STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case Nos. LA-CE-1827 LA-CE-2031
v.	)	
LAKE ELSINORE SCHOOL DISTRICT,	)	PERB Decision No. 646
Respondent.	)	December 18, 1987

Appearances: A. Eugene Huguenin, Jr., Attorney for Elsinore Valley Education Association, CTA/NEA; Parham & Associates, Inc. by James C. Whitlock for Lake Elsinore School District.

Before Porter, Craib and Shank, Members.

DECISION AND ORDER

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Lake Elsinore School District (District) to the proposed decision of a PERB administrative law judge (ALJ), attached hereto. The ALJ found that the District violated section 3543.5(c) of the Educational Employment Relations Act (EERA or Act)[1] by:

---

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

unilaterally changing the method of compensating teachers for extra duties performed during the summer of 1983; unilaterally implementing a proposed $1,500 stipend for teachers assigned to the newly created learning specialist classification; bypassing the exclusive representative by directly negotiating with a unit member to reduce her 1983-84 and 1984-85 work years; failing to give the Elsinore Valley Education Association (EVEA or Association) notice and an opportunity to negotiate over the effects of its decision to reduce School Improvement Project (SIP) instructional aide time; and unilaterally extending the workday of grades 4-6 teachers for four days during the 1983 fall conference week. In addition, the ALJ found that the District derivatively violated section 3543.5(a) and (b) of the EERA by the aforementioned actions.

We find the ALJ's findings of fact to be free of prejudicial error and adopt them as our own.[2] For the

---

> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]We note that the District excepted to the ALJ's finding that the change in the minimum day schedule resulted in one hour per day of additional preparation time. The record instead supports a finding that the change in the minimum day schedule resulted in an increase of one-half hour per day of preparation time. This discrepancy, however, in no way affects our analysis of this allegation.

reasons to follow, we affirm in part and reverse in part the ALJ's proposed decision.

Change in Method of Payment for Work Performed in Summer of 1983

The parties' collective bargaining agreement is silent on the subject of the method of payment for summer school work. The record, however, supports the ALJ's finding that teachers were routinely compensated at an hourly rate in past years, and that the District departed from this practice by compensating learning specialists and research-based instruction coaches on a per diem basis in 1983. Furthermore, the manner in which the the hourly rate was computed was based upon earlier collective bargaining agreements, and thus raises the inference that the earlier contract provision continues to reflect the mutually agreed upon policy. (Morgan Hill Unified School District (1985) PERB Decision No. 554.) While there was some evidence that District employees were paid per diem wages in the past, a clear preponderance of the evidence showed that teachers' compensation was calculated on an hourly basis, and this, combined with the rule articulated in Morgan Hill, shows the District's policy was to compensate teachers for extra duty summer assignments on an hourly basis.

In order to prove a violation of EERA section 3543.5(c) based upon a unilateral change, a charging party must first make a prima facie showing that the respondent breached a written agreement or altered a past practice. (Grant Joint

Union High School District (1982) PERB Decision No. 196.) In this case, the District changed its policy by its unilateral alteration of its past practice in its method of compensating teachers for extra duty summer assignments. We therefore affirm the ALJ's conclusion that the District violated EERA section 3543.5(c) and, derivatively, section 3543.5(a) and (b) by its change in the method of compensating teachers for summer work.

Unilateral Adoption of Learning Specialist Stipend

The District began considering a new classification of "learning specialist" in the spring of 1982; in April 1983, the District approved a job description and positions for the learning specialist classification. Applications for the newly created positions were limited to the District's existing staff. The District began using learning specialists at the beginning of the 1983-84 school year.

Between June 1983 and the beginning of the 1983-84 school year in September, EVEA and the District were engaged in reopener negotiations. Although the learning specialist classification was not among the reopener subjects, the parties discussed the position. The District, in both its announcement to teachers of the new classification and during negotiations, agreed that parts of the learning specialist program, such as a monetary stipend, were negotiable. The District knew, as a result of earlier exchanges between the parties, that EVEA

desired to discuss negotiable aspects of the new program. The District, nonetheless, implemented the program, including a $1,500 stipend, without having reached an agreement with EVEA.

While the decision to establish or abolish classifications is a management prerogative and, hence, is nonnegotiable, management remains obligated to negotiate the effects of its decision falling within the scope of representation. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322.) In the instant case, although the learning specialist classification was new, EVEA sought only to bargain the effects of the District's decision to create the new classification. The stipend is an aspect of wages, a subject expressly enumerated in EERA section 3543.2(a).[3] We have specifically held that salaries for newly created positions are negotiable. (Antioch Unified School District (1985) PERB Decision No. 515.) In addition, we note that the facts of this case show that the stipend for the new classification was integrally related to the interests of the current bargaining unit, in that the position was offered only to current employees and the learning specialist stipend constituted compensation for duties which related to and augmented the

---

[3]EERA section 3543.2(a) provides that the scope of representation "shall be limited to matters relating to wages, hours of employment and other terms and conditions of employment." Stipends relate to wages and are a mandatory subject of bargaining.

normal teaching responsibilities. We therefore find that the stipend was negotiable.

Although the District argues that EVEA waived its right to bargain a stipend for learning specialists, we agree with the ALJ that the record does not support such a contention. Accordingly, we affirm the ALJ's conclusion that the District's unilateral implementation of the stipend was in violation of section 3543.5(c) and, derivatively, section 3543.5(a) and (b) of EERA.

Change in the Work Year of the Bilingual Facilitator

The position of bilingual facilitator is one within the bargaining unit. The collective bargaining agreement provides at article 7 that the length of the work year shall be 179 days for unit members. We agree with the ALJ that the evidence supports the finding that District Superintendent Ronald Flora negotiated directly with Judith Reising, the bilingual facilitator, for a reduction in her 1983-84 work year. The Board of Trustees subsequently approved the reduced school year for Reising. Prior to its approval, EVEA President Denise Thomas inquired of the negotiability of Reising's request, and was told that the subject was nonnegotiable and in compliance with District policy. Believing the subject to be negotiable instead, an EVEA representative filed an amendment to Charge No. LA-CE-1827 to include this allegation.

The following year Reising again requested a reduced school

year. Her request, however, was accompanied by six conditions concerning the amount of her stipend and other terms and conditions of employment. The Board of Trustees approved her request, which it characterized as "child rearing leave" under the contract. The board, however, did not approve Reising's conditions attached to the granting of her leave, and Reising subsequently rejected the leave as approved by the board. When Reising inquired of Flora the status of her leave, she was told to work the same schedule as the year before (1983-84), or the reduced 166-day work year. Although Reising signed a standard contract of employment with the District, there was no change in it to reflect her reduced number of workdays for 1984-85. As in the case of the previous year, there is no evidence that prior to making this decision, Flora provided EVEA with notice or an opportunity to meet and negotiate over the decision. The District's reduction of Reising's work year in 1984-85 resulted in EVEA's filing of an additional unfair practice charge (LA-CE-2031) which was eventually consolidated in the instant case.

We affirm the ALJ's conclusion that the District bypassed the exclusive representative and negotiated individually with the bilingual facilitator for a reduced work year. Although the District maintains that it granted Reising a child rearing leave consistent with the CBA, the evidence does not sustain this contention. Negotiating directly with a bargaining unit

employee to alter existing terms and conditions of employment is a violation of EERA. We, therefore, affirm the ALJ's finding that the Lake Elsinore School District bypassed the exclusive representative in violation of EERA section 3543.5(c) and, derivatively, section 3543.5(a) and (b).

Instructional Aide Time

Although we affirm the ALJ's findings of fact on this charge, we supplement them with the following. SIP is a state categorically-funded program designed to provide educational assistance to students in the subject areas of reading, mathematics and language arts. (Ed. Code, sec. 52000.) The Education Code mandates the establishment of a school site council which is responsible for developing plans for the use of SIP funds. It is composed of the principal, teachers and other school personnel, pupils and parents at each school site. (Ed. Code, secs. 52012 et seq.) The school improvement plans for each school site are developed by the site councils consistent with the District's general guidelines for adoption by the District's Board of Trustees upon the recommendations of the site councils. (Ed. Code, sec. 52034.)

The SIP, in operation at all four school sites within the District, operates on a three-year cycle which began in the 1982-83 school year. Although the SIP state funds may be used to assist students in grades K-6, the District concentrated its 1982-83 SIP program in grades K-3, and a large portion of the

grant monies were allotted toward the salaries of instructional aides in order to provide direct educational services to students in grades K-3.

Acting in accordance with the wishes of the school board, the site councils at two of the four school sites (Wildomar and Butterfield schools) reallocated SIP monies for the 1983-84 school year in a manner benefiting the entire student body in grades K-6, rather than merely those students in grades K-3. Specifically, the site council at Wildomar decided to use a portion of the SIP funds to pay the salaries of a library aide, an aide coordinator of volunteers and a computer laboratory aide. Butterfield's site council opted to use a portion of the 1983-84 SIP funds budgeted to pay the salary of a computer aide. Reallocating a portion of SIP funds in such a manner, however, necessitated reducing the amount of SIP funds previously budgeted (in 1982-83) to pay the salaries of the SIP instructional aides for students in the K-3 classrooms; and, accordingly, some teachers at Wildomar and Butterfield had SIP aides in their classrooms for fewer hours, as compared to the previous year.[4]

---

[4]In 1982-83, the plan at Wildomar School included three hours of aide time for each class in grades K-3. In the 1983-84 school year, SIP instructional aide time was reduced from three hours to two hours per day in the kindergarten classes, and from three hours to one and one-half hours per day for grade 2 classes. At Butterfield School, in 1982-83, the SIP plan provided for SIP instructional aide time of three

Coinciding with the reduction in SIP instructional aide time in the fall of 1983, one-half the pupils of every class in grades K-6 at both Wildomar and Butterfield were taken in groups to the computer lab and the library for half-hour sessions with the computer lab aide and the library aide (a total of one hour per week). This arrangement reduced the class size for each teacher to one-half the number of pupils for reading and math instruction for half an hour per week for each subject area.

The issue involved in this matter is whether the District should have given EVEA notice and an opportunity to bargain any possible effects on the certificated unit of the District's reduction in the hours of the classified unit's instructional aides, the latter decision made as part of a comprehensive plan to reallocate SIP funds.

In her findings, the ALJ noted that the impact on the affected teachers' workday varied depending on the grade level involved and the amount of SIP aide time reduced. Some teachers, she found, had to modify their instructional strategy to accommodate the absence of a second adult. Other teachers

---

hours per day for grades K-1, and one and one-half hours per day for grades 2 and 3. In the 1983-84 school year, SIP aide time for grades K-1 remained at three hours per day. At the beginning of the fall 1983 semester, grades 2 and 3 had no aide time for the first few weeks of the semester until the teachers in grades K-1 classes volunteered to share one hour of aide time per day with grades 2 and 3.

had to increase the classroom preparation time to prepare additional "seat work" required in absence of a SIP aide. Also, some teachers spent noninstructional time correcting student written work that had previously been corrected by the aide.

The ALJ reasoned that the reduction in instructional aide classroom time would conceivably affect the amount of a teacher's time that was required to prepare for and perform such duties. This was so because, where aide time was reduced or eliminated, teachers who had used SIP aides to correct papers and perform record keeping tasks would have to perform these duties themselves, and this would have the result of increasing the teachers' workday. Also, the change required some teachers to prepare additional "seat work" to accommodate the absence of a SIP aide in the classroom working directly with students, and this would likewise require additional preparation time. The ALJ thereafter concluded that the District's decision which had the effect of reducing the amount of classroom aide time from its level in 1982-83 had a reasonably foreseeable adverse impact on the affected teachers' working conditions, and thus was negotiable pursuant to Mt. Diablo Unified School District (1983) PERB Decision No. 373.

We do not agree that the District had the obligation to provide the exclusive representative of the certificated unit notice and an opportunity to negotiate the possible effects of

the District's nonnegotiable decision which reduced the hours of members of the classified bargaining unit. As was noted by the ALJ, the SIP aides were to be utilized to provide "educational assistance to the students in the subject areas of reading, mathematics, and language arts. . . ." This comports with the intent of the Legislature in enacting SIP legislation as is expressed at section 52000 of the Education Code, which states, in pertinent part:

> The Legislature declares its intent to encourage improvement of California elementary . . . schools to ensure that all schools can respond in a timely and effective manner to the educational, personal, and career goals of every pupil. The Legislature is committed to the belief that schools should:
>
> (a) Recognize that each pupil is a unique human being to be encouraged and assisted to learn, grow, and develop in his or her own manner to become a contributing and responsible member of society.
>
> (b) Assure that pupils achieve proficiency in mathematics and in the use of the English language, including reading, writing, speaking and listening.
>
> (c) Provide pupils opportunities to develop skills, knowledge, awareness, and appreciations in a wide variety of other aspects of the curriculum . . . .
>
> (d) Assist pupils to develop esteem of self and others, personal and social responsibility, critical thinking, and independent judgment.
>
> (e) Provide a range of alternatives in instructional settings and formats to respond adequately to the different ways individual pupils learn.

. . . . . .

> The Legislature, by the provisions of this chapter, intends to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school. (Emphasis added.)

As is apparent from the language of the statute, the fundamental purpose of the SIP is to assist pupils in their academic development, and there are numerous options available to the individual school site councils to achieve this goal. Further, there exists evidence in the record demonstrating that teachers were aware that SIP funds were to be used to assist students, and what the role of SIP instructional aides was to be. Although teachers could not recite with verbatim accuracy the Legislative purpose of the SIP legislation, those testifying as to how their workday changed as a result of a reduction in instructional aide time were aware, for the most part, that the SIP aides were there to provide individualized instruction to students, and not to function as personal assistants to teachers.[5] When viewed in light of the

---

[5]The Association called teachers Jill Good, Ann Andrews, Lori Singelyn, Susan Johns, and Elizabeth Fowler to testify as to an increase in workload, if any, caused by the reduction in hours of classified SIP aides. Most witnesses displayed at least a rudimentary knowledge of the goals of the SIP legislation. For example, Good testified that one of the main goals of her school's SIP plan was to provide individualized instruction to students by the use of aides. Similarly, Andrews testified that it was her understanding that the

legislative goals of the SIP, any change in or diminishing of the teachers' preparation time in 1982-83 was, at best, a fortuitous side effect of misuse of the program. Conversely, the extent to which some teachers were required, as a result of the reduction in aides' hours, to adopt a teaching style to accommodate one less adult in the room, reflects more upon the professional nature of teaching, which often requires the exercise of discretion and flexibility, rather than it does a District-compelled increase in workload.

