STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY TEACHERS ASSOCIATION, Charging Party, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2945-E PERB Decision No. 2749 November 2, 2020

Appearances: California Teachers Association by Jacob Rukeyser, Attorney, for Sacramento City Teachers Association, CTA/NEA; Lozano Smith by Steve Ngo and Katherine S. Holding, Attorneys, for Sacramento City Unified School District.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Sacramento City Unified School District to the attached proposed decision issued by an administrative law judge (ALJ). The complaint in this matter alleged that the District violated the Educational Employment Relations Act (EERA)[1] by: (1) deviating from the parties' contractual grievance arbitration policy without providing the Sacramento City Teachers Association (SCTA) advance notice and an opportunity to meet and negotiate over the decision and/or the

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

negotiable effects thereof; and (2) failing to provide SCTA with relevant and necessary information in a timely fashion. The ALJ found the District liable for both alleged violations. The District excepts to the ALJ's unilateral change findings and associated remedy. SCTA filed no exceptions and urges us to deny the District's exceptions.[2]

Based on our review of the proposed decision, the entire record, and relevant legal authority, we conclude that the record supports the ALJ's factual findings and that the proposed decision's conclusions of law are consistent with applicable law. Accordingly, we adopt the Proposed Decision as the decision of the Board itself, as supplemented by the following discussion.

FACTUAL BACKGROUND

We summarize the relevant facts, which are fully set out in the attached proposed decision, to provide context to our decision.[3]

The District and SCTA are parties to a collective bargaining agreement (CBA) which includes, in Article 4, a grievance-arbitration provision. Article 4 establishes procedures for resolving a grievance, which the CBA defines as "an allegation by one

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[2] We affirm those portions of the proposed decision to which no party excepted, namely, the ALJ's finding that the District violated EERA section 3543.5, subdivisions (a), (b), and (c) when it delayed for more than seven weeks before responding to SCTA's information request, and the proposed remedy associated with that violation. Because those portions of the proposed decision are not before us on exceptions, they remain non-precedential; in other words, they are final and binding only on the parties to this case. (PERB Regs. 32215, 32300, subd. (c); *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.) Also, as neither party excepted to the ALJ's proposed remedy for the information request violation, we incorporate that remedy into our order.

[3] The Proposed Decision's findings of fact are based in part on stipulated facts and joint exhibits.

or more members of the bargaining unit or the Association that a member(s) has been adversely affected by a violation, misrepresentation, or misapplication of a specific provision of this Agreement." The CBA's multi-step grievance resolution process culminates in binding arbitration.

Article 4, at section 4.5.3, includes the following paragraph regarding grievance arbitration:

> "When arbitration has been requested, the parties may mutually agree on an arbitrator or shall contact the American Arbitration Association [(AAA)] for a list of arbitrators in accordance with [AAA] procedures. . . . [The designated arbitrator] shall proceed to hear the grievance under the voluntary rules of the [AAA] insofar as said rules do not conflict with the grievance procedure in this Agreement."

The applicable AAA Labor Arbitration Rules include the following provisions under Rule 3 (Jurisdiction):

> a. "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
>
> b. "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause."

The parties' CBA also expressly incorporates by reference a "Framework Agreement" that the parties negotiated and signed on November 5, 2017. The Framework Agreement addresses, among other things, SCTA bargaining unit employee salary schedules.

In August 2018, the parties disagreed about the meaning of the salary schedule provision in the Framework Agreement and how that provision should be interpreted and applied. SCTA contended that the salary schedule provision obligated the District to adopt, effective for the 2018-2019 school year, the certificated salary schedules that SCTA had proposed during collective bargaining, subject to an expenditure cap of 3.5% of District expenditures during that 2018-19 year only. The District contended that the salary schedule provision merely required it to adopt a new salary schedule with a total cost of not more than 3.5% of District expenditures in each year of the schedule.

On September 12, 2018, SCTA filed a grievance alleging that the District violated the salary schedule provision of the Framework Agreement. On September 17, SCTA moved the salary schedule grievance to arbitration and asked AAA to begin administering the arbitration.

By correspondence dated September 20, 2018, AAA assigned the parties' salary schedule arbitration a AAA case number, provided the parties with a list of possible arbitrators, and stated that the arbitration would be administered under AAA's Labor Arbitration Rules. Thereafter, the parties selected an arbitrator and began scheduling a hearing. In several communications during this process, the District reserved all potential defenses, including arbitrability.

On November 16, 2018, the District filed suit against SCTA in Sacramento County Superior Court. The District sought a judicial declaration that the salary schedule agreement did not constitute a valid contract and that SCTA therefore had no right to arbitrate an alleged violation thereof.

On November 19, 2018, the District informed SCTA, AAA, and the parties' agreed-upon labor arbitrator that the District did not believe the salary schedule grievance was arbitrable. The District further stated that it could not "agree to the proposed arbitration dates, or arbitration itself, unless or until the outcome of the action before the Superior Court calls for same."

The next day, District Superintendent Jorge Aguilar sent a letter to SCTA explaining the District's decision to file the Superior Court action. The letter stated in relevant part:

> "As stated in the District's correspondence to SCTA and the arbitrator dated November 19, 2018, we are not refusing to arbitrate, but instead seek a determination as to whether an enforceable contract subject to the Grievance process was reached, which is the appropriate course of action under the law. The District has preserved all of its procedural and substantive defenses in its communications on this matter, including the arbitrability thereof.
>
> "The District feels that this action is necessary to avoid wasting resources arbitrating a grievance that may not be arbitrable."

On January 7, 2019, SCTA filed its own motion in the Superior Court litigation, seeking an order compelling the District to arbitrate the parties' salary schedule grievance. At a February 6, 2019 hearing, the Court granted SCTA's motion. On February 22, 2019, the Court memorialized its ruling in a written order. The Superior Court held:

> "The parties agreed that the arbitrator would decide issues of arbitrability. The Parties' contract provides, in relevant part, that the Parties' arbitrator 'shall proceed to hear the grievance under the voluntary rules of the American Arbitration Association.' [Citation.] The AAA rules provide

> that it is the arbitrator who shall have the authority to rule on questions of arbitrability and the existence of a contract. They provide that the arbitrator shall have '**the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement,' as well as 'the power to determine the existence or validity of a contract of which an arbitration clause forms a part**.' [Citations.] The import of this delegation clause is clear and unmistakable. [Citations.] . . . Accordingly, the issue of whether the salary adjustment provision of the Framework agreement is void or enforceable is one properly to be determined by the arbitrator. The argument that the underlying agreement is void therefore does not establish that the dispute is not subject to arbitration. Because arbitration provisions are considered separable from the contracts in which they appear, 'in the absence of an attack on an arbitration agreement such agreement must be enforced even if one party asserts the invalidity of the contract that contains it.' [Citation.]"

(Emphasis in original.)

On May 2, 2019, an arbitrator ruled in favor of SCTA, holding that the Framework Agreement constituted a valid enforceable contract between the parties.

SCTA initiated the instant unfair practice charge in October 2018, and PERB's Office of the General Counsel issued a complaint in May 2019. After a formal hearing in October 2019, the ALJ issued the proposed decision in this matter on June 29, 2020. The District thereafter timely filed exceptions.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) However, to the extent that a proposed decision has adequately addressed issues raised by certain exceptions, the Board need not further analyze those exceptions.

(*Ibid*.) Here, the ALJ found that the District unilaterally changed the grievance arbitration process by refusing to arbitrate the salary schedule grievance. As part of her proposed remedial order, the ALJ ordered the District to make SCTA whole by reimbursing SCTA for legal expenses incurred while obtaining a court order directing the District to abide by the CBA's arbitration provision. The District excepts to the proposed decision's unilateral change findings and associated remedy. Although the ALJ adequately addressed the District's arguments that could impact the outcome of the case, we supplement the proposed decision to provide greater clarity regarding two issues.

I. Unilateral Changes to Contractual Grievance or Arbitration Provisions

A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case of an unlawful unilateral change, a charging party must prove that: (1) the employer took action to change policy; (2) the change concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and negotiating in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9 (*Merced*); *City of San Diego* (2015) PERB Decision No. 2464-M, p. 51 (*San Diego*), affirmed *sub nom*. *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898.)

