STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SUTTER EDUCATION ASSOCIATION,	)	
	)	
Charging Party,	)	Case No. S-CE-182
	)	
v.	)	PERB Decision No. 175
	)	
SUTTER UNION HIGH SCHOOL DISTRICT,	)	October 7, 1981
	)	
Respondent.	)	
	)	

Appearances: Wayne T. Carothers, Consultant, California Teachers Association, for the Sutter Education Association; Jon A. Hudak, Attorney (Breon, Galgani & Godino) for the Sutter Union High School District.

Before Gluck, Chairperson; Moore and Tovar, Members.

DECISION

The Sutter Union High School District (hereafter District) excepts to the attached Public Employment Relations Board (hereafter PERB or Board) hearing officer's proposed decision. The hearing officer found that the District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA)[1] by unilaterally changing unit members'

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[1]EERA is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code, unless otherwise noted.

Section 3543.5 provides:

It shall be unlawful for a public school

workday from five to six periods, a matter within the scope of representation.

After considering the entire record and briefs of the parties, the Board adopts the hearing officer's findings of fact as the findings of the Board itself. The Board affirms his conclusions of law in accordance with the following discussion.

DISCUSSION

Waiver

The District asserts that the Sutter Education Association (hereafter the Association), the exclusive representative of a unit of the District's certificated employees, waived its right to negotiate about the six-period day by its failure to demand negotiations prior to the July 10, 1978 school board meeting. At that meeting, the school board voted to change the teachers' workday from five to six periods thereby eliminating a forty-five minute preparation period.

Current PERB and National Labor Relations Board (hereafter NLRB) precedent[2] supports the hearing officer's finding that

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employer to:

. . . . . .

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

[2]Relevant cases under the National Labor Relations Act are persuasive precedent in the interpretation of California labor relations statutes. Fire Fighters Union v. City of

an exclusive representative's waiver of the right to negotiate must be "clear and unmistakable." In San Mateo County Community College District (6/8/79) PERB Decision No. 94 at p. 22 the Board held that, for an employer to show that a union waived its right to negotiate, it must demonstrate:

> . . . either clear and unmistakable language, Amador Valley JUHSD (citation), or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. [citations.] (Emphasis added.)

In accord, see Harrison Manufacturing v. UAW (1980) 253 NLRB No. 97 [106 LRRM 1021].

The record clearly establishes that the District gave the Association no "reasonable opportunity" to negotiate over the six-period day issue. The District did not consider the meetings after June 28 and before July 10 as negotiating sessions and refused the Association's request that the Association's negotiating team be present at these sessions to "investigate the possibility of a six-period day". The employer implemented the six-period day on July 10, after the investigation meetings and then ignored the Association's two requests to negotiate in July and August. Based on these facts, the Board adopts the hearing officer's finding

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Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55 [151 Cal.Rptr. 547].

that the Association did not waive its right to negotiate.

Scope of Representation

The District excepts to the hearing officer's finding that the subject of a six-period teaching day is within the scope of representation and that the District's unilateral increase in teacher instructional periods and reduction of preparation time violated section 3543.5(c).

Under section 3543.5(c), an employer is obligated to meet and negotiate in good faith with an exclusive representative only about matters within the scope of representation. Thus, an employer's unilateral change about a matter outside the scope of representation would not be a 3543.5(c) violation.

Section 3543.2[4] limits the subjects of negotiations to "matters relating to wages, hours of employment" or other specifically defined "terms and conditions of employment."

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[4]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 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 hearing officer's proposed decision was issued prior to the Board's promulgation of a balancing test to determine negotiability as set forth in San Mateo City School District, (5/20/80) PERB Decision No. 129, and reaffirmed and elaborated upon in Healdsburg Union High School District (6/19/80) PERB Decision No. 132 and Jefferson School District (6/19/80) PERB Decision No. 133.

