



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION and its CHAPTER 633,

Charging Party,

v.

SAN BERNARDINO COUNTY
SUPERINTENDENT OF SCHOOLS,

Respondent.

Case No. LA-CE-6761-E

PERB Decision No. 2934

December 20, 2024

Appearances: David L. Barber, Chief Counsel, Amy Dunning and Richard Treadwell, Staff Attorneys, for California School Employees Association and its Chapter 633; Atkinson, Andelson, Loya, Ruud & Romo by William A. Diedrich and Beverly A. Ozowara, Attorneys, for San Bernardino County Superintendent of Schools.

Before Krantz, Paulson, and Krausse, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party California School Employees Association and its Chapter 633 (CSEA) to the proposed decision of an administrative law judge (ALJ). The complaint alleges that Respondent San Bernardino County Superintendent of Schools (SBCSS) violated the Educational Employment Relations Act (EERA) in two main respects.¹ First, the complaint alleges that SBCSS failed to bargain in good faith by conditioning its willingness to reach a successor collective

¹ EERA is codified at Government Code section 3540 et seq.

bargaining agreement (CBA) on CSEA waiving bargaining unit employees' statutory right to be paid for the holidays to which they are entitled under the Education Code.² Second, the complaint alleges that SBCSS subsequently failed to participate in good faith in mandatory impasse resolution procedures by continuing to insist that CSEA waive statutorily-required holidays.

After an evidentiary hearing, the parties submitted post-hearing briefs. The ALJ then issued a proposed decision finding no violation and dismissing the complaint. CSEA filed exceptions to the proposed decision, which SBCSS opposed. SBCSS filed no exceptions of its own.³

We have reviewed the proposed decision, the record, and the parties' arguments. For the reasons explained below, we affirm the ALJ's conclusion that SBCSS did not violate EERA.

FACTUAL AND PROCEDURAL BACKGROUND

SBCSS is a county office of education that, as part of its field of responsibility, provides special needs services to school districts. CSEA exclusively represents a bargaining unit of classified employees at SBCSS. At all relevant times, SBCSS has compensated its classified employees on an hourly basis. Classified employees normally have a base schedule of 7 work hours per day, though the record reflects 6 hours per day for paraeducators. Because SBCSS compensates classified employees

² The term "bargain" is equivalent to "meet and confer," as well as "meet and negotiate." (PERB Reg. 32096, codified at Cal. Code Regs., tit. 8, § 32096.)

³ By choosing not to file any exceptions, SBCSS acceded to the ALJ's conclusion that CSEA filed its charge within the statute of limitation. This timeliness issue is therefore not before us, and we express no opinion on it.

on an hourly basis, they do not have a set annual salary, but the parties nonetheless often use the term “salary.” As used in this decision, the term means estimated annualized compensation based on an hourly rate multiplied by the normal number of hours per day for the classification and the number of paid days per year, assuming there is no overtime or other factors causing a deviation in annualized pay.

To provide context to the parties’ dispute over holiday pay, we summarize the Education Code’s holiday and vacation provisions, as well as the parties’ bargaining history on those issues. After summarizing this context, we describe our factual findings regarding the negotiations that gave rise to this charge.

I. Education Code Provisions on Holidays and Vacation for Classified Employees

Education Code sections 45203, 45205, and 45206.5 provide paid holidays for classified public school employees. These provisions have evolved over time, primarily through legislative decisions to add holidays. The current version of these Education Code sections specify the following holidays (while allowing employers to make certain substitutions): January 1, the third Monday in January, February 12, the third Monday in February, the last Monday in May, June 19, July 4, the first Monday in September, September 9, November 11, Thanksgiving Day, and Christmas Day. (See Ed. Code, § 45203 [listing holidays and incorporating by reference certain national holidays]; *id.*, § 45205 [affording leeway to substitute certain holidays]; *id.*, § 45206.5 [adding September 9 or a substitute holiday of the employer’s choosing, in honor of Admission Day]; see also 5 USC § 6103(a) [listing national holidays].)

Education Code section 45203 affords employees the right to receive holiday pay if they are on paid status during any portion of the workdays immediately

preceding or succeeding a holiday, but, significantly for this case, employers have the right to provide holiday pay even to employees who are not on paid status on such days. (*Id.*, 4th par. [section 45203 does not bar an employer “from providing holiday pay for employees who have not been in paid status on the days specified herein”].)

Education Code section 45197 provides that classified employees accrue vacation credit, while also describing the allowable bases for such accrual.

II. The Parties’ Pre-2020 Bargaining History Over Holidays and Vacation

As of the mid-1980s, Article 5.4 of the parties’ CBA, entitled “Hours,” provided as follows: “The work year is computed to be 180 days of class sessions, pre[-]school time and in-service, plus 20 days of holidays and vacation, or 200 days of service for all classes except Developmental Centers for Handicapped minors.” A note to the 1985-1986 and 1987-1989 instructional aide salary schedules similarly reflected this distribution of days in the work year. Although the CBA in the 1980s did not list the specific holidays or specify how many of the 20 extra paid days were holidays as opposed to vacation, both parties accede to the ALJ’s finding that bargaining unit employees were at that time paid for 180 workdays, 10 holidays, and 10 vacation days, for a total of 200 paid days per year.

