STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MONICA FACULTY ASSOCIATION,
Charging Party,Unfair Practice
Case Nos. LA CE 3988
v.êLA CE 3995
LA CE 4001

SANTA MONICA COMMUNITY COLLEGE PROPOSED DECISION
DISTRICT,(1/14/2000) Respondent.

Appearances: Lawrence Rosenzweig, Attorney, for Santa Monica
Faculty Association; Atkinson, Andelson, Loya, Ruud & Romo, by
James Romo, Attorney, for Santa Monica Community College District.
Before Gary M. Gallery,Administrative Law Judge.

PROCEDURAL HISTORY

Three unfair practice cases have been consolidated for formal hearing and decision. In essence, the complaints charge the employer with refusing to provide information, bad faith bargaining and threatening reprisal for protected activity.

The first case, LA CE 3988, commenced on September 17, 1998, when the Santa Monica Faculty Association (SMFA or Association) filed an unfair practice charge against the Santa Monica Community College District (District). After investigation, and on December 12, 1998, the general counsel of the Public Employment Relations Board (Board or PERB) issued a complaint against the District. The complaint alleges that during the period of March

1998 through the present, the District and SMFA have been meeting and negotiating pursuant to Educational Employment Relations Act (EERA or Act)' section 3543.3. It is alleged that on April 22, May 5, and July 9, 1998, SMFA requested the following information which is relevant and necessary to discharge its duty to represent employees:

a.ÊÊÊ A copy of the certificated salary schedule.

b.ÊÊÊ Preliminary budget for 1998 99.

c.ÊÊÊÊÊÊÊÊÊÊÊ Mandated cost recovery requests.

d.ÊÊÊÊÊÊÊÊ Justification for the District's policy prohibiting classified work by certificated bargaining unit members.

e.ÊÊÊÊÊÊÊÊ Reimbursed amounts paid to the superintendent for the 1996 97 and 1997 98 school years.

f.ÊÊÊÊÊÊÊÊ Amount of money the District spent on instruction pursuant to the 50 percent rule.

It is alleged that the District has failed to provide the information requested except for the mandated cost recovery request. That information, however, was provided more than three months after the request and without explanation for the delay. The District's conduct is all6ged to be a refusal to meet and negotiate in **good faith with SMFA in violation of section** 3543.5(c). This same conduct is alleged to interfere with the rights of bargaining unit members to be represented by SMFA in violation of section 3543.5(a) and denying SMFA its right to

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

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represent bargaining unit members in violation of section 3.543.5 (b)

The District's answer was filed on January 19, 1999, denying any violation of the Act.

The second case, LA CE 3995, was filed on October 13, 1998, followed by an amendment on October 19, 1998. A complaint issued on March 8, 1999. The complaint alleges that during the period from March 1998 through the present, the District and SMFA were meeting and negotiating pursuant to section 3543.3. It is alleged that during this time, the District engaged in the following conduct:

a.ÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊ On September 29, 1998, the District's negotiators walked out of a bargaining session.

b.ÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊ On October 20, 1998, during a bargaining session regarding department heads, SMFA presented its proposal on the matter, but the District has failed to provide a counterproposal.

2 In relevant part, section 3543.5 provides that it is unlawful for a public school employer to:

> (a)ÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊ Impose or threaten to **impose reprisals**

on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of thisÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊ subdivision, "employee" includes an applicant for employment or reemployment.

(b)ÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊ Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative. 3

c.ÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊ In December 1998 the District reclassified the positions of Extended Opportunity Programs and Services (EOPS) Director, Academy Coordinator and Continuing Education Director into management positions. Previously, the positions were filled by faculty members. Additionally, the parties were negotiating–the status of these positions at the time of the reclassification.

d.ÊÊÊÊÊÊÊÊ In early 1998 SMFA presented its salary proposal. on December 18, 1998, the District's negotiator stated he was unfamiliar with SMFA's salary proposal and therefore was not prepared to discuss the issue.

The District's conduct is alleged to constitute failure

and refusal to meet and negotiate in good faith with SMFA in violation of section 3543.5(c), interfering with the rights of bargaining unit employees to be represented by SMFA in violation of section 3543.5(a) and denial of SMFA's right to represent bargaining unit employees in violation of section 3543.5(b).

The complaint further alleges that the District reclassified the positions **mentioned above without having negotiated with SMFA** through impasse concerning the decision or **its effects.** This is alleged to be a violation of section 3543.5(c), (a) and (b).

The District filed its answer on May 5, 1999, denying any violation of the.Act, and asserting defenses that will be addressed in this proposed decision.

The SMFA filed unfair practice charge LA CE 4001 on November 4, 1998. This action resulted in a complaint which issued on November 23, 1998. The complaint alleges that.the District's college president, Doctor Piedad Robertson (Robertson), told SMFA President Fran Chandler (Chandler), that, "the managers of the District were sick of the faculty, and because of the Faculty Association's position regarding the District's lack of compliance with the 150 percent rule' [Education Code section 84362], the District might eliminate all reassigned time for faculty and hire more administrators." The employer's conduct and statements were alleged to interfere with employee rights guaranteed by the Act in violation of section 3543.5(a), and denied SMFA's rights *in* violation of section

3543.5(b).

The complaint also alleges that *on* October 22, 1998, Teri Bernstein (Bernstein), SMFA's chief negotiator, distributed flyers at a college budget committee meeting. The flyers contained SMFA's opinion that the District was violating the mandate of Education Code section 84362 requiring at least 50 percent of **revenue!be spent on instruction. In response, it** is alleged, Robertson "threatened to be even more aggressive about the 50 percent law exclusions." It is also alleged that District Vice President Rocky Young (Young) replied that "if the Association challenged the District's compliance with the 50 percent rule, the District might do away with all faculty reassigned time."

The District's answer was filed on December 11, 1998, denying any violation of the Act.

Settlement efforts were unsuccessful, and formal hearing was held on July 20 and 21, 1999, in Santa Monica, California. At the commencement of the hearing, the District moved for deferral of portions of the request for information complaint, on the grounds that the applicable collective bargaining agreement (CBA) required the District to provide such material and also contained binding arbitration. The motion is addressed below. Post hearing briefs were filed on September 10, 1999, and the matter was then submitted for decision. On my order, the record was opened on January 6, 2000, to receive into evidence the form PB 200, discussed below.

FINDINGS OF FACT

SMFA is the exclusive representative of faculty members of the District, and the District is a public school employer, both within the meaning of the Act.

For the last five years, Robertson has served as superintendent/president of the District. Robert Sammis (Sammis) vice president of human resources, is the District chief

negotiator.[3] ÊÊÊÊÊÊÊÊ The other District negotiating team members are

Dot Gelvin and Sherry Lee Lewis.

Chandler is president of the Association and a member of the

bargaining team. Bernstein is the chairperson of the negotiation

[3] Sammis came to the District in January 1998.

team for SMFA.[4] The other member of the SMFA bargaining team is Alan Buckley.

The parties' CBA was due to expire on August 21, 1998. Anticipating the expiration date, SMFA wanted early negotiations with sunshining proposals in December of 1997.

The District demurred through Robertson, who wrote to

Bernstein on October 22, 1997, outlining a number of activities that would take place then and suggesting that they should not sunshine during January/ February of 1998.5 Robertson contended EERA's timelines were vague and borrowed from the Public Transportation Labor Disputes Act to set a timeline 90 days before the existing contract expiration date. She suggested that by May 21, 1998, the parties exchange proposals. She suggested the Association present its proposal to the Board of Trustees at its March 2, 1998, meeting and the public hearing on that proposal would be on April 6, 1998. The District would then present its proposal at the May 4, 1998, meeting and negotiations could begin prior to May 21, 1998.

Bernstein wrote to Sammis on April 29, 1998, **outlining the** Association's frustration that, having agreed to a two month delay in starting negotiations, the District canceled the first agreed upon meeting date.