Further, the record is not clear on whether it was the reduction in SIP aide time or an entirely different factor which caused the increase in preparation time to which four teachers testified. The teachers' testimony revealed several factors, aside from the SIP aide time, which could have increased the teachers' workday. The relative experience of the teacher was one such factor.[6] Aside from the experience

---

purpose of the aide was to give "extra individual attention or individual instruction" to students. Singelyn testified that the aides were "to work with the children, not just sit there and do paperwork." Her testimony was reinforced by that of Walter McCarthy, who, as Assistant Principal at Wildomar in 1982-83, sat in on meetings between the principal and teachers wherein the principal explained that aides were to work directly with the students and strongly discouraged aides being used to grade papers for students. Fowler, however, expressed confusion with respect to the role of the aide in the classroom.

[6]It is noteworthy in this respect that of the four teachers testifying as to an increase in their workday, three, having taught five years or less, were relatively inexperienced teachers and one was in her first year of teaching with the

factor, other factors which could have contributed to an increased workday included: class size, special learning difficulties of some students, competence of the aides and, perhaps the most significant of all, individual variation among teachers themselves. With respect to the latter, some teachers, especially new teachers, habitually worked longer than the contractually mandated minimum 7 1/2 hours, while other teachers did not.

Furthermore, the record shows that in 1983-84, students were taken from the classrooms in groups each week for a half-hour session with the computer lab aide and a half-hour session with the library aide. One may infer that this would be a factor offsetting any increases in the length of some teachers' workday allegedly caused by the reduction in SIP instructional aide time.

In short, the reductions in SIP instructional aide time in certain K-3 classes at two schools occurred within the context

---

District as of the time of the hearing. Conversely, the teacher testifying with the most experience with the District, Lucinda Brouwer, noticed no impact on the length of time it took for her to prepare for class subsequent to the reduction in aide time. In her testimony, Brouwer stated:

> I think because I have taught a little bit longer than some of the witnesses who have spoken earlier, I've made it a habit of doing my work in the seven and a half hours. And I don't take work home and I don't do work on the weekends. And I did that regardless of if I had an aide or not.

of a categorically funded program -- the fundamental purpose of which was to assist students. Mt. Diablo's requirements of notice and an opportunity to negotiate "reasonably foreseeable effects" of a nonnegotiable decision do not contemplate the bargaining of those effects contravening the intent of the Legislature in enacting the SIP legislation. Instead, the reduction in SIP aides' hours reasonably would have been expected to exert, at best, an indirect and speculative impact on the workday of teachers. In this regard, we note that the (1982-83) levels of aide time from which the reduction occurred had been in existence for only one school year. Accordingly, we reverse the ALJ on this allegation and find that the District was not required to provide the Association notice and an opportunity to negotiate such speculative effects on the teachers of its decision which reduced instructional aide services in the classified unit.

Change in the Length of the Instructional Day

The complaint in this case alleges, and the ALJ found, that the District committed an unfair practice by changing the length of the instructional day during the 1983 fall conference week. As to this unfair practice charge, the record before us presents a jurisdictional question which was neither raised by the parties nor addressed by the ALJ: Does this Board have jurisdiction to issue a complaint and resolve an unfair practice charge where the conduct charged is also prohibited by

the provisions of the parties' collective bargaining agreement, which contains grievance machinery covering the matter at issue and culminating in binding arbitration?

A secondary issue presented by the record before us is the effect, if any, on this jurisdictional question of charging party's failure to invoke the grievance machinery and the respondent's concomitant failure to assert as a "defense" to the complaint that the matter was subject to binding arbitration.[7]

Preliminarily it is appropriate to review this Board's jurisdictional terrain.

First, this Board has only such jurisdiction and powers as have been conferred upon it by statute. (Association For Retarded Citizens v. Dept. of Developmental Services (1985) 38 Cal.3d 384, 391-392; Fertig v. State Personnel Board (1969) 71 Cal.2d 96, 103; B.W. v. Board of Medical Quality Assurance (1985) 169 Cal.App.3d 219, 233-234; B.M.W. of North America, Inc. v. New Motor Vehicle Board (1984) 162 Cal.App.3d 980, 994, hg. den.; Graves v. Commission on Professional Competence (1976) 63 Cal.App.3d 970, 976, hg. den.)

Second, this Board acts in excess of its jurisdication if

---

[7]Board Regulation 32646 provides that if the respondent believes that the dispute is subject to binding arbitration, it shall assert such as a defense in its answer to the complaint and move to dismiss the complaint. (Cal. Admin. Code, tit. 8, sec. 32646.)

it acts in violation of the statutes conferring and/or limiting its jurisdiction and powers. (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288-291; Kennaley v. Superior Court (1954) 43 Cal.2d 512, 514; Graves v. Commission on Professional Competence, supra, 63 Cal.App.3d 970, 976, hg. den.) Indeed, all actions taken, or determinations made, in excess of this Board's jurisdiction and powers are void. (City & County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 400, hg. den.; Fertig v. State Personnel Board, supra, 71 Cal.2d 96, 103-104; Association For Retarded Citizens v. Dept. of Developmental Services, supra, 38 Cal.3d 384, 391; B.W. v. Board of Medical Quality Assurance, supra, 169 Cal.App.3d 219, 234; Graves v. Commission on Professional Competence, supra, 63 Cal.App.3d 970, 976, hg. den.)

Third, where this Board is without jurisdiction with respect to a matter before it, it must dismiss the matter on its own motion, regardless of whether the jurisdictional issue has been raised by the parties. (Goodwine v. Superior Court (1965) 63 Cal.2d 481, 482; Abelleira v. District Court of Appeal, supra, 17 Cal.2d 280, 302-303; Linnick v. Sedelmeier (1968) 262 Cal.App.2d 12, fn. 1; Olmstead v. West (1960) 177 Cal.App.2d 652, 655; Warner v. Pacific Tel. & Tel. Co. (1953) 121 Cal.App.2d 497, 502, hg. den.; Estate of Zavadil (1962) 200 Cal.App.2d 32, 36; Costa v. Banta (1950) 98 Cal.App.2d 181, 182, hg. den.; and see Bender v.

Williamsport Area School District (1986) 475 U.S. ___ [89 L.Ed.2d 501, 511, 514-514, rehg. den. 90 L.Ed.2d 682]; Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxiles de Guinee (1982) 456 U.S. 694, 701-702 [72 L.Ed.2d 492, 500-501.)

Fourth, where this Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiesence, nor by waiver or estoppel. (Schlyen v. Schlyen (1954) 43 Cal.2d 361, 375; Keithley v. Civil Service Board of City of Oakland (1970) 11 Cal.App.3d 443, 448, hg. den.; Summers v. Superior Court (1959) 53 Cal.2d 295, 298; Sampsell v. Superior Court (1948) 32 Cal.2d 763, 773, 776; Fong Chuck v. Chin Po Foon (1947) 29 Cal.2d 552, 554; Estate of Lee (1981) 124 Cal.App.3d 687, 692-693, hg. den.; People v. Coit Ranch, Inc. (1962) 204 Cal.App.2d 52, 57, hg. den.)

Lastly, lack of jurisdiction cannot be overcome by the established practices or customs of this Board, nor by Board regulation. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29; Morris v. Williams (1967) 67 Cal.2d 733, 737, 748; Calif. State Restaurant Assoc. v. Whitlow, Chief, Div. of Industrial Welfare (1976) 58 Cal.App.3d 340, 347, hg. den.; Harris v. ABC Appeals Board (1964) 228 Cal.App.2d 1, 6, hg. den.; Graves v. Commission on Professional Competence, supra, 63 Cal.App.3d 970, 976, hg. den.; Adamek & Dessert, Inc. v. Agricultural Labor Relations

Board (1986) 178 Cal.App.3d 970, 978, hg. den.; Brown v. State Personnel Board (1941) 43 Cal.App.2d 70, 75, hg. den.; Davidson v. Burns (1940) 38 Cal.App.2d 188, 192, hg. den.)

The record before us shows that the parties' collective bargaining agreement includes a grievance and arbitration provision culminating in binding arbitration. The contract further provides at article 15 that a grievance may be brought by the Association or any member of the bargaining unit covered by the terms of the agreement, and that:

> [a] "grievance" occurs when a unit member has been adversely affected by an alleged violation, misinterpretation or misapplication of [the] Agreement...

Article 7, section 7.7 of the parties' collective bargaining agreement prescribes:

> The instructional minutes for the intermediate grades may be increased by the District not more than fifteen (15) minutes during the 1982-83 school year. (Emphasis added.)[8]

In this case, EVEA alleged that the District unilaterally increased the number of instructional minutes during Conference Week in the fall of 1983 by approximately 45 minutes per day. Therefore, to the extent that the District increased the number

---

[8]As noted by the ALJ, although under the terms of the collective bargaining agreement the 15-minute increase in instructional minutes was to be implemented during the 1982-83 school year, the agreement was not ratified until April 15, 1983. The parties, accordingly, agreed that the 15-minute increase would be implemented during the 1983-84 school year, beginning in the fall of 1983.

of instructional minutes in an amount greater than 15 minutes, it allegedly has engaged in conduct violative of the provisions of the agreement.

Turning now to the language of EERA, section 3541.5(a) provides, in pertinent part:

> Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery. (Emphasis added.)

In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.) Further, it is a

fundamental maxim of statutory construction that, where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. In other words, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. (Noroian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 654, hg. den.; McQuillan v. Southern Pacific Co. (1974) 40 Cal.App.3d 802, 805-806; Hoyme v. Board of Education (1980) 107 Cal.App.3d 449; Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155; People v. Boyd (1979) 24 Cal.3d 285, 294.)

The Legislature's limitation on this Board's jurisdiction to act prior to the exhaustion of the parties' grievance machinery culminating in binding arbitration is clearly evinced by its choice of words in section 3541.5(a), ". . . the Board shall not issue a complaint. . . ." In dealing with the provisions of EERA, it is important to note that Government Code sections 5 and 14 prescribe that the word "shall" is mandatory. Likewise, California case law customarily construes the word "shall" as being mandatory, while "may" is generally interpreted to describe permissive action on the part of a governmental entity. (Gov. Code, secs. 5 and 14; Fair v. Hernandez (1981) 116 Cal.App.3d 868, 878, hg. den.; Hogya v.

Superior Court, San Diego County (1977) 75 Cal.App.3d 122, 133, hg. den.; REA Enterprises v. California Coastal Zone Commission (1975) 52 Cal.App.3d 596, 606, hg. den.) Furthermore, even without the Government Code's prescriptions that "shall" is mandatory, "(t)he word 'shall' in ordinary usage means 'must' and is inconsistent with the concept of discretion." (People v. Municipal Court (1983) 149 Cal.App.3d 951, 954, hg. den.)

The word "shall" appearing in a statute has additionally been interpreted by courts as being "mandatory" in the sense that a governmental entity's failure to comply with a particular procedural step will have the effect of invalidating a governmental action to which the procedural requirement relates. In this instance, courts have held, the procedural requirement is considered jurisdictional. (Garcia v. County Board of Education (1981) 123 Cal.App.3d 807, 811-813; People v. McGee (1977) 19 Cal.3d 948, 959; Edwards v. Steele (1979) 25 Cal.3d 406, 410.) For example, in the case of Ursino v. Superior Court (1974) 39 Cal.App.3d 611, at issue was the application of a municipal ordinance providing that, "On the filing of any appeal, the Board [of Permit Appeals] . . . shall act thereon not later than forty (40) days after such filing . . . ." (P. 618.) In interpreting this ordinance, the court declared that "[t]he use of the word 'shall' in conjunction with the phrase 'not later than' is clearly

indicative of a mandatory intention." (P. 619.) The court went on to hold that any purported determination made by the Board of Permit Appeals after the 40-day period would be in excess of the Board's jurisdiction and void. (P. 619.)

By these authorities, it would be entirely anomalous to argue that, while "shall" is interpreted by the courts to impose an affirmative duty to act, the words, "shall not" may nonetheless be construed to confer discretion to act. The conclusion is unavoidable that the prohibitory language of EERA section 3541.5 is mandatory. Not only did the Legislature use the word "shall" to express its mandatory intent, it further proscribed certain conduct of the Board by the use of the negative, "not," thereby rendering the statute even more plainly mandatory. (Tarquin v. Commission on Professional Competence (1978) 84 Cal.App.3d 251, 257-258, hg. den.; McKee v. Commission on Professional Competence (1981) 114 Cal.App.3d 718, 721-722, hg. den.; Pollack v. Department of Motor Vehicles (1985) 38 Cal.3d 367, 377-378.)[9]

---

[9]Tarquin v. Commission on Professional Competence, McKee v. Commission on Professional Competence and Pollack v. Department of Motor Vehicles all present decisions in which the words "shall not," appearing in a statute, have been interpreted to operate as a jurisdictional limitation on the authority of the governing board to which such statutory language is directed. For example, in Tarquin, supra, at issue was the application of section 13407 of the Education Code which provides, in pertinent part:

> The governing board of any school district shall not act upon any charges

Furthermore, the second proviso of section 3541.5(a) is further evidence of the Legislature's intent to limit the Board's jurisdiction. It provides, in pertinent part:[10]

> The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge . . . . (Emphasis added.)

In reading section 3541.5 as a whole, while the first proviso is intended to operate as a jurisdictional limitation on the Board's authority to issue a complaint where the matter

---

> of unprofessional conduct or incompetency unless during the preceding term . . . prior to the date of filing the charge and at least 90 days prior to the date of the filing, the board . . . has given the employee . . . written notice of the unprofessional conduct or incompetency, specifying the nature thereof . . . with such particularity as to furnish the employee an opportunity to correct his faults . . . .

In Tarquin, a school district sought to discharge a teacher for incompetence. The district, accordingly, served upon the teacher a notice of unsatisfactory performance. The district also relieved the teacher of his classroom duties. The court found that the notice to the teacher did not comply with the statute inasmuch as it did not give him an adequate opportunity to correct shortcomings. Thus, significantly, the court held that the school district was without jurisdiction to proceed against the teacher on charges of incompetency. (Pp. 258-259.)

[10]EERA section 3541.5(a) is quoted at page 21.

is covered by the parties' grievance procedures and binding arbitration, the statute goes on to vest the Board with discretionary jurisdiction to (1) review such arbitration and settlement awards for repugnancy and (2), if the Board finds repugnancy, to issue a complaint. The Legislature clearly delineated the Board's discretionary jurisdiction to review for repugnancy.

In reaching this conclusion, this Board recognizes the strong policy in California in favor of arbitration and that provisions of EERA embody such a policy. EERA provides a procedure for a party to seek a court order compelling arbitration, and specifies that this action is to be brought under Code of Civil Procedure section 1280 et seq.[11] Language of those statutory provisions and cases decided thereunder contain forceful expressions of this state's legislative and public policies in favor of arbitration. More than one court has declared:

---

[11]Section 3548.7 states in pertinent part:

> Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefore in the agreement . . . , the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefore in such agreement . . . .