In San Mateo City School District, the district unilaterally lengthened the minimum teacher instructional day and eliminated a 30-minute preparation period leaving intact the overall 7 1/4-hour workday and the duty-free lunch period. As in the instant case, the San Mateo District argued that, as long as the total workday remained constant, it was management's prerogative to alter teacher instructional time. The Board rejected this argument and held:

> the Education Code. In addition, the 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 the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

> [T]o the extent that a change in the length of the teachers' instructional day affects the length of the working day or existing duty-free time, the subject is negotiable. Similarly, at least to the extent that changes in available preparation time affect the length of the employees' workday or duty-free time, that subject is negotiable. [Ibid, at p. 19.]

The hearing officer's finding is in accord with San Mateo City School District and we therefore affirm his holding that the District violated section 3543.5(c).

The Business Necessity Argument

The District contends that even if it made a unilateral change about a matter within the scope of representation, it did so because of business necessity and should, therefore, not be found to have violated section 3543.5(c).

In San Francisco Community College District (10/12/79) PERB Decision No. 105, the District, citing business necessity as a defense made unilateral changes in employment after the passage of Proposition 13. The Board refused to allow the defense and stated:

> Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. An employer is under no obligation at any time to reach agreement with the exclusive representative. The duty imposed by the statute is simply -- but unconditionally -- the duty to meet and negotiate in good faith on matters within the scope of representation.

The Sutter District asserted that it was obligated to establish a curriculum that met the minimum requirements of the Education Code, the admission requirements of the University of California and its own self-imposed requirements. The District argued that it could not have met these requirements except for the imposition of a sixth period. Yet, as in San Francisco Community College District, supra, the District's assertion of business necessity is a position for the negotiating table rather than an excuse for refusing to negotiate.[5] We do not find the District was permitted to insure that the curriculum remain the same by unilaterally altering the length of the teachers' instructional day. The hearing officer correctly stated that:

> A school board which knows it must make a decision that will have impact on employee working conditions cannot sit back until the eleventh hour, make a unilateral decision and then plead business necessity as a defense.

The Remedy

The Board affirms the appropriateness of the hearing

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[5]The Board in San Mateo County Community College District (6/8/79) PERB Decision No. 94 and in San Francisco Community College District, supra, relied on the United States Supreme Court decision in NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Katz stated that although generally unilateral changes in conditions of employment about matters within scope constitute a refusal to bargain, "there might be circumstances which the [NLRB] could or should accept as excusing or justifying unilateral action . . . ." As in Katz, San Mateo, and San Francisco Community College District, we find no such circumstances presented here.

officer's remedy including return to the status quo ante.[6] However, the Board recognizes the possibility that the parties may have agreed to some other schedule that is mutually acceptable. To maximize the flexibility of the Board's order, we expressly leave with the Association the right to waive the requirement that the District reinstate the five-period schedule.[7]

The Board further orders that the parties return to the negotiating table, should the Association so request, to negotiate with respect to the teachers' instructional day and preparation time.

The District shall also be required to sign and post the Notice to Employees attached as Appendix to this Decision and Order.

To effectuate the policies and purposes of the EERA the employees affected by the District's unlawful conduct should be

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[6]The Board's remedial authority is found in section 3541.5(c). Section 3541.5(c) provides:

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

[7]See San Mateo City School District, supra, at page 25 for a similar remedy.

notified of the Board's order of the District's readiness to comply. Posting the attached Notice to Employees will satisfy this purpose.

ORDER

Upon the foregoing facts, conclusions of law, and entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Sutter Union High School District and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Sutter Education Association with respect to teacher preparation and the teacher instructional day;

(2) Unilaterally changing the hours of employment, including length of the teachers' instructional day and preparation time without negotiating with the Sutter Education Association.

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

(1) Reinstate the schedules with respect to preparation time and the five-period instructional day that were in effect prior to July 10, 1978, if the Association so requests.

(2) Upon request, meet and negotiate in good faith with the Sutter Education Association with respect to preparation time and a five-period instructional day.

(3) Post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its headquarter's office and at each of its school sites for 20 consecutive workdays. Copies of this notice, after being duly signed by the authorized agent of the District, shall be posted within five workdays of the date of service of this Decision. Reasonable steps should be taken to insure that said notices are not reduced in size, altered, defaced or covered by any other material.

(4) Notify the Sacramento regional director of the Public Employment Relations Board in writing within 30 workdays from the receipt of this decision, of what steps the District has taken to comply herewith.

