STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2971-E PROPOSED DECISION (September 28, 2021)

Appearances: Jacob F. Rukeyser, Staff Counsel, California Teachers Association, for Sacramento City Teachers Association, CTA/NEA; Lozano Smith, by Gabriela D. Flowers, Katherine S. Holding, and Travis J. Lindsey, Attorneys, for Sacramento City Unified School District.

Before Christine A. Bologna, Administrative Law Judge

INTRODUCTION

This case alleges unilateral change/removal of bargaining unit work by a layoff of teachers and replacing them with outside employees. The employer denies any unfair practices or violations of law.

PROCEDURAL HISTORY

On June 10, 2019, Charging Party Sacramento City Teachers Association, CTA/NEA (SCTA) filed an unfair practice charge (charge) against the Sacramento City Unified School District (District).[1]

[1] On July 31, 2019, Respondent District electronically filed (e-filed) a position statement responding to the charge.

On January 6, 2020, the Public Employment Relations Board (PERB or Board) Office of the General Counsel (OGC) issued an unfair practice complaint (complaint) alleging that:

(1) in March 2019, Respondent District changed policy, removing the bargaining unit work of Child Development (CD) Educators exclusively represented by Charging Party SCTA by laying the employees off and replacing the staff with Sacramento Employment and Training Agency (SETA) employees, without prior notice to and affording SCTA an opportunity to negotiate the decision to implement the policy change and/or its effects;

(2) on March 26, 2019, SCTA requested relevant and necessary information, a list of its represented CD Educators who had been given a layoff notice, and the District did not respond to the request; and

(3) in May and June 2019, the District discriminated/retaliated against bargaining unit employee David Aleman (Aleman), taking adverse action-placing him on involuntary administrative leave, investigating his workplace conduct, and reassigning his work location, because of his May 2019 exercise of statutory guaranteed rights-picketing at the District office, raising concerns about the District's layoff plan, and voicing opposition to the layoff plan to his supervisors.

This conduct was claimed to violate the Educational Employment Relations Act (EERA),[2] section 3543.5, subdivisions (a), (b), and (c).[3]

[2] Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On February 3, 2020, the District e-filed an answer to the complaint, admitting certain allegations and factual claims,[4] denying all substantive claims, and asserting affirmative defenses. A March 10, 2020 informal settlement conference did not resolve the dispute. That day, the PERB OGC issued a notice of partial withdrawal without prejudice of the allegation the District failed to respond to SCTA's March 2019 request for information (complaint, paragraphs 9-13).

On October 22, 2020, a prehearing videoconference was conducted with counsel over the mechanics of conducting a formal videoconference hearing under the PERB Webex Virtual Hearing Protocols and Guidelines.[5]

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[3] On the unilateral change/removal of bargaining unit work and refusal to provide requested information claims, the complaint alleged that the District failed and refused to meet and confer with SCTA, with derivative violations of interference with bargaining unit employees' rights to be represented by SCTA and denial of SCTA's right to represent unit employees. The complaint further alleged the District's actions unlawfully discriminated against Aleman, with the derivative violation of denial of SCTA's right to represent unit employees.

[4] The District admitted SCTA is an exclusive representative within the meaning of section 3540.1, subdivision (e); it denied the unit of employees was appropriate. The District admitted it is a public school employer under section 3540.1, subdivision (k). The District admitted CD teachers are exclusively represented by SCTA; it "clarified" that its CD programs employ teachers and non-teaching employees, and CD teachers work in a variety of different teaching positions/classifications (class). The District admitted with clarification that in February 2019, it approved the layoff of some CD teachers, and impacted teachers were notified in March 2019 that their layoffs would be effective at the end of the 2018-2019 (2018-19) school year (SY). The District admitted that on March 26, 2019, SCTA requested a list of CD teachers it represented who had been given a layoff notice. The District admitted Aleman is an employee under section 3540.1, subdivision (j); it admitted, clarified, and admitted with clarification other specific factual allegations of the Aleman discrimination claim.

[5] The June 23-24, 2020 formal hearing was continued at SCTA's request due to witness and counsel scheduling conflicts; the District did not oppose the request,

On October 27, 2020, SCTA withdrew with prejudice the Aleman discrimination/retaliation allegations (complaint, paragraphs 14-18). A notice of partial withdrawal issued October 28.

On October 29-30, 2020, a formal videoconference hearing was conducted. On February 10, 2021, the case was submitted for decision after receipt of post-hearing briefs.[6]

FINDINGS OF FACT

Jurisdiction

The parties stipulated and the District admitted that Respondent is a public school employer within the meaning of section 3540.1, subdivision (k), and Charging Party SCTA is an exclusive representative under section 3540.1, subdivision (e).

Stipulations

The parties also stipulated that the SCTA-represented bargaining unit has included CD teachers employed by the District at all relevant times.

On February 21, 2019, the District Board of Education (District Board) adopted Resolutions Nos. 3053 and 3056, which authorized reduction in services of 39 SCTA bargaining unit CD teaching positions. The District issued layoff notices to 33 SCTA bargaining unit CD teachers effective at the end of the 2018-19 SY. The District

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which was granted for good cause under PERB Regulation 32205; and the hearing was rescheduled to October 29-30, 2020. On October 1, SCTA requested a virtual videoconference hearing, which the District did not oppose; on October 8, an amended notice of formal videoconference hearing issued.

[6] SCTA's request to extend the post-hearing briefing schedule was not opposed by the District, was supported by good cause, and was granted under PERB Regulation 32132.

subsequently rescinded layoff notices of/rehired a number of SCTA bargaining unit CD teachers to whom it issued layoff notices.

PERB is not called upon to review/rule on the District's compliance with the California Education Code when carrying out the 2019 layoff of SCTA bargaining unit CD teachers. SCTA challenged the District's compliance with the Education Code in carrying out the 2019 layoff of SCTA bargaining unit teachers through a civil action, *Sacramento City Teachers Association v. Sacramento City Unified School District* (2020) Sacramento County Superior Court Case No. 34-2019-80003250.

Background

John Borsos (Borsos) has been SCTA Executive Director for six years. Nikki Milevsky (Milevsky) is SCTA 1st Vice President and a District School Psychologist; she has represented the CD teachers on the SCTA Board of Directors since SY 2011-12.[7] David Fisher (Fisher) is SCTA President. Lesley Beth Curtis (Curtis) is outside counsel for SCTA.

Cancy McArn (McArn) is District Chief Human Resources Officer/Assistant Superintendent of Human Resources.[8] Jacqueline Bonini (Bonini) is Director, District Child Development Department (CDD).[9] Iris Taylor (Taylor) is the former District Chief

[7] Milevsky is a 20-year District employee. She has been a SCTA Site Representative, 1st Vice President (five years), President (four years), and is on full-time leave as SCTA 1st Vice President.

[8] McArn has worked for the District since 1997 as an elementary school teacher, Teacher Support Department Coordinator, and Human Resources Director, and in her current position since 2013.

[9] Bonini has worked for the District for 31 years as an elementary school teacher, Vice Principal, Principal, and in her current position since 2016.

Academic Officer. Cindy Nguyen (Nguyen) is the former District Employee Relations Director. Raoul Bozio (Bozio) is District in-house counsel. Dulcinea Grantham (Grantham) is outside counsel for the District.

Denise Lee (Lee) is SETA Deputy Director, Children and Family Services.[10] Kathy Kossick is SETA Executive Director.

The District CDD has provided classes/programs/services to 1500 infant-toddlers (age 0-3), preschool (3-5 years), and school age children (Kindergarten-above) before and after regular school hours and on partial days (Kindergarten), employing CD teachers with specific permits, credentialed/certificated teachers, and classified employees.[11] CD programs are not State-mandated, and the District is not required to offer them. The District funded the CD classes by a Head Start (HS) grant, with the remainder from the District General Fund.