As of the 1980s, when the CBA reflected 200 paid days per year, SBCSS calculated the hourly rate for each classified position by: (1) calculating 1/200 of an intended annualized compensation amount, thereby arriving at a daily rate; and (2) dividing the daily rate by the number of daily hours worked in a normal day, resulting in an hourly rate. For example, the 1985-1986 instructional aide salary schedule listed the annual salary and hourly rate for Range 1 as \$8,217.00 and \$5.87,

respectively. The 1987-1989 instructional aide salary schedule listed the annual salary and hourly rate for Range 1 as \$9,232.00 and \$6.59, respectively, an increase of approximately 12 percent compared to 1985-1986.

In negotiating a new CBA covering 1990-1992, the parties changed their approach to the above calculations. Revised language in CBA Article 5.4 reflected the change, as follows: "The work year is computed to be 180 days of class sessions and pre-school time and one in-service day. The one in-service day shall be effective July 1, 1990." Thus, the parties removed all reference to "20 days of holidays and vacation," "200 days of service" in total. The parties' salary schedule covering the first six months of 1990 listed the annual salary for Range 1 as \$10,313.00, but did not list an hourly rate. Neither party has objected to the ALJ's calculations based on this number. Dividing the annualized Range 1 salary by the revised total of 181 annual workdays and by 7 hours in a workday, the hourly rate became \$8.14. Accordingly, while the annual salary increased by 11.71 percent, the hourly rate increased 23.52 percent.

The record evidence supports the ALJ's characterization of the above CBA changes, including the parties' agreement to remove any mention of holidays from the CBA. The parties agreed to a real wage increase, which in the case of Range 1 amounted to 11.71 percent, as reflected in the higher annualized number. The remaining 11.81 percent increase to the hourly rate arose from a mutually agreed-upon bookkeeping change (dividing the annualized target salary by 181 days rather than 200 days), reflecting the parties' agreement to eliminate discrete holiday and vacation payments by spreading throughout the year the CBA's 10 holidays and

10 vacation days. This change at least slightly benefitted CSEA-represented employees, in two ways. First, it increased their base pay for overtime calculations. Second, spreading out holiday and vacation pay throughout the year can lead to a more consistent income stream without idiosyncratic anomalies for employees who start or end their employment, or take unpaid leave, around the time of a holiday.

By the time the parties executed their CBA effective July 1, 2017, through June 30, 2020, they had further adjusted the language. The provision entitled “Hours,” now designated as Article 6, no longer defined the work year, though it did refer to the “in-service” or “non-student day” as the “181st work day.” Moreover, under Article 9, section 9.5, entitled “Vacation,” subsection 9.5.2 provided that: “Classified employees shall be granted vacation in accordance with Education Code 45197(b) and (c).” Thus, while in 1990 CSEA traded 10 vacation days for extra hourly wages, it later bargained to gain back discrete vacation accrual. The record is silent as to whether this gain was in lieu of a wage increase for certain years.

In contrast to this reversion to a more traditional approach to vacation pay, the CBA remained silent on holiday pay, still reflecting the 1990 bargain to spread holiday pay throughout the year.

III. The Parties’ 2020-2022 Negotiations

In February 2020, the parties provided public notice regarding the types of changes they would be seeking in their upcoming CBA negotiations. As relevant here, CSEA proposed to add discrete holidays to the CBA, while SBCSS proposed to “[r]eview and amend leave provisions to align with current law.” Soon thereafter, the

COVID-19 pandemic led the parties to extend their CBA through June 30, 2021, thereby pausing negotiations for more than a year.

When bargaining resumed, CSEA led off with a proposal dated June 7, 2021. This proposal suggested a new section 9.5.8, entitled “Scheduled Holidays,” providing classified employees with 16 paid holidays.

On June 11, 2021, SBCSS responded with a counterproposal that included the following language:

“9.5.8 SCHEDULED HOLIDAYS - Employees shall be entitled to the following paid holidays provided the employee is in paid status during the working day immediately preceding or the working day succeeding the holiday:

- Independence Day
- Labor Day
- Admission Day (Identified as day before Christmas)
- Veteran’s Day
- Thanksgiving
- Day after Thanksgiving
- Christmas
- Day before New Year’s
- New Year’s Day
- Martin Luther King Day
- Lincoln’s Birthday
- Washington’s Birthday
- Memorial Day.

“9.5.8.1 Bargaining unit members are compensated for the holidays listed in 9.5.8 as part of their annual salary.

“9.5.8.2: When a holiday herein listed falls on a Sunday, the following Monday shall be deemed to be the holiday in lieu of the day observed. When a holiday listed herein falls on a Saturday, the preceding Friday shall be deemed to be the holiday in lieu of the day observed. When an employee is required to work on any said holiday(s), (s)he shall be paid

compensation, or, at the Superintendent's discretion, given compensatory time off for such work, in addition to regular pay received for the holiday, at a rate of time and one-half his regular rate of pay."

