

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



DAVIS TEACHERS ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	Case No. S-CE-76(a) (b)
)	
v.)	PERB Decision No. 474
)	
DAVIS JOINT UNIFIED SCHOOL DISTRICT,)	December 31, 1984
)	
Respondent.)	
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Appearances: George A. Cassell for the Davis Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Garry G. Mathiason, Harlen VanWye and Patricia P. White for Davis Joint Unified School District.

Before Hesse, Chairperson; Tovar and Burt, Members.

DECISION

Burt, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Davis Teachers Association, CTA/NEA (DTA or Association) and the Davis Joint Unified School District (District) to the decision of the administrative law judge (ALJ) in this case. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)¹ by its refusal to negotiate about release time and

¹EERA is codified at Government Code 3540 et seq. Unless otherwise noted, all references are to the Government Code. Section 3543.5(a), (b) and (c) provides:

certain aspects of the school calendar. The Association excepts to the ALJ's failure to find that the District violated EERA by its refusal to negotiate over proposals affecting various classifications of teachers and its refusal to negotiate about procedures for consultation. For the reasons discussed below, we affirm the ALJ in part and reverse in part.

FACTS

The ALJ's findings of fact, summarized below, are generally undisputed by the parties, who except primarily to the legal conclusions drawn. We find the ALJ's findings free of prejudicial error and we adopt them as our own.

Recognition

By letter of April 5, 1976, signed by Jim Ganzer, then president, the Association filed its request for recognition as exclusive representative of teachers in the District as follows:

It shall be unlawful for a public school employer to:

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

. . . the DTA, CTA/NEA hereby requests recognition as the exclusive representative for a unit of all certificated employees excluding those excluded by law; a unit comprising approximately 300 employees of the district, a majority of whom wish to be represented by this organization.

Proofs of support by a majority of said employees in the form of notarized membership lists are herewith submitted.

In support of its contention that it represented a majority, the Association submitted a list containing the names of all 337 certificated employees of the District. Check marks next to most of the names were keyed to the following notation:

Those checked in red are paying CTA/NEA/DTA dues through payroll deductions for 1975-76.

The District rejected that showing on the ground that the list contained the names of management or supervisory personnel and the Association submitted a second list containing 257 names, two of which were lined out, omitting the names of supervisory and management personnel and persons who did not belong to the organization. Otherwise, the lists were identical. The names on both lists were those of the District's full or part-time employees on probationary or permanent status, and did not include the names of persons employed exclusively as adult education teachers, summer school teachers, or substitutes.

On May 11, 1976, the board of trustees recognized the Association as "the representative agent for certificated employees, excluding those designated as management,

supervisory, and confidential employees." At no time prior to the recognition did the parties discuss whether summer school teachers, adult education teachers, driver training instructors, substitute teachers or temporary employees would be included within the prospective negotiating unit.

The parties began negotiating on October 1, 1976. By the time the case went to hearing, the parties had met approximately 60 times. On at least five occasions, beginning with the meeting on November 22, 1976, the parties deadlocked on proposals affecting the five categories of teachers in dispute. The matter first arose on November 22, 1976, in a discussion about the recognition clause. Gary Mathiason, attorney for the District, stated that day-to-day substitutes would not be included. Ganzer replied that the parties would need to clarify the status of all short-term employees. When the parties met again in June 1977, the Association rejected a District proposal because it did not contain summer school teachers. From then on, at one time or another over the next several months in discussions over the recognitions clause, sick leave and salary proposals, the District made clear its position that these teachers were not in the unit and, therefore, it was inappropriate to negotiate about issues relating to them.

In the years before the passage of the EERA, in negotiations under the Winton Act, the District and the

Certified Employees Council had a history of meeting and conferring over proposals concerning driver training instructors, adult education teachers, substitute teachers and summer school teachers.

Generally, the District draws its summer school teachers from the ranks of regular teachers who are given first preference for the summer school jobs. For example, in the summer of 1972, the District hired 78 "insiders" and 11 "outsiders." In 1976, the numbers were 66 and 15. Most of the classes taught in the summer are part of the regular year curriculum and teachers generally teach their respective subjects.

Regular teachers have a lesser role in the adult education classes, generally comprising approximately one third of the adult education teachers. They are paid on an hourly basis, as opposed to the annual salary paid to regular teachers.

Prior to 1976-77, driver training was part of the regular curriculum and driver training teachers were regular certificated teachers. However, beginning with the 1976-77 school year, driver training teachers were paid on an hourly basis.