SETA is a joint powers agency of the City and County of Sacramento. It is mostly funded by federal money but receives some State funds. SETA has two community functions – job training/returning employees to work and child care. Since 1981, SETA has been the grantee for "owning" the HS (3-5 years) and Early HS (EHS) (age 0-3) grants in Sacramento County. SETA provides services and operates 37 CD centers with its own staff, including teachers.[12] SETA also "subcontracts" with five

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[10] Lee has held this position for 11 years. She has worked for SETA for 30 years.

[11] CD "permitted" and certificated teachers are exclusively represented by SCTA. Classified employees are represented by Service Employees International Union (SEIU) Local 1021.

[12] Several SETA CD centers are within the District; SETA CD centers are also in the Elk Grove and San Juan Unified School Districts (USD).

"delegate" agencies (delegates) and two partners, disbursing funds for 120 CD centers serving over 5300 low income County families/children. The District has been a subcontractor/delegate since 1981.[13] SETA annually reviews the delegates' performance under 1400 national performance standards, and renews contracts with a specific number of enrollment slots and associated funding in whole or part each August 1. SETA exercises authority and oversight, auditing HS/ EHS services, and setting funding and program levels.[14]

SETA Notice of HS Reduction in District

On January 29, 2019, Kossick sent a letter[15] to District Superintendent Jorge Aguilar (Aguilar) and Jessie Ryan (Ryan), District Board President, that "followed up" an August 14, 2018 meeting. Effective August 1, 2019, SETA informed the District it would reduce its contracted funded enrollment by 128 slots, and associated funds of nearly one million dollars, due to ongoing "concerns, accusations, violations, and licensing citations" over the health and safety of children enrolled in District HS programs.[16] In a November 9, 2018 conference call, Bonini and Taylor presented a preliminary draft proposal, but formal notice and a District alternative plan had not

[13] Since 1981, the other subcontractors/delegates are Elk Grove USD, Twin Rivers USD, San Juan USD, and Women's Civic Improvement Club (WCIC), a non-profit agency.

[14] Milevsky testified that changes in District CDD programs and reductions in the number of seats occurred almost every year; the reductions did not always correspond with layoffs of District CD teachers.

[15] Lee cowrote the letter.

[16] An attachment to the letter detailed concerns and Community Care Licensing violations/citations involving child health, safety, and supervision since April 2014.

been given to SETA. At the January 24, 2019 SETA-District grant planning meeting, SETA informed the District that the reductions required closure of HS classes at three District schools, and reduction in class size at two other sites.

District-SCTA Communications on CDD

On Sunday, January 20, 2019, Nguyen sent an electronic mail message (e-mail) to Borsos, Milevsky, and Fisher, copying McArn and Taylor, requesting a meeting to discuss the District CDD, offering January 23 and 28 dates.

On January 22, 2019, Milevsky sent a text message to Nguyen, asking about the CD issues to be discussed. Later that day, Nguyen responded they would discuss potential program changes for next year, and information the District needed to provide to SETA "ASAP." Milevsky replied SCTA could meet January 28.

On January 28, 2019, arriving at the District, Milevsky texted Nguyen, asking the meeting location and what information had to be reported to SETA ASAP. Borsos, Fisher, and Milevsky met with McArn, Taylor, and Bonini[17] briefly/ten minutes. The District "shared" that there might be some "potential" changes to CDD. SCTA asked about the "possible" changes. The District could not provide answers/did not have the information then, but would share it. Layoffs, SETA, and the information provided to SETA were not discussed.

On January 30, 2019, Milevsky sent an e-mail to Nguyen, copying McArn, Taylor, Borsos, Fisher, Bozio, and Bonini, to "follow-up" the January 28 CDD meeting. Milevsky stated the District was looking at funding, and thinking about potential

[17] Only Milevsky testified about the meeting; Borsos and Bonini were not questioned about it.

program changes next year; she asked what information needed to be provided to SETA ASAP.

On January 31, 2019, Nguyen sent a text to Milevsky, responding to her January 28 and 30 inquiries that, “The number of seats will be less.” Milevsky’s text asked “exactly” what the District communicated to SETA. Nguyen replied that at the last meeting, “we said we’ll do the analysis, pull together all the information to share, and reach out to schedule a follow up meeting.” Milevsky asked when the information had to go to SETA.

A follow-up meeting was not held. Neither Nguyen nor other District representative responded to Milevsky’s last text/inquiry.

District Response/Alternative to SETA HS Reductions

From 2016 to 2019, District General Fund contributions to supplement SETA funding for CDD EHS/HS programs increased from $1.5 to $2.3 million dollars. The Sacramento County Office of Education (SCOE) advised the District that using General Fund money generated by Kindergarten-Grade 12 students for preschool was an improper draw on that fund. Taylor directed Bonini to develop ways to reduce/ minimize District General Fund contributions to CDD HS programs, given its ongoing fiscal emergency/crisis.

On January 31, 2019, Bonini sent a letter to Kossick and Lee outlining the District proposed alternative HS reductions to address SETA’s concerns for safety and supervision, allow CDD to focus on Kindergarten readiness, and offer relief to the

District budget.[18] The District would return 407 HS slots, and all its 192 EHS seats, 471 more than SETA was taking back. An attachment listed sites and program options that SETA could potentially lease.[19]

On February 6, 2019, Kossick wrote to Bonini, acknowledging receipt of the District alternative enrollment reduction plan for its CDD HS/EHS programs.[20] The District requested, and Lee agreed, to keep four HS slots in the District. SETA would view some Early Learning Center sites to determine their appropriateness for SETA to operate and lease. The revised funding allocation for SY 2019-20 was 736 District HS seats and funds of $5,784,160, after 403 District HS and 192 EHS slots, a total of 595, were returned to SETA.

District Layoffs

At the beginning of the 2018-19 SY, there were approximately 80 CD teachers in the SCTA bargaining unit.

On February 21, 2019, the District Board adopted Resolution 3053 (Reduction of Particular Kinds of Services), and Resolution 3056 (Notice of Layoff: Classified Employees-Reduction in Force due to Lack of Work and/or Funds), which identified certain positions to be reduced/eliminated, including certificated teachers, "permitted"

[18] Increases in District salaries and benefits "have outpaced 'COLAs' offered by HS, requiring continuing contributions from the District General Fund." Bonini testified that the salaries and benefits of all CDD staff were considered, SCTA-represented CD teachers and represented classified employees.

[19] An attachment to the SETA January 29, 2019 letter stated that SETA was open to leasing space from the District, with SETA staffing and operating these sites to ensure HS/EHS services remained within District boundaries.

[20] Lee testified that the District had not voluntarily relinquished slots before 2019, but other subcontractors/delegates had (Twin Rivers USD, WCIC).

teachers, and classified employees in CDD.[21] Milevsky and other SCTA representatives were at the Board meeting.[22] The specified positions were reduced/eliminated for the 2019-20 SY, effective June 30, 2019, the end of the 2018-19 SY. Both resolutions authorized the reduction in services of 39 SCTA bargaining unit CD teachers.

On March 12, 2019, the District issued written layoff notices to 33 SCTA-represented bargaining unit CD teachers (one certificated, 32 permitted). The notices were copied to SCTA.[23]

Further SCTA-District Communications on CDD

On March 20, 2019, Milevsky e-mailed Bonini, McArn, and Bozio, copying Borsos, Fisher, and Ryan, requesting a meeting between the District and teacher representatives to discuss "budget solutions" for District "School Age" CD programs, proposing two dates the following week.

