

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



PALOS VERDES FACULTY ASSOCIATION, )

Charging Party, )

v. )

Case No. LA-CE-122

PALOS VERDES PENINSULA UNIFIED  
SCHOOL DISTRICT, )

Respondent  
APPELLANT. )

PERB Decision No. 96

July 16, 1979

PLEASANT VALLEY SCHOOL DISTRICT  
EDUCATION ASSOCIATION, )

Charging Party, )

v. )

Case No. LA-CE-160

PLEASANT VALLEY SCHOOL DISTRICT, )

Respondent  
APPELLANT. )

Appearances: Charles R. Gustafson, Attorney for Palos Verdes Faculty Association and Pleasant Valley School District Association; J. Michael Taggart, Attorney (Paterson & Taggart) for Palos Verdes Peninsula Unified School District; John Liebert, Attorney (Paterson & Taggart) for Pleasant Valley School District.

Before Gluck, Chairperson and Gonzales, Member.\*

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\*Board Member Moore did not participate in this decision.

## PROCEDURAL HISTORY

The above-captioned cases are before the Public Employment Relations Board (hereafter PERB or Board)<sup>1</sup> on exceptions by the Palos Verdes Peninsula Unified School District (hereafter Palos Verdes District or District) and the Pleasant Valley School District (hereafter Pleasant Valley District or District) to hearing officers' proposed decisions. They have been consolidated on appeal because they present related issues of whether certain elements of a school calendar are within the mandatory "scope of representation" as set forth in Government Code section 3543.2.<sup>2</sup>

The exceptions filed by the Palos Verdes District center on the conclusions of the hearing officer that the distribution of workdays in the year (beginning and ending dates of school year for teachers and the dates of their vacations and holidays), the distribution of hours in a teacher's workday (beginning and ending times of a teacher's workday),<sup>3</sup> and extra hour assignments (Back-to-School Night and Open House) are matters

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<sup>1</sup>Prior to January 1, 1978, the PERB was named the Educational Employment Relations Board.

<sup>2</sup>Quoted in full, infra at fn. 12.

<sup>3</sup>Government Code section 3541.3(b) grants PERB the power to determine, in disputed cases, whether or not certain matters fall within the scope of negotiations. While the distribution of hours in a workday, including the starting and ending times, is raised on appeal as a result of the hearing officer's finding that such an item is within scope, its negotiability will not be passed upon since neither the calendar nor the stipulation of issues between PVFA and the Palos Verdes District mention this item. Accordingly, I neither approve nor disapprove the hearing officer's disquisition on this point nor his ultimate findings.

within the scope of representation.<sup>4</sup> The hearing officer reasoned that these matters were "closely" related to "hours of employment" and, therefore, mandatory subjects of negotiation under the Educational Employment Relations Act (hereafter EERA or Act).<sup>5</sup> The District urges on appeal that these matters so directly relate to the education of students and involve responsibility to parents and community at large that they should be determined by the governing board of the District alone.

The exceptions filed by the Pleasant Valley School District focus solely on the hearing officer's conclusion that the beginning and ending dates of the teaching year are within the scope of representation.<sup>6</sup> The hearing officer found that the "distribution of workdays" is a matter "relating to . . . hours of employment" and therefore a mandatory subject of negotiation, and that since the beginning and ending dates of the school year are encompassed by distribution of workdays, they, too, are negotiable items. The District urges that the

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<sup>4</sup>In addition to these findings, the hearing officer concluded that the particular duties that a teacher is assigned on a weekday are not within the scope of representation. These conclusions are not appealed by any party. Accordingly, they are not considered here.

<sup>5</sup>Government Code section 3540 et seq. Unless otherwise stated, all references are to the Government Code.

<sup>6</sup>In addition to this finding, the hearing officer also concluded that teacher preparation days, parent-teacher conferences, pupil minimum days and scheduling of a teacher's workday/visitation day are not within the scope of representation. These conclusions were not appealed by any party. Accordingly, they are not considered here.

starting and ending dates of teacher service most directly and primarily relate to the manner of delivering the educational services to the community, and are not within the scope of representation.

### FACTS

#### Palos Verdes District

The basic facts in this case relate to the chronology of discussions, negotiations, and other actions regarding the Palos Verdes District's school calendar for 1977-78. In summary, as detailed below, after PVFA was elected exclusive representative, it submitted a negotiating proposal to the District concerning various aspects of the school calendar. The Palos Verdes District offered a counterproposal. After a period of negotiations without agreement on a contract, the District unilaterally adopted a school calendar for 1977-78 in May 1977 and again, qualified by possibility of subsequent modification, in August 1977. The PVFA filed unfair practice charges based on a refusal to negotiate in good faith. The District answered that most of the elements of the school calendar are not within scope or representation, and it therefore had no obligation to negotiate concerning them. The District further answered that in any event, because its action was necessary and qualified, it committed no unfair practice.

#### a. Pre-EERA History

In January 1976, following a meeting at which various components of a school calendar were discussed, the school board issued a document entitled "Calendar Guidelines" listing

various school calendar items. They included the following: scheduling the opening and closing of school; coordinating graduation and vacations with the Los Angeles Unified School District system; permitting school to open on an isolated day in the first week of school; not commencing the school term on major Jewish holy days; scheduling eighth grade graduation to precede twelfth grade graduation; maintaining conference days; and including a contingency day. The same document also indicates that it was the school board's practice to adopt the calendar for the upcoming school year and tentatively approve the calendar for the following school year at approximately the same time. On June 7, 1976, the school board tentatively approved a 1977-78 school year calendar following the January 1976 guidelines.

b. Post-EERA Events

On July 1, 1976, less than a month after the June 7 action noted above, EERA became effective. In November 1976, PVFA was elected the exclusive representative of certificated employees in the Palos Verdes District. On February 23, 1977, PVFA presented an initial proposal regarding the school calendar for 1977-78. It provided for a total of 179 days for teacher service, distributed as follows: grades kindergarten through five teachers were to have 175 teaching, 3 conference, and 1 pupil-free workday; grades six through eight teachers were to have 175 teaching, 2 conference, and 2 pupil-free workdays; and grades nine through twelve teachers were to have 176 teaching and 3 pupil-free workdays. There is no mention of preschool

service days in PVFA's proposal. However, PVFA's proposed calendar sets out the specific dates on which the following occur: first and last day of instruction, conference days, summer session, graduation, vacation recess periods, holidays, final exams and pupil-free workdays.

The District presented its initial proposal on March 7, 1977. This offer proposed 182 days per year, and 8 hours per day for teachers. It also states:

In addition to the above minimum time and required workdays, unit members are responsible for adjunct duties, beyond their instructional duties, which include but are not limited to, program development, professional growth activities, parent conferences, committee assignments, faculty and district meetings, special help to students, back-to-school nights, open house, student supervision, and other assignments which are determined by the district to be necessary for the efficient operation of the district.

On March 22, 1977, PVFA and the District commenced negotiations. On April 12, 1977, the District presented to PVFA a counterproposal on the school calendar essentially the same as that school calendar tentatively approved June 7, 1976, which is referred to above. On April 26, the Palos Verdes District presented to PVFA another calendar, identical to the one it proposed on April 1, except that unlike the April 12 calendar it did not mention any "preschool service" days. On May 2, 1977, the Palos Verdes District school board approved a calendar entitled "Adopted School Calendar for 1977-78 School Year," explaining that the adoption of the calendar was in response to numerous inquiries from the public regarding the

starting date of school in the fall. The District characterized this as a "student calendar," while the PVFA characterized it as a "teacher calendar." This calendar was identical to that proposed by the District on April 26.

Subsequent to May 2, 1977, negotiations continued on the calendar. On May 4, there was a PVFA proposal and on May 12, a District counter offer, which was rejected by PVFA, after which the District withdrew its latest counter offer. The parties met once more on May 26 but could not reach agreement. At a final meeting on June 29, 1977, the parties decided to postpone any further negotiating until legislative action on school finance for the year had become final.

On August 23, 1977, the District notified the teachers that there would be two preschool service days, September 13 and 14. On August 29, the school board adopted a 1977-78 calendar reflecting these two preschool service days. The calendar established the number of workdays at 182 "unless and until modified by a collective bargaining agreement between the District and PVFA." This calendar, except for the two pre-service days, was like that adopted by the District on May 2, 1977.

#### Pleasant Valley District

The facts are undisputed. The Pleasant Valley District voluntarily recognized the Pleasant Valley School District Education Association (PVSDEA) on May 6, 1976. In August 1976, PVSDEA presented an initial contract proposal for the 1976-77 school year. On January 1, 1977, the Pleasant Valley District

and PVSDEA reached an agreement for the remaining portion of the 1976-77 school year, effective until June 30, 1977. This contract incorporated the 1976-77 school calendar adopted while the Winton Act<sup>7</sup> was in effect.

On May 5, 1977, PVSDEA presented its initial contract proposal for the 1977-78 school year, which included a proposed school calendar.

On May 19, 1977, the Pleasant Valley District adopted a "proposed calendar for 1977-78," which differed substantially from the calendar proposed by PVSDEA. In particular, the district calendar provided that the first day for teacher service be August 31 1977, and the last day, June 8, 1978. PVSDEA proposed that September 6, 1977, and June 8, 1978, be the first and last days of the 1977-78 school year.

Despite the May 19, 1977, adoption of a school calendar by the school board, both parties engaged in negotiations on several occasions thereafter. The calendar was discussed only insofar as to why PVSDEA had presented it and why the Pleasant Valley District took the position it was not within scope.

In early August, the Pleasant Valley District notified employees of the starting date for certificated service for the 1977-78 school year. On August 2, 1977, PVSDEA filed unfair practice charges alleging that the Pleasant Valley District had

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<sup>7</sup>Former Education Code section 13080 et seq., repealed Stats. 1975, chapter 961, section 1, effective July 1, 1976.



violated sections 3543.5(a), (b), and (c) of EERA by taking the unilateral action of adopting a school calendar on May 19, 1977.

On November 14, 1977, the parties reached a contract which represented specific agreement on most negotiating subjects. Although they were unable to agree on several aspects of the school calendar, they provided for disposition of these disputes in the contract. Article IV, paragraph 7 of that agreement provides:

Other issues relating to workdays and calendars shall be resolved following EERB decisions regarding those issues (modified days, number of workdays and scheduling of workdays . . . .

#### STATEMENT OF ISSUES

Both cases before the Board present the overall issue of whether or not the unilateral adoption of the school calendars by the districts in each case constitutes a failure to meet and negotiate under section 3543.5(c)<sup>8</sup> of the EERA. But to characterize the common issue between these cases in such a broad context, without refinement, would be misleading since there are considerations unique to each case which pose additional issues and require separate resolution. These are:

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<sup>8</sup>Section 3543.5(c) reads:

It shall be unlawful for a public school employer to

. . . . .

Refuse or fail to meet and negotiate in good faith with an exclusive representative.

A. Palos Verdes District

1. Whether or not the Palos Verdes District, the appellant in this case, lacks standing to except to the hearing officer's decision since the decision below ultimately found in favor of it, dismissing the unfair practice charge on the grounds of "operational necessity."

2. If the case is properly on appeal before the Board, are all the following calendar items within the scope of representation requiring negotiations between the Palos Verdes District and PVFA:

- Beginning and ending dates of certificated service for the school year.
- Vacation and holiday dates for certificated employees.
- Extra hour assignments of Back-to-School Night and Open House.

B. Pleasant Valley District

1. Whether or not the beginning and ending dates of certificated service are within the scope of representation requiring negotiations between the Pleasant Valley District and PVSDEA.

2. If so, has the District waived its right to except to the hearing officer's finding that the District failed to sustain an affirmative defense of operational necessity in view of section 32300(c) of the Board's regulations.

DISCUSSION

Standing of Palos Verdes District

Before focusing on the central issue posed in both cases relative to the question of negotiability of specific calendar items, a threshold issue is presented in Palos Verdes regarding the appellant's standing to take exception to the hearing officer's proposed decision. While the hearing officer concluded that certain calendar items are related to hours of employment as found in section 3543.2 and therefore negotiable,

he was persuaded and so found that the district's adoption of a school calendar on August 29, 1977, was necessary, particularly when characterized as a "qualified unilateral action."<sup>9</sup> As such, he accorded the Palos Verdes District a valid defense and dismissed the unfair practice charge. Thus, the question arises as to whether, in fact, the Palos Verdes District is an aggrieved party and entitled to relief from this Board.

It is well recognized that in civil matters, while a party may not ordinarily appeal a judgment in its favor, an appeal is proper if the judgment apparently in a party's favor is actually against that party.<sup>10</sup> Furthermore, former PERB rule 35030,<sup>11</sup> in effect at the time this appeal was filed, and which provided for appeal of hearing officer decisions, does not limit appeals to parties aggrieved by the hearing officer's order. That provision simply stated:

(a) Within seven calendar days after service of the recommended decision a party may file a statement of exceptions to the recommended decision or any part of the record or proceedings.

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<sup>9</sup>The Palos Verdes District in defense of its unilateral adoption, argued among other things that its action constituted only a "qualified unilateral action" and, as such, could be subject to subsequent modification by a collective bargaining agreement.

<sup>10</sup>6 Witkin, Cal. Procedure (2 ed. 1971) Appeals, section 121, page 419.

<sup>11</sup>The Board's rules are codified at California Administration Code, title 8, section 31000 et seq. Rule 35030 has since been repealed. The comparable present rule is section 32300 which places no restriction on a party's right to take exception to a board agent's decision. It differs from former section 35030 in that it allows more time for a party to appeal a board agent's decision and includes specific instructions regarding a party's statement of exceptions.

(b) The filing of the statement of exceptions submits the case to the Board itself.

In this case the hearing officer's findings are adverse to the Palos Verdes District and have the practical effect of requiring the District to negotiate over matters which the hearing officer found to be within scope and which the Palos Verdes District had contended were not in scope. Furthermore, in view of former section 35030, the case is properly before the Board itself for consideration of whether or not the items at issue are mandatory items of negotiation.

#### Scope of Representation

##### a. Overview

The question of "scope of representation" is one of the most delicate issues that has been or will be faced by this Board. It seems clear that educational management hopes for this Board to adhere to a very tight definition in interpreting the scope of language of EERA, as contained in section 3543.2,<sup>12</sup> while most employee organizations are interested in a broader definition that would allow more issues to be brought to the negotiating table.

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<sup>12</sup>Section 3543.2 provides:

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 as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational

Other jurisdictions have wrestled with the same issue with mixed results, experiencing an interpretive evolution of similar collective bargaining laws. Initially the standard for determining what was a negotiable item appeared to favor a broad definition of scope. Many jurisdictions based their decision on the decision of the New York Court of Appeals (comparable to the Supreme Court in California) which ruled in Board of Education of Union Free School District No. 3 v. Associated Teachers at Huntington<sup>13</sup> that the employer's responsibility to negotiate was limited only by specific clear statutory prohibitions. Other courts in Michigan, New Jersey, Vermont, Pennsylvania, Maine and Rhode Island basically adopted the Huntington position and restricted scope only to certain prohibitions contained in existing statutory law.<sup>14</sup>

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security pursuant to section 3546, procedures for processing grievances pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, exclusive representative of certified personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of employees or employee organization on any matter outside the scope of representation.

<sup>13</sup>(1972) 30 N.Y.2d 122, 282 N.E. 2d 109, 331 N.Y.S.2d 17.

