STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LONG BEACH, Charging Party, v. LONG BEACH UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1329 PERB Decision No. 608 January 7, 1987

Appearances: A. Eugene Huguenin, Jr., Attorney for Teachers Association of Long Beach; McLaughlin & Irvin by Gale P. Sonnenberg for Long Beach Unified School District.

Before Burt, Porter and Craib, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Long Beach Unified School District (District or Respondent) and the Teachers Association of Long Beach (TALB, Association or Charging Party) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)[1] by adopting and applying rules

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:

and regulations which the ALJ found interfered with employee organizations' right of access to employees as granted by section 3543.1(b)[2] of the Act. However, the ALJ also found that the Association waived its right to object to certain of the rules based on provisions the parties agreed to in their collective bargaining agreement. For the reasons which follow, we affirm in part and reverse in part the proposed decision.

FACTS

Having reviewed the exceptions of the parties and the entire record in this case, we determine that the findings of fact in the proposed decision are free from prejudicial error and we therefore adopt them as the findings of the Board itself. We summarize the pertinent facts merely for ease in following the ensuing discussion.

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

[2]Section 3543.1(b) states, in relevant part:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work . . . 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 this chapter.

In 1976, the District promulgated regulations governing access to its facilities by employee organizations. Approximately one year later, during an election campaign for selection of an exclusive representative for the bargaining unit that included the teachers, one of the competing organizations, the Long Beach Federation of Teachers (Federation), filed an unfair practice charge against the District claiming that some of the regulations unreasonably denied it access to members of the unit. One allegation was that the District had engaged in conduct favoring a rival organization, TALB. During the hearing on the matter, TALB joined as a party but later withdrew when that allegation was settled. Prior to the issuance of the proposed decision in that case, TALB was certified as the exclusive representative of the teachers unit. Shortly thereafter, the District and TALB entered into a "mini-contract" and commenced negotiations for a more comprehensive agreement. One of the subjects under negotiation was Association access rights.

Prior to the parties reaching agreement in those negotiations, the ALJ issued a proposed decision, which resulted in exceptions being filed with this Board by both the Federation and the District. Before the Board issued its decision, the District and TALB executed a comprehensive bargaining agreement on May 21, 1979. This agreement included an article on Association rights, including access, as well as an article which defined the workday for bargaining unit members. Negotiations under the reopener

provision commenced in the spring of 1980. Access was not a topic that was automatically reopened, nor did either party elect to reopen that subject with their optional reopeners.

On May 28, 1980, PERB issued its decision in Long Beach Unified School District (1980) PERB Decision No. 130. In that decision the Board ruled that, in analyzing a claimed denial of access, the Board must determine whether the employer's regulation falls within the employer's right to establish "reasonable" regulations. In determining whether an employer's regulation of access rights is reasonable, the Board will consider whether it is consistent with the basic labor law principles set forth in EERA, which are designed to ensure effective and nondisruptive organizational communications.

With respect to the regulations again at issue in this case, the Board found unreasonable the District's regulation that prohibited all Association business during duty hours of the workday. The District equated duty time with workday, and its regulation defined "workday" as extending from 20 minutes before the first assigned period to 20 minutes after the last assigned period, including class, conference and preparation periods. The regulations excluded the duty-free nutrition and lunch periods from the definition of duty time. The Board cited National Labor Relations Board (NLRB) cases in which the NLRB had found denial of access outside working time in nonworking areas to be unlawful. In the case before it, the Board found that the 20-minute periods before and after class did not

constitute work time since the record did not demonstrate that those two periods were expressly, and/or uniformly, reserved for preparation time. In fact, the Board found the record in that case revealed that the majority of teachers do not work during those time periods.

The second access regulation relevant to the present case prohibited access to more than three employees on an informal basis in lounges, workrooms, lunchrooms, or other areas where employees gather, unless prior arrangements for the location had been made at least 24 hours in advance. While the Board found the 24-hour notice aspect reasonable as to rooms not normally used by nonworking employees, the cutoff at four or more employees was unreasonable, since it set an artificial limitation that did not support a conclusion that groups of four or more were disruptive of school functions or the educational environment.

Background in This Case

The collective bargaining agreement between TALB and the District, that was agreed upon in May 1979, contains the following relevant provisions:

> ARTICLE IV - ASSOCIATION RIGHTS
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> A. Association Use of District Facilities:
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> . . . . . .
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> 2. During operation hours, the District agrees upon 24-hours advance request and approval of the site manager to grant the Association access to lounges, faculty dining rooms or other designated locations for the transaction of Association business with employees on non-duty time as provided in Section C.

. . . . . .

C. Association Business: The Association agrees that its authorized staff and building representatives shall not conduct Association business with employees during regular working hours. It is agreed that non-duty times are as follows: before and after the scheduled workday of each employee, the nutrition break, and lunch period. In no event shall any representative or unit member interrupt or interfere in any way with normal work. Any exceptions must be approved by the appropriate division assistant superintendent. It is further agreed that this section of the contract shall be amended to conform to the Public Employment Relations Board's final decision on this matter.

ARTICLE V - DAYS AND HOURS OF EMPLOYMENT

A. Workday

1. It is agreed that the . . . duties are normally expected to involve no fewer than eight (8) hours of total effort each workday for both classroom and non-classroom employees.

2. The regular school day for elementary school teachers is as follows: In the elementary schools teachers shall report for duty not later than twenty (20) minutes before the opening of class. They shall remain twenty (20) minutes after the close of their last assigned period of the day (except on Wednesdays or Fridays--as agreed upon by each school faculty), unless excused earlier or requested to remain by the principal. On Wednesday or Fridays teachers may leave the building immediately upon the close of the regular school day for pupils, except that if district meetings are scheduled on the early day, another day may be designated. . . .

> 3. Junior and senior high school teachers shall report for duty at least twenty (20) minutes before the opening of the first assigned class, conference period, or homeroom and shall check their mailboxes daily before their first assignments. Teachers remain at least twenty (20) minutes after the close of the last assigned class or conference period, except on Wednesdays when they may leave the building immediately upon the close of the last assigned class or conference period, unless assigned to an after-school duty. If District meetings are scheduled on Wednesdays, another day, preferably Friday, may be designated as the early leaving day.
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> . . . . . .
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> 8. The scheduled preparation period at the secondary level is defined as paid working time for the specific purposes of preparing materials, conferring with students, parents and administrators, and other duties subject to assignment by the principal. . . .
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> 9. In the elementary school, limited preparation time may be arranged at individual school sites through staffing patterns that a) are educationally justifiable; b) do not reduce the total instruction time for students; c) are developed jointly by the teaching staff and the site manager, and d) are approved by the Assistant Superintendent, Elementary Division.

Following issuance of PERB Decision No. 130, supra, TALB requested that the District meet to revise the contract pursuant to the language in Article IV, section C. Prior to such meeting, the District revised its regulations, purportedly to comply with Decision No. 130. One month later, in October 1980, TALB wrote to PERB Los Angeles Regional Director Fran Kreiling, seeking an

investigation into the District's compliance with that decision and complaining generally that the District's revised regulations still did not comport with the Board's decision. After additional correspondence between TALB and Ms. Kreiling, she determined that, since TALB was not a party to the decision, it had no standing to seek compliance. TALB did not appeal that determination but, instead, commenced this action in March 1981, claiming that certain of the District's regulations violate EERA by unreasonably denying it access to the bargaining unit members.

Although the parties met in November to discuss the revised regulations, the only outcome of that meeting was that they did not agree on whether the revised regulations complied with PERB Decision No. 130. There is no evidence in the record that TALB made any further effort to negotiate a change in the contract. Indeed, it appears the issue was dropped as TALB pursued relief with PERB.[3]

In its charge, the Association alleged that the District violated EERA by denying it access during the workday, as more fully described in its letter to Kreiling, which was incorporated by reference. Specifically, it challenged the ban on access during the 20 minutes before and after school, with respect to teachers who are not assigned work and are in nonworking areas. TALB cites Regulations I.A. (definition of Association business),

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[3]Although the dissent states that the District "refused" to negotiate, TALB did not prove that that is what occurred.

II.A. (conduct of Association business outside duty hours and away from students and other nonemployees), and III.A.1. (list of prohibited activities) in support of such allegation. The second challenge raised by TALB in its charge concerned Regulation III.H., which provides that off-duty employees may distribute materials to mailboxes or directly to other off-duty employees on nonduty time.[4]

The District filed a Motion to Particularize, claiming that the above charge was not sufficiently specific. In its response, TALB cites two ways in which it claims its organizational right of access was unreasonably interfered with: (1) the limitation on the times for conducting Association business to outside "duty hours" (Regulation II.A., B.[5]) and, therefore, including as

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[4]There is no further reference in the record or briefs to this allegation, nor was it addressed by the ALJ. We therefore conclude that TALB has dropped this issue.

[5]Regulation II.A., B. states, in relevant part:

> A. Employee Association Business--All activities concerning association business, as defined, shall be conducted outside duty hours of the workday for the individuals involved. All association business when on district property shall be conducted in non-work areas during non-work periods away from students and other non-employees. (Example: No association business shall be conducted during such events as PTA or Advisory Council meetings, Open House, etc., or in the presence of VIPS or other non-employees.)
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> B. Personal Business--Conferences on the personal employment problems of an employee

working hours and excluding as access time the 20-minute periods before and after school and the daily conference or preparation periods; and (2) the limitation on access by specifying locations where association representatives may meet with employees (Regulation V.C.1.[6]), and by requiring 24-hours advance notice for room arrangements "[w]hen it is anticipated that Association business is to be conducted informally or formally with a large group of employees . . . " (Regulation V.C.2.[7]).

> shall be conducted outside duty hours of the workday for the individuals involved.
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> The term "personal business" is defined as:
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> . . . any activity initiated by an individual employee who has the need to consult with an Association representative because of some personal employment matter such as the processing of a grievance.

[6]Regulation V.C.1. states in relevant part:

> C.1. Association or Personal Business with Individual Employees--An association representative who is not employed at the site may meet privately with small groups of employees during non-duty hours in a lounge, workroom, lunchroom or other similar area so long as the conversation will not seriously disrupt or interfere with the use of the area by others. The specific lounge or other area may be specified by the site manager or supervisor.

[7]Regulation V.C.2. states, in relevant part:

> C.2. Association Business with Groups of Employees--When it is anticipated that Association business is to be conducted informally or formally with a large group of employees relative to the size of the room, room arrangements must be made at least one

DISCUSSION

Timeliness

The ALJ concluded as a preliminary matter that, contrary to one of the District's defenses, the allegations concerning regulations raised by the Association for the first time in its response to the District's Motion to Particularize (and seven months after the District revised its regulations) were not time-barred. The District excepts to this conclusion. For the reasons which follow, we agree with the ALJ that the challenge to those regulations is not barred by the six-month limitation period set out in section 3541.5(a).[8]

We find that the Association's allegations of unreasonable denial of access assert a violation of a continuing nature. If the regulations violate the Act by unreasonably denying access,

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> day in advance of the meeting. The request for access must be made to the site manager or supervisor and shall include the specific date, time, and size of the facility requested. The principal or office head will evaluate their request and normally, authorize the use of the facilities while mindful of the district's need to balance fairly the rights of all employees, of other associations, and of the district itself. Failure to make arrangements in advance shall be grounds for prohibiting any such meetings at the site. (Emphasis in original.)

[8]Section 3541.5(a) provides, in pertinent part:

> . . . the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge . . . .

then the date on which they were revised is immaterial. Indeed, if the regulations complained of had not been revised in September 1980, then under the District's argument we would have to look at their enactment date to decide if the allegations are timely. Obviously, that date has no legal significance in deciding whether the regulations violate the Act. Likewise, the date on which the revisions occurred does not impact, nor trigger, the six-month period, since it is not the act of revising the regulations of which TALB complains but, rather, their existence, which continued up to and through the time of the hearing.

In reaching this conclusion, we find it unnecessary to adopt the ALJ's statement that each act of enforcement constitutes a new and separate cause of action. While this may be true, the Association need not demonstrate an attempt to violate the regulation in order to show that the District would enforce it.

