STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Charging Party, v. SACRAMENTO CITY TEACHERS ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-635-E PROPOSED DECISION (June 9, 2021)

Appearances: Lozano Smith, by Steven H. Ngo, Attorney, on behalf of the Sacramento City Unified School District; Jacob F. Rukeyser, Attorney, California Teachers Association, on behalf of the Sacramento City Teachers Association.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In this case, the Charging Party, Sacramento City Unified School District (SCUSD or District) alleges that the Respondent, Sacramento City Teachers Association (SCTA or Association) violated the Educational Employment Relations Act (EERA)[1] by refusing or failing to meet and negotiate in good faith with the District over a successor to their expiring collective bargaining agreement and after it had, in fact, expired. The Association denies any violation of EERA.

[1] The EERA is codified at Government Code section 3540 et seq. Below, all section references are to the Government Code unless otherwise indicated.

PROCEDURAL HISTORY

On March 11, 2019, the District filed an unfair practice charge (charge) against the Association with the Public Employment Relations Board (PERB). On the same day, the District requested that the PERB Office of the General Counsel (OGC) expedite processing the charge under PERB Regulation 32147. On March 15, 2019, the Association filed its opposition to the request to expedite processing of the charge. On March 18, 2019, the OGC denied the request for injunctive relief and stated that the matter would be handled under the normal processing time and procedures. On March 20, 2019, the District filed its first amended charge.

On October 4, 2019, the OGC issued a complaint alleging that between November 2018 and April 2019, while the District and the Association were bargaining over a successor collective bargaining agreement, the Association gave numerous and various excuses which delayed negotiations. (These allegations are spelled out in detail in the discussion section of this proposed decision.) Such conduct was alleged to have constituted both a violation of the Association's duty to meet and negotiate in good faith under the totality of the circumstances and "per se" violations of this duty pursuant to EERA section 3543.6, subdivision (c).

On October 17, 2019, the Association filed its answer to the complaint which denied any violation of EERA and asserted numerous affirmative defenses.

An informal conference was held on December 5, 2019, but the matter was not resolved.

The matter was set for hearing on two occasions when State offices were closed during the pandemic and had to be continued.

On May 29, 2020, the District filed a motion to amend the complaint alleging further instances where the Association had delayed meeting and negotiating in good faith. The Association did not file a response to the motion and it was granted. An amended complaint issued by the Administrative Law Judge (ALJ) on August 17, 2020.

Formal hearing was held via videoconference pursuant to Governor's Executive Order N-63-20 on August 27 and 28, and December 2, 15 and 16, 2020. Post-hearing briefs were submitted on February 5, 2021.[2]

On February 5, 2021, the District filed a request for judicial notice that "120 calendar days before June 30, 2019 is March 2, 2019"[3] and of a partial transcript of Association President David Fisher's (Fisher's) comments at a February 7, 2019 meeting of the District Board of Education, a recording of which was played at the hearing as Joint Exhibit 67. The Association did not file a response to said request.

FINDINGS OF FACT

A. The Parties and Their Collective Bargaining Agreement

The District is a public school employer within the meaning of Government Code section 3540.1, subdivision (k).

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[2] On the first day of the formal hearing, August 27, 2020, SCTA moved that issuance of a proposed decision in this matter be stayed until issuance of a final Board decision in *Sacramento City Teachers Association v. Sacramento City Unified School District*, PERB Case No. SA-CE-2945-E. At that time, the ALJ deferred ruling on SCTA's motion. The Board having issued a final decision in that matter on November 2, 2020, SCTA's motion is denied as moot. (See *Sacramento City Unified School District* (2020) PERB Decision No. 2749; see also *infra*, fn. 7 (*SCUSD*).)

[3] The significance of the 120-day period is explained below.

The Association is an employee organization and an exclusive representative of a certificated bargaining unit within the meaning of Government Code section 3540.1, subdivisions (d) and (e).

Article 4 of the parties' July 1, 2016 to June 30, 2019 collective bargaining agreement (CBA) is entitled "Grievance Procedures." It defines a "grievance" as "an allegation by one or more members of the bargaining unit or the Association that a member(s) has been adversely affected by a violation, misinterpretation, or misapplication of a specific provision of this [CBA]." These grievance procedures culminate in final and binding arbitration and provide that "the arbitrator . . . shall proceed to hear the grievance under the voluntary rules of the American Arbitration Association [AAA] insofar as said rules do not conflict with the grievance procedure in this [CBA]." The AAA rules specify that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objection with respect to the existence, scope, or validity of the arbitration agreement," and "to determine the existence or validity of a contract of which an arbitration clause forms a part."

Incorporated into the CBA is a handwritten "Framework Agreement" that was negotiated on November 5, 2017 with the help of Sacramento Mayor Darrell Steinberg (Mayor Steinberg). It contains a "[s]alary agreement" that provides in full as follows:

	7/1/16-6/30/17	7/1/17-6/30/18	7/1/18-6/30/19
Salary Increases	2.5%	2.5%	2.5%
Adjustment to salary schedule - Union's proposed structure			3.5% Maximum District expenditures

The phrase "Union's proposed structure" refers to a proposal that the Association had first tendered to the District in December 2016. The then-existing salary schedule consisted of five "classes," with compensation increasing from class to class. Each of these classes contained several steps, again with compensation increasing from step to step. "Vertical" movement from step to step and "horizontal" movement from class to class was determined by factors such as years of teaching experience, higher education degrees conferred (e.g., B.A. or M.A.), and additional higher education credits earned (i.e., course credits). The Association-proposed changes to this salary schedule *inter alia* decreased both the number of years of teaching in the District required to reach the top step in each class and the number of additional higher education credits required to move from class to class, thus "compressing" the salary schedule both vertically and horizontally and making it easier for employees to move within each class and from class to class and to increase their compensation accordingly.[4] These changes primarily benefitted mid-range teachers.

Article 13 of the CBA is entitled "Employee Benefits" and includes, in its Section 13.1.1, the following provision:

> "The District and SCTA agree to negotiate in good faith on or before July 1, 2018, to effectuate changes to the health plan consistent with this section. The Board [of Education of the District] shall provide eligible employees with a choice of the Kaiser Plan and a mutually agreed upon alternative plan(s), which is currently HealthNet. . . . The level of benefits of the plan (e.g., out of pocket maximums, co-payments, services covered, network scope, etc.), when

[4] In addition, these changes also removed a cap on the number of years of teaching outside the District credited to determine the initial placement within the appropriate class.

> evaluated in the aggregate, may not be reduced, and the providers may only be changed through mutual agreement of the parties. The parties agree that any savings that result from making changes to health plans or in the reduction of health plan costs will be applied to the certificated bargaining unit. The parties will negotiate how to apply to the bargaining unit any such savings achieved by the District. Savings shall be defined as any total amount per plan that is lower on an actual cost basis. . . ."

Fisher testified that, by fall 2018, the Association believed that "changes to the health plan, such as purchasing health plans through the California Public Employment Retirement System (CalPERS) rather than, as currently, directly from providers, could result in recurring annual savings of between three and 16 million dollars and that these savings could result in the creation of over two hundred additional full-time equivalent bargaining unit positions.

It is undisputed that, although the parties "negotiate[d] . . . to effectuate changes to the health plan," they never reached an agreement about any such changes. It is, however, disputed by each party whether the other party negotiated "in good faith," and each party claims that the other dragged its feet and was responsible for the failure to agree on this issue. Below, the ALJ ignores these cross-accusations as they are irrelevant to the issue before him and, in any event, not resolvable based on the evidence presented.

Article 25 of the CBA is entitled "Successor Agreement" and provides that "[t]he parties agree to enter into negotiations of a successor [CBA] no later than one hundred and twenty (120) days prior to the expiration of this [CBA]." It further provides that "[t]he Association agrees to submit its initial contract proposal no later than the first regular meeting of the Board of Education during the month of February of the

year the contract expires." At the PERB hearing, the District's Chief Human Resource Officer, Cancy McArn (McArn), testified that the first sentence quoted in this paragraph meant "[t]hat we would sit down and start negotiating 120 days before the agreement expired." It is undisputed that the CBA expired on June 30, 2019. Per the District's request, the ALJ takes judicial notice that the 120th day prior to June 30, 2019 was March 2, 2019. (See *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 936 [taking judicial notice that the 15th day from June 22, 1972 was July 7, 1972].)

B. The Salary Schedule Grievance

On September 12, 2018, the Association filed a grievance alleging that "[t]he District, through its agent[,] Superintendent Jorge Aguilar (Aguilar) ha[d] refused to honor its agreement to implement the 'union's proposed salary schedule,'" pursuant to the Framework Agreement (Salary Schedule Grievance). The changes to the existing salary schedule encompassed by the union-proposed salary schedule and incorporated into the Framework Agreement were not at issue. Rather, the dispute centered around interpretation of the phrase "3.5% Maximum District expenditures" in the Framework Agreement.

According to the Association, this phrase meant that the changes to the salary schedule described above would be capped at 3.5% of the District's total payroll expenditures *only in the first year of implementation*, effective July 1, 2018, but would be fully implemented in the second year of implementation, effective July 1, 2019, and remain fully implemented thereafter, regardless of cost in subsequent years. This could be achieved, so the Association averred, by delaying implementation by half a year in the first year of implementation but fully implementing the changes thereafter.

According to the District, the phrase in question meant that changes to the salary schedule would be capped at 3.5% of the District's annual payroll expenditures not only in the first year of implementation, but *also in all subsequent years of implementation*. Thus, under the District's interpretation, these changes to the salary schedule might never be fully implemented, as long as and whenever the cost of doing so would exceed 3.5% of the District's annual payroll expenditures. Fisher testified at the hearing that the Association believed that under its interpretation of the Framework Agreement, bargaining unit members would be owed seven and a half million dollars more in salary per year than under the District's interpretation.

Arbitrator Kenneth A. Perea (Arbitrator Perea) was selected to conduct an arbitration hearing and render a decision in the Salary Schedule Grievance. According to an e-mail message dated October 23, 2018 from AAA to the Parties, Arbitrator Perea inquired if the matter be scheduled, heard and resolved on an expedited basis, the Association responded by "requesting the matter to proceed on an expedited basis pending concurrence f[r]om the District," but AAA received no response from the District. On October 24, 2018, District Outside Counsel Dulcinea Grantham (Grantham) informed AAA that "[g]iven the significance of the issues involved in this case, the District does not agree to an expedited arbitration process here." Grantham also wrote: "Without waving any potential defenses to the grievance as noted in prior correspondence,[5] we are happy to work with AAA and SCTA on possible dates that allow the matter to move forward in a timely manner while allowing sufficient time for consideration of these issues." On November 6, Arbitrator Perea

[5] No such prior correspondence is in evidence.

offered January 7-9, February 19-20 and 27-28, and March 1, 2019 as possible hearing dates to the Parties. On November 9, 2019, Grantham replied that she needed "a few additional days to respond to this request in order to coordinate calendars and move items around." Grantham then asked: "May I have until next week to respond to the offered dates?"

However, on November 19, 2018, Grantham informed Perea that "[a]s stated in our prior communications,[6] the District does not believe this matter is arbitrable" because "[t]he District and SCTA had materially different understanding of the framework agreement on the salary schedule, and thus, apparently never mutually assented to an agreed upon meaning." Grantham further stated that "based upon SCTA's position, there can be no other conclusion than the parties were mutually and materially mistaken," such that "[t]here is no agreement as to salary structure that might otherwise be subject to arbitration under the parties' CBA." Grantham also informed Perea that on November 16, 2018, the District had initiated a judicial action in Sacramento County Superior Court (SCSC or Court) seeking a declaration from the Court that the District and SCTA never entered into a contract regarding the salary structure. Grantham concluded: "The District, therefore, cannot agree to the proposed arbitration dates, or arbitration itself unless or until the outcome of the action before the Superior Court calls for same." The Association subsequently filed a Motion to Compel Arbitration and Stay Proceedings (Motion) in the District's SCSC action.

[6] No prior communications are in evidence that so stated and SCTA Executive Director John Borsos (Borsos) testified that he had not received any.

On February 22, 2019, the SCSC granted the Association's Motion based on the Parties' incorporation of the AAA rules quoted above into the grievance procedure of their CBA."[7]

An evidentiary hearing was later conducted on March 7, 8, and 13, 2019 before Arbitrator Perea, who issued a decision on May 2, 2019, as described further below.

C. The District's Attempts to Initiate Successor Contract Negotiations from November 2018 through May 2019

On November 9, 2018, Aguilar wrote to Fisher:

> "[W]e are initiating the "sunshining" process of the District's initial proposal for a 2019-2022 successor CBA at the upcoming Board Meeting on November 15, 2018 in order to get a jump start in negotiations and to avoid negotiating in arrears as we did last year. We would like to meet to begin negotiations on Thursday, November 29, 2018; Wednesday, December 5, 2018; and Tuesday, December 11, 2018, and we look forward to a productive round of negotiations. . . . We plan to approach negotiations with the following norms in mind:
>
> "● Meetings shall occur at mutually acceptable dates, time, and locations which shall be agreed to by the

[7] On October 23, 2018, the Association filed an unfair practice charge (Case No. SA-CE-2945-E) based inter alia on the District's conduct that is described in this subsection and alleging in relevant part that said conduct constituted a unilateral change in violation of EERA. On June 29, 2020, the Board held that by this conduct, the District violated EERA by "deviating from the parties' contractual grievance arbitration policy without providing the [SCTA] advance notice and an opportunity to meet and negotiate over the decision and/or the negotiable effects thereof" when "it asserted a nonexistent legal right to decide for itself whether the salary schedule agreement was a binding contract and whether related disputes were arbitrable." (*SCUSD*, *supra*, PERB Decision No. 2749, pp. 1-2, 9.) PERB may take official notice of the contents of its own files and records. (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.)

parties. Adjustments to the agreed upon schedule may only be made by mutual agreement.

"● To the extent possible, meetings shall rotate between the District Office and the Union Office.

"● The agenda for each session shall be agreed on at the conclusion of the previous session, although it may be altered by mutual agreement.

"● The parties agree to engage in conversations with positive intentions.

"● As agreements are reached, they shall be put in written form, signed by both parties, dated and timed, and labeled as Tentative Agreements.

"● The parties agree to provide advance notice if bringing in other negotiators or speakers.

"The District would also like to discuss some strategies to make our negotiations sessions more productive, such as providing release time for three to five SCTA members in addition to the three SCTA officers who are on leave for union business so that we can meet for full day sessions. Lastly, we would also propose retaining a neutral facilitator for negotiations who can be mutually agreed upon by the parties."

On November 15, 2018, Fisher responded:

"We believe a more productive path forward would begin with the District honoring the terms and conditions of the contract that is currently in effect by: a) implementing the agreed-upon salary structure, and b) immediately empowering District representatives to reinitiate discussion with SCTA regarding changes to the health plan consistent with Article 13.1.1.

"[¶ . . . ¶]

> "From our perspective, negotiations for a successor agreement will proceed much more smoothly after these two extremely important matters—the salary structure and potential health plan changes—are settled for this year, before we address these same issues and others going forward."

At the hearing, Aguilar agreed that "it would be difficult for any parties in a collective bargaining relationship to bargain "[o]n any aspect related to salary schedule" if "they didn't know where they were starting from."

At a November 15, 2018 meeting of its Board of Education, the District "sunshined" its "Initial Proposal to [SCTA] for 2019-22 Successor Agreement." The District's sunshine proposals covered Articles 5 (Hours of Employment), 6 (Evaluation), 8 (Transfers), 11 (Safety Concerns), 12 (Compensation), 13 (Employee Benefits), 17 (Class Size), 18 (Organizational Rights), 21 (Organizational Security), and Article 26 (Duration). They can be fairly described as "placeholder proposals," in that they identified areas in which the District sought changes, but did not provide specifics about the changes sought, and also stated that the District might seek additional changes in other areas within these articles, as is not unusual for sunshine proposals. With respect to Articles 12 and 13, the District went even further and stated only:

> "Propose to negotiate in good faith over ["compensation" (Article 12) and "employee benefits" (Article 13)] within the limits of available financial resources. The District may propose other amendment to this Article."

On December 11, 2018, Aguilar wrote to Fisher:

> "In our First Interim Report submitted to Sacramento County Office of Education ("SCOE") last week, there was

> recognition that aspects of strategy to address the District's budget challenges will require negotiations with our labor partners. As part of SCOE's current oversight of the District's fiscal practices and solvency, SCOE has emphasized the importance of the District beginning negotiations with our labor partners immediately and has requested that the District submit a schedule of the collective bargaining process with our labor partners by December 14, 2018.
>
> "Based on the urgency of addressing our budget challenges, we would like to commence negotiations immediately. As it remains our desire to work collaboratively to reach resolution as soon as possible while the District works on reducing our deficit spending, we would like to schedule dates to meet with your negotiations team. To that end, please inform me by December 13, 2018, of any two of the following dates that you are available to meet to begin negotiations: Tuesday, December 18th, 2018, Thursday, December 20th, 2018, and Wednesday, January 9th, 2019."

Despite these references to "budget challenges," the District never became insolvent.

