate must be filed immediately upon return to work. In the event a District employee fails or refuses to furnish said certificate, said absence shall be treated as and be deemed to be unauthorized absence without pay."

Following the adoption of Resolution 3073, District administrators recruited and trained ERTs to staff schools in the event of a strike. ERTs were not required to be college graduates, but needed a minimum of "90 semester units of coursework and [to] be enrolled in a regionally-accredited four-year college or university and [have] expertise in a particular field of interest, a strong desire to share knowledge[,] and enthusiasm with others." ERTs were required to have an "Emergency Substitute Teaching Permit for Prospective Teachers issued by the California Commission on Teacher Credentialing," but if applicants did not already possess a permit, the Resolution authorized the District to "assist with expediting the process to obtain or renew the required permit." The District designated the ERT classification as unrepresented by a union.

The District advertised a salary of $500 per day in the event of a strike, screened applicants, and provided training. The District's Assistant Superintendent of Curriculum and Instruction, Matt Turkie (Turkie), was in charge of training ERTs. The District hired approximately 440 ERTs. Many ERTs were members of the community who had never worked for the District before, but some classified staff and substitute teachers were also hired as ERTs. The classified employees were not represented by SCTA but the substitute teachers were. Classified employees hired as ERTs were paid a premium over their normal daily pay to bring their total pay to five hundred

dollars. Substitute teachers hired as ERTs were paid five hundred dollars, an amount exceeding their normal pay as substitute teachers.

SCTA engaged in a one-day strike on April 11, 2019. The District used ERTs and kept schools open.

ISSUES

1. Whether the District's adoption of Resolution 3073 interfered with employee or organizational rights in violation of EERA section 3543.5, subdivisions (a) and (b).
2. Whether the District's adoption of Resolution 3073 unilaterally changed a matter within the scope of representation.

CONCLUSIONS OF LAW

1. Interference Allegations

EERA section 3543.5, subdivision (a), makes it an unfair practice for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [EERA]." Subdivision (b) makes it unlawful for a public school employer to deny employee organizations rights guaranteed by EERA, including the right to represent employees in their employment relations. (*Fremont Union High School District* (1983) PERB Decision No. 301, p. 6.)

To analyze allegations of employer interference with the rights of employees or employee organizations, PERB uses the standard articulated in *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*). (*Id*. at pp. 10-11.) Under

Carlsbad, a charging party establishes a prima facie case of interference where an employer's conduct tends to or does result in at least slight harm to protected rights. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 8.) The test for whether a respondent has interfered with protected rights does not require that unlawful motive be established. (*City & County of San Francisco* (2011) PERB Decision No. 2206-M, adopted warning letter, p. 3.)

Once the charging party has established a prima facie case, the respondent may show that its conduct was justified or excused pursuant to any affirmative defenses it has asserted. (*County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 8; *County of Orange* (2018) PERB Decision No. 2611-M, adopting proposed decision at p. 31; *Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.) The degree of harm to protected rights dictates the nature of the respondent's burden in proving its affirmative defense. (*County of Orange*, *supra*, PERB Decision No. 2611-M, adopting proposed decision at p. 31.) Where the harm to protected rights is comparatively slight, the respondent may justify its actions based on "operational necessity," and PERB will then balance the respondent's asserted defense against the harm to protected rights. Under this balancing analysis, if the harm to protected rights outweighs the asserted business justification, a violation will be found. (*County of Santa Clara*, *supra*, PERB Decision No. 2613-M, p. 8.) On the other hand, if the respondent's conduct is "inherently destructive of protected rights," it must show that the interference was caused by circumstances beyond its control and that no alternative course of action was available. (*Ibid*.; *Regents of the University of California (Berkeley*) (2018) PERB Decision No. 2610-H, pp. 70-71.)

Public school employees have a right to strike in protest against an employer's unfair practices. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 33.) An employer facing a potential strike "unquestionably has the right to prepare for [the] strike by taking prudent actions which do not violate the law." (*Rio Hondo Community College District* (1983) PERB Decision No. 292 (*Rio Hondo*), pp. 10-11, citing *Betts Cadillac Olds, Inc.* (1951) 96 NLRB 268, p. 286, *Quaker State Oil Refining Corp.* (1958) 121 NLRB 334.) Among the lawful actions an employer may take are hiring substitutes and refusing to pay striking workers for time not worked. (*Rio Hondo*, *supra*, PERB Decision No. 202, pp. 10-11, *citing NLRB v. McKay Radio & Telegraph Co*. (1938) 304 U.S. 333, *Simplex Wire & Cable Co.* (1979) 245 NLRB 543.)