> General rules relative to arbitration and arbitration agreements and proceedings are provided in section 1280 et seq, Code of Civil Procedure. They reflect the strong legislative policy favoring arbitration . . . . (American Ins. Co. v. Gernand (1968) 262 Cal.App.2d 300, 304; Jordan v. Pacific Auto Ins. Co. (1965) 232 Cal.App.2d 127, 132; Morris v. Zuckerman (1967) 257 Cal.App.2d 91, 95, hg. den.)

In Delta Lines, Inc. v. International Brotherhood of Teamsters (1977) 66 Cal.App.3d 960, 965-966, the court stated:

> It has long been the policy of this state to recognize and give utmost effect to arbitration agreements. . . . "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. . . . 'Therefore every reasonable intendment will be indulged to give effect to such proceedings.'" (Utah Const. Co. v. Western Pac. Ry. Co. (1916) 174 Cal. 156.) "This policy is especially applicable to collective bargaining agreements since arbitration under such agreements has been a potent factor in establishing and maintaining peaceful relations between labor and industry." (Meyers v. Richfield Oil Corp. (1950) 98 Cal.App.2d 667, 671.)

For other decisions in which there have been strong enunciations by California courts of the public policy in favor of arbitration, see also Lehto v. Underground Constr. Co. (1977) 69 Cal.App.3d 933, 939, hg. den.; Vernon v. Drexel Burnham & Co. (1975) 52 Cal.App.3d 706, 715-716, hg. den.; Pacific Inv. Co. v. Townsend (1976) 58 Cal.App.3d 1, 9-10; Posner v. Grumwald-Marx (1961) 56 Cal.2d 169, 176.

Accordingly, EERA proscribes this Board's issuance of a complaint against conduct prohibited by the parties' agreement prior to the exhaustion of the contract's grievance-arbitration machinery. Hence, PERB was and is without jurisdiction to issue a complaint on this allegation.

Turning to our prior precedent, one finds that this Board has traditionally followed the private sector's discretionary deferral doctrine as was articulated by the National Labor Relations Board (NLRB) in the case of Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. The genesis of this Board's adherence to the prearbitration guidelines set forth in Collyer occurred in the decision of Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a. In Dry Creek the Board explained:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.

A comparison, however, of the statutory framework of the National Labor Relations Act (NLRA) with that of EERA reveals the fallacy in the Board's conclusion in Dry Creek that EERA "essentially codified" the NLRB prearbitral policy. In sharp contrast to EERA, there is no statutory proscription or

deferral provision under the NLRA. Indeed, unlike EERA, the NLRA explicitly provides that:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. (29 U.S.C. sec. 160(a), emphasis added.)

Thus, section 10(a) constitutes an expression of Congress' intention for the NLRB's jurisdiction to be paramount over any system which might be devised by the parties to settle their disputes, including binding arbitration pursuant to a provision under the collective bargaining agreement. (See Morris, The Developing Labor Law (2d ed. 1983) p. 918; Johannesen & Smith, Collyer, Open Sesame to Deferral (1972) 23 Lab. L.J. 723.) Therefore, quite unlike the jurisdiction of PERB, that of the NLRB is not displaced by the presence of an arbitration provision within the parties' agreement covering the matter at issue. On the contrary, even though a breach of contract remediable through arbitation occurs, the NLRB may still, if it so chooses, exercise its jurisdiction under the NLRA to prosecute conduct which also constitutes an unfair labor practice. (NLRB v. Strong Roofing and Insulating Co. (1969) 393 U.S. 357, 361 [70 LRRM 2100, 2101]; International Harvester Company (1962) 138 NLRB 923 [51 LRRM 1155]; C & C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 2065]; NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069].)

Although Congress has not statutorily limited the NLRB's jurisdiction to adjudicate unfair practices where the conduct at issue also constitutes a breach of contract cognizable under the parties' grievance machinery, Congress has nonetheless declared, at section 203(d) of the Labor Management Relations Act, that "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" should be the parties' agreed-upon method of dispute resolution. (29 U.S.C. sec. 173(d), emphasis added.) The NLRB has accordingly developed a comprehensive, if not always consistent,[12] doctrine of prearbitral deferral. (See Dubo Manufacturing Corporation (1963) 142 NLRB 431 [53 LRRM 1070]; Collyer Insulated Wire, supra, 192 NLRB 837.)

More specifically, in Collyer Insulated Wire the NLRB articulated standards under which deferral would be deemed appropriate. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to

---

[12]For example, the NLRB has reversed itself on the issue of the propriety of deferring to arbitration alleged discrimination violations. The current position of the NLRB is that such violations are properly deferrable. (See General American Transportation Corp. (1977) 228 NLRB 808 [94 LRRM 1483 overruled by NLRB in United Technologies Corp. (1984) 268 NLRB 557 [115 LRRM 1049], thereby returning to doctrine articulated in National Radio Co., Inc. (1972) 198 NLRB 527 [80 LRRM 1718].)

arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute. (Collyer Insulated Wire, supra, 192 NLRB 837, 842.)

While the NLRB standards set forth in Collyer Insulated Wire apply in the the private sector, such NLRB guidelines are not controlling nor even instructive in administering EERA. Unlike the NLRA, under EERA, where a contract provides for binding grievance arbitration, it is elevated to a basic, fundamental and required component of the collective bargaining process. Quite simply, the Legislature did not "essentially codify" the Collyer requirements. In fact, there is absent even the suggestion in the language of section 3541.5, any other provision in EERA, or in its legislative history of an intent of the Legislature to codify Collyer. On the contrary, by its choice of prohibitory language, the Legislature plainly expressed that the parties' contractual procedures for binding arbitration, if covering the matter at issue, precludes this Board's exercise of jurisdiction. Accordingly, we overrule Dry Creek and its progeny[13] to the extent that they would

---

[13]We also overrule the following PERB decisions to the extent that they rely on the Collyer standards for prearbitration deferral: Lancaster Elementary School District (1983) PERB Decision No. 358; Conejo Valley Unified School District (1984) PERB Decision No. 376; State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S; Los Angeles Unified School District (1986) PERB

condition the proscription of section 3541.5 on an application of the Collyer prearbitration deferral factors.

Finally, in finding today that section 3541.5(a) precludes this Board's exercise of jurisdiction where the disputed issue is covered by the parties' contractual grievance-arbitration procedures, we observe that our regulations are not to be interpreted or applied in such a manner so as to override this express jurisdictional barrier. In this regard, the Board's application of PERB Regulation 32646 is at issue. PERB Regulation 34246 provides, in pertinent part:

> If the respondent believes that issuance of the complaint is inappropriate . . . because the dispute is subject to final and binding arbitration . . . the respondent shall assert such a defense in its answer and shall move to dismiss the complaint, ...

In Charter Oak Unified School District (1982) PERB Order No. Ad-125, this Board held that the district's failure to demonstrate that the association's charge was cognizable under a contractual grievance machinery to which PERB must defer was sufficient grounds to affirm the hearing officer's decision to refuse to dismiss a complaint. While the Board in Charter Oak did not expressly hold that section 3541.5(a) should be considered an affirmative defense under EERA, subject to a party's "waiver," it did place upon the District, the defending

---

Decision No. 587; State of California (Department of Personnel Administration) (1986) PERB Decision No. 600-S; San Juan Unified School District (1982) PERB Decision No. 204.

party, the burden of showing that "deferral" was warranted and that a complaint, therefore, should not have been issued. While procedurally it is appropriate to have the respondent call to the Board's attention that the charge is properly deferrable, its failure to do so cannot be used as a basis for expanding this Board's jurisdiction. Accordingly, we disapprove of any implication in Charter Oak that prearbitration deferral is an affirmative defense under EERA subject to a party's waiver.

Conclusion

In summation, we affirm the ALJ's proposed decision to the extent that it was found that the District violated section 3543.5(c) of the EERA, and derivatively, section 3543.5(a) and (b) by unilaterally changing the method of compensating teachers for extra duties performed during the summer of 1983, by unilaterally implementing a proposed $1,500 stipend for teachers assigned to the learning specialist classification, and by bypassing the exclusive representative in the direct negotiation of a reduction in the work year of one unit member for the 1983-84 and 1984-85 school years. Accordingly, we adopt the ALJ's proposed decision and remedy pertaining to these charges. Furthermore, consistent with the discussion herein, we dismiss those charges alleging that the District violated EERA by failing to give EVEA notice and an opportunity to negotiate over the effects of its decision to reduce SIP

instructional aide time, and by unilaterally extending the workday of grades 4-6 teachers for four days during the 1983 fall conference week.

ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Lake Elsinore School District, its Board of Trustees, Superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning: (a) changes in the rate of pay to unit members for summer work performed; (b) implementation of the learning specialist program, including the amount of annual stipend paid; and (c) changes in the certificated work year and other terms and conditions of employment within the scope of representation.

2. Interfering with the right of the employees to be represented in their employment relations with the District by the employee organization of their choice.

3. Interfering with the right of the exclusive representative to represent members of the bargaining unit in their employment relations with their employer..

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

1. Restore the District's past practice of compensating bargaining unit members at hourly rates of pay for summer work and compensate any affected employees for monetary losses suffered as a result of the unilateral change in the summer of 1983. All payments shall include 10 percent per annum interest. Upon request, negotiate in good faith with the Association on the matter. However, the status quo ante shall not be restored if, subsequent to the District's actions the parties have, on their own, reached agreement or negotiated through completion of the impasse procedure concerning the rate of summer pay.

2. Upon request, meet and negotiate with the Association concerning the negotiable aspects of the learning specialists program, including the amount of annual stipend to be paid.

3. Upon request of the Association, reinstate the work year and other terms and conditions of employment of the bilingual facilitator to those of unit members at the time of unlawful changes in either 1983 or 1984; and negotiate in good faith with the Association before changing any aspect of the employee's work year or other terms and conditions of employment.

4. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

5. Provide written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

It is furthered ORDERED that all other portions of the unfair practice charge and complaint are DISMISSED.

Members Craib and Shank joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Cases Nos. LA-CE-1827 and LA-CE-2031, Elsinore Valley Education Association, CTA/NEA v. Lake Elsinore School District in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a), (b) and (c) by unilaterally making changes concerning matters within the scope of representation affecting certain unit members without first meeting and negotiating with the exclusive representative of such employees.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning: (a) changes in the rate of pay to unit members for summer work performed; (b) implementation of the learning specialist program, including the amount of annual stipend paid; and (c) changes in the certificated work year and other terms and conditions of employment within the scope of representation.

2. Interfering with the right of employees to be represented in their employment relations with the District by the employee organization of their choice.

3. Interfering with the right of the exclusive representative to represent the members of the bargaining unit in their employment relations with their employer.

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

1. Restore the District's past practice of compensating bargaining unit members at hourly rates of pay for summer work and compensate any affected employees for monetary losses suffered as a result of the unilateral change in the summer of 1983. All payments shall include 10 percent per annum interest. Upon request, negotiate in good faith with the Association on the matter. However, the status quo ante shall not be restored if, subsequent to the District's actions the parties have, on their own, reached agreement or negotiated through completion of the impasse procedure concerning the rate of summer pay.

2. Upon request, meet and negotiate with the Association concerning the negotiable aspects of the learning specialists program, including the amount of annual stipend to be paid.

3. Upon request of the Association, reinstate the work year and other terms and conditions of employment of the bilingual facilitator to those of unit members at the time of unlawful changes in either 1983 or 1984; and negotiate in good faith with the Association before changing any aspect of the employee's work year or other terms and conditions of employment.

DATED: _____ LAKE ELSINORE SCHOOL DISTRICT

By: _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, Charging Party, v. LAKE ELSINORE SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case Nos. LA-CE-1827 LA-CE-2031 PROPOSED DECISION (7/24/85)

Appearances: A. Eugene Huguenin, Jr. (California Teachers Association), Attorney for Elsinore Valley Education Association; James C. Whitlock (Parham & Associates, Inc.), for Lake Elsinore School District.

Before: W. Jean Thomas, Administrative Law Judge.

STATEMENT OF CASE

These two cases concern allegations of a series of unilateral changes by the Respondent District in wages, hours and other terms and conditions of employment of employees represented by the Charging Party, including bypass of the Association representative and direct negotiations with an individual bargaining unit employee.

PROCEDURAL HISTORY

Unfair practice case No. LA-CE-1827 was originally filed August 10, 1983, by James E. Caldwell, as an individual, against Elsinore Union School District alleging violations of Educational Employment Relations Act (hereafter EERA or Act)

sections 3543.5(a), (b) and (c).[1] A first amendment to the charge was filed October 25, 1983, by the Elsinore Valley Education Association, CTA/NEA (hereafter EVEA or Charging Party) which substituted itself in place of James Caldwell as the Charging Party. A second amendment to the charge, filed December 6, 1983, withdrew specific paragraphs of the first amendment and substituted Lake Elsinore School District as the Respondent (hereafter District or Respondent) in place of Elsinore Union School District. In order to clarify the issues being contested, on January 30, 1984, a second amended charge was filed which superseded all previous charges and amendments. In addition to the statutory violations cited above, this amendment additionally alleged a violation of

---

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All future references are to the Government Code unless otherwise noted.

Section 3543.5 states as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

section 3543.3 in that the District violated a settlement agreement entered into by the parties on April 15, 1983, as a result of a previous unfair practice charge filed by the EVEA.[2]

On June 15, 1984, the Office of the General Counsel of Public Employment Relations Board (hereafter PERB or Board) issued a partial dismissal and refusal to issue complaint regarding the allegations contained in paragraphs 1 and 3(d) of the second amended charge by dismissing and deferring those allegations to the parties' contractual arbitration procedure. The allegations in paragraph 3(a) and 3(g) were dismissed for failure to state a prima facie allegation of an unfair practice. A complaint issued on the same date regarding the factual allegations set forth in paragraphs 2, 3(b), 3(c), 3(e) and 3(f). The substance of these allegations are respectively: (2) unilateral reduction of instructional aide time allocated certain teachers at two school sites in the fall

---

[2]Section 3543.3 states as follows:

> A public school employer of such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

of 1983, thereby increasing the length of the teachers' workday beyond what it was during the preceding school year; (3b) unilateral implementation of a change in the method and amount of compensating teachers for extra duties performed during the summer of 1983 by paying certain teachers on a per diem basis rather than on an hourly basis which was the past practice for remunerations for such extra duty; (3c) during the summer and fall of 1983, while negotiations regarding the 1983-84 salary were ongoing, and prior to reaching agreement or impasse thereon, the District unilaterally implemented its proposed learning specialist program, including the payment of a $1500 annual stipend to employees assigned as learning specialists; (3e) unilateral extension of the working day for teachers in grades 4-6 on four days designated for parent conferencing in November 1983 by requiring the teachers to teach approximately 30 minutes longer than they had been required to teach during similar conference days in prior school years; and (3f) unilateral reduction of the work year of an employee represented by EVEA through an agreement negotiated individually with the employee, thereby bypassing EVEA as the exclusive representative.

The Respondent filed an answer July 6, 1984, admitting certain factual allegations, denying others and raising affirmative defenses. An informal settlement conference held August 15, 1984, did not resolve the dispute.

