

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



EL CAMINO FEDERATION OF TEACHERS,
LOCAL 1388,

Charging Party,

v.

EL CAMINO COMMUNITY COLLEGE
DISTRICT,

Respondent,

UNFAIR PRACTICE
CASE NO. LA-CE-5747-E

PROPOSED DECISION
(09/27/2013)

Appearances: Lawrence Rosenzweig, Attorney, for El Camino Federation of Teachers, Local 1388; Parker & Covert by Spencer Covert and Michael Travis, Attorneys, for El Camino Community College District.

Before Valerie Pike Racho, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a teachers union alleges that a school district employer implemented terms and conditions of employment that were not reasonably comprehended within the employer's pre-impasse last, best, and final offer. The employer denies any violation of the law.

The El Camino Federation of Teachers, Local 1388 (Federation) initiated this action on October 5, 2012 by filing an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the El Camino Community College District (District). The charge alleged that the District implemented a new salary schedule for counselors that was not included in the District's pre-impasse proposals, nor discussed during the factfinding process. On February 4, 2013, the PERB Office of the General Counsel issued a complaint alleging that the District violated the Educational Employment Relations Act (EERA)¹ by implementing a

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

salary schedule for faculty employees employed on a "197-day per year 'academic year basis'" that was not reasonably comprehended with the District's pre-impasse last, best, and final offer to the Federation.

The District filed its answer to the complaint on February 25, 2013, denying all material allegations and raising various affirmative defenses. PERB conducted an informal settlement conference with the parties on March 11, 2013, but the dispute was not resolved.

On April 30, 2013, the District filed a motion to dismiss the charge and complaint, alleging that the charge was untimely because the Federation had notice of the salary schedule more than six months before the charge was filed. The Federation filed opposition to the motion to dismiss on May 20, 2013. The administrative law judge denied the District's motion to dismiss on May 24, 2013, but noted that it could be resubmitted upon a complete record.² A formal hearing was held on June 4-5, 2013. Upon the receipt of the parties' post-hearing briefs on July 29, 2013, the record was closed and the case was submitted for decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). The Federation is an exclusive representative of a bargaining unit of faculty employees within the meaning of EERA section 3540.1(e). Counselors employed by the District are included in the Federation's bargaining unit.

The Parties' 2011 Negotiations End in Factfinding

After the expiration of their previous collective bargaining agreement (CBA) in effect from 2007-2010, the Federation and the District engaged in negotiations over a successor agreement between February and June 2011. They participated in approximately 13 bargaining

² The District renewed its motion to dismiss in its post-hearing brief.

sessions during this time period before mutually declaring impasse.³ The District's chief negotiators were its attorney, Spencer Covert, and Barbara Perez, the vice president of human resources. The Federation's bargaining team included, among others, Janina (Nina) Velasquez, the executive director of the Federation, and Don Brown, its chief negotiator. Brown did not testify. There were no counselors on the Federation's bargaining team in 2011.

The item in dispute that is germane to this case was the District's proposal to reduce counselors' work year from a "fiscal year basis," consisting of 12 months per year with one month of vacation, to an "academic year basis," consisting of 175 work days. In the prior 2007-2010 CBA, and for many years before that, teaching faculty were paid on the "academic year basis salary schedule," and counseling faculty were paid on the "fiscal year basis salary schedule." Counselors had more work days, and thus, were paid more than teachers.⁴ According to the District, other comparable community college districts did not have counseling faculty working more days than teaching faculty, and the District desired this outcome.⁵ The District also maintains that throughout these negotiations it asserted that it did not want to pay counseling faculty more than it paid teaching faculty. The Federation consistently maintained throughout pre-impasse negotiations that the work year for counselors should remain on the fiscal year basis because that was the way it always had been.

³ PERB determined the existence of an impasse on June 13, 2011 in Case No. LA-IM-3649-E.

⁴ According to Perez, the number of work days for an employee on the fiscal year basis salary schedule is technically 248. This is the number reported as the work calendar for counselors to the entity responsible for administering faculty retirement accounts. However, for reasons that remained somewhat unclear, even to Perez, the actual number of work days when subtracting vacation days was approximately 222.

⁵ The District's factfinding presentation included information regarding counselor work years from seven other community college districts. These ranged from 210 to 175 days.

On October 5, 2011, the parties participated in a factfinding hearing. After their respective presentations, the Federation and the District continued to try and reach an agreement until late in the evening, but were not successful.⁶

On November 4, 2011, the factfinding chairperson issued his report.⁷ Regarding the issue of counselors' work year, the factfinder recommended a "multi-year phase-in" with a "transition from a fiscal year basis to a work year calendar during 2012-2013 of 197 work days, with one additional sick leave day, but no vacation or holiday pay. Within the 197 work days, 175 days will coincide with the modified academic year. . . . Twenty-two (22) additional days will be assigned to be worked during the summer and/or intersession. . . ." The factfinder recommended that the counselors' 197-day calendar be effective on July 1, 2012. Then, effective July 1, 2013, counselors would further transition to a "modified academic year basis of 175 days." The District concurred with the factfinder's report in its entirety. The Federation attached a written dissent, which stated, in part, that current counselors should remain employed on the fiscal year basis, but that newly hired counselors may be hired under the "175-day rule."

On November 9, 2011, the parties held a post-factfinding bargaining session. Covert, Perez, Velasquez, and Brown attended this meeting. The District proposed in writing to accept the factfinding report in its entirety. This document was introduced into evidence as a joint

⁶ Covert testified about a PowerPoint presentation made by counselor Chris Jeffries, and part of this presentation was also introduced into evidence. According to Covert, Jeffries spoke at length regarding how the proposed reduction in work year would be devastating to counselors because of the resulting reduction in salary, and how this would affect her in particular. Jeffries did not testify. Thus, the testimony and documentary evidence regarding Jeffries' presentation during factfinding are uncorroborated hearsay, which is not sufficient in-and-of-itself to establish a matter of fact. (PERB Reg. 32176; *County of Riverside* (2009) PERB Decision No. 2090-M.)