This order shall become effective immediately upon service of a true copy thereof on the Sutter Union High School District.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

Irene Tovar, Member

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS BOARD

An Agency of the State of California

After a hearing in unfair practice case No. S-CE-182, in which all parties had the right to participate, it has been found that the Sutter Union High School District violated the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Sutter Education Association with respect to preparation time and changes in the length of the teachers' instructional day. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT fail or refuse, upon request, to meet and negotiate with the Sutter Education Association with respect to teacher preparation and the teacher instructional day.

WE WILL NOT fail or refuse, upon request of the Sutter Education Association, to reinstate the schedules with respect to preparation time and the five-period instructional day that were in effect prior to July 10, 1978.

WE WILL NOT CHANGE the wages, hours of employment, or other terms and conditions of employment without negotiating with the Sutter Education Association.

Sutter Union High School District

_____

By:

Dated: _____

PUBLIC EMPLOYMENT RELATIONS BOARD
STATE OF CALIFORNIA

SUTTER EDUCATION ASSOCIATION,

Charging Party,

v.

SUTTER UNION HIGH SCHOOL DISTRICT,

Respondent.

Unfair Practice
Case No. S-CE-182-78/79

PROPOSED DECISION
(May 25, 1979)

Appearances: Wayne T. Carothers, Consultant, California Teachers Association, for the Sutter Education Association; Jon A. Hudak, Attorney (Breon, Galgani & Godino), for the Sutter Union High School District.

Before Ronald E. Blubaugh, Hearing Officer

PROCEDURAL HISTORY

This case raises the issue of whether a school district committed an unlawful act by requiring its staff to teach six periods each day rather than five periods, as in the preceding year.

The Sutter Education Association (hereafter Association) filed this unfair practice charge against the Sutter Union High School District (hereafter District) on October 3, 1978. The charge alleges that the District unilaterally changed working conditions in violation of Government Code section

3543.5(a), (b) and (c).[1] A settlement conference was held on October 25, 1978 but the parties were unable to reach agreement. A formal hearing was conducted on December 4 and 5, 1978 at the Sacramento Regional Office of the Public Employment Relations Board (hereafter PERB).

At the start of the hearing, the Association amended its charge to drop the allegation that the District's actions were a violation of Government Code section 3543.5(a) and (b).

FINDINGS OF FACT

The Sutter Union High School District contains one school, Sutter High School. In 1978-79, the school had an average daily attendance of approximately 540 students. Since May of 1976, the Association has been the exclusive representative of a unit of the District's certificated employees.

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[1]Government Code section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Over the years, Sutter High School teachers have been required to teach variously five, six or seven periods, daily. A period is a block of time, currently set at 45 minutes in the District. When the teachers have had a five-period instructional schedule, they have been required each day to teach five classes of students. When the teachers have had a six-period day, they have been required each day to teach six classes of students. Some years ago, the District's teachers were required to teach seven periods each day. However, for at least the four years preceding the 1978-79 school year the District's teachers have had a five-period instructional day.

In the 1977-78 school year, the daily instruction of students took place over six teaching periods. Each teacher was required to teach five of those six periods. The instructional day during 1977-78 was broken down as follows: period one, 8:45 a.m. to 9:30 a.m.; period two, 9:35 to 10:20; period three, 10:35 to 11:20; period four, 11:25 to 12:10 p.m.; period five, 12:55 to 1:40, and period six, 1:45 to 2:30. The nonteaching periods of individual teachers were staggered throughout the day. Teachers occasionally were required to use their nonteaching period to serve as a substitute for another teacher who was absent. Teachers also occasionally were required to use their nonteaching period to have a conference with the parent of a student. For the most part, however, this nonteaching period was used by teachers to grade papers, write exams and prepare for their classes.

The 1977-78 schedule also provided for a student activity period at the end of the school day, from 2:35 p.m.

to 3:15 p.m. During this period, teachers were required to remain in their classrooms and assist any students in need of help. When no students were present, teachers used the activity period as additional preparation time.

