STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMADOR VALLEY TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1094
v.	)	PERB Decision No. 594
PLEASANTON JOINT SCHOOL DISTRICT,	)	October 30, 1986
Respondent.	)	

Appearances: Beeson, Tayer & Silbert by Franklin Silver for Amador Valley Teachers Association, CTA/NEA; Pinnell, Hudak & Kingsley by Robert E. Kingsley for Pleasanton Joint School District.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Pleasanton Joint School District (District) of a decision by a PERB administrative law judge (ALJ), attached hereto. In the decision below, the ALJ rejected the District's contention that the unfair practice charge filed by the Amador Valley Teachers Association, CTA/NEA should be deferred to arbitration. For the reasons outlined below, we agree.

SUMMARY OF FACTUAL ALLEGATIONS

The terms and conditions of employment in the District are set forth in a collective bargaining agreement executed by the parties in October 1985. The term of the contract was made retroactive to July 1984, and runs until June 1987. The

agreement includes a grievance and arbitration provision that culminates in binding arbitration. The parties' agreement defines a grievance as

> . . . an alleged violation, misinterpretation or misapplication of the express terms of this Agreement, which directly and adversely affects the grievant.

The contract contains no provision expressly dealing with minimum days per se. However, the contract does contain other provisions deemed pertinent by the parties. Article IV concerns "Hours of Employment." It reads:

> The duty day shall include as much time as is necessary to fulfill professional duties to facilitate the educational program. The principal shall determine both the schedule and the duties and responsibilities. Each site administrator shall determine the needs of his/her particular school and, where possible, equitably assign such schedules, duties and responsibilities. This provision shall not apply to voluntary activities. Effective July 1, 1982, the portion of the teacher work day assigned to in-classroom student contact for kindergarten teachers shall not exceed two hundred and eighty (280) minutes; the portion of the teacher work day assigned to in-classroom student contact for regularly assigned teachers in grades one through eight (1-8) shall not exceed three hundred and twenty-five (325) minutes.

A second provision, Article XX, concerns the "Calendar." This article states:

> A. For the 1984/85 through 1986/87 school years, there shall be one hundred-eighty (180) instructional days and three (3) noninstructional days for all unit members except psychologists.
>
> For the 1985/86 through 1986/87 school years, the first student day shall be the Wednesday after Labor Day with the first

certificated work day being the Tuesday after Labor Day.

B. For the 1984/85 through 1986/87 school years, there shall be one hundred-ninety-six (196) psychologist work days.

The contract also contains a reopener provision, Article XXV(B). That article states:

For the 1985/86 and 1986/87 school years, the parties agree to reopen negotiations during each school year on the following:

1. Article X - Health and Welfare

2. Article XI - Salary

3. Calendar

4. One unspecified Article per party

Documents filed by the parties indicate that school calendar negotiations were taking place from the time the contract was executed in October 1985 through spring 1986. In prior years, except for 1984-85 when contract negotiations were proceeding, the annual calendar included references to holidays and partial workdays. On March 5, as the charge and complaint allege, the District's school board approved a monthly calendar making March 21, the day preceding spring break, a full teacher workday. This occurred while calendar negotiations were still taking place.

DISCUSSION

Section 3541.5(a) of the Educational Employment Relations Act (EERA)[1] instructs the Board to defer to binding arbitration

---

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

when the grievance machinery of the parties' negotiated agreement "covers the matter at issue."[2] Here, the question is whether the "matter at issue," the alleged unilateral action of the District's school board eliminating March 21, 1986 as a minimum day for teachers, is covered by the terms of negotiated grievance machinery.

By its terms, the parties' grievance machinery covers only those disputes that refer to the express terms of their contract. It sets forth the parties' lawful intent to exclude certain matters from coverage under the grievance machinery. L. M. Settles Construction Co., Inc. (1981) 259 NLRB 379 [108 LRRM 1380]. Thus, the grievance machinery here covers the matter at issue only if, true to the parties' intent, the dispute is founded on express contractual language. Examination of the parties' contractual agreement reveals no article concerning minimum days.

