STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANAHEIM SECONDARY TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-116
v.	)	PERB Decision No. 177
ANAHEIM UNION HIGH SCHOOL DISTRICT,	)	October 28, 1981
Respondent.	)	

Appearances: Paul Crost, Attorney (Reich, Addell, Crost, & Perry) for Anaheim Secondary Teachers Association, CTA/NEA; Kyle D. Brown, Attorney (Hill, Farrer & Burrill) for Anaheim Union High School District.

Before Gluck, Chairperson; Jaeger, Moore, and Tovar, Members.

DECISION

The Anaheim Union High School District (hereafter District) excepts to a hearing officer's proposed finding that released time is a subject of mandatory negotiations and that the District may not pass the cost of compensated released time on to the exclusive representative, the Anaheim Secondary Teachers Association (hereafter ASTA).

FACTS

The facts are stipulated to by the parties. The Association charged that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA),[1] alleging that the District

[1]All statutory references are to the California

had initially restricted released time to hours outside of the instructional workday. The District applied this policy to provide released time without compensation. A second policy, unilaterally adopted June 29, 1977, provided a maximum of 12 days' released time without loss of compensation for 7 employee negotiators. However, this policy also included a provision passing on the released-time costs by requiring the exclusive representative to pay the District at the median daily salary rate for unit employees. Throughout the period of implementation of both employer policies, the employer refused requests by the employee organization to meet and negotiate over the subject of released time.

Government Code unless otherwise stated. EERA is codified at section 3540, et seq.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for 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.
>
> . . . . . .

The hearing officer found that the District's initial policy was not applied unreasonably because the stipulated facts demonstrated that no burden was thereby placed on the negotiating process. The ASTA did not except to the hearing officer's ruling as to this first District policy.

As to the second policy, the hearing officer found: that there was no unlawful unilateral adoption of the policy because the parties to negotiation must start from some released-time base and that a school employer is free to establish the threshold policy providing that it is reasonable; that, thereafter, released time is subject to negotiations because of the subject's relationship to hours and wages; that passing on released-time costs to the exclusive representative is prohibited by section 3543.1(c).[2]

DISCUSSION

Three issues are raised by this case: (1) is released time a mandatory subject of negotiations; (2) if so, may the employer unilaterally establish an initial released-time policy, and (3) may an employer pass on its released-time costs to the exclusive representative?

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[2]Section 3543.1(c) states:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

Released Time is Within the Scope of Negotiations

The scope of representation set forth in section 3543.2 does not include any specific reference to released time.[3] However, in a series of cases dealing with the scope of representation, the Public Employment Relations Board (hereafter PERB or Board) has held that a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives

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[3]Section 3543.2 provides in relevant part:

> 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 Education Code. . . .

(including matters of fundamental policy) essential to the achievement of the District's mission.[4]

Released time, though not specifically defined in EERA, refers to time during an employee's workday during which the employee is excused from work. In the context of section 3543.1(c), it is time during the workday during which an employee is excused from work to participate in negotiations and grievance processing. Further, pursuant to the Act's requirement, the employee is to continue to receive full compensation during reasonable periods of time excused from work for these purposes.

The District's argument that released time is not related to "hours" because the employees are not actually engaged in school work during negotiations is rejected. This Board, in accord with federal and state law elsewhere, has previously found that nonworking hours during the workday may be within scope.[5] The broad subject of scheduling hours during a period or during the workday was found to be in scope in Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608

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[4]San Mateo City School District (5/20/80) PERB Decision No. 129; Jefferson School District (6/19/80) PERB Decision No. 133; Healdsburg Union High School District (6/19/80) PERB Decision No. 132. See also Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96.

[5]Palos Verdes Peninsula Unified School District/Pleasant Valley School District, supra, and cases cited therein.

[116 Cal. Rptr. 507; 87 LRRM 2453]. The United States Supreme Court has interpreted federal labor policy under the National Labor Relations Act (hereafter NLRA) to include within scope nonworking time as it affects working hours.[6]

Clearly, the subject of released time is related to wages. EERA itself requires that reasonable released time be granted without loss of compensation. Wages may be paid for hours not worked as well as for hours worked. Employees may be paid for holidays, vacations, absence due to illness, rest periods and the periods during which service on behalf of the employer is not required or performed. Here, the amount of released time without loss of compensation inherently affects the wages the employees will receive for work just as the amount of released time, irrespective of compensation, bears on the number of hours employees will or will not perform work on behalf of the employer.[7]

The District argues that released time is essentially an administrative matter which does not involve issues of substantial importance warranting negotiations. We find the reverse to be true. That the Legislature considered the matter of released time of great significance in the scheme of

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[6]Amalgamated Meat Cutters v. Jewel Tea (1965) 381 U.S. 676 [59 LRRM 2376].