Release Time

The subject of release time initially arose on October 1, 1976, at the time of the first negotiating session. The Association presented as part of its initial proposal Article V, paragraph 5:

The Association shall designate six (6) representatives who shall each receive a sufficient number of hours per week, but in no event less than five (5) hours each of release time without loss of compensation to prepare for and attend negotiations and impasse proceedings.

The District approached release time as a matter outside of scope to be resolved by a policy determination by the District. Along that line, on October 4, 1976, the District board of trustees adopted a policy establishing a 21-day release-time level. (After the 21 days were exhausted, the District continued to release negotiators with pay, but it then billed the Association for the cost of the substitute teachers.)

On October 19, the parties met again. Upon the Association's request to discuss release time, the District's representative responded that there was a District policy currently in effect, and that the subject was outside of scope.

On November 22, 1976, the Association made a proposal for a "collective bargaining negotiations leave," proposing that paid leave be granted for time in negotiations plus an equal amount of time for preparation. Mathiason, the District representative, commended the Association for its "creativity" in recasting the release-time issue in terms of leave proposal, but the parties did not further discuss the issue.

On November 29, the parties again discussed release time. The Association presented a comprehensive leave proposal including negotiations leave. The District did not respond in

detail, except that one District representative asked a question about the meaning of the proposal and made a comment about the cost of such a proposal. Leaves were discussed again in December 1976.

The subject came up again on July 12, 1977, when the Association restored the release-time proposal to the article on negotiation procedure. The District's negotiator, McClain, said that the proposal was outside of scope and that it would impose problems in flexibility.

The ALJ describes the negotiations process here as follows, and we find his description well supported by the record:

During various discussions about release time and other disputed subjects, the District followed the practice of permitting the Association to explain its proposal in detail. When the District had heard the proposal and had asked sufficient questions in order to fully understand it, a District negotiator would explain that the District believed the proposal to be outside the scope of representation. The District negotiator would then offer the reasons why the District took the position that the proposal was out of scope and the parties would engage in a dialogue about whether or not the matter was within the scope of representation. Frequently, the District's negotiator also would remark that if the Association could convince the District that the particular subject was within the scope of representation the District would be happy to negotiate it. This practice was followed regularly whenever the parties reached a subject the District considered to be outside the scope of representation.

Discussions between the parties about release time invariably followed this

scenario. The parties several times had lengthy discussions about the Association's various release time proposals. But the bottom line always was that the District considered the subject of release time to be outside the scope of representation and would not negotiate about the substance of the proposal. The District never made a counterproposal on release time throughout the 60 sessions the parties had held prior to the hearing.

Procedures For Consultation

The subject of consultation initially came up early in negotiations. The Association originally made a proposal for teacher involvement in curriculum and planning and the District responded that those subjects were properly dealt with by consultation rather than by negotiation. The parties then reached tentative agreement on the following contract provision:

Article XXXI Consultation

The District and/or its Representative(s) will meet, upon request, with the Association to consult on the definition of educational objectives, the determination of the content of courses and curriculum and the selection of textbooks to the extent such matters are within the discretion of the Board of Education.

In December 1976, the Association approached the District and requested to consult about a District-wide testing program. Because there were several delays in the District's response, the Association concluded that specific procedures to implement the consultation article were desirable. On June 20, 1977, the Association proposed to put specific consultation

procedures into the contract. The District responded that it was willing to consult, but it was not willing to put the procedures for doing so into the contract.

On July 18, 1977, the parties held a meeting which both sides agreed was for informational purposes only. That session is described in District minutes as "DTA Informational Session on Non-Scope Items." At that session, the Association presented the following proposal:

CONSULTATION

1. In order to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks and other matters of direct concern to the Association and its representatives, to the extent such matters are within the discretion of the Board of Education, under Sec. 3543.2 of the Act, the following procedures shall be implemented.

2. The council shall be called the Consultation Council. The council shall be formed for the purposes of consulting on items listed in number 1.

3. The Council shall be composed of no fewer than three (3) but no more than seven (7) members designated by the Association. The Council shall also have management people selected by the Board of Education from each level of school program (such as elementary, intermediate and secondary) and from support group areas, one each selected by the District. The District shall assign one administrator from the Superintendent level to meet with the Council and to represent the Board. Board members may volunteer to serve on the Council.

4. Any employee selected to participate on the Council shall be afforded sufficient

release time from his/her regular duties to participate in the Council.

5. The Council shall meet at the request of either side.

6. The Consultation Council may, when necessary, invite community members, students, other bargaining unit members and professional experts to provide additional information.

7. The Consultation Council shall submit its recommendations, in writing, to the School Board for its consideration.

8. On each matter submitted, the School Board shall render a decision in writing to the Council within a reasonable amount of time.