'Bernstein is a certified public accountant and teaches full time in the District's business department.

'Included were accreditation review, and appointment of a vice president of human resources which was later filled by Sammis.

The parties met on April 30, 1998. **Issues discussed** included salary, reassigned time for faculty (the practice had been for faculty members to be placed on reassigned time to perform administrative duties), part time office hours, department chair compensation, benefits for part time instructors, domestic partner

benefits, health benefits, and the issue of limitation on certificated employees hired for classified work asserted by the District because of the Fair Labor Standards Act. Besides salary, department chair and part–time office hours were to be sticky areas of concern for both sides.

Over the next seven months, the parties met some 20 times. Impasse was declared in late October or early November, and mediation was first held on December 18, 1998. During these months the following events occurred which gave rise to the trio of unfair labor practice charges. Reauest for Information (LA CE 3988)

Although the CBA calls for certain information requests to go to the District deputy superintendent, Sammis directed that all requests come to him.

On April 22, 1998, Bernstein wrote to Sammis requesting the following:'

> 1.ÊÊÊ ÊÊÊ A breakdown of Certificated Salaries
> into: Full time regular, Hourly semester, summer intersession, winter intersession, Management (and other, if applicable),

6Each item requested is set forth **separately** along with the relevant at hearing evidence regarding the item. . 8

> both Budget and Actual for the fiscal year (19196 97.

The District responded with two sets of documents, although from SMFA's view, neither gave the information in the format requested here.

In May of 1998, the District provided its community college annual financialand budget reports (CCFS 311) for 1995 96 and 1996 97 and 1997 98 (respondent exhibit nos. 9 and 10).7 The report does not give a breakdown of faculty versus management, full time versus part time employee or sessions.

There is also a form PB 200, provided by the county office of education, on a weekly basis.

Bernstein testified that the District provided a PB 200 in April 1999 in the discovery proceedings in a lawsuit described below. SMFA could extricate the information from the PB 200. Bernstein was uncertain but thought she may have got a PB 200 (a trial balances listing account number and amounts actually expended) but she didn't get one with verification that it was final for that year.

Sammis said the information **is not available as requested.** The documents he provided are the only ones available for 1996 97. To respond to the specific request, the District would have had to prepare additional documentation beyond what was provided.

ÊÊÊÊ 7These reports (CCFS 311) are due at the California
Chancellor's Office by September 30 of the year in question. The
report contains the financial report for the first year (actual)
and the budget (planned) report for the next year.

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2.ÊÊÊÊÊÊÊÊÊ The same breakdown for the [19197 98 Budget, as presented to the Board in September.

Bernstein said SMFA wanted the breakdown on certificated salaries (requests 1 & 2) because they wanted to find management's portion and how the District planned to allocate the funds among managers. The information is not available in public documents given to the Board of Trustees.

According to Sammis, the District had no documentation outside of the PB 200 for this request.

3.ÊÊÊÊÊÊÊÊÊ Detailed justification of changes from (19196 97 to [19]97 98 (by listing each new position, the percentage pay increase for every new and continuing position, and change in classification or title for continuing positions, if applicable) for each category, particularly Full time regular and Management.

Sammis testified that he was unaware of any document that provided this information other than what had been provided.

4.ÊÊÊÊÊÊÊÊÊ A year to date actual [expenditures] for allÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊ the categories above, with a projection of expected expenditures thru year end, by category. (8)

Bernstein testified that requests 3 and 4 were to demonstrate that managers, salaries were increasing, both as a result of reclassification into other positions and contractual

'Bernstein described this request as calling for the amounts that were actually spent in these categories for the current year which would have been 1997 98. **SMFA wanted** to project what would actually have been spent by the end of the **year** and to compare what was budgeted versus actual expenditure. In addition, she wanted to check the validity of the projections for the following year.

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increases.ÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊÊ The increases would be used to compare what was being
offered to faculty.

Sammis testified that he was unaware of any document that provided this information other than what had been provided.

> 5.ÊÊÊÊ ÊÊÊÊ The preliminary budget for [19198 99, with all budget increases broken down with justification (as soon as it is ready for the MayÊÊÊÊ ÊÊÊÊ Board meeting) .191

Bernstein testified that the preliminary budget for 1998 99 was not received in the broken down form they wanted (PB 200) until April 1, 1999 (almost a year later)'and then, only in conjunction with the lawsuit SMFA had filed. SMFA got a preliminary budget for 1998 99, but not in the form it wanted. The District told them that, as late as

December, it was not yet into the system.

Sammis said he did not provide the preliminary budget directly to SMFA, but they got it along with the board material at the May 4, 1998, meeting. Bernstein testified that SMFA gets the board agenda pursuant to the CBA, but no supporting material.

> 6. A listing of any budget changes that will be proposed to the Board for this fiscal year in this and any other categories.(10)

Sammis was unaware of any document that provided this information.

9Since they'were bargaining for that year, Bernstein wanted to be able to compare management increases for fairness with faculty increases.

"Because of past changes during the budget year to the initially approved budgets, Bernstein wanted to know of any anticipated changes.

> 7. A final report, with all justifications for increases, of the analysis done by Cheryl Miller (with minor input from me) for each Contracted Services Area, at the request of the College wide Budget Committee last fall. (Note: ' salary information was also requested at that time, but no progress has been made to the Budget Committee in that area).1"I

Sammis testified that this would require Miller to produce a report.

8.ÊÊÊÊÊÊÊÊÊÊ ÊÊÊÊÊÊÊÊÊÊ Any other financial information which you
areÊÊÊÊ ÊÊÊÊ requesting, or would deem relevant to the
a [sic] discussion of funds available for salaries, new positions or any other project or purpose over the next year or other relevant time period.

There was no evidence offered on this request. Mandated Costs

On May 5, 1998, Bernstein requested among others, mandated cost recovery request and amendments, 1994 to present; [12] justification for the policy denying certificated assignments to classified employees, and the president/superintendent reimbursed expenses for 1996 97 and 1997 98 year to date. She further requested outside counsel information regarding the policy on

"In the fall of 1997, the budget committee had requested a study of increased spending in management and contract services. The study was to be done by Cheryl Miller (Miller) with Bernstein's assistance. However, according to Bernstein, Miller got busy with other projects and it was never completed. Bernstein wanted what she had and she wanted the project finished.

ÊÊÊÊ [12] Mandated costs are whollyÊÊÊÊ or partially reimbursed by the
state. District expenses of negotiations is partially reimbursed
by the state. **SMFA was pressing an argument that if the District**

was being reimbursed for **negotiation expenses, then it, SMFA,**
needed reassigned time to finish negotiations.
ÊÊÊÊ ÊÊÊÊ 12

denying certificated employment to classified employees or vice versa. [13] According to Bernstein, the mandated costs for some past years was provided at the end of the semester, but it was too late to help SMFA negotiate for compensation on reassigned time for summer negotiations sessions.

Sammis testified he directed staff to gather the information and it took until August to put the information together. Reimbursed Expenses

The request for the superintendent's reimbursed expenses for 1996 97 and 1997 98 year to date, was predicated upon SMFAIs findings that more money was being allocated for the salary plus expenses than was actually budgeted. SMFA suspected payments were being made for inappropriate expenses.

The District provided a copy of the original contract of employment for Robertson. The document showed a budget for expenses but not actual expenditures, nor reimbursements for expenses.

Sammis testified that he provided a **copy of Robertson's employment contract with a recent amendment that shows an amount** for expenses. He believed it was a total amount and that amount would be budgeted. He also told SMFA that the president had a corporate American Express account like other administrators and she was

individually responsible for paying the bill.