In his December 13, 2018 response to Aguilar, Fisher wrote:

> "[I]n my letter to you dated November 15, 2018, we suggested a more productive path forward to begin with the District honoring the agreement that is currently in effect by: a) implementing the agreed-upon salary structure according to the terms of our agreement, and b) immediately empowering representatives to reinitiate discussions with SCTA regarding changes to the health plan consistent with Article 13.1.1 and the framework agreement . . . .
>
> "[¶ . . . ¶]
>
> "Additionally, we noted that negotiations for a successor agreement will proceed much more smoothly after these

> two extremely important matters—the salary structure and the potential health plan changes—are settled this year, before we address these same issues and others going forward."

Fisher noted that Article 25 of the CBA states in part that "[t]he Association agrees to submit its initial contract proposal no later than the first regular meeting of the Board of Education during the month of February [of] the year the contract expires." Fisher advised Aguilar that "the Association has every intention of abiding by Article 25" and that "[w]e look forward to scheduling dates after we submit our initial contract proposals as set forth above." Accordingly, Fisher did not accept any of the dates Aguilar had proposed, nor did he propose any dates in return at that time.

On December 21, 2018, Aguilar responded to Fisher as follows:

> "Based on your letter, it is clear that SCTA does not intend to begin negotiations early and will instead make its initial proposal for negotiations in February consistent with Article 25. While we appreciate SCTA's adherence to Article 25, there is nothing in that article that prevents SCTA from making its initial proposal and starting bargaining prior to February. If SCTA remains unwilling to come to the negotiations table in January, we would like to schedule negotiations dates for February so that we can begin negotiations as soon as SCTA makes its initial proposal. The District's negotiating team is currently available on February 11, 13, and 15, 2019."

Aguilar identified the members of the District's negotiations team and asked Fisher to do the same for the Association's team. Aguilar also restated the ground rules for negotiations that he had proposed in his November 8, 2018 letter to Fisher.

No response from the Association to this letter is in evidence.

On January 17, 2019, McArn wrote to Fisher:

> "Since November 2018, the District has requested to begin negotiations with you . . . . We repeated this request in letters dated December 11, 2018 and December 21, 2018. To date, you have not responded to our December 21, 2018 letter offering to begin negotiations with SCTA on February 11, 13, or 15, 2019. You also have not responded to our multiple requests to discuss negotiation norms or ground rules; negotiate for full days to allow for more in-depth discussions; use of a facilitator for negotiations; or identity of the team that will represent SCTA in negotiations. As we did in 2016, the District would like to schedule a pre-negotiations session with the SCTA to discuss these issues.
>
> "[¶ . . . ¶]
>
> "Please let me know by January 21, 2019, which of the February dates offered above will work for our first negotiations sessions. Also please let me know by January 28, January 30, January 31, or February 1 . . . for a pre-negotiations meeting."

No response from the Association to this letter is in evidence.

At the February 7, 2019 meeting of the District's Board of Education, the Association sunshined its initial proposals covering all 26 articles of the CBA. In addition, the Association's sunshine proposals specifically referenced several appendices dealing with evaluation forms, salary schedules, professional improvement plans, and school calendars, and more generally the "[r]emaining [a]ppendices." These proposals further indicated that "[t]he Association intends to present a number of unsettled grievances directly at the bargaining table for resolution." They also announced the Association's intention to make proposals in several additional areas,

i.e., “Restorative Practices,” “Special Education/Multi-tiered System of Support,” “Independent Charter Schools,” and “Language Arts School.” Like the District’s sunshine proposals, the Association’s sunshine proposals can be fairly described as “placeholder proposals,” in that they identified areas in which the Association sought changes but, for the most part, did not provide specifics about the changes sought, and also stated that the Association might seek additional changes in other areas within these articles, which—as noted above—is not unusual for sunshine proposals.

The Association’s sunshine proposal for Article 12, “Compensation,” stated:

> “The Association’s ability to make proposals regarding compensation is greatly impeded by the District’s refusal to honor its agreement to implement the Union’s proposed salary schedule in the previous agreement and the District’s unprecedented lawsuit against its own teachers. Now that the District has been ordered to proceed to arbitration, we hope it will stop wasting resources on outside attorney[s] and frivolous delaying tactics and move immediately to arbitration.
>
> “The Association reserves the right to delay making an initial proposal on this Article until the issue of the abide [*sic*] by this Article and the . . . Framework Agreement has been resolved.”

The Association’s sunshine proposal for Article 13, “Compensation,” included similar language accusing the District of reneging on the prior agreement and reserving the right to present new language when this issue was resolved.

The Association’s sunshine proposal for Article 17, “Class Size,” contained language parallel to that just quoted for Article 13.

The Association's sunshine proposal for Article 18, "Organizational Rights," stated:

> "The Association will propose minor updating to the current language.
>
> "This article is also the subject of an unfair practice charge filed against the District for its unlawful, unilateral change to release time terms and conditions.
>
> "The Association reserves the right to delay making an initial proposal on this Article until the issue has been resolved."

The Association's sunshine proposals for the remaining articles does not contain any qualifying language similar to that just quoted for Articles 12, 13, 17, and 18.

At the conclusion of its sunshine proposals, the Association stated:

> "***Because of the unprecedented refusal of the District to abide by the terms and conditions of the previous contract, including a refusal to arbitrate its refusal to implement the Association's proposed salary schedule and its decision to sue teachers to prevent the dispute from being arbitrate[d], the Association believes that negotiations may be best served [by] being delayed until such time the pending litigation has been completed.***
>
> "***At all times, however, the Association intends to meet its obligations to negotiate with the District in good faith.***"

(Emphasis in original.)

Also at the February 7, 2019 meeting, Fisher addressed the District's Board of Education as follows:

> "I think you have . . . now what we're presenting [to] you consistent with the terms of our collective bargaining agreement [as] our initial sunshine proposal to the District. You will note that they are comprehensive. We look forward to negotiating [a] true intervention program and implementation of restorative practices through the District among other matters including a potentially Spanish dual immersion program. You will also note . . . in our proposals—particularly Article 12, Compensation, Article 13, Benefits, and Article 17, Class Size—that our ability to make proposals is greatly impeded by the District's refusal to implement the provisions of our current agreement. Accordingly, it is our belief that negotiations will be productive only when those matters are first resolved."[8]

On February 15, 2019, Aguilar wrote to Fisher that "[w]e look forward to beginning this critical process [i.e., "to begin negotiations of the successor contract"] and partnering with SCTA as we explore very difficult decisions needed to address our budget deficit and save our schools." Aguilar offered to meet and negotiate with the Association on February 20, 22, 25, 26, 27, and 28 and March 1, 2019. Aguilar reminded Fisher that the District had made multiple requests since November 2018 to discuss "negotiation norms and ground rules." Aguilar renewed these requests and

[8] Although the ALJ finds the partial transcript of Fisher's comments submitted by the District as part of its motion for judicial notice to be substantially correct, and although this uncontested transcript is also otherwise properly subject to judicial notice, the ALJ above relies on his own transcript of those comments based on his review of the audio portion of Joint Exhibit 67, which is available at https://www.scusd.edu/board-education-meeting/board-education-meeting-51. In this regard, the motion for judicial notice is denied.

asked Fisher to "[p]lease let us know by February 20, 2019, the dates that work for SCTA to begin negotiations as well as your response to the proposals above."

In a letter dated February 20, 2019 and signed by 12 Association representatives, including Fisher, First Vice President Nikki Milevsky (Milevsky), and Borsos, the Association responded:

> "As set forth in the proposals that we sunshined at the school board meeting on February 7, 2019, we believe meaningful negotiations regarding a successor contract would be more likely to occur after the resolution of the several major issues from our current contract, including but not limited to, the implementation of the agreed-upon salary restructuring, and the addition of resources to the classroom via smaller class sizes and more support staff, as a result of potential changes from the health plans. . . .
>
> "[¶ . . . ¶]
>
> "In short, while we believe it would be premature to commence negotiations for a successor contract while the wage, benefit and staffing issues remain unresolved, *we reiterate our offer to meet with a committee of our choosing* with representatives of the District, including its SCOE fiscal advisor who has the authority to approve District agreements, to discuss our proposal to fix the district's budget fiasco and 'to avoid state takeover and save our schools.'"[9]

(emphasis in original, some formatting omitted.) The Association's letter neither accepted any of the dates offered in Aguilar's February 15, 2019 letter, nor did it offer any alternative dates for successor contract negotiations. It also did not offer any

[9] The language quoted at the end of this quote does not appear in Aguilar's February 15, 2019 letter to Fisher.

dates "to discuss our proposal to fix the district's budget fiasco."[10] At the hearing, Fisher testified that then and later, the Association did not offer dates for successor contract negotiations because "[o]ur position was [successor contract negotiations were] almost impossible on most things until we get resolution on these huge economic issues."

On March 4, 2019, Aguilar replied to Fisher that, despite "the threat of state takeover looming," "[i]t appears from your letter that you are not willing to begin negotiations on a successor contract unless and until the District agrees to meet with SCTA, and the SCOE fiscal advisor, to discuss SCTA's ideas for the District's budget" and added that "[w]e believe this meeting has already occurred."[11] Aguilar continued:

> "If you are ready to come to the table to negotiate with the District, we reiterate that we are available to meet on any of the following dates and times: March 11, 12, and 15, 2019, all day, and March 13, 2019, until 3 P.M. We also reiterate the requests made in the form of four prior letters that you provide the names of all of the members of SCTA's

[10] This appears to be a reference to an "SCTA Proposal To Address SCUSD Budget Fiasco" dated September 13, 2018, which had three elements: "Curbing Bureaucratic Bloat" (i.e., "reduc[ing] the number of administrators to 2014-15 levels"), "Reigning in Escalating Administrator Salaries" (i.e., "no . . . administrator receiv[ing] more than $150,000 or roughly 2 times the average certificated teacher salary"), and eliminating "Questionable Affiliations" with the "Council of Great City Schools" and the "CORE District Collaborative." A more comprehensive "Students First Budget Rebalancing Proposal" dated December 13, 2018 added several other elements to the earlier proposal, including "[e]liminat[ing] vacation buyout for admin[istrators] and others" and "[r]educing use of outside attorneys for labor relations."

[11] An appendix to this letter mentions a January 18, 2019 meeting with the Association attended by Aguilar, District Board of Education President Jessie Ryan, Mike Fine from the Fiscal Crisis & Management Assistance Team, and Mayor Steinberg, "during which you were provided an opportunity to share your ideas to address the District's financial challenges."

> bargaining team for the current round of negotiations. We also request that you provide the District with SCTA's position on use of a neutral facilitator for negotiations, scheduling full day negotiations to allow us to work through more issues during each session, and selection of a neutral location for negotiations. Please let me know by March 7, 2019, which of the above dates work to begin negotiations."

In a letter dated March 11, 2019 and signed by Fisher, Milevsky, and Borsos, the Association, with reference to the disputes over the salary schedule implementation and the potential health plan changes, sur-replied to Aguilar:

> "On September 13, 2018, SCTA made a proposal to the District that would resolve the District's budget fiasco.[12] On December 13, 2018, . . . SCTA made a second, updated proposal to the District. . . .[13]
>
> "[¶ . . . ¶]
>
> "**[W]e reiterate our willingness to meet with the District with a team of our choosing to discuss our proposal to fix the District's budget fiasco.**
>
> "Because of the looming state takeover, we believe that beginning negotiations on a successor agreement at this time would be premature while two major issues from our previous contract remain unresolved—the salary structure and the implementation of our agreement to redirect health plan savings to achieve our mutual-agreed staffing goals that direct resources to the classroom.
>
> "[¶ . . . ¶]

[12] See *supra*, fn. 10.

[13] See *supra*, fn. 10.

> ". . . **Should the District be prepared to cure its unlawful behavior we remain willing to work with the District to implement Article 13.1.1 and the Mayor's Framework Agreement on this important issue.**
>
> "For the reasons set forth above, we believe that successor contract negotiations would not be productive at this time, and assure you that SCTA will meet its legal obligations to bargain in good faith. Finally, regarding your various requests concerning a neutral facilitator, negotiations scheduling and location site and so on, we consider those to be ground rules, which are permissive subjects of bargaining and which can be addressed when our actual negotiations commence."

(Emphasis in original.) The Association's letter neither accepted any of the dates offered in Aguilar's March 4, 2019 letter, nor did it offer any alternative dates for successor contract negotiations.

In a letter dated March 15, 2019 and again signed by Fisher, Milevsky, and Borsos, the Association informed Aguilar that "the members of the . . . Association have voted overwhelmingly to authorize a strike against the . . . District in protest of the actions you, Board [of Education] President Jessie Ryan and other District leaders in engaging in unlawful behavior in violation of California law." The Association went on to state that "[p]rior to establishing a strike date, however, we want to provide you an opportunity to cure the unlawful activity" and offered to meet on March 26 and/or 28 at the Association office "to negotiate over remedies to the District's unlawful actions, in the hopes that a strike can be avoided."

In his response to Fisher dated March 20, 2019, Aguilar stated that "we do not understand SCTA's unfair practice allegations on th[e] topic [of the salary schedule implementation] given that this matter is pending before an arbitrator who will issue a

decision in short order." Aguilar further stated, regarding the potential health plan changes, that "[b]ecause no savings were achieved there are no savings to discuss."[14] Aguilar however continued that "[w]hile the District strongly disagrees that it has committed any unfair practices, we will accept your offer to meet and discuss *'remedies to the District's unlawful actions'*" (italics in original). To this end, Aguilar wrote, the District "would like to accept the offer of Sacramento Mayor Darrell Steinberg and County Supervisor Phil Serna to facilitate this meeting and will communicate this desire to them." On this topic, Aguilar's letter concludes: "The District team will make itself available to meet at a location that Mayor Steinberg or County Supervisor Serna might designate on a mutually convenient date."[15]

On the topic of successor contract negotiations, Aguilar wrote:

> "Separate from your meeting request to discuss '*remedies to the District's unlawful actions*['] we once again request that SCTA leadership agree to meet with District representatives to begin the negotiations process for a new successor contract. Earlier, Loretta van der Pol, Chief Mediator for the State Mediation and Conciliation Services

[14] Borsos testified that this was the "[f]irst time we ever heard" the District articulate the latter position.

[15] Nevertheless, the Association inaccurately headlined an item in its March 22, 2019 "Messenger" newsletter to its members: "Still No District Response to SCTA Offer to Meet." In the body of the item under this headline, the Association stated: "To date, . . . District representatives have yet to accept our invitation to meet on the 26th or 28th." The subject line of the e-mail by which the newsletter was transmitted to Association members stated inaccurately: "Still No District Response to SCTA Offer to Meet on Tuesday, March 26th." In fact, while the District had indeed not *accepted* the Association's invitation to meet *on March 26*, the District had *responded* to that invitation and agreed "to meet . . . *on a mutually convenient date*" (italics supplied).

(SMCS),[16] offered to facilitate negotiations between the District and SCTA and we hope that SCTA leadership would agree to working with the SMCS."

(Italics in original.)

On March 23, 2019, Aguilar wrote to Borsos:[17]

"Our March 20, 2019 letter stated that separate from your meeting request to discuss 'remedies to the District's unlawful actions' the District is again requesting that SCTA leadership agree to begin negotiations process for a new successor contract. Our letter indicated that the District remains willing to use the services of the [SMCS] to facilitate negotiations between the District and SCTA. We believe that given the strained relationship between the SCTA leadership and the District, using a facilitator for negotiations will allow for productive discussions focused on our joint efforts to save our schools.

"The District remains deeply concerned that SCTA leadership continues to refuse to begin bargaining on a successor contract. We again urge you to agree to meet with the District, with the assistance of a facilitator from SMCS, so that we can begin the bargaining process as we have with our other four bargaining partners."

On the same day, Borsos e-mailed van der Pol, with a copy to McArn:

"We appreciate your offer to assign commissioner Joe Rios to assist the parties in an effort to avoid a potential work stoppage based on the massive unfair labor practices committed by Superintendent Jorge Aguilar and the Sacramento City Unified School District.

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[16] SMCS is a division within PERB. See section 3600.

[17] Aguilar addressed his letter to Borsos rather than, as before, Fisher, "because it appears that President Fisher may not have made you aware of our response to SCTA's letter to the District from March 15, 2019 based on the [March 22, 2019] SCTA Messenger." See *supra*, fn. 15.

> "As we have discussed the SCTA bargaining team offered Tuesday, March 26th at 4 pm at the SCTA office to commence those discussion[s].
>
> "[¶ . . . ¶]
>
> "[T]his meeting is to discuss potential remedies to the unfair labor practices and not to discuss successor contract negotiations. Accordingly, it should be understood that we have no interest in discussing issues related to a successor contract at this time particularly when the district's backtracking and bad faith conduct in relation to implementation of the current contract are part of the district's concerted campaign to repudiate our contract and the subject of many, but not all, of the unfair labor practices that precipitated the strike vote."

Again on the same day, Borsos e-mailed Aguilar: "Based on your letter, we look forward to seeing your team on Tuesday, March 26, 2019 at the SCTA office at 4 pm. [¶] We trust you will send a team with the authority to negotiate for the district."

Still on the same day, Borsos followed up:

> "I further wish to clarify just so there is absolutely no misunderstanding [that] 'negotiate' [i]n my previous email refers to curing the unfair labor practices and unlawful actions[;] we [do] not mean bargaining for a successor contract.
>
> "We believe bargaining for a successor contract will be more productive after the district honors and fully implements the current contract and remedies it's unlawful conduct.
>
> "With that, we are looking forward to meeting with your team on Tuesday[, March 26, 2019]."