[7]Accord Axelson, Inc. (1978) 234 NLRB No. 49 [97 LRRM 1234] enf. (5th Cir. 1979) 599 F.2nd 91 [101 LRRM 3007].

collective negotiations is evident from the very special treatment accorded that subject in section 3543.1(c), supra. Section 3540 sets forth the overall statutory purposes.[8] Aside from these purposes explicitly mentioned, the section demonstrates the legislative belief that good-faith negotiations--that is, the voluntary and mutual resolution of employer/employee disputes--is the preferred means of maintaining labor peace in the school system and protecting the public interest in minimizing disruptions of the educational process caused by employer/employee conflicts.

But, aside from these considerations, there is ample reason for finding that the mediatory influence of negotiations is best suited to the resolution of conflict over released time.

Underlying the statutory mandate of section 3543.1(c), a provision not found in the NLRA, is the intent that school

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[8]Section 3540 states, in part:

> 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 join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. . . .

negotiations proceed expeditiously[9] and an acknowledgement that such a result is more readily obtained if employees are relieved from work for negotiations and are not required to negotiate after the workday with a consequent undesirable impact on their teaching duties.

It is essential to the negotiating scheme of things that neither side be afforded, by law, dominance over the process, thus negating the concept of mutuality and good faith. Allowing the employer to unilaterally dictate the matter of released time, including the number of employee negotiators, amounts of compensation and scheduling of sessions, would give to the employer precisely that objectionable form of dominance. If released time were not negotiable, the only statutory recourse available to employee negotiators would be to file an unfair practice charge challenging the "reasonableness" of the employer's unilateral determination. We find such a procedure impractical and inherently contradictory of the statutory goal of expeditious settlement.

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[9]Section 3543.7 states:

> The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of impasse.

Each negotiation, from presentation of initial proposals to final settlement, has a tempo and rhythm of its own. Typically, ground rules are first established--the time and place for bargaining to start, the order of issues to be discussed, the final settlement conditions that may be imposed, questions of ratification and approval of school officials, and a variety of similar procedural matters. There generally follow sessions designed for the clarification of proposals, an interval for their evaluation and preparation of responses. Sessions on substantive matters may initially proceed at a relatively leisurely pace. Gradually, issues are settled, at least tentatively, or withdrawn and counterproposals go back and forth. Eventually, as the more difficult issues are faced, sessions tend to become longer and more frequent. As the "deadline" approaches, sessions may extend into the late night or early morning hours and even nonworking days. "Crisis bargaining" is not uncommon. To permit the employer to decide at the outset how many hours or days will finally be required and at what times negotiations shall take place and over what duration per session is to apply an inherently unrealistic formula to these arrangements and, by definition, to establish an unreasonably inflexible and mechanistic policy.

Nor would it be feasible to permit the employer to assert a new unilateral policy from day to day to accommodate these fluid and unpredictable circumstances. Indeed, it would be to

invite a never-ending confrontation on procedural matters best left to the mutual resolution by the parties who, in good faith, are seeking to reach the earliest possible mutually acceptable settlement of substantive differences.

PERB's conclusion that the determination of released time is not a prerogative reserved to the employer and that good-faith negotiations is a proper method for resolving conflict on this subject is consistent with national labor policy. In Borg-Warner Corp. (1972) 198 NLRB 726 [80 LRRM 1790], the NLRB expressly disapproved an employer's refusal to negotiate over bargaining ground rules, including time and frequency of meetings and released time, and in St. Louis Typographical Union (1964) 149 NLRB 750 at 752 [57 LRRM 1371] the NLRB held that:

> It is wholly consistent with the purposes of the Act that the parties be allowed to arrive at a resolution of their differences on preliminary matters by the same methods of compromise and accommodation as are used in resolving equally difficult differences relating to substantive terms or conditions of employment.