<sup>14</sup>See Superintending School Comm. v. Winslow Educ. Ass'n. (Me. 1976) 363 A.2d 229; Pennsylvania Labor Relations Board v. State College Area School District (1975) 461 Pa. 494, 509, 337 A.2d 262, 269; Belanger v. Matteson (1975) 115 R.I. 332, 346 A.2d 124; Danville Bd. of School Directors v. Fifield (1974) 132 Vt. 271, 275-76, 315 A.2d 473, 475-76.

Similarly, in Minnesota and Oregon, the courts came to the conclusions that reflected an approach much like that adopted in New York.<sup>15</sup>

More recently, however, employee relations boards and the courts have begun to reassess the approach taken in previous decisions in such a way as to indicate that public policy concerns are to be balanced more equitably with the employment related interests of public employees.<sup>16</sup> Thus, even the New York Court of Appeals has appeared to retreat from the relatively strict Huntington test as demonstrated in Susquehanna Valley Teachers Association,<sup>17</sup> by indicating that policy factors in education are to be considered in determining what is a mandated and enforceable subject of bargaining:

Public policy, whether derived from, and whether explicit or implicit in statute or in decisional law, or in neither, may also restrict the freedom to arbitrate.

Keyed to the analysis is that the freedom to contract in exclusively private enterprises...does not blanket public school

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<sup>15</sup>See Teamsters Local 320 v. City of Minneapolis (1975) 302 Minn. 410, 225 N.W.2d 254; Central Point School Dist. v. Employment Rel. Bd., (1976) 27 Or. App. 285, 555 P.2d 1269 (no constitutional or statutory proscription of school district's agreement to arbitrate questions of teacher dismissal); Springfield Educ. Ass'n v. School Dist. No 19 (1976) 24 Or. App. 751, 547 P.2d 647 (reversing Oregon Employment Relations Board holding that bargaining over school district's contracts with university for student teaching programs was prohibited).

<sup>16</sup>Cohoes City School District v. Cohoes Teachers Association (1976) 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53; School Committee of Hanover v. Curry (1976) 343 N.E.2d 144; Superintending School Comm. v. Winslow Educ. Assn. (1976) 363 A.2d 229.

<sup>17</sup>(1975) 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427.

matters because of the governmental interest in public concerns which may be involved, however rarely that may be.<sup>18</sup>

What the courts appear to be saying is that such elements as inflation, declining enrollment, inherent distinctions between public and private sector collective negotiations, the public's attitude towards government, and taxing policies of both federal and local government all affect decisions made in the court and accords reached at the bargaining table. We, in California, cannot pretend that these same elements do not exist in our state. Consequently, this Board must attempt to balance the right of public employee groups to negotiate about matters directly related to their employment with the ever difficult job of managing public agencies given the current economic and political climate.

On the one hand, in analyzing section 3543.2 language, it seems clear that the Legislature did not intend that this Board blithely go on its way giving an expansive interpretation to section 3543.2 for it specifically mandated that "all matters not specifically enumerated" were to be excluded from the negotiation process, rendering them prohibited items of negotiations. On the other hand, while section 3543.2 appears to impose a very tight limitation on the scope of negotiations, and that the Legislature intended it so, there is, nevertheless, the fact that the enumerated scope language is

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<sup>18</sup>Id. at 616-17, 339 N.E.2d at 133-34, 376 N.Y.S.2d at 429.

prefaced by the words "matters relating to," clearly requiring and enabling this Board to interpret the scope language with some degree of latitude.<sup>19</sup>

The breadth of interpretation, then, is clearly arguable, although in analyzing section 3543.2 language in total, there can be no doubt that, textually, the language and structure of this provision suggests a far more restrictive scope of

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<sup>19</sup>Advocates for a broad scope interpretation might also focus on the purpose language of EERA contained in section 3540, noting, in particular that language affording teachers the right to be represented in their "'professional and employment relations' and to have a 'voice in the formulaton of educational policy.'" Nelson, State Court Interpretation of Teacher Collective Bargaining Statutes: Four Approaches to the Scope of Bargaining Issue (1977) 2 Industrial Relations Law Journal 421, 478. Section 3540 states:

It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees . . . to be represented by such organizations in their professional and employment relationships with public school employers . . . and to afford certificated employees a voice in the formulation of educational policy. Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.



negotiations than is found in most other public sector labor legislation.<sup>20</sup>

First, the Legislature used language of an exclusive rather than inclusive nature in sharp contrast to EERA's predecessor, the former Winton Act.<sup>21</sup> Under the Winton Act, the scope of representation was described as follows:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours and conditions of employment.<sup>22</sup>

Comparing the two scope provisions, it is readily apparent that under EERA, negotiability is "limited to" specifically listed items and to matters which relate to those items. Under the former Winton Act, any matter, so long as it related to employment conditions and employer-employee relations, was a proper subject for meeting and conferring. In fact, a decision issued shortly before the passage of Senate Bill 160,<sup>23</sup> would suggest quite pointedly the Legislature's reason for adopting

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<sup>20</sup>See Najita, Guide to Statutory Provisions in Public Sector Collective Bargaining, Scope of Negotiations, Industrial Relations Center, University of Hawaii (1978) for a compendium of public sector statutory provisions of other jurisdictions relating to scope of negotiation.

<sup>21</sup>See fn. 7, ante.

<sup>22</sup>Former Education Code section 13084, repealed, effective July 1, 1976.

<sup>23</sup>The EERA had its genesis in Senate Bill 160, introduced by Senator Albert S. Rodda. This bill was virtually identical to Senate Bill 1857, also sponsored by Senator Rodda. In terms of scope, it differed from Senate Bill 1857 in that it provided for "organizational security" and "class size" to be negotiable.

limiting language. In San Juan Teachers Assn. v. San Juan Unified Sch. Dist. (1974) 44 Cal.App.3d 232, the court gave an expansive interpretation to the scope of representation language under the Winton Act. In its view, given the fact that, among other things, public school teachers were precluded from collectively bargaining or striking under the Winton Act, it is "reasonable to conclude that the Winton Act represented a legislative attempt not to end but to compensate for those disabilities. (Id. at 249) In summary, then, while there is a noted absence of legislative history accounting for the unique language of section 3543.2, it is not idle speculation to conclude that with the granting of collective negotiating rights to public school employees, the Legislature deliberately chose a more cautious approach, particularly since this was its first grant of such authority to any public employees in the state.

A second textual characteristic reflecting the Legislature's intent to provide a more limited scope of representation than other comparable public sector employment relations statutes is that it established a right of consultation, as opposed to negotiation, over certain specified items -- definition of educational objectives, determination of the course content and curriculum, and selection of textbooks.<sup>24</sup> The items it expressly chose to exclude from

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<sup>24</sup>Some other jurisdictions have adopted a similar approach, creating two categories but making one subject to negotiations and the other subject to discussion or

mandatory negotiations could properly be characterized as falling primarily within the professional interests of teachers as compared to traditional employment interests of employees generally. One commentator describes such items as going to a determination of goals and methods to be achieved by the public agency.<sup>25</sup> Budget costs and levels of service, while important considerations, are secondary to the overriding educational policy concerns that such items generate.

It may be argued that since the Legislature saw fit to relegate such items of professional interest to the consultation process only, any other items which fall within the same genre may not be subject to negotiations because to do so would conflict with the clear Legislative scheme apparent in section 3543.2. In other words, to the extent that the Legislature intended to have the public school employer obligated to the exclusive representative on items of professional interest to teachers, it expressed which items they were to be and the format in which they were to be presented. Any other items or any other format were not contemplated by the Legislature. Furthermore, had the Legislature intended such items to be subject to negotiations, it could have included them, as it did "class size," an item

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consultation. See Ind. Code Ann. section 20 - 7.5 - 1-1- to 14 (Burns 1975); Nev. Rev. Stat. section 288. 010 - .260 (1975); Ore. Rev. Stat. section 243.650-.782 (1975).

<sup>25</sup>Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1181 (1974).

which has typically posed the broader issue of management prerogative in maintaining efficiency, thus a question of educational policy, versus the teachers' ability to negotiate over an item affecting both their professional and occupational status.<sup>26</sup>

But, I am persuaded that such an approach would not be in conformity with that portion of section 3543.2 which allows "matters related to" the specifically enumerated items to also be subjects of negotiations. Thus, the fact that a proposed item may bear upon the teachers' professional interests does not necessarily preclude its negotiability. Furthermore, such a restrictive approach would, in my opinion, be unnecessarily premature in view of the relatively brief time the Board has had to observe the impact of this new law on the educational process generally, and in view of the time yet remaining which will require our examination of a breadth of issues dealing with scope. Thus I would reject such a narrow construction of the law and simply view the Legislature's relegation of certain, specified topics to the consultation process as in and of themselves narrowing the scope of collective negotiations.

While it seems to me that the Board can ascribe only limited significance to the inclusion of a consultation category in assessing its effect on the scope of

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<sup>26</sup>For an in-depth discussion of the class size issue and its decisional history see Weitzman, J., The Scope of Bargaining in Public Employment, at 251, (1975).

representation, another feature of section 3543.2 is also noteworthy. Unlike most other legislative bodies which have followed the classification scheme initially articulated in NLRB v. Wooster Division of the Borg-Warner Corp. (1958) 356 U.S. 342, allowing for mandatory, permissive, and prohibited subjects of bargaining,<sup>27</sup> the California Legislature has adopted a scheme that, for purposes of negotiating, classifies a subject as either mandatory or prohibited.<sup>28</sup> Section 3543.2 states in part:

All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . . . <sup>29</sup>

This departure from the Borg-Warner analysis cannot be attributed to mere happenstance on the part of the Legislature, particularly in view of the substantial criticism that approach

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<sup>27</sup>Typically, bargaining subjects have been categorized as either mandatory, permissive or prohibited. Mandatory topics are items over which labor and management must bargain, permissive topics are items over which labor and management may bargain if both agree, and illegal or prohibited topics are items over which labor and management cannot bargain.

<sup>28</sup>Only one other jurisdiction, Hawaii, has statutorily eliminated a permissive category. See Haw, Rev. Stat. section 89-9(a) 1975. This act requires negotiations over wages, hours and conditions of employment, but section 89-9(d) bars any agreement which would interfere with the rights of a public employer to direct employees; to determine qualifications and standards for work; to hire, promote, transfer, assign and retain employees or discipline employees by proper cause; to reduce staff size for legitimate reasons; to maintain efficiency of governmental operations; and to determine the methods, means and personnel of operating.

<sup>29</sup>A literal application of the language "all matters not specifically enumerated . . ." would have the effect of

has received in the private sector for years,<sup>30</sup> in view of the fact that its application to the public sector has been seriously questioned,<sup>31</sup> and in view of the fact that every other jurisdiction adopting public sector labor legislation prior to the enactment of EERA, except Hawaii,<sup>32</sup> had incorporated the mandatory-permissive-prohibited trichotomy in its scope language. Nor can its reasons for excluding a

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ignoring that language, also in section 3543.2, which reads ". . . matters relating to . . . ." Therefore, elliptically, the limiting language found at the end of section 3543.2 would seem to more appropriately read:

All matters not specifically enumerated  
(except those which relate to the  
specifically enumerated items) are reserved  
to the public school employer. . . .

Hence, the Legislature has seemingly precluded the application of the principle of sui generis, thereby disallowing any addition to the list of enumerated subjects.

<sup>30</sup>Such criticism was evident from the beginning. In Mr. Justice Harlan's separate opinion in Borg-Warner, in which he concurred in part and dissented in part, the dissenting portion of the opinion was particularly critical of the majority's implicit conclusion allowing the NLRB (and thus the courts) to invade the bargaining process by holding that insistence on a non-mandatory, but lawful, subject to impasse was a violation of the duty to bargain, absent any finding of bad faith bargaining. See also, St. Antoine, Judicial Caution and the Supreme Court's Labor Decisions, October Term, 1971. ABA Section of Labor Relations Law - 1972 Proceedings, 4, 11-15 (1973) and Comment, Application of the Mandatory Permissive Dichotomy to the Duty to Bargain and Unilateral Action: A Review and Reevaluation, (1974) 15 Wm. & Mary L. Rev. 918 (1974).

<sup>31</sup>See Sackman, Redefining the Scope of Bargaining in Public Employment (1977) 19 Boston College L. Rev. 155; Kilberg, Appropriate Subjects for Bargaining in Local Government Labor Relations, (1970) 30 Md. L. Rev. 179, 189; Summers, supra, fn. 25.

<sup>32</sup>See fn. 28, ante.

permissive category be unclear, since the main justification in the public sector for excluding a topic from mandated negotiations is precisely because certain demands involve such significant public policy considerations that a determination of them in the isolated context of negotiations, limited to labor and management, would deprive other parties, namely the public, the parents and the students who also have a vital interest in the particular outcome, from having input.

It might be argued that the school board, as trustee for the public's interest in education, would adequately represent the views of the public at the negotiating table. Realistically, however, the task is not so easily satisfied. The public is comprised of various groups whose interest in public education will vary and sometimes conflict. In addition to the public employees, there are other taxpayers, whose interest is primarily school finance and budgeting, and there are the consumers of education, whose interests primarily relate to the level and quality of education provided. Furthermore, the fact that the school board is supposedly politically accountable is not, realistically, an adequate leverage for allowing the determination of significant policy decisions to be made in the exclusive, bilateral process of negotiations--the allegiances of some public officials are not necessarily to the public at large, but to particular constituencies; the frequent turnover of elected and appointed officials prevents an accumulation of labor relations experience; or the quality of representation during the initial

stages of collective negotiations may be no match for the sophistication or militance of some employee representatives.

In sum then it makes little sense, if an item has such significant policy implications for parties not otherwise privy to the negotiations process, to nevertheless allow its negotiability as a permissive subject.<sup>33</sup>

This apparent acknowledgement by the Legislature that the collective negotiations process is not in all instances the appropriate forum for resolving items affecting the employment conditions of public school employees because of the overriding policy considerations does not come too soon. First, it is a recognition of the fact that certain matters are so inextricably tied to the mission of the public school employer in providing an education for the students that it is necessary for the school employer to retain sole authority to decide such issues. "The forum of the bargaining table with its postures, strategies, trade-offs, modifications and compromises [citation omitted] is no place for the 'delicate balancing of different interests.'" San Jose Peace Officers' Assn. v. City of

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<sup>33</sup>It may appear that section 3547 of EERA which requires initial proposals of exclusive representatives and public school employees and new subjects of negotiation to be "sunshined" for public benefit, itself provides adequate opportunity for the interested public's input in the collective negotiation process. Actually, however, the opportunity for input is relatively circumscribed since the actual negotiations where trade-off, modifications, and compromises occur, the essence of the process and, in a sense, where priorities are eventually defined, remains a bilateral operation to the exclusion of the public.



San Jose (1978) 78 Cal.App.3d 935, 948. As the Board stated in Carlsbad Unified School District (1/30/79) PERB Decision No. 89:

Furthermore, the statute lacks any specific 'management rights' clause. Yet, it is unarguable that the Legislature did not intend to deny to employers the opportunity to fulfill the mission of the public agency.