Regarding the first element, there are three primary types of policy changes: (1) deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*Merced*, *supra*, PERB Decision No. 2740-M, p. 9; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.) PERB has long held that an employer's failure or refusal to process a grievance in accordance with collectively bargained procedures may be reviewed as a unilateral change. (See, e.g., *Omnitrans* (2010) PERB Decision No. 2143-M, pp. 6-8; *County of Riverside* (2003) PERB Decision No. 1577-M, p. 6.)

The District contends that it did not implement a policy change, even if—as the Superior Court, arbitrator, and ALJ all found—it violated the CBA when it refused to arbitrate the salary schedule grievance. In support of this claim, the District argues that it did not explicitly indicate any intent as to whether or not it would follow a similar course with respect to future grievances, and that its conduct therefore amounted to at most an isolated contract breach.

However, a single contract breach qualifies as a deviation from the status quo, change in established past practice, and/or enforcement of existing policy in a new way, if either of two circumstances are present: (1) the contract breach changes a policy or employment term applicable to future situations; or (2) the employer acts unilaterally based upon an incorrect legal interpretation or insistence on a non-existent legal right that could be relevant to future disputes. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 25; *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, p. 4 [finding unilateral change

because there was "no evidence to suggest" that the employer would in the future refrain from taking similar actions]; see also, e.g., *San Bernardino Community College District* (2018) PERB Decision No. 2599, p. 8; *City of Davis* (2016) PERB Decision No. 2494-M, p. 32; *County of Santa Clara* (2015) PERB Decision No. 2431, p. 19; *County of Riverside*, *supra*, PERB Decision No. 1577-M, p. 6.)[4]

Here, the District deviated from the status quo, changed established past practice, and/or enforced existing policy in a new way because it asserted a non-existent legal right to decide for itself whether the salary schedule agreement was a binding contract and whether related disputes were arbitrable. Although in certain communications the District referred to the salary schedule grievance as "extraordinary," the District manifestly retained for itself sole discretion to determine the confines of this amorphous category and was entirely silent on when and to what extent it might follow the same interpretation in the future.[5]

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[4] Because a unilateral change is a per se violation of the statutory duty to bargain, these standards apply irrespective of whether a party evidences a good faith belief in its mistaken position. (See, e.g., *City of Montebello* (2016) PERB Decision No. 2491-M, p. 10 [unilateral change destabilizes the collective bargaining relationship and therefore is unlawful irrespective of intent]; *County of Riverside* (2014) PERB Decision No. 2360-M, p.18 [same].)

[5] The District's conduct goes beyond seeking to remove from the arbitrator the duty to resolve arbitrability disputes, which deviated from the status quo. In fact, the District went so far as to repudiate the salary schedule agreement altogether by contending that it did not constitute a valid, enforceable contract because there was no mutual consent and/or because there was a mutual mistake. Although the District's conduct would amount to a unilateral change even if it had not outright repudiated the salary schedule provision, its repudiation constitutes an alternative basis for finding liability. (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, p. 8 [repudiation of collectively bargained provision, without bargaining to impasse or

The District also asserts that even if it committed an unlawful unilateral change, SCTA failed to adduce separate evidence showing that the unilateral change interfered with protected employee and union rights. However, long settled precedent establishes that an employer's unilateral change concurrently or derivatively violates EERA section 3543.5, subdivisions (a) and (b) because it necessarily interferes with employees and their union in the exercise of protected rights. (*San Francisco Community College District* (1979) PERB Decision No. 105, pp.19-20.)

We find that the District's exceptions to the ALJ's liability findings do not demonstrate any error impacting the outcome, and we affirm those findings.

II. Reimbursement of Legal Expenses

The Legislature has delegated to PERB broad powers to remedy EERA violations and to take any action the Board deems necessary to effectuate the Act's purposes. (EERA, § 3541.5, subd. (c); *San Diego*, *supra*, PERB Decision No. 2464-M, p. 42; *Mt. San Antonio Community College Dist. v. Public Employment* Relations Bd. (1989) 210 Cal.App.3d 178, 189-190.) 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* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should make whole all injured persons or organizations for the full amount of their losses and should withhold from the wrongdoer the fruits of its violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13 (*Pasadena*).) In addition to serving restorative and compensatory

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agreement, constitutes unlawful unilateral change]; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, p. 17 [same].)

functions, a Board-ordered remedy should also deter future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 3 (*Palo Alto*); *San Diego*, *supra*, PERB Decision No. 2464-M, pp. 40-42; *Pasadena*, *supra*, PERB Order No. Ad-406-M, pp. 12-13.)

A. Determining Whether to Award Legal Expenses as Make-Whole Relief

The ALJ's proposed order requires the District to reimburse SCTA for its legal expenses related to the Superior Court proceeding. In its exceptions brief, the District acknowledges that there are two alternate standards for determining whether to award legal expenses. One standard applies when PERB must determine whether to award a party legal expenses because of the opposing party's sanctionable conduct in litigating the same case before PERB. That standard, which is akin to Rule 11 of the Federal Rules of Civil Procedure, provides that PERB should make such an award if the offending party maintained a claim, defense or motion, or engaged in another action or tactic, that was without arguable merit and pursued in bad faith. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475a, p. 4; *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 7; *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, p. 5; *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19; *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.)

But a different standard applies when a party seeks to be made whole for legal expenses it reasonably incurred in a *separate* proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice. The Board has not required a Rule 11-type showing in such cases and has instead treated legal expenses the same as

medical expenses, lost pay, lost staff time, or any other loss. (See, e.g., *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30 [ordering reimbursement of legal expenses incurred in ancillary criminal case resulting from an employer's unfair practice]; see also *Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 8, fn. 6. ["While a make-whole remedial order under *Omnitrans* . . . may include, among other items, staff costs or attorney's fees reasonably incurred as a result of a respondent's unlawful conduct, any attorney's fees awarded pursuant to such make-whole principles normally may not include attorney's fees expended simply to litigate the unfair practice charge at issue—under the American Rule, such an attorney fee award is appropriate only as a litigation sanction," if the offending party acted without arguable merit and in bad faith].)

The District argues that PERB should only award such make-whole reimbursement when a party incurs legal expenses in an ancillary *criminal* proceeding, as in *Omnitrans*. However, PERB has followed the same principles irrespective of whether the ancillary proceeding is civil or criminal. (See *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M, p. 3 (*San Joaquin*) [ordering employer to reimburse legal expenses an employee reasonably incurred to defend himself in a separate civil action employer initiated for an unlawful purpose]; *San Diego*, *supra*, PERB Decision No. 2464-M, pp. 46-47 [ordering employer to reimburse future legal expenses union might reasonably incur in ancillary litigation necessary to fully remedy an unfair practice].)[6]

[6] In *Boling v. Public Employment Relations Bd.* (2019) 33 Cal.App.5th 376, the Court of Appeal modified several aspects of our remedy in *San Diego*, *supra*, PERB Decision No. 2464-M, but left untouched our award of legal expenses incurred in the

In *San Joaquin*, *supra*, PERB Decision No. 1524-M, we explicitly rejected a version of the argument the District makes here—that we should only award legal expenses reasonably incurred in a separate proceeding if we find the offending party took a bad faith position that lacked arguable merit. (*Id.* at p. 3.) We likewise decline the District's proposal, as it would eviscerate our make-whole standard and turn it into a counterfeit copy of our litigation sanction standard, at least for legal expenses incurred in an ancillary civil proceeding. We reaffirm that our current rule is logically sound. (See *Palo Alto*, *supra*, PERB Decision No. 2664, p. 8, fn. 6 [litigation sanctions are conceptually different from reimbursement of legal expenses reasonably incurred in an ancillary proceeding as a result of an employer's underlying conduct].) Indeed, we have explained that we order make-whole relief irrespective of whether the harm at issue involves legal professionals who spent time and resources in ancillary litigation or non-legal staff who spent extra time or resources in bargaining, communicating with members, or other functions. (*Ibid.*)

Having reaffirmed and clarified that our litigation sanction standard does not apply to a make-whole award of litigation expenses incurred in an ancillary proceeding to remedy, lessen, or stave off the impacts of unfair practices, it is appropriate to clarify one aspect of the proposed decision. Specifically, the preceding discussion illustrates that the outcome of this case would be the same even if the ALJ had been wrong in finding that the District's Superior Court litigation was baseless. Notably,

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ancillary proceeding. Therefore, on remand from the Court of Appeal, our remedial order once again required reimbursement of legal expenses. (*City of San Diego* (2019) PERB Decision No. 2464-Ma, p. 4.)

however, we have fully considered the record on that issue and agree that the District maintained a baseless position in Superior Court, even though this finding does not impact the outcome.[7]

B. Calculating Reasonable Legal Expenses

Based on our conclusion that the District must make the Association whole for reasonable legal expenses in order to restore the pre-violation status quo, the parties will need to engage in compliance proceedings to allow PERB the opportunity to determine the proper amount of such damages. We provide the following guidance for such proceedings.