Fisher testified that as of March 23, 2019, he had not conferred with Milevsky or Borsos on dates to offer to the District for successor contract negotiations, "based on our consistent position that it would be more productive after we had a resolution on the big ticket item[s]."

Per a letter dated April 2, 2019 from Aguilar to Fisher, Milevsky, and Borsos, a "confidential mediation session to address District practices with a facilitator from [SMCS]" took place on March 28, 2019. In the same letter, after stating that "[w]e have offered SCTA leadership over twenty-four dates to come to the bargaining table . . . and to date you have not agreed to meet to begin successor contract negotiations," which Fisher agreed at the hearing was "accurate," Aguilar also stated:

> "We again request that SCTA leaders meet with the District to begin contract negotiations on or before April 12, 2019 in order to work toward submitting a balanced budget to the [SCOE] at our June 20, 2019 Board of Education Meeting. Our fiscal crisis requires us to continue to look at every option available to save our schools. While I understand that the relationship between the District and SCTA is fractured, our students deserve an earnest commitment from both parties to diligently work together."

The March 28, 2019 mediation session was unsuccessful. The April 2, 2019 edition of the Association's "Messenger" announced: "Sac City Educators to Strike April 11th."

A letter to Aguilar dated April 4, 2019 and signed by the same 12 Association representatives that had signed its February 20, 2019 letter describes itself as "our response to your extremely misleading letter of April 2, 2019" but does not respond to the request in that letter that "SCTA leaders meet with the District to begin contract negotiations on or before April 12, 2019," other than to state that "the District

hypocritically keeps insisting on negotiating a successor contract while refusing to implement major issues that remain unresolved from our current contract."

Apparently, another strike day was scheduled for May 22, 2019. In any event, the May 16, 2019 edition of the Association's "Messenger" announced: "Sac City Teachers Postpone May 22 Strike as Gesture of Good Faith."

On May 21, 2019, Aguilar wrote to Fisher:

> "The District has asked SCTA leaders to agree to commence bargaining on the successor contract since November 2018. As you are aware, we have sent many communications making this request and have offered over twenty-four (24) dates between November and March for the parties to meet and begin negotiations.
>
> "While our Third Interim Budget Report buys the District some time before we run out of cash, it is clear that our District continues to run a structural deficit that is not sustainable and must be addressed. . . . The District's negotiations team remains ready and willing to meet with SCTA leaders as soon as possible and to continue negotiations throughout the summer so that we can complete the process prior to the start of the 2019-20 school year and ensure that we can launch the year in a positive direction prepared to work together to serve our students and community. Our negotiations team can meet with SCTA leaders on the following dates: May 28, June 4, 6, 10, 11, 13,
>
> "As you know, Article 25.1 of our CBA provides that the District and SCTA agree to enter into negotiations "of a successor contract no later than one hundred and twenty (120) days prior to the expiration of this Agreement." Our CBA expires on June 30, 2019. While we are well past March 2, 2019, the date by which we were to commence negotiations under Article 25, we again urge SCTA to begin successor contract negotiations with the District. Please let

> us know which date(s) work for SCTA leaders to commence communications."

No response from the Association to this letter is in evidence.

D. Arbitrator Perea's May 2, 2019 Decision in the Salary Schedule Grievance

On May 2, 2019, Arbitrator Perea issued a decision in the Salary Schedule Grievance, in which he adopted the Association's interpretation of the Framework Agreement. Arbitrator Perea based his decision on the fact that during the November 5, 2017 negotiations that resulted in the Framework Agreement, Borsos had explained to Aguilar that "implementation of the 'Union's proposed structure' at a '3.5% maximum District expenditure' could be mutually accommodated in the July 1, 2018 – June 30, 2019 school year if its implementation date was delayed until sometime mid-school year." Aguilar later repeated in meetings with District administrators. Neither Aguilar nor any other District representative ever communicated to Borsos or any other Association representative a different interpretation of the above-quoted salary schedule provision in the Framework Agreement. Arbitrator Perea found that the District's interpretation of the Framework Agreement would have rendered its salary schedule provision "meaningless due to its impossibility of performance" because "following implementation of the 'union's proposed structure' at a '3.5% maximum District expenditure' during the 2018-19 school year, continuation in succeeding school years of SCTA's proposed [salary schedule adjustment or] SSA at 'a 3.5% maximum District expenditure' becomes mathematically impossible." Thus, adopting the District's interpretation of the Framework Agreement "would be akin to trying to place a square peg ('Union's proposed structure') into a round hole ('3.5% maximum District expenditure')."

By contrast, the Association's interpretation of the Framework Agreement did not render its salary schedule provision meaningless and was therefore preferable over the District's interpretation, which, as just explained, would have done so. As the appropriate remedy, Arbitrator Perea ordered the District to "immediately implement the parties [Framework Agreement], including SCTA's proposed SSA, on a date within the July 1, 2018 – June 30, 2019 school year so as not to exceed a 3.5% maximum SCUSD expenditure for the July 1, 2018 – June 30, 2019 school year with retroactive and prospective compensation paid to all certificated bargaining unit members in accordance with SCTA's proposed SSA."

E. The Health Benefits Grievance

On June 4, 2019, the Association filed a grievance regarding health benefits (Health Benefit Grievance). It alleged that "[t]he District, through its agent, Superintendent Jorge Aguilar, has refused to honor its agreement to negotiate in good faith to effectuate health plan changes and to use savings from the health plan 'to apply to the bargaining unit any such savings achieved by the District.'" According to the Association, Article 13 of the CBA obligated the District to "appl[y] to the bargaining unit" not only "such savings achieved by the District" through yet-to-be-negotiated "changes to the health plan," such as switching to cheaper health insurance providers or purchasing health plans through CalPERS rather than, as currently, directly from the providers; but also savings that resulted from renewal rate reductions unilaterally implemented by the providers.[18] By contrast, according to the

[18] As the parties never reached agreement in their negotiations about "changes to the health plan," there were no such savings that could have been "applied to the bargaining unit." In communications with each other, each party accused the other of

District, only the former types of savings were covered by Article 13's instruction to apply them to the unit, but the latter type of savings was not.

An evidentiary hearing was later conducted on February 25, May 27-29, and June 2, 2020 before Arbitrator Carol A. Vendrillo (Arbitrator Vendrillo), who issued a decision on August 21, 2020, as described below.

F. The District's Continued Attempts to Initiate Successor Contract Negotiations in June and July 2019

On June 13, 2019, Aguilar wrote to Fisher:

> "We urge you to begin [successor contract] negotiations so that we can move forward together on that path to avoid another school year that is consumed by contract negotiations and labor unrest. As two of the dates proposed by the District last week have now passed,[19] please send us proposed dates and times to commence negotiations at your earliest convenience."
>
> "[¶ . . . ¶]
>
> "[T]he District looks forward to commencing contract negotiations with SCTA as soon as possible and throughout

---

dragging its feet in these negotiations. In a November 1, 2018 communication to the District, the Association stated that solely "[b]y transitioning to a larger purchasing pool [i.e., CalPERS], initial estimates from [the California Education Coalition for Health Care Reform or] CECHR calculate savings by as much as $15-16 million per year." In its November 9, 2018 reply to the Association, the District in turn stated that "based on the CECHR reports, SCUSD loses approximately $735,416 with each subsequent month that passes without implementing a change to health care costs." There were, however, savings from renewal rate reductions that could have been so applied, if required by Article 13 of the CBA. In the aforementioned communication with the District, the Association stated that "[t]hese already-realized savings are conservatively estimated at approximately $2 million less than the 6% budgeted increase ["for health benefits"] this year alone."

[19] This proposal is not in evidence.

the summer, and is available to meet on June 18, 25 and 26, 2019."

No response from the Association to this letter is in evidence.

On June 20, 2019, Aguilar again wrote to Fisher:

"This letter follows up on our June 13, 2019 letter to which we still are awaiting a response and respectfully requests that SCTA respond to potential dates to commence successor contract negotiations. Further delay will require us to submit our proposal electronically in order to move the process forward. To date, you have not agreed to our repeated requests to commence negotiations. The District has sent SCTA leaders nine letters offering the following 34 dates to commence negotiations: November 29, 2018, December 5, 11, 18, 20, 2018, January 9, 28, 30, 21, 2019, February 1, 11, 13, 15, 20, 22, 25, 26, 27, 28, 2019, March 1, 11, 12, 13, 15, 2019, April 8,[20] 2019, May 28, 2019, and June 4, 6, 10, 11, 13, 18, 25, 26, 2019. SCTA leaders have not accepted any of the District's offered dates and have refused to commence successor contract negotiations for the 2019-20 school year.

"[¶ . . . ¶]

"Please inform the District by June 27, 2019, which of the following dates work for SCTA to begin successor contract negotiations, or offer alterative dates. We propose to meet on July 9, 10, and 11, 2019. Should SCTA continue to delay and/or refuse successor contract negotiations, the District will send you our proposals electronically to minimize any continued delay of this important process and amend the District's unfair practice charge filed on

[20] The last date is an apparent reference to the District's "suggest[ion]" in its April 2, 2019 letter to the Association that "discussions" [on the topic of "[a]voiding [i]nsolvency"] be scheduled for the week of April 8, 2019." This suggestion was, however, not a "request[]s to commence [successor contract] negotiations."

> March 11, 2019 with [PERB][21] to further describe SCTA's continued refusal to bargain."

On the same day, Fisher responded to Aguilar via e-mail:

> "As we have informed you numerous times, we believe it would be far more productive to commence negotiations for our successor agreement after you have kept your word and honored the current agreement which you have unlawfully refused to abide by.
>
> "Moreover, since the District has chosen to file an unfair labor practice charge on this matter, we believe it is [in] both the Association['s] and the District's interest to wait until the legal process initiated by the District has been completed.
>
> "[¶ . . . ¶]
>
> "In the meantime, we believe your energy might be better spent on ensuring that the enrollment numbers are accurate and that our schools are staffed appropriately when the school year commences on August 29th."

Fisher's e-mail message neither accepted any of the latest District-offered dates nor offered any alternative dates to begin negotiations.

G. The District's August 2, 2019 Proposals

By letter dated August 2, 2019, Aguilar wrote to Fisher that "[t]he District has requested to commence negotiations with SCTA leadership since November 2018, and through June of 2019 with eleven (11) letters offering thirty-seven (37) dates to meet" (underlining in original). He repeated that "[t]he District's desire to commence negotiations early was twofold," i.e., "to start the negotiations process as soon as

[21] This is an apparent reference to the unfair practice charge underlying this case, which however was filed on March 12, 2019.

possible and complete it before the term of the current agreement ended on June 30, 2019 and to move forward collaboratively to avoid another school year consumed by contract negotiations and labor unrest rather than focusing on student achievement." Aguilar further wrote to Fisher that "SCTA leaders have repeatedly stated that negotiations will not be productive until a number of outstanding items related to the [CBA] are resolved" (underlining in original). He stated that one of these "outstanding items," the Salary Schedule Grievance, had already been "resolved through arbitration," and that the other, the Health Benefits Grievance, would be resolved in the same way. Aguilar opined that "[n]either of these issues, nor any other outstanding issue, stands in the way of the parties beginning successor contract negotiations."

Attached to said letter were the District's "initial proposals" regarding Article 13 ("Health Benefits"), the 2020-21 and 2021-22 school calendars, and proposed ground rules for negotiations. The main feature of the District's proposal regarding Article 13 was to reduce the District's portion of the premium cost for employee-plus-one and family plans from 100 percent to 75 percent while maintaining the District's portion for employee-only coverage at 100 percent. The main feature of the District's proposal regarding school calendars was to start the work year in mid-August rather than at the end of August. The proposed ground rules were similar to those the District had proposed in the past as detailed above. The letter finally stated that "[t]he District's negotiations team is available round the clock on August 6, 7, 12, 13, 19, 20, 22, and 27, 2019 to meet and begin contract negotiations for the 2019-22 successor contract." Aguilar asked the Association to let him know "which of these dates work for

SCTA's team by Monday, August 5th close of business," in which case Aguilar would "ensure that the District's bargaining team members are available."

H. The Association's August 7, 2019 Proposal

On August 7, 2019, the Association tendered to the District a "Proposal . . . To Give Our Students the Best Opportunity to Succeed in 2019-20" (SCTA's August 7, 2019 Proposal). The first six items in this proposal read as follows:

> "1. **Filling of vacancies:** The District staff will work with SCTA around the clock to fill all vacancies, and staff according to the most up-to-date enrollment numbers and in compliance with the terms and conditions of the [CBA]. This includes, but is not limited to, abiding by Section 7.4 [of the CBA] in that the District agrees 'to make every effort possible to reduce the number of split classes, as well as efforts to keep students at their neighborhood school . . . .'
>
> "2. **Rescission of cuts to Child Development:** The District will immediately rescind the cuts to Child Development and will work around the clock to recall laid off educators and staff the school sites.
>
> "3. **Rescission of cuts to Classified Staff:** The District will immediately rescind cuts to the nearly 200 classified staff who remain on layoff to ensure that students receive the support services they rightfully need and deserve.
>
> "4. **Full implementation of the Certificated Salary Schedule Arbitration Decision:** To further recruit and retain certificated staff, the District staff will meet SCTA to fully implement the 2018-19 certificated salary schedule, including full retroactivity. The District will commit that educators will receive their retro checks by the commencement of the school year, August 29, 2019, and will work around the clock with SCTA to make sure that occurs.

"5. **Expedited Arbitration on Health Plan:** The District's refusal to abide by the Article 13.1 of its contract with SCTA means that students will have larger class sizes and fewer professional support staff to improve their learning conditions. PERB has already issued a complaint against the District's unlawful actions and SCTA has filed a grievance related to the District's blatant refusal to abide by the contract. To bring this matter to timely conclusion, the District will agree to an expedited arbitration process that consolidates those issues into a single arbitration. The District will work with SCTA to make every effort to litigate the arbitration prior to the commencement of the school year on August 29, 2019.

"6. **Commencement of Successor Contract Negotiations:** Upon conclusion of the items listed above, the parties will commence negotiations for a successor collective bargaining agreement."[22]

(Emphasis in original.)

It is undisputed that the Association does not represent any of the "classified staff" referred to in the third item of proposal quoted above.

I. The District's Continued Attempts to Initiate Negotiations from August through December 2019

Also on August 7, 2019, Aguilar wrote to Fisher:

> "We . . . want to provide an initial response to [the Association's proposal], which is not a collective bargaining proposal due to the fact that many of the listed subjects do not relate to matters to be negotiated in our [CBA], but

[22] The last item in SCTA's August 7, 2019 Proposal provided that, "[a]s required by law, the District commits to including representatives who have the full authority to make decision[s] o[n] behalf of the District, subject to final approval by the SCUSD school board."

> rather relate to the administration of various ongoing processes (e.g. filling vacancies, Child Development rescissions). Should you believe a provision of the CBA is not being followed, the correct avenue to pursue is filing a grievance. Furthermore, you appear to be bargaining on behalf of classified employees, which is a direct violation of labor law. As you know, classified employees are represented by other labor unions and we will work with those labor partners to address any of their concerns."
>
> "[¶ . . . ¶]
>
> "We look forward to discussing any negotiable items in the appropriate venue—at the negotiations table. As we await your response to our initial proposal by the Friday, August 9, 2019 date provided by SCTA Vice President Milevsky days ago,[23] we hope that you will indicate which dates you can meet with us to begin negotiations. Our team stands ready to initiate and finalize this process prior the start of the school year."

On August 8, 2019, Fisher, Milevsky, and Borsos wrote to Aguilar "in response to [his] letters of August 2 and 7, 2019." In said response, the Association did not accept any of the dates Aguilar had proposed in his August 2, 2019 letter, nor did it propose any alternative dates in return. The Association also did not provide a response to the District's "initial proposal" of the same date. Instead, it pointed to the fact that Arbitrator Perea's award in the salary schedule grievance had yet to be implemented in that, prospectively, "the new salary schedules still have not been posted on the District's website" and, retroactively, payments due to members under the award had not yet been calculated. The Association asserted that "that outcome

[23] No such statement by Milevsky is in evidence.

could be achieved by the commencement of school on August 29, 2019 rather than the District's estimated timeline of sometime in the Fall." It concluded:

> "In sum, we reiterate our request that you accept our proposal to address a number of vital outstanding issues in an expeditious manner so that we can commence negotiations on a successor contract as soon as possible. We view working through these obstacles as an important first step in trying to heal the rift that exists between the District and educators."

On August 13, 2019, Aguilar responded to Fisher that "[y]our recent communication appears to be yet another attempt to delay negotiations on a successor contract, something the District has requested to begin since November 2018," and that "[i]t also appears to be conditional bargaining in violation of Government Code section 3543.6 and the obligations of employee organizations to meet and negotiate in good faith with a public school employer." Aguilar stated:

> "We again request that SCTA stop placing specious 'pre-conditions' on negotiations and instead agree to meet with the District negotiations team to begin negotiations. Our team remains available for negotiation sessions on August 19, 20, 22, and 27, 2019."