On March 26, 2019, Milevsky e-mailed and copied the same individuals. Because the District failed to bargain/respond to SCTA's offered dates, "we expect" the CD School Age program budget issues to be discussed at the March 28 meeting.[24]

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[21] Approximately 100 CDD classified and 33 certificated and permitted teaching full-time equivalent (FTE) positions were authorized for reduction/elimination.

[22] The Agenda Items, Executive Summary, and Resolutions were e-mailed to SCTA and classified exclusive representatives on February 15. Exhibit A, identifying vacant and occupied positions to be reduced/eliminated, was available at the Board meeting.

[23] Milevsky testified that SCTA did not receive the layoff letters. McArn testified that District staff followed the regular process in distributing the layoff notices to SCTA and others copied.

SCTA Demand to Bargain and Request for Information (RFI)

On March 21, 2019, during a District Board meeting, Borsos e-mailed McArn and Aguilar, copying Milevsky and Fisher, with the "union's demand to bargain over both the decision and effects [f] proposed and what appears to be unlawfully implemented changes to" CD "services provided by the [D]istrict." SCTA further demanded any and all unlawful acts cease, including but not limited to subcontracting of bargaining unit work; and prior to additional changes, the District meet[s] its legal obligation to bargain over any proposed changes. The e-mail did not mention CDD teacher layoffs.

McArn testified that she received the SCTA e-mail and did not respond to it. She was "not sure" if there was a District response. Borsos and Milevsky testified that SCTA did not receive a response from any District administrator to its bargaining demand.

On March 26, 2019, Borsos e-mailed McArn and Nguyen, copying Grantham, Aguilar, Bozio, Milevsky, and Fisher, requesting a list of SCTA-represented CD educators given a layoff notice by close of business that day.

On March 27, 2019, Grantham e-mailed a list of 32 CD "permit holders notified for layoff,"[25] and the March 12 notices issued to each of them, to Borsos and Curtis.

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[24] The meeting was with a California State Mediation and Conciliation mediator to try to resolve the many charges filed by SCTA and the District against each other. CDD programs/issues, including School Age programs, were not raised/discussed by SCTA or District representatives at the meeting.

[25] On March 26, 2019, Grantham e-mailed Borsos and Curtis that the certificated CD teacher layoff list was provided to Curtis and SCTA on March 15, and one certificated CD teacher received a layoff notice.

Layoffs Rescinded/CD Teachers Rehired

The District/CDD rescinded the layoffs of, in whole/part, and rehired 13 FTEs of the 32 permitted teachers, ten before the end of SY 2018-19 and three in Fall 2019, for SY 2019-20. Fees were raised in fee-based CDD programs, such as School Age (Kindergarten-above) programs before and after school, allowing six to ten teachers to return. Eight additional teachers were rehired after Fall 2019 due to attrition/ retirements. Sixteen (16) teachers remained laid off.

None of the 595 (403 HS, 192 EHS) District CDD slots and associated funds returned to SETA at the end of SY 2018-19 were restored to the District in SY 2019-20 or subsequently.

SETA CD Programs within the District

Since 2019, SETA has leased 12 locations on public school district campuses; six are on current/former District CDD sites/centers.[26]

On June 13, 2019, Taylor sent an e-mail to Milevsky, copying Borsos, Fisher, McArn, Bozio, and Bonini, responding to her June 6 inquiry. In SY 2019-20, SETA will have 663 HS and 167 EHS enrollment center-based slots within District boundaries, in addition to the 736 HS seats at District CDD centers and 120 HS slots at two WCIC CD centers funded by SETA.[27]

Lee testified that once HS/EHS enrollment slots and associated funding are returned by a delegate/subcontractor to SETA, SETA has sole discretion where the

[26] SETA also leases property in Folsom-Cordova USD, and delegate Twin Rivers USD.

[27] Lee prepared an attachment of this information at Bonini's request.

seats and funds will go each year in the future. SETA may choose to return the slots and money to the funding source; to operate the HS programs itself; and/or to reallocate the seats and money to existing delegates. Some of the 595 District-relinquished slots remained with SETA and operated as SETA HS/EHS programs on District-leased property; others were distributed to three delegates;[28] and the rest were converted from HS to EHS slots.

Lee stated that the District has no say in, and any control over, how SETA runs its CD centers and HS/EHS programs now operating on six District-leased sites. SETA employees, employed and paid by SETA, solely provide these services. The District does not furnish any money or other support to SETA to operate the programs.[29]

ISSUE

Did the District unilaterally change policy and/or its effects, and violate its statutory bargaining obligations, by removing Child Development (CD) teaching work from the SCTA-represented bargaining unit, laying off CD teachers, and replacing them with SETA employees?

CONCLUSIONS OF LAW

The parties do not litigate the allegations of a charge at hearing; they try the allegations in the complaint. When a complaint issues, the PERB General Counsel

[28] HS/EHS programs were expanded in Twin Rivers and San Juan USDs, and WCIC.

[29] Lee's testimony was not challenged/controverted.

has discretion to decide which allegations and legal theories to assert and violations to include.

The burdens of going forward with evidence/persuasion and of proving the allegations in the complaint on the merits at hearing are Charging Party's. (*Cabrillo Community College District* (2019) PERB Decision No. 2622; *City of Roseville* (2016) PERB Decision No. 2505-M; *Oakland Unified School District* (2009) PERB Decision No. 2061.) The burdens of persuasion and proof on matters raised by the answer and/or affirmative defenses at hearing are Respondent's. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359; *Regents of the University of California* (2014) PERB Decision No. 2398-H.)

A charging party must prove the allegations of a complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Regulation 32178.) Proof by a preponderance of the evidence requires a party to convince the trier of fact that the existence of a particular fact is more probable than its nonexistence. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 2359, fn. 22, citing Evidence Code section 500, Law Revision Commission comments.) Preponderance of the evidence has also been defined by the courts as "evidence that has more convincing force than that opposed to it" (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 (*Glage*), in terms of the probability of truth; or such evidence, which when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one

is unable to say evidence on either side of an issue preponderates, the finding on the issue must be against the party who has the burden of proving it. (*Glage*.)

Good Faith Bargaining Obligation

In determining whether a party has violated its statutory bargaining obligations, PERB utilizes either the "per se" or "totality of conduct/circumstances" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*City of Arcadia* (2019) PERB Decision No. 2648-M (*Arcadia*); *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M (*Fresno IHSS*); *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*.) The courts and PERB have construed the requirement that parties meet and confer in good faith to mean a subjective attitude demonstrating a genuine desire to reach agreement. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9 (*City of Placentia*.)

Per se violations involve conduct violating statutory rights or procedural bargaining norms, regardless of a party's intent. (*Arcadia*, *supra*, PERB Decision No. 2648-M; *Fresno IHSS*, *supra*, PERB Decision No. 2418-M.) By contrast, under the totality of conduct/circumstances, the Board and Courts make a factual determination of the total bargaining conduct to establish whether there are sufficient objective indicia of a subjective intent to participate in good faith in the bargaining process and reach agreement, or of an intent to frustrate or avoid the bargaining process. (*Arcadia*; *Fresno IHSS*; *State of California (Board of Prison Terms)* (2005) PERB Decision No. 1758-S; *Contra Costa Community College District* (2005) PERB Decision

No. 1756; *Oakland Unified School District* (1982) PERB Decision No. 275; *Pajaro Valley*, *supra*, PERB Decision No. 51; *City of Placentia*, *supra*, 57 Cal.App.3d 9.) The entire course of negotiations, including the parties' conduct at and away from the bargaining table, is examined to determine whether it indicates a serious attempt to resolve differences and reach a common ground. (*City of Roseville*, *supra*, PERB Decision No. 2505-M; *Stockton*, *supra*, PERB Decision No. 143; *Pajaro Valley*, *supra*; *City of Placentia*, *supra*.) The ultimate question is whether the parties was sufficiently egregious to frustrate negotiations. (*Arcadia*; *Fresno IHSS*.) The Board evaluates the net effect of the parties' conduct on the course of negotiations, so even one indicator of bad faith, if egregious, can be sufficient to find that the party failed to bargain in good faith. (*City of San Ramon* (2018) PERB Decision No. 2571-M; *City of San Jose* (2013) PERB Decision No. 2341-M.)