Finally, the District's reliance on Magnolia School District (6/27/77) EERB[10] Decision No. 19 is unavailing. There, the Board expressly declined to reach the question of

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[10]Prior to January 1, 1978, PERB was called the Educational Employment Relations Board.

whether released time is within the scope of negotiations. That issue was not raised by the parties.

The District further argues that section 3543.1(c) provides a specific exemption from the duty to negotiate. According to the District, the explicit obligation imposed on an employer would be unnecessary if negotiability were intended.

Section 3543.2, supra, expressly places certain subjects outside the scope of obligatory negotiations. Released time is not included among these matters. It is therefore impossible to find the specific exemption the District urges.

We do find in section 3543.1(c) that the Legislature considered the matter of released time too important to the statutory scheme to be left either to the employer's discretion or entirely to the vagaries of negotiations. Therefore, a minimum released-time standard was established, and thus, in effect, a standard against which the parties' good faith in negotiating on the subject could be measured.

The Initial Released-Time Policy

We disagree with the hearing officer's conclusion that an employer is entitled to establish the initial released-time policy because negotiations have to start from some base.

First, there is no legal basis for distinguishing negotiations on ground rules from negotiations on substantive issues. The duty to bargain means just that. The employer's position on procedural issues, as its position on wages, hours

or terms and conditions of employment, is to be expressed through its own proposals or counterproposals.

Second, the realities of negotiations eliminates the need for the arbitrary and artificial distinction the hearing officer has made. For example, at some time after proposals are readied for meet and confer sessions, the parties must agree on that first meeting date. Certainly, the employer cannot insist to the exclusion of the union's position that the first meeting occur on a certain date and at a certain hour. That arrangement is mutually determined whether by letter, telephone or face to face over the legendary martini. At the same time and in the same manner, agreement on released time for that initial meeting is accomplished. Agreement on succeeding sessions may also be reached at this time, although the parties may continuously adjust their arrangements with respect to frequency and duration of sessions to accommodate the changing circumstances of negotiations as they proceed.

In short, there is nothing in the process of "getting together" to start negotiation that requires the artificial division of a negotiable matter into negotiable and non-negotiable components.

The Pass-on of Released-Time Costs

The District argues that released-time costs may be passed along for reimbursement by the exclusive representative because section 3543.1(c) does not expressly prohibit such pass-on,

that the employee representatives are not actually losing compensation, and that the ultimate test for the reasonableness of the pass-on rule is whether it imposes a burden on negotiations.

The argument that the statute fails to expressly prohibit pass-ons is not persuasive. For that matter, the statute does not expressly permit or contemplate cost assessment against the employee organization. EERA's statutory structure clearly sets forth an obligation upon the employer by requiring reasonable periods of released time without loss of compensation. The effect of the District's pass-on rule would be to recover with the left hand from the employees the compensation the employer is obligated to pay with its right hand. This is so because the organization's funds are derived largely, and possibly wholly, from membership dues. Thus, the employer's policy is little short of an evasion of its statutory obligation specifically and unequivocally imposed by the Act.

It hardly needs repeating here that by this negotiation "tax" the very purposes of section 3543.1(c)--the expeditious settlement of contract issues, avoidance of procedural advantage to one party over the other, and impairment of the employee's opportunity to negotiate free of procedurally induced anxieties, would be frustrated. Ironically, the employer's policy would not only permit it to circumvent its statutory obligation but would place on the employees, the

intended beneficiaries of section 3543.1(c), the burden of financing the employer's obligation. The District's policy does not simply ignore the Act, it reverses its very meaning.

Conclusion

The Board therefore resolves the issues presented as follows:

1. Released time is a subject on which the District is obligated to negotiate in good faith;
2. The District may not impose a unilaterally determined released-time policy for any negotiating session, including the initial session or sessions.
3. The District may not unilaterally pass the cost of released time on to the exclusive representative.
4. By refusing to negotiate over released time without loss of compensation, the District violated section 3543.5(c) of the EERA and concurrently, section 3543.5(a) and (b) thereof. (See San Francisco Community College District (10/12/79) PERB Decision No. 105. By attempting to pass the cost of released time on to the exclusive representative, the District violated sections 3543.5(a) and (b) of the EERA.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the Anaheim Union High School District shall:

1. RESCIND its released time policy of June 29, 1977 and shall CEASE AND DESIST from refusing to negotiate in good faith with the Anaheim Secondary Teachers Association, CTA/NEA on the subject of released time for employee organization representatives;

2. Post at all school sites where notices to employees are customarily placed, within ten (10) workdays after the issuance of this decision, copies of the attached Notice. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not altered, defaced or covered by other material.

3. Notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, within twenty (20) workdays from the date 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 upon the District.

By: Harry Gluck, Chairperson

John W. Jaeger, Member

Barbara D. Moore, Member

Member Tovar's concurrence begins on page 16.

Member Tovar concurring:

I concur.

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Irene Tovar, Member

Appendix: Notice

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF CALIFORNIA

Pursuant to a hearing in which all parties have had the right to participate and the ORDER of the Public Employment Relations Board, the Anaheim Union High School District will cease and desist from refusing to meet and negotiate with the Anaheim Secondary Teachers Association, CTA/NEA on the matter of released time without loss of compensation for representatives of the exclusive representative and hereby rescinds its policy of passing on to the exclusive representative the released-time costs incurred by the District.

Anaheim Union High School District

By: _____
Authorized Agent

Dated: _____

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

ANAHEIM SECONDARY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, and ANAHEIM UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-116 PROPOSED UNFAIR PRACTICE DECISION April 10, 1978

Appearances: Paul Crost, Attorney (Reich, Adell & Crost) for Anaheim Secondary Teachers Association; Kyle D. Brown, Attorney (Hill, Farrer & Burrill) for Anaheim Union High School District.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

On May 2, 1977, the Anaheim Secondary Teachers Association, CTA/NEA (hereinafter Association) filed unfair practice charge LA-CE-116 against the Anaheim Union High School District (hereinafter District). On May 18, 1977, the District filed its response to the unfair practice charge.

On July 14, 1977, the Association filed a first amended unfair practice charge. The District filed its response on August 1, 1977.

Following a joinder of the pleadings, an informal conference was held. When the informal conference failed to resolve the dispute, the parties entered into stipulations of facts regarding the charges.

Unfair practice charge LA-CE-116 alleges a violation of Government Code Section 3543.5(a),[1] (b) and (c)[2] in that the District denied the Association and its members reasonable released time as required by Section 3543.1(c). It further alleges that the District refused to meet and negotiate on the subject of released time and then unilaterally promulgated a released time policy, without meeting and negotiating, was unreasonable because it required reimbursement by the Association. Such application of the District's released time policy, the Association argues, frustrates the meet and negotiate process and constitutes a bad faith effort to prolong the negotiating process and to avoid reaching a mutually acceptable collective negotiating agreement.

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[1] The Public Employment Relations Board (hereinafter PERB) in San Dieguito Union High School District (EERB Decision No. 22, September 2, 1977 at p. 14) stated that in order to find a violation of Section 3543.5(a) it would have to conclude that:

> The District's conduct was carried out with the intent to interfere with the rights of the employees to choose an exclusive representative, or that the District's conduct had the natural and probable consequence of interfering with the employees exercise of their rights to choose an exclusive representative, notwithstanding the employer's intent or motivation.

There is no evidence indicating that there was an intent to interfere with employees' rights nor is there evidence disclosing a natural and probable consequence of interference with employees' rights. Consequently, no violation of Section 3543.5(a) has been shown and this proposed decision shall address itself only to the issues of possible section (b) and (c) violations.

[2] All section references are to the Cal. Gov. Code unless otherwise specified.

ISSUE

1. Did the District deny to the Association reasonable released time for purposes of meeting and negotiating during the spring 1977 negotiating sessions?

2. Did the District breach its duty to meet and negotiate in good faith by:

   (a) Refusing to meet and negotiate on the subject of released time or,

   (b) Unilaterally promulgating a released time policy without meeting and negotiating with the Association?

3. Does the District's current released time policy contravene the requirements of Section 3543.1(c) in that the policy does not grant released time without loss of compensation?

FINDINGS OF FACT

The stipulated facts may be summarized as follows:

The Anaheim Union High School District has an average daily attendance (hereinafter ADA) of approximately 34,000. Approximately 1,377 teachers, nurses and librarians are in the Association's negotiating unit.

On December 21, 1976, the Association was recognized by the District as the exclusive representative of the regular and part-time teachers, nurses and librarians.

The Association's negotiating team was composed of one staff employee of the Association and four permanent teacher members and one rotating member. The Association staff employee was the spokesperson for the team.