Later the same day, the parties exchanged still more proposals on this topic, which led to a tentative agreement. First, CSEA Labor Relations Representative Steve Moreno e-mailed SBCSS a counterproposal that accepted SBCSS's proposed sections 9.5.8 and 9.5.8.1, while slightly modifying the language SBCSS had shown in section 9.5.8.2. Adjacent to 9.5.8 and 9.5.8.1, the proposal contains typewritten marginal comments (akin to those created using Microsoft Word's comment feature) indicating that the parties reached a tentative agreement on those provisions as of that date. Like the ALJ, we infer that Moreno inserted the comments, as each one begins with the initials "MS."

SBCSS then offered a further proposal, which bridged the remaining gap regarding section 9.5.8.2. This proposal included sections 9.5.8 and 9.5.8.1 as CSEA had already agreed, and it accepted CSEA's proposed revision to section 9.5.8.2. SBCSS included marginal comments, again akin to those created using Microsoft Word's comment feature, indicating that it tentatively agreed to all three provisions.

On June 14, 2021, the parties exchanged proposals that included the previously agreed-upon language in sections 9.5.8, 9.5.8.1, and 9.5.8.2. However, these proposals reflected that CSEA had deleted one of the marginal comments noting a tentative agreement and replaced it with the comment: "Further discussion required."

On July 7, 2021, CSEA passed a proposal that added Juneteenth to the list of paid holidays in section 9.5.8.1. Later that day, SBCSS accepted this addition. Still the

same day, CSEA passed a comprehensive proposal that made no further changes regarding holidays.

On July 13, 2021, Moreno wrote SBCSS Assistant Superintendent for Human Resources William Roberts, as follows:

“[A]fter discussions on July 7, 2021, at the negotiations table, CSEA and [SBCSS] could not come to an agreement regarding the Holidays Tentative Agreement and on the language and intent of Article 9.5.8.1 and how it relates to Article 9.5.8, which is still in discussion. As a result, CSEA cannot agree to the language in Article 9.5.8.1, for several reasons including that classified employees are not salaried positions.

“We look forward to resolving this issue at the table in upcoming negotiations and completing the proposed 2021-2024 [s]uccessor contract.”

On July 19, 2021, CSEA Senior Labor Relations Representative Valerie Hollins e-mailed Roberts a letter stating, among other things, that “CSEA will not agree to waive CSEA’s statutory right to Holidays, as listed in Education Code §45203, including the most recent addition of Juneteenth as a recognized Federal holiday.” The letter also stated that “PERB has previously determined that an employer cannot insist to impasse [on] a proposal that CSEA waive its statutory rights and/or negotiate a non-mandatory subject of bargaining” and that any attempt to do so would lead CSEA to file an unfair practice charge. The letter further stated that any previous waiver had expired with the CBA, while encouraging Roberts “to reconsider your position on maintaining no Holidays in the CBA.”

Roberts responded to Hollins’ letter on August 21, 2021, and the parties exchanged further correspondence on August 25 and September 21, 2021, but full

copies of those documents are not in the record. Meanwhile, in a proposal dated September 16, 2021, CSEA added a marginal comment next to subsection 9.5.8.1, citing Hollins' July 19, 2021 letter and noting that CSEA could not agree to the language SBCSS had proposed.

On September 22, 2021, SBCSS modified its proposal regarding section 9.5.8 as follows: "Employees shall be ~~entitled~~ paid for the following ~~paid~~ 14 holidays provided the employee is in paid status during the working day immediately preceding or the working day succeeding the holiday." It also proposed to modify subsection 9.5.8.1 as follows: "Bargaining unit members are compensated for 12 of the holidays listed in 9.5.8 as part of their annual salary. In recognition of the holidays, an additional 1% shall be added to the annual salary effective 7/2/2021." SBCSS explained in a marginal comment that the effect of its proposal was to add two additional days of pay across all salary schedules.

On September 30, 2021, CSEA rejected this proposal and countered by proposing to delete subsection 9.5.8.1 entirely.

In a proposal dated February 28, 2022, SBCSS deleted section 9.5.8 and subsections 9.5.8.1 and 9.5.8.2, instead proposing "no changes from 9.5.7 to 9.10.4."

On March 17, 2022, CSEA filed an impasse determination request stating:

"The parties have exchanged proposals and reached a tentative agreement on five of the seven articles. The current collective bargaining agreement (CBA) is expired [and] does not provide for paid holidays, despite CSEA's regular proposals to include holidays. The employer insists holiday pay is included in the salary, but there is no evidence in the CBA to support the employer's claim.

"The parties have exchanged proposals on salary, but the

employer has taken a position where they will not agree to a salary agreement without CSEA agreeing to withdraw its holiday proposal.

“On February 28, 2022, during regularly scheduled virtual negotiations, the employer and CSEA both engaged in a discussion where each party made their positions clear; there will not be an agreement and further negotiations on the salary and holiday proposal are futile.”

PERB’s Office of the General Counsel (OGC) determined that an impasse existed.