This language was part of a previously existing proposal for the creation of liaison committees at the local school level. There was some discussion of the proposal, but the District took no position on it at the meeting.

Two days later, on July 20, 1977, the parties discussed procedures for consultation in the context of the liaison proposal. The District took the position that the procedures for consultation should be developed in consultation and were outside the scope of representation, although the District was willing to discuss the proposal thoroughly to resolve the dispute.

On September 17, 1977, after lengthy negotiations, the parties reached tentative agreement on several matters. Among other things, the District agreed to accept the Association's proposals for a liaison committee and the maintenance of

existing benefits if the Association would accept the District's class-size proposal. The Association proposed that the procedures for consultation be considered in the deal, but the District refused to do so. The Association then accepted the District's package as originally proposed, and the consultation issues were removed from the liaison committee article and became a separate article.

Although the parties discussed several times whether or not the procedures for consultation were within the scope of representation, they never actually negotiated about those procedures and the District never made any counterproposal on the subject.

Association Rights

The parties discussed Association rights during at least six negotiating sessions. On October 19, 1976, the Association presented its first proposal as follows:

ARTICLE VIII ASSOCIATION RIGHTS

Language:

1. The Association and its members shall have the right to make use of school equipment, buildings and facilities at all reasonable hours. Such equipment shall include typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment when such equipment is not otherwise in use.
2. The Association shall have the right to post notices of activities and matters of

Association concern on Association bulletin boards, at least one of which shall be provided in each school building in areas frequented by teachers. The Association may use the District mail service and teacher mailboxes for communications to teachers.

3. Authorized representatives of the Association shall be permitted to transact official Association business on school property at all reasonable times.

4. The Board shall place the Association as the first item under "new business" on the agenda of each public board meeting.

5. The Association may designate two teachers who are Association officers to receive unpaid leaves of absence. Also, the Board shall grant a paid leave to the President of the Association during his term in office; half of such leave to be paid by the Board, half by the Association.

6. Names, addresses and telephone numbers of all District teachers shall be provided to the Association no later than October 1 of each school year, or an extension in this time limit may be granted by mutual agreement.

7. The Board of Education will provide the Association with nonconfidential information requested by the Association to include but not be limited to class size, statistical reports, budgetary information, etc.

8. The Board will provide the Association with a complete Board Agenda and minutes at least forty-eight (48) hours before regular Board meetings.

9. Payroll deductions of Association dues shall be provided upon receipt of a signed authorization form from an employee. Such deductions shall remain in force from year to year unless cancelled by the employee.

10. The Association may use district facilities at no cost within the provisions of the law.²

Mathiason responded for the District that the subject was not appropriate for negotiation because the law guaranteed certain rights to exclusive representatives which could not be taken away, and that the District already had a policy on these issues anyway.

On November 4, 1976, the parties again discussed the proposal. The Association struck paragraph 5 at that time. In the interest of resolving the issue, Mathiason distributed a copy of a proposed modification of District policy on employee organizations, which read as follows:

CONSULTATION: PRIVILEGES

Recognized certificated employee organizations have the following privileges [sic]:

1. The right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by Senate Bill 160.

²Pursuant to the parties' agreement on these items, at hearing, the Association withdrew its charges that the District refused to negotiate paragraphs 5, (leaves of absence for Association business); 6, (District provision of addresses to Association), and 9, (payroll deduction of dues). The ALJ's decision, therefore, does not address these items.

2. Use of school building for meetings without charge, providing meetings do not interfere with school use.
3. The opportunity at regularly scheduled faculty meetings to announce meetings of recognized employee organizations, including agenda items to be considered.
4. Listing in the District's directory of the addresses and telephone numbers of the exclusive representatives and their major offices and officers.
5. Reasonable access to employees at their place of assignment when such access will not interfere with their assigned duties.
6. Use of District ditto, mimeograph, and similar equipment, exclusive of materials, provided that the regular use of the District for this equipment is not violated.
7. Nothing in these rules shall be construed to withhold from any individual employee the rights and privileges he may possess as an individual employee of the School District.
8. The District will provide the Association with a complete Board agenda at least 48 hours before regular Board meetings.

The Association's representative, Chris Dailey, complained that the proposed policy referred to privileges rather than rights. Mathiason said that the Association already had the rights and privileges listed in the District policy, and he reiterated that organization rights and privileges were not appropriate for inclusion in the contract since the subject was outside the scope of representation.

On June 20, 1977, the parties again discussed Association rights. The Association spokesman, George Cassell, again struck paragraph 5 and, for the first time, struck its paragraph 9. He then compared the Association's proposal with the District's suggested policy on "consultation privileges." After a caucus, the District spokeswoman, McClain, explained that the revised District policy was not intended to be a counterproposal, but was intended to suggest the items which might be covered in the consultation procedure, since the issue was outside of scope.