On August 16, 2019, Aguilar again wrote to Fisher to follow up on comments that Milevsky supposedly had made at an August 15, 2019 Board meeting. At the conclusion of his letter, Aguilar wrote:

> "While we appreciate SCTA leadership being available on August 22, 2019, this meeting should be a negotiations session. Our negotiation team is available to meet with SCTA leaders beginning at 9:00 a.m. We look forward to

> hearing from you confirming that the August 22, 2019 meeting will be to negotiate a successor contract." [24]

On August 21, 2019, Fisher, Milevsky, and Borsos responded:

> "Your continued insistence on negotiating changes to the health benefits in a successor contract before implementing the current contract, for example, is a blatant attempt to nullify our current agreement and continues the pattern of unlawful actions over which PERB has already issued two complaints. Moreover, to date the District has not agreed to SCTA's proposal to move the entire health plan matter expeditiously to arbitration. Your description that SCTA is attempting to 'move the goal post,'[25] ignores our consistent demands that you honor the contract th[a]t you personally signed and obey the law.
>
> "[¶ . . . ¶]
>
> "We continue to believe that negotiations for a successor contract will be more successful when you are prepared to honor the contract you personally signed in November 2017 and cease and desist your unlawful efforts to nullify our contract."

In its August 21, 2019 response, the Association neither accepted the latest District-offered date nor offered any alternative dates to begin contract negotiations.

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[24] Presumably, Milevsky had offered at the August 15, 2019 Board meeting to meet with the District on August 22, 2019 to discuss what, according to Aguilar, she had characterized as "issues that must be addressed before the District and SCTA can begin negotiations on a new contract." Further according to Aguilar, Milevsky referenced "an additional thirty (30) alleged unfair practices that apparently now must be resolved before negotiations begin." This led Aguilar to accuse the Association of "'moving the goalpost' and imposing new and different conditions on the District to meet before bargaining can begin." The record contains no non-hearsay evidence that would allow the ALJ to make any findings of fact regarding the matters discussed in this footnote. (See PERB Reg. 32176.)

[25] See *supra*, fn. 24.

In his sur-response dated August 23, 2019, Aguilar stated that he had signed an SCTA-proposed agreement to move the Health Benefits Grievance to arbitration and sent the signed agreement to the Association's legal counsel "before your August 21, 2019 letter was sent to the District." Aguilar further stated:

> "[F]rom November 2018 to present, the preconditions that SCTA leaders claim must be met before negotiations can begin have expanded from resolution of the salary restructure arbitration and health benefits grievance, both of which have been or will be resolved through the grievance arbitration process, to now include:
>
> "● Rescissions of certificated layoffs that were upheld by the [ALJ];
>
> "● Rescissions of classified layoffs which is not a subject of negotiations for SCTA; and
>
> "● Resolution of thirty or more unfair practices allegedly committed by the District without providing information to the District on how those prevent the parties from moving forward with negotiations.[26]
>
> "[¶ . . . ¶]
>
> "To move the negotiations process forward while SCTA leaders refuse to meet with the District to begin negotiations, we will continue to provide our proposals to SCTA electronically. In addition to our proposals on ground rules, health benefits (Article 13), and 2020-21 and 2021-22 school calendars provided to you on August 2, 2019 and to which you have not responded, enclosed with this letter please find two additional proposals from the District on Articles 18 (Organizational Rights) and 21 (Organizational Security). The District's negotiations team is available on September 3, 4, and 6, 2019 to meet with SCTA to discuss

[26] See *supra*, fn. 24.

these negotiations proposals. Please let us know by August 30, 2019 which of the dates will work for SCTA."

The District's proposal regarding Article 13 reflects minor changes, all of which appear to be non-economic, such as switching from use of 'District [paper] mail" to "District electronic mail" for the purpose of the Association's access to bargaining unit members (underlining in original). The main feature of the District's proposal regarding Article 18 was the deletion of the "Agency Fees" provision, following the holding by the United States Supreme Court in *Janus v. Am. Federation of State, County, and Mun. Employees, Council 31* (2018) 138 S.Ct. 2448 that the assessment of such agency fees violates the First Amendment of the United States Constitution.

Aguilar testified that he chose to send proposals regarding Articles 18 and 21 to the Association because "they were areas that weren't connected to their position that we had to wait for other disputes to be resolved before we could start the negotiations process" and "we were hoping that we could share with them proposals that could be discussed as part of a negotiations process," given that neither had "any significant budgetary impacts."

Fisher testified that the salary schedule and health benefits disputes "would have a lesser effect [on Article 18] than on other articles" and that these disputes also "wouldn't have as big an effect on [Article] 21 [as they] would . . . on other articles." He further testified that "specifically for Article 21[,] there's some issues around member dues that could slightly be impacted [by these disputes], but I don't think that Article[s] 18 and 21 were the major concerns." And again: "[T]here's usually some impact . . . , but it wasn't . . . the major concern."

Borsos's testimony at the hearing was more categorical on the latter issue:

> "Q [W[hen SCTA sunshined it's [*sic*] proposal on Article 21 . . . on February 7th, 2019, was there any impediment to the parties bargaining over Article 21?
>
> "A No.
>
> "Q And since February 7th, 2019, has SCTA submitted any proposal regarding Article 21?
>
> "A We have not yet."

Based on Fisher's and especially Borsos's testimony, the ALJ concludes that the outcomes of the salary schedule and health benefits disputes had no significant implications for Articles 18 and 21, and that the pendency of these disputes did not stand in the way of bargaining over these articles.

Fisher testified that, as of August 23, 2021, he had not asked bargaining team members about dates to propose to the District to sit down and bargain over a successor contract.

On October 3, 2019, Aguilar wrote to Fisher: "To date, you have not responded to the District's most recent August 23, 2019 letter requesting to begin negotiations on a successor [CBA] between the District and the . . . Association." (Underlining in original.) The District added a non-economic proposal regarding Article 11, Safety Conditions, to the other proposals it had previously tendered to the Association. Aguilar's letter concluded:

> "The District's negotiations team is available on October 9, 11, and 14-16, 2019, to meet with SCTA to discuss all of these negotiations proposals. Please let us know by October 7, 2019 which of these dates will work for SCTA."

Aguilar testified that Article 11 was "yet another example of another element of our proposal that I felt we could sit and negotiate over irrespective of the conditions, if you will, that SCTA had indicated were impediments to initiating the negotiations process," given that "there were[n't] any significant budget impacts on this one."

Fisher testified that the health benefits dispute would have had "just minimum . . . impacts" on Article 11, but "[n]ot big impacts." Asked by the ALJ, "Does that mean you could have negotiated that section during that point in time," Fisher answered: "We could have begun negotiations, yes." Fisher also testified that, as of October 3, 2021, he had not asked SCTA bargaining team members for their schedules so that he could provide dates to the District to begin bargaining over a successor contract: "No, I don't recall, but I don't think we had said specifically."

On October 11, 2019, Fisher, Milevsky, and Borsos responded by claiming that "**[t]he District's continued refusal and inability to fully implement the salary schedule decision impedes our ability to negotiate wages going forward**" (emphasis in original). The Association further claimed, with reference to the Health Benefits Grievance, that "**[y]our backtracking on our collective bargaining agreement further impedes the parties' ability to negotiate going forward**" (emphasis in original) and that "[b]ecause use of the savings is linked to lower class sizes and improved services to students, leaving this matter unresolved means that portions of the contract remain uncertain, including, but not limited to" portions of Articles 5 (Hours of Employment) and 17 (Class Size) and the entirety of Articles 8 (Transfers), 11 (Safety Conditions), 12 (Compensation), 13 (Employee Benefits), 15 (Substitutes) and 20 (Mentor Teacher). It concluded:

> "We continue to believe that successor contract negotiations will proceed much more constructively when the fundamental issues regarding implementation of the last contract have been resolved. Indeed, we consider those issues to be fully enmeshed in the bargaining of a successor contract and don't understand why the District continues to separate the discussion/negotiations. If after more than eighteen months, you have an interest in discussing those matters which are part and parcel of successor contract negotiations, please let us know."

In its October 11, 2019 response, the Association neither accepted any of the latest District-offered dates nor offered any alternative dates to begin successor negotiations. As of that date, current salaries were already being paid in accordance with Arbitrator Perea's award in the Salary Schedule Grievance, but retroactive payments owed under the award had not yet been made. McArn testified the former had been occurring since September 2019, but the latter would not occur until November 2019. Fisher testified that the Association "could have begun" to negotiate over any articles not listed in its October 11, 2019 communication "had the District reached out and said, we want[] to . . . begin negotiations with only these articles, which they never did."

On December 9, 2019, Aguilar again wrote to Fisher: "Despite the District's repeated requests to begin negotiations, . . . SCTA has remained unwilling to come to the bargaining table and respond to the negotiations proposals passed by the District." The District added non-economic proposals regarding Articles 5 (Hours of Employment), 6 (Evaluation), 8 (Transfers) and 17 (Class Size), as well as an economic proposal regarding Article 12 (Compensation), to the previously passed proposals. The District stated that "[t]he proposals included with this letter represent

the last of our proposals on the CBA articles that the District sunshined over a year ago, on November 15, 2018."[27] It further stated:

> "The District's team is again available to commence negotiations, receive counter proposals from SCTA on the articles we have sent you, and offers the following dates: December 16, 18, and 20, 2019. Please let us know by Friday, December 13, 2019, on which of these dates SCTA leaders are available to begin negotiations."

Fisher testified that as of December 13, 2019, neither he nor anyone else from SCTA's leadership had approached the SCTA bargaining team members to gather schedules for the purpose of proposing dates for successor negotiations.

On December 20, 2019, Aguilar once more wrote to Fisher: "To date, you have not responded to the District's most recent letter dated December 9, 2019 requesting to begin negotiations and offering dates this week for us to negotiate." He added:

> "Please respond by January 10, 2020 as to any of the following dates [that] will work for the District and SCTA leadership to begin negotiations: January 14, . . . 16, . . . 24, . . . 28[-]31, 2020."

On January 10, 2020, Fisher, Milevsky, and Borsos responded to Aguilar:

> "[W]e have continually noted that we believe negotiations will proceed more constructively after you first agree to abide by the agreement you personally signed in 2017. Your refusal to honor the agreement related to the health plan, Article 13.1.1, is finally scheduled for arbitration on February 25, 2019, after yet more needless delays on the District's part. Accordingly, we believe that because so many issues are tied to the outcome of that arbitration (and

[27] However, the record contains no District proposal regarding Article 26 (Duration), which was one of the CBA articles that the District had sunshined on November 15, 2018.

> as we have noted several times to you in previous communications) negotiations will proceed more smoothly after that arbitration has concluded."
>
> "Nevertheless, we continue to meet with district representatives over bargaining issues like increased pay for language, speech and hearing specialists, changes in working conditions for substitute teachers and child development educators. We also urge representatives of the district to meet with us to discuss the implementation of restorative practices and multi-tiered systems of support (MTSS)."

In its January 10, 2020 response, the Association neither accepted any of the latest District-offered dates nor offered any alternative dates to begin successor negotiations.

J. Successor Contract Negotiations Begin on March 3, 2020

By letter dated January 13, 2020, Aguilar informed Fisher that "[d]espite the District's repeated requests to begin negotiations, . . . SCTA leaders have not accepted any of the dates offered by the District to begin negotiations, nor have you responded to the negotiations proposals passed by the District," and that, "[u]nfortunately, the District is left with no other option than to seek an impasse determination from [PERB] in the hopes that we can finally begin this critical work."

In its January 17, 2020 response, the Association, under the subject line "***Continuation of Successor Contract Bargaining***" (emphasis in original), for the first time claimed to have been engaged in successor contract negotiations all along and, again for the first time, proposed dates to "continue" to do so:

> "SCTA has never refused to bargain with the District. Rather, we have taken pains to explain that the District's own refusal to comply with the Parties' previous contract—

> including, but not limited to, its salary schedule provisions and health benefits savings provisions—has been and remains a significant obstacle to the Parties' ability to engage in meaningful and substantive negotiations over many key contract provisions.
>
> "Many, but not all. And as to those provisions that are not impacted by the District's violations of the contract and its repeated and inexplicable opposition to timely resolution of the Parties' disputes[,] SCTA has been and remains ready to bargain.
>
> "In fact, SCTA has been meeting with the District to bargain over a number of matters, including but not limited to language, speech and hearing specialist salaries, and permanent CTE employment status. . . .
>
> ". . . SCTA remains ready to continue bargaining over a successor contract. We reiterate this commitment today, though we again submit that bargaining will be most effective and efficient if the Parties first direct their efforts at resolving those matters not impacted and complicated by the outstanding dispute over health benefits. These matters include, but are not limited to, restorative practices, MTSS, induction, and substitute hiring, and student assessments, among others. . . . SCTA proposes that the Parties continue their successor contract negotiations on any of the following dates . . . : March 3, 4, 5, or 6, [2020], commencing at 4 p.m. at the SCTA office."

At the hearing, Borsos confirmed that this was, in fact, "the first time the [Association] had proposed specific dates for successor bargaining with the District." Borsos also testified, however, that SCTA had previously given the District proposals regarding multi-tiered systems of support, new hire rates for language, speech, and hearing specialists, and restorative practices, and had "talked to them" about

subcontracting of bargaining unit work. He maintained: "Whether it's successor negotiations or not, . . . it's negotiations."

Fisher testified that as of January 11, 2020, the salary schedule dispute, including back pay, had been resolved.

On January 22, 2020, Aguilar responded to Fisher:

> "[Y]our claim[] that SCTA has been meeting with the District to 'bargain' over a number of matters is inaccurate. Discussions about CTE teacher status and substitute employee issues have been in the context of the twice-monthly District/SCTA meetings that have been in place for many years to address questions, concerns, and issues of interest to the District and/or SCTA, as well as to address and attempt to resolve grievances under Article 4 of the [CBA]. These are not negotiation sessions on successor contract terms.
>
> "[¶ . . . ¶]
>
> "While we appreciate SCTA offering dates the first week of March to begin bargaining on the successor contract, we believe that this critical work should start sooner. . . . We offer February 5, 11, 13, 18, 19, 21, 25, 26, 2020 to begin bargaining at locations alternating between the Serna Center and SCTA offices. We will also calendar your offered dates of March 3, 4, 5, and 6, 2020, as additional dates for bargaining should they continue to be necessary after our February sessions."

(Underlining in original.)

On January 31, 2020, Aguilar wrote to Fisher:

> "To date, I have not received a response from you confirming the March dates you offered or accepting the February dates that I offered. Further, I am aware that in the SCTA Messenger sent by SCTA leaders on January 24, 2020, you indicate that your January 17[, 2020]

> letter requested to meet with the District on substitutes, student assessments, speech and hearing specialists, as well as status of CTE teachers, Multi-Tiered Systems of Support ('MTSS') and restorative practices . . . .
>
> "[¶ . . . ¶]
>
> "To be clear, the District intends to begin negotiations with SCTA on successor contract negotiations, not simply 'meet' to discuss the items that SCTA lists. All of these important topics . . . will be discussed as part of our successor contract negotiations and we sent proposals to SCTA related to each of these topics."

Aguilar again offered the February dates that he had offered on January 22, 2020 and also again accepted the March dates that the Association had offered on January 17, 2020. He concluded: "Please let us know by close of business on February 3, 2020 as to which of these dates SCTA will accept to begin negotiations."

On February 3, 2020, Fisher, Milevsky, and Borsos replied that none of the February dates that the District had offered worked for the Association and, with respect to the March dates that the Association had offered, "we were offering one of these dates, not all of them." They added: "Since you have indicated the District's availability for any of the dates that we offered in March, by this letter we hereby confirm our meeting on Wednesday, March 3, 2020 at 4 p.m. at the SCTA office . . . ."

On February 6, 2020, Aguilar sur-replied: "If you do not wish to bargain on each of the days offered [by the Association on January 17, 2020], we would like to suggest the following additional dates for our continued work together: March 4, 6, 9, 10, 11, 12, 16, 17, 18, 20, 24, 25, and 27, 2020."

The February 15 and 21, 2020 editions of the SCTA Messenger each contained an identical item entitled "SCTA Bargaining Team Application" that stated:

> "We are meeting with the District on March 3 to resume negotiations on a number of items that the Superintendent and School Board had unlawfully been refusing to discuss for over a year.
>
> "If you are interested in applying to be on the bargaining team, please fill out the form attached here, and return [it] to the SCTA office at [e-mail address omitted]."

(Underlining in original.) Fisher testified that as far as he could recall, this was the first time SCTA had solicited new bargaining team members for successor negotiations. He explained that "[w]e always include our Board of Directors and the previous team[,] [a]nd then the reps and other members change from year to year, so we solicit new members[,] and some [of the old ones] choose to drop off."

On March 3, 2020, the parties met for the first time to meet and negotiate over a successor contract.

When Fisher was asked at the hearing why the Association had not accepted any of the earlier bargaining dates the District had offered since November 2018, he responded:

> "[T]he superintendent was offering to bargain over wages and benefits that would have been impossible or virtually impossible to bargain over. . . .
>
> "[¶ . . . ¶]
>
> "[T]he superintendent was very clear that he exclusively wanted to talk about specifically and exclusively in every one of his letters, producing the proposals that were made on salaries and benefits and other items that . . . would still have the same problem that we've been discussing around

> the economic disputes [over the salary schedule and health benefits]. [H]e never offered, okay, let's get together to talk about . . . non-economic items . . . that we had floated at a couple of times in conversations with the District and other administrators. I don't know if it's in writing anywhere.
>
> " . . . I don't think the superintendent ever gave us that opportunity."