Further, in deciding that the allegations asserted in the Association's response are not time-barred, we find merit in the Association's argument that its original charge challenged the access regulations generally, while the response was a clarification of the specific regulations challenged. Were this not so, then the District's Motion to Particularize would have been unnecessary and the issue would not have arisen. The District asserted, as the grounds for its Motion, that the charge was unspecific and overbroad by failing to give it notice of the precise provisions of Respondent's access regulations

which were alleged to constitute unfair labor practices. Its argument now, that the regulations asserted for the first time in the Association's response were not included in the original charge, is inconsistent with the position it took in its Motion and is, therefore, rejected.[9]

Scope of Charge

The next preliminary issue we address concerns the ALJ's conclusion that the District's regulation requiring the Association to conduct its business away from students and nonemployees was unreasonable. The District argues that this issue was not raised, nor addressed, by Charging Party and, thus, was not before the ALJ. We disagree. While it is true that the charge and the response to the Motion do not precisely address this aspect of the regulations, at the hearing a question arose concerning the exact parameters of the Association's charge. The following excerpt from the transcript demonstrates that the District was placed on notice of the extent of the regulations challenged:

> HEARING OFFICER: . . . the charge that we are concerning ourselves with now is everything that's in the original charge as incorporated, as incorporating the letter that we have in evidence as Charging Party's Exhibit No. 1 [the letter to Fran Kreiling attached to the original charge], and the particularization of the charge, which refers

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[9]Having concluded that Charging Party has alleged a violation of a continuing nature, we need not address, nor do we adopt, the ALJ's remaining rationale for finding the charge timely.

> to those sections of the regulations that you enumerated during your presentation of your objections. . . .
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> CAUSEY [District's attorney]: Okay, as I understand your ruling then, you're saying that all sections of the regulations that are referred to in the letter which is CP No. 1, as well as the sections that are contained in the response to particularize, are the items that are at issue today.
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> HEARING OFFICER: That's correct.
> (Transcript, pp. 14-15, emphasis added.)

The language concerning conduct of association business when on District property away from students and other nonemployees is found in section II.A. of the regulations and, therefore, is referred to in both the original charge and the response. Further, Charging Party addressed the issue for approximately five pages of its closing brief, and the District, in its reply brief, did not protest that this was not at issue. Indeed, the District did not respond to this portion, although it responded extensively to the remainder of TALB's brief. Given this interchange at the hearing that should have alerted the District to the scope of the charge and the references in TALB's brief, and for the reasons expressed by the ALJ, we conclude that the ALJ properly addressed this aspect of the regulations.[10]

Waiver by Contract

The next preliminary issue we address, before proceeding to the merits of the Association's charge, is the question of

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[10]See the discussion following on the merits of this allegation.

whether the Association waived its right to object to the regulations, given the language in the collective bargaining agreement. The District asserts that the contract demonstrates a waiver, and the only inquiry before the Board is whether the regulations are consistent with the contract. The Association merely asserts that access rights cannot be waived by a negotiated agreement, citing Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 and NLRB v. Magnavox Company (1974) 415 U.S. 322. The ALJ correctly noted that United Technologies Corporation (2d Cir. 1983) 706 F.2d 1254 [113 LRRM 2320], which is subsequent to Magnavox, is more on point with the facts of this case. In United Technologies, the court was asked to consider the continued viability of its holding in United Aircraft Corporation v. NLRB (2d Cir. 1971) 440 F.2d 85 [76 LRRM 2761], in light of the U.S. Supreme Court's decision in Magnavox. United Aircraft held that the collective bargaining agreement between the employer and the union authorized the employer's limited no-distribution rule, which prohibited union solicitation during "working time," which the parties understood to be "paid work time." "Paid work time" included employee breaks but excluded lunch time. In United Technologies, the court explained that United Aircraft was still viable and held that the limitation on such activity during paid breaks

> . . . neither deprived employees of rights that were fundamental under Section 7 of the Act, nor implicated public policy concerns

> that were overriding, because the employees remained "free to solicit on company property before and after work and during the lunch hour. . . ." In light of that freedom, we concluded that it was permissible for the union to agree to the limited no-solicitation provision in the collective bargaining agreement:
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> > We see no reason to invalidate the clear agreement of the parties . . . . [T]here are 25,000 employees and over 50 stewards in the plants involved. The company probably considered the no-solicitation ban to be an important bargaining objective, and the agreement should not be lightly overturned. . . . We therefore conclude that the Board properly found that the company Rule 5 and the contract can be applied to prohibit solicitation for the union during working hours, whether or not the employee is working or resting. United Technologies Corp., supra, [113 LRRM, at p. 2329].

The court's test for determining whether the union could waive solicitation rights turned on whether the rule constituted a broad ban on solicitation or distribution anywhere in the plant, as was the case in Magnavox. If it did not, but was instead a limited no-solicitation rule and contract provision, then it did not seriously dilute employees' section 7 rights. The court concluded in United Technologies that its position in United Aircraft was consistent with the Supreme Court's decision in Magnavox, as that case dealt with a negotiated rule that banned solicitation altogether. Indeed, the court framed the issue in Magnavox as specifically addressing the issue of a negotiated rule that would have waived employees' rights even to solicit on behalf of a rival union.

We agree with the court's rationale in United Technologies that a union may agree to collective bargaining provisions that limit employees' rights to engage in union activities and limit the union's right to have access to those employees, so long as such agreement does not seriously impinge on the rights provided by EERA. The Board has previously held that access rules are negotiable (see Davis Joint Unified School District (1984) PERB Decision No. 474) and, once the parties have negotiated those rules, the parties cannot assert that they are not bound by the contract terms. Therefore, to the extent the regulations complained of are covered by the contract and do not seriously impinge on the access rights granted by statute, the contract prevails and the union will be found to have waived its right to object to those regulations.

Specific Regulations Challenged

The Association challenges the following aspects of the District's regulations:

1. The rule that prohibits access during the conference and 20-minute preparation periods and requires Association business to be conducted away from students and nonemployees.

2. The rule that requires 24-hour notice to schedule meetings.

3. The rule that allows the site administrator to designate the specific room to be used for Association meetings.

24-Hour Notice and Designation of Meeting Sites

As to the 24-hour notice provision and the designation of rooms for Association meetings, we agree with and adopt the

ALJ's conclusions and rationale on these issues and, therefore, dismiss Charging Party's allegations related to these two issues.

Access During the 20-Minute Periods and Conference/Preparation Periods

On the subject of access during the conference periods and the 20-minute periods before and after school, we affirm in part and reverse in part. As to the conference period, we agree that the collective bargaining agreement specifically provides that this period of time is "work time" and, therefore, presumptively unavailable for Association access. Long Beach, supra, PERB Decision No. 130; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]; Essex International, Inc. (1974) 211 NLRB 749 [86 LRRM 1411]. Further, in addition to the presumption of no access, the contract specifically states that the Association will not have access during work time and, thus, the Association agreed to embody this presumption into the contract. Clearly then, the Association has waived any objection it might have had to the District's regulation.

On the issue of access during the 20-minute periods, we reverse the ALJ's conclusion that denial of access during these periods is unreasonable, as well as her conclusion that the contract does not constitute a waiver of access during these time periods. The underlying question is whether these periods are "work time" so as to create a presumption that denial of access is reasonable. We conclude that, by both the intent of the parties and by virtue of the collective bargaining language,

these periods are paid preparation periods and, thus, constitute "work time."

The collective bargaining agreement states, in part:

> The Association agrees that its authorized staff and building representatives shall not conduct Association business with employees during regular working hours. It is agreed that non-duty times are as follows: before and after the scheduled workday of each employee, the nutrition break, and lunch period. . . . It is further agreed that this section shall be amended to conform to the Public Employment Relations Board's final decision on this matter. (Emphasis added.)

The ALJ concluded that the language of this section contains an ambiguity, since it does not specifically use the term "work time" but, rather, refers to "regular working hours," "non-duty times" and "scheduled workday." Consequently, she found that the contract does not specifically prohibit access during the 20-minute periods and, therefore, no waiver by the Association was demonstrated. We disagree.

Reading section C of Article IV, together with section A of Article V, which defines the workday as starting 20 minutes before the opening of class and extending to 20 minutes after the last assigned class (except on the early-leaving day), we find that the parties used "working hours" in section C to mean "work time." This becomes clear in the next sentence of section C, when the parties define "non-duty time" as before and after the scheduled workday, the nutrition break and lunch period. These are clearly the times that are available for access. Turning

then to what constitutes the scheduled workday, section A of Article V makes clear that the scheduled workday for teachers commences 20 minutes before the first class or conference period and ends 20 minutes after the last class or conference period. Thus, the parties have agreed by contract that the 20-minute periods are part of the working hours, and have further agreed that there will be no Association access during that time.

Since the parties have defined what is, in essence, "work time" to include the 20-minute periods, under previously articulated PERB presumptions, there is no presumptive right of access during this time. In so holding, we would characterize this time as paid preparation time, notwithstanding the testimony from numerous teachers that they, in fact, do their preparation at other times in order to be able to relax and socialize during these periods. That the District allows this is merely a reflection of the professional nature of teaching and does not transform this time into nonwork time.

This viewpoint of the nature of teaching is borne out repeatedly in the transcript by the testimony of the teachers called by both parties. All of the teachers, even those who testified they relax or "mentally prepare or unwind" during the 20-minute periods, testified that it was necessary for them to arrive early and/or work at home in the evenings in order to accomplish the necessary preparation. In other words, to the extent the teachers chose to use the 20-minute periods for other than actual preparation, they voluntarily extended their workday

to compensate for that choice. It is obvious the District has recognized this professional nature of teaching by not imposing rigid requirements and job tasks on teachers during these preparation periods. Nevertheless, teachers are required to report for duty and remain on duty 20 minutes before and after scheduled classes. The reason for this requirement is not only to provide paid preparation time but also to assure accessibility to the teachers by students, parents and the administration. The very nature of that accessibility indicates this is not duty-free time, even though some teachers choose not to do their preparation during these periods. Allowing the Association to conduct its meetings during this time would defeat the purpose of accessibility and the informal supervision required by the District.

This is not unlike the situation in El Dorado Union High School District (1985) PERB Decision No. 537, in which the contract required the teachers to report for duty one-half hour before classes were to start. The Board found that picketing in front of the school during that time period was an unlawful partial work stoppage, even though the teachers continued to perform their preclass responsibilities. Of relevance to this case is the Board's rationale for finding that such conduct constituted a partial work stoppage:

> The evidence shows that although District policy permitted teachers to choose where in the school they spent the 30-minute periods, there was a paging system for contacting them when needed, and there was a telephone in the teachers' lounge. [Footnote deleted.] Thus, the District could readily meet its

> obligations to student and parent needs. It would not be reasonable to impose on the district the obligation to search out teachers who claim they are available for duties that arise, but who are actually away from the school site itself. El Dorado, supra, at p. 4.

Similarly, in the present case, allowing the Association to conduct its meetings during this time period would make the teachers unavailable for those numerous spontaneous instances when school personnel need to contact them.

In reaching this conclusion, we overrule the standard previously articulated by this Board in PERB Decision No. 130, p. 9, in which the Board rejected the district's argument that these periods are paid preparation periods since, according to the Board, they are not "expressly and/or uniformly reserved for preparation time."[11] The fact that teachers exercise a certain amount of discretion in use of their time does not transform duty time, in this case, paid preparation time, into nonwork time. Further, this standard is not consistent with NLRB case law or other PERB precedent.

This Board has long recognized that preparation time provided in a daily work schedule constitutes a part of the teacher's workload. Other than the Long Beach, supra, decision, the Board

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[11]Were we to continue to adhere to the standard set out in PERB Decision No. 130, we might well reach a different result, in light of the language of Article IV, section C, which states that the section "shall be amended to conform to the Public Employment Relations Board's final decision on this matter." Instead, we view the pertinent contract language in light of the standard adopted herein.

has never required a showing that preparation periods be expressly and/or uniformly reserved for preparation time in order to categorize such time periods as part of the work responsibility of the teacher.[12] Previous decisions make clear that, even where use of such time is at the discretion of the teacher, and some teachers use some portion of the period to rest or relax, the employer unlawfully changes the teachers' workload by unilaterally decreasing or eliminating the preparation period. None of these decisions refer to any requirement that such periods be expressly and/or uniformly reserved for preparation time in order to find that such decrease in allotted time results in an increase in personal time devoted to work activities.[13]

The Board's most recent decision involving preparation time is Victor Valley Union High School District, supra, in which the Board adopted the ALJ's findings of facts in pertinent part.

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[12]See Jefferson School District (1980) PERB Decision No. 133, p. 37; Moreno Valley Unified School District (1982) PERB Decision No. 206; Modesto City Schools (1983) PERB Decision No. 291; Grossmont Union High School District (1983) PERB Decision No. 313; Healdsburg Union High School District and Healdsburg Union School District/San Mateo School District (1984) PERB Decision No. 375; Corning Union High School District (1984) PERB Decision No. 399; Victor Valley Union High School District (1986) PERB Decision No. 565.