In 1977-78, teachers were required to be present at school from 8:15 a.m. until 3:45 p.m. Teachers were required to be in their classrooms at 8:30 a.m. but had no particular assigned duties until the start of their first class. Although teachers technically were required to be present until 3:45 p.m. every day, it was an established practice that they usually were free to leave after 2:30 p.m. on Fridays. In some emergency situations, teachers have been required to stay at school after 4 p.m.

In March of 1978, the District announced plans to reduce its teaching staff by six employees for the 1978-79 school year. The District had 26 teachers in the 1977-78 school year. For the 1978-79 school year, the District employed 20.5 teachers. In conjunction with this reduction in teaching staff, the District announced that it would eliminate some 32 class sections formerly open to students. On May 10, 1978, the District teachers conducted what they described as a "Public Forum." This session was a public meeting at which teachers and members of the community expressed their reactions to the reductions. Teachers attending the session complained that the layoff and reduction of program would injure the quality of education in the District.

The agenda for the June 28, 1978 board of trustees meeting presented the first indication that the District might require its teachers to teach six daily periods in 1978-79. Toward the bottom of the agenda was this entry: "Investigate six-period teaching day."

In the early portion of the June 28 meeting, the board of trustees ratified a contract with the Association for a two-year term, extending through June 30, 1980. Later, the board of trustees approved a motion directing the District administration to "investigate the possibility of having a six-period day." After the board approved the motion, District Superintendent Wayne Gadberry asked Association President Vernon Brewer to select an Association member to discuss the issue.

While the school board's action was couched in terms of a directive to "investigate," there is substantial evidence that if the board had not already decided to have a six-period teaching day, it was leaning strongly in that direction. Russell Mayfield, a parent who attended the meeting, testified that on June 28 he told the board members that he believed the issue of a six-period day already had been decided behind closed doors. Mr. Mayfield testified that after he made that remark, board member "Bruce Harter responded directly to that in a rather heated manner that, yes, in fact the issue had been decided and we were going to have a six-period teaching day in the coming school year."

Association member Raymond Arata, a District teacher of mathematics, volunteered to serve on the superintendent's committee to investigate the six-period teaching day. Prior to the start of the committee deliberations, Association President Brewer told Mr. Arata that he was not empowered to negotiate on behalf of the Association but rather he was just "giving input to the District." Mr. Arata testified that the District also made it clear that he was just to give "input." District Superintendent Gadberry testified that he refused an Association request that the Association's entire negotiating committee be involved in the discussions.

Present at the first session of the committee on the morning after the June 28 board meeting were Mr. Arata, Superintendent Gadberry and Robert Sowell, the District's director of guidance who is a member of the District management team. Mr. Arata initially proposed a schedule for a five-period teaching day which would have required the rehiring of two or three teachers. However, Mr. Sowell responded that the committee was working under guidelines from the board of trustees which precluded the rehiring of any teachers.

After this discussion, Superintendent Gadberry read to the committee the following guidelines which had been prepared on the basis of instructions from the board:

> With 20 teachers teaching six periods a day with the conference period at the end of the day we can offer the following:
>
> 1. All State and Local requirements can be met.
>
> 2. All State College and University requirements can be met.

3. Between scheduled classes and contracted R.O.P. classes all reasonable student interest can be met.

4. Psychology can be reinstated in the curriculum during the Spring Semester.

5. Physics can be reinstated into the curriculum.

6. A second section of Chemistry can be reinstated into the curriculum.

7. R.O.P. and Work Experience counselling periods can be reinstated.

8. Three periods of Opportunity on campus can be offered or two periods of Opportunity and one period of counselling.

9. Ag department can be reinstated to full time with a project supervision-VEA period.

10. We can offer a second section of Spanish II.

11. The Journalism Paper and Journalism Yearbook classes can be reinstated to the teaching day.

12. We can expand upon our lower level Math by changing Intermediate Math to a year course.

13. We can introduce a second semester of State Requirements which would be a course in Health and Hygiene.

Mr. Gadberry and Mr. Sowell testified that the guidelines were designed to insure that the District's 1978-79 educational program would meet the requirements of the Education Code, the admission requirements of the University of California and the District's own educational objectives. The District's educational objectives include requirements that all students complete four semesters of science and two years of math. Mr. Sowell said these requirements are greater than those of most school districts. The District also has its own higher

requirements in social science.