A school district does not operate in a functional vacuum. State legislation imposes on school districts specific mandates. [Citations omitted] Compliance with State mandates, in turn, imposes on the district management certain obligatory duties and responsibilities. It is in recognition of the fact, at the very least, that one is escapably drawn to the conclusion that inherent managerial interests coexist with those rights vested by statute in the district's employees.<sup>34</sup>

Second, it is a necessary recognition of the growing difficulties encountered by public managers in administering the programs and policies they are charged with given those

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<sup>34</sup> Carlsbad Unified School District, supra, at 8-9. The absence of a management rights provisions in EERA is in itself a noted distinction between the Act and other public sector legislation, including that previously adopted by the California Legislature applying to local government employees. See Meyers-Miliias-Brown Act (Gov. Code, sec. 3500-3510). Such a provision has been subject to much criticism on the ground that it creates more ambiguity than clarity in resolving what items are or are not negotiable. One commentator has noted that its susceptibility to a literal interpretation would have the effect of nullifying the bargaining obligation altogether, while giving it a non-literal meaning would make its inclusion virtually meaningless. Alleyne, Statutory Restraints on the Bargaining Obligation in Public Employment, in Labor Relations in the Public Sector (Knapp, edit. 1977) 100, 106. Moreover, as stated by one observer, noting the distinct absence of a management rights clause in laws applicable solely to teachers, "[i]t merely confirms the difficulty of clearly delineating where professional standards and working conditions end and management rights begin." Weitzman, supra, at 52.

factors alluded to earlier such as public attitude towards government programs and spending and a narrowing tax base.<sup>35</sup> And finally, it is consistent with decisions of PERB's and courts of other jurisdictions, which in sharp contrast to the initial line of cases following Board of Education of Union Free School District No. 3 v. Associated Teachers of Huntington, supra,<sup>36</sup> reflect a growing tendency to consider matters of public policy in ultimately determining the negotiability of a specific item.<sup>37</sup>

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<sup>35</sup>See Abood v. Detroit Bd. of Educ. (1977) 431 U.S. 209, 228 [95 LRRM 2411, 2418] where, in dictum, the Court stated:

Finally, decision making by a public employer is above all a political process. The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters--taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relations between the demands and the quality of service.

<sup>36</sup>30 N.Y.2d 122, 282 N.E. 2d 109, 331 N.Y.S.2d 17.

<sup>37</sup>See discussion, ante, at pp. 12 and 13.

But while the Legislature has apparently directed this Board to adopt a less than expansive approach to the scope issue, I am also mindful of the overall purpose of this legislation, to promote the improvement of personnel management and employer-employee relations.<sup>38</sup> Thus the Board must be equally cautious not to be unduly restrictive:

The goal of the Rodda Act is to promote the improvement of personnel management and employer/employee relations within the public school systems. The means chosen is meeting and negotiating by the exclusive employee representative and public school employer in a good faith effort to reach agreement on enumerated matters. A hard and fast refusal to open matters that are arguably within the employment interest to bilateral determination is hardly calculated to facilitate industrial harmony. Such posture would be especially anomalous in light of the fact that there is, in the final analysis, no requirement that any item actually be incorporated into a collective bargaining agreement. Good faith negotiation does not foreclose the employer from saying no. Negotiators should, however, approach the table in a spirit of meeting problems, not avoiding them.<sup>39</sup>

Acknowledging section 3540 as a significant countervailing consideration, then, the Board under certain circumstances is left with the task of appropriately accounting for public policy considerations in assessing the negotiability of items relating to the employment and professional interests of public school employees. Clearly, items which relate solely to policy as compared to traditional employment concerns are rare.

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<sup>38</sup>Government Code section 3540, quoted in part, ante, at fn. 19.

<sup>39</sup>Tepper and Mellberg, Scope of Bargaining for Teachers in California's Public Schools, 18 Santa Clara L. Rev. 885, 892-893 (1978).

Rather, items which appear to have broader policy implications will indirectly bear on "bread and butter" issues, if only as a matter of budget allocation. Similarly, items which relate to the working conditions of school employees most often also affect educational priorities and policy. Despite this overlap, however, the Legislature has explicitly noted those items which are clearly subject to the negotiation process--wages, benefits, class size, transfer policies, for example. In these areas, the Legislature has apparently determined that in spite of the inherent policy ramifications, the items so directly affect the employees' working conditions that their negotiability is not only justifiable but warranted. But where the items are not enumerated, thus requiring a Board determination of what the relationship is between the proposed item and any unenumerated topic, I am satisfied that such a determination may also require a balancing of competing interests, not merely an assessment of whether or not a logical connection exists between the enumerated topic and the proposed topic. Under the latter situation, the negotiability of a particular proposal would depend on whether it relates primarily to the specifically enumerated items found in section 3543.2 or to matters of broader educational policy in which the public's interests is more substantial than that of the public school employees. To ignore the public's interest in this process would otherwise render the language creating a residual, prohibitory category

meaningless. Thus, under some circumstances, the public's interest in the process must of necessity be accounted for.

b. Distribution of Work Days

Distribution of work days essentially poses an issue of when certificated staff are to perform their services as compared to the total amount of time they must provide their services. It seems clear in the private sector that when an employee is required to work is a mandatory item of bargaining. In Amalgamated Meatcutters v. Jewel Tea Co. (1965) 381 U.S. 676, the Court stated in addressing itself to the problem of whether a collective bargaining agreement violated the Sherman Antitrust Act:

The particular hours of the day and the particular days of the week during which employees may be required to work are subjects well within the realm of wages, hours, and other terms and conditions of employment about which employers and unions must bargain.<sup>40</sup>

Six justices in the case agreed that this obligation included whether hours were to fall in the daytime, nighttime, or on Sunday. The Court concluded that regulation of operating hours is directly related to the mandatory issues of working hours and assignment of work for union members.

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<sup>40</sup>Amalgamated Meatcutters v. Jewel Tea Co. (1965) 381 U.S. 676 at 691. See also Long Lake Lumber (1966) 160 NLRB 1475, 63 LRRM 1160.

In other jurisdictions, however, the response to the particular issue of distribution of work time in the context of the school calendar has been fairly evenly divided.<sup>41</sup>

In California, the courts have concluded that the schedule of working hours for local governmental employees is negotiable. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617; Huntington Beach Police Officer's Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 503-504. In particular, in Fire Fighters Union v. City of Vallejo, the Court emphasized the relevance of the term "hours" in the phrase "wages, hours and working conditions" to the particular issue of work schedule.

In view of the foregoing, it is clear that as a logical exercise one may extend the distribution of work hours in a day or work days in a week to the distribution of work days in a school year. All three distributions essentially involve that measurement of time and activity here relevant, hours of employment. Consequently, there is a nexus between the dates for the beginning and ending of certificated service,

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<sup>41</sup>See Edmonds Education Association v. Edmonds School District (Wash. 1977) PERC Case No. 194-U-76-13, 1 CCH Public Employee Bargaining Reporter 4606 (CCH PEBR), wherein the Washington Public Employment Relations Commission decided that school calendar constitutes hours of employment; City of Beloit v. WERC (1976) 242 N.W. 2d 231, [92 LRRM 3318] and Board of Education v. WERC (1971) 191 N.W. 2d 242 [78 LRRM 3040] wherein the Wisconsin Supreme Court ruled that all aspects of the school calendar are negotiable; Northern Community Schools of Tipton County (Ind. 1975) PERB Case No. U-75-26-7935, 1 CCH PEBR 4258 in which the Indiana PERB resolved that "hours" means, among other things . . . the periods of time that work will be performed, including starting time, ending time, and

vacations, and holidays, and the hours in which certificated personnel are expected to provide services--hours of employment.

But while a relationship can be demonstrated between the distribution of certificated workdays and hours of employment as provided in section 3543.2, it is equally apparent that such an issue can have a more direct impact on third parties as compared, perhaps, to an issue strictly of wages or fringe benefits. Consequently, in ascertaining the negotiability of distribution of work days, it is necessary, in my view to examine the effect of such an issue on the students. In this case, the effect is minor, if there is any at all. It is clear that the parties here are not attempting to negotiate student attendance dates but only certificated work days.

Now, ideally, the dates of both should coincide. However, in reality, even now, the beginning of teacher service does not precisely coincide with the date scheduled for instruction given the fact that the initial days of certificated service are spent in orientation or pre-service activities. Moreover, it would be presumptuous to assume that the professionalism of

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the time out from work when the school employee is completely free from assignment," and compare to Bettendorf-Dubuque (Iowa 1976) PERB Case Nos. 598 and 602, 1 CCH PEBR 4270 wherein it was held tht management retains the right to fix the length and division of the school calendar; In re Department of Education (Hawaii 1973) PERB Case No. DR-05-5, 1 CCH PEBR 4228 in which the scheduling of work was viewed as a matter of inherent managements rights; and City of Biddeford v. Biddeford Teachers Assn. (Me. 1973) 304 A.2d 387, [1 CCH PEBR 10,056] wherein the Supreme Judicial Court of Maine held, among other things, that the scheduling and length of school vacations and the beginning and ending of the school year are educational policy decisions which are not subject to the duty to bargain.

both sides at the negotiating table will not prevail in the interest of the students. It seems possible that some accommodation can be made to insure the maintenance of the student school year by innovative planning, and at the same time extend to certificated employees the opportunity to promote a fundamental employment interest, their hours of employment.

However, the Palos Verdes District points to the potential delay in starting school if the parties are unable to reach an agreement on the calendaring issue, which would have a direct impact on students. But this argument overlooks the possibility that under certain circumstances the school board might act out of legal or operational necessity and take such unilateral action as is necessary to assure the maintenance of the school program. As the District itself argues, relying on NLRB v. Katz (1962) 369 U.S. 736, under certain circumstances unilateral action might be justified. For example, California Constitution, article IX, section 5 provides that a system of common schools shall be maintained in each district at least six months a year; Education Code section 37211 is a codification of that provision. Also, Education Code section 41420 requires districts to provide a minimum of 175 days per school year in order to receive state school funding for the next fiscal year. Thus, in the public interest, if the facts justify it, the District may consider taking appropriate action necessary to comply with the law or or avoid jeopardizing the receipt of average daily attendance funding and adopt whatever



calendar item is necessary to insure that the school program is not delayed.

The District also considers the potential disruption caused to the community at large in planning family or civic organizational activities if the school calendar in the particulars at issue here are subject to negotiations. The thrust of the District's evidence on this point, however, suggests that the community wished to be informed of the school calendar in order to coordinate non-school activities rather than to be involved in its formulation. In other words, the little evidence offered by the Palos Verdes District regarding the impact of the work day distribution issue on the public really casts the community's interest in this issue as being reactive rather than proactive. The District fails to make a persuasive argument that the public's interest in this regard is substantial; rather, the public's interest at large would appear to be only one of convenience in contrast to that of the employees, which is one of necessity.

Finally, the Palos Verdes District argues that requiring it to negotiate the school calendar with certificated employees raises potential problems of coordination, and possibly an unfair pactice charge, vis-a-vis classified employees. The District speculates that any agreement with the certificated negotiating unit bears the risk of affecting the "hours of employment" for classified employees. First of all the record does not indicate whether the classified employees in the Palos Verdes District are represented by an exclusive

representative. Thus, a change in the employment conditions of the classified employees in this district may not be the subject of an unfair practice charge. San Dieguito Union High School District (9/2/77) EERB Decision No. 22 at 11. Secondly, the concern raised by the Palos Verdes District is a matter inherent in the collective negotiations process whenever an employer must deal with more than one negotiating unit. At the very least, under EERA, if certificated and classified employees have acquired exclusive representative status, the public school employer will be dealing with more than one negotiating unit since section 3545(b)(3) provides specifically that "[c]lassified employees and certificated employees shall not be included in the same negotiating unit." Thus the Legislature, itself, for whatever reason, has mandated a structure which may require the public school employer to recognize and coordinate the functions of its various employees to some extent on this issue, as well as others.

Accordingly, while the issue of work distribution may have some effect on the educational program, such effect is not so substantial as to outweigh the interest of the certificated staff in this regard. Therefore, the dates of the beginning and ending of certificated service, vacations, and holidays are primarily related to hours of employment as found in section 3543.2, and are consequently negotiable items. This determination applies not only to the Palos Verdes case but to the Pleasant Valley situation to the extent that the issue is raised in the latter case, since the arguments of the Palos

Verdes District as described above are essentially those offered by the Pleasant Valley District in asserting that the beginning and ending dates of certificated service are non-negotiable.

c. Extra Hour Assignments

Only Palos Verdes raises the issue of whether or not the calendar items of Back to School Night and Open House are negotiable within the meaning of section 3543.2. These events require of the school staff additional hours of service. The service is not rendered to the students but rather is intended to keep the parents informed as to the progress of their students. It therefore has no impact on the students' educational day but rather solely on the certificated employee workday as it imposes on employees additional worktime. Consistent with the foregoing discussion, such items are appropriate subjects of negotiation not only in terms of when, but also in terms of how many and how long each assignment is to last.

Operational Necessity

In both cases, the school districts maintained before the hearing officer that even if the items respecting the school calendar do fall within the scope of representation as provided for by section 3543.2, the adoption of the school calendar in each district is nevertheless excused by way of operational necessity. In analyzing that argument as it applies to Palos Verdes, the hearing officer's decision on this issue stands despite the earlier finding that the distribution of work days

and its various components as well as extra duty assignments are within scope. The party against whom the hearing officer's finding stands, PVFA, has raised no argument on appeal questioning such a finding. Accordingly, that factual issue is not before the Board on appeal.<sup>42</sup> In Pleasant Valley, however, one is constrained to find that the argument of operational necessity is of no avail. The appellant-district in this case raised exceptions to the hearing officer's finding only as to the scope issue. Section 35031(c) of the Board's former rules, in effect at the time this case was appealed, like section 32300(c) of the Board's present rules, stated that, "an exception not specifically urged shall be waived."<sup>43</sup> Consequently, given the District's failure to raise the issue of operational necessity on appeal, the hearing

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<sup>42</sup>The defense of operational necessity urged by the District in Palos Verdes is raised only in the context of the school board having adopted a school calendar on August 29, 1977. However, the issue initially stipulated to by the parties at the time of the hearing also raised a question as to the adoption of a school calendar on May 2, 1977. The hearing officer's decision, after finding that the specific calendar items at issue here were negotiable, and after finding that the May 2 calendar was both a "student" and a "teacher" calendar, failed to make any separate finding that the District had violated section 3543.5(c) by its having adopted a calendar on May 2. The Board is not in a position to render a holding in this respect as no such issue is before it today; accordingly, I merely point out the likelihood of the District's having committed an unfair practice by adopting a calendar on May 2, 1977 in view of the ultimate findings on scope upon which both the Chairperson and I agree.

<sup>43</sup>See former California Administrative Code, title 8, section 35031(c), repealed effective March 3, 1978, and California Administrative Code, title 8, section 32300(c).

officer's resolution of this issue stands with neither approval nor disapproval by the Board itself.

Thus, regarding both cases before the Board today the findings are limited only to the scope issue itself and not to an analysis or determination of the affirmative defense of operational necessity. As to the determinations of the hearing officers in both cases below, their findings that the particular calendar items do fall within the purview of section 3543.2 are sustained. However, in Palos Verdes, the hearing officer's dismissal of the unfair practice is sustained for reasons stated above while in Pleasant Valley, the hearing officer's decision finding the Pleasant Valley District to have committed an unfair practice stands, for reasons stated above.