Commencing on April 12, 1977, and continuing until June 29, 1977, the parties met and negotiated 11 times. The last day of the 1976-77 school year was June 17, 1977. The actual time spent in negotiating sessions between April 12 and June 29 was approximately 58 hours of which approximately 35 1/2 hours were prior to summer recess.

Prior to April 12, 1977, and continuing thereafter, the Association proposed holding negotiating meetings at times which would have involved meeting during the school day for one-half or full-day sessions. The Association "based its request for holding negotiating meetings during class hours on both the Rodda Act and existing board policy." Other than on May 31 and June 7, 1977, the board's representative did not agree to hold negotiating sessions during the school day.[3]

The board policy on released time in effect prior to June 22, 1977 was "adopted by the governing board on September 11, 1975 pursuant to the meet and confer process of the Winton

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[3] The parties also stipulated that:

"During the period 1974-76, with the exception of 2 days of meet and confer sessions and 4 days for grievance and arbitration hearings, under District policy GCQDA 16.8, the practice had been to meet and confer during hours when classes were not in session."

Act."[4] The pertinent portion of this policy (GCQDA 16.8) provides:

> During the school year, the Board shall provide each of the C.E.C.'s constituent organizations with a maximum of one paid and released school day for each 10 members in the constituent organization. Membership shall be verified through the annual C.E.C. Formation Report. Such paid and released school days shall be used by the president and/or authorized members of each organization for the purpose of transacting official organization business. Additional days may be used, provided that the certificated employee organizations utilizing such days agree to reimburse the Board for the cost of such days. The Board may adopt reasonable rules and regulations to implement this section, including the use of a form for advance notification by each organization of the use of allotted days, and reasonable limitations on the number of such days which may be utilized by one individual teacher. (Emphasis added)

During the period from April 12, 1977 to June 29, 1977, the Association had available to its members approximately 50 days of released time under board policy GCQDA 16.8. The released time was available for organizational business, but the governing board, with the exception of May 31 and June 7, 1977,[5] refused to allow the Association to use any of those days for meeting and negotiating.

During the period between April 12 and June 29, 1977, the Association made several proposals on released time for negotiating and grievance processing. The governing board consistently took the position that "the matter of released time was not subject to the meeting and negotiating process."

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[4] Former Ed. Code Sec. 13080 et seq. Repealed Stats. 1975, Chapter 961, Sec. 1, effective July 1, 1976.

[5] The facts indicate that on May 31 and June 7, 1977, negotiations were held between 9:00 a.m. and 4:30 p.m. On these dates Association representatives received released time without loss of compensation.

On June 29, 1977, the governing board of the District unilaterally adopted policy GCQDB.[6]

Negotiations continued after June 29, 1977. Prior to August 10, 1977, impasse was declared by the Public Employment Relations Board and mediation occurred during the month of August.[7]

DISCUSSION AND CONCLUSIONS OF LAW

A. Did the District refuse to grant reasonable periods of released time during the Spring 1977 negotiations?

Government Code Section 3543.1(c) sets forth the right of an exclusive representative to released time:

> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

The Association alleges that the District's refusal to grant more than two days released time during the 11-session negotiating period was unreasonable and therefore a violation of Section 3543.1(c). The District denies that its refusal was unreasonable.

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[6] The Board had rescinded policy GCQDA 16.8 on June 22, 1977. For a description of pertinent provisions of this policy GCQDB see page 13, infra.

[7] The hearing officer takes official notice that on February 18, 1978, the parties entered into an Agreement covering the period of February 8, 1978, to August 31, 1979. No provision in the Agreement provides for a released time policy. However, the parties state in Appendix C of the Agreement that if it is ultimately determined that a disputed subject, such as released time, is determined to be a mandatory subject of negotiations, the District and the Association agree to meet and negotiate on the subject.

Both parties seek support from the PERB's decision in Magnolia School District.[8] In Magnolia, the district adhered to a rigid rule throughout the entire negotiation period that prevented released time during the instructional day and restricted such released time to a maximum of 30 non-teaching minutes at the end of the day. The district refused to change its policy even when the policy proved to be a hindrance to effective mediation.

The Board stated that:

> "Reasonable released time" means, at least, that the District has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. ... A district's policy does not provide for reasonable periods of released time if the policy is unyielding to changing circumstances.[9]

The Board also indicated that "at least in some circumstances," "some released time during the instructional day" would be appropriate.