First, we note that oft-used phrases such as "attorney's fee award" and "attorney's fees and costs" normally have the same meaning as the phrase we primarily use in the instant decision: "legal expenses." These phrases describe a broad category that includes virtually any item for which a law firm customarily bills a client, including, inter alia, billable professional services (meaning attorney and law clerk services and certain "paralegal" services that may be performed by legal assistants with or without a paralegal license), as well as incidental costs such as filing

[7] One can understand how the ALJ and the District became sidetracked into assessing whether the District maintained a baseless litigation position. In certain PERB cases, an employer's lawsuit against employees or a union is alleged to interfere with protected rights. In such cases, based on both the litigation privilege and related labor law principles, we do not find interference if the employer had a colorable basis to bring the lawsuit. (See, e.g., *County of Tulare* (2020) PERB Decision No. 2697-M, pp. 9-10.) Here, however, the District committed a unilateral change not by filing suit but rather by refusing to arbitrate a grievance. The Association would have reasonably incurred approximately the same level of legal expenses in filing a Superior Court petition to compel arbitration even if the District had not sued the Association first.

fees, electronic research fees, or fees for service of process. (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 888; see also *Missouri v. Jenkins by Agyei* (1989) 491 U.S. 274, 285-287 [paralegal and law clerk time compensable at prevailing market rate]; *Trustees of Const. Indus. and Laborers Health and Welfare Trust v. Redlands Ins. Co.* (9th Cir. 2006) 460 F.3d 1253, 1256-1257 [support staff work compensable if those costs not already built into attorney's hourly fees].) This definition of legal expenses is particularly appropriate in compensatory cases such as this one, given that our precedent allows compensation even for staff who do not work in legal services in any respect. (*Palo Alto*, *supra*, PERB Decision No. 2664-M, p. 8, fn. 6 [make-whole remedial order may include a union's staff costs reasonably incurred as a result of a respondent's unlawful conduct], citing *Camelot Terrace, Inc. v. NLRB* (D.C. Cir. 2016) 824 F.3d 1085, 1092-1093 [upholding National Labor Relations Board's order that employer reimburse union for bargaining costs as a remedy for having engaged in bad faith bargaining].)

The lodestar method is the most familiar and accepted means of determining reasonable fees for professional services. Under this approach, courts initially consider evidence regarding two central factors: (1) the number of hours reasonably expended, and (2) reasonable market rates for such hours. (*Blum v. Stenson* (1984) 465 U.S. 886, 892-894; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*). After calculating the basic lodestar fee, a court may enhance or reduce the amount based upon numerous factors. (*Evon v. Law Offices of Sidney Mickell* (9th Cir. 2012) 688 F.3d 1015, 1033 fn. 11; *Ketchum*, *supra*, 24 Cal.4th at p. 1132; *PLCM Group v.*

Drexler (2000) 22 Cal.4th 1084, 1096 (*PLCM Group*); *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859.)

In determining reasonable hourly rates under the lodestar approach, courts generally look first at prevailing market rates for private law firm staff with similar experience. (*Ketchum*, *supra*, 24 Cal.4th at p. 1133.) This is equally true even if the personnel in question work for a nonprofit, government agency, or in-house legal department, and/or are paid a flat salary, charge discounted rates, or never billed their client at all. (See, e.g., *Serrano v Unruh* (1982) 32 Cal.3d 621, 643 [linking reasonable rate for public interest attorneys to prevailing billing rates of comparable private attorneys].) For this reason, a party's use of attorneys who work pro bono, or who are paid a flat salary rather than paid hourly, is not reason enough to switch from a lodestar approach to a "cost-plus" approach focusing on the actual salaries of the attorneys involved and the overhead costs of their employer. (*Ibid*. [court did not abuse its discretion in refusing to grant discovery into evidence potentially relevant to a cost-plus calculation].)[8]

The lodestar method is a preferred approach in a wide variety of contexts, including circumstances in which the primary goal of the calculation is to compensate a party for costs it incurred due to the other party's offending conduct. (See, e.g., *Goodyear Tire & Rubber Co. v. Haeger* (2017) 137 S. Ct. 1178, 1186-1190 (*Haeger*), reversing *Haeger v. Goodyear Tire & Rubber Co.* (9th Cir. 2016) 813 F.3d 1233

[8] See also *Beverly Hills Properties v Marcolino* (1990) 221 Cal.App.3d Supp 7, 11 [A tenant's entitlement to fees under Civil Code section 1717 is not impacted by the fact that a civil legal services nonprofit provided him with free representation].

[leaving undisturbed lower court's decision to use lodestar method, but holding that lower court erred in failing to limit its sanction award to a compensatory purpose, which would require it to order reimbursement solely for those attorney hours incurred due to the other party's offending conduct]; see also *Ketchum, supra,* 24 Cal.4th at p. 1136 [lodestar method presumptively appropriate under fee shifting statutes]; *PLCM Group*, *supra*, 22 Cal.4th at pp. 1097-1098 [lodestar method inappropriate in contract matters].) Even when an attorney representing a prevailing class is paid a percent of a common fund, courts may double check the award for fairness by using the lodestar method as a cross-check. (*Laffitte v. Robert Half Internat. Inc.* (2016) 1 Cal.5th 480, 504-506.)

In *PLCM Group*, the California Supreme Court held that even when determining fees for in-house counsel, the lodestar approach is generally preferred to a cost-plus approach, though the Court noted that in exceptional circumstances other methodologies may be acceptable. (*PLCM Group*, *supra*, 22 Cal.4th at p. 1097.) The Court also noted that the lodestar approach is a flexible one and need not always lead to a higher payment than a cost-plus approach, particularly given that courts have leeway in making upward and downward adjustments. (*Id.* at pp. 1096 & 1097; see also *Haeger*, *supra*, 137 S. Ct. at p. 1186 ["A district court has broad discretion to calculate fee awards."].)

The California Court of Appeal's decision in *State v. Pacific Indemnity Co.* (1998) 63 Cal.App.4th 1535 illustrates that a lodestar approach can be applied flexibly and reasonably to achieve fair compensatory results. In that case, the State of California was "entitled to damages that will make it whole, but no more." (*Id.* at p.

1556.) The court found that, based on the circumstances presented in which the State had used both in-house and outside counsel, the appropriate lodestar calculation could be divided into two parts. In the first part, covering work performed in the Attorney General's office, the court ordered reimbursement at the hourly rates the Attorney General's office charges state agencies under Government Code section 11044. (*Id.* at p. 1552.) For work performed by outside counsel the State hired, the court ordered reimbursement at the law firm's regular rate. (*Id.* at p. 1556.) Given that the fee award's primary purpose was compensatory, the court found no cause to order a multiplier, but the court did add to the State's award all incidental litigation expenses, and the court also ordered that interest be paid on all amounts. (*Ibid.*)[9]

Following the above-described precedent, we hold that, in general, the most appropriate methodology will be a lodestar approach that focuses on hours reasonably incurred and does not automatically reduce hourly market rates for attorneys who work in a nonprofit, government agency, or in-house legal department and/or who were paid a flat salary, charged discounted rates, or never billed their client. It is permissible, but not required, to use alternative methods as a cross-check on one

[9] California appellate courts have further illustrated this flexible approach when requiring an insurance company to reimburse an insured party for legal expenses incurred in advocating with or suing the company. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 (*Brandt*).) Such "*Brandt* fees" are deemed to be a mere element of damages, much like medical expenses that an injured party must bear, and a liable defendant must reimburse. (*Ibid.*; see, e.g., *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 806 (*Cassim*).) In *Brandt* fee cases, courts adopt a flexible approach focused on ensuring the injured party is fully made whole but not overcompensated. (See, e.g., *Cassim*, *supra*, 33 Cal.4th at pp. 807-813.)

another to determine an appropriate fee.[10] Moreover, it is appropriate to reimburse any incidental costs, as well as pre-judgment and post-judgment interest on all amounts.