A consolidated second informal conference conducted October 17-18, 1984, was likewise unsuccessful.[3]

On August 10, 1984, James E. Caldwell filed unfair practice charge case number LA-CE-2031. This charge, which was amended August 28, 1984, alleged that the District violated section 3543.5(a), (b) and (c), by again, bypassing EVEA and negotiating directly with the same employee involved in paragraph 3(f) of case LA-CE-1827 to extend the employee's shortened work year for the 1984-85 school year. The complaint, issued by the PERB September 20, 1984, substituted EVEA as the Charging Party in place of Caldwell.

As noted above, this charge was included with the other outstanding cases for the consolidated informal conference on October 17-18, 1984. October 22, 1984, Respondent filed a motion to dismiss on the grounds that the subject employee requested and received a partial child-bearing leave which was consistent with the applicable terms of the collective bargaining agreement between the parties and that EVEA had received notice of this action. On October 31, 1984, EVEA filed an opposition to the motion. No ruling was made on the

---

[3]At the time of the informal conference there were nine active cases before PERB involving the Association and the District. The consolidated informal conference involved the following cases -- LA-CE-1827, CE-1964, CE-1968, CE-1976, CE-2028, CE-2030, CE-2031, CE-2059 and CE-2076 -- and was an attempt by PERB to effect a mediated resolution of all disputes between the parties.

motion prior to the hearing and the motion was taken under submission for ruling with this decision.

On October 30, 1984, a consolidated pre-hearing conference was conducted by the undersigned of all the charges referenced below to determine the order of presentation of the cases for formal hearing. At that conference, it was decided to consolidate the instant two charges for hearing and proposed decision.

Following a consolidated pre-hearing conference by the undersigned, involving all nine cases, these two cases were jointly heard on October 31, November 1 and November 28, 1984. At the conclusion of the hearing, EVEA moved to amend the pleadings in case number LA-CE-2031 to conform to evidence presented during the hearing. This motion was also taken under submission for a ruling with the proposed decision.

Post-hearing briefs were filed and the cases were submitted as of February 25, 1985.

FINDINGS OF FACT

A. Background

The Lake Elsinore School District is a public school employer within the meaning of section 3540.1(k). The EVEA is the exclusive representative, within the meaning of section 3540.1(e), of the certificated bargaining unit of District employees. Prior to July 1983 the District, which was known as Elsinore Union School District and the Elsinore Union High

School District, had a common administration. Both districts employed the same superintendent. Each district, however, had a separate board of trustees. In July 1983 separate superintendent positions and administrations were established. James Flora, who had been superintendent of both school districts since 1981, continued as superintendent of the Respondent District.

The District has an enrollment of 2600 pupils in grades K-6. There are approximately 100 employees in the certificated bargaining unit. The District has four school sites. A fifth site, Jean Hayman School, was scheduled to open in the very near future and, at the time of the hearing, was housed at one of the existing sites.

A collective bargaining agreement (hereafter CBA or agreement) between the parties expired in June 1982. Negotiations over a successor agreement continued until April 15, 1983, when a new CBA, retroactive to July 1, 1982, was signed. That agreement, which provided for reopener negotiations in 1983 and 1984, was in effect until June 30, 1985.

Because the alleged violations in Case Nos. LA-CE-1827 and LA-CE-2031 are specific and discrete, the findings of fact with respect to each specification will be done separately, rather than in one consolidated discussion of the facts.

B. Reduction in Hours of Instructional Aides

This issue is limited to the reduction of instructional aide time affecting the length of the teachers' workday in grades K-3 at two school sites -- Wildomar Elementary and Butterfield Elementary Schools. The specific aide time concerns that provided through the School Improvement Program (SIP), a state categorically-funded program. All four school sites have SIP programs operating on a three-year cycle which started with the 1982-83 school year. The SIP program is specially geared to assist students in grades K-3. The plans for the use of SIP funds were developed by each local school site council following general guidelines provided by the District board.

The instructional aides are utilized to provide educational assistance to the students in the subject areas of reading, mathematics and language arts. They work under the direction and supervision of the classroom teacher to whom the aide is assigned.

In 1982-83 the plan at Wildomar School included three hours of aide time for each class in grades K-3 for the three subjects. In the 1983-84 school year the Wildomar school site council, acting under the District board's general direction, decided to reduce the amount of aide time in the classrooms and add a library aide, an aide coordinator of volunteers, and a

computer laboratory aide. These were to be three-hour positions for all pupils in grades K-6. In the spring of 1983 the board had offered matching funds for the library and computer aide positions. However, this offer was later withdrawn because of the discovery in July 1983 of a $300,000 budget deficit. Thus, the funding for the three new positions came directly from the local site fund allocation for aide services. The creation of the three positions resulted in a reduction of the previous classroom aide time from three hours per day to two hours per day in the kindergarten classes and one and one-half hours per day for grade 2 classes.

Butterfield School was a new site started in the 1982-83 school year. The pupils and staff of Butterfield were housed at Elsinore Elementary School until October 1982. The 1982-83 plan for aide time was three hours per day for grades K-1, and one and one-half hours per day for grades 2-3.

When the SIP funds were reallocated for the 1983-84 school year to include a computer laboratory aide at Butterfield, the in-classroom aide time for grades K-1 remained at three hours per day. At the beginning of the fall 1983 semester, grades 2-3 had no aide time for the first few weeks of the semester until the teachers in the grades K-1 classes volunteered to share one hour of aide time per day with grades 2 and 3.

Starting the fall of 1983, one-half of every class in grades K-6 at both schools were taken in groups to the computer lab and the library for a one-half hour session each (a total of one hour per week) with the computer lab aide and the library aide. This arrangement reduced the class size for each teacher to one-half the number of pupils for reading and math instruction and one-half hour per week for each subject area.

The impact of the reduction in aide time on the affected teachers' workday varied depending on the grade level involved and the amount of aide time which was reduced. Some teachers had to modify their instructional strategy to accommodate the absence of a second adult to work with the student groupings into which the class is divided for instructional purposes. For example, some teachers reduced their groups from three to two during the time that no aide was available in order to deliver the teaching assignments. Other teachers had to increase the non-classroom preparation time to prepare additional "seat work" for their students who were not assisted by an aide while the teacher was instructing other segments of the class. Additionally, some teachers spent more non-classroom time correcting student written work than had previously been corrected by the instructional aide during the instructional time with the students. The evidence shows that for those teachers affected by the reduction in aide time, the average time spent in additional non-classroom preparation was two and one-half to three hours per week.

C. Rate of Compensation for Extra Duty/Summer Work

Article 7.0 of the 1982-85 CBA contains provisions covering the working hours and the work year of certificated bargaining unit members. Section 7.4 of that article specifically establishes the length of the work year. It states as follows:

> The length of the work year shall be 179 days for returning members and 180 days for members new to the District. The nurse's work year shall be 185 days. This means 175 days of student attendance, one day for parent conferences, three (3) preservice days, of which two (2) shall be at the building level. Members new to the Disstrict [sic] shall report one day earlier than returning members for District planned orientation purposes. Of the three (3) preservice days, the third day, and one-half of the second day, shall be meeting free and devoted to classroom preparation.

The salary schedule for unit members is contained in Article 22.0 of the agreement. There is no express language in Article 22.0, or any other provision of the CBA, which pertains to work performed beyond the regular work year, i.e., extra duty or summer work assignments.[4]

---

[4]Article 8.0 of the 1982-85 CBA pertains to non-teaching duties. Section 8.1 of that article specifies teacher duties beyond their regular working hours for which no additional compensation is to be paid. It states as follows:

> Teachers shall be responsible for the following duties beyond their regular working hours without additional compensation: participation in Back-to-School Night, participation in one Open House, and participation in three (3) parent/teacher activities of the bargaining unit member's choice.

The parties have had a number of CBA's from the period of 1976-1985. Previous agreements for the period from 1976-1981 contained salary schedule provisions pertaining to extra duty assignments. In the agreements for 1976-77, 1977-78 and 1978-79, summer school, home teaching and District projects were to be compensated at an hourly rate of pay. Summer school preparation was to be compensated at a per diem rate of pay. The 1979-80 and 1980-81 agreements did not contain salary provisions for summer school assignments. However, compensation for home teaching and District projects remained on an hourly basis.

The salary provisions in the 1977-78 and 1978-79 agreements included a formula for the computation of the hourly pay rate. No agreement since that for 1978-79 has contained a specific formula for calculating the hourly pay rate. Although there is no definitive evidence about the current basis for determining the hourly pay rate, it is undisputed that the hourly rate formula that the District apparently applies to the current certificated salary schedule is based on the formula which was contained in the 1977-78 and 1978-79 agreements.

Two District witnesses, Superintendent Flora and Nella Isaacs, director of educational services, testified that the District's determination of whether payment for extra duty assignments was on an hourly or per diem basis depended on the

type of assignment and the funding source. According to Isaacs' testimony, teachers who performed extra duty or summer assignments for categorically-funded projects were usually compensated on a per diem basis. She further testified that when she worked as a resource specialist for the District, she was compensated on a per diem basis for summer work performed. However, on cross-examination, Isaacs admitted that she has been a non-bargaining unit employee since the mid-1970's and that, at the time she was employed as a resource specialist, she is unsure about whether resource specialists were members of the certificated bargaining unit.

There does appear to be some inconsistency in the rate of of compensation paid to certain bargaining unit employees for work performed during the summer of 1982. Thomas Engelhardt is a Title I diagnostician working in a federally-funded project. Engelhardt has worked during the summers in the District projects office since the summer of 1982. Englehardt, who is a member of the certificated bargaining unit, was paid a per diem rate for 35 days of summer work performed in addition to the regular work year for the 1981-82 school year. Five other teachers who each worked five days in the summer of 1982 for the same projects office were paid the hourly rate of pay for a total of 35 hours per employee.

The preponderance of the evidence shows that for many years prior to the summer of 1983, the majority of bargaining unit

members who performed work during the summer were compensated on an hourly basis. For example, Wilma Durrett, learning specialist at Elsinore School, was paid on an hourly basis for coordinating a summer correspondence program and administering Santa Clara Testing to kindergarten students during the summers of 1982, 1983 and 1984. Patricia Rettinger, a kindergarten teacher with the District for 12 years, worked eight or nine summers in a row for the District, also administering the Santa Clara Testing of kindergarten students. Rettinger was paid on an hourly basis for worked performed during the summers of 1983 and 1984. She also was paid an hourly rate for developing a mathematics curriculum during the summer of 1983. Roger Pahl, a Chapter I teacher at Machado School, was paid on an hourly basis for summer work performed in developing instructional materials in mathematics and science during the summers of 1981 and 1982 and for setting up the Chapter I laboratories during the summers of 1983 and 1984. Jim Caldwell, a Chapter I teacher at Wildomar School, was paid on an hourly basis for summer work performed in connection with the Chapter I program in the summer of 1984. Halle Reising, who formerly taught grades 4-6 at Wildomar School, was paid an hourly rate for work performed in developing a spelling project during the summer of 1984.

It is undisputed that during the summer of 1983, with the exception of two classes of unit employees -- the

research-based instruction (RBI) coaches and learning specialists, all teachers were compensated at the hourly rate of pay for extra duty or summer work performed. There is a provision in the 1982-85 CBA that covers terms and conditions of employment for RBI coaches, who were formerly called "lead teachers."[5]

The learning specialist was a newly-created position in the District in the spring of 1983. The implementation of this program in the summer of 1983 is the subject of a separate allegation in paragraph 3(c) of this unfair practice charge and will be set forth more fully in the discussion of that specification.

Four learning specialists were hired by the District to provide services beginning the fall of 1983. The work that they performed on the days prior to the beginning of the fall semester was compensated on a per diem rate. Both Rettinger and Halle Reising worked as RBI coaches during the summer of 1983 and were compensated at the per diem rate for the services performed in that capacity.

Superintendent Flora testified that, in addition to the per diem rate of pay that was made to the RBI coaches and learning

---

[5]This provision is contained in Appendix 1 which pertains to the implementation of the Erlene Minton research-based instruction program. Among other things, it covers the work year for lead teachers/RBI coaches, but contains no express language on compensation rate for extra duty or summer work.

specialists in the summer of 1983, other classifications of unit employees who were paid the per diem rate for summer work were the speech therapists, the bilingual facilitator and the nurse. The length of the work year and the salary for the speech therapists is the subject of a separate unfair practice charge filed by EVEA (LA-CE-2059). A proposed decision by an administrative law judge was issued in that case on May 13, 1985. The EVEA challenge to the work year and the compensation of the bilingual facilitator, except for the per diem summer pay issue, is the subject of the specifications set forth in paragraph 3(f) of the instant charge and will be discussed in a separate finding of fact infra.[6]

Other than Rettinger and Reising, the record does not show the total number of RBI coaches who worked during the summer 1983. Additionally, the total number of extra days worked by each individual RBI coach is not known.

D. Learning Specialist Program

In the spring of 1982 the District considered the notion of developing a concept for "teacher coaching" that was based on

---

[6]Although Superintendent Flora testified that the nurse was paid the per diem rate for summer work performed, the work year specified in section 7.4 of Article 7 of the CBA is 185 days. There is no specific mention of a separate salary rate for the nurse in Article 22.0, which is the salary provision of the agreement. Since no issue has been raised by the Charging Party concerning the rate of compensation of the nurse, no findings regarding this testimony is made with respect to this classification of employee.

observations by various District administrators and teachers of this type of a program at two nearby school districts. Through discussions held during the 1982-83 school year by the District board itself and the staff, including the District instructional council, the concept gradually developed into what was called the learning specialist (LS) program. The primary function of the LS was to provide small group instruction to children with special needs and to assist teachers in developing programs in all areas of instruction. Superintendent Flora considered the LS program to be more advanced in its application than the RBI coaching/lead teacher program.

On April 26, 1983, the District board approved a job description and positions for the LS classification. Shortly thereafter, the District posted a vacancy notice, seeking applicants for the four positions to be filled. The notice stated that applicants were limited to teachers already on the staff. The deadline for filing applications was May 13, 1983. The notice included a rather detailed list of assigned responsibilities for the LS position and listed in the "minimum qualifications" section, among other things, that,

> . . . stipend, hours, and other terms and conditions of employment for this position will be subject to negotiations with the Exclusive Representative for the certificated bargaining unit.

Nine teachers applied for the positions, one of which was to be placed in each of the four school sites.

On May 20 and 23, 1983, the District conducted interviews of the applicants. Four individuals were ultimately selected and officially appointed by District board action on June 2, 1983, for service during the 1983-84 school year.

On May 13, 1983, Superintendent Flora met with Edna Wright, EVEA president, Ozzie Hairston, EVEA negotiating team spokesperson, and Jim Caldwell, EVEA grievance chairperson, regarding the LS program. The record fails to reveal the specifics of any discussion that took place except that the District made no specific proposal regarding the LS program at that meeting.