The District, finding no express contractual provision, relies on the language of Article IV and Article XX of the parties' agreement. However, neither provision refers to minimum days nor does more than establish the instructional year as 180

---

[2]In pertinent part, section 3541.5(a) proscribes issuance of a complaint

> . . . against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

days. The hours-of-employment article refers to the authority of the "site administrator" and the needs at a "particular school." Here, however, since the disputed action was taken by the school board and was instituted districtwide, it cannot seriously be maintained that the contractual provisions cover the matter at issue.

To the contrary, Charging Party asserts, and the District agrees, that minimum-day designation is a component of the school calendar and that, by operation of their agreement, the parties relegated the matter of the calendar to reopeners. Indeed, once the reopener negotiations commenced in October 1985, the parties exchanged numerous proposals and counterproposals that included minimum-day designations. Undeniably, pursuant to their contractual agreement, the parties were engaged in negotiations over minimum days and, as of March 5, 1985, the date of the school board's action, had not reached agreement. Whether, by this bargaining conduct, the District fulfilled its obligation to negotiate in good faith over the minimum-day designation is the question brought to the Board for resolution. Absent any reference in the parties' contract to minimum days and by virtue of the unambiguous reopener clause regarding the calendar, we find the negotiated grievance machinery does not cover the matter at issue and, therefore, deny the District's motion to defer.

In reaching the conclusion outlined above, we necessarily reject the arguments posed by Member Porter in his dissent.

First, the question of arbitrability is one for this Board, not the arbitrator, to decide. AT&T Technologies v. CWA (1986) ___ U.S. ____ [121 LRRM 3329]. Second, the dissent misreads our decision as one assessing the merits of the District's contention. We have confined our analysis to the singular question of whether the parties' contract "covers the matter at issue." We find it does not because there is no express provision concerning minimum days, because the parties were engaged in reopener negotiations regarding the school calendar, and because minimum-day designation is known by all concerned to be a component of the school calendar. Finally, we readily acknowledge the longstanding presumption favoring arbitration. However, that presumption is not so strong as to require the Board to abdicate its statutory responsibility to decide unfair practice charges when, as here, the parties' dispute is not covered by their contractual agreement.

ORDER

Based on the foregoing, the Board AFFIRMS the administrative law judge's denial of the District's Motion to Dismiss and directs that the case proceed to hearing.

Chairperson Hesse joined in this Decision. Member Porter's dissent begins on p. 7.

Porter, Member, dissenting: I would reverse the ALJ and dismiss the complaint, inasmuch as this matter should be deferred to the arbitration procedure of the agreement between the parties. While this case certainly poses a close question on whether the grievance mechanism covers the matter at issue, given the language defining grievance as involving the "express" terms of the agreement, I do not read the language so narrowly nor so conclusively as does the majority opinion.

In this dispute, the Association alleges that the District unilaterally altered the past practice by eliminating March 21 as a minimum school day, and that this action occurred while the parties were meeting and negotiating reopeners, including the reopener on calendar. While it is clear that this allegation states a prima facie violation of EERA and, while I also agree that the District's contractual argument is unconvincing, it is undisputed that the parties were negotiating the subject of calendar pursuant to an express agreement to do so found in the reopener clause of the contract. Thus, the question becomes, does that reopener provision contain an implied agreement to maintain the status quo pending completion of those negotiations and, if so, what is the status quo? Alternatively, is there a past practice of maintaining the status quo pending the outcome of reopener negotiations that was impliedly included in the agreement? Those questions bring the dispute within the provisions of the collective bargaining agreement. That being the case, it is appropriate to defer the issue to allow an

arbitrator to determine what the parties intended concerning the status quo when they negotiated the reopener language. Should the arbitrator find such an implied understanding or past practice, along with a breach of that understanding, then the arbitrator can essentially resolve the unfair practice at the same time.[1]