Mr. Arata testified that it was impossible to assemble a class schedule which met the various requirements and still kept a five-period day and a teaching staff of 20. Given the requirements, he testified, a six-period teaching day was the only possibility. Mr. Gadberry said there were other approaches than the six-period day to deal with the reduction in teaching staff, but these were not considered by the committee because they did not meet the guidelines from the board of trustees.

On July 10, 1978, the District Board of Trustees directed that the District should have a six-period teaching day in the 1978-79 school year. Eleven of the District's 20 teachers attended the session where this decision was made and several of them spoke in opposition to the plan. The meeting lasted more than four hours and the principal subject of discussion was the proposal for a sixth period. As a result of the opposition of the teachers to the addition of a sixth teaching period, one member of the Board of Trustees proposed a reduction in the student activity period from 40 minutes to 20 minutes in the 1978-79 school year. The teachers who spoke at the meeting found the 20-minute reduction in the activity period to be the most acceptable of the various six-period schedules under consideration.

On July 12, 1978, Association President Brewer wrote a letter to the chairman of the District Board of Trustees asking why the District enacted the six-period teaching day without negotiating. He asked that the District meet

and negotiate with the Association on July 20. On July 28, 1978, Association President Brewer again wrote to the chairman of the board of trustees, complaining about the institution of a six-period day. The District did not respond to either letter.

On August 19, 1978, Association representative Tommie Rounsaville wrote Superintendent Gadberry and complained that the six-period teaching day was a violation of the contract between the parties. She asked for an informal conference to discuss the problem. On August 30, 1978, Superintendent Gadberry denied the grievance.

During the 1978-79 school year, the District's teachers reported to work at 8:15 a.m. and were free to depart at 3:45 p.m. These hours were the same as in the previous year. The beginning and ending times of the six class periods also were the same as they were in 1977-78. However, in 1978-79, each teacher taught six periods instead of five. In 1978-79, the student activity period extended from 2:35 p.m. until 2:55 p.m. The teachers each had a nonteaching period from 3:00 p.m. until 3:45 p.m.

With regard to the nonteaching period, the contract between the parties provides as follows:

> Teachers shall have one period set aside for preparation, planning, conferences and other school-related duties, except in cases of emergencies, to cover other teachers' classes, etc. The administration shall make every effort to insure equitable distribution of covering classes within each conference period.

During 1978-79, faculty meetings occurred during the nonteaching period at the conclusion of the day. Faculty meetings occur about once each month. On days on which there was a faculty meeting, teachers lost use of their nonteaching period.

Because of the addition of the sixth period, nearly all District teachers have more students in 1978-79 than they did in 1977-78. For the staff members who taught in the District both years, the total number of students increased over the two years as follows: Adamski, 104 to 154; Arata, 138 to 154; Brewer, 29 to 52; Crabtree, 92 to 122; Crowhurst, 139 to 212; Dart, 119 to 162; Getty, 124 to 160; Grahn, 110 to 155; Green, 94 to 112; Hollingshead, 120 to 177; Jacobs, 75 to 104; Jordan, 126 to 176; Kenney, 104 to 110; Looney, 77 to 153; Lowman, 154 to 218; Rhyne, 172 to 196; Rounsaville, 93 to 157; Taylor, 78 to 97; Whitmer, 147 to 158. The one teacher who had a decrease was Freund, from 78 to 47.

District teachers are working longer hours in the 1978-79 school year than they did in the 1977-78 school year. Although the witnesses found it difficult to state precisely how much their working hours have increased, there was unanimity among the teacher witnesses that they have longer hours in 1978-79. Mr. Arata estimated that the amount of time he must spend at home on school work increased by more than two and a half hours a week in 1978-79.

The increase in the number of students through the addition of a sixth period has, for example, lengthened the outside-of-class paperwork that accompanies teaching. Thomas Crowhurst, who teaches physical education and mathematics, described the effect of the increased student

load as follows:

> . . . [M]ost of that [increased work load] again comes in in test correction and in recording the scores. It doesn't come in in the preparation for the test because running off an extra ten copies doesn't probably take more than 15 seconds, but if each time you correct a test it takes you five minutes, then that's another 50 minutes for ten more students. If each time you record a grade, that takes ten seconds, that's another 50 seconds, or a hundred seconds for ten more students. . . .