A subsequent meeting was scheduled between Flora and Hairston for June 1, 1983, but was cancelled because Hairston was ill.

On June 7, 1983, the parties held their first meeting regarding their 1983 contract reopener negotiations. The EVEA representatives present at this meeting were Sue Warwick, Judy Stewart-Monceaux, Ozzie Hairston, and Karen Bach. The District representatives were Superintendent Flora and Cliff Koch, assistant superintendent, business. The reopener clause of the CBA provided for salaries, fringe benefits, and three optional items apiece for each party. The District opted to include

hours, evaluations and transfers. EVEA added no optional items. Although the 1982-85 CBA included a provision covering implementation of the lead teacher program, there was no similar provision pertaining to the LS program and neither party made proposals about this subject. During this session, the parties reviewed their respective proposals and agreed to general procedural parameters for coming negotiations.

One subject of discussion during the June 7 meeting was the District administration's desire to stagger the arrival times of students at all four school sites, starting the 1983-84 school year. The administration was considering this change in order to accommodate a request by the new busing contractor. Discussion about the LS program was initiated when Flora proposed that the amount of the annual stipend for the LS's be set at $1500. EVEA felt that the proposed amount was too low.

Although Flora testified that all other matters concerning the LS program were orally agreed to by the parties except the stipend, the testimony of Stewart-Monceaux and Bach directly contradict that of Flora. Bach testified that no agreement was reached on any aspect of the LS issue on June 7. According to her testimony, Hairston agreed to take the District's stipend proposal to the EVEA membership for its consideration prior to making a counterproposal to the District. Based on the observation of the witnesses during their testimony and their

ability to recall the events of this meeting, the testimony of Stewart-Monceaux and Bach is credited on this matter. It is thus concluded that no agreement was reached on June 7 about any negotiable aspect of the LS program.

The next negotiating session was held August 12, 1983. At that meeting Tom Brown, a negotiating specialist for the California Teachers Association, was the EVEA chief spokesperson, and James Whitlock was the spokesperson for the District. The first part of the discussion centered on the District's representation that it was experiencing financial difficulties because a $300,000 budget deficit had been discovered in July 1983. Consequently, the District would have to make cutbacks in various areas in order to achieve a balanced budget.

Brown brought up the subject of the LS program and verbally requested bargaining if the District intended to implement the program during the 1983-84 school year. The District stated that because of the budget problem, the proposed LS program would be placed on hold. At the conclusion of the meeting, EVEA thought that the parties had an agreement or understanding that before the District moved forward to implement either the LS program or the Mentor Teacher program (which is a very similar type of program that was then under consideration), the parties would negotiate over the negotiable aspect of either program.

The next negotiating session was September 2, 1983, which was just after the beginning of the 1983-84 school year. By that time EVEA representatives were aware that the LS's were functioning at the school sites and receiving a $1500 annual stipend. When questioned by EVEA, Koch said that money had been allocated in the 1983-84 budget for the program to be implemented. Upon hearing this, Brown verbally demanded to bargain with the District over this matter. Whitlock promised to check with the superintendent, who was not present at that part of the meeting, about the budget and agreed to bargain with EVEA over the amount of the stipend.

Whitlock responded to Brown in a letter dated September 13, 1984, which set forth the details of the LS program. The letter stated as follows:

> I checked with the Superintendent in Elsinore Elementary for the details of the Learning Specialist. Here they are as I understand them:
>
> 1. There have been four Learning Specialists selected in the District, one at each school site.
>
> 2. For this workyear only, the Learning Specialists worked two days prior to the start of school. This was only for the start of this year and from now on Learning Specialists will have the same workyear as all other unit members.
>
> 3. Workhours for a Learning Specialist are the same as other regular unit members. 50% of the time Learning

Specialists are with students. The remaining 50% of their time, the Learning Specialist is released from their teaching duties to work with other teachers.

4. The District plans to pay these teachers a $1,500 stipend above their regular salary schedule placement.

To my knowledge, all other terms and conditions of employment will be the same for learning specialists as for other regular unit members.

Upon receiving this letter, Brown testified that EVEA felt that it had been "sandbagged" by the District in that EVEA representatives were told one thing at the bargaining table and then the District took action contrary to its position at the table. Following receipt of Whitlock's letter, Dee Thomas, the new EVEA president, sent a written demand to bargain over the LS program in a letter dated September 26, 1983.

The parties continued their negotiations over the reopener items by meeting October 26 and November 28, 1983. The LS issue was discussed at both sessions. At the October 26 meeting, EVEA demanded that the District return to the status quo and bargain over the amount of the stipend, the length of the work year, compensation for extra duty, and the amount of instructional time the LS would spend in the classroom.

At the time of their employment in the LS positions, the four selected teachers signed individual contracts of

employment which provided for a $1500 annual stipend to be paid in equal monthly installments.

At the time of the hearing, no agreement had been reached on any aspect of the learning specialists issue.

E. Teacher Instructional Time on Minimum Student Days During Parent Conferencing Week

Traditionally, the District has scheduled the fall parent conferences to take place at the end of the first quarter of the school year. Usually this is sometime in November. The week that parent conferences are scheduled, the students are on a minimum day schedule on Monday, Tuesday, Thursday and Friday. On Wednesday of that week, the students do not attend school. A minimum day of instruction is defined by California Education Code section 46113 as 230 minutes for grades 1-3 and 240 minutes for grades 4-6.

During parent conference week the teachers are expected to schedule 20 minute conferences, if possible, with the parents of all their students starting at the time of student dismissals through the end of their regular workday. Conferences are to be held all day long on Wednesdays during the teachers' regular seven and one-half hour workday. Those parents who cannot attend a conference at the school site can be conferenced by telephone. If necessary, conferences may be scheduled beyond the teachers' regular workday.

Prior to the conferences, the teachers must complete the grading period, including testing and the completion of student

report cards. Although parent conferences involve teachers in grades 1-6, the Charging Party stipulated that this issue concerns only the length of the instructional period during the minimum day schedule in the fall of 1983 for teachers in grades 4-6.

In the 1982-83 school year, the intermediate grades (4-6) at all four schools were on the same minimum school day during the fall parent conference week. The student instructional day was from 9:00 a.m. to 1:30 p.m., a period of four hours and 30 minutes. During the 1983-84 school year the schools were on a staggered schedule. The minimum day schedule during the fall parent conference week was: Butterfield and Machado - 9:00 a.m. to 2:15 p.m., and Wildomar and Elsinore - 8:00 a.m. to 1:15 p.m., for a total instructional time of five hours and 15 minutes. The change in the time from the 1982-83 school year constituted an increase of the minimum day of 45 minutes for grades 4-5 and 40 minutes for grade 6.

Article 7.0 of the 1982-85 CBA, section 7.7 refers to an increase in the length of the instructional day for the intermediate grades during the 1982-83 school year. It reads as follows:

> The instructional minutes for the intermediate grades may be increased by the District not more than fifteen (15) minutes during the 1982-83 school year.

Although the 15-minute increase in instructional minutes was to be implemented during the 1982-83 school year, the agreement

providing for the increase was not ratified until April 15, 1983. The parties, therefore, agreed that the District could implement section 7.7 during the 1983-84 school year, beginning the fall 1983. As agreed, section 7.7 was implemented at the beginning of the 1983-84 school year. Consequently, the actual amount of time at issue here is a 30-minute increase in the length of the four student minimum days during parent conference week in mid-November 1983.

Judy Stewart-Monceaux testified that when section 7.7 was negotiated, the parties had the regular instructional day in mind, and that there was no discussion about the minimum day schedule, or how the minimum day schedule would be affected by the increase in the length of the regular instructional day. It is noted that there is no express contract provision covering either the minimum day or parent conferences for the 1983-84 school year.[7]

---

[7]Appendix 2 of the 1982-85 CBA outlined the tentative school calendar for 1982-83 school year and included express language regarding parent conferences. This language stated as follows:

> Parent Conferences:
>
> The District shall establish one (1) full day of parent conferences and up to four (4) student minimum days for partial day conferencing. Staff shall be notified in advance of the specific days established for parent conferences.

Appendix 3, which lists the tentative school calendar for 1983-84, contains no such language.

It is undisputed that the 30-minute increase in instructional minutes required the affected teachers to do additional classroom preparation for the increased instructional time. This preparation time was aside from the preparation time that was required to prepare for parent conferences.

The preparation for parent conferences involves substantial record-keeping prior to, and during, the actual conferences themselves. The preparation required of teachers just prior to parent conference week was described by John (Jay) Finnell, a fifth grade teacher at Butterfield School, as "stressful." The teachers must meet to coordinate the scheduling of conferences for parents having more than one child in a given school or grade level. Additionally, if parents fail to attend a scheduled conference, the teachers are responsible for doing any follow-up necessary to make contact with parents.

Finnell testified that, in the past, approximately 30 percent of the parents have failed to attend a scheduled conference and require follow-up. This often includes either rescheduling the conference or conducting it by telephone which is sometimes in the evening after the teachers' regular workday. In 1982 Finnell completed approximately 20 conferences. In the fall of 1983 he completed all of his scheduled conferences by conducting some of them by telephone.

Finnell estimated that the increase in the length of the minimum day in 1983 caused him to have to spend approximately one additional hour per day in outside preparation during the four days of minimum day scheduling. Other teacher witnesses testified that the outside preparation time during parent conference week increased approximately 35 - 40 minutes a day for a total of 2 to 2-1/2 hours for the week.

There is no specific District policy nor provision in the CBA addressing preparation time. District witness, Walter (Keith) McCarthy, acknowledged that one of the factors which affects the amount of preparation time required of teachers is preparation for parent conferences. McCarthy also acknowledged that the quality of the teacher's classroom instruction during the week of minimum days, when teachers are engaged in parent conferencing, is expected to be the same as that offered during any other time of the school year. The only adjustment is in the quantity of instruction because of the shortened instructional day.

F. Reduction in the Work Year of the Bilingual Facilitator

In the summer of 1982 the District hired certificated employee Judith Reising to perform services as the coordinator of bilingual education. This position is known as the bilingual facilitator. The bilingual education program is a state-funded compensatory education program. The bilingual facilitator was hired because the District administration

wanted to improve the District's overall bilingual education program. Previously all Spanish-speaking children were assigned to one school site. In order to allow her start-up time in her new capacity, the District set Reising's work year for the 1982-83 school year as 186 days.

Sometime in the summer of 1983, Reising approached Superintendent Flora about reducing her work year for school year 1983-84. Reising felt that the savings generated from the reduction in her salary could be used to augment the proposed bilingual program budget for the 1983-84 school year.

At a special meeting of the District board on August 26, 1983, the board approved Reising's request to reduce her work year as bilingual facilitator from 186 days to 166 days.

Just prior to the board's taking action on this item, Denise (Dee) Thomas, EVEA president, addressed the board by inquiring about the negotiability of Reising's work year. She was told that it was not negotiable and that the board was acting in compliance with its leave policy for unit members. Thomas then requested a copy of said policy which was promised, but never received.

On or about August 29 or 30, 1983, Thomas spoke with Reising about the board's action on August 26. At the time of their meeting, Reising was preparing a memo to the board

requesting a reduction in her work year. Thomas requested a copy of Reising's memo, along with a copy of a memo from Superintendent Flora to Reising that she saw attached to Reising's draft of her memo. Reising promised to give Thomas a copy of her final memo, but refused to give her a copy of Flora's memo.

EVEA subsequently obtained a copy of Flora's memo, dated August 29, 1983, and entitled "Reduction/Work Year." It stated as follows:

> Your contract will be changed to reflect the reduction in workdays from 185 to 165 days. However, for our protection (yours and the District's) submit your request in writing, back dated prior to Friday's special board meeting (August 26). Enclosed is a copy of Board Policy #4418ES for your information.[8]

---

[8]Board Policy #4418ES was adopted by the District on May 2, 1977. That policy states as follows:

> Limited leave for business or personal reasons, not provided under Personal Necessity Policy in Policy 4402, may be granted without compensation, increment, seniority or tenure credit by the Board of Trustees for a maximum of one year.
>
> The applications for and granting of such leaves of absence shall be in writing. In addition, a unit member on such leave shall notify the District Personnel Office by March 30 of the school year as to an intent to return to employment in the District. Failure to so notify will be considered as an abandonment of position.

This is the policy which Thomas requested on August 26, but never received.

Reising's memo, a copy of which was sent to Thomas was dated August 25, 1983, and was entitled "Request for Limited Leave." It stated as follows:

> Because of my commitment to Bilingual Education and my belief that funds must be available to make this a successful school year, I hereby request a 20 day reduction of my 186 day work year for the school year 1983-84, thereby making a total of 166 workdays. I understand that I will be allowed to select the dates for the 20 days during the year as my work load and assigned duties permit.
>
> My official beginning date will be Tuesday, September 6, 1983 and ending date will be June 22, 1984.
>
> I also understand that my increment, fringe benefits, and seniority credit will not be affected by this 20 day work year reduction.
>
> Finally, I understand that the total amount of my salary reduction will be placed in the Bilingual Program as per the attached proposed schedule.

No negotiations nor discussions ever transpired between EVEA and the District over the subject of Reising's work year either before, or subsequent to, the board's action on August 26, 1983. EVEA never agreed to a change in Reising's work year. Subsequent to the August 26 action, Caldwell filed the instant unfair practice charge as part of an amendment to the original charge.

In his testimony, Flora acknowledged that the board did not have a written request from Reising at the time that it

approved the request on August 26. The board acted upon the request pursuant to an oral presentation by Flora. He further testified that he recommended that Reising submit her request in writing and backdate it in order to establish a proper "paper trail" for personnel action. This practice, according to Flora, was not unusual in the District.

The position of the bilingual facilitator is included in the bargaining unit represented by EVEA. The work year of employees represented by EVEA is established in section 7.4 of the CBA (see p. 10, supra). Article 13.0 of the CBA covers the various types of leaves granted to unit members. However, it does not contain a provision for a reduced work year.

G. Reduced Work Year of Bilingual Facilitator During 1984-85 School Year

Sometime in the late spring of 1984, it was rumored that Judith Reising was contemplating a request for a change in the length of her work year for the 1984-85 school year. In response to this information, Caldwell, on behalf of EVEA, contacted Reising by letter, In the letter, dated May 29, 1984, Caldwell requested that Reising make known to EVEA any contract request concerning her work year that she might have in order for EVEA to determine a way to negotiate terms equitable to Reising and other members of the bargaining unit. Caldwell further stated:

> . . . either a change in the work year length or the unpaid leave policy should be

> able to accommodate your personal - business needs. . . . please let me know soon as we will be putting an initial proposal together, with the first meeting to be held this Friday, June 1.

Caldwell sent a copy of this letter to Flora and Whitlock. No response was received from Reising or either of the District's representatives.