However, "[i]t has long been held that providing certain benefits to non-strikers constitutes unlawful interference with employees in the exercise of protected activities." (*Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto City Schools*), p. 66 *citing San Diego Unified School District* (1980) PERB Decision No. 137 (*San Diego USD*), 4 PERC 11115; *Rubatex Corp*. (1978) 235 NLRB 833; *Aero-Motive Mfg. Co*. (1972) 195 NLRB 790 (non-strikers given pay premium); and *Swedish Hospital Medical Center* (1977) 232 NLRB 16 aff. 238 NLRB 1087. In *Modesto City Schools*, the Board found that, "[t]he District's action of granting the benefit of letters of commendation only to those who refrained from participation in protected organizational activity tends to discourage employees from engaging in protected activity in the future." (*Ibid*.) Violations are not limited to circumstances where an employer in fact provides a benefit to non-striking workers, but also includes

circumstances where the employer promises a benefit. (See *Regents of the University of California* (1983) PERB Decision No. 366-H, p. 11.)

a. Charging Party's Prima Facie Case

In this case, the Complaint alleges that the District interfered with protected rights because "Respondent's adoption of Resolution 3073 authorizes the Respondent to provide premium pay to bargaining unit members and substitute teachers who work during a work stoppage."

There is no dispute that Resolution 3073 states in part, "the Superintendent is hereby authorized to employ Replacement Teachers to be paid whatever rate he deems necessary to assure availability of Replacement Teachers [and]. . . to employ Replacement Teachers or other substitute employees with bilingual certifications, or other evidence of fluency in the Spanish language deemed sufficient by the Superintendent, at a daily rate that shall not exceed $500 unless otherwise approved by the Board." Rather, the dispute centers on whether this language tends to or does result in at least slight harm to protected rights because SCTA unit members would reasonably believe they would receive premium pay for not striking. (*Santee Elementary School District* (2006) PERB Decision No. 1822, pp. 10-12; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905, 908-910; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20 (*Santa Monica CCD*).)

SCTA argues that "substitute employees" includes substitute teachers and thus Resolution 3073 solicits bargaining unit members to break the strike in exchange for a pay premium. SCTA Executive Director Borsos testified that he interprets

"Replacement Teachers" and "substitute employees" to include substitute teachers employees represented by SCTA.

The District argues that "Replacement Teachers" and "substitute employees" do not include employees represented by SCTA. District Chief Human Resources Officer, Cancy McArn, testified that her understanding of the meaning of "Replacement Teachers" was that they were Emergency Replacement Teachers recruited from among the general public and included some classified staff in another bargaining unit, but not teachers or substitute teachers represented by SCTA. She also testified that she understood "substitute employees" to mean District employees such as classified campus monitors and instructional aides who are outside SCTA's bargaining unit; but other District witnesses interpreted these terms to include SCTA-represented teachers and substitute teachers.

In addition to her role as a strike commander, Dr. Smith-Simmons oversaw the District's substitute services division. During her testimony, she was asked, "Did any of the people who were approved as ERTs, were they otherwise substitute teachers?" She replied, "If they applied for the position of ERT, we accepted them as such. So, they have been substitute teachers prior, but for the purposes of that day, they applied for the ERT and was accepted as that position." She testified that substitute teachers who applied to work as ERTs and did not strike were paid the ERT premium of $500 a day, more than twice their standard pay as substitute teachers.

Turkie similarly testified that he understood "substitute employees" to mean employees, such as substitute teachers, who substitute for other employees, such as teachers.

Smith-Simmons and Turkie played key roles in the District's management of the strike and were familiar with Resolution 3073. Their testimony strongly indicates that the Resolution was reasonably interpreted to provide an incentive to SCTA-represented teachers who signed up to be ERTs to not participate in the strike.

The text itself supports this interpretation in two ways. First, the text uses the word "substitute" not "replacement." When the Resolution is referring to community members hired to work in place of teachers during the strike, it refers to them as "replacement" teachers whereas "substitute" is a word widely used by the District to refer to substitute teachers within the certificated unit represented by SCTA.