IV. Post-Impasse Procedures and CSEA’s Charge

The parties engaged in post-impasse mediation, but they were unable to reach agreement on the holiday issue. Accordingly, the parties proceeded to factfinding, with their disagreement over holiday pay as the only remaining issue in dispute.

CSEA filed this charge after mediation and before factfinding.

On March 3, 2023, Impartial Factfinding Chairperson Donald Raczka issued a report. The other two panel members (one appointed by CSEA and the other by SBCSS) filed dissenting opinions. Raczka’s report noted the lack of a written agreement clearly incorporating paid holidays into the salary schedule but stated that “something happened in the 1990 agreement that changed the work year from 200 days to 181 days and there was a calculation in the salary schedule that was a *likely* outcome of incorporating the Holidays.”

Raczka made the following recommendations for resolving the parties' dispute:

"RECOMMENDATION ONE

"The parties will agree on the wording of an Article within the Collective Bargaining Agreement similar to the wording within [SBCSS] Policy 4363.^[4]

"According to the material presented, this wording is: 'A confidential employee shall be entitled to the following fourteen (14) paid holidays provided the employee is in paid status during the working day immediately preceding or the working day immediately succeeding the holiday:

Independence Day, Labor Day, Admissions Day (Identified as the day before Christmas), Veteran's Day, Thanksgiving, Day after Thanksgiving, Christmas, Day before New Year's, New Year's Day, Martin Luther King Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Juneteenth.'

"RECOMMENDATION TWO

"The parties will share the cost of including the Holidays as paid days with [CSEA] assuming 4% and the SBCSS assum[ing] 2.36%.

"Article 4.1.1 of the Collective Bargaining Agreement gives the method of determining the annual salary adjustments by taking the average salary increase of 12 benchmarked county districts listed within the Article. This increase is calculated in May and retroactive to July 1 of the school year. This salary increase is an automatic cost to the SBCSS. If, for example, the average increase of the districts is 6%, then the salary schedule will adjust by that 6%.

⁴ At the time of the formal hearing in this matter, SBCSS Policy 4363 governed holidays for confidential and management employees. Under the policy, SBCSS affords 14 paid holidays to confidential employees who are in paid status during the workday immediately preceding or succeeding a holiday. In contrast, the policy withholds paid holidays from management employees, though it specifies compensatory time off for managers required to work on a holiday.

“As noted above, the cost for each additional paid day is .53%. Of the fourteen holidays listed, 12 [fall] within the work year. Therefore, the cost of adding these 12 Holidays is 6.36% (12 days times .53% for each day).

“The Chair recommends the cost of adding these paid Holidays be shared by having [CSEA] dedicate the first 4% of the salary adjustment for 2022-2023 as calculated by Article 4.1.1 for this purpose. And the SBCSS will assume the remaining 2.36% cost (1.36% more than its proposed settlement).”⁵

On May 18, 2023, SBCSS modified its outstanding proposal to adopt Raczka’s recommendations, effective July 1, 2023. The proposal would increase the number of paid workdays in the year by adding all the holidays referenced in the Education Code, and two other holidays, as paid workdays. But the proposal would raise the annual salary schedules by only 2.36 percent, rather than by the larger percentage that would correspond to the full number of added workdays, if hourly wage rates were held constant. SBCSS proposed to accomplish this by reducing hourly wage rates so that annualized compensation would increase only by 2.36 percent on July 1, 2023. However, unrelated to the holiday issue, SBCSS proposed a retroactive 8.48 percent salary increase, effective as of a year earlier (July 1, 2022).

In a letter dated June 21, 2023, Roberts informed CSEA that SBCSS would implement its proposal based on Raczka’s recommendations, effective July 13, 2023, “unless a prior resolution is reached with CSEA.”

⁵ In stating that 2.36 percent equates to 1.36 percent more than SBCSS proposed, Raczka refers to the fact that, beyond regular wage increases, SBCSS had proposed increasing annualized pay by an additional 1 percent, corresponding to 2 added holidays.

In a memo dated July 31, 2023, Roberts informed employees that SBCSS was implementing Raczka's recommendations. Roberts' memo stated, in part:

"After meeting with CSEA on May 18, 2023, concerning Holidays without success, SBCSS has opted to implement the recommended settlement proposed by the fact-finding panel, with the exception that it will not implement the decision retroactively, meaning there will not be an adjustment to the 2022-2023 salary increase.

"Accordingly, effective July 1, 2023, the following changes will be implemented by SBCSS:

- "• The classified work year will be increased by 14 holidays.

- "• All classified salary schedules shall be increased by 2.36%.

- "• All classified employees will now have the Holidays listed above incorporated into their work year.

"This change will result in an increase of 2.36% to annual salary, with no additional workdays. Moreover, while the hourly rate will decrease slightly, annualized salary will increase 2.36%. Additionally, the parties have not finalized salary for the 2022-2023 school year. In accordance with Article 4, this amount has been calculated at 8.48%, and will be applied to all classified salary schedules effective July 1, 2022, once an agreement is reached."