EERA section 3542.3, subdivision (a) (1), defines scope of representation as limited to matters related to wages, hours, and other terms and conditions of employment. Terms and conditions of employment are identified as health and welfare benefits defined by section 53200, subdivision (d);[30] leave, transfer, and re-assignment policies; safety conditions of employment; class size; employee evaluation procedures; organizational security under section 3546;[31] grievance procedures under sections 3548.5-.8; layoff of probationary certificated school district (Kindergarten-12)

[30] Hospital, medical, surgical, disability, legal expense, or related benefits, including but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or service basis, including group insurance.

[31] Superceded by *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (2018) 585 U.S.__, 138 S.Ct. 2448.

employees under Education Code section 44959.5; and alternative compensation or benefits for employees adversely affected by pension limitations in former Education Code section 22316.[32]

EERA section 3542.3, subdivision (a) (4) reserves decision-making to the public school employer on all matters not specifically enumerated.

EERA section 3542.3, subdivision (c) provides for meeting and negotiating on procedures and criteria for layoff of certificated employees for lack of funds. If agreement is not reached between the school employer and exclusive representative, Education Code section 44944 applies.

Like other PERB-administered statutes, EERA neither expressly enumerates nor excludes subcontracting decisions from the scope of representation. While such decisions involve managerial decisions regarding the merits, necessity, or organization of services, activities or programs, they also affect wages, hours, and working conditions, including whether employees who have previously performed such work will continued to be employed at all. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) Where a management decision affects the merits, necessity, or organization of any service or activity provided by law, it still may be negotiable, if intertwined with a bargainable decision. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena*).) A decision affecting negotiable matters does not become non-bargainable because other non-negotiable matters are also implicated by the decision. (*Regents of the University of California*

[32] As of December 31, 1999, to the extent reasonable, and without violating Internal Revenue Code section 415.

(Berkeley) (2018) PERB Decision No. 2610-H (*UC Berkeley*); *Anaheim Union High School District* (2016) PERB Decision No. 2504; *City of Sacramento* (2013) PERB Decision No. 2351-M (*Sacramento*).)

Unilateral Change

A unilateral modification in terms and conditions of employment within the scope of negotiations is a per se refusal to negotiate. (*National Labor Relations Board (NLRB) v. Katz* (1962) 369 U.S. 736;[33] *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813 (*City of Stockton*); *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*); *Pajaro Valley*, *supra*, PERB Decision No. 51; *Stockton*, *supra*, PERB Decision No. 143.) Pre-impasse unilateral changes in matters within the scope of representation violate the duty to meet and negotiate in good faith, because they have such an inherently destabilizing, destructive, and detrimental effect upon the parties' bargaining relationship and employee rights. (*City of Montebello* (2016) PERB Decision No. 2491-M; *County of Riverside* (2014) PERB Decision No. 2360-M; *San Mateo County Community College District* (1979) PERB Decision No. 94.)

The following criteria establish a prima facie case of an unlawful unilateral change: (1) the employer took action to change, breach, or alter a policy;[34] (2) the policy change concerns a matter within the scope of representation; (3) the action was

[33] In interpreting EERA, it is appropriate to look for guidance from cases construing the National Labor Relations Act (NLRA) and parallel provisions of California labor relations statutes. (*San Diego Teachers Association v. Super. Ct.* (1979) 24 Cal.3d 1; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[34] A policy may be established by written agreement, past practice, and/or it may be newly created, implemented, or enforced policy.

taken without giving the exclusive representative advance notice of the proposed change, and bargaining in good faith over the decision until the parties reached agreement or impasse; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment of represented/bargaining unit members, and was not merely an isolated breach of the policy. (*County of Merced* (2020) PERB Decision No. 2740-M; *City of San Diego* (2015) PERB Decision No. 2464-M, *aff'd sub nom Boling v. Public Employment Relations Bd*. (2018) 5 Cal.5th 898; *Regents of the University of California*, *supra*, PERB Decision No. 2398-H; *Sacramento*, *supra*, PERB Decision No. 2351-M; *County of Santa Clara* (2013) PERB Decision No. 2321-M (*Santa Clara*); *City of Escondido* (2013) PERB Decision No. 2311-M; *County of Riverside* (2013) PERB Decision No. 2307-M; *Regents of the University of California* (2012) PERB Decision No. 2300-H; *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*); *Grant*, *supra*, PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *City of Stockton*, *supra*, 161 Cal.App.3d 813.)

In *Pasadena*, *supra*, PERB Decision No. 2444, the Board stated:

> "Our statutes contemplate bilateral decision-making as to subjects within the scope of representation. The gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process. Whether a unilateral action is the creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten past practice, our statutes require an employer contemplating a change in policy concerning a matter within

> the scope of representation to provide the exclusive representative notice and an opportunity to bargain.[35]"

Charging Party UPE must show that the change in policy had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members. In *Grant*, *supra*, PERB Decision No. 196, PERB observed that "a change in policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." If the dispute is over the "application of" and not a "change" of the terms of the agreement or policy, then a change in policy is not found, as a generalized effect or continuing impact is not demonstrated. (*City of San Juan Capistrano* (2012) PERB Decision No. 2238-M.) There is no unilateral change where an employer takes a legal position on a

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[35] PERB has long recognized the following three general categories of unlawful unilateral actions: (1) changes to the parties' written agreements; (2) changes in established past practice; and (3) newly created, implemented, or enforced policy. Historically, *Grant*, *supra*, PERB Decision No. 196 has been cited as the source of PERB's black letter law for the unilateral action doctrine. Under that precedent, the first of four criteria is whether the employer breached or altered the parties' written agreement or its own established practice. In *Fairfield-Suisun*, *supra*, PERB Decision No. 2262, PERB broadened the wording of the first criterion from "written agreement or its own established past practice" to "policy."

PERB has always recognized "newly created, implemented, or enforced policy" as subject to its unilateral action doctrine (*Gonzales Union High School District* (1993) PERB Decision No. 1006; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033; *City of Stockton*, *supra*, 161 Cal.App.3d 813 [explanations omitted].)

By changing the wording of the first criterion in *Fairfield-Suisun*, *supra,* the Board broadened the language of the first criterion to reflect the greater variety of unlawful unilateral actions encompassed by the doctrine, but without changing its traditional application of that doctrine to unilateral changes in written agreements or established past practices.

contractual provision that is contrary to the union's. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259; *Trustees of the California State University* (1997) PERB Decision No. 1231-H.) The Board is concerned with a conscious or apparent reversal of a previous understanding, whether embodied in a contract or past practice, which results in repudiation of an agreement. (*Grant*.)

It is also the effect of the employer's action, not necessarily "the period of duration" of the act that determines whether it is a unilateral change. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078.) PERB has also rejected the argument that the temporary nature of the change is a controlling factor, finding that "it is irrelevant whether the [change] was intended to be permanent or only temporary. The relevant point is that the new procedures constituted a change from any system that existed previously." (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H.)