⁷ Paul Crost was the neutral party appointed as the factfinding chairperson. Where "factfinder" is used in this proposed decision, this refers to Crost. Crost did not testify.

exhibit. It explained that the District was only proposing CBA language modifications as recommended by the factfinder, and that all other contract language would remain the same. Covert also verbally explained this intention. Velasquez recalled the District verbally explaining the rationale behind its CBA language changes. According to Covert, he also verbally explained, regarding the portion covering counselors' work year, that the District was proposing to pay counselors at the same daily rate that teachers are paid in the 175-day academic year salary schedule. He further stated that the additional 22 days (i.e., the transitional 197-day work year) during 2012-2013 would also be paid at that same rate. Covert testified that the District did not think it was necessary to include a salary schedule with its proposal because the academic year salary schedule already existed and it was not proposed to be changed.

On November 16, 2011, the parties held another post-factfinding bargaining session. The Federation verbally counter-proposed that counselors remain on the fiscal year salary schedule, but also increase their student contact hours from 26 to 30 and receive a three percent raise and additional steps on the salary schedule. The District rejected this proposal and the parties then acknowledged that they had once again reached impasse. The District informed the Federation's team that it would present a recommendation to wholly adopt the factfinder's report at the next meeting of the District board of trustees on November 28, 2011. On that date, the board of trustees voted to adopt and implement all of the recommendations of the factfinding chair. Several counselors spoke publicly at the meeting against the adoption of the factfinder's report.

Events After Factfinding

On or about December 7, 2011, the District advertised an open counseling position. The written advertisement noted that the work year for the position during the 2012-2013

academic year would be 197 days (11 months), with a salary range of \$66,897-\$91,855, and for the 2013-2014 academic year it would be 175 days (10 months), with a salary range of \$59,426-81,624. Velasquez admitted that it is customary practice for the Federation office to receive copies of job advertisements from the District, but also stated that she rarely sees them. Velasquez denied that she ever received this one, or at least that she had ever seen it.

Velasquez is the only full-time employee of the Federation and works out of the Federation office on the El Camino College campus. A counselor and Federation executive board member, Margaret Quinones-Perez, testified that she saw this job advertisement, but could not determine what her own salary would be from the indicated ranges. However, Quinones-Perez also admitted that she determined from the advertisement that the position was not being paid from the fiscal year salary schedule, and that this prompted her to discuss the issue with her dean, Dr. Regina Smith.

Velasquez said that, at some point, several counselors had a conversation with her about the job advertisement because they were upset about having to sit on an interview panel for the position. Velasquez testified: "the counselors did not want to sit on the hiring panel because they felt they want to—it would show their acceptance of the change in salary—working conditions. Change in working conditions." When District counsel then asked whether these counselors were also upset about the salary that would result from a reduced work year, Velasquez stated: "No one ever discussed salary."⁸ However, Quinones-Perez testified regarding the job announcement:

[I] and the other counselors did not want to serve on [the hiring] committee because we didn't want to send a message that we

⁸ Later, when District counsel questioned Velasquez directly over whether any counselor had approached or spoken with her about salaries prior to March 23, 2012, Velasquez was equivocal and somewhat non-responsive, stating that "we were concerned with working conditions."

were okay with a new counselor coming in to be paid like that....[W]e didn't want our actions to infer that we accepted these working conditions, meaning not the job itself, but the salary.

On December 12, 2011, counselor Jeffries sent an e-mail message to the president of the board of trustees, complaining that as of July 2012, her salary would be reduced by \$1,123.19 per month, and expressing doubt about her ability to "live with that reduction." Dr. Tom Fallo, the president of El Camino College, gave Jeffries' e-mail to Perez and asked her to check Jeffries' calculations. Fallo did not testify. Perez confirmed that Jeffries was accurate to within two cents of the manner in which the District was calculating counselors' salaries after the adoption of the factfinder's report.

According to the District, on February 14, 2012, it distributed campus-wide written copies of the imposed terms and conditions of employment ("imposed conditions")⁹ that resulted from the board of trustee's adoption of the factfinder's report.¹⁰ The distribution included some 30 copies to the Federation office and 44 copies to the counseling office. Velasquez denied that she received copies of the imposed conditions at the Federation office on or around that date. The counselors who testified also denied seeing copies of imposed conditions around that date. The imposed conditions included appendices C-1 and C-2. C-1 was entitled "salary schedule for faculty members employed on academic year basis (175 days)," and C-2 was entitled "salary schedule for faculty members employed on academic year basis (197 days)." Appendix C-2 was not slated to become effective until July 1, 2012.

The District admits that appendix C-2 did not exist in written form prior to its being published in the imposed conditions, and maintains that its creation was a "ministerial act"

⁹ During testimony, the document was also referred to as the "imposed contract."

¹⁰ A declaration from employee Michelle Waller was admitted to the record. Waller is the District employee responsible for the distribution of collective bargaining agreements and other documents, including the imposed conditions.

based on calculations using the daily rate from the existing 175-day academic calendar and adding 22 days at that same rate. Perez created appendix C-2 based on the language in the factfinding report regarding "modified academic year." She interpreted this to refer to the academic year basis salary schedule. Perez maintained that if she had not created a separate salary schedule, then the work year for counselors reported to the entity responsible for administering faculty retirement accounts would have been 175, and the extra 22 days would have been paid as per diem and not reported for retirement purposes. The District also admitted that the salary schedule could be calculated differently by changing the number of work days in the year.

