

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SIERRA COLLEGE FACULTY ASSOCIATION,)	
)	
Charging Party,)	Case No. S-CE-89
)	
v.)	PERB Decision No. 179
)	
SIERRA JOINT COMMUNITY COLLEGE)	November 5, 1981
DISTRICT,)	
)	
Respondent.)	
)	

Appearances: Darrel D. Tipton and John Bodney, Attorneys for Sierra College Faculty Association; Paul M. Loya, Attorney (Loya & Associates) for Sierra Joint Community College District.

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

DECISION

The Sierra College Faculty Association (hereafter SCFA) excepts to the dismissal of its charges that the Sierra Joint Community College District (hereafter District) violated section 3543.5(b) and (c) of the Educational Employment Relations Act¹ by refusing to negotiate over released time

¹EEERA is codified at Government Code section 3540 et. seq. Unless otherwise noted, all references will be to the Government Code.

Section 3543.5(b) and (c) provide:

It shall be unlawful for a public school employer to:

and by refusing to provide reasonable amounts of released time to SCFA negotiators.²

In the spring of 1977, faculty members representing the SCFA as negotiators arranged their teaching schedules for the following fall semester so that their Tuesday and Thursday afternoons would be clear for negotiations. The District knew of the teachers' intent and approved the schedules, though it neither expressly approved nor rejected the purpose of those arrangements. When negotiations began on September 8, 1977, SCFA proposed a released-time formula which would provide a one-fifth reduction from the normal fifteen-hour teaching load of community college instructors who were serving as negotiators. The normal total workweek for community college instructors, including classtime, preparation, office duties and meetings, was 40 to 45 hours of which 22 to 25 hours were required to be spent on campus. SCFA suggested that its

(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.

²Section 3543.1(c) reads:

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 proposal was consistent with the District's past practice of granting similar reduced teaching loads to division chairpersons and employee organization officers.

The District rejected the proposal on September 20, taking the position that released time could only be granted from scheduled assignments, not unscheduled duties, and that the SCFA proposal was actually a request for compensatory time-off rather than for released time. The latter, said the employer, could only be provided during periods of actual meeting and negotiating. Since the teachers had no scheduled work during these periods, the District contended released time would not be appropriate. The District also rejected a further suggestion by SCFA that negotiations take place in the morning hours when classes were scheduled by its negotiators. It was the District's position that such a scheduling would be inconvenient to its own negotiators and it offered no meeting times as satisfactory other than those already scheduled in the afternoons. At no time did the District offer counterproposals and SCFA broke off further negotiations on September 20 after the District took the position that future negotiations over released time would be futile.

The hearing officer concluded that although released time is a negotiable subject, the SCFA proposal was one for compensatory time off from duties at times other than "when meeting and negotiating" and, therefore, could not be construed

as a released-time proposal under the terms of the statute. He also found that there was no refusal by the District to negotiate over released time since SCFA was really seeking compensatory time off and because it was SCFA which ended the talks. Additionally, he found that evidence of successful negotiations on some other subjects weighed against the SCFA's claim that the District's conduct interfered with negotiations and amounted to a refusal to negotiate in good faith.

DISCUSSION

The District maintained at the hearing that released time is not subject to negotiations. The hearing officer found otherwise. Yet, he dismissed the charge alleging the District's refusal to negotiate on this matter. His conclusion was predicated on his view of SCFA's proposal as unrelated to released time. Accepting, arguendo, that the SCFA's proposal was not within scope, the District would certainly be within its rights to reject that proposal.

As noted in Jefferson School District (6/19/80) PERB Decision No. 133, and reaffirmed in Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board finds that released time is a subject within the scope of representation. In this case, the District categorically denied that it bore an obligation to negotiate on any released-time proposal. In so doing, it violated section 3543.5(c) of the EERA.

The hearing officer's conclusion that the proposal offered by SCFA was not one for released time placed emphasis on the statutory phrase " . . . when meeting and negotiating." It appears that he defines the negotiating process as only that time when the parties actually are in session.

So narrow a construction of the statutory language is unwarranted. In our view, the phrase is intended to permit teacher negotiators to receive released time for periods spent in the negotiating process. How much of this total time span is subject to the requirement of section 3543.1 depends, of course, on what is "reasonable." But we find in this section no requirement that the time employees are excused from duty without loss of compensation must precisely coincide with time actually spent negotiating. As we pointed out in Anaheim, supra, section 3543.1 evidences a legislative intent that negotiations be conducted and concluded expeditiously and without unnecessary impingement on the educational process. To insist that released time be limited to those periods when negotiating sessions and teaching duties actually coincide, precludes employees from assigning their first priorities to their work obligations. Employees willing to negotiate entirely on their own time in order to minimize interruption of work assignments during the negotiating period would be precluded from proposing release from some portion of their

duties at a time less inconvenient to the educational process or from duties of lesser importance.