An employer does not make an unlawful unilateral change if its actions conform to the terms of the parties' agreement. (*County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M (*Ventura County*); *State of California (Department of Corrections)* (1997) PERB Decision No. 1201-S; *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville)*.)

The mere fact that an employer has chosen not to enforce its contractual rights does not mean it is forever precluded from doing so. (*State of California (Employment Development Department)* (1998) PERB Decision No. 1247-S; *Marysville*, *supra*, PERB Decision No. 314.) An employer does not commit a unilateral change by

enforcing a contractual right even if it has not done so in the past. (*County of Placer* (2004) PERB Decision No. 1630-M (*Placer County*).)

Layoffs

An employer's decision to layoff employees is generally not within the scope of representation as a policy matter concerning the level of and/or manner in which services are provided. (*Fire Fighters Union v. City of Vallejo*, *supra*, 12 Cal.3d 608; *Anaheim Union High School District*, *supra*, PERB Decision No. 2504 (*Anaheim*); *Newman-Crows Landing Unified School District*, *supra*, PERB Decision No. 223.)

Limits on the timing of layoffs to certain periods of the SY, selection of certain classes for layoff to retain individuals in other classes/positions, and the lack of funds to include only where a certain cash balance is sustained are not negotiable as impermissibly intrusive on the employer's right to layoff employees. (*San Mateo City School District* (1984) PERB Decision No. 383 (*San Mateo*); *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg/San Mateo*); *Oakland Unified School District* (1983) PERB Decision No. 326 (*Oakland*).)

Bargaining proposals infringing on inflexible layoff standards in the Education Code are similarly non-negotiable. Creation of a lottery system for layoff of employees with the same hire date was superceded by the Education Code which required decision by the governing board based on district and student needs. Restricting the District's ability to implement layoffs at the end of the SY conflicted with Education Code provisions excusing the District's usual notice of layoffs in specified extraordinary circumstances and was not bargainable. Superseniority for union

officers to exempt them from layoff was non-negotiable as contrary to the Education Code. Requiring the District to pay a fine and costs for issuing and rescinding notices of intent to layoff were punitive and interfered with the employer's statutory obligation to notify employees potentially targeted for layoff and was not bargainable. (*Healdsburg/San Mateo*, *supra*, PERB Decision No. 375; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373 (*Mt. Diablo*); *Kern Community College District* (1983) PERB Decision No. 372; *Kern Community College District* (1983) PERB Decision No. 337 (*Kern*); *Oakland*, *supra*, PERB Decision No. 326.)

An employer's layoff decision is bargainable if intertwined with a negotiable decision to subcontract or transfer work out of the bargaining unit. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440.)

When a layoff is based on labor costs, an employer must meet and confer in good faith, if requested, over implementation and the reasonably foreseeable impacts/effects on non-laid off employees. The duty to negotiate does not extend to the layoff decision, but only to its effects. The employer must give the exclusive representative timely notice and reasonable opportunity to negotiate the effects of the layoff decision. Bargaining is required although the effects may be speculative and the full extent of the layoff are uncertain at the time of negotiations. (*Newark Unified School District, Board of Education* (1982) PERB Decision No. 225.)

The employer's bargaining obligation over the effects of a layoff is not triggered or assumed by a demand to negotiate the layoff decision itself. A RFI to an employer about the impact of a layoff is insufficient to communicate a request to bargain layoff effects. (*City of Richmond* (2004) PERB Decision No. 1720-M.)

Whether or not the layoff decision is negotiable, the employer must bargain the effects of a layoff. Many effects of a layoff decision are negotiable because of their impact on the terms and conditions of employment. This includes the procedures used if not superceded by statute. Layoff effects include: timing of the layoff; number and identity of employees laid off; how much notice employees will receive/a notice period longer than the statutory minimum; severance pay or other benefits; employee bumping, demotion and/or transfer rights; employee recall/re-employment rights; how layoff will affect/impact the workload and safety of remaining employees; distribution of workload; retraining; and reorganization and/or reclassification of positions. (*International Association of Firefighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259; *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651; *Anaheim*, *supra*, PERB Decision No. 2504; *Bellflower Unified School District* (2014) PERB Decision No. 2385; *Placentia Unified School District* (1986) PERB Decision No. 595; *San Mateo*, *supra*, PERB Decision No. 383; *Healdsburg/San Mateo*, *supra*, PERB Decision No. 375; *Mt. Diablo*, *supra*, PERB Decision No. 373; *Kern*, *supra*, PERB Decision No. 337; *Oakland*, *supra*, PERB Decision No. 326.)

Removal of Bargaining Unit Work

The removal of work from a bargaining unit, by transferring the work to other non-unit employees of the same employer (*Ventura County Community College District* (2003) PERB Decision No. 1547 (*Ventura*); *Whisman Elementary School District* (1991) PERB Decision No. 868; *Rialto Unified School District* (1982) PERB Decision No. 209 (*Rialto*)), or by subcontracting/contracting out work from existing

employees to employees of another employer (*City of Milpitas* (2015) PERB Decision No. 2443-M; *Long Beach Community College District* (2008) PERB Decision No. 1941; *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712; *Rialto Police Benefit Association v. City of Rialto* (2007) 155 Cal.App.4th 1295 (*Rialto*); *Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440 (*Lucia Mar*); *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124 (*San Diego*); *Arcohe Union School District* (1983) PERB Decision No. 360 (*Arcohe*)), has been frequently litigated before the Board, which has found both negotiable.

In *Ventura*, *supra*, PERB Decision No. 1547, the Board explained the distinction between the two; in subcontracting, the transfer of work is from existing employees to employees of another employer, while a transfer of work moves work from one group of employees to another group of the same employer. (*See also UC Berkeley*, *supra*, PERB Decision No. 2610-H; *Sacramento*, *supra*, PERB Decision No. 2351-M.)

Subcontracting

Early PERB cases found that subcontracting work was bargainable, absent Education or Government Code supersession limits. (*State of California (Department of Personnel Administration)* (1986) PERB Decision No. 574-S; *Arcohe*, *supra*, PERB Decision No. 360.)

Later Board decisions limited the negotiability of the employer's decision to contract out bargaining unit work to decisions based on labor costs. (*Barstow Unified School District* (1997) PERB Decision No. 1138b; *Barstow Unified School District* (1996) PERB Decision No. 1138 (*Barstow*); *San Diego Community College District* (1988) PERB Decision No. 662, *rev'd in pt. sub nom.* in *San Diego*, *supra*, 223

Cal.App.3d 1124); *Fremont Union High School District* (1987) PERB Decision No. 651; *State of California (Department of Personnel Administration)* (1987) PERB Decision No. 648-S.) A California court reached a similar conclusion in finding a City's contract with the County Sheriff's Department to provide law enforcement services within the scope of representation. (*Rialto*, *supra*, 155 Cal.App.4th 1295.) PERB relied on private sector cases that subcontracting decisions lying at the core of entrepreneurial control or changing the nature and direction of operations may be based on factors not amenable to collective bargaining. (*Building Material & Construction Teamsters' Union v. Farrell*, *supra*, 41 Cal.3d 651; *Otis Elevator Co.* (1984) 269 NLRB 162; *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666; *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203.)

In *Lucia Mar*, *supra*, PERB Decision No. 1440, the Board concluded that where the employer replaces its bargaining unit employees with those of a contractor to perform the same services under similar circumstances, there is no need to apply the additional labor costs test to find the subcontracting decision negotiable. Further, PERB found that the contracting out decision did not involve a change in the direction of District operations or a core restructuring decision. Instead, it was a decision to terminate bargaining unit employees made contemporaneously with the decision to contract out their work, with the result that the same work would be done in a similar manner under similar circumstances. (*City of Glendale* (2020) PERB Decision No. 2694-M; *County of Kern & Kern County Hospital Authority* (2019) PERB Decision No. 2659-M; *Redwoods Community College District* (1997) PERB Decision No. 1242 (*Redwoods*).)