The parties discussed the matter on July 12 and July 13, with similar results.

The School Calendar

On December 13, 1976, the Association presented its "Work Year" proposal for 1977-78, as follows:

SEPTEMBER - 18 Student days
Sept. 2 - returning teachers report
Sept. 6 - school opens
Sept. 9 - Admission Day
OCTOBER - 21 Student days
NOVEMBER - 19 Student days
Nov. 11 - Veteran's Day
Nov. 24 & 25 - Thanksgiving
DECEMBER - 12 Student days
Dec. 19 - Winter holidays begin
JANUARY - 21 Student days

Jan. 2 - school reopens
 Jan. 20 - Teacher Workday
 FEBRUARY - 18 Student days
 Feb. 13 - Lincoln's Birthday
 Feb. 20 - Washington's Birthday
 MARCH - 18 days
 March 20 - spring vacation begins
 APRIL - 20 Student days
 MAY - 22 Student days
 May 29 - Memorial Day
 JUNE - 6 Student days
 June 8 - Last student day
 June 9 - Teacher workday
MINIMUM DAYS
 Nov. 23
 Dec. 16
 Mar. 17
 June 8

Student days - 175
 Teacher days - 178

In its initial form, the Association's proposal called for 175 teacher-student contact days. The Association immediately changed the proposal to provide for 178 teacher-student contact days, the same number as called for in an earlier District proposal. Dailey, the spokesperson for the Association, said that the only difference between the two proposals was in their form.

However, on January 31, 1977, the District presented its counterproposal on work year:

Members of this bargaining unit shall meet with students for 177 days and shall serve on site for an additional three teacher service days for returning teachers and four days for new teachers. This article shall apply for the ____ years covered by this agreement.

In response to the District's proposal, Ganzer, for DTA, stated that the calendar had to be studied in order for the parties to negotiate the work year. The District responded that the number of workdays was negotiable, but not the specific days of the calendar.

On May 26, 1977, the District board of trustees established September 6, 1977, as the opening day of school. On June 7, the parties again discussed the calendar. The Association asked why the District work-year proposal did not include a calendar, and the District responded that the calendar was outside the scope of negotiations. The parties also discussed the Board's action in establishing the opening day of school. The Association contended that it should have been asked for input and, Honoruth Finn, for the District, replied that the date had been set at an open meeting of the board of trustees. The parties discussed further why the Association felt that the calendar dates were of importance to teachers, and the District offered the following counterproposal to the Association's calendar proposal:

Members of the bargaining unit shall provide 180 days of service to the Davis Joint Unified School District. Teachers new to the school district shall provide 181 days of service for the first year of their employment.

On June 20, 1977, the parties restated their positions: McClain stated that the District would stay with its original proposal, and the Association reiterated its interest in having the calendar in the contract.

On July 11, 1977, the parties again discussed the work-year/calendar issue and each restated its previous position. At no time during negotiations did the District offer a counterproposal dealing with anything other than the number of days in the school year.

On August 9, 1977, Hondruth Finn sent a memo to all members of the District's certificated staff. The memo recited that school would open on September 6, 1977 and requested all certificated employees to report to work on September 1. The memo added that teachers with extended contracts would be notified as to the number of days added to their contracts.

On August 25, the board of trustees adopted a calendar for 1977-78, calling for 176 days of pupil attendance, 4 in-service days for returning teachers, and 5 for new teachers. The calendar was adopted with the understanding that the number of in-service days would continue to be subject to negotiations.

DISCUSSION

Unit Recognition

This portion of the case is unusual in that it arises from an unfair practice charge alleging a refusal to negotiate in good faith, rather than a hearing on a unit modification petition. The case is also complicated by the fact of PERB's changing precedents concerning the appropriateness of similar units in the early years.

Government Code section 3545³ defines the standards for determining an appropriate unit under EERA. In its early decisions interpreting this section, the Board found an insufficient community of interest between and among several categories of teachers, such as summer school teachers and regular teachers, to include them in the primary unit of classroom teachers. However, in a reversal of that policy, the Board in Peralta Community College District (11/17/78) PERB Decision No. 77 specifically overruled its earlier cases and established a presumption that all teachers are appropriately placed with a single unit and placed the burden of proving the inappropriateness of a comprehensive unit on those opposing it.

³Section 3545 provides in part:

- (a) In each case where the appropriateness of the unit is an issue, the Board shall decide the question on the basis of the

As noted above, this case does not directly concern the appropriateness of the unit petitioned for, but PERB's precedential history is useful in interpreting the parties' actions.