Here, the teachers rearranged their schedules to avoid a conflict between negotiations and classroom obligations. Whether their request for a one-fifth reduction in teaching load was reasonable or, in some respects, inconsistent with their rescheduling of class sessions, is irrelevant to the question of the negotiability of their proposal. Thus, while the District was under no obligation to accede to the workload reduction, the proposal was lawful and the District was obligated to respond.

The hearing officer's conclusion that successful negotiations on other matters negated the refusal-to-negotiate charge must be considered in light of the totality of the negotiations which took place. Pursuant to this principle, the employer's refusal to agree to a specific proposal may be lawful when viewed in the context of the employer's general good faith negotiation posture.³ However, the principle is not applicable where the employer refuses to discuss a proposal because he denies its negotiability.⁴ In such a case, the

³NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 4051]; NLRB v. Stevenson Brick & Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086].

⁴See John S. Swift & Co. (1959) 124 NLRB 394 [44 LRRM 1388].

lawfulness of the employer's position turns on the negotiability of the subject. Where the subject is negotiable, the employer's agreement on other matters is irrelevant. Here, in light of our finding that released time is a mandatory subject, the District's flat refusal to negotiate on this matter violated section 3543.5(c).

SCFA sought to include evidence that released-time proposals, similar to its own, have been agreed to in other districts and that similar arrangements had been utilized by the District for other purposes. The hearing officer refused to allow this evidence, apparently based on a reading of Magnolia School District (6/27/77) EERB Decision No. 19.⁵ SCFA's exception to the hearing officer's ruling is well taken. The question as to the reasonableness of the number of employees granted released time or the amount of released time granted, is one of fact and depends upon the particular circumstances in which negotiations take place. Evidence of practices in other districts may be relevant and probative.

The hearing officer did not address the matter of the negotiability of the number of employees to be released without loss of compensation although this was raised by the charge.

⁵Prior to January 1, 1978, PERB was called the Educational Employment Relations Board.

His silence may have been the result of his view that no legal proposal had been presented by SCFA in the first instance. As we stated in Anaheim, supra, the full requirements of section 3543.1 are within the scope of the negotiations. An employer may violate its section 3543.5(c) obligations by refusing to negotiate either the amount of time employees are to be released without loss of compensation or the number of employees to be released. Neither aspect of section 3543.1 is subject to the employer's unilateral determination.

The District sought to reopen the record so that it could give evidence demonstrating that the SCFA's proposal would result in a windfall to the employee negotiators and that its own grant of released time was reasonable (Case No. S-CE-89, Motion to Reopen the Record). We now deny that request.

The District's obligation to negotiate over released time is absolute and is not affected by the quality of the unilateral act it took in violation of its duty under section 3543.5(c).⁶ Similarly, while an alleged windfall to the employee negotiators might constitute, as a negotiating position, a valid basis for the District's rejection of SCFA's proposal, it would not constitute justification for the

⁶The Board also finds that the District's conduct violated section 3543.5(b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

District's refusal to respond in the context of good-faith negotiations.

ORDER

Upon the foregoing facts, conclusions of the law and the entire record in this case, it is hereby ORDERED that the Sierra Joint Community College District shall:

1. CEASE AND DESIST from refusing to negotiate with the Sierra College Faculty Association on the subject of released time without loss of compensation for employee representatives and the number of employees to be released for the purpose of conducting negotiations;

2. Immediately prepare and post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. Such posting shall be maintained for a period of 30 workdays. Reasonable steps shall be taken to ensure that said Notice is not reduced in size, altered, defaced or covered by other material;

3. Notify the appropriate 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.

The Sierra Joint Community College District's motion to reopen the Record is DENIED.

This ORDER shall become effective immediately upon service of a true copy thereof on the District.

By: ~~Harry~~ Gluck, Chairman

Barbara D. Moore, Member

~~John W.~~ Jaeger, Member

Member Tovar concurring:

I concur.

Irene Tovar, Member

Appendix: Notice.

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

After a hearing in which all parties had the right to participate it has been found that the Sierra Joint Community College District violated sections 3543.5(b) and (c) of the Educational Employment Relations Act by refusing to meet and negotiate regarding released time without loss of compensation for representatives of the exclusive representative involved in negotiations. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

We will not refuse to meet and negotiate with the exclusive representative over the subject of released time for its organizational representatives.