As final guidance, we note two principles that we have not yet covered. First, although most legal expenses incurred in litigating the instant case are not reimbursable under our award, there is one potential exception: If disputes over the value of reimbursable legal expenses extend to such a degree that the Association is required to perform work beyond drafting an initial set of declarations and supporting briefing, then any additional, reasonable time the Association spends effectuating its legal expenses award is compensable as part of the make-whole remedy. (See, e.g., *Graham v. DaimlerChrysler Corp*. (2004) 34 Cal.4th 553, 580 [work on establishing amount of reasonable attorney's fees must be compensable in order to ensure that lengthy proceedings on that topic do not dissipate the value of order awarding legal expenses].) Normally, however, compliance proceedings to establish estimated

[10] Although we cannot predict what information may be presented during compliance, we are aware from having decided numerous cases involving the Association that it uses both in-house counsel and outside firms. Even if the Association used solely in-house attorneys and legal assistants to perform the Superior Court work at issue in this case, it is still appropriate to consider private law firm rates. Such rates may include, but are not limited to, rates the Association pays to outside firms in other matters; those rates may be particularly relevant if added work for in-house staff tended to lead the Association to hire outside firms to handle other work that otherwise it might have handled in-house. (Nierengarten, Nicholas N. (2012) "Fee-Shifting: The Recovery of In-house Legal Fees," *William Mitchell L. R.*, Vol. 39: Iss. 1, Article 10 [Available at: http://open.mitchellhamline.edu/wmlr/vol39/iss1/10, last accessed October 28, 2020] ["[F]or every hour that in-house counsel spent on the matter, the client lost an hour of legal services that could have been spent on other matters."].)

reasonable legal expenses should involve review of sworn declarations and should not lead to protracted litigation. (*City of Alhambra* (2009) PERB Decision No. 2037-M, p. 4; *Hacienda La Puente Unified School District* (1998) PERB Decision No. 1280, p. 8; see also *Serrano v. Unruh*, *supra*, 32 Cal.3d at p. 642 [explaining that one reason courts look to market rates rather than allowing discovery as to nonprofit attorney salaries is that neither parties nor courts should be forced to spend substantial time litigating the adequacy of a fee award].)

Second, compliance hearings involving legal expense reimbursement should follow general PERB principles. Thus, it is permissible to estimate appropriate damages even if, as is often the case, the exact measure of damages is uncertain. (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13; accord *Haeger*, *supra*, 137 S. Ct. at p. 1186 [The "essential goal" of a legal expenses award is "to do rough justice, not to achieve auditing perfection."] [internal citations omitted].)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the record in the case, it is found that Sacramento City Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c), by unilaterally deviating from the terms of the parties' grievance-arbitration policy, without providing SCTA notice and the opportunity to negotiate; and by failing to provide SCTA, in a timely fashion, with certain information necessary and relevant to SCTA's representation of bargaining unit employees.

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

A. CEASE AND DESIST FROM:

1. Unilaterally deviating from the terms of the parties' grievance-arbitration policy.

2. Failing to provide necessary and relevant information to SCTA pursuant to the requirements of EERA.

3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

4. Denying SCTA the right to represent bargaining unit employees in their employment relations with the District.

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

1. Make SCTA whole for losses it suffered as a result of the District's unlawful conduct, based on compliance proceedings as directed in this decision, including but not limited to: (a) reasonable legal expenses incurred in litigating *Sacramento City Unified School District v. Sacramento City Teachers Association, CTA/NEA*, Sacramento Superior Court Case No. 34-2018-00244737; and (b) reasonable legal expenses, if any, incurred in establishing the value of this award in compliance proceedings following the Association's initial papers documenting its estimate of reimbursable legal expenses. This award shall include interest at the rate of 7 percent per annum.

2. Provide, upon SCTA's request, any outstanding information responsive to SCTA's October 9, 2018 request for information.

3. Within 10 workdays after this decision is no longer subject to appeal, post at all District locations where notices to employees in the certified 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.[11]

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, or

[11] In light of the ongoing COVID-19 pandemic, the District shall notify PERB's 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 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 10 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. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13.)

the General Counsel's designee. The District 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.

Members Banks and Paulson joined in this Decision.

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-2945-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 (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by unlawfully deviating from the parties' collectively bargained grievance-arbitration machinery, without providing prior notice and the opportunity to negotiate; and by failing to provide Sacramento City Teachers Association (SCTA), in a timely fashion, with certain information necessary and relevant to SCTA's representation of bargaining unit employees.

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

A. CEASE AND DESIST FROM:

1. Unilaterally deviating from the terms of the parties' grievance-arbitration policy.

2. Failing to provide necessary and relevant information to SCTA pursuant to the requirements of EERA.

3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

4. Denying SCTA the right to represent bargaining unit employees in their employment relations with the District.

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

1. Make SCTA whole for losses it suffered as a result of the District's unlawful conduct, based on compliance proceedings as directed in this decision, including but not limited to: (a) reasonable legal expenses incurred in litigating *Sacramento City Unified School District v. Sacramento City Teachers Association, CTA/NEA*, Sacramento Superior Court Case No. 34-2018-00244737; and (b) reasonable legal expenses, if any, incurred in establishing the value of this award in compliance proceedings following the Association's initial papers documenting its

estimate of reimbursable legal expenses. This award shall include interest at the rate of 7 percent per annum.

2. Provide, upon SCTA's request, any outstanding information responsive to SCTA's October 9, 2018 request for information.

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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY TEACHERS ASSN., Charging Party, v. SACRAMENTO CITY USD, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2945-E PROPOSED DECISION (June 29, 2020)

Appearances: California Teachers Association, by Jacob F. Rukeyser, Attorney, for Sacramento City Teachers Association, CTA/NEA; Lozano Smith by Steve Ngo, Attorney, for Sacramento City Unified School District.

Before Katharine Nyman, Administrative Law Judge.

INTRODUCTION

An exclusive representative alleges in this case that a public school employer: (1) unlawfully changed the parties' collectively bargained grievance-arbitration machinery, without providing the exclusive representative prior notice and the opportunity to negotiate the decision and/or effects of the decision; and (2) unlawfully failed to timely provide the exclusive representative with necessary and relevant information in violation of the Educational Employment Relations Act (EERA).[1] The public school employer denies any violation of law.

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

PROCEDURAL HISTORY

On October 23, 2018, the Sacramento City Teachers Association (SCTA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Sacramento City Unified School District (District).

On October 23, 2018, SCTA requested that the PERB Office of the General Counsel expedite the processing of this unfair practice charge pursuant to PERB Regulation 32147.[2] On October 30, the District opposed SCTA's request, and SCTA filed a reply to the District's opposition.

On November 5, 2018, the PERB Office of the General Counsel denied the request to expedite the dispute.

On November 26, 2018, the District filed a position statement in response to the charge.

On December 13, 2018, SCTA filed an amended unfair practice charge with the Board. On January 28, 2019, the District filed an amended position in response to the amended charge.

On May 9, 2019, the PERB Office of the General Counsel issued a complaint alleging the District repudiated the parties' agreement on union leave time without providing SCTA with notice and an opportunity to bargain, changed the parties' grievance procedure without providing SCTA with notice and an opportunity to bargain, failed to bargain in good faith with SCTA over healthcare costs, and failed or

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

refused to provide SCTA with requested information that is necessary and relevant to its representational duties. This conduct is alleged to have violated EERA section 3543.5, subdivision (a), (b), and (c).

The District filed an answer to the complaint on June 3, 2019, denying the substantive allegations and asserting multiple affirmative defenses.

An informal settlement conference was held on June 26, 2019, but the matter was not resolved.

On September 27, 2019, after receiving a subpoena request from SCTA seeking the appearance of the District's counsel, SCTA was asked to provide an offer of proof. On October 2, 2019, SCTA filed a prehearing brief regarding the subpoena matters. On October 8, 2019, the District filed its response.

A pre-hearing conference was set October 11, 2019, but later cancelled after the parties reached agreement on the issues surrounding the subpoena request.