When Borsos was asked at the hearing whether "SCTA could have sat down with the District to negotiate a successor contract before March 3rd, 2020," he responded: "Yes." He confirmed that "the implementation of [Arbitrator Perea's award in] the salary structure dispute had been completed by . . . November of 2019." When asked, "what were the obstacles . . . after November 30th, 2019, for SCTA to come sit down with the District to negotiate a successor contract," Borsos answered: "The health plan." He also confirmed that the dispute over health plan savings had not been resolved yet by March 3, 2020.

The record contains no written offer or demand by the Association to the District to begin successor negotiations on non-economic items. Nor is there any testimony to this effect, other than possibly the vague statement by Fisher block-quoted above, which the ALJ however reads to mean only what it literally says. Essentially, the Association "floated" some non-economic items to the District, but never offered or demanded to start successor contract negotiations over these non-economic items and never indicated that "floating" them was in any other way connected to successor negotiations. McArn testified that, at the beginning of negotiations for the 2016-2019 contract, SCTA suggested "that we start with non-economic [proposals] before economic [proposals]" and that the parties "agreed to talk [first] about things that

weren't heavily budget impacting . . . and then ultimately[] work into those that were very heavily impacted by finances." The ALJ concludes that SCTA did not make a similar suggestion for the successor negotiations at issue here.

K. Negotiations Continue But Do Not Result in a Successor Contract

By e-mail message to McArn and District In-House Counsel Raoul Bozio (Bozio) dated March 4, 2020, Borsos submitted a 16-item information request.[28]

By e-mail message dated March 18, 2020, Bozio responded by providing responsive documents or stating that responsive documents had already been or would soon be provided.

On March 24, 2020, the District offered April 3, 2020 as the date for the next negotiation session.

On April 17, 2020, Aguilar wrote to Fisher that the Association had not responded to this offer. He offered May 1, 5, or 6 as possible dates for the next negotiation session.

By e-mail message to McArn and Bozio dated April 24, 2020, Borsos responded with a nine-item information request and stated: "Upon receipt of the above-requested information, we look forward to scheduling a time to meet . . . ."

By e-mail message dated May 8, 2020, Bozio provided Borsos with documents responsive to six of the items in the information request, stated that "our staff is preparing [a] lengthy . . . report" responsive to another item "for providing in the next

[28] According to Borsos, this information had already been requested during the March 3, 2020 negotiations session.

few days," and asserted that there were no documents that would be responsive to the two remaining items.

On May 15, 2020, Aguilar wrote to Fisher that "[t]he District has provided you with nearly all of the information that you requested both after our March 3 negotiations session and in Mr. Borsos' April 24, 2020 email" and asserted that "[a]ny outstanding items from your requests should not prevent you from meeting with the District to continue successor contract negotiations." Aguilar further stated:

> "Please let us know by Wednesday, May 20, 2020, which of the following dates the SCTA negotiations team will be available for . . . successor contract negotiations— May 26, 28, 29, or June 2."

By e-mail message dated May 17, 2020, Bozio provided Borsos with the "lengthy report" promised in his May 8, 2020 e-mail message.

The next day, Borsos responded with five "follow-up questions."

On May 19, 2020, Fisher, Milevsky, and Borsos wrote to Aguilar:

> "As you well know, the May 28 and 29 dates you proposed for bargaining are presently set for the arbitration hearing on the Parties' health benefits dispute. As we are sure you are also aware, the District is insisting, over SCTA's objections, that these hearings proceed remotely, through videoconference, even though this format presents a host of technical and practical constraints and difficulties. Despite our concerns, the District's outside attorneys have insisted on moving forward with the hearing next week, rather than placing it on hold until such time it can occur with all parties present in the same room, because of the need to have the health plan issue resolved before negotiations could meaningfully commence.
>
> "Contrary to your attorneys, we presume from your letter that you are proposing that these dates be repurposed for

> bargaining. . . . SCTA does not oppose the District's proposal to take the hearing off calendar (and continue them until such time as they may proceed in-person) and use one of these days for bargaining.
>
> "SCTA therefore responds to your proposal as follows: If the arbitration hearing is taken off calendar and rescheduled, then SCTA is available on Thursday, May 28."

This communication merits further analysis. The Association therein proposed to postpone the arbitration hearing that would have resolved the Health Benefits Grievance and to conduct successor contract negotiations instead, despite having time-and-again insisted on, and reiterating even now, "the need to have the health plan issue resolved before negotiations could meaningfully commence." Thus, the Association proposed to bargain with the District instead of resolving an issue that, so the Association claimed, had to be resolved before it could "meaningfully" bargain with the District. Moreover, the Association claimed to "presume" from Aguilar's May 15, 2020 letter that it was, in fact, *the District* that was "proposing that these dates be repurposed for bargaining," when no reasonable reader of that letter would interpret it as a proposal to "repurpose" the March 28 and 29, 2020 hearing dates for bargaining. Finally, the Association ignored the two other bargaining dates proposed in Aguilar's May 15, 2020 letter, i.e., May 26 and June 2, 2020, which apparently did not conflict with the May 28-29, 2020 arbitration hearing and would not have required postponement of the latter even if bargaining on the latter two dates would have.[29]

[29] At the hearing, Fisher testified that the May 28 and 29 dates were offered to the Association for successor contract negotiations as the result of an "oversight."

On May 20, 2020, Aguilar responded to Fisher:

> "The May 27, 28, and 29 arbitration dates on SCTA's health benefits grievance will not be taken off calendar. Please confirm the availability of SCTA's bargaining team to meet with the District's negotiations team on the other dates proposed—May 26 or June 2, 2020."

As of the date of Aguilar's response, SCTA had neither responded to any of the District's proposals nor offered any proposals of its own, other than its sunshine proposals of February 7, 2019, that could be construed as proposals in successor contract negotiations, despite Fisher's testimony at the hearing that "we had consistently given proposals on other issues that weren't economic issues." Thus, the record contains no evidence of any SCTA proposal that was identified in the proposal itself or otherwise to the District as a successor contract proposal or that contained language for a successor contract.[30] Moreover, when asked at the hearing why the Association had not bargained with the District earlier about any non-economic articles, Borsos answered that "[w]e're starting to bargain with the District" and "we'll make proposals as the bargaining progresses." This answer implies that no successor

[30] For example, Fisher testified that in March or April 2020, the Association proposed that savings realized in prior years by health care premium reductions, which where the subject of the Health Benefits Grievance, would be used to buy a Chromebook for each of the District's 40,000 students "to deal with the immediate crisis" of the COVID-19 pandemic, which had just necessitated the closure of all schools in the District. When asked whether this proposal was "intended to be put into language as part of a successor agreement," Fisher answered that "that would be in effect going forward into the [successor] agreement, not just the immediate pandemic." However, that a proposal, made when no contract is in effect, is intended to effect changes that are to remain in place after a successor contract has become effective does not make the proposal a proposal for successor contract language.

contract negotiations occurred earlier and that any proposals given to the District were not intended to be construed as proposals in successor contract negotiations.

The parties next met for successor contract negotiations on June 9, 2020. As of December 16, 2020, the last day of formal hearing in this matter, that was the last time the parties met for successor contract negotiations. However, according to Borsos's uncontroverted and therefore fully credited hearing testimony, "at several points later in the summer, we were scheduled to have successor bargaining negotiations and the District only talked about reopening schools or distance learning." The Parties have yet to reach agreement on a successor contract.

L. Arbitrator Vendrillo's August 21, 2020 Decision in the Health Benefits Grievance

On August 21, 2020, Arbitrator Vendrillo issued a decision in the Health Benefits Grievance, in which she adopted the District's interpretation of Article 13. Arbitrator Vendrillo held that Article 13 of the CBA obligated the District to "appl[y] to the bargaining unit" only "such savings achieved by the District" through yet-to-be-negotiated "changes to the health plan," but not also, as the Association would have had it, savings that resulted from rate reductions unilaterally implemented by the providers. Arbitrator Vendrillo found that the language in Article 13 relied upon by the Association as support for the contrary conclusion—i.e., that "[t]he parties agree that any savings that result from making *changes to health plans* or in the *reduction of health plan costs* will be applied to the certificated bargaining unit" (italics supplied)—was compatible with that holding. Arbitrator Vendrillo concluded that "changes to health plans" referred to the never realized option of switching to cheaper health insurance providers and "reduction of health plan costs" referred to the again never

realized option of purchasing health plans through CalPERS rather than directly from the providers—not, as the Association maintained, to savings that resulted from renewal rate reductions unilaterally implemented by the providers. Arbitrator Vendrillo observed that "including renewal rate *reductions* but not renewal rate *increases* as part of the contractual calculation" (italics in original), as the Association read Article 13, would "deliver[] no savings to the District" and "set[] up a one-sided bargain whereby the District achieves no lasting, structural, health benefits cost-saving changes but SCTA reaps the benefit of any funds that result from market fluctuations in existing health benefit plan renewal rates." "That[,]" Arbitrator Vendrillo concluded, "cannot be what the parties intended or agreed to."

ISSUE

Did the Association refuse or fail to meet and negotiate in good faith with the District in violation of EERA section 3543.6, subdivision (c)?

CONCLUSIONS OF LAW

The Complaint alleges several per se violations by the Association of its duty to bargain with the District in good faith and also that the Association engaged in surface bargaining under the totality of circumstances in violation of the same duty. The ALJ now addresses each of these allegations in turn.

Alleged Per Se Violations of the Duty to Bargain in Good Faith

Some individual actions are considered "per se" violations of the duty to bargain because of their inherent ability to frustrate the bargaining process or undermine the authority of exclusive bargaining representatives. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 13 (*City of Sacramento*), citing *Vernon Fire Fighters, Local 2312 v. City of Vernon* (1980) 107 Cal.App.3d 802, 823 (*City of Vernon*).)[31] Per se violations generally involve conduct that is contrary to the procedures for bargaining or the express language or purposes of the statute, irrespective of the party's intent. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 13 (*Fresno)*, citing *San Mateo County Community College District* (1979) PERB Decision No. 94, pp. 14-17 (*San Mateo*), other citations omitted.)

Examples of per se violations include: (1) unilateral changes to matters within the scope of representation (*California State Employees' Assn. v. Public Employment Relations Board* (1996) 51 Cal.App.4th 923, 934-35; *City of Vernon*, *supra*, p. 823; *San Mateo*, *supra*, PERB Decision No. 94, p. 12); (2) absolute refusal to bargain (*Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District* (1975) 45 Cal.App.3d 116, 118; *Sierra Joint Community College District* (1981) PERB Decision No. 179, pp. 6-7); (3) failure to execute agreed-on contract (*NLRB v. Auciello Iron Works, Inc.* (1st Cir. 1992) 980 F.2d 804, 808; *Waste Systems Corp.* (1988) 290 NLRB 1214, 1219); (4) insistence to impasse on non-mandatory subjects,

[31] When interpreting EERA, it is appropriate to take guidance from administrative and judicial authorities interpreting the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and other California labor relations statutes with parallel provisions, policies, and/or purposes. (See, e.g., *Moreno Valley Unified School District v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 196.)

unlawful terms, or a waiver of rights (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 16; *Lake Elsinore School District* (1986) PERB Decision No. 603, pp. 6-7 (*Lake Elsinore*); *Ross School District Board of Trustees* (1978) PERB Decision No. 48, p. 9; *Los Angeles Unified School District* (2013) PERB Decision No. 2326, p. 15; *Berkeley Unified School District* (2012) PERB Decision No. 2268); (5) certain types of conditional bargaining, such as conditioning agreement on the settlement of grievances or unfair practice charges (*Lake Elsinore*, *supra*, pp. 2-3), conditioning willingness even to discuss or consider a mandatory subject upon agreement on non-mandatory subjects (*Petaluma City Elementary School District/Joint Union High School District (2016) PERB Decision No. 2485*, pp. 36-37), or to refuse to discuss mandatory subjects until all other negotiations are concluded (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 27-28 (*San Jose*)); (6) provision of inaccurate information by a public school employer (EERA § 3543.5, subd. (c); (7) employer direct dealing with employees (*Walnut Valley Unified School District* (1981) PERB Decision No. 160, pp. 5-6) and union direct dealing with the employers' principals rather than its designated representatives (*County of Tulare* (2020) PERB Decision No. 2697-M, pp. 8-9); and (8) imposition of coalition bargaining (*Compton Community College District* (1989) PERB Decision No. 728, p. 4 (*Compton*); *Gilroy Unified School District* (1984) PERB Decision No. 471, p. 8.) Several categories of per se violations are at issue here.

1. The Association's February 7, 2019 Sunshine Proposal and Fisher's Same-Day Comments at the District's Board Meeting

The Complaint alleges the following per se violation:

> "Respondent's February 7, 2019 [sunshine] proposal includes a conditional offer that Respondent 'reserves the right to delay making an initial proposal' on compensation, employee benefits, and class size articles 'until the issue of the [Charging Party's] refusal to abide by' specific Articles 'and the Mayor's Framework Agreement has been resolved.' On February 7, 2019, Respondent's President David Fisher also informed Charging Party that it was refusing to bargain until outstanding issues relating to salary, health benefits and class size were 'resolved' for an indefinite amount of time."

The Association's sunshine proposals for Articles 12 (Compensation), 13 (Employee Benefits), and 17 (Class Size) each contain the following statement:

> "The Association reserves the right to delay making an initial proposal on this Article until the issue of the District's failure to abide by this Article . . . and the Mayor's Framework Agreement has been resolved."[32]

Reserving the right to do something is not the same thing as promising or threatening to do something. Thus, viewed by themselves as they must be under the per se analysis, these sunshine proposals do not state, expressly or implicitly, that the Association would, in fact, delay making initial proposals on these articles until the salary schedule and health benefits disputes were resolved, let alone that the Association would refuse to bargain—e.g., by responding to the District's proposals—

[32] The Association's sunshine proposal for Article 17 contains a comma followed by the words "Article 13" in place of the ellipsis in the sentence to which this footnote is appended. In addition, the Association proposal for Article 12 omits the words "District's failure to," presumably by mistake.

about these articles. Even less so do these proposals indicate that the Association would refuse to bargain until the resolution of these disputes about any or all other articles, the proposals for which did not include similar reservation of rights language.

This is not changed by the fact that these proposals also state that "[t]he Association's ability to make proposals" regarding these articles "is greatly impeded" in the case of Article 12 "by the District's refusal to honor its agreement to implement the Union's proposed salary schedule in the previous agreement and the District's unprecedented lawsuit against its own teachers"[33] and in the case of Articles 13 and 17 "by the refusal of the District to implement the terms and conditions of Article 13.1.1. and the Mayor's Framework [A]greement."

At the hearing, Aguilar agreed that "it would be difficult for any parties in a collective bargaining relationship to bargain "[o]n any aspect related to salary schedule" if "they didn't know where they were starting from." Here, the parties did not know "where they were starting from" as long as the salary schedule dispute remained unresolved. Something similar is true of employee benefits and class size.[34] This is presumably the reason why the District's sunshine proposals did not contain any actual proposals regarding Articles 12 (Compensation) and 13 (Employee Benefits). Instead, they merely "propose[d] to negotiate in good faith . . . within the limits of

[33] This is an apparent reference to the District's judicial action seeking, per Grantham's communication to Perea on November 19, 2018, "a declaration from the Court that the District and SCTA never entered into an agreement relative to the framework agreement on the salary structure."

[34] These issues were linked insofar as it was the Association's position that, under the expiring contract, savings from provider-initiated health premium reductions had to be used for additional classroom staffing and thus class size reductions.

available resources" over these mandatory subjects of bargaining and reserved the right to "propose other amendments to th[ese] Article[s]," presumably at some later point in time when the parties knew "where they were starting from."

Fisher's comments at the February 7, 2019 Board meeting, again viewed by themselves as they must be under the per se analysis, were in a similar vein:

> "I think you have . . . now what we're presenting [to] you consistent with the terms of our collective bargaining agreement [as] our initial sunshine proposal to the District. You will note that they are comprehensive. We look forward to negotiating [a] true intervention program and implementation of restorative practices through the District among other matters including a potentially Spanish dual immersion program. You will also note that in our proposals—particularly Article 12, Compensation, Article 13, Benefits, and Article 17, Class Size—that our ability to make proposals is greatly impeded by the District's refusal to implement the provisions of our current agreement. Accordingly, it is our belief that negotiations will be productive only when those matters are first resolved."

Looking forward to negotiating over certain subjects does not necessarily constitute a refusal to bargain over others. Similarly, believing that one's ability to make bargaining proposals is greatly impeded by the District's alleged refusal to implement the provisions of the expiring agreement, and even believing that successor contract negotiations would be productive "only when those matters are first resolved," does not, standing alone, constitute a refusal to negotiate over a successor contract until that resolution has occurred.

This allegation is therefore DISMISSED regarding both of its parts.

2. The Association's February 20, 2019 Letter

The Complaint next alleges the following per se violation:

> "On February 20, 2019, Respondent stated, among other things, that it is refusing Charging Party's demand to bargain and conditioned future negotiations on a meeting with participants of its choosing."