Subsequent cases established that "core restructuring" or "a fundamental change in the nature/scope/direction of a significant facet" occurs where a subcontracting decision alters an employer's basic operations, such as eliminating or changing a particular service. These decisions are within the managerial prerogative and are outside the scope of bargaining. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S; *Long Beach Community College District*, *supra*, PERB Decision No. 1941 (*Long Beach*); *Trustees of the California State University* (2006) PERB Decision No. 1839-H; *Oakland Unified School District* (2005) PERB Decision No. 1770; *Folsom-Cordova Unified School District*, *supra*, PERB Decision No. 1712; *Ventura*, *supra*, PERB Decision No. 1547.)

Where the employer unilaterally increases its existing subcontracting, any significant increase, even of the same type of duties, is an unlawful unilateral change of "quality and kind" of services. (*Beverly Hills Unified School District* (1990) PERB Decision No. 789.)

If the decision to subcontract bargaining unit work is non-negotiable, the impact and/or effects of such decision on matters within the scope of representation are bargainable. (*Long Beach*, *supra*, PERB Decision No. 1941; *Barstow*, *supra*, PERB Decision No. 1138; *Roseville Joint Union High School District* (1986) PERB Decision No. 580; *Mt. Diablo Unified School District*, *supra*, PERB Decision No. 373.)

Effects/Impacts Bargaining

Effects bargaining is not a "stepchild" of and is just as important as decision bargaining over changes in terms and conditions of employment. Impact negotiations balance an employer's need to make decisions about the direction of the workplace

with employees' rights, exercised by and through exclusive representatives, to a voice in negotiable workplace issues. Failure/refusal to bargain over the effects of a non-negotiable change is just as harmful as a failure to bargain over a negotiable change; both equally disrupt and destabilize employer-employee relations and create an imbalance in power between management and exclusive representatives. A union is not required to first demand effects bargaining as a precondition to enforcing an employer's duty to provide reasonable advance notice of a non-negotiable decision and opportunity to bargain any impacts within the scope of representation; rather, the duty to request effects bargaining arises after the employer provides notice and opportunity to negotiate. (*County of Sonoma* (2021) PERB Decision No. 2772-M, *judic. app. pending*; *Santa Clara*, *supra*, PERB Decision No. 2321-M.)

Before implementation of a non-negotiable decision/change, an employer must bargain with the exclusive representative over any "reasonably foreseeable" effects affecting matters within the scope of representation. The Board has found that an exclusive representative bears the burden of establishing actual impact(s) on terms and conditions of employment. PERB later held that the standard for determining unilateral change is distinct from a failure to bargain effects; the first requires repudiation or change in a collective bargaining agreement or established past practice, while the second involves failure to negotiate before any actual change. It is not necessary to demonstrate actual change in working conditions to find a duty to negotiate impact; if the immediate, prospective effect identified is reasonably certain to occur, and is causally related to the decision, the bargaining obligation arises. Requiring actual impact is inconsistent with a foreseeability analysis that looks

forward. The effect on negotiable matters may not be indirect or speculative. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H; *Beverly Hills Unified School District* (2008) PERB Decision No. 1969; *Salinas Union High School District* (2004) PERB Decision No. 1639; *Fremont Union High School District*, *supra*, PERB Decision No. 651; *Lake Elsinore School District* (1987) PERB Decision No. 646; *Mt. Diablo Unified School District*, *supra*, PERB Decision No. 373 (*Mt. Diablo*); *San Bernardino City Unified School District* (1982) PERB Decision No. 255; *Newman-Crows Landing Unified School District*, *supra*, PERB Decision No. 223; *Moreno Valley Unified School District* (1982) PERB Decision No. 206; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623.)

The duty to provide reasonable advance notice and a meaningful opportunity to bargain effects arises when a firm, non-negotiable decision is made, and prior to any implementing action(s). Clear, unequivocal notice of the nature and scope of the proposed change must occur before implementation to allow the exclusive representative a reasonable amount of time to decide whether to demand bargaining. There is no hard and fast rule, and the individual circumstances of each case are considered in determining adequacy of notice. (*Regents of the University of California* (2021) PERB Decision No. 2783-H (*UC Regents*); *County of Santa Clara* (2019) PERB Decision No. 2680-M (*Santa Clara*); *County of Sacramento* (2013) PERB Decision No. 2315-M (*Sacramento County*); *Rio Hondo Community College District* (2013) PERB Decision No. 2313 (*Rio Hondo*); *County of Riverside* (2010) PERB Decision No. 2097-M (*Riverside*); *Trustees of the California State University* (2006) PERB Decision No. 1842-H; *Santee Elementary School District* (2006) PERB

Decision No. 1822; *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652; *Compton Community College District* (1989) PERB Decision No. 720; *Regents of the University of California* (1987) PERB Decision No. 640-H; *Victor Valley Union High School District* (1986) PERB Decision No. 565; *Oakland Unified School District* (1985) PERB Decision No. 540; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District*, *supra*, PERB Decision No. 375; *Mt. Diablo*, *supra*, PERB Decision No. 373; *Newark Unified School District, Board of Education*, *supra*, PERB Decision No. 225; *Newman-Crows Landing*, *supra*, PERB Decision No. 223; *National Labor Relations Board (NLRB) v. Transmarine Navigation Corporation* (9th Cir. 1967) 380 F.2d 933.)

The employer need only provide notice of its decision. The exclusive representative must clearly indicate that it wants to negotiate effects, not the decision; its bargaining request must clearly identify negotiable areas of impact, but a formulaic phrase or particular verbiage is not required. The employer must discuss and/or meet with the union to try to clarify any uncertainty over what is proposed for bargaining, and if it is within the scope of representation, before refusing to negotiate. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2385; *Santa Clara*, *supra*, PERB Decision No. 2321-M; *Sacramento County*, *supra*, PERB Decision No. 2315-M; *Rio Hondo*, *supra*, PERB Decision No. 2313; *CSU Trustees*, *supra*, PERB Decision No. 2287-H; *Riverside*, *supra*, PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Trustees of the California State University* (2009) PERB Decision No. 1876a-H; *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S; *State of California (Department of Corrections)* (2000)

PERB Decision No. 1388-S (*State/CDC*); *Newman-Crows Landing*, *supra*, PERB Decision No. 223; *El Dorado County Deputy Sheriff's Assn. v. County of El Dorado* (2016) 244 Cal.App.4th 950.)

Where an employer implements a non-negotiable decision without providing reasonable pre-implementation notice and opportunity to bargain, it acts at its peril. An exclusive representative has a choice if faced with a unilateral, non-noticed, imposed managerial decision subject to effects bargaining. It may file a charge alleging refusal to bargain without first making a negotiating demand, or it may demand impact bargaining, triggering an employer's response and duty of clarification; failure to clarify itself violates the negotiating obligation. (*Santa Clara*, *supra*, PERB Decision No. 2321-M; *Rio Hondo*, *supra*, PERB Decision No. 2313; *Jefferson School District* (1980) PERB Decision No. 133.)