The parties participated in a formal hearing on October 23 and 24, 2019 in Sacramento. On the first day of hearing, both parties provided the Administrative Law Judge (ALJ) with a partial stipulated record which included a listing of stipulated facts and joint exhibits.[3] (PERB Reg. 32207.) At the start of the formal hearing, SCTA withdrew the allegations that the District repudiated the parties' agreement on union leave time without providing SCTA with notice and an opportunity to bargain, and failed to bargain in good faith with SCTA over healthcare costs.

[3] The stipulated record included 16 paragraphs of stipulated facts and 12 joint exhibits. All joint facts and exhibits were admitted into evidence at the outset of the hearing.

The case was submitted for decision on December 20, 2019, after receipt of post-hearing briefs.

FINDINGS OF FACT

Parties and Jurisdiction

SCTA is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e), of the District's certificated employees.

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Jorge Aguilar (Aguilar) is the District's Superintendent and Raoul Bozio (Bozio) is the District's In-House Counsel. Both Aguilar and Bozio are management employees within the meaning of EERA section 3540.1, subdivision (g).

Collective Bargaining Agreement

SCTA and the District are parties to a collective bargaining agreement (CBA) addressing the terms and conditions of employment for the certificated employees in SCTA's bargaining unit.

The parties' CBA includes, at Article 4, a grievance-arbitration provision setting out the procedures for resolving grievances, defined as "an allegation by one or more members of the bargaining unit or the Association that a member(s) has been adversely affected by a violation, misrepresentation, or misapplication of a specific provision of this Agreement." This contractual grievance-arbitration provision sets out a multi-step process for resolving grievances culminating in binding arbitration.

Article 4, section 4.5.3 of the parties' CBA states that:

> "When arbitration has been requested, the parties may mutually agree on an arbitrator or shall contact the American Arbitration Association for a list of arbitrators in accordance

> with American Arbitration Association [(AAA)] procedures. The grievant or designee and the superintendent's designee from the Human Resources Office shall alternatively strike names from such list until only one (1) name remains. This person shall be designated as the arbitrator and shall proceed to hear the grievance under the voluntary rules of the American Arbitration Association insofar as said rules do not conflict with the grievance procedure in this Agreement."

The most recent version[4] of the AAA labor arbitration rules, effective July 1, 2013, under the title Jurisdiction, state:

> a. "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
> b. "The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause."

The parties' CBA also expressly incorporates by reference a "Framework Agreement" that the parties negotiated and signed on November 5, 2017. The Framework Agreement addresses, among other things, an agreement on SCTA bargaining unit employee salary schedules.

The Framework Agreement Dispute

In August 2018, the parties had a disagreement about the meaning of the salary schedule provision in the Framework Agreement, and how that provision should

[4] The American Arbitration Association Labor Arbitration Rules were amended and effective July 1, 2013.

be interpreted and applied. SCTA contended that the salary schedule provision obligated the District to adopt, effective for the 2018-2019 school year, the certificated salary schedules that SCTA had proposed during collective bargaining, subject to an expenditure cap of 3.5% of District expenditures during that 2018-19 year only. The District contended that the salary schedule provision required the adoption of a new salary schedule with a total cost of not more than 3.5% of District expenditures.

On August 23, 2018, as a result of the parties' disagreement, SCTA Executive Director John Borsos (Borsos), in an email to Aguilar, informed the District that SCTA would be "proceeding to arbitration to resolve this and other outstanding matters regarding the implementation of the contract."

That same day, Aguilar responded to Borsos acknowledging that the parties had "a fundamentally different understanding of what was agreed to regarding the restructuring of the 2018-2019 salary schedule." Aguilar further stated that based on correspondence from Borsos, the District "will prepare accordingly for arbitration."

On September 12, 2018, SCTA formally filed a Level I grievance with the District, alleging the District violated the salary schedule provision of the Framework Agreement.

On September 17, 2018, SCTA submitted to the AAA a written demand that the parties' salary schedule grievance be submitted to arbitration, and that AAA commence administration of the arbitration. The District was copied on this correspondence.

On September 20, 2018, the AAA assigned the parties' salary schedule arbitration AAA Case Number 01-18-0003-4761 and provided the parties with a list of

possible arbitrators. The letter further stated that the arbitration would "be administered under AAA's Labor Arbitration Rules."

On October 1, 2018, Dulcinea Grantham of Lozano Smith, counsel for the District, responded to AAA providing the District's position on the proposed arbitrators. The letter stated the District anticipated that the hearing would take 5 days and that the District prefers that the hearing take place between the months of December 2018 and January 2019 at the District's office. The letter further stated:

> "Please note that in submitting our position above, the District does not waive any potential defenses to the grievance including, but not limited to, the arbitrability thereof."

On October 8, 2018, the District provided AAA with a second response, again providing its position on the proposed arbitrators and stating:

> "Please note that in submitting our position above, the District does not waive any potential defenses to the grievance including, but not limited to, the arbitrability thereof."

On October 10, 2018, AAA sent an email to both parties advising that arbitrator Kenneth Perea had been appointed Arbitrator and asking whether the parties would like the matter scheduled, heard and resolved on an expedited basis. On behalf of SCTA, Borsos agreed to an expedited arbitration process. The District, through Grantham, emailed AAA and SCTA on October 24, 2018 stating:

> "Given the significance of the issues involved in this case, the District does not agree to an expedited arbitration process here. We feel it is important that both sides have an opportunity to prepare their respective cases and ensure availability of any and all witnesses needed to testify in this

> matter. Without waiving any potential defenses to the grievance as noted in prior correspondence, we are happy to work with AAA and SCTA on possible dates that allow the matter to move forward in a timely manner while allowing sufficient time for consideration of the issues."

On November 6, 2018, Arbitrator Perea emailed the parties a series of available dates to schedule arbitration. That same date, SCTA responded that it was available for all suggested dates. On November 9, 2018, the District, responded and requested that it needed additional time to respond to the request.

On November 16, 2018, the District, filed a complaint in Sacramento County Superior Court against SCTA in Case No. 34-2018-00244737. The District sought a judicial declaration that the salary schedule agreement incorporated into the parties CBA "d[id] not constitute a valid contract" and that the "Framework Agreement is thus void and unenforceable, in part, and does not constitute a 'specific provision' of the CBA to which the parties are bound. Accordingly, the Framework Agreement—specifically as to Party 1, salary schedule adjustments—is neither grievable nor arbitrable under the CBA." That same day, the District forwarded a courtesy copy of the civil action to SCTA.

On November 19, 2018, Grantham, on behalf of the District, informed Arbitrator Perea, AAA and SCTA of the civil action and that it did "not believe this matter [was] arbitrable." Grantham further stated that the District "cannot agree to the proposed arbitration dates, or arbitration itself, unless or until the outcome of the action before the Superior Court calls for same."

On November 20, 2018, Aguilar sent a letter to SCTA explaining the District's decision to file the Superior Court action. The letter stated in relevant part:

> "As stated in the District's correspondence to SCTA and the arbitrator dated November 19, 2018, we are not refusing to arbitrate, but instead seek a determination as to whether an enforceable contract subject to the Grievance process was reached, which is the appropriate course of action under the law. The District has preserved all of its procedural and substantive defenses in its communications on this matter, including the arbitrability thereof.
> "The District feels that this action is necessary to avoid wasting resources arbitrating a grievance that may not be arbitrable."

On January 7, 2019, SCTA filed a motion to compel arbitration and stay proceedings in the Superior Court action. At a hearing on February 6, the Court granted SCTA's motion, ordering the District to proceed to arbitration before Arbitrator Perea over the parties' salary schedule dispute.

On February 22, 2019, the Sacramento Superior Court entered an order granting SCTA's motion to compel arbitration of the Framework Agreement and stay proceedings. In its ruling, the Superior Court held:

> "The parties agreed that the arbitrator would decide issues of arbitrability. The Parties' contract provides, in relevant part, that the Parties' arbitrator "shall proceed to hear the grievance under the voluntary rules of the American Arbitration Association." [Citation.] The AAA rules provide that it is the arbitrator who shall have the authority to rule on questions of arbitrability and the existence of a contract. They provide that the arbitrator shall have "**the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement," as well as "the power to determine the existence or validity of a contract of which an arbitration clause forms a part**." [Citations.] The import of this delegation clause is clear and unmistakable. [Citations.] … Accordingly, the issue of whether the salary adjustment provision of the Framework agreement is void or

> enforceable is one properly to be determined by the arbitrator. The argument that the underlying agreement is void therefore does not establish that the dispute is not subject to arbitration. Because arbitration provisions are considered separable from the contracts in which they appear, "in the absence of an attack on an arbitration agreement such agreement must be enforced even if one party asserts the invalidity of the contract that contains it." [Citation.]"