The EERA prohibits this agency from issuing a complaint against conduct also prohibited by the provisions of the agreement until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted by either settlement or binding arbitration. (Gov't Code section 3541.5(a).) EERA also provides a procedure for a party to seek a court order compelling arbitration, and specifies that such action is to be brought under Code of Civil Procedure section 1280 et seq.[2] This Board should be mindful of the language of

---

[1]The majority's reliance on AT&T Technologies v. CWA (1986) ___ U.S. ____ [121 LRRM 3329] for the proposition that the question of arbitrability is for this Board to decide, rather than an arbitrator, is misplaced. This case is inapposite, since it addresses the court's role in ruling on a petition to compel arbitration. Our role is different. The Board's task is to further the aim of collective bargaining by deferring to the agreed-upon dispute resolution mechanism, if it covers the matter at issue. It is the majority's conclusion on this latter point with which I disagree, since, for the reasons noted herein, the grievance article does cover the matter at issue.

[2]Section 3548.7 states, in pertinent part:

> Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefore in the agreement . . . , the aggrieved party

those statutory provisions and cases decided thereunder in resolving questions concerning arbitrability, as these cases reflect the public policy that favors arbitration. Section 1281.2 of the Code of Civil Procedure states, in part:

> If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

This clearly reflects a legislative preference for arbitration, notwithstanding that the court finds little or no merit in the petitioner's contention under the contract. As at least one court has stated in construing this provision:

> In this state, disputes as to the meaning, interpretation, and application of any clause of an agreement which provides for arbitration--even those that prima facie appear to be without merit--are a proper subject for consideration and decision by the arbitrators. . . .
>
> . . . . . .
>
> California has declared its preference for the arbitrable rule established in the series of labor cases commonly referred to as "the arbitration trilogy" [citing the Steelworkers trilogy]. . . .
>
> . . . . . .

> may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefore in such agreement . . . .

> The arbitrators, not the courts, have the task of defining the issues between the parties and of the interpretation, construction and application of the Joint Powers Agreement. Judicial caution is called for against jumping too quickly to the conclusion that a claim indisputably falls outside the scope of an arbitration provision. East San Bernardino County Water District v. City of San Bernardino (1973) 33 Cal.App.3d 942, 951, 952, 954 [183 Cal.Rptr. 360, 645 P.2d 1192].

In Morris v. Zuckerman (1967) 257 Cal.App.2d 91 [64 Cal.Rptr. 714], the court, after referencing Code of Civil Procedure section 1281.2, stated:

> Following Posner [Posner v. Grunwald-Marx, Inc., 56 Cal.2d 169 [14 Cal.Rptr. 297, 363 P.2d 313]], the court made these further pronouncements as to the question of arbitrability: "Arbitration is, of course, a matter of contract, and the parties may freely delineate the area of its application. The court's role, according to the Supreme Court, however, must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitration. A heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" (Citation omitted.) 257 Cal.App.2d, at p. 95.)

The standard articulated by the courts above came from the Steelworkers trilogy, and reflects the strong policy in California in favor of arbritration.

Previous Board decisions have utilized the standard adopted by the NLRB for determining whether the contract and its meaning lie at the center of the dispute. See, e.g., Dry Creek Joint

Elementary School District (1980) PERB Order No. Ad-81a; Conejo Valley Unified School District (1984) PERB Decision No. 376. In Conejo Valley, id., the association alleged that the district had reduced hours and laid off employees without giving the association an opportunity to negotiate. The collective bargaining agreement between the parties contained provisions that addressed the topics of layoffs and reductions in hours, and included binding arbitration. The association challenged the regional attorney's conclusion that the contract and its meaning lay at the center of the dispute. The Board relied on the NLRB's interpretation of the phrase, "the contract and its meaning lie at the center of the dispute," and dismissed the charges against the employer. This interpretation was articulated in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931], in which the NLRB stated:

> [T]he unilateral action taken . . . is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. . . .