ÊÊÊÊ Sammis provided the contract sometime prior to summer of 1998. At the time, he understood the document was the single

[13] These matters had been discussed at the April 30 meeting.

source of information. Sammis never asked the superintendent for her expenses. He went to individuals in the business area for any documents which existed regarding expense reimbursements and was presented with the contract. It was his understanding that the contract was the sole document.

In January of 1999, Sammis learned there were records maintained by the District on the president's reimbursed expenses. The District has not yet provided the actual reimbursement, although it is in the process of doing so. Sammis–said the 50 percent lawsuit and discovery process took the issue out of his control and it was now an issue to respond through the discovery process.

Limitations on Certificated Employees in Classified Positions

SMFA had learned that the District was implementing a policy detrimental to its part time members. Previously, many part time faculty also held part time classified jobs with the District, which allowed them some benefits and security of employment.

Sammis' testimony was evasive on the point of whether there was a change in policy. **The District did not have a policy** either prohibiting or permitting a crossover, he said meaning an employee holding both a certificated and a classified position. The District did tell certificated staff they could not be classified employees too.

SMFA wanted something in the contract to resolve the problem. The request for information on the District's policy

had been made at the table and Sammis had said he would provide the justification for the change in practice. [14]

Sammis testified that this issue came up in spring of 1998. The District had placed limitations because of concerns of the Fair Labor Standards Act provisions. He provided SMFA with a copy of the regulations in late spring or at the July bargaining session.

Sammis said he attempted to explain his analysis of the regulations and that another college had problems in this area in the past. 50 Percent Requirement

Under Education Code section 84362, the District is required to spend at least 50 percent of the District's current expense of education on classroom instructor salaries.'s

On July 9, 1998, Bernstein wrote to Sammis (and others) requesting extensive information on the 50 percent law, and the District's calculations for compliance therewith for

the 1996 97 school year. SMFAIs interest was predicated upon the notion that the District was uninterested in **funding any SMFA requests for** other than a 2 percent salary*increase. SMFA wanted a larger

[14] Bernstein's testimony is not clear that Sammis said he had outside written 'advice from counsel on the District's position. SMFA wanted a legal opinion, but the record does not support a finding that there was one, or that Sammis said that he would provide such an opinion to SMFA.

"This proposed decision does not address the District's compliance with that requirement.

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salary increase and additional money for part time faculty office hours and domestic partner benefits.

Bernstein wrote that at the June 8 or 9, 1998, meeting she had asked for this information. Her information was that the District had a 75 percent increase in administrative cost. Prior fili ngs with the State Chancellor's office showed the District was very close to the 50 percent limit, and she did not see how it could continue to be in compliance. SMFA did not believe the District was spending sufficient funds on classroom instruction.

Bernstein testified that SMFA got some audit workpapers, a portion of the CCFS 311 submitted to the state for the 1996 97 year, either at the end of June or beginning of July. They wanted later years to check the accuracy. The CCFS 311 report is a form required by the California

Community College Chancellor's Office to be submitted annually. It tabulates the District's expenditures to ascertain compliance with the 50 percent law.

The CCFS 311Q quarterly report for the quarter ending March 31, 1998, and the preliminary budget for 1998 99 was presented to **the Board of Trustees on May 4, 1998.16 Bernstein** had no recall when she received the (tCFS 311, however, she did

"The CCFS 311 includes a category "Academic Salaries" which includes salaries of administrators. There is no place on the form to break out administrative salaries from certificated salaries. The only document that **Sammis knows that** comes close would be the PB 200 report. He admits the District does not normally compile documents which contain information about administrative salaries separately from other salaries, in terms of budget reports.

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get one. Sammis testified he provided it to the SMFA in September of 1998.

Bernstein said she got the PB 200 in August or September from Cheryl Miller. She then testified that she got a PB 200 in July and again in August.

Sammis said he provided a PB 200 in May, and a year .end PB 200 in September which was related to the lawsuit on the 50 percent law. The PB 200 lists classifications expenditures, line item by line item." He provided this information in response to SMFAIs questions regarding breakdown of

information on salaries, and questions related to the 50 percent law.

Sammis provided SMFA with a form titled "Analysis Of Compliance With The 50 Percent Law" (respondent exhibit no. 13) for the year ending June 30, 1997, in early September 1998, in response for information on the 50 percent law.

Section 3.6 of the CBA provides as follows:

> The District shall make available to the Association any public information that the District normally compiles. This shall include financial reports, enrollment statistics, and any other public information that is necessary for the **Association** to develop its collective **bargaining position,** provided such information requested is already in a printed form. When a request is made for information that is not currently available in printed form or that is not public information, the request shall be directed to the Deputy Superintendent and Chief Business officer, who will advise the Association of the actual and necessary cost

"The PB 200 comes from the county on a weekly basis. The form was added to the record, by the **undersigned, by order issued** January 3, 2000.

> to be reimbursed to the District for preparing the requested information or will tell the Association how to approach any legal prohibition to the distribution of the requested information.

Section 3.12 provides:

> The District shall provide the Association with one copy of CCAF 311, CCAF 320, and the district's annual audit at the time such reports are submitted to the Board or State authorities.

The CBA also contains a grievance procedure that culminates in binding arbitration (CBA sec. 12.3.9). 18

The parties only met once in July and August. The District wanted to meet but the SMFA wanted its representative to be assigned and then reassigned in order to be paid for bargaining. The District rejected the idea.

The next meeting after July 16 was September 8, 1998.

Bargaining Conduct

The District was concerned about department chairs. The Association was concerned about office hours for part time faculty.

On September 7 or **8, 1998, SMFA offered a comprehensive** proposal that included provisions on additional duties and reassigned time. It listed several coordinator positions: Disabled Students, EOPS, Student Health Programs, Contract Education (this.was proposed to be added), Psychological

18Section 12.1.1 defines a grievance as "an allegation . . . by the Association that it has been **adversely affected** by a violation of any of the specific provisions of this Agreement that apply to the rights of the Association,

is

Services, Special Programs for African American Students, Latino Center and Professional Development.19 As will be seen, some of these positions were later converted to administrative positions by the Board of Trustees.

Another comprehensive proposal was advanced by SMFA on October 8, 1998. It appears the proposal on added duties and reassigned time were the same as the September proposal.

On September 21, 1998, Bernstein requested to discuss coordinators at the next meeting followed by a department chairs meeting.

The District modified its salary proposal at least three times before December 18. The first, advanced May 26, 1998, offered 2.0 effective August 24, 1998, with reopeners for the second and third year.

The District's next salary proposal was July 16, 1998. it provided for 2 percent in August 1998, a new salary increase in August 1999, by approved and funded cost of living adjustments (COLA).

On September 17, 1998, the **District's salary proposal called** for 3 percent effective August 1998, with COLA plus 1 percent for 1999 2000, and COLA for 2000 2001. This was the second comprehensive proposal advanced by the District.

'9CBA section 6.16 listed coordinators as Child Care Services, Psychological Services, Special Programs for African–American Students, Latino Center, Environmental College, International Students Center, **Disabled Students, EOPS, Student** Health Programs, Humanities Center, Institutional Research, and Corsair Advisor.

Early on, SMFA's salary **proposal was a new set formula upon** which increases would be calculated.

Sammis said the District was concerned, from the beginning, about the formula salary proposal. The District **was not prepared** to agree to the concept. The Association also wanted a role in the reassigned time. The District did not want to cede that authority. SMFA also had a position on coordinators. The District did not want to link the coordinators with department chairs. The District was interested in clarifying coordina tor positions listed the prior agreement.

On January 20, 1999, the District advanced a third comprehensive proposal. It contained language on extra responsibility assignments, reassigned time and stipends." The Association had advanced a proposal tying coordinators to a stipend that would eventually apply to department chairs.

The parties ultimately came to agreement on domestic partners insurance coverage, although there is no contract. The agreement is to give partners money to buy their own insurance. Case No. LA CE 3995

The September 29, 1998, Meeting

The complaint alleges that on September 29, 1998, "[the District's] negotiators walked out of a bargaining session."