#### ORDER

Upon the foregoing facts, conclusions of law, and records in these cases, the Public Employment Relations Board orders that:

(1) In Palos Verdes Peninsula Unified School District, LA-CE-122, the hearing officer's dismissal of the unfair practice charge filed by the Palos Verdes Faculty Association against the Palos Verdes Peninsula Unified School District be sustained,

(2) In Pleasant Valley School District, LA-CE-160, the Pleasant Valley School District cease and desist from

(a) unilaterally taking action on matters within the scope of representation without meeting and negotiating upon request with the Pleasant Valley School District Education Association;

(b) failing or refusing to meet and negotiate in good faith with the Pleasant Valley School District Association upon request with regard to the starting and ending dates of teacher service.

and take the following affirmative actions designed to effectuate the policies of the act by

(a) preparing and posting copies of the appended notice at all of its schools and work sites for twenty (20) calendar days in conspicuous places, including all locations where notices to certificated employees are customarily posted and,

(b) notifying the Los Angeles Regional Director of the Public Employment Relations Board at the end of the posting period of the action it has taken to comply with this Order.

By: ~~Raymond J. Gonzales~~, Member

Concurring opinion of Chairperson Harry Gluck begins on page 40.

Appendix: Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the Pleasant Valley School District violated the Educational Employment Relations Act by taking unilateral action regarding proposed school calendar items without providing the exclusive representative, Pleasant Valley School District Education Association, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

CEASE AND DESIST FROM:

1. Unilaterally taking action on matters within the scope of representation without meeting and negotiating upon request with the Pleasant Valley School District Education Association;
2. Failing or refusing to meet and negotiate in good faith with the Pleasant Valley School District Association upon request with regard to the starting and ending dates of teacher service.

By: \_\_\_\_\_  
Superintendent

Dated:

This is an official notice. It must remain posted for 20 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Harry Gluck, Chairperson, concurring:

In determining whether the disputed matters are mandatory subjects of negotiation, two basic approaches are suggested:

1) Is the subject explicitly listed in section 3542.3 as a required subject of negotiations? 2) If the subject is arguably included among the specified subjects, what test is to be applied to determine the legislative intent?

The latter question has been addressed in Fibreboard Paper Products v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], where two tests were established: 1) Is the subject of such vital concern to both management and employees that controversy and conflict are likely to occur? 2) Is collective bargaining the appropriate means of resolving that conflict? A factor in answering the latter question is whether the employer's obligation to negotiate would "significantly abridge his freedom to manage his business." Id., 379 U.S. at 213.

The essence of the Districts' argument in the cases before us relates to the latter admonition. Their position is that the interests of the public and the students in combination with fundamental educational objectives, require that the school calendar be left to their sole discretion.



1. The statutory language

Section 3543.2 of the Educational Employment Relations Act establishes "hours of employment" as a mandatory subject of negotiations.

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment ....

In defining "hours of employment" it is appropriate to take guidance from the federal sector.<sup>1</sup> The scope language found in NLRA section 8(d) reads in pertinent part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ....

"Hours of employment have caused little difficulty in the area of mandatory subjects of bargaining in light of the express terms of 8(d) of the Act." (Morris, *The Developing Labor Law*, p. 403.) The term has been held applicable to working days and working hours (Gallenkamp Shoes v. NLRB (1968) 402 F.2d 525 [69 LRRM 2024]; to

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<sup>1</sup>In Fire Fighters v. City of Vallejo [(1974) 12 Cal.3d 608], the California Supreme Court held that, in the interpretation of language in a California statute, cognizance should be taken of the decisions of the National Labor Relations Board interpreting identical or similar language in the Labor Management Relations Act. [Sweetwater Union High School District (11/23/76) EERB Decision No. 4.]

holiday, overtime and Sunday work (NLRB v. Boss Mfg. Co. (1941) 118 F.2d 187 [8 LRRM 729]). In Amalgamated Meat Cutters v. Jewel Tea Co. (1965) 381 U.S. 676, 691 [59 LRRM 2376], the Supreme Court stated:

The particular hours of a day and the particular days of the week during which employees may be required to work are well within the realm of wages, hours, and other terms and conditions of employment about which employers and unions must bargain.

Regarding the disputed matters here, the school calendars adopted by the Districts specify the length of the school year, the length of the working day and the distribution of working hours within the day during which certificated employees are required to be present for duty. "Under any definition, these items ... are directly related to 'hours of employment' ...."<sup>2</sup>

Nevertheless, the Districts contend that their obligation to negotiate on hours of employment is limited to the total hours per day and does not include the opening and closing dates of the school year or the distribution of assignment time within the day; and, that if the number of hours per day that a certificated employee is required to be at work is not altered, how the employee spends the day, on what assignments and for what duration, are outside of mandatory scope.

The basis for this argument is that the items claimed to be excluded are the means by which the Districts effectuate policy matters solely within their province.

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<sup>2</sup>West Hartford Education Association v. Decourcy (1972) 162 Conn.566; however items held not subject to negotiations because "hours of employment" were excluded from scope provisions of Teacher Negotiation Act.

This argument must fail if it is the unequivocal legislative intent that these items be within scope. It must also fail if the obligation to negotiate such matters would not preclude the Districts from exercising those managerial prerogatives which are fundamental and essential to the existence and operation of the school system and which must remain under the exclusive control of the Districts if they are to fulfill their constitutionally mandated missions.

2. The legislative intent

As stated by the court in Fire Fighters v. City of Vallejo, supra, 12 Cal.3d 608, the adoption of identical or comparable language permits the conclusion that the legislative intent is to pattern the local statute after the federal model. Here, pertinent scope provisions of the EERA are substantially the same as those found in the NLRA. It should not be assumed that this is the result of thoughtless and rote reproduction. To the contrary, the very differences between section 3543.2 and section 8(d) lead to the inescapable conclusion that the California Legislature was very deliberate in deciding which aspects of the federal law were to be followed and which were to be distinguished. The reference in section 3543.2 to "terms and conditions of employment" is, of course, substantially different from the federal language in that the EERA term is defined by the inclusion of a list of specifically mandated subjects followed by the admonition that "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating...." In this substantial distinction lies purposeful differentiation. It is logical, indeed,

in my view necessary, to conclude that those subjects (e.g., hours of employment) which were not treated differently by the Legislature were not meant to be treated differently by this Board. In summary, I conclude that by the incorporation of the term "hours of employment", the Legislature expected and intended federal precedents to be followed. Consequently, I find no basis for excluding recognized and well established aspects of "hours of employment" from the requirement of mandatory bilateral determination.

### 3. Managerial necessity

The Districts' argument that the school calendar is so essentially a matter of managerial imperative that the employees' workday, hours and their distribution are necessarily excluded from scope is not persuasive. No claim is made that either the California Constitution or State legislation mandates the specific dates on which the school year is to begin and end or the duration of that school year. It is common knowledge that the first and last dates of the school year vary from district to district.<sup>3</sup> The days and hours during which pupil attendance is required, though closely correlated with them, are not four-square with the days and hours that certificated employees are required to be on duty.<sup>4</sup> There is some flexibility in accommodating the employees' work schedule and the pupils' attendance schedule to each other. If that flexibility is nevertheless limited for all practical purposes, the District is not required to agree to any specific proposal the employees may choose to advance.

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<sup>3</sup>For example, the San Juan School District began and ended its 1978/79 school year one week earlier than did the Los Angeles Unified School District and two weeks before the Las Virgenes School District.

<sup>4</sup>According to the school calendar in evidence here, teachers are assigned extra duties on days and during hours when students' attendance is not required.

The obligation to negotiate requires a good faith effort to reach agreement, but does not compel any specific concession.<sup>5</sup> Negotiating the dates when employees will report to work, take vacation, enjoy holidays, perform extra assignments such as back-to-school and open house, and end of working year does not preclude the Districts from establishing educational programs or fulfilling their educational missions. The Legislature saw no conflict between the employees' interests in their working conditions and the districts' managerial needs of such magnitude as to impair the operation of the educational program. This is evident not only in its inclusion of "hours of employment" in section 3543.2, but also in its inclusion of leave policies as a mandatory subject of negotiation.<sup>6</sup> It is apparent that the questions of employee attendance and pupil attendance were not viewed as so inextricably mated as to remove the former from the scope of mandatory negotiations.

I therefore concur in the conclusion that in Palos Verdes Peninsula School District the following are mandatory subjects of negotiations under section 3543.2 of EERA:

- 1) Beginning and ending dates of certificated employees' services during the school year;
- 2) Vacation and holiday dates for said employees;

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<sup>5</sup> See e.g., Partee Flooring Mill (1954) 197 NLRB 1177, 1178, wherein the NLRB held that "the significant fact is not whether [the employer] was in a position to grant concessions but rather whether it bargained in good faith on the subject."

<sup>6</sup> "Terms and conditions of employment" mean health and welfare benefits as defined by section 53200, leave and transfer policies .... [Government Code section 3543.2.]

3) Time and duration of back-to-school night and open house assignments.

I further concur, in Pleasant Valley District, that the beginning and ending dates of certificated employees' services during the school year are mandatory subjects of negotiations. Finally, I concur with the reasoning and conclusion that the Pleasant Valley School District waived its right to except to the hearing officer's finding that the District failed to prove operational necessity for its unilateral act in adopting the school calendar.

Harry Gluck, Chairperson

PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
PALOS VERDES FACULTY ASSOCIATION,	)	
	)	
Charging Party,	)	
	)	Case No. LA-CE-122-77/78
vs.	)	
	)	
PALOS VERDES PENINSULA UNIFIED	)	<u>RECOMMENDED DECISION</u>
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	January 31, 1978

Appearances: Charles Gustafson, Attorney, for Palos Verdes Faculty Association;  
J. Michael Taggart, Attorney, for Palos Verdes Peninsula Unified School District.

Before Jeff Paule, Hearing Officer.

STATEMENT OF THE CASE

On May 9, 1977, the Palos Verdes Faculty Association (hereinafter "PVFA" or "charging party") filed an unfair practice charge against the Palos Verdes Peninsula Unified School District (hereinafter "District" or "respondent") with the Public Employment Relations Board (hereinafter "PERB") alleging a violation of Government Code Sections 3543, 3543.1(a), 3543.2, 3543.5(b) and 3543.5(c).<sup>1</sup>

<sup>1</sup>Unless otherwise specified, all section references are to the Government Code. Section 3543.2 provides that:

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 as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8

Section 3543.5(c) provides:

It shall be unlawful for a public school employer to:

Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The District filed its answer to the unfair practice charge on June 9, 1977.

The essence of the charge is that the District failed to meet and negotiate in good faith by unilaterally adopting a calendar for the 1977-78 school year while negotiations were in progress. The PVFA contends that the various aspects of a school calendar relate to hours of employment and wages as those terms are used in Section 3543.2 and that the calendar is therefore a mandatory subject of bargaining under the provisions of this section.

The District's position is that the school calendar is not a mandatory subject of bargaining and assuming that it is, the District met and negotiated in good faith and did not commit an unfair practice when it adopted a calendar for the 1977-78 school year.

A hearing was held in Los Angeles, California, on September 19, 1977.

#### ISSUES

1. Is the school calendar within the scope of representation as defined by Government Code Section 3543.2?
2. Assuming the school calendar is within the scope of representation, did the District's adoption of a school calendar while negotiations were in progress constitute a failure to negotiate in good faith in violation of Government Code Section 3543.5(c)?

#### FINDINGS OF FACT

Because of the complicated history of this case, it is helpful to present chronologically the events which preceded the unfair practice hearing.

On January 26, 1976, the Board of Education of the Palos Verdes Peninsula Unified School District (hereinafter "School Board") held a meeting during which the various factors that compose a school calendar were discussed. Shortly afterwards, the School Board issued a document entitled "Calendar Guidelines" listing these factors. They include the following: scheduling the opening and



closing of school, graduation, and vacations to coincide with the Los Angeles Unified School District system; permitting school to open on an isolated day in the first week; not commencing the school term on major Jewish holy days; scheduling eighth grade graduation to precede twelfth grade; maintaining conference days; and including a contingency day. The guidelines also indicate that it was the School Board's practice to adopt the calendar for the upcoming school year and tentatively approve the calendar for the following school year at approximately the same time.

On June 7, 1976, the School Board tentatively approved a calendar for the 1977-78 school year following the guidelines that had been issued in January of 1976.

The calendar tentatively approved on June 7, 1976 sets out the total number of days a teacher is required to work (182), the duties to be performed on those days (i.e. teaching, conference<sup>2</sup>) as well as the dates on which those days fall. The 182 days are divided as follows: teachers of grades kindergarten through five are assigned 176 teaching, four conference, and two pre-school service days; teachers of grades six through eight are assigned 176 teaching, three conference, two pre-school service days, and one pupil-free work day; teachers of grades nine through twelve are assigned 177 teaching, two pre-school service, and three pupil-free work days.

Less than a month after the School Board tentatively approved the above calendar, the Educational Employment Relations Act (hereinafter "EERA" or "Act") went into effect, on July 1, 1976. In November, 1976, the PVFA was elected the exclusive representative of certificated employees in the Palos Verdes Peninsula Unified School District.

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<sup>2</sup>Conference days are those on which teachers hold conferences with parents; students do not attend school.

On February 23, 1977, the PVFA presented its initial calendar proposal to the District. Entitled "Proposed School Calendar for 1977-78 School Year," the calendar provides that the total number of days that a teacher is to render service be 179, distributed as follows: grades kindergarten through five (175 teaching, three conference days, and one pupil-free work day); grades six through eight (175 teaching, two conference, two pupil-free work days); and grades nine through twelve (176 teaching and three pupil-free work days). There is no mention of pre-school service days in the PVFA proposal. In addition, the PVFA's proposed calendar sets out the specific dates on which the following occur: first and last day of instruction, conference days, summer session, graduation, vacation recess periods, holidays, final exams and pupil-free work days.

On March 7, 1977, the District presented its initial contract offer. Under the heading of "Hours", the offer specifies the number of days per year (182) and the number of hours per day (8) that teachers are required to work. The offer goes on to state:

In addition to the above minimum time and required work days, unit members are responsible for adjunct duties, beyond their instructional duties, which include but are not limited to, program development, professional growth activities, parent conferences, committee assignments, faculty and District meetings, special help to student(s), back-to-school nights, open houses, student supervision, and other assignments which are determined by the District to be necessary for the efficient operation of the District.

Negotiations between the PVFA and the District began on March 22, 1977. At the negotiating session held on April 12, 1977, the District presented to the PVFA a counter-proposal entitled "Tentative School Calendar for 1977-78 School Year." This is the same calendar referred to earlier that had been tentatively approved by the School Board on June 7, 1976.

The areas of difference between the PVFA's initial proposal and the District's counter-proposal are the following: the total number of working days in the year;

the number of conference days; the number and dates of pupil-free work days; the inclusion of pre-school service days, Back-to-School Night and Open House on the District's proposed calendar; and the designation of final exam days on the PVFA's proposed calendar.

During a negotiating session held on April 26, 1977, the District presented to the PVFA a "Proposed School Calendar for 1977-78 School Year." This calendar differs from the one presented by the District on April 12 only in that there is no mention of any pre-school service days.

There were no negotiating sessions from April 26 until May 4, 1977.

On May 2, 1977, the School Board approved a calendar for the 1977-78 school year. The calendar is entitled "Adopted School Calendar for 1977-78 School Year." This calendar is identical to the one proposed by the District on April 26, 1977. The School Board took this action on May 2, 1977 because the District was receiving numerous inquiries from the public about the starting date of school.