SIERRA JOINT COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

Dated: _____

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of:)	Unfair Practice
)	
SIERRA COLLEGE FACULTY ASSOCIATION,)	Case No. S-CE-89
)	
Charging Party,)	
)	PROPOSED DECISION
v.)	
)	(6/23/78)
SIERRA JOINT COMMUNITY COLLEGE DISTRICT,)	
)	
Respondent.)	
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Appearances: Darrel D. Tipton and John Bodney, Attorneys, for Sierra College Faculty Association; Paul M. Loya, Attorney (Paterson and Taggart) for Sierra Joint Community College District.

Before Terry Filliman, Hearing Officer.

PROCEDURAL BACKGROUND

On October 11, 1977, the Sierra College Faculty Association (hereafter the Association or Charging Party) filed an unfair practice charge against the Sierra Joint Community College District¹ (hereafter District)² with the Public Employment Relations Board (hereafter

¹Sierra Joint Community College District is located in Placer County and is joint with parts of Nevada, El Dorado and Sacramento Counties. The District has an average daily attendance (ADA) of 5,303. Annual Report, Financial Transactions Concerning School Districts of California, Fiscal Year 1975-76, prepared by Kenneth Cory, State Controller at pp. 526-527.

²Effective January 1, 1978, the Educational Employment Relations Board was renamed the Public Employment Relations Board.

PERB) alleging violations of Government Code sections 3543.1, 3543.3 and 3543.5(b) and (c).³ On October 27, 1977, the District filed an answer to the charges.

A formal hearing was held on January 5, 1978 at the PERB Sacramento Regional Office. At this hearing, the Association withdrew those aspects of the charge which alleged that the District had violated sections 3543.3 and 3543.5(c) by taking negotiable matters before the faculty senate.

FINDINGS OF FACT

The parties stipulated that the Association is an employee organization within the meaning of the Educational Employment Relations Act⁴ (hereafter Act) and the Association is the exclusive representative for employees in a certificated teacher unit. Additionally, the parties stipulated that the District is an employer within the meaning of the Act. These stipulations are accepted without further inquiry.

Negotiation Sessions

Early in the 1976-77 school year, several instructors⁵ employed at Sierra College prearranged their teaching schedules so that they would

³All references are to the Government Code unless otherwise indicated.

⁴Government Code section 3540 et seq.

⁵The evidence indicates that the following employees of the District were present at the September 8, 1977 negotiation meeting as members of the Association's negotiating team: Bruce Broadwell, Patricia Robertson, Clair Parsh, Don Edgar, Garvin Jabusch, and Evie Cogley. At the September 20, 1977 meeting two other employees were present in addition to the above listed members: Paul Linder and Pauline Bond. These are the instructors who apparently prearranged their schedules in order to have time for negotiations.

have no scheduled classes between 1:30 to approximately 5:00 or 6:00 p.m. on Tuesdays and Thursdays. This prescheduling was to give the instructors certain hours free from scheduled instruction and office hours during which they could negotiate with the District as members of the Association's negotiating team.

The Association's negotiating team members decided to schedule "free time" for negotiating so as to preclude interferences with scheduled class time. This scheduling of "free time" occurred without input or participation by the District although the schedule requests were accepted by the District's administration.

Although five negotiation sessions were originally scheduled, only two sessions were held - one on September 8, 1977 and the other on September 20, 1977.

At the first negotiation session, the Association presented proposed ground rules for the 1977-78 negotiation sessions. The purpose of this meeting was to arrive at some agreement on the ground rules for future meetings.

Article 4 of the Association's proposed ground rules presented a request for released time as follows:

"4. SCFA representatives shall be provided with necessary release time without loss of compensation for the purpose of negotiation sessions. Necessary release time shall be 1/5 of the full time load."

The Association through its spokesperson, Mr. Richard Baker, specifically asked for released time for the September 8th meeting and for future meetings in accordance with its interpretation of what release time meant within the community college setting.

In response, the District spokesperson, Ms. Edna Francis, said that the District team would have to consult with the Board of Trustees about the concept of released time. Moreover, Ms. Francis concluded that

no released time, as the term was defined by the Association, would be granted for the first session.

Initially, about ten proposals were submitted by the Association. Both parties discussed the proposals and each party submitted counter-proposals regarding most issues. During the first session agreement was reached on most of the proposals.