Second, the language "Replacement Teachers or other substitute employees with bilingual certifications, or other evidence of fluency in the Spanish language. . ." indicates that "substitute employees" include substitute teachers within the certificated unit because only certificated teachers could possess bilingual certifications whereas the fluency of non-teachers who work with English language learners is evaluated in a less formal way.

Finally, this interpretation is supported by the fact that at least some substitute teachers in fact worked as Emergency Replacement Teachers, which indicates that those substitute teachers and the people who recruited and trained them to be ERTs reasonably believed that the Resolution authorized premium pay for bargaining unit employees who did not strike. Thus, Charging Party satisfies its prima facie case because Resolution 3073 tends to and in fact did cause at least slight harm to protected rights because it can be reasonably interpreted to induce bargaining unit employees to refrain from striking in exchange for a pay premium.

b. The District's Affirmative Defense

The District argues it had an operational need to recruit replacement workers to keep schools open during the strike. To that end, managers testified about the consequences of not recruiting any replacement workers at all; but the District's argument is off point. There is no dispute that the District had a legal right to recruit, train, and use replacement workers. The issue is whether it had an operational need to induce bargaining unit workers to refrain from striking. I find that it did not for two reasons.

First, the harm to protected rights was significant. Unfair practice strikes serve to protest an employer's unlawful conduct and impress on employers the workers' resolve and solidarity with their union's demands. "[A]n integral part of any strike is persuading other employees to withhold their services and join in making the strike more effective." (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 20 *quoting NLRB v. Southern California Edison Co*. (9th Cir. 1981) 646 F.2d 1352, 1363.) Thus, the District's interference with SCTA's lawful efforts to persuade employees to honor the strike was a significant violation of SCTA's and its members protected rights. That few teachers took the District up on its offer does not change this analysis because the District's conduct tends to have a negative effect on the solidarity of the strikers on a unit-wide basis.

Second, the District could have employed other means to mitigate the strike without interfering with protected rights, but failed to do so. The District did not seek to use an employment agency or registry of replacement workers to secure qualified adults to work during the strike—techniques that are common in other industries. (See

County of San Mateo (2019) PERB Order No. IR-61-M, p. 24.) Whether the District could have secured replacement workers with these techniques is unclear because the District did not even attempt to do so, but it appears quite possible given the modest qualifications it sought for replacement workers. Having chosen to eschew available options that might obviate the need to interfere with protected rights, the District cannot claim an operational need to induce bargaining unit employees to refrain from striking in exchange for a pay premium. (See *County of San Mateo, supra*, PERB Order No. IR-61-M at p. 25 (analyzing effect of employer strike management decisions to requests for injunctive relief).) Thus, the District's affirmative defense fails, and I find that the District unlawfully interfered with protected rights.

2. Unilateral Change Allegations

The Complaint alleges that Resolution 3073 unlawfully changed SCTA-represented employees' pay and sick leave policies without providing the exclusive representative prior notice and the opportunity to negotiate the decision and/or effects of the decision. Unilateral changes to policies within the scope of representation are "per se" violations of the duty to negotiate in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143, pp. 21-22; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-19.) Absent a valid defense, a respondent commits an unlawful unilateral change if: (1) it took action to change the parties' written agreements, policies, past practices, or applied or enforced an existing policy in a new way; (2) the change concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized

effect or continuing impact on terms and conditions of employment. (*County of Monterey* (2018) PERB Decision No. 2579-M, pp. 9-10; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

a. Change

The District changed wages and leave policies when it adopted Resolution 3073 because it increased the available pay for substitute teachers if they worked as ERTs, curtailed the available circumstances for using personal necessity leave, and introduced a new doctor's certification requirement for sick leave use.

The District argues its physician's certification requirement is no change to the sick leave policy because the CBA states in part, "Nothing shall be deemed to prevent the superintendent or designee from requiring a doctor's verification as to the employee's claimed illness in any situation in which there is reasonable cause to believe that no valid grounds exist for the employee's claim of sick leave." This argument fails because the Resolution's physician's certification requirement is materially different than the CBA. Whereas the CBA required an individualized determination, the Resolution has a one-size fits all approach. For example, under the Resolution, if an employee with a known long-term illness took sick leave before and after the strike and happened to also do so on the strike day, they would have to produce a physician's certification despite there being no reasonable cause to believe there was no valid grounds for their use of leave. Thus, there is a change.

b. Scope of representation

Employee wages and leaves are within the scope of representation. (Gov. Code § 3543.2(a)(1); *Sacramento City Unified School District* (1979) PERB Decision