Even though the calendar proposed by the District on April 26, 1977 and later approved by the School Board on May 2, 1977 makes no mention of pre-school service days, it is found that the District had not at this time changed its offer of a 182-day school year, which includes two pre-school service days. The PVFA appears to have understood this because even after May 2, 1977, the parties continued to discuss the necessity for and number of pre-school service days.

A few days after the School Board approved the school calendar on May 2, 1977, the PVFA filed the instant unfair practice charge, charging the School Board with unilaterally adopting the 1977-78 school calendar in the midst of negotiations involving the calendar.

The District argues that the calendar adopted on May 2 was merely a "student" calendar which did not purport to establish the number of working days or their distribution for teachers. It is found that the calendar approved on May 2, 1977 is both a "student" and a "teacher" calendar. First, the days that students are

to be present are also days that teachers must be present. Second, the calendar establishes dates for conference days, Back-to-School Night and Open House--occasions which require the teachers' presence, not the students'.

It is noted that both parties devote considerable attention in their briefs to the issue of "student" versus "teacher" calendar. The distinction is not that important to a resolution of this case. Neither party argues nor is it found that the length of the students' day or the number of days students must attend class is negotiable.

During the negotiating session on May 4, 1977, the PVFA submitted a calendar proposal to the District which included a provision for one pre-school service day.

When the parties met again on May 12, 1977, the District responded to the PVFA's May 4, 1977 proposal of one pre-school service day by offering to eliminate one of the two proposed pre-school service days and thus to reduce the total number of working days from 182 to 181. The PVFA rejected the offer because, although there was now agreement on the total number of pre-school service days, there still was no agreement on the total number and distribution of workdays. At that point, the District withdrew the offer and reverted to its 182 workday/2 pre-school service day position.

The parties discussed the calendar at one more negotiating session, on May 26, 1977, but could not reach agreement. The parties met again on June 29, 1977 and at that time agreed to postpone any further bargaining until the State Legislature passed and the Governor signed the school appropriations bill.

On August 23, 1977, the District notified the teachers that there would be two pre-school service days, on September 13 and 14, 1977. On August 29, 1977, the School Board formally adopted a calendar establishing the total number of working days at 182 "unless and until modified by a collective bargaining agreement between the District and the PVFA." This calendar, the one currently in operation, reflects the two pre-school service days.

Throughout the District's several negotiating sessions with the PVFA over the school calendar, and in its brief submitted in this case, the District never waivers from its position on the negotiability of school calendar items. This position is summarized in a report entitled "Meet and Negotiate" issued by the District on April 26, 1977:

Only the number of days that a teacher is required to render service and the number of hours per day that the teacher is required to render service are negotiable. All other aspects of the calendar which have a direct impact upon students and parents in the community is a nonnegotiable item.

The PVFA, on the other hand, maintains that all aspects of the school calendar that relate to teachers are negotiable. These include the start and end dates of the year, the start and end times of the workday, and the number and scheduling of conference days, pre-school service days, holidays, vacations, Back-to-School Night and Open House.

The parties had 13 negotiating sessions to discuss their contract proposals; the school calendar was discussed at six or seven of these meetings. Each side fully presented its views on the calendar, bargaining back and forth over several proposals and counter-proposals. This bargaining continued until August 29, 1977, when the District officially adopted a calendar for the 1977-78 school year.

The PVFA stipulated that no action taken by the District at the negotiating table constituted in itself a failure to negotiate in good faith. Thus, the dispute between the parties involves the question of whether the various aspects of a school calendar are within the scope of bargaining under the EERA and if so, whether the District's unilateral action with respect to the school calendar constitutes an unfair practice.

#### CONCLUSIONS OF LAW

##### Scope of Representation Under Section 3543.2

"School calendar" is an umbrella term for the schedule that a school district follows in a particular year. It usually refers to a document which includes

some or all of the following information: the total number of days that teachers are to render service; the duties to be performed on those days (teaching, parent conferences, preparation); the distribution of those days over the year; and the number and dates of holidays, vacations, and special events such as Back-to-School Night, Open House and graduation.

Neither "school calendar" nor any of the several aspects that traditionally comprise a school calendar is specifically mentioned in Section 3543.2 of the EERA.<sup>3</sup> That section provides:

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 as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8.

It is important to note that the Legislature defined the phrase "terms and conditions of employment" to include seven specific areas in addition to wages and hours of employment. The Board noted in Fullerton Union High School District Personnel and Guidance Association v. Fullerton Union High School District, EERB Decision No. 28 (July 27, 1977) (remanded on other grounds), that in order for a

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<sup>3</sup>In San Dieguito Faculty Association v. San Dieguito Union High School District, EERB Decision No. 22 (September 2, 1977), the Board held that:

Government Code Section 3543.2 creates two obligatory classes and one optional class of subjects: (1) a mandatory duty to negotiate with an exclusive representative on certain subjects; (2) a mandatory duty to consult with an exclusive representative on certain subjects; and (3) an option to consult or not consult with any employee or employee organization on remaining subjects.

The PVFA's position is that the school calendar and all its components fall within category (1).

subject matter to be negotiable "the EERA requires a relationship to an item specifically enumerated in the definition of 'terms and conditions of employment' or wages or hours." [Emphasis added.] It is appropriate, therefore, for the PERB to interpret the words "matters relating to" wages, hours of employment, and other terms and conditions of employment.

While the PERB has not yet adopted a precise test defining the required relationship between a proposal and an expressly enumerated subject within the scope of bargaining, in the instant case "hours of employment" and "wages" are the only subjects which arguably relate to calendar items.<sup>4</sup> Thus, the issue to be determined is whether the necessary relationship exists between hours of employment or wages and the particular components of the school calendar sought to be negotiated.<sup>5</sup>

#### "Hours of Employment" in the Private Sector

Historically, in the United States, employees' concerns with hours of employment date back more than a century. At first, the struggle focused on reducing the legal maximum hours for women, children, and later, men. Gradually, legislation concerning hours of employment came to encompass not only maximum workday and workweek, but also other aspects of hours of work, such as day of rest, meal periods, rest periods, and night work.<sup>6</sup>

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<sup>4</sup>The parties' briefs suggest no other enumerated subject to which the school calendar relates.

<sup>5</sup>It is not possible to say whether a "school calendar" is a matter relating to hours of employment or wages without elaborating on the particular components of a school calendar. The parties agree. At the hearing, they stipulated that the issue was whether it is an unfair practice to refuse to meet and negotiate in good faith on the matters set forth in the calendar, including but not limited to the total number of days on which services are to be rendered by unit members, the number and dates of conference, orientation, Back-to-School Night and Open House days, holidays and vacation recess periods and specific dates or days of instruction. Thus, this decision concerns itself with the question of which, if any, components of the school calendar are related to hours or wages and therefore are mandatory subjects of bargaining.

<sup>6</sup>The Growth of Labor Law in the United States, published by the United States Department of Labor, 1967, p. 123. See also pp. 7-58 and 123-133.

The EERA's inclusion of "hours of employment" within the scope of representation parallels the National Labor Relations Act's (hereinafter "NLRA") use of "hours" as a mandatory subject of bargaining. Both the California Supreme Court and the EERB have held that it is appropriate to use National Labor Relations Board (hereinafter "NLRB") decisions as guidance in interpreting California labor relations statutes having language similar to the NLRA. See Firefighters Union v. City of Vallejo, 12 Cal. 3d 608, 87 LRRM 2453 (1974) and Sweetwater Union High School District, EERB Decision No. 4 (November 23, 1976).

With the passage of the NLRA in 1935, it became an unfair labor practice for an employer "to refuse to bargain collectively with representatives of his employees. . .".<sup>7</sup> When Congress amended the NLRA in 1947, the obligation to bargain was defined more specifically to reflect the NLRB's own decisions during the early years of the NLRA. Section 8(d) of the NLRA now requires the employer and the employee representative "to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

"Hours", according to NLRB decisions, means, at minimum, the total number of hours in a day and the total number of days in a week that an employee is required to work.<sup>8</sup> Furthermore, the distribution of hours that employees work in a day (work shift) also has been held to be a mandatory subject of bargaining under the NLRA. In Meat Cutters v. Jewel Tea, 381 U.S. 676, 59 LRRM 2376 (1965), the United States Supreme Court held that an employer must bargain about its employees' proposal to work only during the period between 9:00 A.M. to 6:00 P.M.<sup>9</sup>

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<sup>7</sup>Section 8(a)(5) of the NLRA.

<sup>8</sup>Massey Gin and Machine Works, Inc., 78 NLRB 189, 22 LRRM 1191 (1948); Timken Roller Bearing Co., 70 NLRB 500, 18 LRRM 1370 (1946) (enforcement denied on other grounds), 161 F. 2d 949, 20 LRRM 2204 (6th Cir. 1947).

<sup>9</sup>See also, Camp & McInnes, 100 NLRB 524, 30 LRRM 1310 (1952), where without consultation with or notice to the Union, the Employer reduced the lunch period of its employees from one hour to 30 minutes, and changed the quitting time from 5:00 P.M. to 4:30 P.M., the NLRB finding that the Employer had violated Section 8(a)(5) of the NLRA.



The distribution of days in a week that employees are required to work is also a mandatory bargaining subject under the NLRA. In Long Lake Lumber, 160 NLRB 1475, 63 LRRM 1160 (1966), the NLRB found a violation of the duty to bargain when an employer unilaterally changed its employees' workdays from Monday through Friday to Tuesday through Saturday.

The NLRB recently held that an employer that operates a college violated the NLRA when,

unilaterally, and without bargaining with union, it changed its past practice of conferring with faculty employees before publishing class schedule for fall term.

[N]o merit is found in contention that class schedules, without more, have no effect on terms and conditions of employment since . . . class schedules are encompassed within term "hours" under Section 8(d) of LRMA.  
[Emphasis added.]

Kendall College, 95 LRRM 1094, 1095 (1977).

Thus, under the NLRA, "hours" has been held to mean the total number of hours in a day and days in a week that employees are required to work, the distribution of those hours and days, and teachers' class schedules. Any addition, reduction, or rearrangement of working hours or days by an employer is a mandatory subject of bargaining.

#### "Hours of Employment" in the Public Sector

##### A. California

It is not only in the private sector that the subject of "hours" has received an expanded definition. The Meyers-Miliias-Brown Act (MMBA), which applies to all local public employees in California, provides for a scope of representation "including, but not limited to, wages, hours, and other terms and conditions of employment. . . ."10

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<sup>10</sup>Gov. Code Sec. 3504.

The California Supreme Court, in Firefighters Union v. City of Vallejo, supra, held that the MMBA's "hours" provision applies to a Schedule of Hours proposed by firefighter employees. The Court stated:

The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for firefighters on 8-hour shifts and 56 hours per week for firefighters on 24-hour shifts is clearly negotiable . . . . The Vallejo charter provides explicitly that city employees shall have the right to bargain on matters of wages, hours and working conditions; furthermore, working hours and workdays have been held to be bargainable under the National Labor Relations Act . . . . [W]e conclude that Schedule of Hours is a negotiable issue. [Emphasis in original.]

Recently, in Huntington Beach Police Assn. v. Huntington Beach, 58 Cal. App. 3d 492, 92 LRRM 2996 (1976), the District Court of Appeal held that under the MMBA, not only are total hours in the workday or workweek negotiable, but also how and when those hours are distributed. The contract at issue in Huntington Beach provided for a 4-day, 10 hour per day workweek. The employer unilaterally changed to a 5-day, 8 hour per day schedule. The court held that even though the total hours in the week remained the same, the employer had nevertheless committed an unfair practice by not bargaining with the union about the scheduling change. See also, Dublin Professional Firefighters, Local 1885 v. Valley Community Services Dist., 45 Cal. App. 3d 116, 119 (1975).

#### B. Other States

Employment relations boards or courts in no less than 17 states have issued decisions on the negotiability of either the entire calendar or one or more of its parts.<sup>11</sup> Each state ultimately rests its decision on the interpretation of its own statute; however, there is a common theme running through most of these decisions--the linking of the school calendar to "hours of employment."

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<sup>11</sup>The PERB has made use of decisions from other states where pertinent. See Sweetwater, supra, and New Haven Unified School District, EERB Decision No. 14, (March 22, 1977).

Most states agree that when the collective bargaining law includes "hours" as a mandatory subject, then either the entire school calendar or one or more of its parts is sufficiently related to "hours" to render it negotiable. Two states (New Jersey and Oregon) find that the calendar is not a mandatory subject of bargaining<sup>12</sup> while two other states (Pennsylvania and North Dakota) have left undetermined the status of the negotiability of the school calendar.<sup>13</sup>

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<sup>12</sup>The New Jersey case, Burlington County College Faculty Assn. v. Board of Trustees, 311 A. 2d 733 (1973), involves a college calendar and is therefore distinguishable from the instant case. The court relied primarily on the difference between a college calendar and a public school calendar in finding the college calendar not to be a mandatory subject of bargaining. But see Byram Board of Education v. Byram Education Assn., 96 LRRM 3059 (1977).

In Oregon, the employee organization sought to bargain with the school board on some 92 separate items, including the school calendar, which it contended were mandatory subjects of bargaining under Oregon's Public Employee Collective Bargaining Law. The Oregon Employment Relations Board found that the school calendar was not a mandatory subject of bargaining. This decision was affirmed by the Oregon Court of Appeal. Springfield Education Association v. Springfield School District, No. 19, 547 P. 2d 647, 2 PBC ¶20, 415 (1976).

<sup>13</sup>Section 701 of the Pennsylvania Public Employee Relations Act states that employer and employee representatives shall meet and confer "with respect to wages, hours and other terms and conditions of employment." However, Section 702 provides that "employees shall not be required to bargain over matters of inherent managerial policy . . . ." The Pennsylvania Supreme Court held that there is overlap in the two sections, and that the issue is not whether a bargaining proposal falls into one section or the other, but whether a matter is of "fundamental concern to the employees' interest in wages, hours, and other terms and conditions of employment." PLRB v. State College Area School District, 337 A. 2d 262, 90 LRRM 2081 (1975). If so, it is negotiable. The court remanded the case to determine whether the items at issue, including the school calendar, were of such fundamental concern. The case was not pursued by the local Pennsylvania State Education Association or the Pennsylvania Labor Relations Board (letter to Barbara Weitzman Ravitz, PERB Board Agent, from James F. Wildeman, Executive Director, Pennsylvania Labor Relations Board, October 12, 1977).

North Dakota's statute provides for parties to meet and negotiate "with respect to terms and conditions of employment." The Supreme Court of North Dakota stated that it was unable to rule as a matter of law on the negotiability of a proposal entitled "the schedule for work year" because that description was too brief and needed further clarification. Fargo Education Assn. v. Paulsen, 92 LRRM 2492 (1976).