[13]Modesto, PERB Decision No. 291, supra, found that the association failed to meet its burden of proof because it did not show that the district's alteration in preparation time, in fact, extended the workday. Subsequent decisions have not expressly required such actual proof of increase in the workday in order to find a unilateral decrease in preparation time to be unlawful.

In that case, the Faculty Handbook required teachers to be "on duty" 15 minutes before and 10 minutes after scheduled classes. The ALJ states, at pp. 5 and 6 of his decision:

> Presumably, the 15 minutes before the first class, and the 10 minutes after the last class was time in which a teacher could prepare lessons, grade papers, talk to students or parents - perform the non-classroom duties which are necessary parts of a teaching assignment.
>
> . . . . . .
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> The use of each teacher's preparation time was within the discretion of the teacher; it was generally used for preparation of lessons, grading of examinations or other written work, or conferences with individual students.

The Board affirmed the ALJ's conclusion that the district violated the Act by unilaterally changing the amount of "paid non-instructional time" without negotiating such change.

While the foregoing PERB precedents do not address the issue of access time but, rather, involve the negotiability of preparation time, they are, nevertheless, instructive on the issue of the nature of preparation time. Even where employees have testified they used a portion of the time to rest or relax, a decrease in the amount of that time was nevertheless found to impact work hours. It is clear this Board views preparation time, including that duty time before and after classes begin, as part of the paid work time required of teachers without the necessity of showing it is expressly and/or uniformly reserved for preparation time. To take a contrary approach in the area

of access rights is inconsistent with the Board's established precedents involving negotiations and unilateral changes.

Therefore, we conclude that these two 20-minute periods (as well as the conference/preparation period during the workday) do constitute work time, and the employer may validly deny access during that time. This is especially the case when the Association is accorded access during the lunch and nutrition breaks and prior to and following these 20-minute periods, as well as immediately after school on the early-leaving day when teachers are released from duties at the same time as the students are dismissed.

Association Business Away from the Presence of Students and Nonemployees

On the final issue of the District's regulation that requires Association business to be conducted out of the presence of students and nonemployees, we first note that the contract does not address this subject and, therefore, the Association has not waived its right to object to this regulation. We agree with the ALJ that this regulation is unreasonable but do not entirely agree with her analysis. The ALJ concluded this regulation is "overbroad" and "vague." These terms are generally used in a constitutional analysis, which is not appropriately applied to this regulation. Rather, once the Association demonstrates restrictions of its presumptive right of access, which is apparent here on the face of the regulation itself, it is then incumbent upon the District to rebut the presumption by

demonstrating that such access would be disruptive. See Long Beach, supra, PERB Decision No. 130; The Regents of the University of California, University of California at Los Angeles Medical Center (1983) PERB Decision No. 329-H. Here, no evidence was presented on this point, and we cannot conclude that the regulation is reasonable on its face. Therefore, we affirm the ALJ, but on the basis of the District's lack of proof.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is hereby ORDERED that the Long Beach Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

Enforcing the District regulation which requires that the Teachers Association of Long Beach conduct organizational business with employees during nonwork times in nonwork areas which are away from students or other nonemployees.

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

1. Within thirty-five (35) days following the date this 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.

2. Provide written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

It is further ORDERED that all other portions of the unfair practice charge and complaint are DISMISSED.

Member Craib joined this Decision. Member Burt's concurrence and dissent begins on page 28.

BURT, Member, concurring and dissenting: I agree with most of the conclusions of the majority in this case. However, I cannot agree that the District may lawfully prohibit access for the 20-minute periods before and after school.

The parties to this case first entered a "mini-contract", after the PERB hearing on the previous Federation charges concerning access, but before the decision of the administrative law judge. In March 1978 the parties began negotiations for a comprehensive agreement, and the ALJ's decision issued during negotiations, in June 1978. That decision described the prohibition against solicitation during the workday as the rule most problematic for the Federation. The decision contains a lengthy discussion of the 20-minute periods, and an extensive analysis of the "working hours/working time" dichotomy under the National Labor Relations Board (NLRB).

Negotiations between TALB and the District concluded on May 21, 1979. At that point, the parties signed a contract with ambiguous language regarding the workday. The contract includes Article IV, section C, which provides as follows:

> Association Business: The Association agrees that its authorized staff and building representatives shall not conduct Association business with employees during regular workings hours. It is agreed that non-duty times are as follows: before and after the scheduled workday of each employee, the nutrition break, and lunch period. In no event shall any representative or unit member interrupt or interfere in any way with normal work. Any exceptions must be approved by the appropriate division assistant superintendent. It is further agreed that this section of the contract shall be amended to conform to the Public Employment Relations Board's final decision on this matter.
> (Emphasis added)

In May 1980, PERB issued its decision in Long Beach Unified School District (1980) PERB Decision No. 130, concerning the Federation's charges. In that decision, the Board determined, among other things, that the prohibition on access during the 20-minute periods before and after school was unreasonable. TALB approached the District to modify the contract to reflect this decision, consistent with the contractual language providing that the contract "shall be amended" to conform with PERB's decision. The District refused to do so and, instead, unilaterally altered its regulations to define what it thought teachers were supposed to be doing during the 20-minute periods. It was at that point that TALB sought help from PERB by way of PERB's compliance procedures. Finding that compliance was not available, TALB filed charges with PERB, complaining, as had the Federation, about the District's access regulations, including those regarding the 20-minute periods before and after school.

Under these circumstances, I cannot find that an ambiguous provision, apparently purposely left ambiguous by parties who were on notice of the issues raised by that ambiguity and awaiting clarification from PERB, consitututes a waiver of access rights during these periods.

Further, while the majority apparently wishes that the 20-minute periods were working time, the ALJ in this case found

that the teachers' actual use of the 20-minute periods before and after school is "quite similar" to the uses found by the ALJ in the 1978 hearing; that is, the 20-minute periods are working hours but not working time.

In addition to believing that the majority is in error on this point, I find it of some concern that the District apparently ignored the previous Board decision on this issue in a successful effort to force a second employee association to go through the entire PERB process once again in order to prove the same facts as those found in the first decision: the 20-minute periods are not working time and, following the NLRB's rule, TALB should be allowed access at that time.

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. LA-CE-1329, Teachers Association of Long Beach v. Long Beach Unified School District, in which all parties had the right to participate, it has been found that the Long Beach Unified School District violated Government Code section 3543.5(a) and (b) by adopting and applying a regulation which unreasonably interfered with employee organizations' right of access to employees as granted by section 3543.1(b) of the Act, by requiring employee organizations to conduct organizational business with employees during nonwork times in nonwork areas which are away from students or other nonemployees.

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

CEASE AND DESIST FROM:

Enforcing the District regulation which requires that the Teachers Association of Long Beach conduct organizational business with employees during nonwork times in nonwork areas which are away from students or other nonemployees.

Dated: LONG BEACH UNIFIED SCHOOL DISTRICT

By_____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF LONG BEACH, Charging Party, v. LONG BEACH UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-1329 PROPOSED DECISION (5/31/84)

Appearances: A. Eugene Huguenin, Jr., Attorney for Teachers Association of Long Beach; Paul R. Causey, Attorney (McLaughlin and Irvin), Long Beach Unified School District.

Before: W. Jean Thomas, Administrative Law Judge.

PROCEDURAL HISTORY

This case presents a challenge to a school district's promulgation and application of certain regulations which are alleged to unreasonably interfere with the exclusive representative's right of access to bargaining unit members.

On March 16, 1981, the Teachers Association of Long Beach (hereafter TALB or Association) filed an Unfair Practice Charge against the Long Beach Unified School District (hereafter District) alleging a violation of the Educational Employment Relations Act (hereafter EERA or Act.)[1] The District filed an Answer on April 6, 1981. On April 9, 1981, the District also filed a Motion to Particularize the charge. An informal

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All statutory references are to the Government Code.

settlement conference was conducted by an administrative law judge for the Public Employment Relations Board (hereafter PERB or Board) on April 15, 1981, but the conference failed to resolve the dispute. Following the informal conference, the Charging Party filed a Response to the Motion to Particularize the Charge on April 27, 1981. The charge, as particularized, alleges that the District, by applying its regulations to TALB activities, has unreasonably interfered with the Association's right of access guaranteed by section 3543.1(b) by the following:

(1) Limiting the time for conduct of employee Association business and employee personal business time to outside "duty hours" and, therefore, to include as working hours and exclude as access time, the 20-minute periods before and after school and the daily conference periods within the duty day during which times the employee is required to be at the site without specified duties; and

(2) Limiting Association access to employees by specifying locations where Association representatives may meet with employees and requiring 24-hour advance notice for room arrangements when "it is anticipated that Association business is to be conducted formally or informally with a large group of employees." Such conduct is further alleged to have constituted violations of section 3543.5(a) and (b) of the EERA.

On May 6, 1981, the Respondent filed an Answer to Response of Charging Party to Motion to Particularize, admitting that it promulgated the revised regulations in September 1980, and asserting as one of its affirmative defenses, that the regulations were reasonably and validly promulgated pursuant to the power and authority granted to the District under the laws of the State of California.

A Complaint and Notice of Hearing was issued by the Chief Administrative Law Judge of PERB on April 30, 1981, scheduling the first day of hearing for June 26, 1981. Later, this date was reset due to scheduling conflicts. The case was heard before the undersigned on September 22, 23, December 3, 4 and 8, 1981; February 8, 9, 10, April 1, and 2,[2] May 20, October 28 and 29, November 1, 1982; and January 19, 1983. Post-hearing briefs were filed by both parties and the case was thereafter submitted for proposed decision.

FINDINGS OF FACT

A. Background

The parties stipulated that the District is a public school employer within the meaning of the Act and that TALB is the

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[2]Due to a mishap that occurred during the mailing of the hearing tapes for April 1 and 2, all the tapes for this session were lost in the mail. The hearing was recessed, pending a search by the U. S. Postal Service. The tapes were never recovered so the October 28, 29 and November 1 sessions were necessary in order to re-hear the lost testimony.

exclusive representative of the certificated K-12 employee bargaining unit of the District.3 The unit consists of all regular certificated employees under contract including classroom, Junior ROTC instructors, and specialist teachers; program facilitators, nurses, nurse facilitators, and librarians. It excludes all school counselors, guidance counselors, psychological services specialist, Child Development Center teachers, substitute teachers, part-time hourly teachers, management, supervisory and confidential employees. There are approximately 2700 employees in the bargaining unit, of which 1700-1800 are members of TALB.

In grades K-12 there is an enrollment of approximately 57,000 students. The area served by the District includes Santa Catalina Island. There are 53 elementary school sites, 2 special schools, 14 junior high schools, 1 junior-senior high school, 5 senior high schools, 1 continuation high school and 1 school for adults.

The District's student population is composed of diverse racial and ethnic groups. In the 1981-82 school year

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3Official notice is taken of the PERB representational files maintained in the Los Angeles PERB Office. Case file LA-R-47A shows that TALB was certified by the PERB as the exclusive representative of the Certificated Employee Unit (Unit A) on December 19, 1977. On this same date TALB was also certified by PERB as the exclusive representative of the Child Development Center Teachers Unit (Unit C)(LA-R-47C). However, access to members of the latter unit is not an issue in this charge.

grades K-12 were comprised of 48.8 percent whites, 19.8 percent Hispanics, 19.4 percent blacks, and 12.0 percent other non-caucasians which included American Indians, Asians or Pacific Islanders, and Filipinos. This diversity was demonstrated at one junior high school where the enrollment consisted of students representing 27 different ethnic and minority groups speaking 15 different languages.

Since the TALB was certified as the exclusive representative, the parties have entered into several collective bargaining agreements. The first agreement, which they refer to as a "mini-contract or agreement," was negotiated in 1978 for a term extending from March 13, 1978, to October 15, 1978. The first comprehensive collective bargaining agreement covered the period from May 21, 1979, through August 31, 1981. Pursuant to the reopener provisions of that agreement, and subsequent negotiations, the term of that agreement was extended to June 30, 1982. At the time of the hearing the terms of this agreement were still in effect.