The Board has identified the limited circumstances under which an employer may implement a decision on a non-mandatory subject before exhausting its effects bargaining obligation: (1) the implementation date is based on an immutable deadline/important managerial interest and delay beyond the chosen implementation date would undermine the employer's right to make the decision; (2) the employer gives sufficient advance notice of the decision and implementation date to allow for meaningful negotiations before implementation; and (3) the employer negotiates in good faith before implementation and continues to bargain after implementation on subjects not resolved as of implementation. All three conditions must be met. (*Compton Community College District*, *supra*, PERB Decision No. 720; *County of Ventura* (2021) PERB Decision No. 2758-M.)

Analysis/The Merits

Decision Bargaining

Charging Party SCTA bore the dual burdens of proof and persuasion to establish non-noticed, non-negotiated changes in District policy that unlawfully removed CD teaching work from the SCTA-represented bargaining unit by laying off CD teachers, subcontracting/contracting out the work to, and replacing the CD teachers with SETA employees. SCTA has failed to meet these burdens by a preponderance of the evidence for several reasons.

The first and fourth elements of a prima facie case of unlawful unilateral change are established by the evidence. It is undisputed that the District implemented a layoff of one certificated and 32 permitted SCTA bargaining unit CD teachers on February 21, 2019, effective at the end of SY 2018-19/June 30. The layoff also had a generalized effect/continuing impact on terms and conditions of represented CD teachers, since 16 certificated and/or permitted staff were laid off/lost their jobs.

The evidence on the third element, advance notice to exclusive representative SCTA and opportunity to negotiate the decision, is mixed. The parties dispute whether SCTA received adequate, advance notice of the layoff details/documentation before the District Board adopted the two layoff resolutions on February 21, 2019, initiating the layoff process. The District supplied the list of names of laid off CD teachers and their individual notices to SCTA on March 15 and 27. It is undisputed that the parties did not negotiate over the layoff at any time.

The layoff decision was not within the scope of representation under EERA, and the second element is not established by the evidence. The District made a

nonbargainable policy decision concerning the level of and/or manner in which "non-mandated" preschool services would be provided when it discontinued its General Fund financing of all EHS programs and limited HS services to those focusing on Kindergarten readiness. The District faced an ongoing fiscal crisis. The SCOE had also advised that District use of General Fund money generated by school age children for preschool was an improper draw on those funds. SCTA did not dispute these three facts (preschool HS services are not mandated, District financial limitations, SCOE admonition against use of General Fund for preschool).

The District also did not subcontract/contract out bargaining unit CD teaching work to SETA. Lee's uncontroverted testimony established that SETA was the HS grant holder, disbursing funds to the District and other "subcontractor"-delegates to operate CD centers/HS programs in accordance with national standards monitored by SETA. SETA contracted with the District, rather than the reverse urged by SCTA. When the District returned the EHS/HS slots and associated funds to SETA at the end of SY 2018-19, it did not continue to operate them within District HS programs/services in SY 2019-20. SETA either ran these CD centers, using its own staff and resources, as SETA EHS/HS programs while leasing District sites and paying rent, or SETA provided the former District seats and funds to three other delegates to expand their own HS programs on their own properties. SCTA presented no evidence that the District retained any involvement in the SETA, Twin Rivers USD, San Juan USD, or WCIC HS/EHS programs in SY 2019-20.

The District decision to eliminate EHS and reduce HS services was not motivated entirely by labor costs, i.e., the negotiated pay and benefits of bargaining

unit CD teachers, as SCTA contends. When the District did not improve its performance under a corrective action plan imposed by SETA to improve safety and supervision in HS programs, SETA took back slots and funds of approximately one million dollars, which would have to be made up by District General Fund money. At the same time, the District was experiencing a fiscal emergency, and was looking for budget relief. Finally, the salaries and benefits of all CDD staff in the centers, certificated and permitted teachers and classified employees, were considered when the District concluded that the overall cost to run the HS programs exceeded the amount of funds received from SETA for them. Ultimately, more than three times CDD classified staff than SCTA-represented bargaining unit teachers were authorized for layoff.

SCTA admits that the District did not "actually" contract with SETA to provide CDD HS services. It argues that the District "chose to continue these services with outside employees instead of its own," citing *UC Berkeley*, *supra*, PERB Decision No. 2610-H, for support. That University employer authorized the subcontractor to represent itself as the "permanent continuation" of the former program and use University logos; and provided the new entity with financing. The former University employees were laid off and some were subsequently hired by the subcontractor to perform the same functions. None of these factors/facts exist in this District layoff of bargaining unit CD teachers to make the decision negotiable, for the reasons explained above.

This claim is dismissed.

Effects Bargaining

Charging Party SCTA also bore the dual burdens of establishing that the District failed to provide reasonable advance notice and opportunity to bargain any negotiable impacts/effects of a non-bargainable decision/policy change before its implementation, and of establishing actual impact(s) on terms and conditions of employment. SCTA has met these burdens by a preponderance of the evidence for the following reasons.

McArn admitted that she received Borsos' March 21, 2019 demand to bargain the decision and effects of proposed and implemented changes to District CD services, including subcontracting bargaining unit work. McArn further acknowledged that she did not respond to the SCTA bargaining demand, and was unsure if there was a District response. Borsos and Milevsky provided mutually corroborating testimony that SCTA did not receive a response to its bargaining demand from any District representative. The District did not dispute this.

The District defends that it was not obligated to engage in effects negotiations, or seek clarification, because SCTA's bargaining demand was insufficient, citing *Healdsburg Union High School District and Healdsburg Union School District* (1980) PERB Decision No. 132 (*Healdsburg*), *City of Pinole* (2012) PERB Decision No. 2288-M (*Pinole*), and *County of Sacramento*, *supra*, PERB Decision No. 2315-M (*Sacramento County*). Neither *Healdsburg* nor *Pinole* address effects bargaining, and therefore do not provide support for the District.[36] In *Sacramento County*, the Board

[36] *Healdsburg* considered scope of representation and negotiable bargaining proposals, including subcontracting of bargaining unit work. *Pinole* examined unilateral change, surface bargaining, and failure to provide requested information.

affirmed dismissal of the charge, and the District accurately cites language in the decision. *Sacramento County* also states that the effects bargaining demand must place the employer on notice that the exclusive representative seeks to negotiate over effects, and believes the proposed changes affect one or more subjects within the scope of representation/wages, hours, and terms and conditions of employment.

The March 21, 2019 SCTA e-mail meets the *Sacramento County*, *supra*, PERB Decision No. 2315-M test for a valid effects bargaining demand that is not "formulaic." It sought to negotiate the effects of proposed and implemented changes to District CD services performed by bargaining unit employees, including the subcontracting of bargaining unit work.

Longstanding PERB precedent also establishes that if an employer is unsure that a particular subject is bargainable, it is the employer's obligation to ask the exclusive representative to justify its negotiability. (*State/CDC*, *supra*, PERB Decision No. 1388-S.) In *Rio Hondo*, *supra*, PERB Decision No. 2313, PERB explained:

> "Upon receiving an effects bargaining demand, and before refusing to negotiate, the employer must attempt to clarify through discussions with the Union any uncertainty as to what is proposed for bargaining and whether it falls within the scope of representation. (Citation omitted.) Refusing an effects bargaining demand without first attempting to clarify ambiguities and or whether matters proposed for bargaining fall within the scope of representation, violates the duty to bargain in good faith."

Here, the District did not attempt to clarify any questions raised by Borsos' March 21, 2019 e-mail, but simply did not respond to the SCTA bargaining demand.

By the above conduct, the District violated its duty to meet and negotiate over the effects/impacts of its nonbargainable February 21, 2019 layoff decision.