SBCSS then imposed the changes Roberts described. CSEA filed a separate unfair practice charge regarding this imposition, primarily alleging that SBCSS imposed new employment terms that were not reasonably comprehended within its last, best, and final offer (LBFO). We take administrative notice of the records filed so far in that case (designated as Case No. LA-CE-6840-E), including Roberts' memo dated July 31, 2023. However, we express no opinion on the merits of that charge.

In August 2023, the parties completed negotiations on a new CBA effective July 1, 2022, through June 30, 2025. The parties did not change any existing provisions in Article 6 (“Hours”) or Article 9 (“Leave Provisions”), and they explicitly noted that this case would continue, as follows: “The SBCSS and the CSEA agree that PERB case LA-CE-6761-E regarding entitlement to paid Holidays and/or any lawsuits regarding the same shall not be affected by this agreement.”

On November 14 and 15, 2023, the ALJ held a formal hearing. After the parties submitted post-hearing briefs, the ALJ issued the proposed decision dismissing the complaint and underlying charge.

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.*) The Board also need not address alleged errors that would not affect the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5 (*San Ramon*).)

In determining whether a party has violated its duty to bargain in good faith, PERB uses a “per se” test or a “totality of conduct” analysis, depending on the specific conduct involved. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 34.) Per se violations generally involve conduct that violates statutory rights or procedural bargaining norms. (*Id.* at pp. 34-35.) Unlike the totality of conduct analysis, a per se violation requires no inquiry into the respondent’s subjective intent or finding of bad

faith. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 15 (*Fresno*).)

An impasse resolution procedure continues the bargaining process. (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 199 (*Moreno Valley*).) Where a labor relations statute requires one or more impasse dispute resolution procedures, or where the parties voluntarily agree to such a procedure, both parties must participate in good faith. (*Id.* at p. 198; *County of Santa Clara* (2020) PERB Order No. Ad-483-M, pp. 5-6; *City of Davis* (2012) PERB Decision No. 2271-M, p. 6.) In evaluating a claimed failure or refusal to participate in good faith in impasse resolution procedures, PERB applies the same per se and totality of conduct tests that govern bad faith bargaining claims. (*Moreno Valley, supra*, 142 Cal.App.3d at pp. 199-200, 206; *Temple City Unified School District* (2008) PERB Decision No. 1972, p. 12, fn. 12.)

Here, the central theme of CSEA's exceptions is that, over its objection, SBCSS insisted to impasse and throughout the impasse procedures on a waiver of employees' statutory right to receive paid holidays. According to CSEA, "the pre-impasse status quo was a waiver of mandatory statutory rights, and so SBCSS violated EERA by insisting on retaining that waiver when CSEA firmly declined to agree to such a waiver." SBCSS counters that it was never in dispute that "paid holidays for classified employees listed in Education Code §§ 45203 and 45206.5 are mandatory," but rather the dispute is over how bargaining unit employees are to be paid for the statutory holidays, a topic on which the statutes are silent.

Part I below explains the governing legal principles, while Part II applies those principles to the unusual facts presented.

I. Governing Legal Principles

This case requires distinguishing between two principles of good faith bargaining that are often conflated or mistakenly combined. The first principle allows a party to make proposals on permissive bargaining topics but prohibits such a party, at the time of impasse or thereafter, from conditioning its willingness to sign an overall agreement on its counterpart conceding to a permissive or illegal proposal.⁶ We refer to this as “insisting to impasse” on a permissive or illegal proposal. The second principle is that if an employer unilaterally imposes new employment terms and conditions after impasse, it cannot impose terms that require mutual consent.

Part A below covers the first of these principles, while Part B covers the second and notes certain examples in which an employer can lawfully insist to impasse on a proposal but cannot lawfully impose it after impasse. Part C summarizes past decisions explaining how these principles apply to employer proposals that a union waive statutory rights. Finally, Part D explains that the Education Code sets inflexible parameters as to certain terms while leaving flexibility as to others, which can impact whether a party may lawfully insist to impasse on a proposal and/or whether an employer can lawfully impose a new employment term after impasse.

⁶ “Permissive” describes subjects about which parties need not bargain, although they may choose to do so. (*Oakland Unified School District* (2024) PERB Decision No. 2875, p. 3, fn. 4.) We sometimes refer to such topics as falling outside the “scope of bargaining” or “scope of representation.” (*Ibid.*) In contrast, an illegal proposal is one that parties cannot lawfully agree upon. (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 43-44 (*San Jose*).)

A. Insisting to Impasse on an Illegal or Permissive Proposal

If a party insists to impasse on an illegal proposal, that constitutes a bargaining violation irrespective of whether or how its counterpart responded to the proposal.

(*San Jose, supra*, PERB Decision No. 2341-M, p. 44.)