The Board also considered the NLRB's decision in Roy Robinson Chevrolet (1977) 228 NLRB 828 [94 LRRM 1474], in which the NLRB deferred to arbitration a charge that the employer had closed part of its operation and discharged its employees without first bargaining with the union. The employer claimed that the contract gave it the authority to take such action without

negotiating, relying on a provision that merely said the "employer shall have the exclusive right to hire, suspend and discharge his employees." Although the union had argued that the employer's interpretation of the contract language seemed improbable, the NLRB nevertheless deferred the matter, saying:

> As to the dissenter's argument that there is no contract provision which could even arguably give color to Respondent's conduct, we disagree. The Supreme Court said in United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 582-583, 46 LRRM 2416, that an order to arbitrate a particular grievance should not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." We believe that the dispute here falls within that standard and is therefore properly referable to the parties' arbitration procedure. (Emphasis added.) Conejo Valley, supra, at p. 6, quoting Roy Robinson Chevrolet, supra.

The Board found the facts in Conejo Valley to be similar to those in Roy Robinson Chevrolet, in that in both cases the contract authorized the employer to lay off or discharge employees, but did not expressly state that the employer could do so without further negotiations. The Board found that the employer in Conejo Valley had an even stronger argument that it had fulfilled its negotiating obligation than did the employer in Roy Robinson Chevrolet and, therefore, the charge "raises a substantial question of contract interpretation which lies at the center of the parties' dispute." (Conejo Valley, supra, at p. 9.) The Board thus concluded that under those circumstances,

EERA section 3541.5(a)(2) prohibited the agency from issuing a complaint.

Applying the previously utilized standard, I cannot conclude that the arbitration clause in this case is not susceptible of an interpretation that would allow an arbitrator to resolve this dispute. The Association itself recognized the possibility of this when it filed a grievance claiming a violation of the calendar provision.

Many arbitration decisions can be found in which the arbitrator looked to the past practice or custom to resolve a dispute. For example, the arbitrator in Klickital County (1985) 86 LA 283, 286 states:

> It is generally accepted in the law of labor arbitration that "custom and past practice between the parties may be acknowledged by the arbitrator to interpret ambiguous language in a contract, to exise or revise clear language in a contract, or to provide work rules or conditions of employment where the contract is silent."

In Farrell Lines, Inc. (1986) 86 LA 36, the arbitrator was asked to determine the arbitrability of a grievance which the employer claimed did not meet the contractual filing timelines. The grievant alleged that the practice of the parties was to utilize an informal step of dispute resolution prior to implementing the first formal step of the grievance mechanism, and that was done in this case within the contemplated timelines. After examining the past practice, the arbitrator concluded that the practice was unvarying, clearly defined, verbalized and acted

upon, and accepted by both parties. Consequently, the arbitrator concluded that the practice became an unwritten part of the grievance procedure and the grievance was timely and, therefore, arbitrable. See, also, Maple Heights Board of Education (1985) 86 LA 338 (past practice revealed that, notwithstanding contractual language to the contrary, the intent of the parties was that the seven and one-half hour workday included lunch); Sun Refining and Marketing Co. (1985) 86 LA 266 (based on past practice, arbitrator concluded that language describing the job function of the chief operator was not all-inclusive and the operator had in the past performed the complained-of task); School City of Hobart (1985) 86 LA 557 (district discontinued giving three early release days, although they had been granted for the preceding three years. The calendar did not specifically address early release days, although it was attached to the contract. The arbitrator framed the issue as whether the association had proved that there existed a contractual basis or an implied condition on which the contract was silent, but which was nevertheless an established past practice that would support a continuation of the grieved benefit.).

The harm of the majority opinion is that it has, without the benefit of any testimony or evidence, concluded that the agreement of the parties forecloses arbitration unless the contract specifically addresses a subject. Thus, the majority opinion writes out of the agreement that body of arbitrable standards which allows an arbitrator to examine past practice to

determine if the contract impliedly contains a term or understanding not specifically included in the agreement. Such a result does not further the purposes of EERA, since it disavows the agreement of the parties to submit contractual disputes to arbitration, and it does not foster labor stability.