At the second negotiation session, conducted on September 20, 1977, the District asserted that no released time would be granted to Association members according to the terms of the Association's released time proposal. The District made no counterproposal for an alternate solution to the Association's request. However, at this second meeting, Mr. Baker made an informal request to hold negotiating meetings in the morning. Ms. Francis maintained that morning meetings were inconvenient for administrative members of the management negotiating team and therefore morning meetings were unacceptable. She asserted that the scheduled afternoon meetings were better suited to both teams' convenience.

At the September 20 meeting, it was generally agreed by both sides that there was a technical question as to what section 3543.1(c) meant by "released time." The Association maintained that further negotiations could not continue until the "released time" issue was resolved. Thereafter, the Association filed an unfair practice charge in order to let the PERB resolve the problem. At no time did the District propose to call a halt to the scheduled negotiation sessions.

Both negotiation sessions took place from 3:00 to approximately 5:00 p.m. During these two sessions none of the Association team members had scheduled classes or scheduled office hours. Moreover, it is the

District's position that if any of the instructor/team members had had office hours or classes scheduled during negotiations, those instructors would have been relieved of their required duties.

At both sessions there appeared to be considerable interchange between the parties as to the Association's proposal for released time. The Association interpreted released time as a release from any portion of the undefined faculty workday - including teaching, office hours, committees and homework or preparation time - which contributes to the negotiating team members' professional responsibilities. The Association's request for a one-fifth reduction in workload assumed that actual lost time could not be measured and a calculated average must be arrived at. The District's position was that released time entailed release for those members of the negotiating team who were actually scheduled for class or office hours during negotiations.

At one of the sessions, Ms. Francis asked if what the Association really was requesting was "compensatory time off". There was some deliberation and discussion among the Association team members about the question but ultimately Mr. Baker replied that, in substance, that was what was requested.

At both sessions, neither the District nor the Association made any concessions with respect to the Association's released time proposal. Neither side made any counterproposals even though there was considerable discussion as to what was meant by the proposal as submitted and what the Rodda Act required (infra). Near the end of the second session, after neither party would relent or at least submit counterproposals the District indicated that it had terminated its discussion of the released time proposal.

Subsequent to the two negotiation meetings, Mr. Baker discussed with Ms. Francis over the phone the subjects of released time proposals and future meetings. Ms. Francis once again stated that released time would not be granted as requested.

Faculty Workload

The evidence indicates that there is no uniform workday or workweek for instructors in the District. Instead there are several District policies which limit and define portions of the workday and workweek.

A full-time teaching load consists of 15 hours per week per instructor. If an instructor teaches a lab, the full-time load is 18 hours. In addition to this classroom time, each full-time faculty member is required to maintain seven hours of scheduled office or conference hours per week. Both office hours and classroom hours are scheduled through the school's administration and may occur during morning, afternoon or evening hours.

As a guide for scheduled activities, District policy dictates that when conference hours are added to the full teaching load each full-time instructor is required to be on campus a minimum of 25 hours per week.⁶ Additionally, each instructor must be on campus a minimum of three (3) hours per day.

In addition to scheduled obligations, instructors are expected to expend time for class preparation, attendance recording, grading papers and participating as members of faculty committees. These unscheduled obligations can be carried out whenever the instructor's time is available, unless such obligations are formally scheduled.

⁶To arrive at the 25 on-campus hours, the District adds the full-time teaching load to the office hour requirements. District policy allows for three "fudge" hours if an instructor does not teach a lab. These three "fudge" hours include committee time which may be scheduled for the instructor.

Generally the time for class preparation is considered to vary between one and three hours for each hour of instruction due to each instructor's individual abilities and experience. Although total workweeks may vary greatly from individual to individual, the evidence indicates that full-time instructors may work 40 to 45 hours per week.

In 1974, a Sierra Community College faculty committee prepared a self-study report which was approved by the District and submitted to the state accreditation team.

The report recognized a concept of "assigned time" which was time granted to instructors for extra preparation or for developing new programs. The "assigned time" was recognized by the District as an offset to classroom time, thus reducing the teaching load by a proportional amount of non-classroom duty hours. It is the Association's position that this concept of "assigned time" is synonymous with "released time".

Several examples of "released time," as understood by faculty members, were presented at the hearing. One witness, Claireva Cogley, a current counsel member for the Association, was a former president of the Association under the Winton Act.⁷ Ms. Cogley as former president of the Association was granted full-day time off from her duties for 16 days (eight days per year) in order that she could attend state meetings.