(Emphasis in original.)

On May 2, 2019, an arbitrator ruled in favor of SCTA, holding that the Framework Agreement constituted a valid enforceable contract between the parties.

Request for Information

On October 9, 2018, Borsos emailed the District's then-Chief Business Officer, John Quinto (Quinto), on behalf of SCTA to request "the amount each administrator received by individual in the cash out of vacation in 2017-18." SCTA Vice President Nikki Milevsky (Milevsky) was copied on Borsos' October 9 email.

On October 10, 2018, Milevsky separately emailed Quinto on behalf of SCTA and requested an explanation for the increase in administrator pay. Borsos was copied on Milevsky's October 10 email.

On October 19, 2018, Quinto responded to Milevsky, stating that he would research her question and get back to her. Borsos was copied on Quinto's October 19 email.

On October 23, 2018, Quinto responded to Milevsky. In his email, Quinto identifies "vacation payout" and "retro" as the reasons for the increase in administrator pay. Borsos was copied on Quinto's October 23 email.

That same day, Milevsky responded to Quinto, copying Borsos, and requesting that the District "[p]rovide SCTA with a breakdown as to how much was vacation payout and how much retro salary increase for each administrator by name, position title and site or department."

On approximately October 24, 2018, Quinto forwarded Borsos' October 9 email request to Bozio.

On November 2, 2018, Bozio responded to Milevsky's October 23 email, stating that the District had located responsive records and was in the process of "compiling these voluminous electronic records." Borsos was not sent a copy of this email.

On November 16, 2018, Borsos followed up on his October 9 email, stating that the District "seems to be dragging [its] feet on this and [Milevsky's] additional, related request on these items."

On November 30, 2018, Bozio responded to Borsos, stating that the District had identified responsive records and asked for clarification on the "reference to Ms. Milevsky's, 'additional, related request on these items'." Bozio further stated that the District was in the process of providing notice to all employees who had received a vacation cash out in order to inform them that their compensation information was going to be released. Once notification was completed, Bozio said the District would provide SCTA with the responsive documents.

On December 3, 2018, SCTA and the District exchanged additional emails regarding SCTA's request. Milevsky was copied on the December 3 emails, and all subsequent emails regarding SCTA's request.

On December 12, 2018, Bozio furnished some information responsive to Borsos's October 9 request.

On December 18, 2018, SCTA objected to the information provided, alleging that the information was incomplete. Borsos stated:

> "We asked for the vacation payout for all administrators. Administrators would include all those employees represented by UPE as well as all non-represented management and confidential employees. Additionally there are [sic] appear to be several administrators who are missing. If administrators did not receive a payout can you also indicate those who did not receive a payout to ensure that all are accounted for."

On January 7, 2019, Bozio responded to SCTA acknowledging the clarification, and on January 14, 2019, Bozio provided additional information to SCTA.

ISSUES

Did the District violate the duty to meet and confer in good faith by: (1) unilaterally changing the terms of the grievance-arbitration policy, without providing SCTA notice and the opportunity to bargain that decision or the effects of that decision and (2) failing to timely respond to SCTA's October 9, 2018 request for information.

CONCLUSIONS OF LAW

Unilateral Change

The PERB complaint alleges that the District violated its duty to meet and confer in good faith by unilaterally changing the grievance arbitration process. Unilateral changes to polices with the scope of representation are "per se" violation of the duty to negotiate in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143; *San Joaquin County Employees Association v. City of*

Stockton (1984) 161 Cal.App.3d 813.) Absent a valid defense, a respondent commits an unlawful unilateral policy change if: (1) it took action to change policy; (2) the change in policy 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. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262; *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

A policy may be established by written agreement or regular and consistent past practice. For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M; *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda*).)

1. Change in Policy

The dispute in this case is whether the District made a change in policy to the grievance-arbitration provision of the parties' CBA when it made the decision to go to the Sacramento Superior Court for a determination about whether the parties' dispute over the Framework Agreement was an arbitrable issue, or whether the District's actions conformed to the parties' CBA.

The District argues that it had a good faith belief that there was no agreement between the parties on the Framework Agreement, from which "a violation, misinterpretation, or misapplication of a specific provision" could be adjudicated under the parties' CBA. It states that it was not refusing to arbitrate. But, that because an invalid contract could not have been incorporated into the CBA, the District believed the parties could not use the CBA's grievance arbitration procedure until the threshold question of whether there was a valid contract was first adjudicated. According to the District, this "very extraordinary case of misunderstanding" justified their decision to seek adjudication of this issue at the Sacramento Superior Court.

The District's argument, however, fails to address the language of the parties' grievance arbitration policy or the policy's incorporation of the AAA rules. Article 4 of the parties' CBA provides for a multi-step process for resolving grievances defined as "an allegation by one or more members of the bargaining unit or the Association that a member(s) has been adversely affected by a violation, misrepresentation, or misapplication of a specific provision of this Agreement" which ends in binding arbitration. The CBA further provides that once arbitration has been initiated, the parties' arbitrator "shall proceed to hear the grievance under the voluntary rules of the American Arbitration Association." According to the AAA rules, the arbitrator has the authority to rule on questions of arbitrability and the existence of a contract.

The parties stipulated that the CBA expressly incorporated by reference the Framework Agreement, which included an agreement on employee salary schedules. Therefore, it was incumbent on the District to submit any question as to whether the Framework Agreement was a valid contract subject to arbitration directly to the

arbitrator, not the Sacramento Superior Court. This same conclusion was also reached by the Sacramento Superior Court. By instead choosing to remove this decision-making authority from the arbitrator and seek a judicial adjudication from the Sacramento Superior Court, the District made a change to the parties' grievance arbitration policy.

2. Scope of Representation

The second element, whether the change in policy concerns a matter within the scope of representation, is also met. The Board has long held that grievance procedures, including procedures for arbitration are within the scope of representation. (*County of Riverside* (2003) PERB Decision No. 1577-M p. 6, citing *Anaheim City School District* (1983) PERB Decision No. 364; *Baldwin Park Unified School District* (1991) PERB Decision No. 903.) Therefore, the District's change to the parties' grievance arbitration policy concerns a matter within the scope of representation.

3. Notice or Opportunity to Bargain

The third element of a unilateral change case requires the charging party to demonstrate that the alleged change of policy or practice was taken without giving the exclusive representative notice and an opportunity to bargain over the change. Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative reasonable time to decide whether to demand negotiations. (*State of California (Board of Equalization)* (1997) PERB Decision No. 1235-S.) Further, the notice must be sufficiently clear and reasonably understood to mean that

the employer is going to take certain action. (*Lost Hills Unified Elementary School District* (2004) PERB Decision No. 1652.)

The District argues that notice was provided to SCTA, but that SCTA chose to overlook it. In support of its position, the District cites to Grantham's October 24 email stating that the District would work with SCTA and AAA to look for possible dates to move forward with arbitration, "[w]ithout waiving any potential defenses to the grievance as noted in prior correspondence" and Borsos' testimony admitting to reading the above sentence as "potentially an argument that the District would raise arbitrability at some point."

This sentence highlighted by the District in Grantham's October 24 email provided SCTA with notice only that the District may raise the issue arbitrability at some point in the future. The sentence did not provide SCTA with notice that the District would seek direction from the Sacramento Superior Court as to the arbitrability of the Framework Agreement instead of allowing the issue to be decided by an AAA arbitrator as dictated by the parties' grievance arbitration policy. The District's notice is not sufficiently clear and cannot be reasonably understood to mean that the District was going to take certain action. Therefore, the District did not provide SCTA with notice or an opportunity to bargain regarding the arbitration grievance policy prior to the District's implementation of the change.

4. Continuing Effect on the Bargaining Unit

The final element in the unilateral change test is whether the respondent's conduct has a continuing impact on employees' terms and conditions of employment.

According to the District, it's action cannot be considered a change in policy, but instead an isolated breach of contract because the District has filed no other similar-type action.