B. Events Leading to the Current Charge

On October 1, 1976, the District promulgated a set of administrative regulations entitled "Administrative Regulations: Association Activities Involving District Employees and Employee Associations." These regulations were

issued in memorandum form by the District's then-coordinator of employee relations, William Marmion, and distributed to all District management and supervisory employees and employee organizations. The regulations set forth the District's rules concerning on-campus activities by employee organizations. Subsequently, certain provisions of these regulations became the subject of an unfair practice charge filed by the Long Beach Federation of Teachers, Local 1263, AFT, AFL-CIO (hereafter AFT) on August 24, 1977.[4] In the resulting PERB decision, Long Beach Unified School District (5/28/80) PERB Decision No. 130, the Board found that various provisions of the contested regulations were unreasonable within the meaning of section 3543.1(b) and constituted unlawful interference with access rights guaranteed by EERA, in violation of section 3543.5(a) and (b).

Not all of the regulations challenged in Long Beach, supra, are in dispute in this case. One of the rules to which

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[4]Official notice is taken of all PERB files maintained regarding this charge, including the proposed decision issued by the hearing officer on June 2, 1978, and the Board's subsequent decision.

These records show that TALB requested permission to join as a party to the action on October 24, 1977, and the request was granted. Thereafter, pursuant to an informal settlement agreement, among other things, TALB withdrew as a party to the case.

objections were raised in that case and is again in issue here, was entitled "Activity Hours."[5] This regulation banned

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[5]This rule, in pertinent part, stated as follows:

> II. Activity Hours
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> A. Employee Association Business--All activities concerning association business, as defined, shall be conducted outside duty hours of the workday for the individuals involved. All association business when on district property shall be conducted away from students and other non-employees. (Example: No association business shall be conducted during such events as PTA or Advisory Council meetings, Open Houses, etc., or in the presence of VIPS or other non-employees.)
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> . . . . . .
>
> C. Workdays--Definitions apply as follows:
>
> 1. Teachers (includes Math/Reading Specialists)--Normally, the teachers' workday extends from 20 minutes before the first assigned period to 20 minutes after the last assigned period; including class, conference, and preparation periods. (Kindergarten teachers have the same workday as other elementary teachers. Elementary teacher-librarians work a 7-hour day.) It also includes additional related service time such as after school and evening supervision of student body activities and other extra-curricular duties. (Emphasis in original.)
>
> 2. Other Employees--All other regular full time employees have an eight-hour day, exclusive of a lunch period.
>
> 3. Nutrition and Lunch--No part of the duty-free nutrition and lunch periods (except for passing time supervision of students when assigned) is considered to be duty time.

employee association business[6] during an employee's "duty hours" of the workday.

Another disputed rule, which is again being challenged, prohibited various organizational activities by employees during the duty hours of their workday. Such activities included any solicitation or distribution related to association business.[7]

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[6]These same rules defined "employee association business" as:

> . . . any activity related to recruitment of members, circulation of petitions, election campaigning, or other matters relating to unit determination hearings and exclusive representation elections.

[7]This rule read as follows:

III. Prohibited Activities by Employees During Duty Hours

The following is a partial list of activities which may not be conducted by employees during the duty hours of their workday (emphasis in original):

A. Planning, attending, or conducting association business meetings

B. Soliciting employee membership in an association

C. Meeting for the purpose of collecting signatures for exclusive representation petitions or related activity

D. Campaigning prior to a hearing or an election

E. Soliciting employees for funds or services in behalf of an employee association

F. Preparing or duplicating written material for association business purposes

The AFT also objected to a rule requiring employee organization representatives who did not work on the campus where an informal or formal meeting was to take place to make arrangements at least one day in advance for meetings with four or more employees.[8]

G. Contacting employees or association representatives for the purpose of transacting association business

Note: Secretaries and clerks will place messages regarding incoming calls in employee mailboxes but will not deliver messages to rooms or other sites.

H. Distributing written materials on association business

I. Using district facilities, equipment, supplies as per section V., paragraph E. 5. of this bulletin

[8]The rule concerning the prior arrangement requirement read, in pertinent part, as follows:

V. Organizing Activities by Employee Associations

. . . . . .

D. Facilities Arrangements

. . . . . .

2. Association Business with Groups of Employees--When it is anticipated that association business is to be conducted informally or formally with a group of four or more employees, room arrangements must be made at least one day in advance of the meeting. The request for access must be made to the site manager or supervisor and shall include the specific date, time and size of a facility requested. The principal or office head will evaluate the request and normally authorize use of the facilities while mindful of the district's need to balance fairly the rights of all employees, of other associations, and of the district itself. Failure to make arrangements in advance shall be grounds for prohibiting any such meetings at the site.

With respect to this latter rule, the Board reached the following conclusion:

> The Board finds that the District's rule is reasonable and it may legitimately require that one day advance notice be given in order for an employee organization to secure the use of rooms not normally used by nonworking employees. However, to the extent that the District's rule appears to require that all meetings with four or more employees be conducted at such pre-arranged facilities, the regulation is unreasonable. The Board recognizes, of course, that in certain settings, unlike lounges, lunchrooms or other nonworking areas, large gatherings of employees may be disruptive of the educational process unless they are conducted in appropriate facilities, for which advance notice is generally required. However, absent the nonavailability of appropriate facilities or a showing of probable disruption of school functions, there is no justification for the District's rule which has the result of denying an employee organization the right to use such facilities for organizational activity conducted during nonworking hours. (Long Beach Unified School District, supra, at p. 22.)

It determined that certain of the other challenged regulations, including sections II and III set forth above, were unreasonable, unlawfully interfered with the employee organizations' right of access to employees and were therefore in violation of the EERA.

In response to this decision the District revised the regulations and reissued them, effective September 15, 1980, in the same bulletin form as before. A cover memo addressed to principals, office heads and employee organization stated that

the changes made were "pursuant to a recent PERB Decision." Also attached was a copy of a document entitled "Log of Visits of Employee Association Representative," which was to be used by association representatives when they visited local school sites on association business. The cover memo also stated that "[r]epresentatives may be asked for commonly-accepted forms of identification at the time they check in." The first page of the bulletin stated that the regulations superseded those issued October 1, 1976, and were to be brought to the attention of staff and members of an association, and posted.

Those parts of the revised regulations which are again in issue are set forth below.

II. Activity Hours

A. Employee Association Business--All activities concerning association business, as defined,[9] shall be conducted outside duty hours of the workday for the individuals involved. All association business when on district property shall be conducted in non-work areas during non-work periods away from students and other

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[9]The term "employee association business" is defined as:

> . . . any activity related to recruitment of members, circulation of petitions, election campaigning, matters relating to unit determination hearings and exclusive representation elections, or other business of the association.
>
> NOTE: An association/union which has been certified by the PERB as an exclusive representative has additional specified rights provided by law.

non-employees. (Example: No association business shall be conducted during such events as PTA or Advisory Council meetings, Open House, etc., or in the presence of VIPS or other non-employees.)

B. Personal Business[10]--Conferences on the personal employment problems of an employee shall be conducted outside duty hours of the workday for the individuals involved. (Emphasis in original.)

C. Workdays--Definitions apply as follows:

1. Teachers (includes Math/Reading Specialists)--Normally, the teachers' workday extends from 20 minutes before the first assigned period to 20 minutes after the last assigned period; including class, conference, and preparation periods. The 20-minute periods before and after the instructional day are deemed to be duty time to be used for consultation with students, parents and/or school personnel, or class preparation in classrooms or school offices, or for supervisory duty directed by manager.* (Kindergarten teachers have the same workday as other elementary teachers. Elementary teacher-librarians work a seven-hour day.) It also includes additional related service time such as after school and evening supervision of student body activities and other extra-curricular duties. (Emphasis in original.)

2. Other Classified and Certificated Employees--All other regular full time employees have an eight-hour day, exclusive of a lunch period.

*See appropriate job descriptions for lists of duties.

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[10]In the revised bulletin the term "personal business" is defined as:

> . . . any activity initiated by an individual employee who has the need to consult with an association representative because of some personal employment matter such as the processing of a grievance.

3. Nutrition and Lunch--No part of the duty-free nutrition and lunch periods (except for passing time supervision of students when assigned) is considered to be duty time.

4. Child Development Center and Other Part-time Employees (including Teacher Aides)--Meetings for these employees may be arranged at work sites so long as they do not conflict with the individual employee's duty time and do not disrupt the work function of other employees still on duty. Access rights of associations to these employees shall be respected within reason.

III. Prohibited Activities by Employees During Duty Hours

The following is a partial list of activities which may not be conducted by employees during the duty hours of their workday (emphasis in original):

A. Planning, attending, or conducting association business meetings.

B. Soliciting employee membership in an association.

C. Meeting for the purpose of collecting signatures for exclusive representation petitions or related activity

D. Campaigning prior to a hearing or an election

E. Soliciting employees for funds or services in behalf of an employee association

F. Preparing or duplicating written material for association business purposes

G. Contacting employees or association representatives for the purpose of transacting association business

Note: Secretaries and clerks will place messages regarding incoming calls in employee mailboxes but will not deliver messages to rooms or other sites.

H. Distributing written materials on association business

Note: Off-duty employees may distribute materials to mailboxes or to other off-duty employees on non-duty time. (See Section V, paragraph D.1, page 6.)

I. Using district facilities, equipment, supplies as per Section V., paragraph D. 4, p.7.

. . . . . .

V. Organizing Activity by Employee Associations

. . . . . .

C. Facilities Arrangements

1. Association or Personal Business with Individual Employees--An association representative who is not employed at the site may meet privately with small groups of employees during non-duty hours in a lounge, workroom, lunchroom or other similar area so long as the conversation will not seriously disrupt or interfere with the use of the area by others. The specific lounge or other area may be specified by the site manager or supervisor.

2. Association Business with Groups of Employees--When it is anticipated that association business is to be conducted informally or formally with a large group of employees relative to the size of the room, room arrangements must be made at least one day in advance of the meeting. The request for access must be made to the site manager or supervisor and shall include the specific date, time, and size of the facility requested. The principal or office head will evaluate their request and normally, authorize the use of the facilities while mindful of the district's need to balance fairly the rights of all employees, of other associations, and of the district itself. Failure to make arrangements in advance shall be grounds for prohibiting any such

> meetings at the site. (Emphasis in original.)
>
> 3. Right of Refusal--The site manager has the right to refuse permission to use a facility if appropriate facilities are not available or if there will be a probable disruption of school functions.

During the summer of 1980 and just prior to the District's issuance of the modified regulations, Shirley Guy, Executive Director of TALB, contacted Marmion about having a meeting to discuss revisions of the 1976 regulations based on the Board's rulings in Long Beach, supra. A meeting was eventually scheduled for September 17, 1980, but was cancelled by Marmion and not rescheduled. Shortly thereafter, Marmion's position with the District was changed and he no longer had responsibility for employee relations activities.

On October 22, 1980, Ms. Guy wrote to Tom Collins, the new coordinator of employee relations and former assistant to Marmion, requesting a meeting to discuss "a number of [TALB] concerns" regarding the newly amended regulations. On that same date, Guy wrote to Frances Kreiling, Regional Director of the PERB Los Angeles Regional Office, and requested an investigation into the District's compliance with PERB Decision No. 130 (Long Beach, supra). In her letter Guy stated the following:

> The District has posted Notices in the schools of the District. The District has also amended its regulations governing Employee Association Activities. However, it is the feeling of the Teachers

> Association of Long Beach that the revised regulations do not comply with the Order of the Decision [PERB Decision No. 130, LA-CE-171] and further that the implementation of the regulations do not comply with the provisions of the Order.

Sometime in late October or early November of 1980, Guy and Collins had a meeting on another matter during which time they discussed the amended regulations. Also present at the meeting were Robert Welborn, a field representative for TALB, Donald Goddard, president of TALB, Donald Ashley, assistant superintendent, personnel services division and Marjorie Ingram, assistant coordinator, employee relations.

During the meeting, Guy stated the Association's belief that the revised regulations did not conform to the mandate expressed in PERB Decision No. 130. Collins took the position that the amended regulations did conform to the PERB order. At the conclusion of the meeting, their positions were unchanged and the matter remained unresolved.

Sometime during this same period, Kreiling contacted Collins by telephone to inform him that TALB had requested an investigation regarding the District's compliance with the Board Order in Long Beach, supra. In a letter to Guy dated December 4, 1980, Kreiling requested specific allegations about the District's non-compliance with the PERB Order.

On December 16, 1980, Guy sent Kreiling a lengthy letter which characterized the changes in the regulations as "window dressing," outlined the Association's view of the lack of

substance in the changes actually made in the 1976 regulations, and cited examples of difficulties that TALB representatives were encountering in attempting to gain access to teachers during the 20-minutes before and after the assigned instructional periods.