No. 100, p. 7.) The District argues that the leave certification component of the Resolution is not within scope, citing *Barstow Unified School District* (1979) PERB Decision No. 215 (Barstow). But *Barstow* is unavailing because that employer's action was consistent with an established past practice. (*Id.* at p. 3.) Thus, the issue was not scope of representation at all, but whether there was in fact a change.

c. Notice and opportunity to bargain

The District adopted Resolution 3073 without giving SCTA notice and an opportunity to bargain. The District adopted the Resolution at its March 21, 2019 board meeting. It failed to give SCTA notice of the Resolution before the meeting. While the record is uncertain about whether a SCTA board member was present during the meeting, merely learning about the Resolution at the meeting it was to be adopted at is insufficient notice to give a meaningful opportunity to bargain. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 29 and cases cited therein.)

d. Generalized or continuing effect on the bargaining unit

Resolution 3073 has a generalized effect on the unit because it changed leave policies unit-wide and wages for a large part of the unit. District's argument that District leaders believe the Resolution no longer applies does not save it. The Resolution has not been rescinded and has no express sunset clause; but even if it had, there would still be a generalized effect at the time it was in force.

e. Affirmative defense

The District argues it was privileged to make unilateral changes within the scope of representation because the strike was an emergency. To prevail on this theory, the District must show that the unilateral changes were "reasonably 'necessary

to avert a serious threat of interruption of educational services." (*Rio Hondo*, *supra*, PERB Decision No. 292, p. 18.) The District fails to meet this burden for two reasons. First, it failed to show there was a realistic threat of a sickout. While some District witnesses speculated there may be an abuse of sick leave, the District offered no evidence this was in fact planned or likely. And the fact that the union authorized a strike makes a sickout, which is typically a wildcat action, less probable. Second, the District, as discussed above, cannot show there was no alternative when it left opportunities to recruit replacement workers on the table.

REMEDY

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

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

"A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools*, *supra*, PERB Decision No. 291, pp. 67-68.) Here, SCTA seeks a cease and desist order, rescission of the unlawful portions of Resolution 3073, a notice posting, and a remedial bonus to striking workers.

A cease and desist order is appropriate. (EERA § 3541.5(c).)

Recission of the unlawful portions of Resolution 3073 is not appropriate. Rather, I find that Resolution 3073 is void for violation of EERA. It is an appropriate

remedy to order that the District restore the status quo and rescind the unlawful changes. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 31.) Here, partial recission of the Resolution is suboptimal because the Resolution does not contain a severability clause and the unlawful portions are not tangential. Voiding achieves restoration of the status quo ante without these problems.

A notice posting is also appropriate. Notice posting orders effectuate the purposes of EERA by informing employees that the controversy over this matter has been resolved and that the employer will comply with the ordered remedy. (*Desert Sands Unified School District*, *supra*, PERB Decision No. 2092, p. 33.) The notice posting shall include both a physical posting of paper notices at all places where notices are customarily placed, as well as a posting by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by SCTA. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento*, *supra*, PERB Decision No. 2351-M.)

The District's decision to pay premiums to non-striking bargaining unit members must also be remedied. In *San Diego USD* and *Modesto City Schools*, the Board was similarly faced with benefits conferred to non-strikers—letters of commendation—and ordered that the letters be withdrawn. (*Modesto City Schools*, *supra*, PERB Decision No. 291, p. 69.) But here, the benefit was a bonus payment to non-striking bargaining unit members, which cannot be easily withdrawn and the District has made no effort to do so. In similar circumstances, the NLRB has ordered the bonus be paid to the striking workers to restore the status quo ante. In *Aero-Motive Mfg. Co*., the NLRB

explained that when an employer gives a bonus to non-strikers, “the impact on employees is plain for all to see—that nonstrikers did, and presumably will in the future, receive special benefits which strikers will not receive.” (*Aero-Motive Mfg. Co.*, *supra*, 195 NLRB 790, 792.) As a result, the NLRB typically orders the employer to pay the same bonus to the striking workers, thus mitigating any perceived benefit for the non-strikers. (*Id.* at 793.) The NLRB has only declined to apply this remedy where the employer had already significantly mitigated its unlawful conduct. (See *Boise Cascade Corp. & Loc. No. 1136, W. Council of Indus. Workers, Chartered by United Bhd. of Carpenters & Joiners of Am., Affiliated with Inland Empire Dist. Council, W.C.I.W., AFL-CIO*, (1991) 304 NLRB 94, 97 (“Respondent's regional manager admitted to the Union that he had “screwed up” in awarding the vacation certificates to the nonstrikers” and the employer rescinded the bonuses before issuance of the complaint.).) This remedy has also been applied in the public sector. (See *Carmi Community Unit School District 5* (1990) 6 PERI ¶ 1020 (Ordering employer to “[m]ake whole all striking certified employees for the bonus received by nonstriking certified employees.”)