The district's inflexible position in Magnolia proved to be a hindrance to meaningful negotiations and the PERB found it unreasonable. Thus, when a district adopts an inflexible released time policy which hinders negotiations, the policy is unreasonable and in violation of the Educational Employment Relations Act (hereinafter EERA or Act).

Unlike the situation in Magnolia, the charging party here has not shown the District's released time policy to be inflexible, unyielding or a hindrance to a meaningful negotiations. The stipulation of facts indicates that of 11 negotiating sessions, the Association was given released time for two of them. There is nothing in the stipulation of facts to indicate the amount of released time granted by the

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[8] EERB Decision No. 19, June 27, 1977.

[9] Id., at page 5.

District in the spring of 1977 was unreasonable or inappropriate to the circumstances of the negotiations in the District as they existed at that time. There is no proof that the negotiating schedule hindered negotiations, caused any ascertainable delay or subverted the negotiating process in any specific fashion. Therefore, the Association has not proven that the District's refusal to grant additional released time was unreasonable. Section 3543.1(c) has not been violated. Accordingly, the Association's charge that the District violated Section 3543.5(b) is hereby dismissed.

B. Did the District Breach its Duty to Meet and Negotiate in Good Faith?

Section 3543.5(c) provides that:

> It shall be unlawful for a public school employer to:
> ...
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

A district's obligation to meet and negotiate in good faith with an exclusive representative is limited to those matters within the scope of representation.[10]

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[10] See Fullerton Union High School District, EERB Decision No. 20, July 27, 1977. See also Gov. Code Sec. 3540.1(h) which provides:

> "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

Section 3543.2 defines the scope of representation as:

> matters relating to wages, hours of employment, and other terms and conditions of employment. 'Terms and conditions of employment' mean health and welfare benefits...leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security ... and procedures for processing grievances. ...

Released time then, must relate to wages, hours of employment, or other terms and conditions of employment in order for the District to be required to meet and negotiate over it. If released time does not so relate, the District need not negotiate over the subject and may take unilateral action in regard to it.[11]

A review of the subjects within the scope of representation leads one to the conclusion that released time is negotiable, if at all, as a matter relating to wages or hours of employment. The Association argues that released time relates to both wages and hours; the District disagrees.

The PERB in Magnolia recognized that at least in some circumstances negotiations during the instructional day are required. If released time is granted to employee negotiators but in the form of a requirement that they pay for the substitutes, the employees'

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[11] Gov. Code Sec. 3543.2 also provides for various "consult" items about which the District must consult with the exclusive representative before the District implements its determination. None of these are arguably related to released time, and indeed, no party has raised the argument that this portion of 3543.2 is applicable.

effective wages have been diminished. Consequently, the amount of released time without loss of compensation relates to wages, as employee organizations will want to maximize their effective wages by ensuring that the time that they must pay for substitutes is kept at a minimum.

Released time also relates to hours. Although the total number of compensable hours is not affected by a released time policy, the distribution of those hours is affected. Courts interpreting the NLRA have held that the distribution of hours that employees work in a day is a mandatory subject of bargaining.[12]

Having determined that released time is a mandatory subject of negotiations,[13] it must next be determined whether the District refused to meet and negotiate regarding it. The stipulation of facts indicates that the District consistently refused to negotiate the subject of released time. Consequently, the District has breached its duty to meet and negotiate in good faith and it has violated Section 3543.5(c).

The Association has also alleged that the District's unilateral promulgation of policy GCQDB on June 29, 1977 constitutes a breach of the District's duty to meet and negotiate in good faith. Under

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12 Cf., Camp & McInnes, 100 NLRB 524, 30 LRRM 1310 (1952) (reducing lunch periods 30 minutes and changing quitting time from 5:00 pm to 4:30 pm); Meat Cutters v. Jewel Tea, 381 U.S. 676, 59 LRRM 2376 (1965).