Where the proposal at issue is merely permissive, a different analysis applies. (*San Jose, supra*, PERB Decision No. 2341-M, pp. 43-44.) In such instances, if the party receiving such a proposal effectively indicates that it will not bargain over the proposal because it is permissive, the proposing party must either withdraw the proposal by the time the parties reach a bona fide impasse, or otherwise demonstrate its willingness to reach an overall agreement without any concession by its counterpart on the permissive topic. (See *Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 9 [party that objects to bargaining need not use any “magic words,” but must make it sufficiently clear that it “is unwilling to engage in further negotiations on the issue”] (*Anaheim*); *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S, pp. 3-7 [context is critical in determining whether receiving party has unequivocally refused to bargain over permissive proposal and whether proposing party thereafter unlawfully insisted on the proposal to impasse]; *Lake Elsinore School District* (1986) PERB Decision No. 603, pp. 7-10 [same] (*Lake Elsinore*).) Thus, the proposing party may be able to lawfully maintain the proposal by specifying an alternate set of parameters—involving exclusively mandatory bargaining topics—on which it could reach agreement even in the absence of any concession on the permissive topic. (See *Lake Elsinore, supra*, p. 7 [although a party may not insist on permissive proposal as absolute requirement

for agreement, permissive issue may have bearing on party's position on economic matters or other mandatory proposals].)

Moreover, if a proposal includes a mix of permissive and mandatory topics, or if it is unclear whether the proposal is partially or wholly permissive, the receiving party cannot flatly refuse to bargain. Instead, it must seek in good faith to clarify the proposal and clearly state its willingness to bargain over any aspects of the proposal involving a mandatory bargaining topic. (*Cerritos Community College District* (2022) PERB Decision No. 2819, pp. 23-24, fn. 9 (*Cerritos*); *City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 33; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 9-10.) Thus, a party must bargain over mandatory subjects even though in doing so it must address proposals that also touch on permissive subjects. (*Anaheim, supra*, PERB Decision No. 2504, p. 11 [finding such a circumstance “neither unprecedented nor particularly troubling”].)⁷

B. Limits on Imposing New Terms After Impasse

If negotiations reach a bona fide impasse and the parties complete any required or agreed-upon post-impasse procedures without the employer committing any

⁷ Bargaining over ground rules represents a special case. Ground rules are a mandatory subject of bargaining, meaning neither party can refuse to bargain over them. (*County of Orange* (2018) PERB Decision No. 2594-M, pp. 12-14 (*Orange*).) However, bargaining over ground rules is analytically distinct from bargaining over substantive terms, meaning that neither party can lawfully refuse to bargain over substantive terms merely because of a dispute over ground rules, and as a result PERB precedent establishes certain default ground rules that apply absent an agreement to the contrary. (*Ibid.*)

unremedied unfair practice during the negotiations or impasse procedures, then the employer can lawfully impose new employment terms or conditions. (*City of Glendale* (2020) PERB Decision No. 2694-M, p. 60.) But if the employer chooses to avail itself of this right, it must respect certain limits. First, the terms imposed must be reasonably comprehended within the employer's LBFO, meaning they are not regressive compared to the LBFO and the employer afforded the union a full opportunity to bargain over such terms. (*Id.* at pp. 59, 62-63.) Moreover, the employer cannot impose terms giving it unfettered discretion over a mandatory topic. (*Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 2 (*LAUSD*).) Finally, the terms cannot be ones for which mutual consent is necessary. (*San Ramon, supra*, PERB Decision No. 2571-M, p. 13.)

Precedent establishes a non-exhaustive list of terms requiring mutual consent, including: an arbitration clause, durational language akin to that in a contract, a management rights clause or other waiver of the right to bargain, a no-strike clause, or another statutory rights waiver. (*San Ramon, supra*, PERB Decision No. 2571-M, pp. 12-14; *Fresno, supra*, PERB Decision No. 2418-M, pp. 21-24 & 35-37.) Notably, certain terms requiring mutual consent involve mandatory bargaining subjects, which means a party is free to demand concessions on such topics as a condition for reaching an overall agreement, but reaching impasse does not privilege the employer to unilaterally impose terms involving these topics. (See, e.g., *San Ramon, supra*, pp. 13-14 [contract duration is a mandatory subject, but after impasse employer may not impose duration for new employment terms]; *Fresno, supra*, pp. 35-37 [although no-strike clause is a mandatory subject, after impasse employer may not

impose a no-strike clause or other waiver of statutory rights].) In contrast, a proposal to modify a bargaining unit is both permissive (meaning it cannot be a condition for reaching an overall agreement) as well as one requiring mutual consent, absent a PERB unit modification order. (*Orange, supra*, PERB Decision No. 2594-M, pp. 11-12; *Chula Vista City School District* (1990) PERB Decision No. 834, pp. 37-39 (*Chula Vista*).)

C. Waivers of Statutory Rights

Applying the above principles to cases in which employers propose statutory rights waivers, PERB has developed a nuanced line of precedent. While an employer can never unilaterally impose a statutory rights waiver, PERB decisions classify certain proposed statutory rights waivers as mandatory topics, others as permissive, and still others as illegal. These designations control whether an employer can insist to impasse on such waivers.