On or about March 8, 2012, Velasquez recalled a conversation with Fallo outside of her office where she asked if something could be done for the counselors. Later, during cross-examination, Velasquez admitted that she asked Fallo whether the counselors "could go back to a fiscal salary schedule," and that she was angry that the counselors would lose so much of their salary when they were put on the 175-day schedule. Fallo said that the parties would have the opportunity to address these issues in upcoming negotiations.

Negotiations in 2012

1. March 23, 2012

Despite the recent publishing of the imposed conditions, the parties began a new round of negotiations over a successor agreement on March 23, 2012. According to Velasquez, she called Waller, Perez's assistant, that day to request copies of the imposed conditions because she "had not seen them at all" and she needed them for bargaining. Velasquez admits receiving copies of the imposed conditions prior to attending the bargaining session. The District maintained that copies of the imposed conditions were also passed out during the bargaining session, but Velasquez did not recall that happening. Velasquez insisted that she

only obtained her copy because she requested it. A counselor, Susan Oda Omari, also joined the Federation's bargaining team. Oda Omari recalled that the District passed out copies of the imposed conditions on March 23, 2012. Oda Omari explained regarding her inclusion on the bargaining team that the result from factfinding was "such a huge issue for the counselors . . . one of the largest issues," so when counselors learned that the Federation was resuming negotiations, they insisted that a counselor be on the bargaining team. Quinones-Perez was not on the bargaining team, but she took part in Federation executive board meetings and counselors' meetings wherein she participated in formulating bargaining strategy. Sean Donnell replaced Brown as chief negotiator for the Federation during this round of negotiations, but he did not testify.

During this first session, the Federation proposed to restore counselors to a fiscal year salary schedule, and the District rejected this proposal. Velasquez admitted that the District discussed the manner in which the "extra 22 days" would be paid, but she did not "make [the] connection" that they would be paid according to the daily rate on the 175-day academic year basis salary schedule, although she said that "may have been discussed." Velasquez maintained that she did not actually see appendix C-2 in the imposed conditions, which set forth the 197-day salary schedule, until "well into the [2012] negotiations." Velasquez said that she "did not know it was in the contract," was "surprised to find out that it existed," and that she only realized it was based on the academic schedule after "counselors were looking at it and discussing it." Velasquez did not remember who, in particular, brought it to her attention, or precisely when this occurred, but it was perhaps as late as May 18, 2012. She also stated, "I did not look into it particularly myself." Velasquez further denied that the District ever explained how the C-2 salary schedule was calculated during 2012 negotiations.

Covert recalled the bargaining session on March 23, 2012 differently than Velasquez. In response to the Federation's proposal to restore counselors to the fiscal year salary schedule, Covert stated, "you know, we've got a major issue here, which is you're proposing that counselors get paid more money per day than teachers." Covert also maintains that he and Perez directed the Federation team's attention to the salary schedule in the imposed conditions and "went through" the calculations. At that point, the Federation president, Elizabeth Shadish, requested information from the District regarding various permutations of counselors' salaries based on work year, in order to ascertain how much money the District would derive in savings. The District agreed to provide this information. Shadish did not testify. During direct examination, Velasquez first said she had no knowledge of an information request by the Federation, then she said that she did not make a request. During cross-examination, however, Velasquez admitted that Shadish requested information from the District on March 23, 2012.

2. March 30, 2012

The parties met again on March 30, 2012. Proposals were not exchanged. In response to the Federation's information request at the previous bargaining session, Perez prepared a detailed memorandum with an attached spreadsheet showing all current counselors' salaries at the fiscal year (i.e., 12-month) salary schedule, an 11-month (i.e., 197-day) schedule, and a 10-month (i.e., 175-day) schedule, as well as some other options with additional work days added in. Perez explained all of these calculations during the session and Oda Omori took notes. Oda Omori's copy of the spreadsheet with her hand-written notes was introduced into the record. Velasquez at first could not remember when she received Perez's memorandum, but then admitted that it was discussed during the March 30, 2012 bargaining session. However, when asked about specific explanations that Perez gave regarding the information that she had

compiled, Velasquez did not recall any portion of Perez's discussion that day. Velasquez claimed her only familiarity with the document was that she had received it.

Oda Omori had a better recall than Velasquez of Perez's discussion over the memorandum and spreadsheet. Oda Omori admitted that Perez explained that the salary calculations in the column of the spreadsheet reflecting an 11-month or 197-day schedule were based upon the academic year salary schedule. Oda Omori's handwritten notes on her copy of the spreadsheet stated, "Why has our monthly pay changed? Based on the academic schedule—not the fiscal schedule[,] our current salary." However, like Velasquez, Oda Omori maintained that she never actually saw appendix C-2 in the imposed conditions until mid-April 2012, and was similarly not clear about how and when she discovered it.¹¹ Oda Omari said that when she became aware of appendix C-2, she and another counselor immediately began running their own calculations on different ways that a 197-day salary schedule could be created. One of these methods was later used by the Federation in a bargaining proposal presented to the District. (See the discussion below regarding the May 18, 2012 bargaining session.)

At some point after the March 30, 2012 bargaining session, the counselors met to discuss negotiations and formulate strategy and Perez's memo and spreadsheet were shared with the meeting participants. Quinones-Perez attended and recalled the discussion over the spreadsheet, but stated that she "tuned-out" the explanations because she "didn't want to know" what it said. When pressed about why she did not want to know, Quinones-Perez stated "I didn't agree with the proposals. . . . I have been there 28 years and—27 years and been on the fiscal schedule, and all of a sudden it's gone, along with our retirement levels, and that was

¹¹ Oda Omari said regarding how she became aware of appendix C-2: "I was trying to recollect. I can't remember if it was a counselor who brought it to my attention or after discussion in negotiations, which, you know, we started in late March 2012, that a couple of weeks after that, I discovered it."

never told to us.” Regarding appendix C-2, Quinones-Perez stated that she was not aware of it until “April, when we got the contracts.”