While this allegation presents a closer call, it nevertheless ultimately fails as well, primarily due to the timing of the communication at issue. The letter stated:

> "As set forth in the proposals that we sunshined at the school board meeting on February 7, 2019, we believe meaningful negotiations regarding a successor contract would be more likely to occur after the resolution of the several major issues from our current contract, including but not limited to, the implementation of the agreed-upon salary restructuring, and the addition of resources to the classroom via smaller class sizes and more support staff, as a result of potential changes from the health plans. . . .
>
> "[¶ . . . ¶]
>
> "In short, while we believe it would be premature to commence negotiations for a successor contract while the wage, benefit and staffing issues remain unresolved, *we reiterate our offer to meet with a committee of our choosing* with representatives of the District, including its SCOE fiscal advisor who has the authority to approve District agreements, to discuss our proposal to fix the district's budget fiasco and 'to avoid state takeover and save our schools.'"

(Emphasis in original, some formatting omitted.)

As before, and again viewed by itself as it must under the per se analysis, the expression of the Association's belief that "meaningful negotiations regarding a successor contract would be more likely to occur after the resolution of the several

major issues from our current contract, including but not limited to, the implementation of the agreed-upon salary restructuring, and the addition of resources to the classroom via smaller class sizes and more support staff, as a result of potential changes from the health plans," does not constitute a refusal to enter successor contract negotiations. Neither does the expression of the Association's belief that "it would be premature to commence negotiations for a successor contract while the wage, benefit and staffing issues remain unresolved," at least where that belief is expressed, as it was here, before the Association's contractual obligation "to enter into negotiations of a successor [CBA] no later than one hundred and twenty (120) days prior to the expiration of this [CBA]"—i.e., by March 2, 2019—had come into play.

The ALJ agrees with the Association's interpretation of the relevant contract language, according to which the District thereby "waived its right to demand successor bargaining prior to the specified date[]," although the parties could of course still agree to do so. The ALJ's conclusion is based primarily on McArn's testimony that the contract language in question meant that "we would sit down and start negotiating 120 days before the agreement expired," as well as the statements in Aguilar's December 21, 2018 letter that "it is clear that SCTA does not intend to begin negotiations early and will instead make its initial proposal for negotiations in February *consistent with Article 25*" and that "[w]hile we appreciated *SCTA's adherence to Article 25*, there is nothing in that article that prevents SCTA from making its initial proposal and starting bargaining prior to February" (italics supplied). These

statements support the Association's position that it was acting in conformity with Article 25 of the CBA.[35]

It is true that the Association's February 20, 2019 letter neither accepted any of the dates offered in Aguilar's February 15, 2019 letter, all of which fell before March 2, 2019, nor offered any alternative dates for successor negotiations. However, on February 20, 2019, the Association was under no obligation to do either. It was only under an obligation to enter into successor contract negotiations by March 2, 2019. There was still time for the Association after February 20, 2019 to propose bargaining dates that would have allowed it to do so, if only barely. As shall be seen below, similar letters sent after March 2, 2019 do constitute a per se violation to bargain, but while—as stated above—this allegation presents a close call in this

[35] In concluding that the contract language waived any right to commence bargaining before March 2, 2019, the ALJ does not rely on the cases relied on by the Association. One of these cases is inapposite. (See *Inglewood Unified School District* (2012) PERB Decision No. 2290, p. 10 [where contract provided that "[n]o later than April 1 of each year," the parties would agree to reopen certain articles of their CBA, attempt to reopen on April 20 was untimely].) The other two cases present factual scenarios that are so different from the one presented here as to be of little or no help as well. (See *Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 10, overruled in part by *City of Culver City* (2020) PERB Decision No. 2731-M (*Culver City*) [by agreeing to contractual provision that permitted school district to grant teachers a lunch period of 30 minutes or longer at its discretion, union waived its right to negotiate over district's reduction of actual lunch period to 30 minutes]; *Grossmont Union High School District* (1983) PERB Decision No. 313, page number unavailable [where contract provided that "[t]he standard teaching assignment shall be six periods per day including a preparation period," that teachers will "normally be assigned five periods of instruction per day . . . plus a preparation period," and that "[n]o member shall teach more than twenty-five (25) hours per week," union waived its right to negotiate over school district's decision to increase actual teaching load to five instructional periods per day].)

regard, it is concluded that the District has failed to carry its burden of proving that the Association's February 20, 2019 letter does so here.

The remaining part of this allegation, that the Association "conditioned future negotiations on a meeting with participants of its choosing," also cannot be sustained. First, the ALJ agrees with the Association that in the phrase "our offer to meet with a committee of our choosing with representatives of the District," the words "a committee of our choosing" refer to the Association's committee, not the District's. It is well-settled that, absent extraordinary circumstances, which are not alleged here, each party has unilateral control over whom it will designated as its representatives. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 57; *Anaheim Union High School District* (2015) PERB Decision No. 2434, pp. 20-22.) Second, although the words "including its SCOE fiscal advisor who has the authority to approve District agreements" do refer to the District's committee, this is irrelevant, as the meeting in question was "to discuss our proposal to fix the district's budget fiasco and 'to avoid state takeover and save our schools,'" matters which the District agrees are non-mandatory subjects of bargaining.

Finally, these non-mandatory subjects of bargaining were unrelated to the reason why the Association believed that successor contract negotiations were "premature," as stated in the same sentence and also earlier in the same letter, namely, that "wage, benefit and staffing issues [i.e., the salary schedule and health benefits disputes] remain unresolved." The District has therefore failed to carry its burden of proving that the Association conditioned successor contract negotiations on discussing these non-mandatory subjects of bargaining. Key language in this

sentence, especially the word "while," is contrastive rather than causative and therefore does not establish the required linkage.

Accordingly, this allegation is DISMISSED.

3. The Association's March 11, 2018 Letter

The Complaint also alleges the following per se violation:

> "On March 11, 2019, in response to Charging Party's offer of new dates for negotiations, Respondent stated that it was refusing to come to the table, and again conditioning its agreement to negotiate on resolution of the salary structure and 'the implementation of our agreement to redirect health plan savings to achieve our mutually-agreed upon staffing goals that direct resources to the classroom."

The letter in question states that it would "serve as a response to [the District's] March 4, 2019 letter, in which the District had offered to meet for successor contract negotiations on March 11, 12, 13, and/or 15, 2021 and requested that the Association provide it with its "position on use of a neutral facilitator for negotiations, scheduling full day negotiations to allow us to work through more issues during each session, and selection of a neutral location." In its response, the Association accepted none of these dates and offered no alternative bargaining dates, nor did it respond to the District's proposed ground rules. Instead, it stated in relevant part:

> "Because of the looming state takeover, we believe that beginning negotiations on a successor agreement at this time would be premature while two major issues from our previous contract remain unresolved—the salary structure and the implementation of our agreement to redirect health plan savings to achieve our mutually-agreed upon staffing goals that direct resources to the classroom.
>
> "[¶ . . . ¶]

> ". . . **Should the District be prepared to cure its unlawful behavior we remain willing to work with the District to implement Article 13.1.1 and the Mayor's Framework Agreement on this important issue.**
>
> "For the reasons set forth above, we believe that successor contract negotiations would not be productive at this time, and assure you that SCTA will meet its legal obligations to bargain in good faith. Finally, regarding your various requests concerning a neutral facilitator, negotiations scheduling and location site and so on, we consider those to be ground rules, which are permissive subjects of bargaining and which can be addressed when our actual negotiations commence."

(Emphasis in original.)

Crucially, by March 11, 2019, the Association was under contractual obligation to have entered into negotiations over a successor contract by March 2, 2019, an obligation that it had not met. By failing to accept any of the potential bargaining dates or to offer alternative dates, the Association refused to do so now, if belatedly, especially in light of the Association's reference to an unspecified future point in time "when our actual negotiations commence."

Moreover, by stating that "beginning negotiations on a successor agreement at this time would be premature while two major issues from our previous contract remain unresolved—the salary structure and the implementation of our agreement to redirect health plan savings to achieve our mutually-agreed-upon staffing goals that direct resources to the classroom," the Association signaled that it would not commence successor contract negotiations until the salary structure and health plan disputes had been resolved. Whether characterized as accrued wages and benefits under a previous agreement or as a proposal to resolve outstanding grievances or

unfair practice disputes, PERB regards these issues as nonmandatory subjects of bargaining. (*County of Tulare* (2015) PERB Decision No. 2414-M, pp. 31-32, partially vacated on other grounds by *County of Tulare* (2016) PERB Decision No. 2414a-M; *The Regents of the University of California* (1992) PERB Decision No. 922-H, pp. 3-4.) The Association's insistence on resolving these non-mandatory issues before commencing successor negotiations was, in effect, a per se refusal to bargain over subjects that are within the scope of mandatory bargaining. (*Fresno*, *supra*, PERB Decision No. 2418-M, p. 18; see also *San Jose*, *supra*, PERB Decision No. 2341-M, pp. 35-36.)

Even assuming arguendo that these were mandatory subjects of bargaining, and although "a party may lawfully condition its *agreement* over a mandatory subject on agreement over others," it is a per se violation for a party to "condition its willingness even to *discuss* or *consider* a proposal concerning a mandatory subject on prior agreement over others." (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 35-36 (*Petaluma*), citing *San Jose*, *supra*, PERB Decision No. 2341-M, p. 31, *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 5 (*Santa Rosa*), *San Mateo County Community College District* (1993) PERB] Decision No. 1030, pp. 18-19. At least with respect to the health plan dispute, this is what the Association did, because no grievance had been filed yet in the matter and the Association was instead insisting that the District "cure its unlawful behavior [and] implement Article 13.1.1 and the Mayor's Framework Agreement" according to the Association's understanding of that article and agreement. Even with respect to the salary structure dispute, where a grievance had

already been filed and the Association argues that it was not insisting that the District agree with its interpretation of the Framework Agreement, but was rather only awaiting resolution of that dispute by Arbitrator Perea, whatever it may be, this is of no help to the Association, because it is also a per se violation to "insist on unilateral control over which mandatory subjects will be discussed or the order in which they will be discussed." (*Petaluma*, *supra*, p. 36, citing *San Jose*, *supra*, p. 31, *Santa Rosa*, *supra*, p. 5.)

The Association however defends that "[g]iven the significant financial uncertainties by the unresolved salary schedule and health benefits disputes and the District's insistence on prioritizing economic items in successor negotiations, SCTA was legally privileged to defer negotiations until these uncertainties were resolved." Neither part of this defense has merit. Elsewhere in its post-hearing brief, the Association claims more narrowly that "a party may lawfully defer collective bargaining *over economic items* when financial uncertainty hinders meaningful negotiations" (emphasis supplied). In support of this proposition, it cites to *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S (*DPA III*); *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 823-S (*DPA II*); *State of California (Department of Personnel Administration)* (1986) PERB Decision No. 569-S (*DPA I*); and *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*).[36] However, in each of these cases, the financial uncertainty was due to forces beyond

[36] A fifth case cited by the Association in this context, *San Mateo*, *supra*, PERB Decision No. 94, appears inapposite.

the parties' control. (See *DPA III*, *supra*, p. 7 [delaying making economic proposals while State faced projected $11 billion revenue shortfall]; *DPA II*, *supra*, p. 10 [delaying making economic proposals until State budget had been adopted and reviewed]; *DPA I*, *supra*, p. 12 [delaying making economic proposals until legislative budget action]; *San Francisco*, *supra*, pp. 8-9 [suggesting that lack of information what revenue would be following passage of Proposition 13 "may be a reason to . . . defer negotiations until more is known"].) By contrast, in the present case, any financial uncertainties were of the parties' own making, and there is accordingly much less reason to allow one of the parties unilaterally to defer bargaining over economic items until such uncertainties are resolved, as to do so would allow the party to create such uncertainties for the very purpose of delaying the bargaining process. Here, while the Association ultimately prevailed in the Salary Schedule Grievance, it later lost in the Health Benefits Grievance, and it would be inviting trouble if the ALJ allowed it to use its creation of especially the latter dispute as an excuse for deferring bargaining.

Even assuming arguendo that the salary structure and health plan disputes constituted valid reasons to "defer collective bargaining over *economic items*" (emphasis supplied), that is not what happened here. Instead, the Association "deferred" successor contract negotiations over *all items*, including non-economic mandatory subjects of bargaining. Thus, the District's March 4, 2019 letter specifically requested SCTA's position regarding ground rules that the District had first proposed on November 18, 2018 and which it now reiterated. In its March 11, 2019 letter, the Association denied said request and, after falsely characterizing ground rules as "permissive subjects of bargaining," insisted that these rules "can be addressed when

our actual negotiations commence." (See, e.g., *San Jose*, *supra*, PERB Decision No. 2341-M, p. 27, citing *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*), *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 [Board regards ground rules as mandatory subject of bargaining].) There is no PERB precedent that would sanction such unilateral deferral of bargaining over non-economic mandatory subjects of bargaining in light of financial uncertainties, and the Association offers no reason why the ALJ should sanction such behavior here. Finally, the Association's defense that "the District[] insiste[d] on prioritizing economic items in successor negotiations" rings especially hollow in this instance, where the District explicitly prioritized a non-economic item, i.e., ground rules.

The Association arguably did worse by also conditioning entering into successor negotiations on first discussing non-mandatory subjects of bargaining. This is what the Association did when it first "reiterate[d] our willingness to meet with the District . . . to discuss our proposal to fix the District's budget fiasco" and then, in the very next sentence, expressed its belief that "[b]ecause of the looming state takeover, . . . beginning negotiations on a successor agreement at this time would be premature." Here, the linkage missing in the Association's February 20, 2020 letter is present, as the language just quoted strongly implies that there would be no successor contract negotiations before the parties had discussed the Association's proposal to "fix the District's budget fiasco," and thereby avoid the "looming state takeover." That proposal, or rather the two proposals the Association made on September 13 and December 13, 2018, to which the Association cites in its March 11, 2019 letter, centered around "Curbing Bureaucratic Bloat" (i.e., "reduc[ing] the number

of administrators to 2014-15 levels"), "Reigning in Escalating Administrator Salaries" (i.e., "no . . . administrator receiv[ing] more than $150,000 or roughly 2 times the average certificated teacher salary"), eliminating "Questionable Affiliations" with the "Council of Great City Schools" and the "CORE district Collaborative," and "[e]liminat[ing] vacation buyout for admin[istrators] and others" and "[r]educing use of outside attorneys for labor relations." PERB has held that even conditioning ultimate *agreement* over mandatory subjects of bargaining on agreement over non-mandatory subjects of bargaining, such as those immediately above, constitutes a per se violation of the duty to bargain. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 35.) All the more, so does conditioning mere *discussion* of mandatory subjects on agreement or discussion of non-mandatory subjects constitute a per se violation of that duty.

For these reasons, this allegation is SUSTAINED.

4. The Associations March 15, 2019 Letter

The Complaint further alleges the following per se violation:

> "On March 15, 2019, Respondent again refused to begin negotiations over a successor contract."

At issue in this allegation is a March 15, 2019 letter by which the Association informed Aguilar that "the members of the . . . Association have voted overwhelmingly to authorize a strike against the . . . District in protest of the actions you, Board [of Education] President Jessie Ryan and other District leaders in engaging in unlawful behavior in violation of California law." The Association went on to state that "[p]rior to establishing a strike date, however, we want to provide you an opportunity to cure the unlawful activity" and offered to meet on March 26 and/or 28 at the Association office

"to negotiate over remedies to the District's unlawful actions, in the hopes that a strike can be avoided."

There is nothing in this letter that could be interpreted as a refusal to begin negotiations over a successor contract, which are not mentioned anywhere in the letter. The Association's expressed desire to negotiate over remedies for the District's alleged "unlawful actions," in the hope of avoiding a strike in protest of these actions," does not translate into such a refusal.

In its post-hearing brief, the District attempts to link these issues by pointing to the fact that in a letter dated March 4, 2019, the District had "ask[ed] [the Association] to bargain over a successor contract and proposed . . . potential [bargaining] dates." However, the Association's March 15, 2019 letter does not indicate anywhere that it constitutes a response to the District's March 4, 2019 letter. The linkage suggested by the District is therefore rejected and this allegation is DISMISSED.

5. The Association's January 10, 2020 Letter

In addition, the Complaint alleges the following per se violation:

> "On January 10, 2020, Respondent agreed to meet with Charging Party to discuss select bargaining issues of Respondent's choosing, but stated to Charging Party that it would negotiate a successor agreement only after the arbitration related to health plan savings is 'concluded,' and that 'negotiations will proceed more constructively after you first agree to abide by the agreement you personally signed in 2017.'"

The relevant portion of the Association's January 10, 2021 letter reads as follows:

> "[W]e have continually noted that we believe negotiations will proceed more constructively after you first agree to

> abide by the agreement you personally signed in 2017. Your refusal to honor the agreement related to the health plan, Article 13.1.1, is finally scheduled for arbitration on February 25, 2019, after yet more needless delays on the District's part. Accordingly, we believe that because so many issues are tied to the outcome of that arbitration (and as we have noted several times to you in previous communications) negotiations will proceed more smoothly after that arbitration has concluded."

This letter was written in response to the District's December 20, 2019 letter, in which the District had offered January 14, 16, 24, and 28-31, 2020 as potential bargaining dates, and in which it had pointed out that the Association had not yet responded to any of the proposals that the District had submitted to it since August 2, 2019 on Articles 5 (Hours of Employment), 6 (Evaluation), 8 (Transfers), 11 (Safety Concerns), 12 (Compensation), 13 (Employee Benefits), 17 (Class Size), 18 (Organizational Rights), and 21 (Organizational Security),[37] and on the school calendars for the 2020-21 and 2021-22 school years. In its January 10, 2020 letter, the Association did not accept any of the offered bargaining dates, nor did it propose any alternative bargaining dates. The Association also did not respond to any of the District's proposals regarding the articles listed above, nor did it make any proposals of its own.