I find the NLRB’s considerations persuasive and consistent with PERB and California judicial authority in roughly analogous circumstances. (*Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, pp. 55-56; *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684, 691–692, affirming PERB's remedial order in *Santa Monica CCD, supra*, PERB Decision No. 103, at pp. 27-29.) The District paid non-striking SCTA-represented employees an unlawful bonus and made no effort to rescind the bonus. Thus, the

District must pay the same premium it paid to non-striking bargaining unit members to SCTA-represented employees who participated in the April 11, 2019 strike. The remedial payment will be calculated by subtracting the amount of daily pay SCTA-represented employees who did not work on April 11, 2019 earned at that time from five hundred dollars, compounded by interest at the rate of seven (7) percent per annum.[2]

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that SACRAMENTO CITY UNIFIED SCHOOL DISTRICT violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c), by adopting Resolution 3073 which changed wages and leave policies of employees represented by the Sacramento City Teachers Association (SCTA), authorizing pay for non-striking bargaining unit employees at a wage premium, and by paying the premium.

Pursuant to section EERA sections 3541.3, subdivisions (i) and (n), and 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

[2] Based on the District's salary schedule at the time of the strike, it appears some striking employees will not receive a remedial premium because they earned more than five hundred dollars a day. This is consistent with the remedy because it only seeks to restore the parties as nearly as possible to that which would have existed without the violation and those employees would not have received a premium if they had agreed to work as CRTs on April 11, 2019.

A. CEASE AND DESIST FROM:

1. Interfering with the rights of bargaining unit employees represented by the Sacramento City Teachers Association (SCTA).

2. Unilaterally changing wages, hours, or terms and conditions of employment of SCTA-represented employees.

3. Granting special bonuses or compensation to employees who refrain from lawful strike activity.

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

1. Pay each employee represented by SCTA who was employed at the time of the April 11, 2019 strike and did not work that day an amount equal to $500 minus their daily rate in effect at that time, compounded by seven percent interest per annum.

2. Within 10 workdays of the service of a final decision in this matter, post at all District locations where notices to employees in the certificated bargaining unit are customarily posted, copies of the Notice attached hereto as an Appendix. In addition to physical posting, the Notice shall be posted by electronic means customarily used by the District to regularly communicate with employees in the bargaining unit. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. In light of the ongoing COVID-19 pandemic, the District shall notify the

General Counsel of the Public Employment Relations Board (PERB) or the General Counsel's designee if a majority of the bargaining unit employees are not physically reporting to work during the time the physical posting would commence.

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

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions and supporting brief, within 20 days after the decision is served (PERB Regulation 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Regulation 32305(a).) The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Regulation 32110(a).) Appeal documents may be electronically filed by registering with, and uploading documents to the "ePERB Portal" that is found on PERB's website (https://eperb-portal.ecourt.com/public-portal/). To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Regulation 32110(d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via: in-person delivery, US Mail, or other delivery service. (PERB Regulation 32110(a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Regulation 32135(a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Regulation 32135(b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regulations 32300(a), 32140(c), and 32093). Proof of service forms can be located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regulations 32140(b) and 32093.)

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-2966-E, *Sacramento City Teachers Association v. Sacramento City Unified School District*, in which all parties had the right to participate, it has been found that the Sacramento City Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Interfering with the rights of bargaining unit employees represented by the Sacramento City Teachers Association (SCTA).
2. Unilaterally changing wages, hours, or terms and conditions of employment of SCTA-represented employees.
3. Granting special bonuses or compensation to employees who refrain from lawful strike activity.

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

1. Pay each employee represented by SCTA who was employed at the time of the April 11, 2019 strike and did not work that day an amount equal to $500 minus their daily rate in effect at that time, compounded by seven percent interest per annum.

Dated: _____ Sacramento City Unified School District

By: _____
Authorized Agent

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