3. April 27, 2012 and May 11, 2012

The parties met again for bargaining on April 27, 2012. The District provided a written response to the Federation’s proposal on March 23, 2012. According to Covert, he reiterated the District’s intention to pay counselors at the same daily rate as teachers. The Federation did not accept this proposal. Like her reaction to Perez’s memorandum, Quinones-Perez “didn’t want to know” the content of the District’s proposal as it was shared with counselors by the Federation bargaining team. The parties met again on May 11, 2012, but there is scant information in the record about what was actually discussed during this session. The District presented a proposal regarding compensation.

4. May 18, 2012

The Federation presented a proposal at the May 18, 2012 bargaining session entitled a “memorandum of understanding” (MOU). It is undisputed that MOUs are not subject to a ratification vote. The Federation’s proposed MOU contained its own version of the appendix C-2 salary schedule, with higher salary levels than what appeared in the imposed conditions’ appendix C-2. Perez testified that when she examined the Federation’s version, she knew that it had been calculated using 222 work days to obtain a higher daily rate than the academic year basis salary schedule. Perez explained to the Federation’s team that she understood how they had arrived at their numbers, and she asked why counselors should be paid more per day than teaching faculty. Oda Omori and Velasquez admitted that Perez had asked this question throughout negotiations. Oda Omori also admitted that the Federation’s modified appendix C-2 was based upon a daily rate using 222 work days, from the fiscal year basis salary schedule, paid out in 197 days. The District rejected the Federation’s proposed MOU and

reiterated that appendix C-2 in the imposed conditions was where they were starting from. The Federation also presented another separate proposal that day, one they had derived from a copy of a prior District proposal, making hand-written modifications upon it. This other proposal referenced salary schedules at appendices C-1 and C-3¹² (175 days) and C-2 (197 days), but these appendices were not actually attached to the proposal.

Velasquez attended the May 18, 2012 bargaining session and reviewed the Federation's proposed MOU during the hearing, but had no recollection that the Federation presented the MOU proposal or that it included a modified version of appendix C-2. Regarding the other Federation proposal presented that day, Velasquez recognized that the handwriting on the document belonged to Donnell, and admitted that her team presented the proposal to the District on May 18, 2012. But she did not acknowledge that the appendices referenced therein referred in any way to appendix C-2 in the imposed conditions. When Velasquez was asked whether she had read the original proposal from the District that the Federation used to create their hand-modified counter-proposal she said, "I may not have." When she was asked whether Donnell discussed this counterproposal with the Federation's team, she had no recollection. When asked whether the imposed conditions was the first contract to ever use appendix C-2 with a modified academic year salary schedule of 197 days, she answered that she had still not seen appendix C-2 in the imposed conditions.

5. June 22, 2012

The District presented a proposal to the Federation during bargaining on June 22, 2012. The District proposed the same essential terms as its previous offers, but added that counselors may be able work an additional 25 days beyond the 175-day academic calendar at the same

¹² Appendix C-3 apparently referred to the salary schedule for two bargaining unit employees in coordinator positions who would remain employed on a 12-month, fiscal year basis. It is not entirely clear why this proposal referenced a 175-day work year in connection to appendix C-3, but this ambiguity does not affect the analysis in this proposed decision.

daily rate (as that paid under the academic year basis salary schedule) during the 2013-2014 school year. The Federation wanted these additional days of work guaranteed, but the District refused to do that and insisted on permissive language. The Federation expressed disappointment with the District's proposal.

Also during this bargaining session, the Federation presented the District with a letter demanding to bargain over the 197-day salary schedule. The letter stated that since appendix C-2 had not "formerly been presented" during the prior year's negotiations, it could not legally be imposed. Upon receipt of the letter, Covert said to the Federation's negotiating team, "I thought we'd been negotiating a 197-day schedule for a long time."

6. The Final Session – June 29, 2012

Late in the day on the last day of negotiations, the Federation made a proposal regarding counselors' work year. According to Covert, the parties had reached several tentative agreements regarding various other matters, and counselors' work year was the last item up for discussion. Oda Omari did not attend negotiations that day, but Velasquez was there, as well as another counselor who did not testify. The Federation's proposal did not include the modified appendix C-2 salary schedule that had been presented on May 18, 2012, or any other salary schedule. Upon noticing that the modified salary schedule was missing, Covert expressed to the Federation's team that he was glad that the Federation had accepted that everyone would be making the same daily rate. According to Covert and Perez, as was the parties' custom and practice, the omission of the salary schedule signified that the Federation had retracted that proposal. However, the District did not agree to the other terms of the Federation's proposal, and then the Federation's team decided to caucus.

After the Federation's caucus, both parties began revising the language from the District's proposal of June 22, 2012. Covert expressed that the parties had spent a long time,

but he was glad that they were able to resolve the issue of work year and work rates. The parties then continued to modify the language in the June 22, 2012 proposal regarding the potential for counselors to work up to an additional 25 days in 2013-2014, after they had worked 175 days. Subsequently, the parties reached a tentative agreement over the issue of counselors' work year, and their entire successor agreement. Covert said he was pleased that the parties had reached agreement with respect to counselors' salary schedule and rate of pay effective July 1, 2012. Perez confirmed Covert's comments. Velasquez signed the tentative agreement and agreed to submit it for a ratification vote to the Federation membership. The tentative agreement was then ratified by the Federation membership on September 28, 2012, and approved by the District board of trustees on October 15, 2012. The agreement is currently in effect until 2015.