On February 11, 1981, Kreiling notified Guy by letter, that pursuant to her investigation of TALB's complaint, she was denying the Association's request for initiation of compliance procedures stating, among other things, that TALB lacked standing as a party to the proceeding in Long Beach, supra. Kreiling did note that TALB was not foreclosed from filing an unfair practice charge against the District. On March 16, 1981, the instant charge was filed.

C. History of Collective Bargaining Negotiations Between the Parties

In the spring of 1978 the parties negotiated their first collective bargaining agreement (CBA) which was in effect for the period from March 13, 1978, through October 15, 1978. This agreement, referred to by the parties as the "mini-contract or agreement," was negotiated shortly after TALB was certified as the certificated unit exclusive bargaining representative. The intent of this agreement was to achieve a quick resolution of salary matters for the bargaining unit and to maintain the status quo with respect to all other areas pending future

negotiations. Evidence of this intent was placed in Article VI - Negotiation of Successor Contract, section 6.20 which stated as follows:

> The Association and the District further agree that for the duration of this agreement, the District's existing written policies and regulations on salaries and fringe benefits, hours of employment, voluntary payroll deductions, leaves of absence, transfer, safety conditions of employment, class size, evaluation procedures, grievance processing, and association activities shall remain in effect unless a change is mutually agreed upon by the parties to this agreement.

At that time the District regulations covering employee organization activities were the same 1976 access regulations which were being challenged before PERB and were subsequently litigated in Long Beach Unified School District, supra.

Shortly after entering into the mini-contract, the parties commenced negotiations for a more comprehensive CBA. Those negotiations, which included impasse and a PERB-appointed mediator, lasted from March 1978 until May 1979. The resulting contract, which was the second CBA between the parties, but their first comprehensive agreement, was in effect for the period from May 21, 1979 to August 31, 1981.

The above negotiations included extensive discussions about Association rights and access to members of the bargaining unit. Following the initiation of these bargaining sessions, the hearing officer's proposed decision in LA-CE-171 (which provided the basis for PERB Decision No. 130) was issued on

June 2, 1978. Thus, while the parties were in the midst of their negotiations, they were aware of the fact that the proposed decision had found parts of the District's regulations governing employee organization access to be unreasonable and therefore, in violation of the Act. They were also aware during this time that exceptions were filed to the hearing officer's decision and the case was pending before the Board for a final determination.

That agreement contained several articles which are relevant to the issues now being raised by this case. Article IV, which concerned association rights, stated in pertinent part:

> A. Association Use of District Facilities: The Association and its members may utilize District school buildings and facilities.
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> . . . . . .
>
> 2. During operation hours, the District agrees upon 24-hour advance request and approval of the site manager to grant the Association access to lounges, faculty dining rooms, or other designated locations for the transaction of Association business with employees on non-duty time as provided in Section C.
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> . . . . . .
>
> B. Association Communications
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> . . . . . .
>
> 3. FACILITY MAILBOXES. The District authorizes the Association to use

school and other District facility mailboxes. Distribution of communications shall be by employees on non-duty time or by non-site representatives of the Association.

C. Association Business: The Association agrees that its authorized staff and building representatives shall not conduct Association business with employees during regular working hours. It is agreed that non-duty times are as follows: before and after the scheduled workday of each employee, the nutrition break, and lunch period. In no event shall any representative or unit member interrupt or interfere in any way with normal work. Any exceptions must be approved by the appropriate division assistant superintendent. It is further agreed that this section of the contract shall be amended to conform to the Public Employment Relations Board's final decision on this matter.

The last sentence in Article IV, paragraph C, above memorializes the parties' acknowledgment that the challenges to the District's access regulations regarding this matter were before the PERB. The language of this provision expresses their intent to make changes in this section in accord with the Board's final determination on this matter.

Article V of that CBA covers days and hours of employment for unit members. Article V, section A, contains specific provisions regarding the workday as set forth below:

A. Workday

1. It is agreed that the professional duties of employees require both on-site and off-site hours of work, that the varying nature of such professional duties may not lend itself to a total maximum daily work time of definite or uniform length,

and that such duties are normally expected to involve no fewer than eight (8) hours of total effort each workday for both classroom and non-classroom employees.

2. The regular school day for elementary school teachers is as follows: In the elementary schools teachers shall report for duty not later than twenty (20) minutes before the opening of class. They shall remain twenty (20) minutes after the close of their last assigned period of the day (except on Wednesdays or Fridays--as agreed upon by each school faculty), unless excused earlier or requested to remain by the principal. On Wednesday or Fridays teachers may leave the building immediately upon the close of the regular school day for pupils, except that if district meetings are scheduled on the early day, another day may be designated. Teachers of kindergarten and the first three grades remain on duty as long as teachers of the fourth through sixth grades, unless excused earlier by the principal. Teachers assigned to elementary school libraries work a seven-hour day.

3. Junior and senior high school teachers shall report for duty at least twenty (20) minutes before the opening of the first assigned class, conference period, or homeroom and shall check their mailboxes daily before their first assignments. Teachers remain at least twenty (20) minutes after the close of the last assigned class or conference period, except on Wednesdays when they may leave the building immediately upon the close of the last assigned class or conference period, unless assigned to an after-school duty. If District meetings are scheduled on Wednesdays, another day, preferably Friday, may be designated as the early leaving day.

4. The on-site workday for other unit members including nurses, secondary school librarians, and program facilitators shall be eight (8) hours per day, exclusive of lunch. Occasional modifications of the on-site work hours may be requested by the employee and approved by the site manager so as to accommodate job responsibilities that must be done outside of normal working hours. Driving time between district sites shall be included as part of the normal working day, exclusive of the duty-free lunch period.

5. Modification in the students' schedule such as "minimum days" shall have no effect on the unit member's workday as described above, except for Back-to-School Night in the fall and Open House during one night of Public Schools Week in the spring. Additional exceptions may be approved by the appropriate divisional assistant superintendent.

6. It is recognized that in carrying out job responsibilities, each employee shall perform many duties and adjunct responsibilities which occur outside of the scheduled minimum on-site duty day. Such duties may involve activities such as supervision of pupils, sponsorship of student activities, and participation in school, districtwide, and parent-community committees. Managers shall seek volunteers for such duties and adjunct responsibilities. However, in the absence of volunteers, the managers may assign unit members to meet the needs of the school situation. The maximum expectancy for any secondary school teacher is eighty (80) minutes per week for such duties and adjunct responsibilities, exclusive of faculty/department meetings. Because school activities are not equally distributed throughout the year, the teacher's duties and adjunct

responsibilities may exceed eighty (80) minutes during some weeks and be less in others. The maximum expectancy shall be twenty-four (24) hours in an eighteen (18) week period.

7. All unit members shall be entitled to the statutory minimum duty-free lunch period thirty (30) minutes. Normally, teachers can expect to have the same length of lunch period as students except that the site manager may assign employees to supervisory duties during the passing periods and/or to meet the occasional needs of the school lunch period situation.

8. The scheduled preparation period at the secondary level is defined as paid working time for the specific purposes of preparing materials, conferring with students, parents and administrators, and other duties subject to assignment by the principal. It may also, if deemed necessary by the immediate site manager, be used for providing replacement services (class coverage) for a temporarily absent unit member. Replacement service may be required when another teacher is absent, no substitute teacher is immediately available, and, in the judgment of the administrator, no other certificated employee is available. The site manager shall make a reasonable effort to distribute these occasional replacement assignments equitably.

9. In the elementary school, limited preparation time may be arranged at individual school sites through staffing patterns that a) are educationally justifiable; b) do not reduce total instruction time for students; c) are developed jointly by the teaching staff and the site manager, and d) are approved by the Assistant Superintendent, Elementary Division.

10. Employees who request a part-time assignment shall have a minimum on-site responsibility exclusive of any duty-free lunch period proportionate to their contract assignment. Elementary part-time teachers who teach half of the normal instructional time shall have a workday that is one-half the workday of a full-time teacher. Secondary part-time teachers who are assigned to three (3) instructional periods shall have a workday that is one-half the workday of a full-time teacher; other workdays shall be based upon the principle that exclusive of the lunch period, six (6) periods plus required time before and after classes constitute a full-time assignment. Teachers who work less than full-time shall not be scheduled for a preparation period as part of the workday. Employees who work half-time or less shall be exempt from all extra-duty responsibilities except for faculty meetings which are contiguous with the employee's workday and annual PTA-open house activities.

11. The provisions of this section shall not apply to teachers in the Outdoor Education program.

Article XIV of the agreement contains the grievance procedure. Section A, paragraph 1, defines a grievance as:

> A claim by a grievant that he/she has been adversely affected by an interpretation, application, or violation of the specific provisions of this Agreement. Informally, a grievance may be presented verbally; formally, it shall be presented in writing.

The grievance procedure includes an informal level which enables a grievant, before filing a formal written grievance, to attempt resolution through informal conference with the site

manager. The formal level of the procedure consists of four steps. The procedure also makes provisions for the grievant to be granted release time to process the grievance.[11]

In the spring of 1980 the parties commenced reopener negotiations on certain items of the 1979-81 CBA. Those negotiations extended into the fall of 1980, culminating in a ratified agreement in November 1980.

This amendment to the CBA extended the contract term to June 30, 1982. All provisions of 1979-81 CBA set forth above, remained unchanged in the extended contract.

During the 1980 contractual negotiations, the parties again went to impasse and had a PERB-appointed mediator assist

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[11]Article XIV, section G, paragraph 4, states:

> RELEASED TIME. a) An employee with a grievance shall be granted reasonable released time to process the grievance; b) the Association may, upon request of the grievant, have released time for an authorized representative to participate in a grievance conference; c) the Association shall designate in writing to the Employee Relations Office the names of unit members who are authorized as grievance representatives prior to the District's approval of released time; d) except for the informal conference, an employee must request approval from the site manager at least twenty-four (24) hours prior to being released from duties to participate as a grievant or representative in a grievance conference; e) released time shall be limited to one Association representative per grievance conference; f) released time for processing grievances at the site level shall be at times that do not disrupt direct service to students.

them. While these negotiations were underway, the Board issued its decision in Long Beach Unified School District, supra on May 28, 1980.

As was stated above, sometime in July or August of 1980 Ms. Guy contacted Mr. Marmion about their having a meeting to discuss the decision as provided for by Article IV, section C, of the CBA. However, the parties did not actually meet until after the District had completed revision of the 1976 regulations and reissued them effective September 15, 1980.

Association access was not one of the subjects of the 1980 negotiations. Ms. Guy testified that TALB did not place the item on the table because it was not one of the items which was subject to the reopener.

Ms. Guy was TALB's chief negotiator for all three CBA's negotiated by the parties at the time of the hearing. Marmion was the District's chief negotiator until October 1, 1980, when Collins replaced him. However, Collins was present during the course of negotiations for all three agreements as Marmion's assistant until his appointment as employee relations coordinator.

D. Teachers Use of Time During 20-Minute Periods and Conference/Preparation Periods

Since at least 1943 the District has maintained the practice of requiring teachers to report to duty at least 20 minutes prior to the beginning of the first assigned class,

conference period, or homeroom and remain on duty at least 20 minutes after the close of the last assigned class or conference period of the day (except on Wednesdays or Fridays). Traditionally, Wednesdays and Fridays are known as the "early leaving days." On either of those days, as agreed upon by each school faculty, the teachers may leave at the close of the last assigned class or conference period, unless given an after school assignment.

The District relies on State Department of Education regulations as the source of its authority for requiring teachers to be on duty for the two 20-minute periods each day.[12]

Since the mid-1940's, the District has also maintained the practice of designating one non-teaching period per day as a conference or preparation period for secondary level teachers.

The conference/preparation period, commonly referred to as the "conference period," is time during the instructional day

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[12]Title 5, Calif. Admin. Code, section 5570 states:

> Unless otherwise provided by rule of the governing board of the school district, teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school.
>
> All teachers shall observe punctually the hours fixed by regulation of the governing board of the school district for opening and closing school.

to be used for class preparation and other classroom-related responsibilities, consultation with parents or other school personnel, school business meetings, and specific supervisory duties as assigned by the principal or site manager. For example, a teacher may be assigned to provide replacement services (class coverage) for a temporarily absent teacher where no substitute teacher is immediately available.

Faculty at some of the elementary schools have agreed to work extra minutes during the regular instructional period during the week in order to have a block of non-classroom time set aside once each week for preparation time. The extent to which elementary schools throughout the District have scheduled weekly preparation periods is unknown. However, at least two witnesses employed at different elementary school sites testified that they have such time set aside in their programs.