Further, by concluding that this issue is not arbitrable under the parties' agreement, the charging party is foreclosed from relying on the contract as one of the bases of its claim. If the Association is unable to demonstrate that the Friday before spring break has consistently been designated a minimum day, then it will not have met its burden of showing unlawful action by the District. Reaching this conclusion makes it clear that at least part of the real harm complained of is the District's alleged undermining of the agreed-upon negotiations that were occurring under the express terms of the contract. Thus, we come back to the language of the contract itself and its agreed-upon dispute resolution mechanism. The majority opinion itself recognizes this when it concludes:

> Undeniably, pursuant to their contractual agreement, the parties were engaged in negotiations over minimum days and, as of March 5, 1985, the date of the school board's action, had not reached agreement. Whether, by this bargaining conduct, the District fulfilled its obligation to negotiate in good faith over the minimum-day designation is the question brought to the Board for resolution. (Emphasis added. Majority opinion, p. 5.)

There are several good reasons why the deferral policy favors arbitration. First, the entire thrust of the Act is to have the

parties reach a mutual agreement over terms and conditions of employment. Having done so, the parties may mutually agree to a mechanism to resolve alleged violations and/or disputes concerning the meaning of that agreement.

Second, the dispute resolution mechanism will no doubt result in a speedier conclusion to the matter, so the parties can go on about their business. This is especially important when it concerns an issue involving negotiations, as that issue will continue to taint future negotiations, which does not encourage stable labor relations.

Third, preference for one forum, arbitration, over another, PERB procedures, will avoid duplication of litigation with the possibility of inconsistent results, and will tend to discourage "forum shopping" by the charging party.

Fourth, as stated by the NLRB in Roy Robinson Chevrolet, supra, doubts should be resolved in favor of coverage.

Finally, there is a strong public policy in California that favors arbitration. The California Supreme Court has stated:

> We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (Citation omitted.) Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 622 [116 Cal.Rptr. 507, 526 P.2d 971].

While the issue before the Court was interest arbitration, the policy is no less applicable when the matter concerns grievance arbitration. See, also, Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802, 811, 813 [165 Cal.Rptr. 908].

For the foregoing reasons, I dissent and would defer the matter to arbitration.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

AMADOR VALLEY TEACHERS ASSOCIATION, Charging Party, v. PLEASANTON JOINT SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1094 MEMORANDUM AND ORDER DENYING MOTION TO DISMISS

The Pleasanton Joint School District (District) has moved to dismiss this action on the ground that deferral to binding arbitration is required under section 3541.5(a)(2) of the Educational Employment Relations Act (EERA or Act).[1]

The unfair practice charge filed March 13, 1986 by the Amador Valley Teachers Association (Association) alleged that the District's school board had voted to unilaterally eliminate a minimum day for teachers on the Friday preceding the upcoming

---

[1]Government Code section 3541.5(a)(2) states in relevant part that the Public Employment Relations Board (PERB or Board) shall not,

> . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

spring vacation. This conduct, it was claimed, violated the good faith bargaining requirement of the EERA.[2]

The PERB General Counsel issued a complaint on March 27, 1986, also alleging a bargaining violation. The complaint stated that prior to March 1986 the minimum day before spring vacation had been an established policy, and that the parties were negotiating the 1985-86 calendar when the District changed it to a full workday. According to the complaint, the District's action was taken,

> . . . without having negotiated with Charging Party to agreement or through the impasse procedures . . . .

The day the complaint issued, the Regional Attorney in San Francisco wrote a letter rejecting the District's pre-complaint contention that the parties' collective bargaining agreement required deferral by the PERB to the binding arbitration machinery of that agreement. Analyzing the District's claims in light of PERB and federal precedent,[3] the Regional Attorney concluded that the contract and its meaning did not lie at the center of the dispute.[4]

---

[2]See Government Code section 3543.5(c), which prohibits a refusal and failure to negotiate in good faith. Concurrent violations of EERA sections 3543.5(a) and (b) were alleged as well.

[3]See, e.g., Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a; Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].