States which have found the school calendar as it relates to teachers to be negotiable, either in whole or in part, include: Washington, Edmonds Education Association v. Edmonds School District, Case No. 194-U-76-13 (PERC 1977), 1 CCH Public Employee Bargaining Reporter 4606 (hereinafter cited as "CCH PEBR"), (Washington Public Employment Relations Commission decision that school calendar constitutes hours of employment); Wisconsin, City of Beloit v. WERC, 242 N.W. 2d 231, 92 LRRM 3318 (1976) and Board of Education v. WERC, 191 N.W. 2d 242, 78 LRRM 3030 (1971), (Wisconsin Supreme Court decision affirming Wisconsin Employment Relations Commission's ruling that all aspects of the school calendar are negotiable); Indiana, Northern Community Schools of Tipton County, 1 IPER 38, 1 CCH PEBR 4248 (1975), (Indiana EERB determination that "hours" means "[t]he number of hours the school employee is going to work and the periods of time that work will be performed; including starting time, ending time, and the time out from work when the school employee is completely free from any assignment."); Iowa, Sergeant Bluff-Lyton Education Association, 1 CCH PEBR 4272 (1975), (Iowa PERB ruling that "hours" extends not only to the total number of hours worked, but also to starting and quitting time as well); Florida, Escambia Education Association, 2 FPER 92 (1976), aff'd Escambia County School Board v. Florida PERC, 3 FPER 270, 1 CCH PEBR 4199 (1977), (Florida Court of Appeal affirms Florida PERC decision that school calendar is proper subject of bargaining); Michigan, Westwood Community Schools, 7 MERC Lab. Op. 313 (1972), (start and end dates negotiable); New Jersey, Byram Board of Education v. Bryam Education Association, 96 LRRM 3059 (1977), (start and end time of workday negotiable); New York, City School District of the City of Oswego v. Helsby, 346 N.Y.S. 2d 27, 2 PBC ¶20, 082 (1973), (total number of workdays negotiable); Massachusetts, Medford School Committee and Medford Public Schools Custodians Assn. 1 MLC 1250 (1975); Nebraska, Seward Education Assn. v. School District of Seward, 1 CCH PEBR 4400 (1971); Norfolk Education Assn., 1 CCH PEBR 4400 (1971) and Alaska, Kenai School District v. Ed. Assn., 97 LRRM 2153 (1977).

Further illumination of the meaning of "hours" in relation to the school calendar comes from the Connecticut Supreme Court. That court held, in West Hartford Education Assn. v. DeCourcy, 295 A. 2d 526, 80 LRRM 2422 (1972), that the school calendar (defined as the number and distribution of days during which the schools are in session or teachers may be assigned duties) is not a mandatory subject of bargaining. However, Connecticut's Teacher Negotiations Act states that there is a duty to negotiate with respect to salaries and other conditions of employment . . . ." There is no mention of 'hours'. The court reasoned that although the length of the school day and the school calendar "are directly related to 'hours of employment', it is our conclusion that these matters were specifically exempted from the Act with great deliberation." 80 LRRM at 2428.

The history of the negotiability of the school calendar has followed an interesting course in Nevada. Nevada's statute governing employment relations in the public schools provided for negotiations "concerning wages, hours and conditions of employment." The Nevada Supreme Court affirmed the Employee-Management Relations Board's decision that the school calendar, defined as the length and structure of the teacher work year, was negotiable. The court found that "any item which is significantly related to wages, hours, and working conditions is negotiable. . . ." Clark County School District v. Local Board, 88 LRRM 2774, 2776 (1974).

Following this decision, in 1975, the Nevada Legislature amended its public employee labor relations statute by limiting the scope of bargaining to twenty specific areas. These areas include the following "calendar" items: the total hours of work required of an employee on each workday or workweek; the total number of days' work required of an employee in a work year; vacation leaves; holidays; and teacher preparation time. (Nevada Revised Statutes, Section 288.150(2).)

It is clear, then, from a study of the interpretations given to "hours of employment" by the NLRA, federal courts, California state courts and other jurisdictions that "hours" encompasses more than the total number of hours in the workday or workweek. "Hours" refers to an employee's schedule--between which hours

and on which days he or she works. This is especially true in a school setting, where a nine or ten month year is the rule, unlike most other businesses which usually operate on a year-round basis.

Thus, it is apparent that a school calendar is a matter necessarily and directly related to hours of employment. However, the more precise issue which must be determined is which items of the school calendar are so closely related to hours of employment that they fall within the ambit of Section 3543.2 of the EERA and are therefore mandatory subjects of bargaining.

#### The Palos Verdes School Calendar

##### A. Total Number of Workdays and Their Distribution

The District concedes that the total number of workdays in the year is a mandatory subject of bargaining under the EERA. This calendar item is a matter closely related to hours of employment and wages. Other states are in accord: Indiana (Clarksville Community School Corporation, 1 IPER 38 (1975); New York (City School District of the City of Oswego v. Helsby, supra); and Wisconsin (City of Madison v. WERB, 155 N.W. 2d 78, 65 LRRM 2488, 2491 (1967)).

The District vigorously contends in its brief, however, that the distribution of workdays (that is, the start and end dates of the school year for teachers, dates of vacation periods for teachers, and holidays) is a policy matter and "that the elected school board officials are directly responsible for formulating policies which affect the running of the school."

The District's argument is not convincing. The issue is not whether a particular subject matter involves policy considerations. Indeed, salaries and leaves and transfers are matters of policy and yet the EERA quite clearly states that "wages" and "leave and transfer policies" are negotiable. As one court noted, "[t]he key...is how direct the impact of the negotiability of the distribution of workdays is on the well-being of the individual teacher as opposed to its effect on the operation of the school district as a whole." National Ed. Assn. vs. Board of Education, 512 P. 2d

426, 84 LRRM 2223 (Kansas 1973). (See also Fibreboard Corp. v. Labor Board, 379 U. S. 203, 57 LRRM 2609 (1964).

It is found that the distribution of workdays is a matter so closely related to hours of employment and has such a significant impact on the welfare of the individual teacher that it is a mandatory subject of bargaining under the EERA. This becomes especially clear when one considers the possible effect that a finding of nonnegotiability could have on teachers' schedules. If school district employers did not have to bargain about this item, then there is nothing to prevent them from requiring employees to work the total number of days that were agreed upon at any time during the year. See Medford School Committee (Massachusetts), supra, and West Hartford Education Assn. v. DeCourcy (Connecticut), supra. As noted by the Michigan Employment Relations Commission in Westwood Community Schools, 7 MERC Lab. Op. 313 (1972), "the rather substantial interest which the school teachers have in planning their summer activities, e.g., advanced study, supplementary employment, travel and vacation, outweigh any claim of interference with the right to manage the school district."

Other states finding start and end dates, vacations, and holidays for teachers to be negotiable subjects include Nevada (Washoe County Teachers Assn. v. Washoe County School District, 88 LRRM 2774 (1974) and by statute, Nevada Revised Statutes, Section 288.150(2)); Wisconsin (City of Madison v. WERB, supra); and Nebraska (Norfolk Education Assn. v. South District of Norfolk, Case No. 40, 430 GERR B-7 (1971)).

#### B. Total Number of Hours and Their Distribution

The District concedes that the total number of hours in a day that a teacher must work is negotiable. The District maintains, however, that when those hours will begin and end (work shift) does not fall within the definition of the phrase "hours of employment" and is therefore not a mandatory subject of bargaining under the EERA.

The charging party cites several cases where the distribution of hours has been found to be within the ambit of "hours of employment" and therefore negotiable.

See Firefighters Union v. City of Vallejo, supra, Huntington Beach Police Association, supra, and AFSME v. University of California (a California superior court decision reported at 91 LRRM 2511 (1975)). The District counters that "[t]hese public employers, however, are not charged with the same type of responsibilities that public school employers are, i.e., the education of children."

The District's distinction is not persuasive. The fact that students are required to be in attendance at school during certain hours (see generally Education Code Sections 46100-46192), does not preclude negotiations over the teachers' work shift. Obviously, teachers are paid to teach and the teachers' presence at school must coincide with those of their students. However, there are other areas where meaningful negotiations over the teachers' work shift can occur. These include the time a teacher is to report to school prior to class (see Title 5, California Administrative Code, Section 5570), or remain at school after class, or in those situations where a double session is required (see Education Code Section 46112). A similar conclusion was reached in Byram Board of Education v. Byram Education Association, supra, where a New Jersey court found that a proposal by the teachers that they be required to report to school no earlier than 20 minutes prior to the start of the students' day and be permitted to leave no later than five minutes after the end of the students' day was a mandatory subject of bargaining. The court also gave judicial approval to the New Jersey PERC's reasoning that the teachers' proposal related to the length of the teachers' workday and not to the length of the students' school day. In a similar case, the Indiana EERB held that the "starting and ending times of the teacher workday are mandatory subjects of bargaining encompassed by the phrase 'hours' in [the Indiana statute]." Northern Community Schools, supra.<sup>14</sup>

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<sup>14</sup>Other states have found that work shift of school employees to be negotiable. These include Massachusetts (Medford School Committee, supra) and Iowa (Sergeant Bluff-Lyton Education Association, supra).



Accordingly, it is found that the distribution of hours in the teachers' workday is a subject matter closely related to and encompassed by the term "hours of employment" in the EERA and is therefore a mandatory subject of bargaining.

C. Extra Work Hours

Events such as Back-to-School Night and Open House require the teachers' presence at school in the evening, making it necessary for them to work extra hours beyond the regular work shift. Since these and other evening events increase the total number of hours a teacher must work, they are clearly "matters relating to . . . hours of employment."

The District must negotiate about the number of such events during the year, the period of time teachers are required to be in attendance, and the particular days (nights) on which they fall.

D. Duties on Workdays

The PVFA sought to bargain with the District about the number and distribution of pre-school service, conference and pupil-free workdays.

The discussion of this aspect of the calendar proceeds on the assumption that the total number of workdays is negotiable, and that non-teaching workdays, such as those enumerated above, are included in that total.

Once the total number and distribution of workdays are agreed upon, then the particular duty that a teacher performs on those days--either teaching, meeting with parents, preparing materials, etc., cannot be said to be a matter so closely related to hours of employment or wages to render it negotiable under the EERA. It is no longer a matter of scheduling but of curriculum planning. Thus, it is found

that neither the number of pre-school service, conference, and pupil-free workdays--nor the dates on which they occur--are aspects of school calendar which fall within the EERA's scope of representation.<sup>15</sup>

### Conclusion

In summary, it is found that the District must negotiate with the PVFA over the total number of hours in the day and days in the year that teachers are to render service; the distribution of those hours and days (i.e. which hours in the day and which days in the year), including the start and end dates of the school year and vacation periods; and days that teachers are required to work extra hours beyond the normal workday such as Back-to-School Night and Open House nights. The above are all matters closely relating to hours of employment pursuant to Section 3543.2 of the EERA.

On the other hand, it is found that the particular duties that teachers are to perform while they are working are not matters closely relating to hours of employment and are not within the EERA's scope of representation. Thus, the number and distribution of pre-school service, conference, and pupil-free workdays are not negotiable insofar as they are included in the total number and distribution of workdays.

### Respondent's Contentions

The District argues that many of these calendar items are matters of inherent management prerogative. Section 3543.2 of the EERA provides that "all matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . . ." The District's argument in this regard is not convincing. Since the school calendar items found herein to be negotiable are closely related to hours of employment and wages, they are "specifically enumerated" and are not within the employer's exclusive authority.

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<sup>15</sup>There was no evidence presented that these three types of non-teaching days require a teacher to work longer hours or different hours than on a regular working day. (See discussion under "C", Ante, at p. 19).

Furthermore, the aspects of the school calendar found to be negotiable are fundamental to the employment relationship. They are not matters of educational policy, philosophy or curriculum on which the PVFA has only the right to consult. (See Section 3543.2) Teachers have a strong interest in negotiating their work schedules with their employer. They need to know what hours, days and nights they will be required to work. These plans affect additional jobs, child care arrangements, vacations and further education.

It is true, as the District argues, that other, non-certificated school district employees are affected by the items of the school calendar. They too, however, are entitled to negotiate their work schedules with their employer. Oftentimes, what is negotiated by one group of employees affects the bargaining process between the employer and another group of employees, whether it is a work calendar or wages or a leave policy. This fact alone should not preclude negotiations on a particular subject.

The District further argues that allowing teachers to negotiate their work schedule as reflected in the school calendar would allow teachers more influence in the political process than other appropriate constituent groups--parents, employers of students, and religious leaders.

Under the EERA, however, the concerns of the community are not ignored. The PVFA concedes in its brief that there are factors to consider in establishing a calendar other than the desires of certificated employees. The EERA itself contains detailed public notice procedures (Section 3547(a)-(e)). School district employers and employee representatives must present their initial bargaining proposals at a public meeting and negotiations may not begin until the public has been afforded reasonable time to express itself regarding the proposals.

Having found certain aspects of the school calendar to be negotiable subjects under the EERA, the next inquiry is whether the District failed or refused to meet and negotiate in good faith with respect to these subjects.

Did the District Refuse or Fail to Meet and Negotiate in Good Faith with Respect to the Subjects Determined Herein to be Mandatory Subjects of Bargaining?

The parties stipulated during the hearing that the issue to be determined in this case is whether the unilateral adoption of a calendar by the respondent, while negotiations were in progress, is an unfair practice in that it constitutes a refusal to meet and negotiate in good faith on the matters set forth in the calendar. This stipulation and the entire record in the case clearly support the conclusion that no "bad faith" bargaining occurred during negotiations.

The charging party contends, however, that under NLRB v. Borg-Warner Corp., 357 U.S. 342, 42 LRRM 2034 (1958) and particularly, NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), the respondent is guilty of an unfair practice by its adoption of a calendar while the matter was under discussion. The Supreme Court held in Katz that "the duty [to bargain collectively] . . . may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within [the scope of representation] and about which the union seeks to negotiate, violates [the NLRA] though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in all good faith bargains to this end." 50 LRRM at 2180.

Thus, argues the charging party, a violation of Section 3543.5(c) occurred when the District unilaterally adopted a new calendar for 1977-78 on August 29, 1977.

The District defends its unilateral action on three grounds:

First, that there was no duty to meet and negotiate because the school calendar is not a mandatory subject of bargaining and therefore there can be no legal basis for an unfair practice. This decision disposes of this argument except for the subject of the duties to be performed on workdays. With respect to the actual duties to be performed by teachers during the workday, there is no mandatory obligation to meet and negotiate on this subject and therefore no

violation has occurred because of the District's alleged refusal or failure to negotiate this item.

Second, the District submits that a calendar was adopted "out of necessity" on August 29, 1977 and that a "business necessity" is a legitimate defense to a unilateral action unfair practice charge.

Third, that even assuming there was no "business necessity" requiring adoption of a calendar on August 29, 1977, the District's action on this date constituted "qualified unilateral action" in that the Board resolution adopting a calendar includes the following language: " . . . unless and until modified by a collective bargaining agreement between the District and the Palos Verdes Faculty Association."

The District's second position finds its authority in dictum from the Katz decision. NLRB v. Katz, supra. The Supreme Court noted in Katz: "[w]hile we do not preclude the possibility that there might be circumstances which the [NLRB] could or should accept as excusing or justifying unilateral action, no such case is presented here." The District urges the PERB to recognize the inherent differences between private employers and public employers, particularly school district employers. In its brief, the District states: "Faced with the impending beginning of school and with negotiations stalled because of the problems surrounding the passage of the school finance bill, the District had no choice other than to adopt a school calendar for the 1977-78 school year that set forth the workdays for certificated employees."

The "necessity doctrine" is not well defined in the federal labor relations area. The defense of necessity to a unilateral action appears to be available when the exigencies of the employer's business require an immediate management decision in order to prevent serious harm or disaster to the business. (See Morris, The Developing Labor Law, 1971, p. 324).