The addition of a sixth teaching period also has meant that some teachers must prepare for an extra and different course. Teaching an additional course increases the total hours a teacher must spend in research, exam writing and other preparation.

The employment contract which the parties entered on June 28, 1978 contains the following provision on the length of the teacher work day:

> ARTICLE VI
> TEACHING HOURS
>
> A. The length of the teacher work day, including conference time, lunch break, morning break and the time required before and after school, shall not exceed eight (8) hours, except in the case of emergencies or special situations.

Superintendent Gadberry testified that the addition of a sixth period has not increased the amount of time teachers must work beyond the contract limit of eight hours. He offered his opinion that if teachers were to use all available time within the eight hours they could complete their duties in that period. This testimony of Mr. Gadberry is specifically rejected because it was not based on his recent observations. The key fact at issue is whether or not

teacher work hours actually increased in 1978-79 because of the addition of the sixth period. Mr. Gadberry testified that he had not been a teacher since 1965 or 1966. He also testified that he cannot and has not observed how many hours District teachers do school work at home. His personal knowledge of what occurred 13 or more years ago is too remote to be probative and he has no personal knowledge of how many total hours District teachers actually were working in 1978-79.

By the addition of the sixth teaching period, the District was able to restore 25 of the 32 class sections which it originally had announced for elimination in the 1978-79 school year.

LEGAL ISSUES

1) Is the Association estopped from bringing this action by its alleged failure to file a timely grievance or to make a timely request to negotiate about the change from a five-period teaching day to a six-period teaching day?

2) Was the District's adoption of a six-period teaching day a unilateral change about a matter within the scope of representation, in violation of Government Code section 3543.5(c)?

3) If the District's action was a unilateral change about a matter within the scope of representation, was that action excused by a business necessity?

The Estoppel and Waiver Arguments

As its initial argument, the District asserts that the Association is barred from pursuing the present action by estoppel and waiver. The District argues that the grievance filed by Mrs. Rounsaville about the six-period day was untimely and not meritorious. The District contends that the Association, having lost the grievance, is estopped from raising the same issue in an unfair practice proceeding. Moreover, the District contends, the Association did not ask to negotiate about the proposed change to a six-period teaching day until after the June 28 and July 10 meetings of the board of trustees. Because of this delay, the District reasons, the Association waived any right to negotiate about the question.

The District asserts no statute or case in support of its estoppel and waiver arguments. It is concluded that neither argument is valid.

It cannot be argued that the Association is estopped from bringing the present action because it earlier filed a grievance. By filing a grievance, the Association properly attempted to resolve the dispute through the use of the District's processes. An employee organization does not lose its statutory protections under the Educational Employment Relations Act by pursuing its contractual remedies. The right to a PERB hearing is lost only under the narrow conditions set forth in Government Code section 3541.5(a),

none of which exist in the present case.

Government Code section 3541.5(a) precludes the PERB from issuing "a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration." There was no settlement in this case and the agreement between these parties, which was introduced as an exhibit at the hearing, does not provide for binding arbitration. Section 3541.5(a) therefore does not preclude the PERB from considering the present charge.

It also is clear that the Association did not waive any right to negotiate about the six-period day by its failure to demand negotiations prior to the July 10, 1978 board meeting. Precedent involving the federal labor laws[2] holds that an exclusive representative's waiver of the right to bargain must be "clear and unmistakable." Beacon Piece Dyeing & Finishing Co. (1958) 121 NLRB 953 [42 LRRM 1489]; see also, Amador Valley Secondary Education Assn. v. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. It cannot be said that the Association made a "clear and unmistakable" waiver of any right it may have had to negotiate about the six-period day. If anything was clear

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[2]Relevant cases under the National Labor Relations Act are persuasive precedent in the interpretation of California labor relations statutes. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55 [____ Cal.Rptr. ____].

and unmistakable on June 28 and July 10 it was the Association's opposition to the six-period teaching day. No case for waiver can be made from the evidence in this record.