According to Perez and Covert, the parties shook hands after the tentative agreement was signed. No one from the Federation's bargaining team gave any indication that there was an outstanding issue related to counselors' salary schedule.

When questioned over what she believed the salary schedule would be for counselors on the 197-day schedule after the parties reached agreement, Velasquez said, "I had not considered it." Velasquez admitted that it is customary between the District and Federation that tentative agreements modify their previous contracts, and if language is not included in a tentative agreement as a change, then the language existing in the previous contract is still in effect. Velasquez further admitted that, in this instance, the previous contract was the imposed conditions, that she knew at least by mid-negotiations in 2012 what appendices C-1 and C-2 said, and that nothing in the tentative agreement modified C-1 or C-2.

Credibility Determination

There are many material facts in dispute in this case, which largely turn on the credibility of witnesses. PERB looks to the factors in Evidence Code section 780 to evaluate witnesses' credibility, including: bias, the capacity to perceive, recollect, or communicate, and prior consistent or inconsistent statements, among others. (*State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S; see also *Santa Clara Unified School District* (1985) PERB Decision No. 500.) Each of the District's witnesses' testimony was internally consistent, and there was no disparity in the factual accounts between District witnesses. District witnesses also did not have any trouble recalling pertinent events. In contrast, the Federation's witnesses, particularly Velasquez, was unable to recall pertinent events consistently. For example, Velasquez did not remember that the Federation proposed an MOU with its own version of a salary schedule for counselors on May 18, 2012. Nor could Velasquez recall any portion of Perez's detailed explanation of the memo and spreadsheet during the March 30, 2012 bargaining session. This memory failure is particularly notable given that, by all accounts, that was the only topic discussed in bargaining that day.

Furthermore, Velasquez's testimony was both internally inconsistent and contradicted by the testimony of other Federation witnesses. For example, Velasquez first denied that she had any knowledge that the Federation requested information from the District regarding various methods of calculation of counselors' salaries based on different work years. Later, however, she admitted that the Federation president requested the information. Velasquez also denied that the District passed out copies of the imposed conditions at the first 2012 bargaining session, which was contradicted by Oda Omori.

Velasquez also changed her own testimony regarding the group of counselors who were unhappy about having to participate in the hiring committee for the open counseling position.

Velasquez first said that the counselors were upset about the change in salary of the position, and then, as if catching herself, said in the same breath—"change in working conditions."

Velasquez then specifically denied that any of them ever brought up the issue of salary. However, this was contradicted by Quinones-Perez, who said that counselors were upset about having to sit on the committee precisely because they did not want to indicate their agreement with the salary ranges stated in the advertisement. Velasquez also gave several equivocal answers to questions. As one example, when asked whether she had reviewed a District proposal prior to it being modified by the Federation, Velasquez answered with, "I may not have."

Remarkably, all three Federation witnesses were quite vague in their answers regarding when and how they became aware of appendix C-2. When considered in light of all the facts in the record, this vagueness becomes especially suspect. The issue of reduced salaries for counselors after factfinding, as Oma Omari admitted, was "huge" for counselors, and "one of the largest issues" that emerged from factfinding. Counselors were so concerned, in fact, that they demanded to be represented on the Federation's bargaining team in 2012. Quinones-Perez admitted that counselors did not want to participate in the hiring committee for the open counseling position because they were upset over the reduction in salary. Perez confirmed that Jeffries' e-mail accurately reflected what her particular salary reduction would be (almost to the penny) as of July 1, 2012, after the District's adoption of the factfinder's report. These facts make it very likely that counselors were talking to each other at length about exactly what their salaries were going to be in July 2012. It is very unlikely that the bargaining team would not have been keenly aware of this and focused upon the actual salaries of counselors during negotiations.

With this issue of the salary reduction looming large, the parties entered negotiations on March 23, 2012, and the Federation president specifically requested at this session that the District calculate counselors' salaries with various numbers of days in their work year. But, despite this topic being openly explored, Velasquez maintained that she did not "make [the] connection" that the District had counselors being paid based on the academic year salary schedule in the imposed conditions. While discussing the District's calculations at the very next bargaining session, and specifically regarding the 197-day schedule, Oda Omori wrote contemporaneously, "Why has our monthly pay changed? Based on the academic schedule—not the fiscal schedule[,] our current salary." Given all of these facts in the record, that the three Federation witnesses still maintained that none of them become aware of appendix C-2 until some undefined period in "late April or early May" strains credulity and casts doubt as to the veracity of their entire testimony. (See *Regents of the University of California* (1984) PERB Decision No. 449-H, proposed decision at pp. 84-88 [inherently unbelievable testimony casts considerable doubt over the bulk of testimony].)

For these reasons, where there are material factual disputes, the District's witnesses are credited over the Federation's witnesses.

ISSUES

1. Was the charge timely filed?
2. Was appendix C-2, the 197-day salary schedule, reasonably comprehended within the District's pre-impasse last, best, and final offer?

CONCLUSIONS OF LAW

1. Timeliness of the Charge

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the

filing of the charge.” The charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002; *Tehachapi Unified School District* (1993) PERB Decision No. 1024.) In general, the limitation period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The limitation period is triggered by a charging party’s discovery of the conduct that constitutes the alleged unfair practice, not the discovery of the legal significance of that conduct. (*Charter Oak Unified School District* (2011) PERB Decision No. 2159 (Charter Oak).)