2'The Association had pushed the point that it should have a role in setting stipend amounts.

SMFA's note taker was absent that day so Chandler took notes made partially in shorthand about the meeting." She reduced

the notes to writing on July 6, 1999.

Her notes indicate a conversation that follows:

> DomesticÊÊÊÊ ÊÊÊÊ partners discussion: ÊÊÊÊ Not permitted.
> Sammis:ÊÊÊÊ ÊÊÊÊ "There will be nothing further on this issue."
>
> Sammis: "Room for movement. Will have to analyze it."
>
> Discussion of 6% and 3% on the table: 1221
> Sammis: "You take our 3 percent or we"re at
>
> ÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊimpasse ÊÊÊ ÊÊÊ 11ÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊÊ 1
>
> ... Teri, I'm not going to, that's it ...
>
> Notes end abruptly with "District walked out."

Sammis testified he did leave the meeting early. He said it was apparent they were not going to agree on some issues (salary) and that Bernstein began to attack them for failing to respond to proposals or make movement on salary. The attacks accused him of failing to listen,

give information they wanted and accusations

that he did not have authority to reach agreement with them.

Bernstein was upset, sarcastic, but not yelling. He told them he was not going to sit there and **allow them to attack him and the**

District. He heard no affirmative response that the attacks were going to stop so he directed his team to leave. At that point he was of a mind they were at impasse. He said the District's

September salary . proposal was different than earlier proposals

> "Chandler has taught shorthand at the District.
> 12 Chandler said the SMFA salary proposal was for 6 percent.
> ÊÊÊ 21

and the District believed its proposal was a fair allocation of its resources.

Chandler confirmed that SMFA was frustrated at the meeting because the District had not returned proposals or provided information requested. SMFA was upset at the canceled meeting and the impact on their own revised scheduled classes. The parties were talking about the District's salary proposal.

Later, Bernstein and Sammis exchanged e mails with the latter wanting to have a "brainstorming session"

regarding department chairs, and the former wanting to talk about part time office hours.

On October 12, 1998, Sammis sent an e mail to Bernstein expressing concern that the SMFA was unwilling to schedule a "brainstorming session" concerning department chairs. [23] He stated, "The District believes that this (is] an issue where both parties have a mutual interest and detailed discussions would be mutually beneficial." He advised her that unless she was prepared to discuss department chairs at the Tuesday meeting, he saw no need to meet that day. He also indicated the District was making review of the situation to see if the parties were at impasse.

Bernstein responded the next day that the SMFA felt the office hours for part time faculty was as important to the union as department chairs was to the District.

ÊÊÊÊ [23] "Brainstorming sessions"ÊÊÊÊ **were not negotiation meetings** but
sessions where outside experts on **issues were brought** in to help
the team members better understand issues and aid in settlement.
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On October 16, the two exchanged e mails with Sammis announcing the District's review of SMFA's latest proposal suggesting the parties had significant differences. He sought further work on the department chairs issue, and noted newspaper articles suggesting SMFA had determined they were at impasse. If SMFA were to request certification from PERB, the District would not object.

Bernstein replied that the SMFA would not discuss department chairs until the teams had discussed office hours for part time faculty in the same level. She noted the District had given a "last best offer" at a meeting prior to October 5, 1998. There, Sammis had reportedly stated that they were at impasse if SMFA would not accept the District's salary offer with no money for part time offices. She discussed his position on impasse.

Sammis and Bernstein exchanged e mails on October 19, 1998, and SMFA agreed to have a brainstorming session the next day.

They did meet on October 20, 1998. It was a "brainstorming session" not bargaining. They reached an understanding that the District would provide a proposal **shortly thereafter.** Bernstein said the promise was for a response within two weeks.

The District did not, however, provide a proposal until January 20, 1999, at the second mediation session, when the District advanced a proposal to form a committee to develop language on several issues related to department chairs.

Bernstein described **the proposal as "diametrical to progress** in negotiations." They had, she said, already spent hours in

committee type setting and the District's proposal to

set up a committee was "regressive."

Sammis had a different motive in presenting the proposal. He thought they had agreement on issues but needed further work on developing the details. He understood the SMFAIs frustration, but it was a misunderstanding of the District's intent. The four points advanced in his counterproposal came from the October 20, 1998, meeting and represented parameters the parties had agreed upon.

Sammis admitted that he did agree at the October 20, 1998, meeting to return with a proposal within two weeks. But, he said, he did not return with a proposal in two weeks, because they went into mediation and bargaining was "frozen." He did not present a proposal at the first mediation session.

Sammis testified that the parties were at impasse and until mediation was held, the District was not prepared to present a' proposal on department chairs.

There were no further face to face meetings until December 18, 1998, when the parties held their first mediation session.

Sammis' Statement on Salary Proposal

The complaint alleges that On December 18, 1998, the District's negotiator stated he was unfamiliar with SMFAIs salary proposal, and therefore was not prepared to discuss the issue.

At hearing, Bernstein testified that Sammis, at the meeting, "said he wasn't familiar with the details of it and he didn't come prepared to discuss detail issues." She continued:

> And they were things that admittedly, we hadn't discussed for several months but, you know, I think our team, our side of the team came prepared, came I mean, we prepared. We reviewed our stuff so that we'd be ready to settle. We had We were optimistic about impasse.

Sammis denied that he stated that he was unfamiliar with the SMFA salary proposal on December 18, 1998. He testified that the SMFA had proposed the concept of a salary formula early in 1998. They had been in negotiations for several months and had exchanged salary proposals. December 18, 1998, was their first mediation session. The mediator had them go through each issue to identify areas of agreement and disagreement.

The parties had five sessions and went to factfinding on September 14, 1999.

The Reclassification of Faculty Positions

The District used full time faculty on specific assignments away from the classroom. **one such group was the EOPS** coordinators for whom,SMFA had submitted a proposal on September 9, 1998.

The faculty members in non teaching assignments in the spring and fall of 1998 included: Elmer Bugg (Bugg) who

was on reassignment to work on fast track/customer services, JTPA grants, and contract education; J. S. Penchansky (Penchansky) who was assigned to student services at **the Academy of Entertainment**

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Technology; MGM Tannalt *(Tannalt) who* was assigned planning specialist in the development office; and D.M. Hearn (Hearn) who was on reassigned time at EOPS.

On December 7, 1998, the Board of Trustees approved the appointment into administrative positions of Bugg to assistant dean, workforce and economic development; Hearn as director of EOPS; Penchansky as assistant dean, external programs/student affairs; and *Tannatt as* assistant dean, continuing education." Coordinators are in the CBA.

There were also coordinators listed in the District's proposals on the table. The District's September 17, 1998, proposal lists coordinators in EOPS, Student Health Programs and Disabled Students.

On January 20, 1999, the District's proposal still made reference to EOPS coordinators related to the stipend proposal. Sammis denied that a month before the District made this'proposal the EOPS coordinator was eliminated and made an administrative position. However, the documentary evidence establishes that Deyna Hearn was **appointed administrative director of EOPS as of** January 4, 1999. Sammis testified he thought her appointment was

2'The item before the board noted that the

administrative positions were included in the management reorganization approved by the board on July 6, 1998. Bernstein saw that plan and asked Sammis about it. He told her, she said, that no faculty positions would be affected.

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to a new position established in July of 1998.25 He thought the administrative position was different than the coordinator. He admitted coordinators were still on the table in December. The EOPS coordinator position is still vacant.

Bugg was on reassigned time and appointed administrative assistant dean, workforce and economic development. Although contract administration is not listed in the CBA as a coordinator function, Bugg was performing that function on reassigned time and it is what he is doing in the new position, among other duties. He was also doing customer service JTPA grants. Those duties are also incorporated into his assistant dean position.