The Board, however, has long held that a contract breach can support a unilateral change claim when the breaching party asserts that the contract authorizes its conduct. (*Regents of the University of California* (Davis) (2010) PERB Decision No. 2101-H (*UC Davis*) citing *Hacienda*, *supra*, PERB Decision No. 1186.) As the Board held, a contract breach must be generally applicable to future situations, either through the circumstances or the parties' assertion that their conduct is legally permitted, to have a "generalized effect or continuing impact" sufficient to constitute a unilateral change. (*State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S.)

Here, the District maintained, and continues to maintain that because of the extraordinary nature of the present dispute, it believes that filing the civil action was the most appropriate course of action for this instance. It maintains this belief without acknowledgement of the language of Article 4 of the parties' CBA mandating that the grievance be heard under the voluntary rules of the AAA, or language of the AAA labor arbitration rules granting the arbitrator authority to determine the existence or validity of a contract. The District's interpretation is therefore contrary to the language of the CBA itself. Therefore, I find the District's contract breach to have a "generalized effect or continuing impact" sufficient to constitute a unilateral change as a result of its assertion that its conduct was legally permitted. (*State of California (Departments of*

Veterans Affairs & Personnel Administration), *supra*, PERB Decision No. 1997-S.) Accordingly, the fourth element of the unilateral change test has been met.

District's Affirmative Defenses

1. Litigation Privilege

The District defends its position first by stating its action in seeking declaratory relief though the court system is protected under the litigation privilege and cannot be the basis for a claim for unilateral change or bad faith.

The litigation privilege is set forth in Civil Code section 47, subdivision (b), and applies to "any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [citations omitted.]" (*County of San Bernardino* (2018) PERB Decision No. 2556-M citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212.) The purposes of the litigation privilege include affording litigants and witnesses access to the courts without fear of being subsequently harassed by derivative tort actions, encouraging open channels of communication, promoting complete and truthful testimony, giving finality to judgments, and avoiding unending litigation. (*Ibid*. citing *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 955.)

The Board first addressed the litigation privilege in *County of San Bernardino*, *supra*, PERB Decision No. 2556-M. There, the Board, by adopting the proposed decision by the administrative law judge, relied on the litigation privilege to find an employer agent's superior court declaration to have been protected speech. (*Ibid*.)

The administrative law judge found that the rules of privilege, including the litigation privilege, applies in formal hearings for unfair practice cases. (*Id.* at pp. 12-13.)

The Board addressed the litigation privilege a second time in *County of Riverside* (2018) PERB Decision No. 2591. In a footnote, the Board stated:

> "We note, however, that neither the litigation privilege nor *County of San Bernardino*, *supra*, PERB Decision No. 2556-M, protects baseless litigation that an employer brings with the intent of interfering with or retaliating against employees for their exercise of protected rights. (*State of California (State Personnel Board)* (2004) PERB Decision No. 1680-S, adopting warning letter at pp. 2-4.)"

First, the litigation privilege extends to communications. While communications exist discussing the District's intentions, the foundation of the unlawful unilateral action is the District's decision to seek judicial adjudication. The actual content of the civil complaint or the District's communications sent to SCTA addressing the matter need not be relied upon.

Instead, the District contends that the litigation privilege extends beyond communications, to encompass the very existence of the superior court action. In support of its position, the District relies on *California Teachers Association v. State of California* (1999) 20 Cal.4th 327. The District contends that in this case, the California Supreme Court held that "a teacher's request for an administrative hearing, in and of itself, is protected by the litigation privilege" and quotes the following language in support of that proposition:

> "to deter teachers from requesting hearings in cases that prove to be unsuccessful, even though the teacher's claim may be reasonable–renders the statute unconstitutional" "under the litigation privilege."

I do not find this case supportive of the District's position. This case concerns the constitutionality of Education Code section 44944, subdivision (e), that requires a tenured teacher, who files an administrative appeal from a decision dismissing or suspending the teacher and loses, to pay half the costs of the administrative hearing. The language relied on by the District when read in completion, is a summary of the language of section 44944 subdivision (e) with no reference to the litigation privilege.

The single reference to litigation privilege was made when the court cited to *Pacific Gas & Electric Co. v. Bear Sterns & Co.* (1990) 50 Cal.3d 1118, 1130-1137, that "We assure all participants in litigation … 'the utmost broad privilege for publications made in the course of litigation. [Citations.] The policy of encouraging free access to the courts is so important that the litigation privilege extends … [citation] … to any action except one for malicious prosecution. [Citations." (*Id*. at pp. 1132-3, fns. Omitted.) The purpose of the privilege is to protect litigation communications, not baseless lawsuits. Therefore, the District's argument that its actions, as a whole, are covered from the litigation privilege is rejected.

2. Unclean Hands

The District also contends that the doctrine of unclean hands should preclude SCTA from relief because SCTA filed the instant unfair practice charge during the pendency of a grievance with the District under Article 4 of the parties' CBA. The District further argues that where it made a single attempt to ascertain the validity of an agreement in Superior Court, SCTA engaged in multiple PERB matters that should have been resolved in arbitration.

The California Supreme Court recognized the doctrine of unclean hands stating:

> "The rule is settled in California that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy."

(*Lynn v. Duckel* (1956) 46 Cal.2d 845, 850.)

I do not find merit in the District's argument, and see no evidence establishing that SCTA has violated conscience, good faith or other equitable principle in its prior conduct. As an exclusive representative, within the meaning of EERA section 3540.1, subdivision (e), of the District's certificated employees, SCTA has the right to represent its members in their employment relations with public school employers. (EERA § 3543.1, subd. (a).) This right necessarily includes the right to represent their member in the filing of unfair practice charges. Moreover, PERB has the jurisdiction to resolve unfair practices in cases where the employer's conduct also constitutes the breach of an existing collective bargaining agreement. (*State of California (Departments of Veterans Affairs & Personnel Administration)*, *supra*, PERB Decision No. 1997-S.)

Simply because an employee organization files an unfair practice charge concurrent with a pending grievance, does not amount to unclean hands. The District's argument that unclean hands preclude SCTA from relief is rejected.

Accordingly, I conclude that the District made an unlawful unilateral change in violation of EERA section 3543.5, subdivision (c). I further conclude that by the same conduct, the District interfered with the rights of bargaining unit employees to be represented by SCTA in violation of section 3543.5, subdivision (a), and denied SCTA its right to represent those employees in violation of section 3543.5, subdivision (b).

Request for Information

An exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty to represent bargaining unit employees. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485 at p. 17 (*Petaluma City ESD*).) PERB uses a liberal, discovery-type standard similar to that used by the courts, to determine relevance. (*Id.* at p. 16.)

When a union requests relevant information, the employer must either fully supply the information or timely and adequately explain its reasons for not doing so, and the employer bears the burden of proof as to any defense, limitation, or condition that it asserts. (*Sacramento City Unified School District* (2018) PERB Decision No. 2597, citing *Petaluma City ESD*, *supra*, PERB Decision No. 2485, pp. 19, 24.) A party answering a request for information must exercise the same diligence and thoroughness as it would "in other business affairs of importance," and a charging party need not show that it suffered harm or prejudice as a result of a responding party's lack of care. (*Ibid*.)

Failing to provide necessary and relevant information upon request, absent a valid defense, is a per se violation of the duty to negotiate in good faith. (*Petaluma*

City ESD, *supra*, PERB Decision No. 2485, pp. 19-20.) Even an unnecessary delay in providing such information constitutes a violation. (*Ibid*.) Thus, an employer that considers the request to be overly broad, burdensome, or ambiguous must still respond in a timely manner, either by attempting to comply, seeking clarification, or notifying the union of any concerns it has about producing the information. (*Id*., citing *UC Davis*, *supra*, PERB Decision No. 2101-H, pp. 35-36, *Keauhou Beach Hotel* (1990) 298 NLRB 702, and *United States Postal Service* (1985) 276 NLRB 1282, p. 1287; *Trustees of the California State University* (2004) PERB Decision No. 1597-H, p. 3 (*Trustees of the CSU*).)