In 1978 when the parties negotiated the first CBA, the District had a set of regulations entitled "Regulations of the Board of Education" which contained among other things, specific provisions regarding the workday of certificated personnel. Those provisions required all classroom teachers to report to duty at least 20 minutes before their first assignment. A copy of these regulations is issued to every teacher at the beginning of the person's employment with the District.

In 1981 the above-mentioned regulations were revised. The revision contained no reference to the workday or hours of teachers, but did include a detailed listing of teachers' duties.

Article V, section A, paragraphs 2 and 3[13] of the current CBA refer to the 20-minute periods as "duty time." However, these provisions contain no listing of specific duties or assignments to be performed during this time at the elementary level. At the secondary level, the contract specifically requires junior high and senior high school teachers to check their mailboxes daily before their first assignment.

Both parties presented a number of witnesses who testified about their normal activities during the two 20-minute periods. The evidence is uncontradicted that, as a general rule, teachers at both the elementary and secondary level engage in some type of professional preparation in the time both before and after the instructional day. However, the actual use of these 20-minute duty times, varies with the individual teacher according to his/her particular school site and the grade level taught.

In the mornings many teachers arrive on the campus as much as 30-45 minutes prior to the beginning of the 20-minute period in order to complete specific preparation activities which they deem to be important.

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[13]See full text, supra at p. 21.

The activities performed are generally left to the discretion of the individual teacher. Examples of these activities include opening and preparing the classroom for the arrival of the students, checking on equipment or supplies to be used during classroom instruction, duplicating written materials, writing assignments on the classroom blackboards, consulting with the school nurse or other support personnel, and distributing materials on the pupils' desk. If assigned by the principal, some teachers at the secondary level must supervise the halls during the students' passing period just prior to the beginning of the first period. At the elementary school level, the teachers are assigned 15-minute yard duty in the mornings on a rotating basis, the frequency of which depends on the number of teachers at a particular site. Once a month, staff meetings are held, usually in the morning prior to the beginning of the 20-minute period, and may extend into part of the 20-minute duty time. Faculty committee meetings are generally held in the afternoon, starting at the beginning of the 20-minute period. Teacher participation in faculty committees is usually voluntary.

At each school site there is an area which is designated as the teachers' lounge. This lounge is utilized by the teachers for rest and relaxation and, in some instances, for lunch breaks. The actual size and number of lounges per school site and type of equipment kept in these areas varies considerably

throughout the District. In some schools, aside from the furniture, magazines, etc., for the teachers to utilize during their break time, the lounges contain equipment such as duplicating machines which the teachers use for class work. Occasionally, some lounges are used as a work area by a teacher during the conference/preparation period if that person's classroom is in use during this time. The classroom teachers do not have private offices. Aside from the faculty dining rooms, the lounges are generally the only other areas on the campus where teachers may smoke and have coffee or other refreshments.

Testimony presented by various witnesses for both sides exemplified how teachers' activities during a "typical day" vary. For example at the elementary level, Violet Moody, a third grade teacher at Jane Addams School and a witness for the District, is involved in "team teaching" with five other teachers for the reading classes at her school site. This program requires a great deal of coordination between the teaching staff and their assistants. This school also has several specially-funded state and federal programs because of the very diverse student population. Thus most of her time during the 20-minute periods is taken up by the consultation and record-keeping activities required for these programs. At her school the teachers do not have a weekly preparation period. Their early-leaving day is Wednesday. Occasionally,

faculty meetings have been scheduled on the early-leaving day and the time consumed by these meetings is not given back to the teachers.

Similarly, Loretta Foster, a bilingual kindergarten teacher at John Muir School and a witness for TALB, spends approximately 95 percent of her non-classroom duty time doing class preparation work. At her school, the kindergarten teachers do have a preparation period of approximately 70 minutes in the afternoon which they utilize preparing lessons for the next day's classes. Because the lessons must be prepared in two languages, a great deal of time is required to accomplish this task.

Three of the witnesses presented by the parties were department heads. As defined by the District's job descriptions, department heads have extra duties for which they receive extra compensation. Jo Ann Powell, a TALB witness, had a special assignment as the yearbook advisor at Jordan High School. The evidence presented by all these witnesses indicates that each of them spends time during both 20-minute periods and their conference periods attending to many of the extra duties required of department heads or teachers with special assignments. In addition, on a regular basis, these individuals must have meetings with the school principals and their respective departmental staff, or the students involved in projects such as the yearbook. These meetings are in

addition to the regular monthly site staff and committee meetings referred to above.

The use of the 20-minute periods after the last assigned instructional period also varies somewhat. Some teachers use this time to meet with students who have special instructional needs, do their blackboard work for the next day's class, go to the mailbox, go to the teachers' lounge and relax and converse with other teachers, attend committee meetings, meet with parents, and secure the classrooms or remove their materials from the classrooms if the classroom is to be used for other activities at the end of the regular day. At the junior high level, some six or seven schools have a daily after school tardy/detention program for pupils which lasts for 10-15 minutes of the 20-minute period. The teachers assigned to conduct the detention must remain in the classroom to supervise the detainees. The frequency of this assignment depends on the number of pupils who must be detained.

If a teacher elects to take unauthorized leave from the campus during the 20-minute period, the District practice has been to charge that individual with leave time pursuant to the leave provisions of the CBA.

The scheduled conference/preparation period is defined by Article V, section A, paragraphs 8 and 9 of the CBA[14] as paid working time for bargaining unit members.

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[14]See full text of provisions, supra at p. 23.

The use of the conference periods varies according to the needs of a particular teacher. But generally, it was acknowledged by all witnesses that this time is considered to be working time to be used for such activities as paperwork, conferencing with pupils or parents, conferencing with resource personnel, going to the library, ordering of supplies, checking on equipment, etc. These are all activities related to the instructional programs. The time is also used for such assigned duties as replacement services, as mentioned above, attendance at faculty meetings and participation in conferences related to grievance processing. Release time is available to a teacher for this activity in accord with provisions of the CBA.15

Those teachers, who do not use the conference period for purposes described above or take unauthorized leave from the campus during this time, have been disciplined by their principals and/or charged with leave time as provided for by the CBA.

E. The District's Policy Regarding Use of its Facilities

The use of District facilities for meetings, other than classroom teaching, is commonplace. For example, various extracurricular activities occur before and after school, such as student club meetings, special projects, the yearbook and tutoring. Also the academic departments, at a school site have

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15See full text of this provision, supra at p. 25.

various meetings throughout the year which require the use of rooms other than for classroom instruction.

Pursuant to the Civic Center Act (California Education Code sections 40046-40058) the District is required to make its facilities available for use by community and civic groups. In furtherance of this obligation the District has established various policies regarding the allocation of its facilities for civic activities. These policies require that groups desiring to use District facilities must submit applications for permits at least two weeks prior to the date of the event for which the District site is to be required.

Under the Civic Center Act organizations such as the Girl Scouts, Boy Scouts, the Parent-Teachers Association and other service and community-oriented groups use the District's facilities for their meetings and activities.

Additionally, the District has an adult school population of 3,000 students who use District sites for evening school classes.

Article IV of the CBA contains provisions regarding the Association's use of District facilities. Section A, paragraph 2[16] of that Article provides for 24-hour advance request by the Association for access to lounges, faculty dining rooms or designated locations for the transaction of Association

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[16]See full text of this provision, supra at p. 19.

business. The District's access regulations set forth above, also require one-day advance arrangement where a large group meeting is to be held.[17] In practice the District only requires TALB to submit the advance request when there is a large group meeting, whether formal or informal. Informal meetings or visitations by TALB with small groups of employees do not require a 24-hour advance room request for access to the lounges, etc.

F. TALB's Visitations to School Sites

The TALB schedule of school site visitations is developed by its office personnel each school year at the beginning of the fall and the spring semesters. This schedule is sent to the District's employee relations office and to each TALB school site faculty representative at the beginning of the semester. Approximately 1 1/2 weeks prior to the scheduled visit, the TALB office sends a reminder to the site faculty representative in order that room arrangements, if needed, can be made. Room arrangements are made with the site manager. That notice is also posted to let the teachers at a facility know that a visit is scheduled.

During the fall semesters of the 1980-81 and 1982-83 school years, the TALB visitation schedules were set up on a rotation basis. During the 1980-81 school year, the visitations were

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[17]See full text of this provision, supra at p. 14.

conducted by Guy, Welborn and Goddard, who was then the TALB president and on leave of absence. The visitations at the elementary schools were scheduled for mornings, usually beginning at 7:30 a.m. Visitations at the secondary schools were scheduled during lunch time. Room arrangements for the meetings are generally left up to the site representative, depending on the type of meeting planned, i.e., a formal structured meeting or an informal visitation. Occasionally, the meeting times are modified if the faculty, at a particular site, prefer a time other than that scheduled by the Association.

TALB representatives also have meetings with individual teachers which, on occasion, have been held during the scheduled conference periods in the teacher's classroom or the faculty lounge. Welborn testified that at times he has met with teachers regarding grievance matters during their conference periods without obtaining authorization from the site principal. He viewed the investigation of possible grievances as part of the grievance process permitted by the CBA.

Upon arrival at a local school site, the general practice of TALB representatives is to go to the principal's office and sign in on the log for employee organization visits. However, both Guy and Welborn admitted that they have visited individual

teachers at a site without first signing in at the principal's office. Guy testified that if the meeting was related to a possible grievance matter, she considered the meeting to be "confidential" and therefore, it was not entirely necessary to sign in. She further testified that generally when she has visited individual teachers without first going to the principal's office to sign in, the visitations were to drop off TALB materials such as membership applications, etc.

During the 1980-81 school year, a very high percentage of the morning visitations which were scheduled to begin at 7:30 a.m. extended into the 20-minute period by as much as the entire 20 minutes. The use of the entire period during a visit has occurred when discussion ensued between one or two individual teachers and the TALB representative. TALB representatives testified that it had been their observation that when a teacher had a specific assignment or a duty during the 20-minute period, that person simply left at the appropriate time during the visitation.

Visitations at the secondary schools during the lunch periods (where the schools have two lunch periods) had at times extended past the lunch period and into the conference period if that period occurred immmediately after the duty-free lunch period.

During the 1980-81 school year, the majority of the TALB

visitations or meetings occurred either in the faculty lounges or the teachers' dining rooms.

During their testimony both Guy and Goddard admitted that TALB could schedule more afternoon meetings, especially on the early leaving days. However, as a general practice, the Association had not done so because of a fear of conflict with District business meetings. Also many teachers had personal matters which they preferred to take care of, particularly, on Friday afternoons when that day was the early leaving day. These factors made late afternoon meeting times less desirable.

The District has a policy which prohibits school district business meetings on the early-leaving days unless the meetings have been approved by the District administration or consented to by the teachers at the facility. If the early-leaving day is used for a school business meeting, the teachers are to receive another day as an early-leaving day. Goddard testified that he believes the District pretty much adheres to this policy.

No evidence was presented that a TALB meeting which was scheduled for an afternoon following the 20-minute period had ever been preempted by a District business meeting scheduled at the same time.

G. The District's Application of its Revised Access Regulations to TALB's On-Campus Activities

In the fall of 1980 the District began to actively enforce its amended access regulations to various TALB on-campus activities. In conjunction with the reissuance of these rules, the District administration conducted in-service meetings with its site managers, reviewing with them the administration's interpretation of the regulations and related contract provisions. A few instances where enforcement of the regulations occurred showed inconsistencies in the way they were interpreted at the school site level.

The first example concerns an encounter between Judith Powell, a TALB faculty representative at Jordan High School and former TALB president, and the Jordan principal, Joseph L. McCleary. This encounter occurred entirely through the exchange of a series of memos over a two-day period. On October 8, 1980, Powell distributed a memo to the Jordan faculty announcing that a site meeting would be held on October 9 at 3:05 p.m. in room 855 (which was her regular classroom) to give an update on the status of bargaining between TALB and the District. On that same date, McCleary sent Powell a memo in response to her memo indicating that, if carried out, the meeting scheduled for October 9 "would be a violation of the contract and District regulations." He stated that a site meeting at 3:05 p.m. would include "duty time" for

nearly all teachers, nurses and librarians at Jordan and that their participation in a meeting during duty time would be a contract violation. His memo cited Article V, section A, paragraph 3, of the CBA as support for this statement. McCleary also stated that the use of school facilities for a formal meeting required advance approval by the principal; and as of the time of his memo, no such request had been submitted.