In a charge alleging a unilateral change,¹³ the six-month statute of limitations begins to run when the charging party knows, or should have known, of the respondent’s intent to implement a change in policy, provided that nothing subsequently evidences a wavering of that intent. (*County of Riverside* (2010) PERB Decision No. 2132-M; *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H.) Notice of a proposed change must be given to an official of the union who has the authority to act on behalf of the organization. (*State of California (Department of Corrections)* (2000) PERB Decision No. 1392-S, proposed decision, pp. 18-22.) The knowledge of one or even several members of the bargaining unit,

¹³ In its brief, the District cited *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*), for the proposition that the PERB complaint mistakenly alleges a violation of EERA section 3543.5(c), when allegations of post-impasse bad faith should be analyzed under 3543.5(e). However, *Charter Oak* involved allegations of unlawful conduct during the pendency of the statutory impasse procedure, and that is not the case here. The PERB complaint alleges that, “On or about July 1, 2012, [the District] implemented a salary schedule...[that] was not reasonably comprehended within the last, best, and final offer presented by [the District] prior to...impasse.” There are no facts indicating that the statutory impasse procedure extended until July 1, 2012 in this case. An allegation that an employer implemented terms not reasonably comprehended within pre-impasse proposals is properly analyzed as a unilateral change under EERA section 3543.5(c). (See *Laguna Salada Union School District* (1995) PERB Decision No. 1103.)

who lack authority to act in an official capacity, will not be imputed to the organization. (*Victor Valley Union High School District* (1986) PERB Decision No. 565, pp. 5-6 (*Victor Valley*).) A charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.)

The Federation filed its unfair practice charge on October 5, 2012. Thus, the limitation period in this case extends back until and includes April 5, 2012. The District argues that the charge is untimely because the Federation has been on notice at least since November 9, 2010 that it intended to implement the factfinder's report in its entirety, including a modified 197-day academic year basis salary schedule based upon the existing 175-day academic year basis salary schedule that applied to teaching faculty. The District contends that there was no need to present a salary schedule during the pre-impasse negotiations period, because: (1) the Federation understood that it was consistently proposing that counselors and teachers work the same number of days and therefore be paid at the same daily rate; (2) the District was not proposing to modify the existing academic year basis salary schedule in any way; and (3) consistent with the parties' custom and practice, there was no need to present language in negotiations that was not proposed to be changed, because, unless modified through a tentative agreement, the language from the prior agreement—i.e., the 175-day salary schedule— would remain in full force and effect.

The Federation argues in its closing brief that "the earliest possible dates when the Federation knew how Appendix C-2 was calculated are sometime in late April or early May." The Federation contends that this is the time period that should trigger the running of limitation period.

The Federation's theory of timeliness is rejected for several reasons. First, as previously discussed, the Federation's witnesses' testimony regarding the timeframe in which they discovered appendix C-2 is not credited. For the sake of argument, one may accept the premise that until the Federation actually saw appendix C-2, it did not realize that it differed in some way from the factfinder's recommendations.¹⁴ Similarly, it may be possible that copies of the imposed conditions were not actually received by the Federation at the time of the campus-wide distribution on February 14, 2012. Nonetheless, there is still the matter of negotiations commencing on March 23, 2012. District witnesses consistently testified that they discussed the imposed conditions with the Federation's bargaining team, including appendix C-2, during that first bargaining session. It would also be logical to assume that this explanation of appendix C-2 is what prompted the Federation president's information request. Because it has been determined that material factual disputes are resolved in favor of the District's witnesses, it is concluded that the Federation had notice of appendix C-2 at the very latest on March 23, 2012.

However, even though the Federation knew about appendix C-2 more than six months before the charge was filed, this does not end the inquiry over timeliness of the charge in this instance. In *Omnitrans* (2009) PERB Decision No. 2001-M, the Board considered whether an employer's wavering of intent to implement a change in policy served to make a charge timely. In that case, the union had been aware for approximately nine months before the unfair practice charge was filed that the employer was going to implement a new rulebook. However, prior to

¹⁴ Perez concluded that Jeffries accurately calculated her own salary reduction as of July 1, 2012. This might demonstrate that the factfinding report provided ample notice of the manner in which the 197-day salary schedule would be calculated. However, there is no evidence in the record that Jeffries communicated with the Federation regarding her calculations. Thus, this knowledge may not be imputed to the Federation. (See *Victor Valley*, *supra*, PERB Decision No. 565.)

implementation, a union official had a conversation with a management representative who informed the union that he was "looking forward to employee input" and was open to making changes in response to feedback. (*Id.* at p. 7.) Then, during separate negotiations over a successor contract, the union rejected the employer's proposal to replace references to the former rulebook with references to the new one. The rulebook was still not yet in effect during these negotiations. There were no facts demonstrating that the parties actually exchanged proposals over the content of the rulebook. However, the Board found it significant that the new rulebook had not taken effect during the time that the parties were negotiating. The Board concluded that there were sufficient facts to show that the employer was at least "amenable to making changes...based on the feedback it received," and thus a wavering of intent during the limitation period to make the charge timely. (*Ibid.*)

In contrast, in *Milpitas Unified School District* (1997) PERB Decision No. 1234 (*Milpitas*), the Board found insufficient facts to determine that an employer had wavered in its intent to close school sites during a winter break. In that case, the employer had informed the union by letter that it was going to close school sites during the winter break in order to save on electricity costs. This notice came outside of the limitation period. During a regular monthly labor-management meeting, the union presented the employer with a letter stating the union's disagreement with the plan. Later, at an unrelated negotiation session over a successor agreement, the employer's representative informed the union that the employer had the right to close school sites without negotiating with the union. At their next bargaining session, the employer presented another statement to the union of its intent to close school sites that mirrored its original letter providing notice. The Board found that the employer's original letter to the union "clearly communicated" its firm decision, and that the employer's

subsequent communications merely reiterated that decision, so the charge was untimely. (*Id.* at p. 2.)