The employer may raise bona fide objections to the form or the cost of the information requested. (*Los Rios Community College District* (1988) PERB Decision No. 670, pp. 12-13 (*Los Rios CCD*).) However, it must timely assert its objections to disclosure. (*Petaluma City ESD*, *supra*, PERB Decision No. 2485, p. 23; see also *Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 10.) In such instances, both parties must make a good faith attempt to resolve those objections in a mutually satisfactory way. (*Los Rios CCD*, *supra*, pp. 12-13; *Trustees of the CSU*, *supra*, PERB Decision No. 1597-H, p. 3)

The duty to supply requested information requires the same diligence and thoroughness exercised in other business affairs of importance. (*Petaluma City ESD*, *supra*, PERB Decision No. 2485, p. 19, citing *Compton Community College District* (1990) PERB Decision No. 790, adopting proposed dec., at p 29 (*Compton CCD*) and *NLRB v. Truitt Mfg. Co*. (1956) 351 U.S. 149, 153-154.) The fact that an employer eventually furnishes the requested information does not excuse an unreasonable

delay. (*Petaluma City ESD*, p. 20, citing *Compton CCD*, p. 5, *Chula Vista City School District* (1990) PERB Decision No. 834, p. 51, and *K & K Trans. Corp. Inc*. (1981) 254 NLRB 722.) The reasonableness of the delay turns on the individual circumstances of each case. (*Petaluma City ESD*, p. 19.) However, the exclusive representative is not required to demonstrate that it was prejudiced to establish that the employer's delay in responding was unreasonable. (*Id*. at pp. 23-24.)

1. Relevance of the Requested Information

The District has not, at any point in time, disputed the relevance of the information SCTA requested in its October 9 request. Nevertheless, the information requested by SCTA was the dollar amount District administrators received as a result of vacation cash out during the 2017-2018 school year. This information was requested during the period in which the parties were discussing the parameters of the Framework Agreement. And, as Borsos testified, SCTA requested the information in order to better evaluate the District's claims that its financial distress precluded compliance with its contractual obligations set forth in the Framework Agreement's salary schedule provision. The Board has held that necessary and relevant information includes data relevant to a party's bargaining position, such as information to assess an employer's claims used to justify concessionary proposals (*City of Davis* (2018) PERB Decision No. 2582-M.) To the extent the information sought in SCTA's October 9 information request was relevant to the District's position on the parameters of the Framework Agreement, such information is necessary and relevant.

2. Timing

On October 9, 2018, Borsos first submitted his request for "the amount each administrator received by individual in the cash out of vacation in 2017-18." The request was sent to Quinto, the District's Chief Business Officer, and copied to Cancy McArn, the District's Chief Human Resources Officer. Five- and one-half weeks later, Borsos sent a follow-up email to Bozio stating that the District seemed to "dragging [its] feet" on responding to the October 9 information request. Two weeks later, Bozio sent an email acknowledging SCTA's request, stating that it had identified responsive records, but that it would be initiating a process to "provide notice to all employees who have received a vacation cash out in order to alert them that their compensation information is being released." Bozio further stated that the District would produce responsive documents once the notification process had been completed. In total, nearly seven- and one-half weeks elapsed between Borsos' initial October 9 information request and the District's first response.

In *Petaluma City ESD*, *supra*, PERB Decision No. 2485, the union requested information during reopener negotiations about the costs of step and column salary increases for employees. (*Id*. at p. 20.) The Board found the requested information to be presumptively relevant and held that the employer's six-week delay in responding to the request, without any contemporaneous explanation, was unreasonable under the circumstances. (*Id*. at pp. 20-23.) It rejected the notion that the allegation should have been dismissed because the negotiating teams were not meeting at the time and the union did not show that it was prejudiced by the delay. (*Id*. at pp. 24-25; see also *Compton CCD*, *supra*, PERB Decision No. 790, p. 5, adopting proposed dec., at

p. 29.)

Similarly, here, the District failed to say anything in response to SCTA's information request for over seven weeks, and did not provide any information for nearly two additional weeks. This is a significant delay, without any contemporaneous explanation. The District attempts to explain its delay by highlighting the indirect path the October 9 request took getting to Bozio. However, at hearing, Bozio testified that while he is generally responsible for receiving and responding to requests for information from SCTA, the parties have no official or unofficial agreement that information requests must be sent him. The October 9 information request was sent to the District's Chief Business Officer and a copy was sent to the Chief Human Resources Officer. Without a policy stating that all requests are required to be sent to the District's In-House Counsel, the District's reliance on the fact that the request was first sent to Quinto is unreasonable. SCTA has established that the District has not exercised the same diligence and thoroughness as it would in other business affairs of importance. The District's failure to establish the reasonableness of its delay in responding to Borsos' request for necessary and relevant information constitutes a violation of the duty to meet and confer in good faith.

REMEDY

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

> "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."

The District failed to meet and negotiate in good faith with SCTA violation of EERA section 3543.5, subdivision (c), by unilaterally changing the terms of the grievance-arbitration policy, without providing SCTA notice and the opportunity to bargain that decision or the effects of that decision. The appropriate remedy is an order that the District restore the status quo. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 31.) In addition, SCTA incurred attorney fees to represent it in the proceeding before the Sacramento Superior Court. It is necessary to require the District to reimburse SCTA for its reasonable attorneys fees and litigation expenses incurred as a result of having to defend itself against the District and thereby make SCTA whole. (*Omnitrans* (2009) PERB Decision No. 2030-M, p. 30.) These proceedings would not have occurred but for the District's unilateral change to the parties' negotiated grievance arbitration policy.

It is also found that the District failed to meet and negotiate in good faith in violation of EERA section 3543.5, subdivision (c), when it failed to timely provide necessary and relevant information requested by SCTA. By the same conduct, the District interfered with the rights of employees to be represented by SCTA in violation of EERA section 3543.5, subdivision (a), and denied SCTA the right to represent bargaining unit employees in their employment relations with the District in violation of EERA section 3543.5, subdivision (b). It is appropriate to order the District to cease and desist from such conduct.

In cases involving a failure to provide necessary and relevant information, an employer is typically ordered to provide the requested information upon the charging party's request. (*Trustees of the California State University*, *supra*, PERB Decision No. 613-H, adopted proposed decision, p. 22.) The District is ordered to provide, upon SCTA's request, any outstanding information responsive to SCTA's October 9 request for information.

Finally, it is appropriate to order the District to post a notice incorporating the terms of the order at all locations where notices to bargaining unit employees are customarily posted. In addition to the physical posting requirement, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to regularly communicate with bargaining unit employees. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) The posting requirement effectuates the purposes of EERA by informing employees that the controversy has been resolved and the employer will comply with the ordered remedy. (*Regents of the University of California* (1998) PERB Decision No. 1263-H.) On May 7, 2020, in response to the COVID-19 pandemic, Governor Newsom issued Executive Order N-63-20 suspending physical posting requirements.[5] In light

[5] Executive Order N-63-20, paragraph 10, states:

> "Any statute or regulation that requires a public employer to post notice on 'employee bulletin boards' is suspended, provided that the public employer provides such notice to its employees through electronic means, such as through electronic mail to its employees, posting on an employer-operated website frequented by its employees, or any other electronic means customarily used by the public employer to communicate with its employees."

of the ongoing pandemic, the District shall notify the PERB General Counsel or his/her designee if a majority of the bargaining unit employees are not physically reporting to work during the time the physical posting would commence. If appropriate, the PERB General Counsel will issue amended posting instructions. (*City of Culver City* (2020) PERB Decision No. 2731-M, p. 29, fn. 13.)

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 3543.5, subdivisions (a), (b), and (c), by unilaterally changing the terms of the parties' grievance-arbitration policy, without providing SCTA notice and the opportunity to bargain that decision or the effects of that decision and by failing to timely respond to SCTA's October 9, 2018 request for information.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the terms of the parties' grievance-arbitration policy.

2. Failing to provide necessary and relevant information to SCTA pursuant to the requirements of EERA.

3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

4. Denying SCTA the right to represent bargaining unit employees in their employment relations with the District.

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

1. Make SCTA whole for monetary losses and losses it may have suffered as a result of litigating *Sacramento City Unified School District v. Sacramento City Teachers Association, CTA/NEA*, Sacramento Superior Court Case No. 34-2018-00244737, including but not limited to the reimbursement of reasonable attorneys fees and litigation expenses incurred in defending itself. This award shall include interest at the rate of 7 percent per annum.

2. Provide, upon SCTA's request, any outstanding information responsive to SCTA's October 9 request for information.

3. 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

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. The District 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 TO APPEAL

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-8231
Facsimile: (916) 327-9425
E-File: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile

Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)