The next morning at 7:15 a.m. Powell responded to McCleary's memo with another memo which included a request for use of her classroom and indicated that the meeting would still be held at 3:05 p.m. Powell stated that in her opinion the District's regulations prohibiting meetings during the 20-minute periods was not in compliance with PERB Decision No. 130. Later in the day, McCleary sent Powell another memo granting her request for the use of her classroom for the site meeting and indicating that the time of the meeting was to be no earlier than 3:20 p.m. He concluded his memo with the following admonition:

> I encourage you not to mislead teachers into a violation of their contract and District regulations which have been revised specifically in response to a recent PERB Decision and posted as required as well as furnished to employee associations.

Later that same day (October 9), Powell distributed another memo to the Jordan faculty stating that because of the

disagreement that had arisen regarding the time set for the meeting, TALB intended to file a grievance or an unfair practice charge against the District.

At the hearing Powell admitted that she knew that she was supposed to request a room a day in advance of the meeting. Although she did not agree with the rule she actually forgot about submitting the request before scheduling the meeting for October 9 because she had never requested the use of her own room before.

In late October 1980 another incident involved Guy and Martha Dauway, principal of Stevenson Elementary School. The facts surrounding this incident are in dispute. Guy testified that there was a rather heated verbal exchange between her and Dauway over Dauway's denial to her of access to the teachers' lounge. The reason Dauway gave for her action was that there had been no 24-hour advance request made for the use of the room. Dauway's version of the incident cited Guy's failure to sign in at the Dauway's office prior to her visitation on campus in the early morning. Dauway testified that Guy complained to her that when she (Guy) went to the teachers' lounge, no one was there. The only documentary evidence presented about this incident was the log of visits of employee association representatives which showed that Guy was present on the campus on October 21, 1980. Her arrival time was

7:55 a.m. and departure was shown as 8:30 a.m.[18]

Later that same morning Guy related the incident to Collins when she stopped by the District administrative headquarters. By the time she arrived, Dauway had already called Collins and reported the matter to him.

Starting in the fall of 1980, Guy testified that she received reminders from principals and from site faculty representatives that the morning visitations and meetings were to be confined to the period of time preceding the beginning of the 20-minute preparation periods.

At three elementary school meetings that Guy conducted during the 1980-81 school year, she was not permitted to hold these meetings in the faculty lounges. Instead she was directed to designated classrooms. During the fall of 1980 a meeting was held at Muir Elementary School. In this instance, the teachers wanted an afternoon meeting which was to be held in a classroom. However, the school principal required the meeting to be conducted in the teachers' lounge because the principal considered the classroom a "designated working area."

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[18]This administrative law judge makes no finding about which witnesses' version of the incident is accurate. In this instance a credibility resolution is not necessary in order to reach a conclusion about whether an incident actually occurred related to the District's attempts to enforce its disputed regulations.

In the fall of 1981 Guy had a discussion with the principal of Fremont Elementary School regarding a morning meeting that extended into the 20-minute preparation period. While that meeting was in progress, the principal appeared and asked to speak with both Guy and the faculty representative as soon as the meeting was concluded. A discussion ensued at which time both Guy and the representative were reminded that such meetings extending into the 20-minute period were impermissible.

In September 1982 Guy received a letter from Collins regarding the TALB fall visitation schedule for secondary schools. He advised her that the scheduled meetings should not extend into the five minute passing period between lunch periods when teachers were required to supervise the movements of students in hallways.

During this same period of time, Guy met with a teacher at Stevens Junior High School during that teacher's conference period. The meeting lasted the entire conference period. Guy signed in at the principal's office, but she did not state with whom she was meeting nor the exact purpose of the meeting. This was an instance where Guy considered the meeting to be of a "confidential" nature thus it was not necessary for the District to know all the details of her meeting.

In October 1980 Goddard was involved in an incident at Barton Elementary School. Goddard attempted to conduct a

morning meeting in the teachers' lounge. However, the principal objected because she had not been informed about the meeting by the site representative. In that instance Goddard was not permitted to finish the meeting in the teachers' lounge. Instead he, and those present, were required to continue the meeting in the site representative's classroom. Goddard said that TALB and the teachers disliked this change because the lounge is a more relaxing location for meetings and is physically more comfortable than the classrooms which are equipped with desks and chairs to fit young children rather than adults.

On occasion during his other visitations during the 1980-81 school year, Goddard and the teachers were required to meet in the school library instead of the teachers' dining room or the lounges. Goddard feels that these variations in meeting places adversely affected the attendance since the locations were, at times, more removed from where the teachers liked to gather and were accustomed to meeting. Thus, fewer teachers attended the meetings. No evidence was presented about whether such meetings were formal or informal or whether they occurred during the 20-minute periods or at other times.

Another incident involved Goddard and the assignment of a meeting room at Stevens Junior High during the 1981-82 school year. In that instance, Goddard had an encounter with the

principal who refused to permit Goddard the use of the teachers' lounge because the faculty site representative had failed to make a 24-hour advance request for the use of the room.

In April 1981 Welborn was involved in an incident at Kettering Elementary School. He scheduled a meeting with Donna Gannon, a kindergarten teacher. This meeting was held during the instructional day to prepare a response to an evaluation that Gannon had received and to explore the possibility of her filing a grievance. Welborn's meeting prompted an exchange of letters between TALB and the District regarding meetings with employees during "non-class duty time during the workday." In this instance, Gannon had not made a request for release time for the meeting. Following the District's letter to TALB, this matter was satisfactorily resolved between the parties.

H. Availability of Appropriate District Facilities

The evidence shows that throughout the District there is a great demand for the use of the classrooms and other facilities for instructional purposes during the regular school day. Because of overcrowding at many of the elementary schools, it is necessary for a sizeable number of pupils to be bussed daily to other sites which have classrooms available to accommodate the overflow. The District also has a large voluntary bussing program which involves the movement of many students in and out

of facilities each day. The after school use of District classrooms and facilities by student and community groups varies at each school site depending on the enrollment and the number of extracurricular after school activities scheduled.

At approximately half of the junior high schools, there is also the tardy/detention program. These students are retained for 10 to 15 minutes after the instructional day in the classroom where they have the seventh period by the seventh period teacher. This program, where in effect, causes the use of a number of classrooms on a four day a week basis. Wayne Piercy, the principal of Franklin Junior High School, testified that on any given day approximately 32 of the 39 teachers at Franklin are involved in the detention of 1 to 2 pupils per day.

ISSUES

1. Whether the Association's challenges to the District's access regulations raised in its particularization to the charge are time-barred by the provisions of section 3541.5(a)(1)?

2. Whether, either by adoption or application, certain of the District's revised employee organization access regulations are "unreasonable" within the meaning of section 3543.1(b) and thereby constitute a violation of section 3543.5(a) and (b)?

3. Whether, through specific provisions of the CBA of the parties, the Association has waived its right to object to the application of those access restrictions which it now challenges?

CONCLUSIONS OF LAW

Initially, it is noted that not all provisions of the revised access regulations are being challenged. Specifically at issue, are those parts of the rules that: (1) prohibit association and personal business during the 20-minute periods before and after the instructional day or the assigned conference/preparation periods and, (2) give the District the right to specify the on-campus meeting locations for Association business and require at least a 24-hour advance request for room use for Association meetings.

As noted above, the regulations presently being challenged in this case were previously litigated before the PERB in a pre-amended form and resulted in an earlier decision, namely, Long Beach Unified School District, supra. Although this case at first glance may appear to be simply a relitigation of that case, it does present important factual and legal differences which distinguish it from the earlier case.

In the earlier case the charging party was a non-exclusive representative which was engaged in a very competitive organizing effort of both certificated and classified District

employees. No exclusive representative had been selected and there was no collective bargaining agreement in existence at that time. In the present case the Charging Party is an exclusive representative and at the time of the hearing the parties had negotiated three collective bargaining agreements, two of which contained provisions addressing the areas of the revised regulations now being contested.

Because of these factors, this case presents an issue not previously addressed by PERB in its growing body of case law interpreting employee organization access rights under either the EERA, or the Higher Education Employer-Employee Relations Act, (hereafter HEERA).[19]

A. Timeliness of Allegations Included in the Particularization of the Charge

The threshold issue of this case is the District's objection to the allegations raised by the Association in its Response to the Motion for Particularization of the charge. The District contends that TALB expanded the scope of the charge by adding sections of the regulations to its charge in the particularization. This objection, raised as an affirmative defense, argues that the additional sections are

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[19]The HEERA is another labor relations act administered by the PERB. The language of this statute, which provides for express employee organization access rights, is virtually identical to the language of section 3543.1(b) of the EERA.

time-barred by the statute of limitations provision in section 3541.5(a)(1).[20] The District's basis for its objection is that the original charge filed on March 16, 1981, raised objections to section I, paragraph A, section II, paragraphs A and C, and section III of the revised regulations. In its particularization to the charge TALB added objections to sections II, paragraph B, section V, paragraph C, subparts 1 and 2. The District argues that since the regulations were issued on September 15, 1980, and the original charge was filed March 16, 1981, the Response to the Motion to Particularization, which was filed on April 27, 1981, was filed seven months after the occurrence of the act complained of. Consequently, the additional allegations in the particularization are untimely under the statutory limitations provision of 3541.5(a)(1).

The fundamental purpose of a statute of limitations is to promote justice by preventing surprise and prejudice to a party

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[20]Section 3541.5(a)(1) states, in relevant part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

from having to defend against stale claims which "have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared." Order of Railroad Telegraphers v. Railway Express Agency (1944) 321 U.S. 342 [14 LRRM 506]. A statute of limitations helps to assure that the defendant receives timely notice which enables him/her to assemble a defense while the facts are still fresh. Elkins v. Derby (1974) 12 Cal.3d 410.

TALB presents two theories of defense to the untimeliness claim. First, it maintains that the District's conduct with regard to the promulgation and implementation of the regulations constitutes a "continuing violation" because the rules remained in effect and were applied up to the day that the original charge was filed. In support of this theory, TALB relies on the Board's decision in Carlsbad Unified School District (1/30/79) PERB Decision No. 89, where PERB applied the notion of "continuing violation" in construing the statute of limitations provision contained in section 3541.5(a)(1).

In Carlsbad, supra, the District had announced its decision to transfer certain individual employees who actually were relocated sometime later. In that case PERB held that:

> While it may have been possible for O-CFT to have filed the charge at the time that the decision to transfer the employees was announced, it was not precluded from doing so when those transfers actually became

> effective. The interference with the employees' rights did not start and end with the announcement. It existed at the time the transfers actually occurred and persisted thereafter. The District's conduct constituted a continuing violation of section 3543.5(a) [citation omitted]. We therefore sustain the Hearing Officer's finding that the charge was timely filed.

It is noted that in the statement of alleged conduct in the original charge, TALB alleges in paragraph three that "on or about September 15, 1980, and continuously thereafter (emphasis added) the Board . . . and its agents, has denied to the Association its right of access. . . ." Attached to the statement of the charge was a copy of a letter from Guy to Kreiling dated December 16, 1980, citing examples of the District's conduct about which TALB objected. The specific references to the regulations cited in her letter were incorporated by reference into the statement of the charge.

Receiving the context in which the examples of changes that the District made in the regulations and their alleged impact on the Association's access were described in the letter, it cannot be concluded that those sections of the regulations cited in the letter constituted the full extent of the Association's objections. Thus, the additional sections of the regulations cited in the particularization are viewed as more fully explaining the basis for the objections raised in the original charge. They are not considered to have improperly raised new matters as contended by the District.

The evidence shows that the regulations at issue did remain in effect and were enforced up to the time that the original charge was filed. Although it would have been possible for the Association to file a charge at the time that the rules were issued, the alleged interference with the Association's rights did not start and end with the issuance of the rules. As was noted in Carlsbad, supra, it was not only the publication of the decision to transfer which was unlawful, but each act implementing such decision or policy was held to constitute a separate violation from which redress could be sought. Applying that precedent to this case, it is concluded that from the date that the regulations went into effect, each instance of enforcement thereafter constituted a separate and additional basis for the filing of a charge. (See Carlsbad, supra. See also California State University, Hayward (8/10/82) PERB Decision No. 231-H.)

By characterizing the District's actions as "continuous conduct," the statute of limitations began to run again after each instance of alleged unlawful enforcement occurred beginning September 15, 1980, and thereafter until the time the charge was filed. Following this theory, any alleged interference with the Association's rights which existed at the time that the original charge was filed, were timely raised in the particularization of the charge.