On June 13, 1984, the EVEA grievance committee met with Flora to discuss pending grievance matters. At that meeting, EVEA raised the subject of Reising's anticipated request for change in her 1984-85 work year. Flora was informed that EVEA had asked Reising to inform EVEA about her request for 1984-85, and that it would attempt to seek resolution for her through the negotiation process. It was further indicated that EVEA felt that the 1982-85 CBA leave provision did not cover the kind of leave being considered by Reising. However, the request could possibly be settled by a leave policy change or by a shortened work year. Flora's response to EVEA's stated position is unknown. Following the June 13 meeting, no oral or written communication was received from either Reising or Flora.

After not hearing from Reising, on or about June 25, 1984, Caldwell went to her office to attempt to speak with her concerning this matter, but Reising was not available. Caldwell thereafter left a note for Reising on a copy of the June 13 minutes of the grievance committee meeting, reminding

her that EVEA had not heard from her regarding her request for a reduced work year.

On July 3, 1984, Caldwell spoke with Reising in her office, asking that she make any requests for contract changes through EVEA. Reising informed Caldwell that she was undecided about whether to pursue the matter through EVEA or through the superintendent.

On or about the same day, Reising submitted a written leave request, dated July 3, 1984, for the 1984-85 school year. Her memo addressed to Flora stated, in part, as follows:

> I hereby, request a reduction of my work year in order to have more child-rearing time with my daughter as well as to enable the Bilingual budget to remain within the budget restraints of the EIA-LEP allocation. I would like to work six tenths (6/10) of the regular 179 day work year. That would give a total of 107.4 work days. I understand that I will be allowed to allocate those days according to the demands of my job and my family's needs.
>
> I request this leave pending the approval of the following stipulations:

The six items set forth as "stipulations" covered the amount of stipend, and other terms and conditions of employment. A copy of the memo was sent to Caldwell as the EVEA representative.

On July 5, 1984, the District board acted to approve Reising's leave request. The board approved,

> . . . unpaid child-rearing leave, .4 of 1984-85 school year with all terms and conditions being consistent with Education Code, District policy and EVEA/LESD contract.

Subsequently, Flora sent a letter, dated July 16, 1984, to Reising which stated that the board had approved a 40 percent leave for the 1984-85 school year. He further stated that,

> . . . all terms and conditions of said leave must be consistent with district policy, education code and the EVEA/LESD agreement.

The letter then listed in detail the terms and conditions of the leave approved on July 5. The last paragraph contained the following statements:

> The Board has granted this partial leave based upon your request and not due to budget considerations. Due to the relatively rare frequency of such leave, some details of the terms and conditions of your leave may be subject to review by EVEA. Therefore, a copy of your initial request and this reply are being forwarded to the Association. If modifications to the conditions of your leave are necessary, you will be notified.

Reising testified that upon her return from vacation at the end of July 1984, she received Flora's July 16 letter. She did not accept the terms and conditions applied to the leave approval. Shortly thereafter she spoke to Flora about the status of her request, and was told that the matter was being held in negotiations, pending the outcome of the earlier unfair practice charge filed by EVEA (LA-CE-1827, paragraph 3(f)). The instant unfair practice charge was filed August 10, 1984.

Sometime in late August 1984, Reising spoke with Pat Perkins, the new EVEA president, and Caldwell regarding the issue and was told that the matter was "on hold."

In late September, Reising spoke again with Flora, seeking clarification about her work year. He told her to work the exact same number of days for 1984-85 school year that she worked during the 1983-84 school year, i.e., a 166-day work year, until the matter was resolved in negotiations. Although Reising signed a standard contract of employment with the District on June 15, 1984, there has been no written revision of this agreement to reflect a change in the number of workdays for 1984-85.

Flora testified that he had no personal objection to granting Reising's leave request for the 1984-85 school year, but that he was only authorized to recommend her request to the board which he did. At the time that he received her written request, Flora admitted that he gave no thought to advising EVEA of the matter before acting to recommend the request to the District board.

When cross-examined about his reference to the EVEA/LESD contract in the July 16 memo, Flora responded that he was referring to section 13.8, part (b)(1) of the CBA. This provision states as follows:

> b. An unpaid leave shall include but not be limited to:
>
> 1. Child-Rearing Leave - Upon request, the Board may provide a unit member, who is a natural or adopting parent, an unpaid leave of absence for the purpose of rearing his or her infant. Such leave

> shall remain in effect at least until the end of the semester following the birth or adoption of the child.

Flora admitted that usually child-rearing leave is granted to an employee immediately after the birth of a child. The evidence does not show the exact age of Reising's daughter referenced in her July 3 leave request; however, there is no indication that the child was an infant.

At the time of the hearing, at least three certificated unit employees were on child-rearing leave pursuant to the subject leave provision.

There was no evidence that EVEA and the District engaged in any negotiations over this matter, either before the board's July 5 action approving the leave or since that time.

ISSUES

1. Whether the District violated section 3543.5(c) by implementing a decision to reduce the amount of instructional aide time assigned to certain classroom teachers without first meeting and negotiating with EVEA about the negotiable aspects of such decision?

2. Whether the District altered an established summer pay policy in violation of the section 3543.5(c) -- duty to bargain in good faith?

3. Whether the District violated section 3543.5(c) by its implementation of the learning specialist program?

4. Whether the District violated section 3543.5(c) by increasing the instructional minutes during the minimum days' schedule of the fall 1983 parent conferencing week?

5. Whether the District engaged in direct dealing with a certificated unit employee over various terms and conditions of employment during the 1983-84 and 1984-85 school years, thereby bypassing the exclusive representative EVEA in violation of its duty to bargain in good faith?

6. Whether any or all of the above-described conduct also concurrently violated sections 3543.5(a) and (b)?

CONCLUSIONS OF LAW

It is unlawful for a public school employer to "refuse or fail to meet and negotiate in good faith with an exclusive representative" about a matter within the scope of representation.[9] Moreover, a unilateral change in terms and

---

[9]Section 3543.2 provides in pertinent part as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits . . . , leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . , procedures for processing grievances . . . , and the layoff of probationary certificated school district employees . . . .

In addition, a subject will be found to be negotiable even though not specifically enumerated in section 3543.2 if (1) it

conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

An unlawful unilateral change will be found where the Charging Party proves, by a preponderance of the evidence, that an employer unilaterally altered an established policy. Grant Joint Union High School District (1982) PERB Decision No. 196. The nature of existing policy is a question of fact to be determined from an examination of the record as a whole. It may be embodied in the terms of a collective agreement (Grant, supra) or, where a contract is silent or amibiguous as to a policy, it may be ascertained by examining past practice or bargaining history. Marysville Joint Unified School District (1983) PERB Decision No. 314; Rio Hondo Community College District (1982) PERB Decision No. 279.

---

is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. Anaheim Union High School District (1981) PERB Decision No. 177, affirmed San Mateo City School District v. PERB (1983) 33 Cal.3d 850.

An employer's unlawful failure and refusal to negotiate concurrently violates an exclusive representative's right to represent unit members in their employment relations (section 3543.5(b)) and interferes with employees because of their exercise of representational rights (section 3543.5(c)). San Francisco Community College District (1979) PERB Decision No.105.

These general and well-established principles concerning unlawful unilateral changes will be applied to the District's conduct as alleged by the Association in the six issues raised by the two instant charges.

A. Impact of Reduction in Aide Time

In its original charge, the Charging Party challenged the District's right to unilaterally reduce the SIP aide classroom time in the 1983-84 school year. In its post-hearing brief, the Charging Party clarified its position by stating that it did not challenge the negotiability of the decision to reduce aide time, however, it asserts that the employer could have, and should have, given EVEA notice and an opportunity to negotiate over the negotiable effects of this decision.

Respondent defends its action by arguing that it had no duty to negotiate at the time that the reduction in hours occurred. It contends that EVEA had notice of a contemplated

employer action, which in this instance was accomplished through the teachers' participation on the school site councils that made the initial decision regarding the changes in aide hours, yet failed to demand bargaining over the effects of such decision. Since EVEA had notice of the employer's action and never submitted a demand to bargain or a proposal concerning the same, no negotiating duty ever arose and thus, there could be no failure to perform the duty. Additionally, Respondent contends that since the District did not anticipate any adverse impact on certificated employees as a result of the decision, it had no need to seek negotiations with EVEA over this subject. Neither arguments are meritorious on this point.

The duty to meet and negotiate arises under section 3543.3.[10] PERB has held that the obligation of an employer to give notice and an opportunity to bargain regarding the negotiable effects of a non-negotiable decision arises when the employer reaches a firm decision. Newark Unified School

---

[10]Section 3543.3 states in pertinent part as follows:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

District (1982) PERB Decision No. 225; Kern Community College District (1983) PERB Decision No. 337 and Mt. Diablo Unified School District (1983) PERB Decision No. 373.

There is no question here that the District board reached a firm decision to reduce classroom aide time prior to the time that the revised plan was implemented. The decision was made in the spring of 1983, prior to the end of the 1982-83 school year. During the interim period before the plan was implemented in the fall 1983, the District had ample time to notify EVEA of the decision and provide an opportunity for negotiations of the effects on matters within the scope of representation.

It is undisputed in this case that the employer did not notify EVEA nor offer EVEA an opportunity to negotiate any negotiable effects of the plan to reduce classroom aide time for grades 2 and 3 at Wildomar School and grades K-3 at Butterfield School starting the fall of 1983. Although the District argues that EVEA had notice of its contemplated action, there is no persuasive evidence which supports a conclusion that the individual teacher's participation on a school site council could be viewed as a substitute for actual notice to EVEA, or further, that such teacher participation in any way satisfied the District's duty to meet and negotiate with EVEA. Kern Community College District, supra.

The evidence supports a conclusion that the effects of the District's decision to reduce the amount of classroom aide time from its previous level, clearly had "a reasonably foreseeable adverse impact on the affected teachers' working conditions" and thus was negotiable. Mt. Diablo, supra. The reduction in instructional aide assigned classroon time anywhere from one to two and one-half hours per day in some classrooms without any concomitant changes in other aspects of the teachers' overall instructional responsibilities would conceivably affect the amount of a teacher's time that was required to prepare for and perform such duties. Since each teacher had discretion about the use of their assigned aide time, some teachers used the aides to correct written class work and perform certain record-keeping tasks during the students' instructional time. In those situations where aide time was completely eliminated or substantially reduced, the affected teachers still had to perform the tasks formerly assigned to the aides, even if the time required to do these tasks was beyond the regular seven and one-half hour workday. Additionally, the change required some teachers to prepare additional "seat work" to accommodate the absence of an aide in the classroom to work directly with a group of students while the teacher was instructing another group. The extra "seat work" required additional non-classroom preparation time for some teachers until the aide time was restored or reallocated.

Even if the District doubted that there would be adverse effects on the teachers' working conditions as a result of its decision, it was not possible for the EVEA to make a demand to negotiate and explore anticipated effects prior to implementation of the revised aid plan, where notice and an opportunity to request meeting and negotiating were not provided. The burden of providing notice and an opportunity to negotiate belongs on the employer who, in this instance, had full knowledge of the changes and the anticipated implementation date. Where an employer guesses wrong, i.e., fails to reasonably foresee the impact of a decision (such as a reduction in aide time) on the hours of employment or working conditions of classroom teachers, it is fair to allocate the burden of this error in judgment to the employer. Mount Diablo Unified School District, supra at p. 51.

In this instance, the employer failed to provide prompt notice and an opportunity to EVEA to negotiate over the negotiable effects on teachers of a firm decision to reduce and, or modify, classified services. It has been found here that the implementation of the decision had adverse effects on matters within the scope of representation of the affected teachers. It is therefore, concluded that the District's conduct in this regard amounted to a violation of section 3543.5(c). planned change in policy with arguably negotiable effects. It has further failed to establish a valid defense or

excuse for its failure to set in this regard. Consequently, its conduct is found to have violated the duty to bargain in good faith as required by section 3543.5(c).

B. Rate of Compensation for Work Performed the Summer of 1983

The Charging Party asserts that when the District paid certain teachers represented by EVEA a per diem rate for work performed during the summer of 1983, it unilaterally changed the established practice that summer work performed by unit members was to be paid on an hourly basis. EVEA further alleges that such exceptions to this practice as they have become aware of them are the subject of unfair practice charges.

Respondent maintains that the determination of the payment rate, whether hourly or per diem, has been based on the type of assignment and the funding source, and historically has been established without bargaining with EVEA. It further asserts that there has been no established consistent past practice for compensation of teachers for summer work. Hence, since there has been no change in practice, no duty to bargain ever arose with respect to the issue raised in this specification.

PERB has held that an employer may not unilaterally alter the method of computing pay for summer school instruction. Rio Hondo Community College District, supra. Although the issue here concerns the pay rate for summer work, as contrasted with method of payment for summer school instruction, the rule

prohibiting unilateral modification of payment of wages, an enumerated subject of bargaining, applies to this case.

In Grant Joint Union High School District, supra, the Board held that for a Charging Party to state a prima facie violation of section 3543.5(c) when a unilateral change is charged, it must allege facts sufficient to show: (1) that the District breached or otherwise altered the parties' written agreement or its own established past practice; (2) that the breach or alteration amounted to a change of policy (i.e., that it had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); (3) that the change of policy concerned matters within the scope of representation. This issue is thus considered in light of the principles enunciated in both Rio Hondo and Grant.

The parties have stipulated that the 1982-85 CBA does not contain a provision relating to additional compensation for responsibilities beyond regular assignments. However, in the CBA's between EVEA and the District for the period from 1976-80, there was an express provision covering additional compensation which specified an hourly pay rate for additional responsibilities (including District projects and summer school), with the exception of summer school preparation. The latter was compensated on a per diem basis.

The preponderance of the evidence presented here shows that the practice of compensating unit members on an hourly basis

for various types of extra duty or summer assignments has continued for several years with few exceptions. One fairly recent exception involving a bargaining unit member was the rate of compensation for work performed by Thomas Engelhardt during the summer of 1982. Engelhardt was compensated on a per diem basis. However, this fact was unknown to Engelhardt or to the EVEA until it was revealed during the hearing. Other than this case, no evidence was presented of bargaining unit members being compensated for extra duty or summer assignments on a per diem basis prior to the instances that gave rise to this charge. Additionally, the formula which the District has used for calculating the hourly rate apparently has continued to be that which was set forth in the CBA's for the periods 1977-78 and 1978-79.

It is undisputed that with the exception of the bargaining unit positions enumerated below, all unit members who performed work during the summer of 1983 were compensated on an hourly basis. However, in the summer of 1983 the District did alter the method of compensation for summer work performed by the RBI coaches, learning specialists, bilingual facilitator, and speech therapists. The challenge to this modification of pay practice as it applied to the speech therapists is addressed in unfair practice charge LA-CE-2059. The change in practice with respect to the other employees does not represent a breach or alteration of any written agreement, nor does it modify a

stated District policy. However, it is a change of the District's established practice of many years for summer work compensation of bargaining unit members, and amounts to a unilaterial change of policy affecting an important and continuing term of employment -- salaries.