The Scope of Representation Argument

The District next asserts that the subject of a six-period teaching day is not negotiable because it is outside the scope of representation. If the District is correct in this assertion, it had the absolute right to make a unilateral change from a five-period to a six-period teaching day. Under Government Code section 3543.5(c), an employer is obligated to meet and negotiate in good faith with an exclusive representative only about matters within the scope of representation.

The scope of representation under the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.) is set forth at Government Code section 3543.2.[3] That

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[3]Government Code section 3543.2 provides as follows:

> 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 Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the layoff of probationary certificated school district employees, pursuant to Section 44959.5

(continued on page 16)

section limits the subjects of negotiation to "matters relating to wages, hours of employment" and other specifically defined "terms and conditions of employment." The question raised by the present case is whether the change from a five-period to a six-period teaching schedule is a matter "relating to ... hours of employment." Unless such a relationship can be shown, then the matter is not within the scope of representation. See generally, Fullerton Union High School District Personnel and Guidance Association v. Fullerton Union High School District (7/27/77) EERB Decision No. 20.

The District takes the position that the change from five to six teaching periods has not affected the hours which teachers must work. The District argues that under the contract teachers must be present for eight hours each day and all the District has done is to rearrange the nature of how teachers shall spend those eight hours. Such a rearrangement, the District contends, has no effect on the number of hours and is therefore not within the scope of representation.

(continued from footnote 3, page 15)
of the Education Code. In addition. the exclusive representative of certificated 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 the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

This argument, however, ignores the actual impact of the change to six teaching periods. The evidence clearly supports the Association contention that District teachers are working longer hours in 1978-79. The addition of the sixth period has given more students to every District teacher but one. The evidence establishes that the more students a teacher teaches the more hours the teacher must spend in grading and recording tests and papers. The more classes a teacher teaches, the more classes for which the teacher must do research, write exams and otherwise prepare. Additional tasks require additional time.

Contrary to the assertion of the District, the contract between the parties did not permit this change. The contract provision on hours (p. 11, supra) provides only that except in emergencies, the work day shall not "exceed" eight hours. The contract does not fix the teacher work day at eight hours. It establishes no minimum limit on the number of hours a teacher must work each day. It cannot be argued, therefore, that the contract authorizes any change in the past practice which would have the effect of lengthening the total numbers of hours a teacher must work each day.

Because the change from a five-period to a six-period teaching day is related to the number of hours which a teacher must work, it is concluded that the matter is within the scope of representation.

The "No Unilateral Change" Argument

The District next argues that even if the change to a six-period day involved a matter within the scope of representation, the change was not unilateral. The District argues that it "consulted at length" with the Association and that prior to its July 10, 1978 decision, the board of trustees reached a "compromise" with the Association. The purported July 10 compromise was that the Association accepted the reduction in the student activity period in exchange for the addition of a sixth period.

These District arguments are not supported by the record. The participation by Mr. Arata in the sixth period study committee could under no reading of the record be considered negotiation or even consultation by the Association. With the restrictions placed on the committee by the superintendent and the board of trustees, it is apparent that the only task of the committee was to prepare a schedule to implement the sixth period. The committee did not have the leeway to do anything else.

Neither can it be contended that the discussion on July 10 between the board of trustees and various teachers amounted to a negotiating session and an Association compromise. Those discussions did not involve a District offer and an Association acceptance of a proposal to institute a six-period day in exchange for a reduction in the length of the student activity period. Rather, the Association was presented with a series of proposals for

how classes would be scheduled under a six-period day. After hearing various teacher complaints, the board of trustees proposed still another schedule, one which reduced the length of the student activity period. One or more Association representatives then told the board of trustees that the Association preferred the schedule with the shortened activity period. These comments did not create a negotiated agreement to institute the six-period day. They were simply a statement of preference for the least objectionable alternative.

It is concluded, therefore, that the District did make a unilateral change that related to hours, a matter within the scope of representation. An employer's unilateral change about a matter within the scope of representation is per se a refusal to negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Education Association, CTA/NEA v. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51. It is a violation of Government Code section 3543.5(c) for a public school employer to fail to meet and negotiate in good faith.