Mr. Clair Parsh, a negotiating team member for the Association, was formerly a division chairperson in the business department at Sierra Community College. As a former division chairperson he received a 1/5

⁷The Winton Act, repealed by the Educational Employment Relations Act, was found in Education Code section 13080 et seq.

reduction in his teaching load as well as extra compensation for his position as chairperson. It appears that this reduction plus compensation occurred during the operation of the Winton Act.

In the past, the District has granted released time to members of the classified employee organization who attended approximately 10 or 11 negotiating sessions. In so doing, the District agreed to a block grant of hours for released time for members of the negotiation team as against a variable release from specified duties.

In contrast, the District did not propose a total number of hours of released time for the Association's negotiating team members who attended the sessions held September 8 and 20, 1977.

ISSUES

1. Did the District deny the charging party its rights under section 3543.5(b) by refusing to grant reasonable released time as required by section 3543.1?

2. (a) Did the District refuse or fail to negotiate in good faith the subject of released time and thereby violate section 3543.5(c)?

(b) If not, did the District refuse or fail to negotiate in good faith the subject of compensatory time off and thereby violate section 3543.5(c)?

CONCLUSIONS OF LAW

I. 3543.5(b)

The Association maintains that its rights were denied by the District due to the latter's refusal to grant the Association's request for a block grant of released time during the year. The Association, pointing to

the scheduled and unscheduled work week of its full-time faculty members, seeks time off with compensation from duties which might have been performed during the negotiation sessions although such duties were not scheduled to occur during those sessions. The denial of the Association's request is alleged to be a violation of section 3543.5(b).⁸

On the other hand, the District contends that the Charging Party's rigid proposal for released time was unreasonable because it did not come within the meaning of released time as intended by the Legislature and because it was unnecessarily inflexible to changing circumstances. Furthermore, it is the District's position that the Association actually sought compensating time off in return for the time its faculty members spent in negotiation sessions. Therefore, due to the nature of the request for time off with compensation, the District feels its refusal to grant the request does not constitute a violation of the Act.

The resolution of this element of the unfair charge requires some clarification of the legislative intent behind the released time provisions. Moreover, it is necessary to set some parameters for the meaning of "reasonable released time" in order to determine if it was unlawfully refused or denied.

Section 3543.1 provides the employee organizations with certain rights. Section 3543.1(c) provides:

(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."

⁸Section 3543.5(b) provides that it shall be unlawful for a public school employer to:

(b) Deny to employee organizations rights guaranteed to them by this chapter.

Section 3540.1(h) provides in pertinent part:

"(h) 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 ..."

Sections 3543.1(c) and 3540.1(h) must be read together in order to determine the time period which released time covers. Released time should be granted when the employer and exclusive representative meet, confer, negotiate and discuss in good faith matters which come within the scope of negotiation. These two sections indicate that released time is a trade-off or exchange for time spent negotiating and that the representatives of the exclusive representative shall be released from certain obligations when negotiating. It does not follow that the legislation intended that released time should be granted in addition to time spent negotiating; otherwise the Legislature would have so provided.

Sections 3543.1(c) and 3540.1(h), taken together, indicate that the Legislature intended that released time be granted in order to facilitate face-to-face meet and negotiation sessions. Public school employers must provide reasonable periods of released time to the representatives of an exclusive representative to promote easier access to the negotiating process than would otherwise be possible. This rationale for released time should not be construed generally to extend the released time concept to include time off from employment duties which do not conflict with negotiation sessions. To allow too broad an interpretation of released time, as suggested by the Association, would unreasonably burden the employer.

Nowhere in the Act is it found that the Legislature intended that the employer must bear an extra financial burden, beyond that contemplated, when meeting and negotiating.

In Magnolia Educators Association (EERB Decision No. 19, June 27, 1977), the Board for the first time treated the issue of released time. In that case, the Board found that in the face of an employee organization's repeated requests for negotiation sessions during classroom hours, as well as similar requests by a mediator, it was a per se violation of the Act for the District to restrict released time to one half-hour of non-teaching time at the end of the instructional day. That per se violation was due to the "rigidity and inflexibility of the District's policy" regarding released time. Id. at p. 4.

The Board, in Magnolia, went on to say:

"'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." Id. at p. 5.

Federal precedent on the subject of released time is not directly relevant because there is no section of the National Labor Relations Act (hereinafter the NLRA) as amended,⁹ which is comparable to section 3543.1(c).