Since the District argues that there has been no change of a past practice, it has raised no justification or excuse in defense of its unilateral action. Even if the individual employees involved in this action agreed to the change in the basis for payment of their summer work, it does not rebut a finding of unlawful unilateral change, absent a showing that the District first fulfilled its bargaining obligation with EVEA. There has been no such showing in this case.

For the reasons stated, it is therefore concluded that the District's unilateral modification of the method of compensation for summer work performed by bargaining unit members was in violation of section 3543.5(c).

C. Learning Specialist Program

EVEA concedes that the District had no obligation to negotiate over the decision to establish the learning specialist positions. This management prerogative was established by the Board in Alum Rock Union Elementary School District, (1983) PERB Decision No. 322, where the Board, applying the test for negotiability set forth in Anaheim Union High School District, supra, found that "where management seeks

to create a new classification to perform a function not previously performed . . . by employees . . . it need not negotiate its decision." See also Mt. San Antonio Community College District (1983) PERB Decision No. 334.

At issue, however, is the District's fulfillment of its obligation to meet and negotiate with EVEA regarding the negotiable aspects of the learning specialist program prior to the implementation of the same. The District acknowledged that it had an obligation to negotiate with EVEA when it advertised during the spring of 1983 for applicants for the new positions. A reference on the vacancy notice stated that hours, wages, including stipend and other terms and conditions of employment were "subject to negotiations with the exclusive representative EVEA." However, the District contends that, in this particular instance, EVEA was provided adequate notice and a reasonable opportunity to negotiate, but failed to exercise the right to bargain over this matter by failing to formally demand bargaining until September 26, 1983, some three and one-half to four months after the matter was first explored by the parties. This delay, it is argued, amounts to a waiver by inaction of the right to bargain. A review of the bargaining history over this issue simply does not support Respondent's argument.

The parties first discussed the LS program in May 1983. Even if this meeting arguably was not a formal negotiating

session, the matter was raised and again discussed at the initial contract reopener negotiating session June 7, 1983. Neither party submitted a written proposal concerning the subject. However, the District did orally propose a $1500 annual stipend which EVEA rejected. EVEA took the position that it had to consult with its membership before making a counterproposal.

Despite the discussions between the parties on this subject in May, June, August and September 1983, the District contends that the Charging Party failed to formally demand to bargain over the issue until September 26, 1983, which was just after the beginning of school when the LS's were in place and working. This delay, it is argued, amounts to a waiver of the right to bargain. This argument lacks factual support and is therefore rejected.

There is no evidence that at any time during the summer 1983 that EVEA indicated it was waiving the right to negotiate over the amount of the stipend or other terms and conditions of employment of learning specialists. On the contrary, EVEA reasonably relied upon Respondent's statements in bargaining meetings in August and early September 1983, when it made inquiries about the status of the LS program, to the effect that the LS program would not be implemented beginning the fall of 1983. Acting upon these representations, EVEA made conditional oral demands to bargain prior to any implementation

of the program. Charging Party contends that Respondent is estopped from characterizing EVEA's failure to insist upon negotiations, in reliance upon material misrepresentations by the Respondent, as a waiver of its rights. Charging Party further asserts that Respondent's conduct in this regard presents a classic case of estoppel in that Respondent, with actual or virtual knowledge of the facts, misrepresented or concealed material facts from the Charging Party, who was actually ignorant of the truth and was induced to rely upon the representations of the Respondent, to its detriment. 7 Witkin, Summary of California Law (8th Ed.) Equity, Section 133, at pp. 5351-5352, is cited for this proposition.

In Newman-Crows Landing Unified School District (1982) PERB Decision No. 223, the Board held that no duty to bargain arose where, after receiving notice of the employer's intention to lay off, the exclusive representative expressed only a desire to negotiate the employer's decision, rather than the effects of the planned layoff "concededly a matter within the scope of representation" as opposed to the nonnegotiable managerial decision to lay off. The Board cautioned, however, that its decision should not be read to impose any strict rule of form as to a request to negotiate.

> [A] valid request would be found, regardless of its form for the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining. (Newman-Crows Landing Unified School District, supra at p. 8.)

Thus, the determination as to whether there has been a valid request to negotiate is a question of fact to be resolved on a case-by-case basis. Delano Joint Union High School District (1983) PERB Decision No. 307, at p. 7, citing Newman-Crows Landing Unified School District, supra.

Here, the District had notice as early as May 1983 that the Association had concerns about the implementation of the LS program. In August and September 1983, the Association specifically indicated its desire to negotiate. Although no written request nor specific proposal was ever submitted by EVEA during these meetings, EVEA representatives made it known to the District on both occasions (August and September) that, if it were intending to implement the LS program, EVEA definitely wanted to negotiate over the negotiable aspects of that program prior to any implementation. It was after EVEA received written confirmation from Whitlock in mid-September 1983 that the program in fact had been implemented at the beginning of the school year, that a written demand to bargain was sent to Superintendent Flora on September 26, 1983. The September 26 written demand was almost an act of futility by EVEA since the implementation of the program was apparently a fait accompli. It certainly was not the first knowledge that the District had of EVEA's interest in this subject. EVEA's conduct prior to September 26 cannot be ignored.

Applying the reasoning set forth in Newman-Crows Landing to the facts of this case, it is determined that the course of communications between the parties was a sufficiently valid request by EVEA to put the District on notice that EVEA desired to hold negotiations on the negotiable effects of the decision to implement the learning specialist program. Consistent with the Board's discussion in Newman-Crows Landing, supra, the Respondent's notion that a request for negotiations must meet a strict standard as to form or language is rejected.

Absent clear and unequivocal language or conduct to the contrary, PERB will not readily infer that party has waived its statutory right to bargain over a decision not already firmly made by the employer. Amador Valley Joint Union High School District (1978) PERB Decision No. 74. and Sutter Union High School District (1981) PERB Decision No. 175.

There has been no such showing in this case. Although the parties had further negotiations in October and November 1983, the District has not pointed to any "clear and unmistakable" language or other conduct by EVEA which points to a waiver of the right to negotiate over this matter. Additionally, Respondent is estopped from asserting a waiver by conduct or inaction where the Charging Party's forborne insistence upon negotiations in reliance upon material misrepresentations by Respondent at the negotiating table.

Far from explicitly relinquishing or implicitly abandoning its request to negotiate, upon learning the true circumstances of this case, EVEA actively pursued its rights through these unfair practice proceedings.

Having determined that the District failed to establish a valid waiver defense, it is concluded that the unilateral implementation of the learning specialist program in the fall 1983 contravened the fundamental purpose of the Act by violating the section 3543.5(c) duty to bargain in good faith.

D. Change in Length of Instructional Day

In this specification the Charging Party alleges that the District unilaterally increased the length of the instructional day for teachers of grades 4-6 on four parent conference days when students were supposed to be on a minimum day schedule. It is further asserted that this increase of student contact time on days which were set aside for parent conferencing had the impact of increasing the length of the workday for the teachers by decreasing the amount of on-site time during the workday that was to be set aside for parent conferencing. It also added planning and preparation time necessary to teach the additional instructional minutes.

Basically, the issue here is an increase of 30 minutes of student contact time on four days the week of November 14, 1983. Because the increase allegedly was

implemented without notice to the EVEA, nor an opportunity to meet and negotiate over the matter, it violated the District's statutory obligation to meet and negotiate in good faith with EVEA.

The Respondent counters with several arguments. The first is that when the parties negotiated an increase of 15 minutes in the instructional day to begin during the 1983-84 school year, there were no negotiations regarding the specific definition of a "student minimum day" during the parent conference days, nor how the 15 minute increase in contact time for the intermediate grades would be implemented during the student minimum day schedule. It is also contended that the change in the length of the instructional day had no impact on the workday of the affected teachers. Additionally, the District asserts that since the CBA is silent on the question of preparation time, there is no issue with respect to any change in preparation time. Finally, it is argued that the 1983-84 student minimum day schedule during the four parent conference days in question represents a reasonable application of section 7.7 of the CBA which provided for the additional instructional time; and said contract provision constitutes a waiver by contract of any right by EVEA to renegotiate this provision even though there was a subsequent change in circumstances, i.e., a new bus schedule, not contemplated by the parties during their initial negotiations over this

subject. The District cites Mt. Diablo Unified School District, supra, as support for the latter argument.

It is a well-established PERB precedent that the length of the instructional day is a matter within the scope of representation. See San Mateo City School District, supra; Healdsburg Union High School District (1980) PERB Decision No. 132, and Sutter Union High School District (1981) PERB Decision No. 175. That principle is not contested in this case. What is disputed is whether the negotiations and subsequent agreement concerning an increase in the length of the instructional day constituted a waiver by EVEA barring further negotiations on this issue as it relates to the student minimum days.

There is no dispute about the negotiated increase of instructional time for the intermediate grades (4-6) and the implementation of such increase. Beginning in fall 1983, the District increased the instructional time for grades 4 and 5 by 15 minutes and added 10 minutes for grade 6 instructional day that was in effect for the 1982-83 school year.

Although the CBA made a specific reference to "student minimum day," neither the agreement nor any District policy specifically defines the term. It is established that in the past the District has followed the state-established standard of 240 minutes in determining the minimum instructional day for grades 4-6.

By including the increased minutes permitted by section 7.7, as noted above, to the 240 minute minimum day previously followed, the District increased the minimum day schedule for 1983-84 to 250 minutes, which was 10 minutes beyond the state minimum. However, that 10 minutes is not, and cannot be disputed by EVEA because the parties did not expressly exclude the application of section 7.7 to the minimum day schedule during the fall 1983 parent conference week. It is therefore found that, even if EVEA were disputing this time, section 7.7 constitutes an express waiver on that point.

However, the additional 30 minutes at issue here, was time added to the minimum student day beyond the 250 minutes discussed above, to accommodate the needs of the school's new bus contractor.

The student contact time was 5-1/4 hours which represented an increase of 45 minutes for grades 4 and 5, and 40 minutes for grade 6. This time was added without: (1) notice to EVEA; (2) an opportunity for EVEA to negotiate or (3) any actual implied waiver or consent by EVEA. The language of section 7.7 is plain and unambiguous. It cannot be read as being inclusive of this latter increase. The District's argument that the additional 30 minutes was a "reasonable application" of this contract provision must be rejected.

The District's defense of "no impact" is now considered. Basically, it is further argued that the increased student

contact time had no impact on the length of the teachers' instructional day and that, even if it did, the preparation time attendant to this additional instructional time is an extension of the teachers' basic working day. In San Mateo City School District, supra, the Board addressed the question of preparation time as it relates to the hours of employment. In discussing instructional day and preparation time, the Board stated:

> [T]he instructional day includes two distinguishable elements: the amount of time students are required to be in school for instruction and the amount of time teachers are required to spend during the working day instructing students. Although the two may coincide, they're not necessarily identical. Nor, is the teachers' instructional day synonymous with their working day. . . . Some portion of the workday has been utilized for instructional preparation and it is undisputed that the District requires and the job mandates that teachers spend some time in that activity.[11]

Although the CBA in this case is silent as to defining or recognizing preparation as a component of the teachers' employment obligation, there is sufficient evidence to demonstrate that an increase in the students' instructional day

---

[11]The Board noted that while the definition of preparation time was not clearly demonstrated in the record before it, it apparently included planning for and preparation of the subject matter to be covered in class, arranging for the availability and distribution of teaching aids and materials, and review of student records; in brief, a combination of professional and administerial activities designed to expedite the presentation of educational subject matter.

foreseeably resulted in having an effect on the teachers' instructional day and preparation time. San Mateo, supra.

Here, the length of the teachers' instructional day was unilaterally altered by the District beyond the time that was bilaterally negotiated with the exclusive representative. The effect of the increase of 30 minutes per day on the students' minimum day schedule was to reduce the amount of time available for required preparation and parent conferencing. District witness, Keith McCarthy, acknowledged that the District expected teachers to maintain the same quality of instruction on the minimum day schedule as required on a regular instructional day. Consequently, the affected teachers were expected to do necessary preparation and planning for the additional 30 minutes of instructional time.

Several teacher witnesses testified about the effect of the increased instructional time on the amount of time that they

---

As a requirement of teaching, "job" preparation time is a component of the teachers' employment obligation in the same sense as classroom instruction and other mandated duties such as parent-teacher conferences, giving examinations, or grading students.

The Board went on to say that while it may be conceded for purposes of the case, the matter not being an issue, that the District's requirement that teachers "prepare" for instruction is a matter of managerial prerogative not subject to negotiations, to the extent that requirement relates to the teachers' hours of employment, the matter is subject to bilateral determination. San Mateo City School District, supra at pp. 15-17.

were required to spend outside their regular seven and one-half hour workday to complete preparation for their regular classroom instruction, in addition to preparation and for the parent conferencing sessions. This time varied from 25-45 minutes per day per teacher beyond the regular 7-1/2 hour workday. To the extent that the preparation time is a condition of employment which relates to hours of employment, as in this case, it is properly a subject of negotiations and may not be unilaterally increased. San Mateo, supra at p. 17.

There is nothing in the language, of section 7.7 from which it can be reasonably inferred that EVEA waived its statutory right to further negotiations over this subject. Thus, the District's final proffered excuse of "changed circumstances" does not rise to the level of business nor operational necessity which would justify its unilateral actions in this regard.

For all the foregoing reasons, it is found that the District violated section 3543.5(c) of the EERA by refusing and failing to meet and negotiate in good faith with EVEA over the decision to increase the teachers' instructional day and preparation time in the fall of 1983.

E. Reduction in Work Year of Bilingual Facilitator

The issues raised by LA-CE-1827, paragraph 3(f) and LA-CE-2031 are the same, except that they involve two different

school years. For this reason they will be discussed here concurrently.

In both charges, EVEA contends that when the District agreed to a reduced work year for Judith Reising, a member of the certificated bargaining unit employed as the District bilingual facilitator, the Respondent engaged in direct dealing or negotiations with a unit member in derogation of the statutory rights to representation granted to EVEA as the exclusive representative.

In charge LA-CE-1827, the Respondent admits taking action to reduce the work year of Judith Reising for the 1983-84 school year, but denies that its conduct, in this regard, amounted to direct dealing or bypass of EVEA. In charge LA-CE-2031, the Respondent denies reducing Reising's work year for the 1984-85 school year. Instead, it asserts that it granted a limited childbearing leave as provided for by a provision of the CBA.

Section 3543.5 provides that it is unlawful for a public school employer to deny to employee organizations rights guaranteed to them by the EERA, or to refuse or fail to meet and negotiate in good faith with an exclusive representative.