[4]The letter stated, in part:

The District filed its answer and a motion to dismiss on April 23, 1986, urging that the subject of the complaint was a matter for binding arbitration. (See PERB Rules 32644, 32646 (Cal.Admin. Code, tit. 8, secs. 32644, 32646).) The Charging Party submitted its opposition to the motion on May 9, 1986. In connection with the motion, each party offered relevant documents and factual claims, which were considered together with the allegations of the complaint and the charge. (See Conejo Valley Unified School Dist. (1984) PERB Dec. No. 376 at p. 9; Merced Union High School Dist. (1985) PERB Order No. Ad-150 at pp. 3-4.) For the reasons that follow, it is found that the Regional Attorney correctly rejected the District's deferral objection and that dismissal is not warranted.

The contract between the parties was executed in October 1985 and covers the period July 1984 through

---

> The contract does not contain a provision which directly covers the dispute raised by the unfair practice charge. Neither Article IV nor Article XX refers to the annual schedule indicating the dates of holidays, vacations, noninstructional days, and instructional (full and minimal) days. Nor does the contract even arguably grant the authority to school principals to make determinations concerning the dates on which such events shall occur.
>
> In sum, interpretation of the contract will not resolve the dispute over the existence of a past practice of observing a minimum day on the last Friday before spring break.

June 1987. The agreement includes a grievance and arbitration article. (Art. II.) A grievance is defined as "an alleged violation, misinterpretation or misapplication of the express terms of this Agreement, which directly and adversely affects the grievant." Grievants may be unit members or the Association itself. If a dispute goes to arbitration, the decision "shall be final and binding . . . ."

The District contends that two contract provisions arguably apply to the minimum day dispute, thereby justifying arbitration because the District's action was not "patently erroneous," but was "based on a substantial claim of contractual privilege . . . ." (Quoting Conejo Valley Unified School Dist., supra, PERB Dec. No. 376 at p. 5.)

One article cited by the employer is the section on "Hours of Employment." (Art. IV.) That article states:

> The duty day shall include as much time as is necessary to fulfill professional duties to facilitate the educational program. The principal shall determine both the schedule and the duties and responsibilities. Each site administrator shall determine the needs of his/her particular school and, where possible, equitably assign such schedules, duties and responsibilities. This provision shall not apply to voluntary activities. Effective July 1, 1982, the portion of the teacher work day assigned to in-classroom student contact for kindergarten teachers shall not exceed two hundred and eighty (280) minutes; the portion of the teacher work day assigned to in-classroom student contact for regularly assigned teachers in grades one through eight (1-8) shall not exceed three hundred and twenty-five (325) minutes.

The second provision cited by the District concerns the "Calendar." (Art. XX.) This article states:

> A. For the 1984/85 through 1986/87 school years, there shall be one hundred-eighty (180) instructional days and three (3) noninstructional days for all unit members except psychologists.
>
> For the 1985/86 through 1986/86 school years, the first student day shall be the Wednesday after Labor Day with the first certificated work day being the Tuesday after Labor Day.
>
> B. For the 1984/85 through 1986/87 school years, there shall be one hundred-ninety-six (196) psychologist work days.

One other section of the contract also is relevant to this dispute. The contract's reopener provision (Art. XXV(B)) states that,

> For the 1985/86 and 1986/87 school years, the parties agree to reopen negotiations during each school year on the following:
>
> 1. Article X - Health and Welfare
>
> 2. Article XI - Salary
>
> 3. Calendar
>
> 4. One unspecified Article per party

The agreement, it should be noted, does not contain as an alternative to a negotiated calendar any section incorporating past policy or practice, either directly through express adoption, or indirectly through the scope of the grievance procedure. Further, there is no management rights provision, general or specific in nature, cited by the District as authority for its deferral claim.

Beyond the contract, the papers filed by the parties indicate that school calendar negotiations were taking place from the time the contract was executed in October 1985 through spring 1986. In prior years, except for 1984-85 when contract negotiations were proceeding, the annual calendar included references to holidays and partial workdays. On March 5, as the charge and complaint allege, the District's school board approved a monthly calendar making March 21, the day preceding spring break, a full teacher workday. This occurred while calendar negotiations were still taking place. There was no evidence or argument offered by the District that the schedule for other 1985-86 holidays, vacations or partial workdays was implemented unilaterally while negotiations were going forward.