Considering both the legislative intent of section 3543.1(h) and Magnolia, it is concluded that released time should encompass a release

⁹29 U.S.C. 150 et seq.; the National Labor Relations Act was amended by the Labor Management Relations Act in 1947.

from those scheduled activities which the representatives of the exclusive representative would otherwise be obligated to perform during the negotiating sessions. However, Magnolia adds one more qualifier to released time requirement. The Board, therein, considered several factors which bear on reasonableness of released time, particularly:

"[R]easonable needs of the District, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations and other relevant factors."
Id., at p. 5.

Therefore, reasonable released time entails a release from scheduled activities which coincide with negotiation sessions provided that the released periods are reasonable according to the circumstances of each case. Thus the reasonable provision could conceivably extend released time beyond the bounds of coinciding scheduled duties.

The Association takes the position that each negotiating faculty member should be released from 1/5 of his or her teaching load and its attendant preparation and paper grading obligations, regardless of whether the negotiation sessions occur during or after classroom instruction periods. Moreover, the Association seeks compensation for the periods of release even though there may be no overlap with negotiation sessions. This concept of "reasonable release time" amounts to a request for time off from non-coinciding duties with compensation in exchange for time spent meeting and negotiating.

It is recognized that faculty members at Sierra Community College may work long hours in addition to their scheduled duties. Added together, the working hours of an instructor could exceed 40 or even 50 hours per week. These long hours may be expected of professional college

instructors because of the nature of their work. However, aside from their scheduled duties, it is evident that these college instructors can perform their unscheduled duties when they so desire with the sole proviso that the work be accomplished.

A hypothetical extension of the Association's request for "reasonable released time" is necessary to see the impracticality of the request. If negotiation sessions were to occur on a weekend, by mutual agreement, the Association could be seeking to have its negotiating team receive extra pay and time off from preparation time that they chose to perform on a Saturday or Sunday. Thus the Association's negotiating members would be receiving "released time" for periods other than meeting and negotiation, in contradiction of section 3543.1(c). If the Legislature would have envisioned such a concept of "reasonable released time" it could have so provided.

Furthermore, it cannot be found that the District's released time policy is so rigid and inflexible as to amount to a per se violation of the Act. Magnolia, supra, at p.11. The evidence indicates that the negotiating faculty members independently agreed to arrange their schedules so that the negotiation sessions would not interfere with their scheduled classroom duties. Moreover, the evidence indicates that the District would have released faculty negotiators from scheduled office hours and teaching duties if an overlap with negotiation sessions had occurred. Nevertheless, the District did agree to hold the meetings at the times prearranged by the Association.

Unlike Magnolia, no formal requests were made by the Association for negotiation sessions during scheduled class hours. Only an informal suggestion

was made at the second negotiation meeting of September 20, 1977, to hold future sessions in the morning hours. The District indicated its dissatisfaction with the idea and indicated that it wanted to hold sessions during the hours as originally scheduled and suggested by the Association. Without more evidence the charging party has failed to show that the District's policy was fatally rigid and inflexible.

In contrast to this holding, the Association argues that if it is a per se violation to refuse to grant released time during the instructional day (as in Magnolia), then it must be a per se violation of the Act to refuse to grant released time outside the instructional day. This argument fails for several reasons.

Magnolia involved a distinctly different fact pattern. As noted above, there were several requests for negotiation sessions during teaching hours, unlike the instant case. The instant case involves a community college teaching environment which is much less structured than that found in Magnolia, a K-12 district. In the instant case, unlike Magnolia, the District policy toward released time was not fatally rigid and inflexible. And lastly, the instant case does not involve a request for "reasonable released time" as contemplated by the Legislature.

In conclusion, it is found that the Association did not make a request for reasonable released time. The request was for compensatory time off. Unlike the released time requirement, the Act does not require that a public school employer grant compensatory time off although that matter may be negotiated.

Based on the foregoing, it is found that the Association did not prove by a preponderance of the evidence that the District's released time policy was unreasonable. Therefore, the District did not violate sections 3543.1(c) and 3543.5(b) by denying the Association's request for "reasonable released time."

II. 3543.5(c)

- A. The Charging Party contends that the District has violated section 3543.5(c) by refusing to negotiate the issue of released time. The Charging Party maintains that released time is a mandatory subject of negotiation, and a failure or refusal to negotiate such a subject does not require an inquiry into elements of good faith.

The District, both during the hearing and in its brief, asserts that released time is a ground rule and is not a proper subject of negotiations under the Rodda Act. More specifically it is argued that released time is a right held by the exclusive representative which may be enforced without resorting to the negotiations process.