The Business Necessity Argument

As a final line of defense, the District asserts that even if it made a unilateral change about a matter within the scope of representation, it did so as a necessary and appropriate business necessity. The District asserts that it was obligated to establish a curriculum that meets the

minimum requirements of the Education Code, the admission requirements of the University of California and its own self-imposed requirements. The District asserts that it could not have met these requirements except for the imposition of a sixth period.

Even if business necessity is a valid defense for a unilateral action, an issue yet to be considered by the PERB, the District has not shown a business necessity in the present case. The District has demonstrated no reason why it was precluded from negotiating with the Association about the effects of the imposition of a sixth period on teacher working hours. The decision to lay off six teachers was made in early March. Classes for the 1978-79 school year did not begin until the following September, some six months later. There was a great deal of time for the District and the Association through negotiations to mutually explore the effects of the layoff and the effects of an additional daily teaching period on teacher work hours. Meeting together, the parties might have developed a plan which was agreeable to both. But by acting unilaterally, the District foreclosed the possibility of a mutual agreement. A school board which knows it must make a decision that will have an impact on employee working conditions cannot sit back until the eleventh hour, make a unilateral decision and then plead business necessity as a defense.

For all of these reasons, it is concluded that the District's imposition of a six-period teaching day in the

1978-79 school year was an unlawful unilateral action about a matter within the scope of representation and a violation of Government Code section 3543.5(c).

THE REMEDY

The Association has several times modified the remedy it seeks in the present case. In its final amended form, the remedy desired by the Association is a return to the status quo, i.e., the reinstatement of the five-period teaching day.

Under Government Code section 3541.5(c), the PERB is given:

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

In cases involving unlawful unilateral actions, an order to reinstate the status quo is appropriate. NLRB v. Allied Products Corp. (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433] enforcing as modified 218 NLRB 1246 [89 LRRM 1441]; Southeastern Michigan Gas Co. (6th Cir. 1973) 485 F.2d 1239 [85 LRRM 2191] affirming 198 NLRB 1221 [81 LRRM 1350].

It also is appropriate that the District be directed to cease and desist from the unfair practice and that the District be directed to post a copy of the attached order. California School Employees Association, Chapter 658 v. Placerville Union School District (9/18/78) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Sutter Union High School District, board of education, superintendent and representative shall:

A. CEASE AND DESIST FROM:

Refusing to meet and negotiate in good faith with the Sutter Education Association by unilaterally instituting a six-period teaching day and thereby affecting a matter related to the hours which teachers must work, in violation of Government Code section 3543.5(c);

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

1. Rescind its requirement that teachers must teach six periods each day and return to the past practice of requiring teachers to teach five periods each day;

2. Post at all school sites, and all other work locations where notices to certificated employees customarily are placed, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive days from the date this proposed order becomes final. Reasonable steps should be taken to insure that the notices are not altered, defaced or covered by any other material.

3. Notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, within 20 days

of the date this proposed decision becomes final, of what steps the District has taken to comply with this order.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 14, 1979 unless a party files a timely statement of exceptions. See Calif. Admin. Code, tit. 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on June 14, 1979 in order to be timely filed. See Calif. Admin. Code, tit. 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the PERB itself. See Calif. Admin. Code, tit. 8, sections 32300 and 32305, as amended.

Dated: May 25, 1979

Ronald E. Blubaugh
Hearing Officer

APPENDIX

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

After a hearing at which all parties had the right to participate, it has been found that the Sutter Union High School District violated the Educational Employment Relations Act by unilaterally requiring teachers to teach six periods of instruction each day. This unilateral action, taken without negotiation with the exclusive representative Sutter Teachers Association, was a violation of the District's obligation to negotiate in good faith. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

Cease and Desist from refusing to meet and negotiate in good faith with the Sutter Education Association by unilaterally instituting a six-period teaching day and thereby affecting a matter related to the hours which teachers must work.

We WILL rescind the requirement that teachers must teach six periods each day and return to the past practice of requiring teachers to teach five periods each day.

SUTTER UNION HIGH SCHOOL DISTRICT

_____

By:

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.