The ALJ found that the disputed categories of employees were not included under the initial recognition and, therefore, concluded that the District's refusal to negotiate regarding these employees did not violate the Act because there was no duty to negotiate for the categories of employees not in the unit. In so finding, he noted that the parties never really discussed or agreed upon whether these employees were to be in the unit and he found that the Association's request to represent "all certificated employees excluding those excluded by law" was vague from the outset. Further, he found that the fact that the list submitted apparently did not include teachers in the disputed categories lends support to the

community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees and confidential employees.

District's contention that the original petition did not contemplate representation of those employees.

While we agree with the ALJ that the parties never discussed the scope of the recognition, we find that the disputed categories of teachers were included in the unit from the outset.

The language describing the unit sought by the Association, "all certificated employees excluding those excluded by law," is quite clear in its description of a comprehensive unit. Similarly, the language used by the District to recognize the Association as "the representative agent for certificated employees, excluding those designated as management, supervisory, and confidential employees," describes a unit which includes all certificated teachers.

The District was very scrupulous in adjusting the list to exclude the categories of employees excluded by law--management, supervisory, and confidential--but never made any effort to exclude others. As this Board noted in El Monte Union High School District (10/20/80) PERB Decision No. 142 in a similar effort to determine the original intent of the parties, if the District had intended to exclude other teachers, they would have been listed with those it so pointedly did exclude. In the absence of such exclusions, we read the language of the unit description precisely as it is

written and we therefore find that the unit as originally recognized did include the disputed classification of teachers.

We do not find persuasive the fact that the list may not have included the names of teachers who taught exclusively in the disputed categories. We have found the language of the petition quite clear in seeking a comprehensive unit; there was never any argument by the District that the Association's showing of interest would have been inadequate if the other teachers had been included in the list.

We cannot, however, find that in these circumstances the District violated EERA by its refusal to negotiate about all these employees. Certainly the unit was defined expansively and there was no PERB case law to guide the parties as of the date of recognition. When the parties first briefly discussed the recognition clause in November of 1976, Mathiason stated only that day-to-day substitutes would not be included in the unit. (The Association claims in its exceptions to the Board that it never sought to represent day-to-day substitutes.) Association President Ganzer replied only that the parties would need to clarify the status of all short-term employees.

However, by the time the parties met again in the summer of 1977, PERB had issued a series of decisions specifically excluding various groups of teachers from the negotiating unit. See Belmont Elementary School District (12/30/76) EERB Decision No. 7; Petaluma City Elementary and High School

District (2/22/77) EERB Decision No. 9; New Haven Unified School District (3/22/77) EERB Decision No. 14; and Los Rios Community College District (6/9/77) EERB Decision No. 18 (summer school teachers); Petaluma, supra; Lompoc Unified School District (3/17/77) EERB Decision No. 13; New Haven, supra (adult education teachers); Belmont, supra; Petaluma, supra; Oakland Unified School District (3/28/77) EERB Decision No. 15; Los Rios, supra (substitute teachers).⁴

PERB later reversed its policy in Peralta, supra, reinterpreting Government Code section 3545 to establish a presumption that all classroom teachers should be in one unit; however, the Board specifically made Peralta prospective only in cases where disruption would result from retroactive application.⁵

The fact remains that, at the time the parties were negotiating and at the time the District refused to negotiate

⁴Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

⁵We note that, following Peralta, supra, the Board has determined that these teachers are properly included within the unit. See Palo Alto Unified School District (10/24/83) PERB Decision No. 352 (adult education); Dixie Elementary School District (8/11/81) PERB Decision No. 171, Oakland Unified School District (6/20/83) PERB Decision No. 320 (substitutes); Redwood City Elementary School District (10/23/79) PERB Decision No. 107; Palo Alto, supra, (summer school); El Monte Union High School District (10/20/80) PERB Decision No. 142; Los Gatos Joint Union High School District (11/14/83) PERB Decision No. 355 (driver's education).

about summer school teachers, adult education teachers, substitute teachers, and driver training instructors, the District was justified in believing that most of these employees could not properly be included in the unit. Although PERB had not specifically ruled on the status of driver training instructors, we do not find unreasonable the District's assumption at the time, given the trend of PERB's cases, that PERB would treat these teachers in the same fashion as the other groups considered. We therefore find no bad faith in the District's refusal to negotiate about these teachers.

The situation is somewhat different with regard to "temporary employees." The ALJ found that on July 12, 1977, the Association announced it might want to include long-term substitutes (as well as summer school and adult education teachers) within the unit. The District announced that these employees were not within the unit, relying on its argument that they were not within the unit it had recognized. Unlike the other classifications, however, PERB at that time had issued two decisions concluding that temporary teachers were properly included within the unit (Belmont, supra, and Grossmont Union High School District (3/9/77) EERB Decision No. 11.)