Section 3543.5(c) provides that it shall be an unfair practice for a public school employer to:

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

Section 3543.2 provides in pertinent 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. ... All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating...

B. The PERB has not dealt directly with the issue of whether released time is a mandatory subject for meeting and negotiating. However, in Magnolia, the PERB treated the subject of released time in a somewhat different setting (supra).

In Magnolia, the Board took the position that a district must maintain "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." Magnolia, supra, at 5. Since a district is to consider the amount of released time, it is concluded that it must consider the subject of released time as well. More importantly, since released time includes the concepts of wages¹⁰ and hours¹¹ it naturally follows that released time is within the ambit of scope of representation according to section 3543.2. Therefore, it is found that the subject of "reasonable released time" comes within the scope of mandatory negotiating subjects.

¹⁰Section 3543.1(c) notes that "reasonable periods of released time without loss of compensation" is to be granted when meeting and negotiating. As noted above, the Legislature contemplated a release from scheduled duties with no similar release from wages. This treatment of wages comes within the scope of mandatory negotiating subjects.

¹¹"Hours" are encompassed in the concept of released time because the negotiating team member is relieved from scheduled duties which he or she is expected to perform during coinciding negotiating sessions.

The fact that released time is a statutory right created by section 3543.1 cannot pre-empt its direct relationship to the wages and hours of members of the Association's negotiating team and its inclusion as a mandatory subject of negotiations. Therefore, an employer is allowed to unilaterally adopt a released time policy which meets minimum standards of "reasonableness", but yet is still required to meet and negotiate upon proposals designed to expand or otherwise modify released time.

However, the Association was not presenting a proposal for released time. Instead, it submitted a request for compensating time off. Both sides were arguing different interpretations and different subject matter. Therefore, it is found that the District did not refuse to negotiate the mandatory subject of released time as no proposal was presented to it on the subject.

- C. In order for the District to have violated its duty to negotiate mandatory subjects in good faith, it is necessary to find that "compensatory time off" comes within the scope of mandatory negotiating subjects.

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Federal precedent is somewhat relevant to the subject

¹²Where state labor legislation is essentially the same as federal legislation, interpretation of the state statute should be made in light of the federal precedent. Fire Fighters Union v. City of Vallejo (1974), 12 Cal. 3d 608, 617, [16 Cal.Rptr. 507].

of compensatory time as a mandatory subject of
negotiation since section 8(d)¹³ of the NLRA, as amended,
is similar to section 3543.2 of the Rodda Act in
delineating the bounds for mandatory subjects. Although
the NLRA does not make compensatory time off, specifically,
a mandatory subject, the NLRB has held that arrangements
for negotiations are a mandatory subject of bargaining.
N.C. Coastal Motors Lines (1970) 219 NLRB 1009 [90 LRRM
1114]; General Electric Co. (1968) 173 NLRB 253 [69 LRRM
1305].

But more importantly, since section 3543.2 makes wages and
hours of employment mandatory negotiating subjects, it
follows that "compensatory time off" falls within those
enumerated subjects. This conclusion follows because
compensatory time off entails, at least, time off from
hours of employment, with or without compensation, in
exchange for some duties or activities performed by the
employee.

- D. To find that the District violated section 3543.5(c), it
must be found that the District failed or refused to negotiate
in good faith the Charging Party's proposal for compensatory
time off.

The duty to negotiate in good faith may be violated without

¹³29 U.S.C. 158(d), section 8(d) in pertinent part states:

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

a treatment of the good faith element where it is found that a party with the duty has refused in fact to negotiate mandatory subjects. NLRB v. KATZ (1962) 369 U.S. 736, 743; see also NLRB v. Allison and Co. (6 CA 1948), 165 F.2d 766, cert. den., 335 U.S. 814; rehearing den., 335 U.S. 905. Thus it would appear to be a per se violation of the duty to negotiate in good faith if it were found that the District in fact refused to negotiate the compensatory time off issue presented by the Association.

While the District contends that the Association's proposal, whether characterized as released time or compensatory time, was not a negotiable issue, it nevertheless asserts that the management negotiating team did attempt to reach agreement over the issue.

The Association presented its proposal for compensating time during both negotiation sessions. It made no formal alterations in its proposal but adhered to it maintaining that it was reasonable and encompassed the "released time" requirement as found in section 3543.1(c).

In reply to the Association's requests, the District responded with what it considered released time to be. At both negotiation sessions, the District explained that there would be no released time as proposed because Association team members were not actually scheduled for classes. One witness for the District, Mr. Kolster, stated that if the

Association team members had been scheduled for duties during the negotiation sessions, those members would have been released from their scheduled duties without loss of compensation.