13 The hearing officer takes note of the recent NLRB decision in Axelson Inc., 234 NLRB No. 49 97 LRRM 1234 (1978), which held that "the payment of wages for time spent in negotiations constitutes a mandatory subject of bargaining." However, because of PERB's determination in Fullerton (note 10, ante) that the scope of representation as it relates to working conditions under the NLRA is broader than that under the EERA, the Axelson decision cannot be given controlling weight.

federal precedent, an employer's unilateral change of a mandatory subject of bargaining is regarded as a per se refusal to bargain.[14]

Normally, federal precedent would be applicable here[15] and the District would be found to have violated Section 3543.5(c). However, because Section 3543.1(c) mandates that a district provide the exclusive representative with reasonable periods of released time it is necessary that these two notions be harmonized.

The EERA requires the employer to grant "[a] reasonable number of representatives of an exclusive representative ... reasonable periods of released time ..." In order for the employer to make such a grant it is likely that at some point it would have to unilaterally grant "reasonable periods of released time." To require an employer to both meet and negotiate regarding released time and to grant reasonable periods of released time but to condition that with the onus of commiting an unfair practice would place the employer in an unfair dilemma. If the employer met and negotiated with the exclusive representative and did not unilaterally grant released time it would be guilty of violating Section 3543.1(c). If the employer unilaterally granted reasonable released time it would be guilty of violating Section 3543.5(c).

A resolution of this dilemma is apparent if an employer is permitted to unilaterally promulgate a reasonable released time policy but yet is still required to meet and negotiate regarding the subject

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14 NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962).

15 The PERB has stated that it is appropriate to use NLRB decisions as guides in interpreting the EERA. See Sweetwater Union High School District, EERB Decision No. 4, Nov. 23, 1976.

of released time. In essence, the employer's released time policy would become a base upon which the parties would negotiate. This approach is already utilized in the EERA. For example, by statute a school district is required to maintain evaluation procedures for certificated employees[16] and grant classified employees a specified number of holidays and days of vacations.[17] These subjects are clearly matters relating to "wages, hours of employment and other terms and conditions of employment" and are hence negotiable. Thus, as is the case with released time, a district's evaluation procedure is subject to the meet and negotiate process.

By meeting and negotiating on released time the parties facilitate agreement on what is "reasonable released time" and generate an effective approach to meaningful negotiations. Once a released time policy has been agreed upon by the parties, it becomes the standard of what is "reasonable" and the district's need to unilaterally promulgate a reasonable released time policy disappears.[18]

Naturally, this unilateral promulgation of a released time policy is only valid if it occurs before the implementation of a negotiated policy and the policy itself is reasonable. The reasonableness of the June 29, 1977 policy is the subject of the Association's third allegation.

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[16]Ed. Code Sec. 44660, et seq.

[17]Ed. Code Secs. 45197 and 45203.

[18] Thus, the District's fear that meeting and negotiating with the exclusive representative would subject it to attack from its employees is unfounded. Because the district and the exclusive representative have agreed upon the policy, that policy is presumed to be a reasonable one.

C. Is District Released Time Policy GCQDB promulgated on June 29, 1977 reasonable?

District Policy GCQDB provides in pertinent part:

> 1.0 Released Time - Negotiations
>
> During each school year when negotiations are in progress, and following prior notice and schedule coordination with the immediate supervising administrator, seven (7) authorized representatives of each employee organization representing a bargaining unit, shall be granted a maximum of twelve (12) full days of released time each without loss of compensation for the purpose of meeting and negotiating. This released time may be taken in minimum increments of one full day. Organizations requesting use of released time for meeting and negotiating shall reimburse the District for the value of educational services lost, as paid from public funds, because of the absence of employees from their duties to act in the capacity of employee organization representatives. Reimbursement shall be at the median daily salary rate of the employees comprising the bargaining unit. Reimbursement shall occur within one-hundred and twenty (120) calendar days of the dates of released time.

The Association argues that Policy GCQDB is unreasonable because the grant of released time is "contingent upon an employee organization's picking up the tab."

The District argues that the policy is a reasonable one. According to the District, Section 3543.1(c)'s proviso that released time be "without loss of compensation" was "concerned solely with the remuneration to be received by the district employee who was being released." The EERA, the District alleges, was silent as to the ability of a district to adopt a "sharing arrangement which relates

to the additional costs (ie., those beyond the salary of the released employee) which are incurred by virtue of the release, and, if so, upon what formula." In the absence of legislative directive, it is the position of the District that it "may impose any cost-sharing arrangement it desires as a condition of released time, except one which in operative effect requires the exclusive representative to pay the salary of the individual so released."