The quintessential example of a statutory rights waiver that involves a mandatory bargaining topic is a no-strike clause. (*Fresno, supra*, PERB Decision No. 2418-M, pp. 35-37.) Other statutory rights waivers, in contrast, are permissive, including a proposal for a union to contractually waive its right to file a grievance in its own name, or to waive its right to arbitrate without a grievant's consent. (*Mt. Diablo Unified School District* (1990) PERB Decision No. 844, p. 2; *Chula Vista, supra*, PERB Decision No. 834, pp. 18-23 & 31-35.) The same is true of proposals that a union waive statutory rights by withdrawing or settling a pending grievance, unfair practice charge, or lawsuit. (See, e.g., *Lake Elsinore, supra*, PERB Decision No. 603, pp. 6-9.)

Still other statutory rights waivers are illegal, typically because external law sets an immutable and therefore non-waivable standard. (*Berkeley Unified School District* (2012) PERB Decision No. 2268, p. 9.) This category includes, for example, proposals to allow an employer to garnish employee wages without employee consent, thereby violating the California Labor Code. (*Id.* at pp. 9-11.) However, given that wages are a mandatory subject of bargaining, garnishment proposals are mandatory provided they do not conflict with external law. (*Id.* at p. 9; see *LAUSD, supra*, PERB Decision No. 2326, pp. 14-15 [parties cannot negotiate away or waive rights guaranteed by statute, but “may agree to incorporate an external law-derived right into the collective bargaining agreement,” and/or negotiate “more generous terms” or other agreements “in areas left unaddressed by the external law”].)

D. Proposals on Topics Covered Under the Education Code

For bargaining parties bound by EERA, the Education Code is often the most salient external law. “Because EERA exists alongside the Education Code, the former gives way to the latter when there is a specific conflict between the statutes.” (*Cerritos, supra*, PERB Decision No. 2819, p. 20; Gov. Code, § 3540 [EERA “shall not supersede other provisions of the Education Code”].) However, “the Education Code’s supersession over EERA is not absolute.” (*Cerritos, supra*, p. 20.) Rather, as the California Supreme Court first explained in *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, parties may bargain over matters the Education Code regulates, provided that its provisions would not be “replaced, set aside or annulled by the language of the proposed contract clause.” (*Id.* at p. 864.) In other words, the Education Code does not “fully occupy the field” on any subject, and

bargaining is permitted to the extent a proposal “would not supersede the relevant part of the Education Code” and instead “would strengthen it.” (*Id.* at p. 866.) Thus, the Education Code precludes bargaining only to the extent it “clearly evidences an intent to set an inflexible standard or insure immutable provisions.” (*Id.* at pp. 864-865.) Notably, the Supreme Court has repeatedly reaffirmed these principles since first announcing them. (See, e.g., *United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 515-516; *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 286.)

PERB, too, has consistently followed these principles. For instance, as noted *ante* at page 22, in *LAUSD, supra*, PERB Decision No. 2326, the Board explained that precedent on EERA’s interplay with the Education Code aligns with broader precedent on the relationship between collective bargaining and external law. (*Id.* at pp. 14-15.) Accordingly, there is a duty to bargain whenever the Education Code leaves discretion as to terms or conditions of employment, and the parties may agree to “additional employee protections beyond those provided in the Education Code” if they do not circumvent or eviscerate mandatory statutory provisions. (*Cerritos, supra*, PERB Decision No. 2819, p. 22; *San Francisco Unified School District* (2009) PERB Decision No. 2040, p. 5, fn. 4.)

II. Application of Governing Principles to the Present Facts

CSEA contends that SBCSS has unlawfully insisted to impasse on CSEA’s agreement “to eliminate paid holidays specifically identified and mandated by [the Education Code],” or stated another way, “to continue the waiver of paid holidays that had been part of the contract since 1990.” If that were what occurred, we would have

no trouble finding it illegal to insist to impasse on a waiver of statutorily provided holidays; by the same token, the parties' CBAs over three decades would all have contained illegal terms. However, the facts do not match CSEA's narrative. Rather, the parties agreed to spread out the accrual and payment of holidays.

CSEA focuses on the absence of a holidays article and the diminution of the work year from 200 to 181 workdays beginning in 1990. But we consider those facts together with the clear bargaining history from 1990 and the parties' practices over 30 years, which show that the parties' 1990 agreement improved holiday pay accrual and payment methodologies rather than eliminating holiday pay. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 15 [where contract is silent or ambiguous, bargaining history and past practice are relevant].) Using these interpretive tools, we find that the parties agreed to incorporate holiday and vacation pay into the hourly rate, thereby decreasing the number of days in the work year from 200 to 181. Far from eliminating holidays for classified employees, the parties' 1990 agreement resulted in more generous terms than the Education Code mandated. As noted at page 6, *ante*, the agreement increased overtime rates and avoided anomalies based on whether employees were in paid status the day before or after a holiday.