Applied to the public sector the "necessity doctrine" takes on a different, perhaps broader, meaning. The issues raised in this case, however, do not require an extensive discussion on all the differences between private sector and public sector collective bargaining. One difference seems manifest in this case, though, and that is that the obligations and responsibilities imposed on a school district by the State Constitution (see Cal. Const. A. IX, Sec. 5),<sup>16</sup> the Education Code, the State Board of Education (see generally Title 5, Cal. Admin. Code) and particularly by the public, to provide a smooth and uninterrupted educational program for the benefit of students is paramount. The School Board cannot defer indefinitely to the completion of good faith negotiations the establishment of the date for the commencement of school. This is particularly so inasmuch as a certificated employee must be present in the classroom when pupils are there. See Ed. Code Sec. 46300. (See also Cal. Admin. Code, Title 5, Sec. 5531, which states that certificated personnel must supervise all extracurricular activities of pupils.)

In support of its "necessity doctrine" defense, the District presented evidence that because of community pressure the starting date of school was a date the District was required to set "out of necessity." This is not an idle argument. The concerns of the community are not subordinate to those of the teachers. The public generally and parents of the students specifically, have an interest in the starting date of school and also the dates of vacation, holidays, graduation and closing of school, just as the teachers do.

The District further maintains that it "has every intention of continuing negotiations" on matters within the scope of representation relating to the school calendar. This position is reflected in the resolution adopting the

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<sup>16</sup>Section 5 of Article IX of the California State Constitution provides that: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established." See also Ed. Code Sec. 41420.

school calendar on August 29, 1977 wherein the School Board stated that the calendar was adopted, "unless and until modified by a collective bargaining agreement." (Emphasis added.)

Thus, the District's contention is that its third defense, that of "qualified unilateral action," combined with the defense of necessity, is sufficient to negate the unfair practice charge. It appears from the record and after considering the parties' briefs, that this argument must prevail.

Certainly, the wording of the resolution cannot be used to excuse past unilateral action in every case. Each "unilateral action" case must be decided on its own facts. In the instant case, the parties stipulated that no bad faith or surface bargaining occurred (i.e., no intentional delays in meeting and negotiating) and that the only issue to be decided was whether the unilateral action by the District was proper. The District waited as long as it reasonably could (August 29, 1977) before it acted unilaterally, and even then, the School Board's resolution plainly demonstrates that the District is willing to continue to meet and negotiate over matters within the scope of representation.<sup>17</sup>

For the foregoing reasons, it is concluded that the District has presented a valid defense to the unilateral action and accordingly the unfair charge will be dismissed.

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<sup>17</sup> This conclusion is buttressed by the current status of negotiations between the parties. The hearing officer takes official notice that as of the date of this decision, no agreement has been reached between the parties and, moreover, no declaration of impasse has been filed by either party with the PERB.

ORDER

The unfair practice charge filed by the Palos Verdes Faculty Association is hereby DISMISSED.

Pursuant to Title 8, Cal. Admin. Code Section 35029, this recommended decision and order shall become final on February 13, 1978 unless a party files a timely statement of exceptions. See 8 Cal. Admin. Code Section 35030. Any statement of exceptions must be served on the opposing party. See Olson v. Manteca School District, EERB Decision No. 21 (August 5, 1977).

Dated: January 31, 1978

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Jeff Paule  
Hearing Officer



PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

PLEASANT VALLEY SCHOOL DISTRICT	)	
EDUCATION ASSOCIATION,	)	
	)	
Charging Party,	)	
	)	Unfair Practice
v.	)	Case No. LA-CE-160-77/78
	)	
PLEASANT VALLEY SCHOOL DISTRICT,	)	
	)	
Respondent.	)	<u>PROPOSED DECISION</u>
	)	(7/ 7/78)
	)	

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Appearances: Charles R. Gustafson, Attorney for Pleasant Valley School District Education Association; John Liebert, Attorney (Paterson & Taggart) for Pleasant Valley School District.

Before Kenneth A. Perea, Hearing Officer.

This case presents the issue of whether "school calendar", wherein the dates upon which classes are held and other school activities are scheduled, is within the scope of representation as defined in Government Code section 3543.2.

PROCEDURAL HISTORY

The events preceding the administrative hearing before the Public Employment Relations Board (PERB) in the above-captioned matter are summarized as follows:

(1) On August 2, 1977, the Pleasant Valley School District Education Association (Association) filed an unfair practice charge alleging a violation of section 3543.5(a), (b) and (c) in that at a regularly scheduled meeting on

May 19, 1977, the Pleasant Valley School District (District) unilaterally adopted a school calendar for the 1977-78 school year.<sup>1</sup>

(2) On August 19, 1977, the District filed an answer to the unfair practice charge denying that the schedule of dates upon which classes are held, instruction conducted, and other school activities occur is within the scope of representation as defined in section 3543.2.

(3) A notice of hearing for October 14, 1977 was issued by PERB's General Counsel on September 20, 1977.

(4) Pursuant to the District's request, the hearing scheduled for October 14, 1977 was continued to December 8, 1977.

The gravamen of the unfair practice charge is that the District allegedly failed to meet and negotiate in good faith by unilaterally adopting a calendar for the 1977-78 school year while negotiations were in progress. The Association contends that the various aspects of a school calendar are "matters relating to . . . hours of employment" as defined in section 3543.2 and that the calendar is therefore a mandatory subject of bargaining pursuant to the provisions of said section. The District's position is that while the number and length of teacher workdays is negotiable, the scheduling of said workdays is not a mandatory subject of bargaining and that the District met and negotiated in good faith and did not commit an unfair practice when it adopted a calendar for the 1977-78 school year.

An administrative hearing before a hearing officer of the PERB was held in Los Angeles on December 8, 1977.

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<sup>1</sup>All statutory references are to the California Government Code unless otherwise specified.

## FINDINGS OF FACT

The District voluntarily recognized the Association as the exclusive representative for certificated employees of the District on May 6, 1976. The District and the Association met and negotiated beginning in August 1976. A collective negotiating agreement was reached and ratified effective January 6, 1977 through June 3, 1977. Said agreement included a clause which provided that the elements of the then-current 1976-77 school calendar which was arrived at between the Certificated Employees Council and the District through the meet and confer provisions of the Winton Act would be honored.<sup>2</sup>

On May 5, 1977, the Association submitted its initial contract proposal for the 1977-78 school year to the District. The Association's initial proposal contained a provision for a school calendar including 177 teacher duty days of which four (4) were half days.

On May 19, 1977, the District adopted a "proposed calendar for 1977-78." The number of teacher duty days in said proposed calendar was set at 179, the same number of duty days in the 1976-77 calendar.

There are substantial differences between the school calendar contained in the Association's initial proposal and the "proposed calendar for 1977-78" which the District adopted on May 19, 1977:

(1) The Association proposed that September 6, 1977 be the first and that June 9, 1978 be the last teacher duty day for the 1977-78 school year. The calendar adopted by the District, however, provides that the first teacher duty day for the 1977-78 school year be August 31, 1977 and that the last teacher duty day for the 1977-78 school year be June 8, 1978;

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<sup>2</sup>Former Ed. Code section 13080 et seq., repealed, Stats. 1975, chapter 961, sec. 1, effective July 1, 1976.

(2) The calendar proposed by the Association provides for one teacher preparation day preceding the first pupil day and that said preparation day occur on September 6, 1977.<sup>3</sup> The calendar adopted by the District, however, provides for three teacher preparation days prior to the first pupil day with said preparation days occurring on August 31, September 1, and September 2, 1977;

(3) The Association's proposed school calendar for the 1977-78 school year provides for a "teachers' workday/visitation (teacher option) day" wherein pupils not be in attendance and teachers have the option of attending inservice training sessions or visiting classrooms in other school districts to observe teaching techniques. The calendar adopted by the District, however contains no provision for a "teachers' workday/visitation (teacher option) day";

(4) The calendar proposed by the Association for the school year 1977-78 provides for pupil minimum days and parent-teacher conferences on November 9, 10, 14-18, 21-23, 1977 and April 10-14, 1978.<sup>4</sup> The calendar adopted by the District for the 1977-78 school year, however, provides for parent-teacher conferences during which pupils would attend for minimum day on November 14-19, 21-23, 1977 and April 17-21, 1978;

(5) The Association proposed in its calendar for the 1977-78 school year that the following days preceding pupil vacations be pupil minimum days: November 23, 1977, December 16, 1977, March 17, 1978 and June 9, 1978.<sup>5</sup> The

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<sup>3</sup>Teacher preparation days are those days during which teachers attend meetings with District administrators and generally prepare for the forthcoming school year prior to the pupils' first day of attendance.

<sup>4</sup>Parent-teacher conference days are those on which teachers hold conferences with their pupils' respective parents after the pupils' minimum day.

<sup>5</sup>The Association, in seeking to negotiate pupil minimum days preceding pupil vacations, did not propose that the teachers' workday be correspondingly shortened, but rather that teachers prepare their classrooms for the pupil vacation after pupils are dismissed.

calendar adopted by the District for the 1977-78 school year provides that only the last day of school preceding pupil summer vacation, June 9, 1978, be a pupil minimum day;

(6) The Association proposed in its calendar for the 1977-78 school year that there be 177 teacher workdays. The calendar adopted by the District for the 1977-78 school year provides for 179 teacher workdays.

The District and the Association met and negotiated between June 1 and November 14, 1977 at which time a collective negotiating agreement was reached. The term of the current agreement is from December 2, 1977 through June 30, 1978.

The current collective negotiating agreement reflects agreements reached on various aspects of "duty hours/calendar." Agreement was reached regarding regular duty hours per day, extended daily duty hours and duty hours per year for unit employees other than classroom teachers.

No agreement was reached, however, on other aspects of "school calendar." The number and scheduling of half days was not agreed upon although the District did make a counterproposal regarding half days before student vacations, which the Association declined to accept, sometime after the teachers had reported to work during the school year 1977-78. Negotiations concerning the number of duty days per year did not result in agreement although the District and the Association did meet and negotiate regarding the number of duty days on June 3, 19, 16, 22 and July 6. No agreement was reached regarding the scheduling of workdays, the number and scheduling of teacher preparation days, scheduling of a so-called "teachers' workday/visitation (teacher option) day" and the number and scheduling of parent-teacher conference days since the District took the position that said items of the school calendar were not within the scope of representation pursuant to section 3543.2.

Since disputes regarding the negotiability of certain aspects of the school calendar were the only remaining unresolved items preventing agreement in

November 1977, the Association and the District agreed to set those issues aside pursuant to paragraph 7 in Article IV of the agreement which provides:

Other issues relating to workdays and calendar shall be resolved following EERB decisions regarding those issues (modified days, number of workdays and scheduling of workdays).

During the first week of August 1977, the District implemented the starting time of the duty year pursuant to the adopted proposed calendar by notifying employees of the dates of teacher service. The Association thereupon filed the unfair practice charge which is the subject of this proposed decision.

### ISSUES

(1) Are the following items of "school calendar" within the scope of representation as defined in section 3543.2:

- a. The starting and ending dates of teacher service;
- b. The number and scheduling of teacher preparation days prior to the first pupil day;
- c. The number and scheduling of parent-teacher conference days;
- d. The number and scheduling of pupil minimum days preceding pupil vacations;
- e. The scheduling of a "teachers' workday/visitation (teacher option) day"?

(2) Assuming that any of the above items of school calendar are within the scope of representation as defined in section 3543.2, did the District's adoption of a school calendar while negotiations were in progress constitute a violation of section 3543.5, subsections (a), (b) or (c)?

## CONCLUSIONS OF LAW

### Scope of Representation Pursuant to Section 3543.2

"School calendar" is a general term for the schedule that a school district follows during a given year. "School calendar" usually refers to a document which includes some or all of the following information: the total number of days which pupils are required to be in attendance and the distribution of those days over the year; the total number of days which teachers are to render service; the duties teachers are required to perform on those days (teacher preparation, teaching, parent-teacher conferences) and the distribution of those days over the year; and the number and dates of holidays, vacations and special events.

Neither "school calendar" nor any of the many aspects which traditionally comprise "school calendar" is specifically mentioned in that portion of the Educational Employment Relations Act (EERA) which defines scope of representation. Section 3543.2 provides:

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 as defined by section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to section 3546, procedures for processing grievances pursuant to section 3548.5, 3548.6, 3548.7 and 3548.8, and the layoff of probationary certificated school district employees pursuant to section 44949.5 of the Education Code. . . .

As the PERB itself noted in Fullerton Union High School District Personnel and Guidance Association v. Fullerton Union High School District (7/27/77) EERB Decision No. 28 (remanded on other grounds), in order for a subject matter to be negotiable "the EERA requires a relationship to an item specifically enumerated in the definition of 'terms and conditions of employment' or wages or hours." [Emphasis added.] It is appropriate, therefore, for the PERB to interpret the words "matters relating to" wages, hours of employment, and other terms and conditions of employment.

In the instant case, "hours of employment" is the only subject which arguably relates to calendar items. Furthermore, the parties' briefs suggest no other enumerated subject to which school calendar relates. Therefore, the issue to be determined is whether the necessary relationship exists between "hours of employment" and the particular components of the school calendar sought here to be negotiable.

#### "Hours" in the Private Sector

Both the California Supreme Court and the PERB itself have held that it is appropriate to use National Labor Relations Board (NLRB) decisions as guidance in interpreting California labor relations statutes having language similar to the Labor Management Relations Act, as amended, (LMRA).<sup>6</sup> See Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [87 LRRM 2453] and Sweetwater Union High School District (11/23/76) EERB Decision No. 4. Because the EERA's inclusion of "hours of employment" within the scope of representation parallels the LMRA's use of "hours" as a mandatory subject of bargaining, NLRB decisions have been considered by the hearing officer in arriving at the conclusions herein.

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<sup>6</sup>29 U.S.C. section 151 et seq. The Labor Management Relations Act amended the National Labor Relations Act.



"Hours," pursuant to NLRB decisions, at a minimum means the total number of hours in a day and the total number of days in a week that an employee is required to work. Furthermore, the distribution of hours that employees work in a day (work shift) also has been held to be a mandatory subject of bargaining under the LMRA.<sup>7</sup> In Meat Cutters v. Jewel Tea (1965) 381 U.S. 676 [59 LRRM 2376], the United States Supreme Court held that an employer must bargain about its employees' proposal to work only during the period between 9:00 A.M. to 6:00 P.M.<sup>8</sup>

The distribution of days in a week that employees are required to work is also a mandatory bargaining subject under the LMRA. In Long Lake Lumber (1966) 160 NLRB 1475 [63 LRRM 1160], the NLRB found a violation of the duty to bargain when an employer unilaterally changed its employees' workdays from Monday through Friday to Tuesday through Saturday.

Thus, under the LMRA, "hours" has been held to mean the total number of hours in a day and days in a week that employees are required to work and the distribution of those hours and days. Any addition, reduction, or rearrangement of working hours or days by an employer is a mandatory subject of bargaining.

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<sup>7</sup>Massey Gin and Machine Works, Inc. (1948) 78 NLRB 189 [22 LRRM 1191]; Timken Roller Bearing Co. (1946) 70 NLRB 500 [18 LRRM 1370] (enforcement denied on other grounds), 161 F.2d 949, 20 LRRM 2204 (6th Cir. 1947).

<sup>8</sup>See also Camp and McInnes (1952) 100 NLRB 524 [30 LRRM 1310] where without consultation with or notice to the union, the employer reduced the lunch period of its employees from one hour to thirty minutes, and changed the quitting time from 5:00 P.M. to 4:30 P.M., the NLRB finding that the employer had violated sec. 8(a)(5) of the LMRA.