Section 3543.1(a)[12] gives the exclusive representative

---

[12]Section 3543.1(a) reads:

> Employee organizations shall have the right to represent their members in their

the right to represent its bargaining unit members in their employment relations with the employer. Likewise, section 3543.3[13] obligates the employer to meet and negotiate only with the exclusive representative of a group of given employees, upon request, with regard to matters within the scope of representation.

In Walnut Valley Unified School District (1981) PERB Decision No. 160, the Board addressed a charge of bypassing the exclusive representative where the employer extended overtime opportunities to four members of the bargaining unit. The Board said:

> The law regarding employers negotiating directly with their employees and bypassing the designated bargaining representative is clear. Section 3543.3 of the EERA, requires the employer to negotiate and bargain in good faith once an employee organization has been duly designated as the exclusive representative for a given group of

---

> employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

[13]See fn. 2, supra.

> employees[3] This obligation imposes on the employer the requirement that it provide the exclusive representative with notice and the opportunity to negotiate on proposed changes of matters within the scope of representation. Unilateral action taken without fulfilling this obligation constitutes a refusal to negotiate in good faith. San Mateo County CCD PERB Decision No. 94 (6/8/79). An employer may not, in the presence of an exclusive representative, unilaterally establish or modify existing policies covering, for example, overtime pay rates, the selection of employees to work overtime, or the definition of overtime hours. (Underlining in original. Footnote as per original, omitted.)

In Walnut Valley, PERB held that in order to prove that the employer has unlawfully bypassed the exclusive representative by "negotiating" directly with unit employees, it must be demonstrated that the District sought either to create a new policy of general application or to obtain a waiver or modification of existing policy applicable to such employees.

This case does not address overtime policy, but rather the work year of a unit employee, a matter similarly within the scope of representation. Sometime during the summer of 1983, while the District and EVEA were commencing contract reopener negotiations, Reising approached Superintendent Flora with her request to reduce her work year for the 1983-84 school year from the 186 days she had worked during the 1982-83 school year to 166 days. The District board acted to approve Reising's request, a reduction of her work year on August 26, 1983. The

subsequent exchange of memoranda between Reising and Flora, concerning this action, indicates an attempt by Reising to negotiate with Flora concerning various terms and conditions of her employment in connection with the reduction in the number of days that she wanted to work during the ensuing school year.

Flora's memo to Reising dated August 29, 1983, stated that "your contract" will be changed to reflect the reduction in workdays. Although the District denies it, its conduct, in this regard, amounted to direct dealing with Reising. There is no evidence that any attempt was made to involve EVEA, in any way, in the process that led to the approval of the reduced work year.

The CBA, which had been ratified by the parties on April 1983, provided for a work year for returning unit members of 179 days. Additionally, other terms and conditions of employment, such as seniority credit, salary increments, were covered by the same agreement. Although Reising's memo of August 25, 1983, to Flora showed that a carbon copy was sent to Dee Thomas, president of EVEA, there was no subsequent reference mentioned in Reising's memo to Flora that Thomas on behalf of EVEA, had questioned the propriety of the action in question and expressed EVEA's interest in being involved in this process. Likewise, Flora's memo to Reising did not make any reference to the CBA or EVEA's need to be involved or informed about this action.

Again in the summer of 1984, upon hearing a rumor that Reising was going to request another reduction in her work year, Caldwell, on behalf of EVEA, approached Reising in anticipation of this action and requested that she pursue it through the exclusive representative.

Instead of involving EVEA or allowing the organization to proceed on her behalf, Reising herself again requested a reduction of her 1984-85 work year to have child-rearing time with her daughter. This time her request included a list of six "stipulations" covering various terms and conditions of employment which Reising sought as a condition for the leave being approved. Though this memo showed that a copy was sent to the EVEA, there was a statement in the memo to indicate that the request was being sought through EVEA as the exclusive representative acting on Reising's behalf. Although Reising again obtained the District board's approval of her request for a 40 percent leave, i.e., reduction of the work year, she was not able to obtain the additional terms sought as part of the negotiated package.

After Reising rejected the terms and conditions which were applicable to her leave, she sought the assistance of EVEA and the District in resolving the work year problem during their negotiations of items subject to the contract reopener provision.

Failing to obtain a satisfactory resolution of her problem, Reising then approached Flora who unilaterally advised her to

work the same reduced work year during the 1984-85 school year that the District had approved for the 1983-84 school year. Again, there is no evidence that prior to making this decision, Flora provided EVEA with notice or an opportunity to meet and negotiate over this decision.

The District has offered no defense of its actions with respect to the reduction of Reising's 1983-84 school year, except to deny bypass of EVEA. Its characterization of the change in the work year for the 1984-85 school year as child-rearing leave is not convincing.

The work year of employees represented by EVEA is specifically defined in Article 7.0 of the CBA. The only exceptions are expressly set forth in the language itself. (See p. 10, supra.) The stated exceptions do not refer to the bilingual facilitator position. Nor does the language provide for a "reduced work year" for any unit member.

The District's limited leave policy that was referred to when Reising's 1983-84 work year reduction was approved, does not expressly provide for a reduced work year. Thus, the District's action on August 26, 1983, approving such change, must be viewed as a unilateral change of policy of general application with respect to existing District policy and the CBA. Additionally, such action was the result of direct dealing between an individual bargaining unit employee and

District administrative personnel. This action, as well as the District board's subsequent approval, all occurred without notice to EVEA nor an opportunity for EVEA to represent the employee involved or the interest of the entire bargaining unit. This action constitutes bypass of EVEA as the exclusive representative and is a violation of the duty to meet and negotiate with the exclusive representative as required by sections 3543.3 and 3543.5(c).

The following year when the District board took action on July 5, 1984, to grant Reising an "unpaid child-rearing leave, .4 of 1984-85 school year," this action was taken prior to any formal notification by the District to EVEA that such action was being contemplated. Additionally, it occurred despite efforts by EVEA in June and early July 1984, with both Reising and Flora, to be included in working out a resolution for Reising that would also protect the integrity of the collective bargaining process.

Flora's subsequent directive to Reising in September 1984 about working a reduced year for the 1984-85 school year was not made known to EVEA until it was revealed during the unfair practice hearing in this case. Flora admitted that this decision was never reduced to writing, nor otherwise made official by him because the matter remained on hold pending the outcome of these proceedings. All these actions clearly

fall within the ambit of the standard of proof established in Walnut Valley Unified School District, supra. In his July 17, 1984, memo to Reising, Flora acknowledged that Reising's leave request was "relatively rare" and "may be . . . subject to review by EVEA." However, these statements were all subsequent to formal action by the District board. Flora's statement that the type of leave granted to Reising was "relatively rare" is viewed as evidence that the District's application of the child-rearing leave provision to Reising's case was not encompassed by section 13.8 of the CBA.

Contrary to the District's contentions about its 1984 action, it is clear that the exchange of memoranda between Reising and Flora in 1984 and their subsequent discussions concerning changes in her work year were a form of negotiations over matters within the scope of representation. As an outcome of this process, the District's board unilaterally altered the application of a leave provision of the CBA and reduced an individual employee's work year from that established by an express term of the collective agreement between the District and EVEA. The District also proposed modifying other terms and conditions of Reising's employment for the 1984-85 school year. Reising's later rejection of the terms of employment approved by the District with her leave/reduced work year request does not moot the effect of the unlawful action.

In J. I. Case Co. v. NLRB (1944) 321 U.S. 332, [88 L. Ed. 762] cited by PERB in San Francisco Community College District (1979) PERB Decision No. 105, the United States Supreme Court said:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

In the Modesto City Schools (1983) PERB Decision No. 291, the PERB found a direct offer to employees, without such offer first being communicated to the exclusive representative, to be a violation of the employer's obligation to bargain only with the exclusive representative. Here, not only did the District agree to terms of employment which were at variance with those provided for in the collective agreement, it did so without first providing the exclusive representative with an opportunity to negotiate the matter. By such actions in both 1983 and 1984, it is concluded that the District violated its duty to bargain in good faith by bypassing the exclusive representative and securing employment contracts with an individual member of the bargaining unit with terms different than those provided for by the collective bargaining agreement. This conduct is a derogation of the duty imposed by section 3543.3 and, thereby, violates section 3543.5(c).

CONCLUSION

It is concluded that with respect to the allegations contained in case numbers LA-CE-1827, paragraphs 2, 3(b), 3(c), 3(e), and 3(f), and LA-CE-2031, charging the District with unlawful unilateral actions because of a failure to meet and negotiate with EVEA in good faith prior to such actions, where violations of section 3543.5(c) were found, this conduct concurrently violated section 3543.5(a) and (b) of the Act. San Francisco Community College District, supra.

With regard to case number LA-CE-2031, the Respondent's motion to dismiss is denied. Charging Party's motion to amend the pleadings to conform to evidence presented during the hearing is granted.

REMEDY

Section 3541.5(c) authorizes the PERB 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 a unilateral change case, it has been the practice of PERB to order the employer to cease and desist from its unlawful action, to restore the status quo ante, and to require the employer to make affected employees whole for monetary losses incurred as a result of the employer's unlawful conduct. Rio Hondo Community College District (1983) PERB

Decision No. 292. It is appropriate, therefore, to order the District to cease and desist from such unlawful conduct as has been found above.

The EVEA seeks an order restoring the status quo of benefits improperly enhanced or reduced by the District, and to pay to employees represented by EVEA who were obliged, as a result of the District's unlawful actions, to work either additional time beyond their regular workdays or increased student instructional time, appropriate compensation for the increased time. In Corning Union High School District (1984) PERB Decision No. 399, a case in which PERB found that a school district had unlawfully eliminated certain teachers' preparation periods, PERB issued a remedial order which had two alternative methods of compensating those employees who were required to work longer hours than had been agreed to. The Board ordered the District to compensate the affected employees by giving them paid time off work "which comports with the number of extra hours each employee actually worked." In the alternative, the Board ordered that if the district and the employee organization were unable to agree on the manner in which the time off would be granted, "the employees concerning whom there is no agreement shall receive monetary compensation commensurate with the extra hours worked."

That precedent will be followed here with respect to the District's unilateral actions in the fall of 1983 which

resulted in increasing the amount of non-classroom preparation required of teachers affected by (1) the reduction in instructional aide time beyond what it was during the preceding school year or (2) an increase in student instructional time on student minimum days in mid-November 1983 beyond the increase negotiated with the exclusive representative.

It is recognized that for this part of the order, the evidence is incomplete about the actual amount of preparation time worked by each affected teacher after both unilateral changes. Only teachers who reduced their preparation effort could have avoided lengthening their workday. There is no credible evidence that any teacher chose this path.

Despite this lack of concrete proof, the make-whole remedy is appropriate.

It is possible that specific teachers might have reduced their preparation time during the fall 1983 time when their assigned aide time was either reduced or eliminated completely and again during the week of November 14, 1983, on the four minimum days in question; and as a result, did not have a longer working day or week. If the parties cannot, by their own efforts, agree on amounts of money or compensatory time due, the question of each teacher's entitlement is left to a compliance proceeding. The order, therefore, establishes that teachers who did work longer days as a result of the subject

unilateral changes are entitled to additional compensation or paid time off.[14]

It is also appropriate to order the District to rescind the practice that modified the compensation of certain bargaining unit members from an hourly rate to a per diem rate for work performed during the summer of 1983; and to compensate any affected employees for monetary losses suffered as a result of this unilateral change. All payments shall include 10 percent per annum interest.

A more difficult problem concerns the fashioning of a remedy regarding the learning specialist program. It is recognized that the individuals employed in these positions during the 1983-84 and 1984-85 school year may have already received the annual $1500 stipend for both school years in question. To order a complete restoration of the status quo ante as to compensation already received could impose a severe hardship on the affected employees by requiring that any stipends received be repaid to the District.

In recognition of this circumstance, it is therefore appropriate to order the District to cease and desist from

---

[14]PERB has issued similar orders in other unilateral change cases, in which the entitlement of various individuals to monetary compensation was uncertain. Oakland Unified School District (1980) PERB Decision No. 126, aff'd, Oakland Unified School District v. PERB, 120 Cal.App.3d 1007 (1981) and Lincoln Unified School District (1984), PERB Decision No. 465.

further implementation of this program, including further payment of a stipend to any incumbents in learning specialists positions; and upon request from the EVEA, meet and negotiate in good faith over the negotiable aspects of the learning specialist program until agreement is reached or the statutory impasse procedure is exhausted before reinstituting this program. An agreement, if reached, can address the issue of stipends paid for the 1983-84 and 1984-85 school years.

Additionally, it is appropriate to order the District, upon the request of EVEA, to restore the work year of the bilingual facilitator to that prevailing for unit members at the time of unlawful changes in the 1983-84 or 1984-85 school years.

Finally, it is appropriate that the District should be required to post a notice incorporating the terms of this order attached as an appendix hereto. The notice should be subscribed by an authorized agent of the Lake Elsinore School District, indicating that the District will comply with the terms of this order. The notice shall not be reduced in size. Posting of such notice will provide employees with an additional statement that the District has acted in an unlawful manner, and is being required to cease and desist from such activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy.

See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and purusant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Lake Elsinore School District, its Board of Trustees, Superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association concerning: (1) the length of the teachers' instructional day and workday and the effects of any increase in the same on non-class preparation time; (2) changes in the rate of pay to unit members for summer work performed; (3) implementation of the learning specialist program, including the amount of annual stipend paid; and (4) changes in the certificated work year and other terms and conditions of employment within the scope of representation.

2. Denying to the Elsinore Valley Education Association, CTA/NEA, rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

1. Upon request, meet with and negotiate with the exclusive representative regarding changing the length of the unit members' instructional day and the effects, if any, of such change on non-class preparation time.

2. Restore the District's past practice of compensating bargaining unit members at hourly rates of pay for summer work and compensate any affected employees for monetary losses suffered as a result of the unilateral change in the summer of 1983. All payments shall include 10 percent per annum interest. Upon request, negotiate in good faith with the Association on the matter. However, the status quo ante shall not be restored if, subsequent to the District's actions the parties have, on their own, reached agreement or negotiated through completion of the impasse procedure concerning the rate of summer pay.

3. Upon request, meet and negotiate with the Association concerning the negotiable aspects of the learning specialists program, including the amount of annual stipend to be paid.

4. Upon request of the Association, reinstate the work year of the bilingual facilitator and other terms and conditions of employment to that of unit members at the time of unlawful changes in either 1983 or 1984; and negotiate in good faith with the Association before changing any aspect of the employee's work year or other terms and conditions of employment.

5. Grant to each teacher who worked extra time as a result of the reduction in classroom instructional aide time during the fall 1983 or the unilateral increase in the length of the instructional day in November 1983, the amount of time off which corresponds to the number of extra hours worked as a result of the changes described above. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked. However, if subsequent to the District's unlawful actions, the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning the length of the instructional day, the workday and the effects of changes in either on non-class preparation time, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

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

7. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 13, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.)

on August 13, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: July 24, 1985

W. JEAN THOMAS
Administrative Law Judge