CSEA characterizes the 1990 agreement as having eliminated paid holidays "for an alleged one-time increase in annual salary." But the significant increase the parties bargained in 1990—a sizable portion of which was based on incorporating holiday pay—has continued year after year since then, compounded by other increases. Throughout these years, employees working overtime have earned more

net income because the parties incorporated holiday pay into the hourly rate, while employees who only work a regular schedule have not lost compensation.⁸

Bargaining parties can agree to more generous terms than those set out in the Education Code, if doing so strengthens the Education Code's provisions rather than annulling them. (*Cerritos, supra*, PERB Decision No. 2819, p. 21; *LAUSD, supra*, PERB Decision No. 2326, pp. 14-15.) CSEA nonetheless argues that "it is not clear that the Education Code actually permits" spreading the pay for statutory holidays across a year of paychecks "because doing so makes the holidays something less than the celebratory paid holidays required by law." But we find no legislative intent preventing a beneficial practice as to accrual and payment, provided that the increase tied to holidays covers at least the number of holidays the Legislature declared. In other words, the Education Code sets a floor regarding entitlement to holiday pay, but bargaining over the timing of holiday accrual and payment can strengthen the statutory provisions. Indeed, the Education Code invites more generous accrual terms. (Ed. Code § 45203, 4th par. [clarifying that statutory language on holiday pay shall not be interpreted as barring employer "from providing holiday pay for employees who have not been in paid status on the days specified herein"].)

We are also mindful that timing of accrual and/or payment is normally a mandatory topic. (See, e.g., *Laguna Salada Union School District* (1995) PERB

⁸ Given this history, even if CSEA were correct that SBCSS's proposal was permissive, that would not necessarily result in annualized pay increasing by the equivalent of 14 additional days. Rather, SBCSS would be permitted, in any resumed negotiations, to make a new wage proposal to account for the change in holiday pay methodology.

Decision No. 1103, pp. 11-13 & fn. 13 [employer must bargain over “how and when” employees are paid].) We harmonize that general principle with our above finding that the Education Code includes a default provision for holiday accrual requirements while allowing more generous provisions. For these reasons, SBCSS did not violate EERA in proposing to continue the parties’ longstanding practice. Indeed, that proposal involved a mandatory bargaining topic.⁹

Finally, we do not accept CSEA’s argument that the parties’ longstanding approach to holiday pay expired with the contract. Normally, an employer cannot reverse a previous understanding unless it first affords the exclusive representative advance notice and an opportunity to bargain to impasse or agreement. (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 15.) However, where the previous understanding is a statutory rights waiver, such a waiver normally

⁹ Even if CSEA had been correct that SBCSS’s proposal was merely permissive, CSEA’s legal claim would still have failed. As noted above, a party that refuses to bargain over a permissive proposal must make it sufficiently clear that it “is unwilling to engage in further negotiations on the issue.” (*Anaheim, supra*, PERB Decision No. 2504, p. 9.) CSEA did not do so. The closest it came was Hollins’ letter to Roberts dated July 19, 2021. Context is important: this letter came only eight days after the parties had reached a tentative agreement on holiday pay and just five days after CSEA reneged on this tentative agreement and noted that further discussion on the issue was required. Moreover, Hollins’ letter did not include an explicit refusal to bargain. Rather, the letter closed by stating: “We look forward to resolving this issue at the table in upcoming negotiations.” Most telling is that the parties continued to exchange proposals regarding holiday pay through February 2022, demonstrating that CSEA was in fact willing to engage in further negotiations. Eventually, SBCSS shifted its position by proposing to follow Raczka’s recommendation and replace the parties’ non-traditional accrual and payment practices with the Education Code’s default. Thus, even if SBCSS’s proposal had been permissive, the facts would still not reflect a respondent conditioning its willingness to reach agreement on a permissive proposal after its bargaining counterpart clearly indicated a refusal to bargain over it.

expires at the CBA's conclusion. (*LAUSD, supra*, PERB Decision No. 2326, p. 40, fn. 28.) Here, for all the reasons discussed above, the parties' 1990 agreement was a beneficial pay practice that exceeded a statutory floor, meaning it strengthened rather than waived a statutory right. Accordingly, its terms remained the status quo at the end of the parties' CBA, and SBCSS followed EERA by continuing the longstanding practice during negotiations.¹⁰

For the foregoing reasons, CSEA has failed to prove that SBCSS conditioned its willingness to reach a CBA on CSEA agreeing to a permissive or illegal proposal. As noted *ante*, we leave for resolution in a separate, pending case the question of whether SBCSS complied with EERA when it imposed its new holiday pay proposal based on Raczka's factfinding recommendations.

ORDER

The complaint and underlying unfair practice charge in PERB Case No. LA-CE-6761-E are hereby DISMISSED.

Members Paulson and Krausse joined in this Decision.

¹⁰ A similar circumstance arises when public entities collectively bargain compensatory time off arrangements. (See 29 U.S.C. § 207(o)(2)(a)(i) [permitting negotiated agreements for compensatory time off when public employees work overtime].) Such an arrangement requires mutual consent, but once agreed upon, it becomes a beneficial pay practice that strengthens rather than waives a statutory right. Maintaining such an arrangement as the status quo pending negotiation serves to stabilize labor relations by preventing compensatory time off arrangements from stopping and starting suddenly when a CBA lapses or is renegotiated. (See generally *City of Montebello* (2016) PERB Decision No. 2491-M p. 10 [PERB precedent on unilateral changes is designed to prevent actions that destabilize labor relations]; *LAUSD, supra*, PERB Decision No. 2326, p. 40 [same].)