In this case, when Velasquez asked Fallo whether “something could be done” for the counselors, and specifically whether they could be returned to the fiscal year salary schedule, he told her that the Federation and the District would have the opportunity to address these issues in upcoming negotiations. Fallo’s statements to Velasquez are uncorroborated hearsay, but notably, the District questioned Velasquez about this event and did not attempt to rebut that this conversation occurred. The District also did not produce Fallo as a witness, and addressed Velasquez’s testimony in its closing brief without casting aspersions on its accuracy. Similar to *Omnitrans, supra*, PERB Decision No. 2001-M, appendix C-2 was not yet in effect at the time of the 2012 negotiations. Furthermore, unlike in *Milpitas, supra*, PERB Decision No. 1234, the District never maintained during successor negotiations in 2012 that the subject of a 197-day salary schedule for counselors was off the table, or that the subject was non-negotiable. In fact, the manner in which appendix C-2 was calculated was explored throughout the negotiations, and the Federation presented a proposal on May 18, 2012 that included a modified appendix C-2. Furthermore, after the Federation demanded to bargain over appendix C-2 at the June 22, 2012 bargaining session, the District responded with the belief that the parties were already doing that. Thus, there are sufficient facts to demonstrate that the District was at least “amenable” to modifying appendix C-2 well into the limitation period in this case. (*Omnitrans, supra*, PERB Decision No. 2001-M.) Therefore, the charge was timely filed.

2. Reasonably Comprehended Within the Pre-Impasse Last, Best, and Final Offer

It is well-established that an employer’s unilateral change in negotiable terms and conditions of employment is a per se violation of the statutory duty to bargain in good faith. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *NLRB v. Katz* (1962)

369 U.S. 736.) In California, public sector employers may lawfully make unilateral changes only after the exhaustion of statutory impasse procedures. (*Laguna Salada, supra*, PERB Decision No. 1103, citing *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 422.) Exhaustion of impasse procedures under EERA requires the employer's good-faith consideration of the report produced by the neutral factfinding chairperson.

(*Modesto City Schools* (1983) PERB Decision No. 291.) Factfinding reports that provide a basis for settlement renew the obligation to bargain, but if impasse is once again reached, the employer is then free to implement terms and conditions of employment. (*Ibid.*) Where the parties have reached impasse a second time after good-faith consideration of a factfinding report, the unilaterally implemented terms and conditions of employment "need not be exactly those offered during negotiations, but must be reasonably 'comprehended within the impasse proposals.'" (*Charter Oak, supra* PERB Decision No. 873, p. 15, citing *Modesto City Schools, supra*, PERB Decision No. 291, p. 46; emphasis supplied.)

Imposed terms need not be "*absolutely identical*" in order to be considered "reasonably comprehended," within the last offer on a given issue. (*PERB v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900; emphasis in original.) PERB has found that "matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table." (*Modesto City Schools, supra*, PERB Decision No. 291, p. 47.) "PERB will not, however, dissect a package proposal to 'separately compare each provision of the package to prior proposals concerning that provision.'" (*County of Sonoma* (2010) PERB Decision No. 2100-M, p. 13, citing *Charter Oak, supra*, PERB Decision No. 873, p. 15.)

In *Laguna Salada, supra*, PERB Decision No. 1103, the employer ran afoul of its bargaining obligation by unilaterally implementing a wage decrease in a manner the Board

found was not reasonably comprehended within its pre-impasse last, best, and final offer. In that case, the parties had completed the statutory impasse procedure. The employer's final offer included a 1.76 percent salary decrease that had been slated to take effect nearly one year earlier. At the time of implementation, there was only one pay period left in the school year. The employer unilaterally decided to implement the salary cut by calculating the cumulative value of the reduction from the time it was originally supposed to take effect. This resulted in a 17.6 percent reduction, i.e.—the entire year's salary cut, in the employees' final pay period. The Board first concluded that the methodology used for making wage payments is a matter within the scope of representation. (*Id.* at p. 13.) Next, the Board determined that it had to consider whether the District's final bargaining proposal reasonably comprehended both "the level of wages implemented by the District, and the methodology the District utilized in adjusting wages to that level." (*Id.* at p. 14; emphasis in original.) Finally, the Board concluded that the "mere statement" regarding the proposed effective date of the salary reduction did not "reasonably comprehend that the entire annual amount must be deducted from employee paychecks before the end of the...year." (*Id.* at p. 15.) It is noted that the factual record in that case was stipulated. There were no facts in the stipulated record to indicate that the parties had ever discussed the method of implementation during pre-impasse bargaining, and no description of the impasse procedure other than the date of issuance of the factfinding report.

Because the parties in this case reached a second impasse after good faith consideration of the factfinding report provided a basis for settlement and renewed their bargaining obligation, the threshold inquiry is whether the implemented terms were reasonably comprehended within the post-factfinding proposals. (*Charter Oak, supra* PERB Decision No. 873, p. 15, citing *Modesto City Schools, supra*, PERB Decision No. 291, p. 46.)

The District explained during the first post-factfinding bargaining session on November 9, 2011 that the transitional 197-day work year for counselors proposed by the factfinder would be paid according to the existing 175-day salary schedule for teaching faculty. The District also noted that the additional 22 days in the work year beyond the traditional 175-day academic year schedule would be paid at that same daily rate. The District had also consistently maintained throughout 2011 negotiations that it was proposing to pay the same rate for teachers and counselors, because it wanted them to have the same work year. Thus, it should have come as no surprise to the Federation that the 197-day salary schedule was based upon the existing 175-day academic year salary schedule. For these reasons alone it could be concluded that appendix C-2 was reasonably comprehended within the District's impasse proposals, consistent with *Charter Oak*, *supra*, PERB Decision No. 873 and *Modesto City Schools*, *supra*, PERB Decision No. 291.¹⁵ However, even if this was not entirely clear to the Federation at the time of the District's adoption of the factfinding report, it certainly became so prior to implementation during the 2012 bargaining cycle. It is this fact that squarely distinguishes this case from *Laguna Salada*, *supra*, PERB Decision No. 1103.