Since we have found that the recognition by the District properly covered all certificated teachers and the District had no reason to believe that PERB would exclude these teachers from the unit, we find that the District violated EERA by its refusal to negotiate about temporary teachers.

Release Time

The ALJ found that the subject of release time was within the scope of negotiations⁶ and that the District had refused to negotiate. PERB precedent is clear that release time for negotiations is related to wages and hours, and is therefore within the scope of negotiations. Anaheim Union High School District (10/28/81) PERB Decision No. 177. In that decision, the Board further found that the District is not entitled to set an initial release-time policy, nor may it unilaterally pass on the cost of release time to the exclusive representative.

Here the record amply supports the ALJ's conclusion that the District refused to negotiate in any meaningful way about the subject of release time. The District unquestionably adopted its own initial policy. Then, although the parties discussed the

⁶Section 3543.2 states:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits 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. In addition, the

proposal--what it meant, why the parties took their respective positions on whether the issues raised were in or out of scope--the District never made any counterproposal, nor made any apparent effort actually to negotiate about the substance of the proposal.

We find, therefore, that the District violated section 3543.5(c), and concurrently section 3543.5(a) and (b) by its refusal to negotiate release time.

Consultation Procedures

The ALJ found that the District had similarly refused to negotiate about procedures for consultation. Although the parties reached a tentative agreement early in negotiations, the parties' subsequent inability to get together in consultation prompted the Association to offer a very different, much more detailed proposal several months later, about which the District would never negotiate in substance.

exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Even though he found that the District refused to negotiate about this subject, the ALJ found no violation since he found the issue to be outside the scope of representation.

The Board, however, has since decided this issue decisively in Jefferson School District (6/19/80) PERB Decision No. 133.

The Board there held that:

The requirement that teachers be consulted on 'other educational matters that are decided on an individual school basis' we find to be a mandatory subject of bargaining as well. Although the actual substance of educational matters need not be negotiated, the procedures for consultation must be. The right of consultation is guaranteed in section 3543.2. . . . Since this proposal seeks only to establish the mechanism for implementing that right, the proposal conforms to the mandates of section 3543.2 and the employer may not refuse to bargain over this proposal.

We agree with the ALJ that the District refused to negotiate procedures for consultation. As with the other disputed subjects, the District discussed the proposal at length but refused to negotiate about the substance. While the District contends on exceptions that it did not refuse to negotiate, it points to no portion of the record in support of that claim. To the extent that the District claims to have fulfilled its obligation to negotiate by its agreement to the general consultation article, we do not find its argument persuasive. The District had merely tentatively agreed to do what it was obligated by law to do, and it retained an

obligation to respond to the Association's later in-scope proposal, developed to address very real problems in the consultation process.

We conclude, then, that the District violated EERA section 3543.5(a), (b) and (c) by its refusal to negotiate procedures for consultation.

Association Rights

The ALJ found that the District refused to negotiate about the proposal on association rights. However, he also determined that this subject was outside scope and, therefore, he found no violation. The Association did not except. (The District did except to the finding that it did not negotiate.) However, PERB has determined that it will consider an issue even where no exceptions were filed in order to remedy a serious error of law. Fresno Unified School District (4/30/82) PERB Decision No. 208; Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373, at p. 39. We find it necessary to do so here since the Board has subsequently ruled on the negotiability of many of these items.

As the case went to hearing, the following Association proposals were still in dispute:

ARTICLE VIII, ASSOCIATION RIGHTS

Language:

1. The Association and its members shall have the right to make use of school equipment, buildings and facilities at

all reasonable hours. Such equipment shall include typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment when such equipment is not otherwise in use.

2. The Association shall have the right to post notices of activities and matters of Association concern on Association bulletin boards, at least one of which shall be provided in each school building in areas frequented by teachers. The Association may use the District mail services and teacher mailboxes for communications to teachers.
3. Authorized representatives of the Association shall be permitted to transact official Association business on school property at all reasonable times.
4. The Board shall place the Association as the first item under "new business" on the agenda of each public board meeting.
.....
7. The Board of Education will provide the Association with nonconfidential information requested by the Association to include but not limited to class size, statistical reports, budgetary information, etc.
8. The Board will provide the Association with a complete Board Agenda and minutes at least forty-eight (48) hours before regular Board meetings.
.....
10. The Association may use district facilities at no cost within the provisions of the law.