Penchansky was appointed assistant dean, external programs/student affairs. Prior to the appointment she was on some level of reassigned time. Although she was not a coordinator under the CBA, she may have been referred to as one.

While just before, during and after the Board of Trustees took this action, the parties had proposals on the table regarding some of these positions. There was no notice to SMFA that the Board"of Trustees was going to take action on the coordinator positions,. The faculty positions remained vacant the following spring term.

25Sammis testified that Title 5 regulations required that there be a director of EOPS. Bernstein testified that she asked Sammis about this in July when the **board agenda on rebrganization** was passed and he told her then that no faculty position would be affected.

Case No. LA CE 4001

The complaint alleges that Robertson told Chandler at an October 21, 1998, meeting that "the managers of the District were sick of the faculty, and because of the Faculty Association's position regarding the District's lack of compliance with the 50 percent rule, the District might eliminate all reassigned time for faculty and hire more administrators."

On October 21, 1998, Robertson met with Chandler, at the latter's request. The last contract dispute had been resolved in this type of meeting. This time, however, the parties were personally at odds. Robertson had resolved, according to her testimony, that "enough was enough." Their versions in testimony differ.

> Chandler wrote in a e-mail within two hours of the meeting:
>
> > . . . From the inception, she was threatening and insulting to the Association, to me personally, and to faculty in general. Among many things, she stated that she believes impasse is a way of bringing us together (Huh?). She threatened to take all reassigned

time away from faculty and hire more administrators. She said her managers are sick of the faculty [1261] **and the way** shared governance and **the faculty get their way.** [1271] In response to her statement that she didn't trust me or the Association (and a long list of others), I told her that it was unfortunate that she never realized that 50 percent of the faculty supported her when she came here; however, she has lost the

"Chandler could not remember the issue in which the comment was made.

"At hearing, Chandler noted that Robertson had not said anything about shared governance.

confidence of those people now. At that point, she began shaking and sputtering irrational words that made little sense, saying something to the effect of "You too! You got your job by default. You got it by default! You got your job because somebody died!" Then I realized she was talking about Jim Prickett and my position as President of the Association!

One positive note: she did say that she supports faculty, and to prove it she said she told the Citizens Commission that she is not in favor of statewide collective bargaining (not a surprise since along with statewide bargaining would come statewide control of the

colleges by the State Chancellor's office).

Chandler testified that Robertson tried to intimidate her by telling her that she was going to take away all faculty reassigned time and hire more administrators. Robertson went on to tell Chandler that managers were sick of faculty getting in their way.

Robertson testified the meeting deteriorated very quickly. The discussion went to the 50 percent law and the Bernstein flyer (described below). Chandler raised issues of faculty support in a tone Robertson was tired of listening to. Faculty reassignment and its relationship to the 50 percent law was also discussed.

ÊÊÊÊ Robertson testified she did make **a statement about managers**
being concerned about not getting compensation packages in a
timely manner. Traditionally, the managers did not get salary
increases until all compensation packages were in place. In
January of the following year, the Board of Trustees placed the
managers on a separate schedule. She **said she did** not say the
managers were "sick" of faculty. She did talk about the faculty's position on classroom time under the 50 percent law.
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She did say their position was going to cause her to rethink her position on faculty reassigned time. She was

upset with Chandler for "continued sort of pecking away at the same issue." She was a "little less tolerant of Chandler's remarks." She did say something about Chandler's getting her job by default.

Sometime before October 26, 1998, Bernstein authored and the SMFA distributed a flyer castigating the District for noncompliance with the 50 percent law."

Around October 26, 1998, Bernstein presented the flyer to the budget committee at a scheduled meeting. Robertson was late in attending the budget committee meeting where Bernstein's flyer had been distributed. Although late for the meeting, Robertson was aware of the Association's contentions.

Bernstein testified that Robertson said, after some people had left, that 11(n]ow that we've brought this to her attention that they'd be even more aggressive about excluding things from the SO percent law."

Robertson testified that at the meeting she did say that the District would have to look at the exclusions raised by the flyer

"Charging party exhibit no. 17 was introduced to reflect the flyer. It c.ould not have been the original flyer as it contains reference to a District November 5 flyer and rebuts some of the contentions therein. There are certain allowable exclusions from the calculation of expenses of classroom instruction not relevant to this decision. This exhibit does contain reference to items that should have been excluded from the instructional side, including money spent for faculty reassigned time.

but did not "threaten" as stated in paragraph six of the complaint. She did not use the word "aggressive.1129 Rocky Young Statement

The complaint alleges that Rocky Young (Young) stated, following Robertson's statement just above, that, "If the Association challenged the District's compliance with the 50 percent rule, the District might do away with all faculty reassigned time."

The source of the allegation against Young came from an e-mail from Karin Costello (Costello) to Bernstein on October 26, 1998. Costello wrote:

> At the end of the budget meeting and in response o (sic] Teri's handout on "Compliance with the Fifty Percent Law," Rocky made an interesting point. He suggested that we think very carefully about how we approach the reassigned time' issue because the District could just decide not to give reassigned time for things like holding office in the FA and the Academic Senate. He was warning us, I think, that Piedad won't hesitate to play hardball. He wasn't threatening us, but unfortunately, we aren't negotiating with him. . . .

Young testified that after the budget committee meeting he had a conversation with Costello. In paragraph 6 of unfair practice charge LA CE 4001 he is quoted as saying "if the Association challenged the District's

compliance with the 50%

ÊÊÊÊÊ Yet when asked the question of whether she made the
statement in the complaint, she said **the statement was correct** if
you took out "threatened". "Aggressive" was also in the
statement quoted in the complaint.
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rule, the District might do away with all faculty reassigned time."

Young testified that in his comments to Costello he could have said something to that effect. However, he.said, it was a casual conversation between he and Costello and another person, and he thought it was a private conversation.

This pers pective is corroborated by Costello's own assurances to Chandler who was following up on Young's comments. Costello wrote to Chandler on October 27, 1998:

> Rocky made his comments after he looked at Teri's handout. The remarks were spontaneous and private (to me and to Fran Manion) after the meeting has [sic] essentially broken up. I am absolutely positive that he meant to be helpful, to send a message to us, to warn us to be aware of how the District could use the issues of reassigned time. I would never forgive myself if I led you [to) believe that he had ulterior motives or were acting as a

mouthpiece for PRIs messages. He wasn't.

At the time of the meeting, Young was vice-president of planning and development.10 Young was employed at the District for some 28 years. At Santa Monica, his responsibilities did not include compliance with the 50 percent law.

Based upon his understanding of the 50 percent law, replacing faculty on reassigned time with administrators would not assist the District in complying with the 50 percent law.

The District promulgated a response on November 5, 1998, addressing each of the issues raised by the SMFA flyer.

ÊÊÊÊ 30At the time of the hearing Young was president of Pierce
College in the Los Angeles Community College District.
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On November 24, 1998, a **lawsuit was filed on the Districi's** compliance with the 50 percent law. Since that time, the parties have been engaged in discovery motions over information requested earlier by SMFA.

ISSUES

The issues in this case are whether the District (1) failed to provide necessary and relevant information to SMFA in violation of EERA; (2) bargained in bad faith with SMFA; or

(3) threatened to retaliate against SMFA for its

position on the 50 percent rule, in violation of the EERA? CONCLUSIONS OF LAW Reauest for Information

PERB has long held that the duty to bargain in good faith includes the obligation of the employer to provide the exclusive representative with requested information that is necessary and relevant to bargaining. Failure to do so evidences failure to bargain in good faith, unless the employer demonstrates adequate reasons why it cannot provide the information. (Stockton Unified School District (1980) PERB Decision No. 143.) **Requests for** information which involve negotiable terms and conditions of employment are presumptively relevant. (Modesto City Schools and High School District (1985) PERB Decision No. 479.) Absent a valid defense, refusal to furnish necessary and relevant information is in itself an unfair practice and may also support an independent finding of surface bargaining. (Trustees of the California State Universit (1987) PERB Decision No. 613 H.)