There is no need for an in-depth analysis here, as much of it would mirror or repeat that regarding the Association's March 11, 2019 letter above. By failing to accept any of the offered bargaining dates or to offer alternative bargaining dates, by

[37] These comprise all the article that the District had sunshined on November 15, 2018, with the sole exception of Article 26 (Duration). See *supra*, fn. 27.

failing to respond to any of the proposals made by the District or to make any proposals of its own, and by stating instead only that "negotiations will proceed more smoothly [or "more constructively"] after th[e] [health plan] arbitration has concluded, the Association once again clearly and unambiguously signaled, as it had in its March 11, 2019 letter, that it would not commence successor contract negotiations until the health plan dispute had been resolved. Again, assuming arguendo that this was a mandatory subject of bargaining, such conditioning of the Association's "willingness even to discuss or consider a proposal concerning a mandatory subject on prior agreement over others" constitutes a per se violation of the duty to bargain. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 36, citing *San Jose*, *supra*, PERB Decision No. 2341-M, p. 31, *Santa Rosa*, *supra*, PERB Decision No. 2308-M, p. 5.)

This allegation is SUSTAINED.

6. <u>The Association's January 17, 2020 Letter</u>

The Complaint also alleges the following per se violation:

> "On January 17, 2020, Respondent reiterated its position that outstanding issues remained 'a significant obstacle to the Parties' ability to engage in meaningful and substantive negotiations over many key contract provisions.' Respondent offered dates in March of 2020 to negotiate on matters of its own choosing—those 'not impacted and not complicated by the outstanding dispute over health benefits'—while refusing to negotiate other mandatory matters."

This allegation is not supported by the evidence. In its January 17, 2020 letter, the Association does state that "we have taken pains to explain that the District's own refusal to comply with the Parties' previous contract—including, but not limited to, its salary schedule provisions and health benefits savings provisions—has been and

remains a significant obstacle to the Parties' ability to engage in meaningful and substantive negotiations over many key contract provisions." However, and especially in light of the fact that elsewhere in the same letter, the Association for the first time offered potential dates specifically, and without limitation, for "successor contract negotiations," to wit, March 3, 4, 5, or 6, 2020, that statement cannot be interpreted as a refusal to bargain over any or all other mandatory subjects of bargaining.

Similarly, the Association's letter does state that "we again submit that bargaining will be most effective and efficient if the Parties first direct their efforts at resolving those matters not impacted and complicated by the outstanding dispute over health benefits." But that statement again cannot be interpreted as a refusal to bargain over any or all other mandatory subjects or bargaining. True, the statement two paragraphs earlier in the letter that "as to those provisions that are not impacted by the District's violations of the contract and its repeated and inexplicable opposition to timely resolution of the Parties disputes[,] SCTA has been and remains ready to bargain," read in isolation, might be taken to suggest that SCTA had not been and did not remain ready to bargain over provisions that *were* impacted by the District's alleged violations and delay. However, and again in light of the fact that elsewhere in the same letter, the Association for the first time offer potential dates specifically, and without limitation, for "successor contract negotiations," that statement is too ambiguous to firm that suggestion into a conclusion.

The bottom line is that, in its January 17, 2020 letter, the Association for the first time showed any willingness to come to the bargaining table and proposed dates on which to do so. It would serve no purpose to parse this letter overly closely and to

turn it, again viewed by itself as it must under the per se analysis, but based on mere suggestion and implication, into a refusal to bargain, a merely conditional offer to bargain, or an offer to bargain only over some subjects but not others.

This allegation is DISMISSED.

7. Summary

The allegations of separate per-se violations of the duty to bargain in good faith based on the Associations March 11, 2019 and January 10, 2020 letters in violation of EERA section 3543.6 subdivision (c) are SUSTAINED. All other allegations of per-se violations are DISMISSED.

B. Alleged Surface Bargaining under the Totality of Circumstances

The Complaint also alleges that the Association engaged in bad faith or surface bargaining over a successor CBA with the District. Good faith in bargaining is a subjective attitude that requires a genuine desire to reach an agreement. (*Placentia Fire Fighters, Local 2147, et al. v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 (*City of Placentia*), citing *NLRB v. MacMillan Ring-Free Oil Company, Inc*. (9th Cir. 1968) 394 F.2d 26, *NLRB v. Mrs. Fay's Pies* (9th Cir. 1965) 341 F.2d 489.) By contrast, bad faith in bargaining, also known as surface bargaining, describes the subjective attitude of a respondent who approaches its bargaining obligations without any actual intent to reach an agreement. At its essence, surface bargaining occurs when a party "merely goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement." (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 13, citing *Inter-Polymer Industries* (1972) 196 NLRB 729, 759-760.)

PERB evaluates surface bargaining allegations under a "totality of conduct" analysis, which examines the parties' conduct as a whole to ascertain their subjective intent. (*City of Arcadia* (2019) PERB Decision No. 2648-M, p. 36.) Under this analysis, PERB typically looks for the presence or absence of common "indicia" of bad faith, including, but not limited to, the following: (1) entering negotiations with a take-it-or-leave-it attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enfd. *NLRB v. General Electric Co.* (2d Cir. 1969) 418 F.2d 736, cert. den. 397 U.S. 965); (2) failure to exchange reasonable proposals, offer counterproposals, act on the other side's proposals, explain positions, and attempt to reconcile differences (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 20-21, 40-43 (*San Jose*); *Compton*, *supra*, PERB Decision No. 728, adopting proposed decision at pp. 59-61; *Gonzales Union High School District* (1985) PERB Decision No. 480, adopting proposed decision at pp. 43-44 (*Gonzales*)); (3) regressive bargaining in the form of withdrawal of proposals or reneging on previously reached tentative agreements or ground rules (*Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 14-15, 17-18; *Compton*, *supra*, PERB Decision No. 728, adopting proposed decision at p. 54; *Stockton*, *supra*, PERB Decision No. 143, p. 24); (4) insistence on unlawful conditions before starting and/or during negotiations, such as conditioning agreement over one mandatory subject of bargaining on prior agreements over others or conditioning agreement regarding economic matters on agreement regarding non-economic matters (*Petaluma*, *supra*, PERB Decision No. 2485, p. 34; *San Jose*, *supra*, pp. 32-23); (5) negotiator's lack of authority which delays and/or thwarts the bargaining process (*Oakland Unified School District* (1983) PERB Decision No. 326, pp. 41-43 (*Oakland*);

Stockton, *supra*, p. 30); (6) dilatory or evasive conduct and cancelling, missing, or failing to prepare for scheduled negotiating sessions (*Gonzales*, *supra*, adopting proposed decision at pp. 38-40; *Oakland supra*, pp. 33-34; *Stockton*, *supra*, pp. 24-25); (7) premature or unfounded declaration of impasse (*City of San Ramon* (2018) PERB Decision No. 2571-M, pp. 10-12; *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 25, fn. 13 (*Regents*)); and (8) committing separate contemporaneous unfair practices at or away from the table (*San Jose*, *supra*, p. 23).

In general, the Board has held that one indicator is typically not enough to establish a finding of overall bad faith. (See *Contra Costa Community College District* (2005) PERB Decision No. 1756, p. 3, citing *Chino Valley Unified School District* (1999) PERB Decision No. 1326 and *Regents*, *supra*, PERB Decision No. 520-H.) However, it remains possible that a single action could have such a profound and detrimental effect on the bargain process as a whole that it obstructs the possibility of an agreement in good faith. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 18-19, 32-33.) Here, as discussed below, several indicators of bad faith are present, making this a clear-cut case of bad faith bargaining under the totality of the circumstances. However, as also discussed below, the ALJ considers at least two of these indicators—to wit, the Association's refusal to schedule any bargaining sessions for a full year and its failure to offer any proposals or counter proposals following the initial exchange of place-holder sunshine proposals—to have had such a profound and detrimental effect on the bargaining process as a whole that each by itself obstructed the possibility of an agreement in good faith, and each of these indicators by itself therefore establishes bad faith bargaining on the part of the Association.

1. The Association Engaged in Dilatory and Evasive Conduct by Refusing to Schedule Any Bargaining Sessions for a Full Year

Between March 4, 2019 and January 31, 2020, the District offered the Association no fewer than 51 dates to begin successor contract negotiations. These ranged from March 11, 2019, nine days after March 2, 2019, the date by which the Parties had contractually obligated themselves to do so pursuant to Article 25 of their CBA, and February 26, 2020, five days before March 2, 2020, one year after that obligation had become effective. The Association did not accept any of these dates and offered no alternative dates until January 17, 2020, when it proposed to meet and confer on March 3, 4, or 6, 2020. As a result, the Parties did not begin successor negotiations until March 3, 2020, i.e., one year and two days after March 2, 2019.

Specifically, on March 4, 2019, the District offered to bargain on March 11, 12, 13, and 15, 2019. On April 2, 2019, the District requested that the Association meet with it "to begin contract negotiations on or before April 12, 2019." On May 21, 2019, the District offered to bargain on May 28 and June 4, 6, 10, 11, and 13, 2019. On June 13, 2019, the District offered to bargain on June 18, 25, and 26, 2019. On June 20, 2019, the District offered to bargain on July 9, 10, and 11, 2019. On August 2, 2019, the District offered to bargain on August 6, 7, 12, 13, 19, 20, 22 and 27, 2019. On August 23, 2019, the District offered to bargain on September 3, 4, and 6, 2019. On October 3, 2019, the District offered to bargain on October 9, 11, 14, 15, and 16, 2019. On December 9, 2019, the District offered to bargain on December 16, 18, and 20, 2019. On December 20, 2019, the District offered to bargain on January 14, 16, 24, 28, 29, 30, and 31, 2020. The Association failed to accept any of these dates. It also did not propose any alternative dates.

After the District on January 13, 2020 informed the Association that, in light of the Associations continued failure to accept any of the District-offered dates or to propose alternative dates, "the District is left with no other option than to seek an impasse," the Association in its January 17, 2020 response offered to bargain on March 3, 4, or 6, 2020. On January 22, 2019, the District responded that it believed that bargaining should begin earlier and offered to do so on February 5, 11, 13, 18, 19, 21, 25, and 26, 2020, but also stated that "[w]e will calendar your offered dates of March 3, 4, 5, and 6, 2020, as additional dates for bargaining should they continue to be necessary after our February sessions." The District did so again on January 31, 2020. In its February 3, 2020 response, the Association replied that none of the eight February dates that the District had offered worked for the Association, but gave no further explanation for its unavailability, and stated, with respect to the March dates that the Association had offered, that "we were offering one of these dates, not all of them." The Association added: "Since you have indicated the District's availability for any of the dates that we offered in March, by this letter we hereby confirm our meeting on Wednesday, March 3, 2020 at 4 p.m. at the SCTA office . . . ." The Parties thereafter met and began successor contract negotiations on March 3, 2020, one year and two days after March 2, 2019, the date by which they had to do so pursuant to Article 25 of their CBA.

Moreover, while the Association was unwilling to meet and confer with the District over a successor contract for over a year, it was willing to meet with the District "to discuss our proposal to fix the District's budget fiasco," a non-mandatory subject of bargaining, as it "reiterate[d]" on February 20, 2019 and March 11, 2019.

When, on March 23, 2019, the Association proposed to meet with the District on March 26, 2019 "in an effort to avoid a potential work stoppage based on the massive unfair labor practices committed by . . . the . . . District," the Association not only saw fit to state in the same e-mail message that "it should be understood that we have no interest in discussing issues related to a successor contract," but also, after having stated in a follow-up e-mail message that "[w]e trust you will send a team with the authority to negotiate for the district," to "clarify" yet again in a third e-mail message that day that "'negotiate' in my previous email refers to curing the unfair labor practices and unlawful actions," but that "we [do] not mean bargaining for a successor contract. Similarly, on October 11, 2019, the Association invited the District: "If . . . you have an interest in discussing those matters [i.e., "the fundamental issues regarding implementation of the last contract"] which are part and parcel of successor contract negotiations, please let us know." The inescapable conclusion is that the Association was willing to meet and confer or discuss with the District about many topics of its own choosing, just not a successor contract.

In *Gonzales*, *supra*, PERB Decision No. 480, the Board observed that while "[a] party's insistence on delaying meetings, or scheduling meetings with long periods in between, is usually taken as evidence of underlying bad faith, rather than as a *per se* violation," nevertheless, "in a number of cases the NLRB has found that a refusal to meet for an extended period of time is itself an unlawful act." *(Id.* at pp. 38-39, italics in original, citing *Southwest Chevrolet* (1972) 194 NLRB 975; *Valley Imported Cars* (1973) 203 NLRB 873.) The Board concluded in that case that a union's refusal to meet with a school district for the purpose of contract negotiations from June 2 until

September 20 constituted a per se violation of the union's duty to meet and negotiate with the District. (*Id.* at p. 39.) The Board observed: "Even in light of the financial uncertainty surrounding the passage of the annual state budget, and the uncertain financial consequences for the . . . District, there were many non-economic subjects which could have been subject to negotiations." (*Ibid*.) Accordingly, "[b]y its refusal to meet *at all* during the summer, the Association prevented the parties from making progress on any of the outstanding non-economic proposals." (*Ibid.*, italics in original; see also *Stockton*, *supra*, PERB Decision No. 143, pp. 24-25 [school districts "recalcitrant[ce] in scheduling new meetings" among "factors" establishing bad faith bargaining].)

Here, while the Association did not explicitly refuse to meet with the District, it's failure to accept any of the 51 dates offered by the District or to offer any alternative dates that would have allowed the Parties to begin bargaining within a year after March 2, 2019, the date by which they were supposed to have done so according to their CBA, is equivalent to an outright refusal to meet and confer for one year, and thus more egregious than the outright refusal to meet and confer for just under four months that was at issue in *Gonzales* and that the Board found to constitute a per se violation of the duty to bargain. (See *Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 20 (*COPPA*), citing *Fresno*, *supra*, PERB Decision No. 2418-M, p. 15 [stating that "an unreasonable delay is treated as an outright refusal to bargain"].) The more egregious delay in the present case is a strong indicator of bad faith bargaining. Indeed, this indicator of bad faith bargaining is so strong and the ALJ considers it to have had such a profound and detrimental

effect on the bargaining process as a whole that it by itself obstructed the possibility of an agreement in good faith and establishes bad faith bargaining on the part of the Association. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 18-19, 32-33.)[38]

The Association's by now familiar defense, that "[g]iven the significant financial uncertainties posed by the unresolved salary schedule and health benefits disputes and the District's insistence on prioritizing economic items in successor negotiations, SCTA was legally privileged to defer negotiations until these uncertainties were resolved," is to no avail. Most damaging to the first part of this defense is that on May 19, 2020, after the District had offered May 26, 28, 29, or June 2," 2020 for bargaining, the Association interpreted this as a proposal to take the arbitration hearing in the health benefits dispute that had had been scheduled for May 28 and 29, 2020 off calendar and to repurpose these dates for bargaining, which proposal the Association eagerly accepted. The Association's interpretation of the District's proposal, which no reasonable reader of that proposal would have shared, was transparently based on the Association "objections" to conducting the hearing in the health benefits dispute "remotely, though videoconference," as required in light of the COVID-19 pandemic, and its desire to "plac[e] it on hold until such time it can occur with all parties present in the same room." Thus, the Association proposed to bargain with the District on May 28 and 29, 2019, instead of resolving an issue that, so the Association claimed then and still claims now, had to be resolved before it could "meaningfully" bargain with the District. It did so solely because it did not want to

[38] No successor contract had been reached by the last day of hearing on December 16, 2020, almost one and a half years after the last contract expired on June 30, 2019.

resolve the issue in the only format in which it could be resolved at the time, "remotely, through videoconferencing," thus negating the reason for "defer[ing] negotiation until these uncertainties were resolved."

The District's alleged "insistence on prioritizing economic items in successor negotiations" is of no help to the Association either, for the simple reason that there is no evidence of any such insistence. To the contrary, and as discussed in more detail in the next section, the District's first proposal was non-economic and consisted of ground rules that the District proposed and reproposed on November 9, 2018, December 21, 2018, January 17, 2019, February 15, 2019, but the Association never asked or agreed to meet and confer with the District about these ground rules until the parties finally met for the first time on March 3, 2019. Similarly, on August 23, 2019, the District made proposals regarding Articles 18 (Organizational Rights) and 21 (Organizational Security). Fisher testified that the salary schedule and health benefits disputes "would have a lesser effect" or wouldn't have as big an effect" on Articles 18 and 21 "than on other articles." Borsos more categorically answered "No" to the question, "[W]hen SCTA sunshined its proposal on Article 21 . . . on February 7th, 2019, was there any impediment to the parties bargaining over Article 21?" Yet the Association never asked or agreed to meet and confer with the District about these articles until the parties finally met for the first time on March 3, 2019. In contrast, Borsos also categorically answered "Yes" to the question whether "SCTA could have sat down with the District to negotiate with the District on a

successor contract before March 3rd, 2020."[39] That it did not do so is a strong indicator of bad faith.[40]

2. The Association Failed to Offer Any Proposals or Counter Proposals Following the Initial Exchange of Place-Holder Sunshine Proposals

During the entire period of time at issue in this case, the District proposed ground rules and offered proposals regarding all but one of the ten CBA articles it had sunshined on November 15, 2019. The Association never responded to any of these proposals and never made any proposals regarding any of the 26 CBA articles it had

[39] Similarly, Fisher testified that the health benefits would have had "just minimum . . . impacts" on Article 11, Safety Conditions, but "[n]ot big impacts." When asked by the ALJ, "Does that mean you could have negotiated that section" when the District on October 3, 2019 offered a proposal regarding Article 11 to the Association, Fisher answered: "We could have begun negotiations, yes."