Items 1, 2, 3 and 10 appear to be well within the Board's holding in Healdsburg Union High School District et al.

(1/5/84) PERB Decision No. 375 that proposals intended to guarantee the exclusive representative's access to District employees, facilities, and equipment are within the scope of negotiations under EERA. Healdsburg, supra, at p. 19. The Board there rejected the District's argument that the Legislature intended to preempt negotiations of these items by its inclusion of access in section 3543.1(b), finding it quite appropriate to include statutory rights guaranteed by EERA in a collective bargaining agreement.

Item 7 seeks a wide range of information, which is clearly relevant to the Association's role as exclusive representative. PERB has previously determined that provision of such information is negotiable to the extent that the information is necessary for the exclusive representative to fulfill its representational role. Jefferson, supra, at p. 55. This principle was reiterated in Healdsburg. To the extent that the District disputes whether the information is necessary, it has the obligation to clarify the meaning of the proposal rather than to simply refuse to negotiate about it. Healdsburg, supra, p. 20.

The Board previously decided in Jefferson, supra, that a proposal to provide the agenda for school board meetings was negotiable because the representative was seeking only

information relevant to its role of representing employees in the employment relationship. Jefferson, supra, at p. 57. We therefore find item 8 to be negotiable.

The proposal remaining is number 4, which would require the school board to place the Association on the agenda as the first item of "new business" at each public meeting. While this proposal is clearly related to the Association's role as exclusive representative, we find that this proposal interferes with management prerogative so as to render it beyond the scope of negotiations. Anaheim, supra. PERB has previously decided that an exclusive representative has some right to appear before the school board in its capacity as the representative of employees in the employment relationship. (San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.) However, that right does not require a secured first place on the agenda of every public board meeting. We therefore find this proposal outside of scope.

We also find the ALJ's conclusion that the District did not negotiate in a meaningful way about these proposals to be amply supported by the record. As with the other disputed subjects the parties discussed the proposals, but the District took the consistent position that they were outside scope.

Calendar

The ALJ found that the District did negotiate with regard to some of the elements of the calendar and did not negotiate

with regard to others. He found that the District negotiated the number of days, the number of student contact days, and the number of holidays. He found that the District did not negotiate the dates of student contact days and the dates of minimum days; however, he found these items outside of scope and the Association did not except.

He found violations as to four items which were within scope which the District refused to negotiate: (1) the date of commencement of the school year; (2) the dates of holidays; (3) the number of minimum days, and, (4) the date of the beginning of summer vacation. The District excepts to the finding of violation as to these four items, claiming that they are outside of scope. It does not claim that it fulfilled any obligation to negotiate over these issues.

In a series of cases, PERB has determined that the calendar, that is, beginning and ending dates of the work year, vacation and holiday dates is within the scope of negotiations. Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96; Jefferson, supra; San Jose, supra; Oakland Unified School District (12/16/83) PERB Decision No. 367. We therefore conclude that the District violated section 3543.5(a), (b) and (c) by its refusal to negotiate these items.

The ALJ next concluded that the number of minimum days is within scope. Designation of a day as a minimum day means that the number of hours of instruction for that day is reduced and

the time thereby made available is devoted to other work duties. The ALJ based his conclusion on his finding that minimum days are those in which there are fewer teaching hours, and that the matter at issue is therefore hours itself. The District excepts, claiming that no impact on hours was demonstrated by the record, and that the issue of minimum days concerns duties rather than hours.

The Board has previously decided in San Jose Community College District (9/30/82) PERB Decision No. 240 that it is within the prerogative of the District to decide which among a teachers' normal duties will be performed on any given day. In that case, the District unilaterally substituted 15 days of classroom instruction for 15 in-service days in the school calendar. The Board found there that the Association failed to prove any impact on a matter within scope, since there was no evidence to show any increase in hours, preparation time, etc., and found as well that the decision whether the teachers were to attend in-service or instruct students was properly reserved to the District. The Board therefore found no unilateral change in a matter within scope. See also Palo Verde Unified School District (10/28/83) PERB Decision No. 354.

Those decisions would appear to be controlling here. The matter at issue is minimum days rather than in-service training (although it appears that minimum days are often used for in-service) but the evidence similarly fails to indicate that

the designation of a minimum day instead of an instructional day affects the number of work hours required of a teacher. The ALJ found an impact on the length of the teachers' workday but, as the District notes by way of exception, the only testimony on the subject is by Association president Ganzer, who testified that the students' day was shorter on a minimum day and, therefore, student contact time was shorter but that the length of a teacher's day was the same. We find therefore that the number of minimum days is outside the scope of negotiation, as opposed to the total number of days of work.