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Limitations on this obligation include *information otherwise* relevant that would be unduly burdensome. The employer bears the burden of proving this defense. (Stockton Unified School District, supra, PERB Decision No. 143.) The Motion to Dismiss

At the beginning of the hearing, the District moved to dismiss and defer the request for information complaint (LA CE 3988) to the grievance procedures of the CBA.

Relying on Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the District urges that section 3541.5(a)(2)" of the Act requires PERB to defer Case No. LA CE 3988.

As the District notes, Lake Elsinore holds this section to be jurisdictional, and requires deferral when (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement.

SMFA contends deferral is not **appropriate because (1) there** is no deputy superintendent to whom requests should be directed,

(2) there is no obligation to provide *information that* is not in

[3] 'Section 3541.5(a)(2) provides that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . .

printed form, or that is not made public, (3) the mandate of CBA section 3.6 is only information "the District normally compiles." [32] SMFA argues certain items Bernstein requested are not normally compiled. These include the detailed justification of changes between budgets for 1996 97 and 1997 98, the year to . date actual for

all categories and a listing of any budget changes to be proposed, the compilation of the superintendent's expenses, and the limitation on certificated employment in classified position in a legal opinion. Since these documents are not normally compiled within the meaning of the CBA, such documents are not subject to the CBA requirement.

Finally, SMFA argues that all information requested except the legal opinion were provided, but only after an unreasonable

[32] Section 3.6 is repeated here.

> The District shall make available to the Association any public information that the District normally compiles. This shall include financial reports, enrollment statistics, and any other public information that is necessary for the Association to develop its collective **bargaining position,** provided such information **requested is already in a** printed form. **When a request is** made for information that is not currently available in printed form or that is not public information, the request shall be directed to the Deputy Superintendent and Chief Business Officer, who will advise the Association of the actual and necessary cost to be reimbursed to the District for preparing the requested information or will tell the Association how to approach any legal prohibition to the distribution of the requested information.

delay.Ê ÊÊÊÊÊÊÊ SMFA argues there are no standards of reasonableness in
section ÊÊÊÊÊÊÊ 3.6 of the CBA. Therefore, the arbitrator would have no
standards upon which to judge compliance with the contract
language. Thus, there should be no deferral.

The District notes that in addition to section 3.6, set forth above, section 3.12 of the CBA requires additional information to be provided to SMFA. Citing the specific documents referred to in Case No. LA CE 3988, the District contends" that all this information existed in some form of documentation and fell within the purview of either section 3.6 or 3.12 of the CBA.

The District argues the issue of timeliness would be subject to arbitration, as section 3.12 requires production of the documents as soon as they are available. In addition, section 3.6 obligates the District to provide information to SMFA "necessary for the association to develop its collective bargaining position." This obligation requires some degree of timeliness the arbitrator would of necessity ascertain. To support the argument further, the **District notes that, absent the** ability of the arbitrator to determine the reasonable timeliness of the response, the District could subvert compliance of the contractual duty to provide information by failing to respond beyond the useful time necessary by the exclusive representative. Finally, the District notes that PERB ruled it will presume the

ÊÊÊÊ 33 it does except from thisÊÊÊÊ argument the information
regarding the alleged change in policy on employment of certificated employees in classified positions.
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arbitrator will resolve all disputes "arguably arising under the contract" unless the parties expressly indicate a contrary intention in their contract..

The parties were engaged in negotiations in which one key issue was salary. The SMFA was seeking additional sources of funds to support a salary increase greater than that offered by the District. This would appear to embrace the financial documents, in existence, required by section 3.6,of the CBA. The 50 percent rule is a state mandate of District expenditures specifically addressed to instructional expense including the salary of instructorls. Therefore, all information regarding the District's calculation of compliance with that mandate, in existence, would be mandated by the language of section 3.6.

The SMFA was seeking to obtain reassigned time for summer negotiations sessions. Since the District was being reimbursed, in part, for cost of negotiations, information on the District's mandated costs reimbursements was relevant to the SMFA1s efforts to obtain District funding for reassigned time. This was information "necessary for the **Association to develop its'** collective bargaining.position" and would be subject to the arbitrator's grievance review.

The justification for the District's policy prohibiting

classified work by certificated bargaining unit members specifically related to wages, benefits and limits thereon. The SMFA wanted contract language to relate to such limitations. It too related to a collective bargaining position and would fall

within section 3.6 of the CBA. I am not convinced, however, that there is a written legal opinion on the District's position. SMFA did not establish that there was one.

Finally, under the liberal standard articulated above, the expenses of the superintendent, if exceeding the employment contract amount, would be additional funds rightfully available for general expenditures, including increased faculty salary. This *information, however,* was not normally made public by the District. It would not fall under the purview of section 3.6 of the CBA. It would not be subject to the arbitrator's review and hence is not deferrable.

Thus, the complaint's allegation to the copy of the certificated salary schedule, preliminary budget for 1998 99, mandated cost recovery requests, justification for limitation on classified work by certificated personnel, if any, and the amount of District funds spent pursuant to the 50 percent rule, all clearly fall within the purview of section 3.6 of the CBA, and were subject to grievance review, leading to binding arbitration.

Since the information requested was subject to the

grievance machinery, the District's motion to **defer the complaint on** information request must be granted save for the *information* requested on the reimbursed expenses for the superintendent.

The information regarding the superintendent's reimbursed expenses was found relevant and necessary for bargaining purposes. The District's refusal to provide the information was

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a violation to bargain in good faith with SMFA. This was a[34] violation of section 3543.5(c). This same conduct violated SMFAIs right to represent its members in violation of section 3543.5(b), and denied unit members the right to be represented by SMFA, in violation of section 3543.5(a). Bad Faith Bargaining (LA CE 3995)

The Associat ion argues that the District's unjustified delay to start negotiations, its cancellation of the first negotiations meeting and rebuff of the Association's efforts to schedule more meetings, together with other acts, constitutes evidence of bad faith bargaining by the District.

The District argues, that the basic test is whether the District had the requisite intent to reach agreement.

As a result of Paiaro Valley Unified School District (1978) PERB Decision,No. 51, bad faith bargaining is determined under a "totality of circumstances" test. The test examines the entire course of negotiations to determine whether the employer had the requisite intention

of reaching an agreement. Some conduct is considered to be **a "per sell violation without a determination of** the employer's subjective intent.

The totality of conduct test looks at several factors as indicative of bad faith bargaining: (1) frequent turnover in negotiators, (2) negotiator's lack of authority, (3) lack of

ÊÊÊÊ "Sammis, belief that the lawsuit discovery procedures took
the matter out of his hands was simply wrong. No authority has
been advanced to suggest the union's right to information is
subject to proceedings in litigation.
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preparation for bargaining sessions, **(4)missing, delaying or** cancelling bargaining sessions, (5) insisting on ground rules before negotiating substantive issues, (6) taking an inflexible position, (7) regressive bargaining proposals, (8) predictably unacc eptable conterproposals, and (9) repudiation of a tentative agreement. However, the presence of one indicia alone will not establish bad faith bargaining. (Oakland Unified School District (1996) PERB Decision No. 1156.)

The September 29, 1998, Walkout by the District

It is not disputed that the September 29, 1998, meeting was aborted by Sammis, early departure. The parties were discussing a variety of topics, including the 50 percent law, domestic partners, and salary.

The evidence also shows that both sides were frustrated. SMFA was upset about the District's posture on meetings, substantive position on issues on the table and information requests. Sammis, on the other hand, was offended by the charges against him and the District.