[40] Implicit in Borsos's acknowledgment that the Association could have met and negotiated with the District over a successor contract before March 3, 2020 is the further acknowledgement that the Association did not actually meet and negotiate with the District over a successor contract before March 3, 2020. The same acknowledgement is implicit in the Association's defense that it was "legally privileged to defer negotiations until the[] ["financial"] uncertainties ["posed by the unresolved salary schedule and health benefits disputes"] were resolved." These acknowledgments are incompatible with the Association's claim, which it first raised in its January 17, 2020 letter to the District under the heading "Continuation of Successor Contract Bargaining," that it had been engaged in successor contract negotiations with the District all along, in the form of discussions over certain issues, some of which were mentioned in its sunshine proposals but none of which were linked to any existing CBA articles. The latter claim independently lacks credibility, given the clear and unambiguous statement in the Association's August 7, 2019 proposal that "[u]pon conclusion of the [five] items listed above," and only then, "the parties will commence negotiations for a successor collective bargaining agreement." It is further discredited by the fact that the Association did not solicit new bargaining team members for successor contract negotiations until February 15, 2020 and also did not canvas old bargaining team members for possible dates for such negotiations until at least December 13, 2019. This may be seen as an independent indicator of bad faith.

sunshined on February 7, 2019. As of December 16, 2020, the last day of hearing in this matter, the Parties had yet to reach agreement on a successor contract.

Specifically, on March 4, 2019, the District requested that the Association provide it with its position regarding certain ground rules that the District had proposed and re-proposed on November 9, 2018, December 21, 2018, January 17, 2019, and February 15, 2019. The Association never responded to this request. On August 2, 2019, the District again re-proposed these ground rules. The Association never accepted these ground rules or proposed alternative ground rules. On the same day, the District also offered proposals regarding Article 13 (Health Benefits) and the 2020-21 and 2021-22 school calendars. The Association never accepted any of these proposals or made counter-proposals regarding these matters. On August 23, 2019, the District offered proposals regarding Articles 18 (Organizational Rights) and 21 (Organizational Security). The Association never accepted any of these proposals or made counter-proposals regarding these matters. On October 3, 2019, the District offered a proposal regarding Article 11 (Safety Conditions). The Association never accepted this proposal or made a counter-proposal regarding this matter. On December 9, 2019, the District offered proposals regarding Article 5 (Hours of Employment), 6 (Evaluation), 8 (Transfers), 12 (Compensation) and 17 (Class Size). The District added that "[t]he proposals included with this letter represent the last of our proposals on the CBA article that the District sunshined over a year ago, on November 15, 2018."[41] The Association never

[41] However, the record contains no District proposal regarding Article 26 (Duration), which was one of the CBA articles that the District had sunshined on November 15, 2018.

accepted these proposals or made counter-proposals regarding these matters. The Association also never made a proposal regarding any of the CBA articles that it alone had sunshined on February 7, 2019, namely, Article 1 (Recognition), 2 (Definitions), 3 (Effect of Agreement), 4 (Grievance Procedure), 7 (Assignment), 9 (Leaves of Absence), 10 (Personnel Files), 14 (Personal and Academic Freedom), 15 (Substitutes), 16 (Liaison Committee), 19 (District Rights), 20 (Mentor Teacher), 22 (Professional Growth Program Related to Requirements for Renewal or Clear Teaching Credentials), 23 (Classroom Teacher Instructional Improvement Program), 24 (Site-based Decision Making), or 25 (Successor Agreement). This remained true even after negotiations began on March 3, 2020.

In *Gonzales*, the school district presented proposals regarding discipline and layoff to the union at a meeting on May 13. (*Gonzales*, *supra*, PERB Decision No. 480, adopting proposed decision at p. 41.) After denying at that meeting that either issue was within the scope of representation, the union acknowledged at a meeting on June 2 that both were within scope, but remained without a position on either. (*Id.* at pp. 41-42.) At a meeting on September 20, the union continued to be unable to articulate a position on either issue. (*Id.* at p. 42.) Through October 18, it still had not presented any position on either. The Board concluded that the union had not presented any reasonable explanation for its failure to present any position on the layoff and discipline subjects from June through October and that its conduct therefore violated its obligation to negotiate in good faith. (*Id.* at pp. 43-44.)

Here, the conduct of the Association is, if anything, again more egregious than that of the union at issue in *Gonzales*. As discussed in the previous section, the

District proposed and reproposed ground rules on November 9, 2018, December 21, 2018, January 17, 2019, February 15, 2019, but the Association never responded to this proposal at least until the parties finally met for the first time on March 3, 2019. Counting from March 2, 2019, this represents a failure to respond this proposal of at least one year and two days. Similarly, the hearing testimony by Fisher and Borsos recounted in the previous section establishes that the Association could have responded to the proposals regarding Articles 18 (Organizational Rights) and 21 (Organizational Security) that the District made on August 23, 2019, but it never did so. As of the date of the PERB hearing, Borsos admitted that the Association had still not proposed any language regarding Article 21. Counting from August 23, 2019, this represents a failure to respond to these proposals of at least 1 year, and 3 months. Finally, the Association could also have responded to the proposal regarding Article 11 (Safety Conditions) that the District made on October 3, 2019, but it apparently never did so, either.[42] In fact, from March 2, 2019 through December 16, 2020, a period of one year, nine months, and fourteen days, the Association did not make a single proposal regarding any of the 26 CBA articles that it had sunshined on February 7, 2019.

The defenses raised by the Association do not hold water for the reasons discussed in the previous section, which do not have to be repeated here.[43] The Association's complete failure to respond, timely or otherwise, to any of the proposals offered by the District and its failure to make a single proposal regarding any of the

[42] See *supra*, fn. 39

[43] See *supra*, fn. 40 and accompanying text.

CBA articles that it had sunshined is a strong indicator of bad faith. Indeed, as before, this indicator of bad faith bargaining had such a profound and detrimental effect on the bargaining process as a whole that it by itself obstructed the possibility of an agreement in good faith and establishes bad faith bargaining on the part of the Association. (*San Jose*, *supra*, PERB Decision No. 2341-M, pp. 18-19, 32-33.)[44]

3. The Association Conditioned Discussion of Mandatory Subjects on Agreement over, or Discussion of, Other Subjects

In *Petaluma*, *supra*, PERB Decision No. 2485, the Board distinguished between three types of conditional bargaining:

> "Following federal precedent, PERB has long held that conditioning agreement over one mandatory subject of bargaining on prior agreement over others is not itself unlawful, but may indicate an absence of good faith under the totality of circumstances analysis. [Citations omitted.] . . .
>
> "By contrast, where agreement on mandatory subjects is conditioned on agreement over non-mandatory subjects, such as a waiver of statutory rights, PERB analyzes the allegation as a per se violation of the duty to bargain. [Citations omitted.] . . . .
>
> "In *City of San Jose*, *supra*, PERB Decision No. 2341-M, we recognized a third category of conditional bargaining allegations, one in which a party's willingness to *discuss* mandatory subjects is conditioned on prior agreement over [or discussion of] other mandatory subjects. [A party] . . . may not condition its willingness even to *discuss* or *consider* a proposal concerning a mandatory subject on prior agreement over others or insist on unilateral control over which mandatory subjects will be discussed or the

[44] See *supra*, fn. 38.

> order in which they will be discussed. [Citations omitted.] Such conduct is a rejection of bilateral negotiations because it allows one party to dictate what compromises the other side may propose for consideration. [Citations omitted.]"

(*Petaluma*, *supra*, PERB Decision No. 2485, pp. 34-36, italics in original.)

Logic dictates that where a party's willingness to discuss mandatory subjects is conditioned on prior agreement over or discussion of *non-mandatory* subjects of bargaining, such an allegation may also be analyzed as a per se refusal to bargain and as evidence of bad faith in negations. A party may not refuse to discuss a mandatory subject by insisting on postponing negotiations until agreement is reached on another subject, regardless of whether that subject is mandatory or non-mandatory. (*Anaheim*, *supra*, PERB Decision No. 2434, pp. 16-26; *San Jose*, *supra*, PERB Decision No. 2341-M, p. 27.) PERB and private-sector precedent alike recognize that "[s]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." (*NLRB v. Wooster Div. of Borg-Warner Corp.* (1958) 356 U.S. 342, 349.)

It was concluded above that in the Association's March 11, 2019 letter, it signaled that it would not commence successor contract negotiations until the salary structure and health plan disputes had been resolved when it stated therein that "beginning negotiations on a successor agreement at this time would be premature while two major issues from our previous contract remain unresolved—the salary structure and the implementation of our agreement to redirect health plan savings to achieve our mutually-agreed-upon staffing goals that direct resources to the classroom." It was further concluded that the Association thereby "condition[ed] its

willingness even to *discuss* or *consider* a proposal concerning a mandatory subject on prior agreement over others" and/or "insist[ed] on unilateral control over which mandatory subjects will be discussed or the order in which they will be discussed" (*Petaluma*, *supra*, PERB Decision No. 2485, p. 36, italics in original) and thus committed a per se violation of its duty to bargain with the District. The same is true of the Association's January 10, 2020 letter, as also discussed above. These per se violations serve as further indicators of bad faith bargaining under the totality of the circumstances analysis.

Without repeating the analysis conducted above with respect to the Association's March 11, 2019 and January 10, 2020 letters, the same must be concluded with respect to the Association's August 8, 2019 letter, in which it "reiterate[d] our request that you accept our proposal to address a number of vital outstanding issues in an expeditious manner so that we can commence negotiations on a successor contract as soon as possible," a proposal that the District had by then repeatedly rejected. Although not alleged as a per se violation, this conduct also serves as an additional indicator of bad faith bargaining.

Special mention in this context is due to the Association's August 7, 2019 proposal, in which it listed five demands, quoted in full in the Findings of Fact section above, regarding "1. Filling of vacancies," "2. Rescission of cuts to Child Development," "3. Rescission of cuts to Classified Staff," "4. Full implementation of the Certificated Salary Schedule Arbitration Decision," and "5. Expedited Arbitration on Health Plan" (emphasis omitted). These demands were followed, under the heading "6. Commencement of Successor Contract negotiations," by a statement that "[u]pon

conclusion of the items listed above, the parties will commence negotiations for a successor collective bargaining agreement" (emphasis omitted). Regardless of whether the five demands are classified as concerning mandatory or non-mandatory subjects of bargaining,[45] such conditioning of the Association's willingness to "commence negotiations for a successor [CBA]," and thus even to discuss the mandatory subjects of bargaining addressed therein, on prior agreement over and/or discussion of other subjects constitutes a per se violation of the duty of bargaining and is evidence of bad faith bargaining. (See, e.g., *Petaluma*, *supra*, PERB Decision No. 2485, pp. 34-36.) As before, the Association has no valid defense for this conduct.

4. Summary

Above, it has been concluded that three indicators of bad faith are present in this case, namely, that the Association engaged in dilatory and evasive conduct by refusing to schedule any bargaining sessions for a year, that it failed to offer any proposals or counter proposals following the initial exchange of place-holder sunshine proposals, and that it conditioned discussion of mandatory subjects on agreement over, or discussion of, other subjects, many of them themselves mandatory subjects of bargaining. It has further been concluded that each of the first indicator by itself establishes bad faith on the Association's part under the totality of the circumstances analysis. Assuming instead that neither of them does so, it would still be concluded that together, these three indicators establish bad faith, and there is no question that

[45] At least the demand for "Rescission of cuts to Classified Staff" clearly concerns a non-mandatory subject of bargaining, as it is undisputed that the Association does not represent the District's classified staff.

the Association's conduct unreasonably delayed negotiations and thwarted the possibility of reaching agreement. (*San Jose*, *supra*, PERB Decision No. 2341-M, p. 19 [ultimate question in bad-faith bargaining cases is whether respondent's conduct, when viewed in its totality, was sufficiently egregious to frustrate negotiations].) The allegation that the Association engaged in bad faith or surface bargaining with the District over a successor CBA in violation of EERA section 3543.6 subdivision (c) is therefore SUSTAINED.

REMEDY

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

> "The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

In this case, it has been found that the Association violated EERA section 3543.6, subdivision (c), by violating its duty to meet and negotiate with the District in good faith under the totality of the conduct test and by committing per se violations of the same duty. It is appropriate under these circumstances to order the Association to cease and desist from violating the law and to bargain with the District upon demand. (*COPPA*, *supra*, PERB Decision No. 2558, p. 35, citing *Anaheim Union High School District*, *supra*, PERB Decision No. 2434, adopting proposed decision at p. 100; see also *Gonzales*, *supra*, PERB Decision No. 480, p. 62.)

It is also a customary remedy in all unfair practice cases that the party found to have committed an unfair practice be ordered to post a notice incorporating the terms of the Board's order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, the Association will be ordered to post a notice incorporating the terms of the order herein at its buildings, offices and other facilities where notices to bargaining unit employees are customarily posted. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the Association to communicate with employees in its bargaining unit. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 45-46.) Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. Posting of such notice effectuates the policies of the EERA that employees be informed of the resolution of this matter and the Association's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69; see also *Gonzales*, *supra*, PERB Dec. No. 480, pp. 62-63.)

In the Charge, the District also requests an order "[t]hat SCTA make the District whole for any losses suffered as a result of SCTA's unlawful misconduct, including but not limited to all attorney fees and costs incurred in the filing and prosecution of this unfair practice charge." However, an award of attorney fees and litigation costs does not constitute a make-whole remedy, but is appropriate only as a litigation sanction,

if—as here--these fees and costs were incurred in the action in which they are awarded. (*City of Palo Alto* (2019) PERB Decision No. 2664-M, pp. 6-8 & fn. 6, citing *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30; *Lake Elsinore Unified School District* (2018) PERB Order No. Ad-446a, pp. 5-6 (*Lake Elsinore*).) To obtain reimbursement of attorney fees or litigation costs incurred while litigating a matter in front of PERB, the moving party must demonstrate that the claim, defense, motion, or other action or tactic was "without arguable merit" and pursued in "bad faith." (*Id.* at p. 7, citing *Lake Elsinore*, *supra*, p. 5; *City of Alhambra* (2009) PERB Decision No. 2036-M, 19; *City of Alhambra* (2009) PERB Decision No. 2037-M, p. 2.) As the District has not demonstrated that the Association's defenses and other actions or tactics in this litigation were without arguable merit, let alone that they were pursued in bad faith, this part of the request is denied. Moreover, as the District has not demonstrated that it suffered any losses from the unlawful misconduct itself, as distinguished from the litigation that ensued from it, the make-whole remedy request is denied as well.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Sacramento City Teachers Association (SCTA or Association) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6, subdivision (c), by violating its duty to meet and negotiate in good faith with the Sacramento City Unified School District (District) under the totality of the conduct test, and by committing per se violations of the same duty by refusing

to meet and negotiate with the District over a successor contract and failing to respond to District proposals and offer SCTA proposals for more than a year.

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and negotiate in good faith with the District.

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

1. Upon request by the District, meet and negotiate in good faith with the District.

2. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the bargaining unit represented by SCTA customarily are posted copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of SCTA, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by SCTA to communicate with employees in the bargaining unit represented by SCTA. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[46]

[46] In light of the ongoing COVID-19 pandemic, SCTA shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the District.

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions and supporting brief, within 20 days after the decision is served. (PERB Regulation 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Regulation 32305(a).) The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Regulation 32110(a).) Appeal documents may be

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or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If SCTA so notifies OGC, or if the District requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing SCTA to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing SCTA to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing SCTA to mail the Notice to those employees with whom it does not customarily communicate through electronic means. (*Culver City,* supra*,* PERB Decision No. 2731-M, p. 29, fn. 13.)

electronically filed by registering with, and uploading documents to the "ePERB Portal" that is found on PERB's website (https://eperb-portal.ecourt.com/public-portal/). To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Regulation 32110(d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via: in-person delivery, US Mail, or other delivery service. (PERB Regulation 32110(a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Regulation 32135(a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Regulation 32135(b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regulations 32300(a), 32140(c), and 32093). Proof of service forms can be located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served

has agreed to accept electronic service in this matter. (See PERB Regulations 32140(b) and 32093.)

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CO-635-E, *Sacramento City Unified School District v. Sacramento City Teachers Association*, in which all parties had the right to participate, it has been found that the Sacramento City Teachers Association (SCTA) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by violating its duty to meet and negotiate in good faith with the Sacramento City Unified School District (District) under the totality of the conduct test, and by committing per se violations of the same duty by refusing to meet and negotiate with the District over a successor contract and failing to respond to District proposals and offer SCTA proposals for more than a year.

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

A. CEASE AND DESIST FROM:

1. Failing or refusing to meet and negotiate in good faith with the District.

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

1. Upon request by the District, meet and negotiate in good faith with the District.

Dated: _____ Sacramento City Teachers Association

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.