Here, unlike in *Laguna Salada*, *supra*, PERB Decision No. 1103, the parties fully explored, prior to implementation, the "methodology the District utilized in adjusting wages. . . ." (*Id.* at p. 14.) The Federation proposed an alternate method of calculation of the wage adjustment through its proposed MOU on May 18, 2012, but admittedly withdrew that from its proposal on June 29, 2012. Notably, in the interim, the Federation had presented the

¹⁵ Notably, the Federation's argument that because the salary schedule could be calculated differently, admittedly by using more days in the work year, does not support the argument that the District's calculation of the 197-day salary schedule was not reasonably comprehended within its impasse offers. The District never proposed to use any other work year than the base amount of 175 days, the academic year basis. The Federation was only able to boost its numbers by using 222 work days. That is calculated by using the fiscal year schedule as the base rate, which is precisely what the District was proposing to abolish for counselors.

District with a letter demanding to bargain the 197-day salary schedule to which the District replied with words to the effect that the parties had already been doing that for a long time. There are no facts in the record to suggest that the Federation protested that such negotiations should be handled separately from the negotiations over the successor agreement.

Next, the District expressed its understanding on June 29, 2012 that the Federation's withdrawal of the modified appendix C-2 from the proposal presented that day signified that the Federation was no longer contesting that teachers and counselors should be paid at the same daily rate. There are no facts in the record to suggest that the Federation's team told the District's team that they had misconstrued their intention. Then, the Federation's team signed a tentative agreement and sent it for ratification to its members. The District expressed its pleasure that the parties had reached agreement over counselors' work year and salary schedule during the signing of the tentative agreement. There are no facts in the record to suggest that the Federation's team said anything to disabuse the District of that notion. Velasquez said she "had not considered" whether appendix C-2 would be included in the tentative agreement. She maintained this stance despite admitting that nothing in the tentative agreement modified appendix C-2, and that it is the parties' practice that unless modified by a tentative agreement, the language from the prior contract, in this case the imposed conditions, is rolled into the new agreement. Velasquez's testimony regarding her lack of consideration of appendix C-2 under these circumstances is completely unreasonable.

The facts in this case are similar to those in *Omnitrans, supra*, PERB Decision No. 2001. There, the union requested to bargain over changes to a new rulebook. The employer responded by letter, requesting that the union provide in writing its areas of concern. The union responded with an itemized list of 19 concerns, and noted that the union would not agree to any proposed change in conflict with the parties' contract, especially regarding procedures

for employee discipline. Subsequently, the union and the employer held a meeting over the rulebook. Then, the union sent a letter to the employer stating that the union would do a "final review" over proposed changes, and after that review the parties should meet once more before implementation. There is no indication that the parties held another meeting, but the union followed with another letter highlighting six additional areas of concern. The letter concluded by stating that there should be a 30-day grace period for employees to adjust to the changes and suggesting that the employer be available for questions. (*Id.* at pp. 2-3.)

The Board in *Omnitrans, supra*, PERB Decision No. 2001, found that the only element of the test for unilateral change at issue was whether the employer had taken action without providing the exclusive representative with notice or an opportunity to bargain over the change, because all other elements were satisfied.¹⁶ (*Id.* at p. 8.) Notably, the same is true in this case.¹⁷ The Board found that it was evident that the parties bargained over the rulebook; the only question was whether they had concluded bargaining. (*Id.* at p. 9.) Again, notably the same is certainly true in this case, because there is no legitimate question that bargaining occurred over appendix C-2 in 2012. The Board found that: (1) in light of the union's letter noting that there should be a grace period for implementation; (2) the failure of the union to then request further negotiations after sending that letter; and (3) the failure of the union to rebut the employer's stated reliance on the letter, the union had failed to meet its burden in

¹⁶ The other elements of the test for unilateral change are: the employer breached or altered the parties' written agreement or its own established past practice; the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and the change in policy concerns a matter within the scope of representation. (*Grant Joint Union High School District* (1982) PERB Decision No. 196.)

¹⁷ There is no dispute that appendix C-2 concerns a matter within the scope of representation, that the salaries of counselors were a change in policy, or that this change would have a generalized and continuing effect on unit members.

showing it had not been afforded adequate opportunity to bargain over the rulebook. (*Id.* at p. 10.)

Here, the Federation expressly admitted that nothing in the tentative agreement changed appendix C-2, that appendix C-2 was in effect in the previous contract, and that it is the parties' practice that prior contract language not modified by a tentative agreement continues in effect in a successor agreement. The Federation did not request further bargaining over the 197-day salary schedule while it was signing the tentative agreement. The Federation allowed the District to make congratulatory statements on June 29, 2012 over reaching agreement with the Federation on counselors' work year and salary schedule, and never expressed its disagreement with that idea. As in *Omnitrans, supra*, PERB Decision No. 2001, the Federation has failed to meet its burden in demonstrating that it was not afforded an adequate opportunity to bargain over the counselors' 197-day salary schedule. Similarly, the District cannot be faulted for believing that the methodology of the wage reduction was fully negotiated and agreed upon under these facts. (See *Laguna Salada, supra*, PERB Decision No. 1103.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-5747-E, *El Camino Federation of Teachers, Local 1388 v. El Camino Community College District*, are hereby DISMISSED.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public

Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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

RECEIVED

SEP 30 2013

PARKER & COVERT, LLP