REMEDY

EERA section 3541.5, subdivision (c), gives PERB

> "… 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.[37]"

It is found that the District breached its obligation to meet and negotiate over the impacts/effects of its February 21, 2019 decision to layoff CDD certificated and permitted teachers effective at the end of SY 18-19. By this conduct, the District failed to bargain in good faith with SCTA, in violation of section 3543.5, subdivision (c). By the same conduct, the District denied SCTA its right to represent bargaining unit employees, in violation of section 3543.5, subdivision (b), and interfered with the rights of unit teachers to be represented by SCTA in violation of section 3543.5, subdivision (a). Therefore, it is appropriate to order the District to cease and desist from its unlawful conduct, a standard and ordinary remedy in such cases. (*Chula Vista City School District* (1990) PERB Decision No. 834; *Trustees of the California State University* (1987) PERB Decision No. 613-H; *Rio Hondo Community College District* (1983) PERB Decision No. 292.)

After finding violations of the statutory negotiating obligation, PERB generally orders a restoration of the status quo ante as it existed prior to the violation, as nearly as possible to the situation existing but for the unfair practice. (*County of Sacramento* (2008) PERB Decision No. 1943-M; *Desert Sands Unified School District* (2004)

[37] Section 3541.5, subdivision (i), also empowers the Board to investigate charges, take action, and make determinations deemed necessary to effectuate EERA policies.

PERB Decision No. 1682; *Modesto City Schools* (1983) PERB Decision No. 291; *Santa Clara Unified School District* (1979) PERB Decision No. 104.) If the decision to make the policy change is not a mandatory subject of bargaining, the Board will not order a return to the status quo ante, but will order negotiations over the effects of the change. To restore the parties to the bargaining position(s) they would have been in had the employer not unlawfully failed/refused to negotiate the impacts/effects of its unilateral policy change, PERB has ordered a limited back pay remedy to run if and while the parties bargain over the effects of the non-negotiable decision to make employees whole for losses suffered, and to mitigate as much as possible the imbalance in the parties' bargaining positions resulting from the employer's unlawful conduct. It is appropriate to order the District to make employees whole for any losses suffered as a result of its failure to meet and confer over the effects of its layoff decision. An unfair practice finding creates a presumption that bargaining unit employees suffered some loss as a result of the employer's unlawful conduct. (*UC Regents*, *supra*, PERB Decision No. 2783-H; *Bellflower Unified School District* (2019) PERB Order No. Ad-475; *Desert Sands Unified School District* (2010) PERB Decision No. 2092.)

The back pay period runs from a prescribed date following service of the decision, or the date the exclusive representative requests bargaining after the decision issues, until the earliest of the following conditions: (1) date of agreement covering effects/impacts of the unilateral change; (2) date that statutory impasse resolution procedure is exhausted; (3) failure of SCTA to submit bargaining proposals or request negotiations within the designated timeframe; or (4) failure of SCTA to

bargain in good faith. (*Bellflower*, *supra*, PERB Decision No. 2385; *Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H; *Placentia Unified School District*, *supra*, PERB Decision No. 595; *Mt. Diablo*, *supra*, PERB Decision No. 373; *Kern Community College District*, *supra*, PERB Decision No. 337; *Oakland Unified School District*, *supra*, PERB Decision No. 326; *Solano County Community College District* (1982) PERB Decision No. 219; *South Bay Union School District* (1982) PERB Decision No. 207a; *Moreno Valley Unified School District*, *supra*, PERB Decision No. 206; *Transmarine Navigation Corporation* (1968) 170 NLRB 389; *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848.)

The District is ordered to meet and negotiate with SCTA, upon SCTA's submission of proposals addressing the reasonably foreseeable, negotiable impacts/effects of the District's decision to layoff CDD teachers. The District is further ordered to provide all affected CDD teachers with an award of reasonable monetary compensation/back pay for any losses resulting from its failure to bargain the effects of the layoff decision, plus interest at the annual rate of seven percent (7%).

SCTA shall submit its impacts/effects request to bargain/negotiating proposals within 30 days following service of this proposed decision and order becoming final. If SCTA does not request bargaining/submit such proposals within this timeframe, this limited back pay remedy shall not go into effect. If SCTA timely requests negotiations/submits proposals, payments shall remain in effect until the earliest of the following conditions: (1) date of SCTA-District agreement on impacts/effects of the layoff decision; (2) exhaustion of the EERA-prescribed negotiating and impasse

resolution procedures; or (3) SCTA's subsequent failure to bargain in good faith with the District.

It is also appropriate that the District be ordered to post a notice incorporating the terms of this remedial order at all District work locations (buildings, offices, facilities) where notices to employees are customarily posted for bargaining unit teachers represented by SCTA. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with unit employees represented by SCTA. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M.) Posting such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purpose of EERA that employees be informed of the resolution of this controversy, and the District's readiness to comply with the ordered remedy. (*Omnitrans* (2010) PERB Decision No. 2143-M; *Regents of the University of California* (1998) PERB Decision No. 1263-H; *Placerville Union School District* (1978) PERB Decision No. 69.)

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 (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by failing/refusing to negotiate with SCTA over the

effects/impacts of its February 21, 2019 decision to layoff certificated and permitted CDD teachers.

Pursuant to EERA section 3543.1, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing/refusing to bargain in good faith with SCTA over the reasonably foreseeable, negotiable impacts/effects of the District decision to layoff CDD teachers.

2. Denying SCTA the right to represent bargaining unit teachers in employment relations with the District.

3. Interfering with unit employees' rights to be represented by SCTA.

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

1. Within 30 days of service of a final decision in this matter, meet and bargain in good faith with SCTA upon receipt of SCTA's request to negotiate/bargaining proposals addressing the reasonably foreseeable, negotiable impacts/effects of the District's decision to layoff CDD teachers.

2. Compensate all affected CDD teachers with an award of reasonable monetary compensation for any losses resulting from the failure to bargain the effects of the layoff decision, plus interest at the annual rate of 7%. SCTA shall submit its impacts/effects request to bargain/negotiating proposals within 30 days of service of a final decision in this case, or this limited back pay remedy shall not go into effect. If SCTA timely submits its bargaining request/negotiating proposals, payments shall remain in effect until the earliest of the following conditions: (1) date of SCTA-

District agreement on impacts/effects of the District's layoff decision; (2) exhaustion of the EERA-prescribed negotiating and impasse resolution procedures; or (3) SCTA's subsequent failure to bargain in good faith.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to bargaining unit teachers represented by SCTA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with SCTA-represented bargaining unit employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[38]

[38] In light of the ongoing COVID-19 pandemic, Respondent District shall notify the PERB Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the District so notifies OGC, or if Charging Party SCTA requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the District to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing the District to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the District to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on 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-2971-E, *Sacramento City Teachers Association, CTA/NEA* (SCTA) *v. Sacramento City Unified School District* (District), in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by failing and refusing to bargain in good faith with SCTA over the impacts/effects of its decision to layoff certificated and permitted Child Development Department (CDD) teachers.

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

A. CEASE AND DESIST FROM:

1. Failing/refusing to meet and negotiate over the reasonably foreseeable, negotiable effects/impacts of the District's decision to layoff CDD teachers.

2. Denying SCTA its right to represent bargaining unit employees.

3. Interfering with unit teachers' rights to be represented by SCTA.

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

1. Meet and bargain in good faith with SCTA upon receipt of SCTA's request to negotiate/bargaining proposals on the impacts/effects of the District's decision to layoff CDD teachers.

2. Award all affected CDD teachers reasonable monetary compensation for any losses resulting from the failure to bargain the effects of the layoff decision, plus interest at the annual rate of 7%. The further conditions of this limited back pay are set forth in the proposed decision.

Dated: _____ Sacramento City Unified School District

By: _____
Authorized Agent

APPENDIX

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

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.