It was at the second session that the District asked if what was being sought was compensatory time off. To this the Association, through Mr. Baker, replied in the affirmative. While the evidence presented by the parties as to exactly what transpired at the negotiating table during the remainder of that meeting is confusing, the record does not support the conclusion that the District refused further negotiations on the subject of released time or compensating time. The fact that the District may have declined further discussion of the released time proposal offered at that time is not conclusive evidence that the employer's position was one of adamant refusal to negotiate the issue. It did agree that if sessions were held during class hours that released time would be granted. Neither the District nor the Association presented any explicit counterproposals on the subject.

Furthermore, it was the Association which decided to terminate future negotiating sessions, a short time later during the same meeting, because it wanted the matter of released time to be determined by the PERB. Had negotiations continued, it is possible that the District's reluctance to carry on further discussions of the compensating time proposal could have developed into a violation. One might infer from its position at the hearing regarding the non-negotiability of

released time that the District was headed toward conduct constituting a per se refusal to negotiate. But that is mere conjecture. Had the Association persisted in its negotiation efforts, it is possible that some resolution of the proposal could have been effected. Instead, all negotiations were discontinued.

- E. In the alternative to finding a "per se" violation, Charging Party apparently asserts that the District's conduct regarding the released time proposal is indicative of overall surface negotiating attitude in violation of section 3543.5(c).

If a party demonstrates an unyielding rigidity during negotiations which makes negotiations a futility, it will be found that such party has refused to negotiate in good faith. Borg Warner Controls (1972) 198 NLRB 726 [80 LRRM 1790]. In order to find a refusal, it is necessary to examine the overall conduct of the parties during negotiations and determine whether the District negotiated with a desire to reach an agreement. Ibid.

Here it appears that there was considerable interchange by both parties over the "released time" request. Although there was no agreement and an absence of concessions by both sides on this issue, it cannot be found that such a stalemate, by itself, supports a finding that the District did not negotiate in good faith. To this end, an obligation to negotiate in good faith does not require that the parties reach an agreement and does not compel either party to make

concessions. NLRB v. American Ins. Co. (1952) 343 U.S. 395 [30 LRRM 2147]. Chevron Oil Co. v. NLRB (CA 5 1971) 442 F.2d 1067 [77 LRRM 2129]; Proctor and Gamble Manufacturing Co. (1966) 60 NLRB 334 [62 LRRM 1617].

The evidence indicates that approximately ten (10) proposals were submitted by the Association. During both negotiation sessions, both parties discussed the proposals and agreement was reached on about eight issues by the second session. Both parties submitted counterproposals to most of the issues which were contested. The exception was with the released time proposal which received explicit counterproposals from neither side.

The NLRB has held that an employer, engaged in hard bargaining, did not violate its duty to bargain in good faith where it was shown that the employer was willing to meet with the union, discussions of proposals and counterproposals took place and the parties actually reached agreement on many issues. Dierks Forest, Inc. (1964) 148 NLRB 923 [57 LRRM 1086].

Given the overall conduct of the District during the negotiation sessions, it is found that it did demonstrate a willingness to arrive at some reasonable agreement. The District did submit counterproposals and did arrive at agreement on most of the proposals in contrast to the Association's claim of surface bargaining. Cf. NLRB v. Darlington Veneer Co., (CA 4 1956) 236 F.2d 85 (enf'g 113 NLRB 1101) [38 LRRM 2574].

The District's overall negotiation conduct demonstrates that it did more than merely reject proposals as submitted by the Association. Cf. Fitzgerald Mills Corp. v. NLRB (CA 2 1963) 313 F. 2d 260, (enf'g 133 NLRB 877) [52 LRRM 2174]. Therefore, it is found that in the absence of further proof the District negotiated in good faith and did not violate section 3543.5(c).

PROPOSED ORDER

It is the Proposed Decision, based upon the above findings of fact and conclusions of law and the entire record of the case that:

1. The District did not fail to grant "reasonable periods of released time" to the Association's negotiating team and thereby did not violate section 3543.5(b);
2. The District did not refuse to negotiate about the subjects of released time or compensatory time off and thereby did not violate section 3543.5(c);
3. The Unfair Practice Charge filed by Sierra College Faculty Association is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final on July 17, 1978 unless a party files a timely statement of exceptions within twenty (20) calendar days of service. See California Administrative Code, title 8, section 32300.

Dated: June 23, 1978

Terry Filliman
Hearing Officer