The walkout, contends SMFA, was a "thin skinned reaction to the typical heat of collective bargaining," and shows the "District's unwillingness to engage in the give and take necessary to reach agreement." The parties were not at impasse, despite Sammis' statement that the Union take 3 percent or they were at impasse, as the parties met again on October 20, 1998, on department chairs.

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The District counters that, under the circumstances, the walk out was not indicative of bad faith. The parties did reach agreement on domestic partners, and did in fact meet subsequently to discuss department chairs." The District's position on the SMFA salary proposal may have been hard bargaining, but was not bad faith bargaining. The District was simply unwilling to tie salary increases to a fixed formula. At this point the District had made several salary proposals, each progressively an improvement over the last. The end of the meeting was brought about by SMFA's attack on Sammis and his team.

I conclude the walk out was not indicative of bad faith by the District. It is clear the parties were near impasse regarding salary and the issue of department chairs, and part–time faculty issues. Given this gap,

and the SMFA's accusations against the District's chief negotiator, no further purpose was seen by Sammis to continue the meeting. Sammis testified he asked SMFA's team if such accusations were going to stop. With no assurance,such would be the case, he and his team left. Contrary to SMFA's argument, I do **not believe members of either** negotiations team need remain in a **meeting where negotiations** have broken down and further progress appears doubtful. The very existence of the statutory impasse procedure acknowledges the possibility the parties might be unable to reach agreement by

[15] The meeting was not a negotiating session, but rather a "brainstorming session." Nonetheless, the matter of department" chairs was of concern to the District, and this approach to resolving the differences is more reflective of an interest to reach an agreement than to forestall a meeting of the minds.

themselves. Leaving a meeting where negotiations have reached a stalemate, where there is no assurance of any movement on either side, is not indicative of bad faith bargaining.

The October 26, 1998, Meeting

SMFA contends that the District's insistence on limiting discussion to department chairs as a condition precedent to meeting at all, its failure to meet its promise of a counterproposal, and its ultimate submission of a regressive proposal shows evidence of lack of interest in reaching agreement.

The District contends the failure to make the counterproposal until the January 20, 1999, mediation session was justified by the declaration of impasse shortly after the October 20 meeting. Under the authority of Moreno Valle Unified School District v. PERB (1983) 142 Cal.App.3d 191 (191 Cal.Rptr. 601 (Moreno Valley) and Victor Valley Union High School District (1986) PERB Decision No. 565, the declaration of impasse suspends the parties, formal duty to bargain. Moreover, argues the District, it did present a counter proposal at the January 20 mediation session **reflecting what Sammis believed to be** conceptual agreements reached by the parties at the October 20, 1998, meeting. His response was indicative of a desire to reach agreement.

The District's defense here is that the obligation to bargain in good faith **was suspended following the declaration of** impasse, and this suspension also excused the failure to provide 42

a timely counterproposal. The obligation to bargain is suspehded during impasse. However, I do not believe that principle also suspends the District's agreement to provide a counterproposal. The parties were not in a bargaining session when Sammis indicated his willingness to submit a proposal. Sammis, failure to timely provide the counterproposal shows a lack of respect for commitments made, but not a desire to avoid agreement.

The Unilateral Classification of Faculty Positions into
Management Positions

SMFA contends that while negotiations on certain positions were pending, the District unilaterally, and without notice to the SMFA, reclassified faculty

positions into administrative positions.

The EOPS coordinator position, with a stipend, was in the District's January 20, 1999, proposal and yet, just a month before, the District had transferred that position into a management position. This was, according to the Association, a classic unilateral change and a per se violation of the Act.

The District contends, however, that the coordinator positions were not affected. **Rather, the July 1998 action was** to create new administrative positions in addition to the coordinator positions. The District was proposing to add stipends to coordinators already in the collective bargaining agreement, thusdemonstrating good faith bargaining.

I reject the District's construction of its action. The coordinator positions vacated by the Board of Trustee's

December 7, 1998, action remained vacant at the time of the hearing. The reclassification of those positions was done at a time when the parties were bargaining aspects of the positions. This was a virtual transfer of bargaining unit work to non unit status, thus depriving the SMFA of unit work. (See Norris School District (1995) PERB Decision No. 1090; Regents of the University of California (1989) PERB Decision No. 722 H.) No notice was given to SMFA of the reclassification and transfer." This was a violation of the District's obligation to participate in good faith in the statutory impasse procedures, a violation of section 3543.5(e). This same conduct denied SMFA its right to

represent its members guaranteed by section 3543.5(b), and denied unit members their right to be represented by SMFA in violation of section 3543.5(a).

The District's Reaction to SMFA's Salary Proposal

The Union contends that SMFA advanced its proposed formula on salary increases very early in bargaining. Yet, at the December 18, 1998, mediation session, the District's chief

"The complaint alleged this action was a violation of section 3543.5(c). In fact, the action of the Board of Trustees was taken after the declaration of impasse and before the completion of the statutory impasse procedures. Therefore, it could not have been a section 3543.5(c) violation. It was, however, a section 3543.5(e) violation. That section provides that it is unlawful for the employer to:

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

(See Moreno Valley.) The complaint will be amended to conform to the proof.

negotiator announced that he was unfamiliar with and not prepared to discuss that proposal.

The District contends that Sammis did not make the statement attributed to him. Further, the record shows a history of mutual discussion of each sides, positions on salary, with the District long taking the position that

it was not interested in the formula salary increase proposal advanced by SMFA.

I decline to make a finding that Sammis made the statement attributed to him in the complaint. **He may have said he was** not prepared to discuss the proposal. Given Bernstein's testimony acknowledging they had not discussed the proposal for some time, it cannot be said that his position was unreasonable. Moreover, his unrefuted testimony that the mediation session, the first between the parties, was dedicated to a presentation of each side's position on issues, does not appear to be a setting in which he was required to discuss in detail their proposal.

Taking the three events together, argues SMFA, the evidence shows the District did not intend to reach agreement.

The District contends the record does not support a finding that it did not have the requisite intent to reach agreement, nor did its conduct reach the kind or type represented in Compton Community College District (1989) PERB Decision No. 728 (Comipton).

In Compton, the District reneged on ground rules, repudiated tentative agreements, was evasive on financial resources,

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conditioning agreement on a non liability clause and changed its last and best salary offer.

In Muroc Unified School District (1978) PERB Decision No. 80, the PERB stated:

> . . . It is the essence of surface bargaining that a party goes through the motions of negotiations*, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the subjective intent to reach agreement. Such behavior is the antithesis of negotiating in good faith. (Fns. omitted.)

I decline to make a finding that the District's conduct shows lack of intent to reach agreement. Overriding SMFA's factual contentions about the District's behavior is the fact the parties met in negotiations sessions 20 times before impasse. The District made three adjustments in its salary proposal, increasing the offered amount each time. It sought to use the "brainstorming" approach to resolve the stalemate over department chairs. The District agreed to **provide domestic partners** benefits, after initially taking the position that it would not give that benefit.

ÊÊÊÊ Such evidence does not reflect a mind set against reaching
agreement. Although the District's position against SMFA's
salary position and office hours for part time faculty

was firm,
it was not obligated to cede to the proposal. (See Oakland
Unified School District (1981) PERB Decision No. 178.)
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The Alleged Threats (LA CE 4001)

SMFA contends Robertson unlawfully threatened Chandler on October 21, 1998, when she said she would replace faculty on reassigned time with administrators. It argues she reiterated the threat when she told Bernstein that she would get more "aggressive" about the 50 percent exclusions. This had to be a threat, argues SMFA, as it was not a solution. Both Robertson and Young testified the addition of more administrators would not enhance the District's compliance with the 50 percent rule.. Further, the District could have applied for an exemption, a solution to the problem, rather than threaten to replace faculty with administrators. And, adds SMFA, the District carried out the threat when it converted the faculty positions to administrative positions.