The District's argument is unpersuasive. Granting released time upon condition that some third party or agency compensate the district contravenes the explicit language of Section 3543.1(c) and such a policy violates the Act.

Similarly, the District's reliance on Yuba City Unified School District,[19] a non-appealed hearing officer's decision, is misdirected. Unlike a Board decision, a hearing officer decision which has not been appealed to the Board is not binding precedent. In any case, the facts in this case are distinguishable from those in Yuba City. In Yuba City the cost-sharing arrangement was instituted after a substantial amount of released time without loss of compensation had already been granted. And the nature of the cost-sharing plan was such that the District was "willing to meet on school time every week if the Association paid for substitutes on an alternating basis or to meet after school every other week." In

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[19] EERB Decision No. HO-U-4, May 6, 1977.

this case, the District policy, unlike that found in Yuba City, does not provide the exclusive representative with at least some released time without loss of compensation. This discrepancy is fatal and therefore the District cannot rely on the Yuba City case to support its position.

For the above reasons the District has violated Section 3543.5(b) in that District Policy GCQDB violates Section 3543.1(c) because it does not provide for reasonable periods of released time without loss of compensation.

D. Remedy

Gov. 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 the offending party to "cease and desist from the unfair practice and to take such affirmative action ... as will effectuate the policies of this chapter."

In Magnolia School District[20] the Board found that the district had violated Section 3543.1(c) by refusing to grant reasonable periods of released time without loss of compensation. The Board's remedy in that case included a cease and desist order but did not direct the District to grant a specific number of hours of released

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[20] Note 8, ante.

time for meeting and negotiating. Implicit in the Board's decision is a directive to the District to reconsider its released time policy in light of the Board's opinion. Similarly the facts in this case do not warrant an order specifying the specific amount of released time to be given to employee negotiators. The District should reconsider its policy and thereby arrive at a policy which provides for released time without loss of compensation and which "is appropriate to the circumstances of the negotiations." In addition, the District should meet and negotiate upon request with the Association regarding released time in an attempt to agree on a reasonable released time policy.

The requirement that the District post copies of the order "effectuates the policies of the Act" in that it serves to inform all those employees who are vitally interested in the case of the decision relating to the unfair practice charge.

The language in Section 10(c) of the National Labor Relations Act is nearly identical to Government Code Section 3541.5(c).[21] The first decision rendered by the National Labor Relations Board (hereinafter NLRB), Pennsylvania Greyhound Lines, Inc., 1 NLRB 1, 1 LRRM 303 (1935), included an order to "post notices in conspicuous places in all of the places of business

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[21] Section 10(c) of the National Labor Relations Act (29 U.S.C. §160) provides in pertinent part that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

wherein the employees are engaged." The NLRB found that such a posting requirement "effectuates the policies of the NLRA." The employer challenged inter alia the posting requirement. In affirming the NLRB in NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 2 LRRM 600 (1938), the United States Supreme Court stated that "[i]t is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of Section 10(c) and are within its terms."

In NLRB v. Empress Publishing Co., 312 U.S. 426, 8 LRRM 415 (1941), the Court commented with respect to the posting requirement, "[o]nly a word need be said of that part of the [NLRB's] order requiring the posting of notices. We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by Section 10(c) of the [NLRA] 'to take such affirmative action... as will effectuate the policies of the Act.'" NLRB v. Empress Publishing Co., supra. See also City of Albany v. Helsby, 328 N.Y.S. 2d. 658, 79 LRRM 2457 (1972). Accordingly, an order to post copies of the order is deemed appropriate in this case.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Government Code Section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Anaheim Union High School District and its representative should:

1. CEASE AND DESIST FROM:

(a) Failing to meet and negotiate in good faith upon request with the Anaheim Secondary Teachers Association with regard to released time;

(b) Failing to grant to the representatives of the Anaheim Secondary Teachers Association reasonable periods of released time without loss of compensation.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

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

(b) 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 charge shall be dismissed with respect to any unfair practices which are alleged and have not been found to be violations of the Act.

The parties have twenty (20) calendar days after service of this Proposed Decision in which to file exceptions in accordance with California Administrative Code, Title 8, Part III, Section 32300. If no party files timely exceptions, this Proposed Decision will become final on May 5, 1978 and a Notice of Decision will issue from the Board.

Dated: April 10, 1978

Bruce Barsook
Hearing Officer