Remaining is the issue of unilateral change in the calendar. On August 9, 1977, the District sent a memo to all certificated staff announcing that teachers should return to work as of September 1, 1977. The Association charged that the District violated EERA by its action on August 9 in unilaterally establishing the beginning date of school for teachers. We agree. Since we have concluded that the opening date of the teachers calendar is in fact an item within scope, we therefore find a violation in the District's unilateral establishment of the opening day. Grant Joint Union High School District (2/26/82) PERB Decision No. 196; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

In sum, we find that the District violated EERA by failing to negotiate in good faith with the Association over proposals

affecting temporary teachers. We find also that the District violated EERA by its failure to negotiate about release time, procedures for consultation, association rights (with the exception of item 4), commencement of the teachers' work year, dates of holidays, and the end of the teachers' work year. We also find the District's unilateral imposition of the opening date of the 1977-78 work year for teachers to be an unlawful unilateral change.

We deny the outstanding request for oral argument since most of the issues raised by this case have already been resolved, and we similarly deny the request from the Informational Project of Educational Negotiations to file an informational brief.

ORDER

Pursuant to section 3541.5(a), (b) and (c), and based upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the Public Employment Relations Board hereby ORDERS that the Davis Joint Unified School District shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith regarding all members of the certificated employees unit.

2. Failing and refusing to meet and negotiate in good faith over release time, procedures for consultation,

association rights, commencement of the teachers' work year, dates of holidays and the date of the end of the teachers' work year.

3. Unilaterally setting the beginning of the teachers' work year without meeting and negotiating in good faith.

4. Interfering with the right of employees to be represented by failing and refusing to negotiate in good faith.

5. Denying to the Davis Teachers Association, CTA/NEA, the right to represent employees by failing and refusing to negotiate in good faith.

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

1. Upon request, meet and negotiate in good faith with the Davis Teachers Association, CTA/NEA, with respect to those subjects enumerated above to the extent that we have determined them to be within the scope of representation.

2. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this

Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with her instructions.

Member Tovar joined in this Decision.

Chairperson Hesse's concurrence begins on page 38.

Hesse, Chairperson, concurring: Insofar as the majority applies the precedents found in Jefferson School District (6/19/80) PERB Decision No. 133, Healdsburg Union High School District (1/5/84) PERB Decision No. 375, et al., concerning issues within the scope of bargaining, I concur that the above decisions are correctly followed.

Concerning the majority opinion on the unit question, I question the rationale adopted by my colleagues in ruling that the disputed categories of teachers were included in the unit, but that there was no violation when the District refused to bargain. To hold that they have been in the unit all along without also finding a violation of section 3543.5(c) seems contradictory at best.

We must bear in mind that this case is nearly eight years old and pre-dates Peralta, where PERB adopted a new rationale and a new presumption for deciding who bears the burden of proof in dealing with the placement of teachers in a comprehensive unit. Just as the majority notes, Peralta should not be used to find a violation of section 3543.5(c). I believe, however, that it also should not be used retroactively as a yardstick to determine what the composition of the unit was in 1977. Thus, I would hold that, except for the temporary employees, the disputed groups were properly excluded from the unit in 1977. Now that this case has been decided and PERB law stabilized, the parties may prospectively negotiate over the

inclusion of those teachers who have been in limbo for seven-and-a-half years. I thus concur that there is no violation of 3543.5(c), but for the reason I have stated above, rather than the majority's rationale.

APPENDIX

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



After a hearing in Unfair Practice Case No. S-CE-76(a)(b), Davis Teachers Association, CTA/NEA v. Davis Joint Unified School District, in which all parties had the right to participate, it has been found that the Davis Joint Unified School District violated the Educational Employment Relations Act, Government Code section 3543.5(a), (b) and (c) by failing and refusing to meet and negotiate in good faith with the Davis Teachers Association, CTA/NEA.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith regarding all members of the certificated employees unit.
2. Failing and refusing to meet and negotiate in good faith over release time, procedures for consultation, association rights, commencement of the teachers' work year, dates of holidays, and the date of the end of the teachers' work year.
3. Unilaterally setting the beginning of the teachers' work year without meeting and negotiating in good faith.
4. Interfering with the right of employees to be represented by failing and refusing to negotiate in good faith.
5. Denying to the Davis Teachers Association, CTA/NEA the right to represent employees by failing and refusing to negotiate in good faith.

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

1. Upon request, meet and negotiate in good faith with the Davis Teachers Association, CTA/NEA, with respect to

those subjects enumerated above to the extent that they have been determined to be within the scope of representation.

Dated:

DAVIS JOINT UNIFIED SCHOOL DISTRICT

By:

Authorized Agent

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