I reject SMFA's interpretation of the evidence. It is not clear that SMFA was making an overt expression of concern about compliance with the 50 percent rule until early fall 1998. SMFA did not rebut the District's demonstration that the shift from faculty to **administrative positions was a result of plans adopted** by the Board of Trustees at its July 1998, meeting. This well preceded SMFA's expressed concern about the 50 percent issue.

The District contends the complaint is inaccurate as to what Robertson said, and in any event, her remarks have to be

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construed in the context of the overall circumstances." In the end, they did not constitute reprisal or promise of benefit.

PERB precedent allows the employer to comment on matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate under the following test:

> . . . The Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (Rio Hondo Community College District (1980) PERB Decision No. 128; fn. omitted.)

In Temple City Unified School District (1990) PERB Decision No. 841, the Board further articulated its approach to speech regulation.

> Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. [Citation.) Thus, the charging party must show that the

> employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights. The fact that employees may interpret statements, which are otherwise protected, as coercive does not **necessarily render those** statements unlawful. [Citations.]

In addition, statements made by the employer are to be viewed in their overall context (i.e., in light of surrounding

"'These circumstances include the impact of legislation allegedly increasing the role of faculty in governance. There was no evidence upon which findings could be made about that legislative intent.

circumstances) to determine if they have a coercive *meaning*. (Los Angeles Unified School District (1988) PERB Decision No. 659.)

Robertson told Chandler that faculty reassigned time could be impacted because of the SMFAIs position on District compliance with the 50 percent law.

The SMFA had a right to monitor and insure the District was in compliance with a statutory mandate that instructors' wages constitute at least 50 percent of the District's expenditures. Faculty reassigned time was also a matter about which SMFA was entitled to be concerned. Robertson told Chandler in effect, back off on complaining about District compliance, or faculty

will loose reassigned time. This was a threat conditioned on SMFAIs foregoing a right to insist on the District's compliance with the 50 percent law. This was a violation of SMFAIs statutory right to engage in protected activity guaranteed by section 3543.5(b).

Regarding Robertson's comments about being more "aggressive" about exclusions under the 50 percent law, I conclude such comment does not violate the Act. **Exclusions are allowed by the** statute mandating the expenditure, and the District is entitled to use such exclusions. Robertson's *announcement was* no more than an assertion that the District intended to use the exclusions allowed. This is neither a threat nor promise of benefit.

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ÊÊÊÊ Young's comments following the budget meeting on October 26,
1998, constituted a reiteration of Robertson's comment to Chandler the day before. However, I do not believe the comments
constitute an independent violation of the Act. This finding is
predicated upon the very private and personal circumstances in
which Young's comment was made. Costello's initial memo on the
subject stressed that Young was not threatening the two faculty
members to whom he was talking. Her second memo was even more
emphatic that Young's remark was spontaneous and private

and not
a position of the District. Costello, SMFA's own source of Young's comment, declined to find a threat, and so do I.
ÊÊÊÊ ÊÊÊÊ REMEDY

Under section 3541.5(c) PERB is empowered 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. Unfair Practice Case No. LA CE 3988

It has been found that the **District failed and unlawfully** withheld information on the **superintendent's expense** reimbursements. The District should be ordered to cease and desist in unlawfully withholding relevant and necessary information from SMFA and should be ordered to provide such information to the Association.

All other information requests, the certificated salary schedule, preliminary budget for 1998 99, mandated cost recovery

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requests and amount of money the District spent on instruction pursuant to the 50 percent rule, should be deferred to the contractual grievance machinery. The District's motion to defer, to the extent herein described, is granted. Unfair Practice Case No. LA CE 3995

It has been found that the District failed to bargain in good faith when it unilaterally reclassified the faculty

on assignment to administrative positions. This was a transfer of bargaining unit work outside of the bargaining unit. Hence, the District will be ordered to cease and desist from transferring bargaining unit work from the bargaining unit without first giving notice to SMFA and providing it with an opportunity to negotiate the transfer. All other allegations concerning the District's conduct in bargaining are dismissed. Unfair Practice Case No. LA CE 4001

It has been found that the District unlawfully threatened the Association to deny reassigned time because of its position on the 50 percent law. The District should be ordered to cease and desist from such conduct.

Finally, it is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District, indicating that it will comply with **the terms thereof.** The notice shall not be reduced in size and reasonable effort will be taken to insure that it is not **altered, covered by any material** or defaced and will be replaced if necessary. Posting such a

notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the Act that employees be informed of the resolution of th e controversy and will announce the District's readiness to comply with the

ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; Placerville Union School District, (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, and pursuant to the Educational Employment Relations Act (EERA), Government Code Section 3514.5(c), it is hereby ordered that the Santa Monica Community College District (District) and its representatives shall:

A.ÊÊÊ CEASE AND DESIST FROM:

1.ÊÊÊÊÊÊÊÊÊ Denying the Santa Monica Faculty Association (SMFA) rights guaranteed to them by the EERA, by failing and refusing to provide necessary and relevant information, and by threatening to retaliate against SMFA members for SMFA's position on the District's compliance with the So percent rule.

2.ÊÊÊÊÊÊÊÊÊ By the same conduct, denying members of the unit represented by SMFA rights guaranteed to them by the EERA.

3.ÊÊÊÊÊÊÊÊÊ Refusing or failing to meet and negotiate in good faith, and refusing and failing to participate in the statutory

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impasse procedures by unilaterally transferring bargaining unit work out of the unit represented by SMFA.

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

1.ÊÊÊÊÊÊÊÊÊÊ Provide the SMFA with information relating to the superintendent's expense reimbursements..

2. Upon request of the SMFA, meet and negotiate with the union over the decision and effects thereof of transferring the coordinator positions out of the bargaining unit.

3.ÊÊÊÊÊÊÊÊÊÊ Within ten (10) workdays of service of a final decision in these matters, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4.ÊÊÊÊÊÊÊÊÊÊ Upon issuance of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the **charging party.**

It is further ordered that all aspects of the charges and complaints are DISMISSED.

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 Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
Ê Ê 1031 18th Street
Ê Sacramento, CA 95814 4174
Ê Ê FAX: (916) 327 7960

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, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier **promising overnight delivery, as shown on the** carrier's receipt, not later than the **last day set** for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document.is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec.

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32135(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, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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, secs. 32300, 32305, 32140, and 32135(c).)

Gary,,K' _Oalle'ry
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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 Nos. LA CE 3988, LA CE 3995 and LA CE 4001, Santa Monica Faculty Association v. Santa Monica Community College District, in which all parties had the right to participate, it has been found that the Santa Monica Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), (c) and (e).

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

A.ÊÊÊÊ CEASE AND DESIST FROM:

1.ÊÊÊÊÊÊÊÊÊ Denying the Santa Monica Faculty Association (SMFA) rights guaranteed to them by the EERA, by failing and refusing to provide necessary and relevant information, and by threatening to retaliate against SMFA members for SMFA's position on the District's compliance with the 50 percent rule.

2.ÊÊÊÊÊÊÊÊÊ By the same conduct, denying members of the unit represented by SMFA rights guaranteed to them by the EERA.

3. Refusing or failing to meet and negotiate in good faith, and refusing and failing to participate in the statutory impasse procedures by unilaterally transferring bargaining unit work out of the unit represented by SMFA.

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

1.ÊÊÊÊÊÊÊÊÊ Provide the SMFA with information relating to the superintendent's expense reimbursements.

2. Upon request of the SMFA, meet and negotiate with the union over the decision and effects thereof of transferring the coordinator positions out of the bargaining unit.

Dated:ÊÊÊÊÊÊÊÊÊ SANTA MONICA COMMUNITY
ÊÊÊÊÊÊÊÊÊ COLLEGE DISTRICT

By:
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT

LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.