## "Hours" in the Public Sector

### A. California

The Meyers-Miliias-Brown Act (MMBA) Government Code section 3500 et seq., governing employer-employee relations in local public agencies, provides for a scope of representation "including, but not limited to, wages, hours, and other terms and conditions of employment. . . ." <sup>9</sup>

The California courts have not addressed the narrow issue of whether the schedule of hours is a mandatory subject of negotiations pursuant to the "hours" provision of the MMBA. In Firefighters Union v. City of Vallejo, supra, the court did not pass upon the question because the language of the city charter provision closely paralleled the language of the MMBA. Similarly, in Huntington Beach Police Association v. Huntington Beach (1976) 58 Cal.App. 3d 492 [92 LRRM 2996], the court did not relate the schedule of hours specifically to "hours" but only to wages, hours and other terms and conditions of employment generally. As held by the PERB itself in Fullerton Union High School District Personnel and Guidance Association v. Fullerton Union High School District (6/30/78) PERB Decision No. 53, since the Educational Employment Relations Act delineates the phrase "and other terms and conditions of employment," the above-cited cases may not be applicable precedent.

### B. Other States

Employment Relations boards or courts in at least seventeen states have issued decisions on the negotiability of either the entire school calendar or one or more of its parts.<sup>10</sup> Each state ultimately rests its decision on the interpretation of its own statute. An examination of the decisions in other states on the issue of the negotiability of "school calendar" shows that the

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<sup>9</sup> Sec. 3504.

<sup>10</sup> The PERB has made use of decisions from other states where pertinent. See Sweetwater, supra, and New Haven Unified School District (3/22/77) EERB Decision No. 14.

states are evenly divided.<sup>11</sup>

<sup>11</sup>States which have found the school calendar as it relates to teachers to be negotiable, either in whole or in part, include: Washington, Edmonds Education Association v. Edmonds School District (PERC 1977), Case No. 194-U-76-13, 1 CCH Public Employee Bargaining Reporter 4606 (CCH PEER), (Washington Public Employment Relations Commission decision that school calendar constitutes hours of employment); Wisconsin, City of Beloit v. WERC (1976) 242 N.W.2d 231 [92 LRRM 3318] and Board of Education v. WERC (1971) 191 N.W. 2d 242 [78 LRRM 3030] (Wisconsin Supreme Court decision affirming Wisconsin Employment Relations Commission's ruling that all aspects of the school calendar are negotiable); Indiana, Northern Community Schools of Tipton County (1975) 1 IPER 38, 1 CCH PEER 4248, (Indiana EERB determination that "hours" means "[t]he number of hours the school employee is going to work and the periods of time that work will be performed, including starting time, ending time, and the time out from work when the school employee is completely free from any assignment."); Florida, Escambia Education Association (1976) 2 FPER 92, aff'd Escambia County School Board v. Florida PERC (1977) 3 FPER 270, 1 CCH PEER 4199 (Florida Court of Appeal affirms Florida PERC decision that school calendar is proper subject of bargaining); Massachusetts, Boston Teachers Union, Local 66, AFT (AFL-CIO) v. School Committee of Boston (1976) 2 CCH PEER 20,155, 350 N.E.2d 707, (Massachusetts Supreme Judicial Court held that required hours of teaching is a "proper" subject of bargaining although the Supreme Court did not indicate whether hours was a mandatory or permissive subject of bargaining); Michigan, Westwood Community Schools (1972) 7 MERB Lab. Op. 313 (start and end dates negotiable); New Jersey, Byram Board of Education v. Byram Education Association (1977) 96 LRRM 3059, (start and end time of workday negotiable); New York, City School District of the City of Oswego v. Helsby (1973) 346 N.Y.S.2d 27, 2 PBC ¶20,082, (total number of workdays negotiable); Nebraska, Seward Education Assn. v. School District of Seward (1971) 1 CCH PEER 4400; Norfolk Education Assn. (1971) 1 CCH PEER 4400.

On the other hand, numerous states have held that school calendar is not negotiable: Alaska, Kenai Peninsula Borough School District v. Kenai Peninsula Education Association (1977) 97 LRRM 2153; Connecticut, West Hartford Education Association, Inc. v. Dayson DeCourcy (1972) 1 CCH PEER 10,217, 295 A.2d 528, (Connecticut Supreme Court held school board is not required to bargain with teachers concerning the length of their school day, the school calendar or the scheduling of extra curricular activities since these matters are subjects of educational policy to be determined by school board alone); Hawaii, In Re Department of Education (1973) Case No. DR-05-5, (scheduling of teacher preparation periods is, in effect, the scheduling of work and a matter of inherent management rights); Iowa, Bettendorf-Dubuque (1976), Case Nos. 598 and 602, (management retains the right to fix the length and division of the school year and thus school calendar is a permissive subject of bargaining); Maine, City of Biddeford v. Biddeford Teachers Association (1973) 1 CCH PEER 10,056, (Supreme Judicial Court of Maine held the length of a teacher's workday, the scheduling and length of school vacations and the beginning and ending of the school year are educational policy decisions which are not subject to the duty to bargain); Nevada, Washoe County Teachers Association v. Washoe County School District (1976) Case No. A1-045297, (Employee-Management Relations Board held that teacher preparation time is a mandatory subject of bargaining but that school calendar is not); New Jersey, Burlington County College Faculty Assn. v. Board of Trustees (1973) 311 A.2d 733, 1 CCH PEER 10,236, (Supreme Court for New Jersey held that the establishment of a college calendar fixing the length and division of the school year was a matter of management control and decision); but see Byram Board of Education v. Byram Education Association (1977) 96 LRRM 3059, (start and end time of (footnote continued)

## The Pleasant Valley School District Calendar

Considering the above findings of fact and precedents, it is concluded that:

- (a) the starting and ending dates of teacher service is within the scope of representation as defined in section 3543.2;
- (b) the number and scheduling of teacher preparation days, parent-teacher conferences, pupil minimum days preceding pupil vacations and the scheduling of a "teachers' workday/visitation (teacher option) day" are not within the scope of representation as defined in section 3543.2.

### A. The Number of Workdays and Their Distribution

The District concedes that the total number of workdays in a year is a mandatory subject of bargaining pursuant to the EERA and in fact sought to bargain the total number of workdays with the Association. The number of workdays in a year for teachers is a matter closely related to hours of employment. Other states are in accord: Indiana (Clarksville Community School Corporation) (1975

(Footnote continued)

workday negotiable); Oregon, Eugene Education Assn. v. Eugene School District (1974) Case No. C-279, 1 PEB CR 446, (school calendar was outside the scope of mandatory bargaining and is a permissive topic of bargaining); see also Springfield Education Association v. The Springfield School District No. 19 (1974) Case No. C-278, 1 PEB CR 347 and Southland Education Assn. v. Southland School District, No. 45 (1975) Case No. C-280, 1 PEB CR 459; Pennsylvania, Pennsylvania Labor Relations Board v. State College Area School District (1975) 337 A.2d 262, 90 LRRM 2081, (Pennsylvania Supreme Court held that the exclusive representative does not have the right to bargain the school calendar which is a matter of inherent managerial policy.)

1 IPER 38); New York (City School District of the City of Oswego v. Helsby, supra); and Wisconsin (City of Madison v. WERB (1967) 155 N.W.2d 78 [65 LRRM 2488]).

The District contends, however, that the distribution of workdays (the start and end dates of the school year for teachers) is a policy matter reserved for management's unilateral determination.

The distribution of workdays is a matter "relating to . . . hours of employment" and consequently a mandatory subject of negotiations. The scheduling of the start and end dates of the school year must necessarily relate to "hours of employment" since the start and end dates of the school year determine when the individual teacher must perform his duties. When the individual teacher must perform his duties affects his advanced study (which in many school districts determines salary), supplementary employment, travel and vacation.

To hold the schedule of workdays to be negotiable does not ignore the important responsibilities vested in the District, representing the educational needs of the community, to allow families and classified employees their summer vacations, to ascertain dates for the opening of school for the purchasing and delivery of supplies, and to coordinate its calendar with that of the high schools for the convenience of families with children in both school districts. It is believed that the District's duty to represent the educational needs of the community, while complying with its collective negotiating responsibilities pursuant to the EERA, are best served by presenting the community's interest at the bargaining table in an exchange of proposals in a good faith attempt to reach agreement with the teachers' negotiating representative regarding the beginning and ending dates of the school year for teachers.<sup>12</sup>

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<sup>12</sup> It should be noted that the EERA contains detailed public notice procedures which allow considerable community involvement in all aspects of the negotiations. Pursuant to sec. 3547, school district and employee organization representatives must present their initial negotiating proposals at public meetings, and negotiations may not commence until the public has been given reasonable time to express its opinion on the proposals. Community concern regarding the scheduling of the school year's beginning and ending dates may be reflected at that time.

## B. Duties on Workdays

The remaining issues all relate to the particular duties to be performed on workdays. Thus, the Association seeks to negotiate the number and scheduling of teacher preparation days, parent-teacher conference days, pupil minimum days preceding pupil vacations, and the scheduling of a "teachers' workday/visitation" day. The District contends that these matters primarily impact upon the level and nature of the educational program and therefore fall within the District's managerial prerogatives.

Section 51002 of the Education Code provides, in part:

[I]t is the intent of the Legislature to set broad minimum standards and guidelines for educational programs and to encourage local districts to develop programs that will best fit the needs and interests of the pupils, pursuant to stated philosophy, goals and objectives.

Education Code section 51041 provides:

The Governing Board of every school district shall evaluate its educational program and shall make such revisions as it deems necessary. Any revised educational programs shall conform to the requirements of this division.

Therefore, pursuant to the Education Code the District has a clear managerial responsibility to maintain the educational program for the pupils. While some matters of school calendar relate directly to "wages" and "hours of employment" of certificated employees, others do not. Having concluded that the number and scheduling of workdays is negotiable and that the District negotiated duty hours per day, nothing regarding "school calendar" remains which are "matters relating to . . . hours of employment." That which remains of "school calendar" after negotiating the number and scheduling of workdays and duty hours per day, however, directly affects the educational program. It is thus concluded that the particular duties performed during a workday (teacher preparation, teaching, parent-teacher conferences, pupil minimum days preceding pupil vacations, "teachers' workday/visitation (teacher option) day") are not matters relating to "hours of employment", are not specifically enumerated as "terms and conditions of employment", and are therefore not mandatory subjects of negotiation.

### Respondent's Contentions Regarding "Business Necessity" of Calendar Adoption

Having concluded that the starting and ending dates of teacher service are within the scope of representation pursuant to section 3543.2, it must be determined whether the District failed or refused to meet and negotiate in good faith with respect to this aspect of "school calendar."

The District vigorously defends its unilateral adoption of a "tentative" school calendar on May 19, 1977, which contained the starting and ending dates of teacher service, or the grounds that it had compelling reasons for adoption of the calendar (requests for the school schedule from members of the community, necessity of informing its employees of their work schedules and the District's own business requirements for scheduling purchase and delivery dates of supplies).

The defense of "business necessity" to a unilateral action appears to be available when the exigencies of the employer's business require an immediate management decision in order to prevent serious harm or disaster to the business.<sup>13</sup>

The facts in the instant matter are that the District unilaterally adopted its school calendar for the 1977-78 school year on May 19, 1977, two weeks after the Association submitted its initial contract proposal for the 1977-78 school year which contained a proposal for school calendar.

The evidence further shows that while the District agreed to and did in fact negotiate certain elements of the school calendar (duty hours and number of duty days per year) the District steadfastly took the position that the scheduling of workdays (including the starting and ending dates of teacher service) is not an item within the scope of representation pursuant to section 3543.2 and therefore refused to negotiate said item of the school calendar.

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<sup>13</sup> See Morris The Developing Labor Law 1971, p. 324.

In NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177], the United States

Supreme Court held:

. . . the duty [to bargain collectively] . . . may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within the scope of representation and about which the union seeks to negotiate, violates [the LMRA] though the employer has every desire to reach agreement with the union upon an overall collective agreement and earnestly and in good faith bargains to this end. [50 LRRM at 2180] [Emphasis added.]

Thus, while it may be that the District negotiated with a desire to reach agreement with the Association upon an overall contract and earnestly and in good faith bargained toward agreement, it nevertheless remains that the District refused to negotiate the starting and ending dates of teacher service.

Because the District adopted the school calendar on May 19, 1977, two weeks after the Association presented its initial proposal and over three months before the opening day for the 1977-78 school year, never attempted to reach agreement on the starting and ending dates of teacher service through negotiation with the Association, and was able, without apparent difficulty, to notify all certificated staff of the unilaterally determined dates of teacher service during the first week of August 1977, the District's "business necessity" defense cannot overcome the conclusion that it failed to negotiate with the Association regarding a mandatory subject of negotiation in violation of section 3543.5(c) and concomitantly section 3543.5(b).

#### Allegation Regarding Section 3543.5(a)

The PERB itself held in San Dieguito Faculty Association v. San Dieguito Union High School District EERB Decision No. 22 (9/2/77), that in order to prove a violation of section 3543.5(a) the charging party must show either that the allegedly illegal conduct was carried out with the intent to interfere with



employee rights or that the conduct had the natural and probable consequence of interfering with the exercise of employee rights. Because the District did meet and negotiate with the Association regarding the number of workdays and duty hours, and did reach agreement with the Association regarding all matters relating to wages, hours and other terms and conditions of employment except for the items relating to school calendar dealt with herein, it is concluded that the District's failure to negotiate the starting and ending dates of teacher service was not carried out with the intent to interfere with employee rights nor that it had the natural and probable consequence of interfering with the exercise of employee rights. Accordingly, no violation of section 3543.5(a) is found.

#### REMEDY

Government Code section 3541.5(c) provides that the PERB shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the Educational Employment Relations Act.

Under the facts of this case, an order to cease and desist from failing or refusing to meet and negotiate in good faith over the subject matters determined within this decision to be mandatory subjects of negotiations is adequate to remedy the unfair practice. In addition, an order to post copies of the order will be required. A posting requirement effectuates the policies of the EERA in that it serves to inform the employees of the disposition of the unfair practice charge, and further, announces the readiness of the District to comply with the decision. See NLRB v. Empress Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415, 420].

#### RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to section 3541.4(c), it is hereby ordered

that the Pleasant Valley School District, its governing board, and other representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally taking action on matters within the scope of representation without meeting and negotiating upon request with the Pleasant Valley School District Education Association;

2. Failing or refusing to meet and negotiate in good faith with the Pleasant Valley School District Association upon request with regard to the starting and ending dates of teacher service.

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

1. Prepare and post copies of this Order at all of its schools and work sites for twenty (20) calendar days in conspicuous places, including all locations where notices to certificated employees are customarily posted;

2. At the end of the posting period, notify the Los Angeles Regional Director of the Public Employment Relations Board of the action it has taken to comply with this Order.

It is further ordered that the unfair practice charge is dismissed with respect to the allegation that the Pleasant Valley School District violated section 3543.5(a).

Pursuant to California Administrative Code, tit. 8, section 32305, this Proposed Decision and Order shall become final on July 31, 1978, unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of this Proposed Decision. 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

PERB itself. See Cal. Admin. Code, tit. 8, sections 32300 and 32305

(as amended).

Dated: July 7, 1978

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Kenneth A. Perea  
Hearing Officer