Regarding the allegation that a past practice of minimum days had been altered, the District contends that,

> While previous Fridays before spring vacation have not always been a regular length instructional day, the length of these instructional days has varied depending upon the needs of the individual school sites as determined by site administrators. (Answer and Motion at p. 4.)[5]

---

[5]In its argument on the motion, the District also stated:

> It is conceded that in prior years teachers have not always been required to work a regular length instructional day the Friday preceding spring vacation. However, there has been no District-wide practice. The length of the instructional day required of individual school site teachers has varied

Finally, in support of the motion, the District has indicated that the Association had already filed a contract grievance on the minimum day issue. This grievance was dated March 12, the day before the unfair practice filing. The grievance alleged that the "District had unilaterally violated past practice by eliminating the minimum day prior to Spring Vacation," in violation of the calendar provision, Article XX.

The Association does not deny that a grievance was filed, urging that it was done "out of an excess of caution" and promising that it will be withdrawn if deferral is inappropriate. (Opposition at p. 4.) The Association flatly states that the grievance erroneously relied on the contract. (Id. at pp. 5-6.)

Based on the facts and arguments above, it is concluded that the contract does not cover the matter in dispute. First, the hours article (Art. IV), on its face, concerns the authority of site administrators and not the school board. There is no reference to the school board in the literal language of that section, and there is no factual allegation that site administrator involvement led in any fashion to the school board's decision in this instance.[6]

---

depending upon the need as determined by the site administrator. (Id. at p. 9.)

[6]At most, based on the District's assertion of a varying past practice regarding the length of the school day,

The second contract article concerning the school calendar (Art. XX) also fails to support the District's deferral claim. This article does not include any indication of specific holiday, vacation, full or minimal days. These matters obviously were not left to the District's unfettered discretion because the contract reopener clause specifically requires negotiations for the 1985-86 school calendar. In the absence of a negotiated calendar, an established past practice would govern, as the complaint alleges, assuming a practice can be discerned when the merits of the case are heard. If an inconsistent and varying practice is shown, however, the complaint may be dismissed. (Modesto City Schools (1984) PERB Dec. No. 414.) Nonetheless, under the contract, past practice alone does not form the basis for a grievance, contrary to the allegation in the grievance initially filed by the Association, and deferral is not warranted.[7]

---

respondent has suggested that extrinsic evidence would reveal a latent ambiguity in language that is otherwise inapplicable to this dispute. (See, e.g., Los Angeles City Employees Union v. City of El Monte (1985) 177 Cal.App.3d 615, 622-623.) If such evidence is available, presumably it can be offered during the formal hearing in this case, and the District then can renew its deferral objection. At this stage, however, a separate evidentiary hearing is not warranted. Not only are the past practice facts susceptible to proof in conjunction with the hearing on the merits, but it would thwart the statutory jurisdiction of the PERB to defer when not even a facial ambiguity is apparent in the agreement.

[7]Absent the Association's disclaimer of the prior grievance, and its announcement of its readiness to withdraw from the contractual procedure, this would be a more difficult

In sum, the District has not advanced a substantial claim of contractual privilege that covers the matter at issue. The motion to dismiss shall be denied. The settlement conference and formal hearing shall proceed on the dates previously indicated.[8]

Dated: May 21, 1986

BARRY WINOGRAD
Administrative Law Judge

---

deferral issue to resolve. Since the Association has retracted its claim, however, its earlier mistaken judgment should not block the PERB from exercising its appropriate unfair practice jurisdiction.

[8]Respondent may appeal this refusal to dismiss the complaint to the Board itself pursuant to PERB Rule 32646(b), incorporating the procedure set forth in PERB Rule 32635. (See Cal. Admin. Code, Tit. 8, secs. 32646(b), 32635.)