TALB's alternative argument is that even if the allegations contained in particularization of the charge are construed to be more expansive than the original statement, in this case the doctrine of equitable tolling should be applied to preclude the charges from being time-barred.

In support of this argument, TALB relies on the Board's decision in State of California, Department of Water Resources (12/29/81) PERB Order No. Ad-122-S, in which PERB adopted and applied the equitable tolling principles enunciated in Elkins v. Derby, supra. (See also, Victor Valley Joint Union High School District (12/29/82) PERB Decision No. 273.)

In Victor Valley, supra, PERB pointed out that the "key issue is whether the defendant would be surprised or prejudiced by the tolling."

Based on the facts presented in this case, it would be equally appropriate to apply the doctrine of equitable tolling. The District was on notice from the time that the parties met in late October or early November 1980 to discuss the regulations, and continually thereafter, that TALB disagreed with the lawfulness of the revisions made to the 1976 regulations, as well as the application of those rules to its on-campus activities. Even if it is argued that this disagreement between the parties was insufficient notice, the District certainly became aware of the existence of a dispute

when TALB filed a request with PERB in October 1980 to initiate compliance proceedings regarding the order in Long Beach, supra.

TALB's attempt to obtain a compliance investigation clearly put the District on notice of the nature of their dispute and obviated the danger of surprise and prejudice which might otherwise have resulted from the passage of time.

It is found that the notice created by this procedure was effective to the extent that it protected the "[d]efendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence" [Elkins v. Derby, supra, 12 Cal.3d at 417]. It is therefore concluded that the statute of limitations found in section 3541.5(a)(1) was equitably tolled from October 22, 1980 until February 11, 1981, while TALB reasonably and in good faith pursued a remedy before the PERB via the compliance procedure. TALB thereafter timely filed an Unfair Practice Charge with PERB raising the same issues. This charge was then supplemented by the particularization which was timely filed on April 27, 1981.

B. Validity of Access Regulations

Section 3543.1(b)[21] gives an employee organization the

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[21]Section 3543.1(b) states:

> (b) Employee organizations shall have the right of access at reasonable times to areas

right of access to areas in which employees work, the right to use various means of communication with employees and the right to use institutional facilities. This right of access is limited to "reasonable times" and is subject to "reasonable regulations" adopted by the employer to implement the access procedure. In striking this balance, the Board has considered, as stated in Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99, that an employer's regulation of an organization's access rights is,

> . . . reasonable if it is consistent with the basic labor law principles set forth in EERA which are designed to ensure effective and non-disruptive organizational communications.

In determining whether an employer's rule concerning organizational activity is reasonable and therefore permissible under the EERA, the Board has considered applicable private sector labor law precedent.

In Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620], the Supreme Court adopted the presumption that a rule prohibiting union solicitation by employees outside their working time was an unreasonable impediment to

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> in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulations, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

self-organization. Subsequent decisions in this area have attempted to accommodate the employees' rights to freely participate in the activities of employee organizations with the right of the employer to maintain order and discipline. NLRB v. Babcock and Wilcox, Co. (1956) 351 U.S. 105 [38 LRRM 2001]. In striking this adjustment, in Stoddard Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110], the National Labor Relations Board (hereafter NLRB) established a distinction between distribution of literature and solicitation. Restrictions on employee solicitation during non-working time and restrictions on distribution during non-working time and in non-working areas were held to be violative of section 8(a)(1) of the National Labor Relations Act (hereafter NLRA) unless the employer justifies the rules by a showing of special circumstances which make the rule necessary to maintain production or discipline. (See also Long Beach Unified School District, supra at pp. 7-8.)

In Essex International, Inc. (1974) 211 NLRB 749 [86 LRRM 1411], the NLRB distinguished between employer rules which prohibit solicitation during "working hours" and those which prohibit solicitation during "working time." In that decision the NLRB held that the term "working hours" generally is understood to mean the entire period of time between when an employee begins and completes a shift. Because a rule

prohibiting solicitation during "working hours" would extend the ban through lunch and rest periods, it is presumptively illegal. The NLRB held that the term "working time" generally is understood to mean only that portion of a shift when an employee is actually working. Because a rule prohibiting solicitation during "working time" would exclude lunch and rest periods, it is presumptively legal.

In interpreting the meaning of the term "reasonable times" in section 3543.1(b), the PERB applied this federal sector precedent and interpreted the term to mean "non-working time." (See Long Beach, supra at p. 9.)

With these basic principles in mind, each aspect of the Association's objections to the present regulations will be discussed below.

1. The Prohibition Against Organizational Activity During the Duty Hours of the Workday

The rule prohibiting association business during duty hours of the workday is found in section II, paragraphs A, B, and C of the regulations.[22] Paragraphs A and B are the same as the versions of the rule promulgated in 1976. As was noted by the Board in Long Beach, supra, this regulation does not distinguish solicitation from distribution. Rather, it seeks to restrict both types of organizational activities directed at employees during the duty hours of the workdays for the

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[22]See full text, supra at pp. 11-13.

individuals involved. The net effect of this rule is that it prohibits all organizational activity from the 20 minutes prior to the start of a teacher's first assigned period to 20 minutes after the last assigned period, with the exception of the duty-free lunch periods and the nutrition break time.

In Long Beach, supra, the Board found that to the extent that the District's ban on organizational activity prohibited solicitation and distribution efforts directed at teachers who were not assigned work during the 20-minute periods before and after classes and who were in non-working areas, the rule was unreasonable and constituted a violation of section 3543.5(b).[23] Long Beach Unified School District, supra at p. 9.

Following the ruling by PERB, section II, paragraph C, which defines the workday, was modified to the extent that it now states the types of activities to be performed during the two 20-minute periods each day. In this regard, it is noted that there is no dispute between the parties regarding

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[23]Section 3543.5(a) and (b) states,

> 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.

the fact that the two 20-minute periods are considered "duty time." The dispute is over whether the time is "working" or "non-working" time.

The Association maintains that the 20-minute rule is unreasonable and invalid on its face and as applied. Since it restricts employee organization access to time outside of actual working time, it must be presumed to be unreasonable under the precedent established by Long Beach Unified School District, supra, which cites the precedent set by Republic Aviation, Inc, supra.

For the same reasons, the Association also attacks section II, paragraph B, as unreasonably restricting individual employees from consulting with Association representatives regarding personal employment matters such as the processing of a grievance except outside of duty hours of the workday.

The Association contends that the 20-minute periods are still basically non-assigned duty time during which teachers are free to exercise their discretion about performing certain work-related tasks. The Association maintains that because there has been no actual change in the nature of activities engaged in by employees currently from those found to exist in 1978, the rule of law applied to the situation in Long Beach, supra, should be reaffirmed in the present case.

The District defends its regulations restricting access during the 20-minute periods by arguing that these two periods

are part of the teachers' paid duty day and that these times are needed for preparatory and follow-up tasks which are required to insure effective use of classroom time. The District further argues that although teachers are permitted to exercise professional discretion as to the most effective use of this time, they have a myriad of specific and general duties to be carried out during these two time frames. Examples of such duties are those listed in the amendment to paragraph C.

The District asserts four reasons to justify the "no access" rule during the 20-minute periods. First, these preparation periods are essential to the proper performance of a teacher's professional duties. Second, the general informal supervisory functions performed by all teachers while on campus including these preparation periods, are essential to maintaining the safety and discipline of students. Additionally, this supervisory role is required by State law, vis-a-vis specific provisions of the Education Code and the California Administrative Code. Third, there has been no demonstration that the times before and after the 20-minute periods, the duty-free lunch and nutritional break, and the extra time on the early-leaving days are insufficient for the accomplishment of Association business. And finally, there has been no denial of access to the Association during the non-duty periods and therefore, unlike those cases where interference has been found, the denial of access is not based upon anti-union animus.

Additionally, the District argues that its rule banning teachers' personal activities during the 20-minute periods is equally applied with regard to non-organizational activities and hence does not stem from any discriminatory motive.

The evidence shows that the teachers' actual use of the 20-minute periods is quite similar to the use found to exist in 1978 when the first hearing was conducted. Although some teachers have specific assignments during these periods such as morning yard duty, hall supervision during the passing periods, faculty meetings and afternoon tardy/detention, there are a number of teachers who spend part or most their 20-minute periods in the teachers' lounges relaxing or taking a break either alone or with other teachers. Some teachers arrive on campus as much as 30 to 45 minutes prior to the beginning of the 20-minute preparation period so that they can spend the actual preparation time relaxing in the lounge, "mentally preparing themselves for beginning the instructional day." The District administration is aware of the fact that many teachers do not actually work during the entire 20 minutes before or after classes. Some teachers choose to utilize that time as non-work break time and take work home where there is a longer uninterrupted span of time to concentrate on a particular activity, if it is an activity that can be done outside the school site. This practice is consistent with the workday provision of the CBA.

Although the District attempted to present a strong case demonstrating the importance of informal supervisory responsibilities of all teachers during the 20-minute periods, it is not persuasive. Absent a specific supervisory assignment during these periods, this particular responsibility exists for the teachers at all times that they are on campus, whether it is during duty or non-duty times. The District has failed to show that the nature of this general responsibility justifies a total ban on access during the 20-minute periods when teachers are not actually assigned or engaged in work.

In further support of its argument that the above restrictions are valid, the District points to Articles IV and V of the CBA. Article IV, section C, states that "the Association agrees that its authorized staff and building representatives shall not conduct Association business with the employees during regular working hours". That same section defines non-duty times as before and after the scheduled workday of each employee, nutrition break and lunch period. The District contends that the language in this article combined with the workday provisions in Article V, permits the restrictions contained in sections II and III of the regulations.

A review of the language in each of these provisions which addresses the duty hours of the workday reveals that the

meaning of the various terms used to describe "duty hours" is unclear when compared with the terms "working hours" and "working time" as they were interpreted by the Board in Long Beach Unified School District, supra.

The CBA does not define the term "regular working hours" beyond its reference in Article V section A, paragraph 1, to "on-site and off-site hours of work." Paragraph 2 of that same provision refers to the "regular school day" for elementary school teachers. Paragraph 6 of that section refers to "on-site duty day." As to the two 20-minute periods, none of these terms specifically refer to these time periods as "working time." Additionally, Article IV, section C, states that the parties intended to amend this section to conform to the Public Employment Relations Board's final decision on this matter.

Although the two documents which prohibit association business (including solicitation) during the 20-minute periods of the employees' workday refer to this time as "regular working hours," "duty hours of the workday" and "hours of work," none of these clarifies, by either definition or example, how to distinguish "working hours" from "working time." When the parties met in the fall of 1980, they were well aware of the distinctions enunciated by PERB in Long Beach, supra, yet no change was made in the CBA language to reflect this.

The Board, consistent with the NLRB, has held that a waiver, to be effective, must be clearly and unequivocally conveyed. Oakland Unified School District (8/31/82) PERB Decision No. 236:

> [W]e will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms. . . .

Grossmont Union High School District (5/26/83) PERB Decision No. 313, citing San Francisco Community College District (10/12/79) PERB Decision No. 105, at p. 11.

It is clear that TALB, either by clear and unmistakable language or demonstrative behavior, in the CBA has not waived its right to access during the 20-minute periods. This conclusion is supported by the testimony of both Guy and Collins. As the chief negotiators for each party to the CBA's being reviewed, both of them testified that the parties intended to reopen the agreement and amend the Article IV, subsection C, in accord with the Board's final decision on the subject. They met in the fall of 1980, discussed the matter, and did not agree about the appropriate interpretation of Long Beach, supra, as it relates to the 20-minute periods. Consequently, that section of the contract was not amended. Obviously then, the express language of Article IV, section C, does not constitute a clear and unequivocal waiver on this question. Likewise, it is concluded that this language does

not provide contractual authority for the amendments made in Section II, paragraph A, of the regulations.

It is also noted that the revision of the regulations now under attack was completed prior to the parties ever having met and discussed the meaning of Long Beach, supra, within the context of their contractual agreement.

In Ace Machine Company (1980) 249 NLRB 623 [104 LRRM 1449] 624, the NLRB declared:

> It is well settled that the reasonably foreseeable effects of the wording of a no-solicitation rule on the conduct of employees will determine its legality, and that where the language is ambiguous and may be misinterpreted by the employees in such a way as to cause them to refrain from exercising their statutory rights, then the rule is invalid even if interpreted lawfully by the employer in practice. . . . And, we note further that the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by that rule. (Footnotes omitted.)

The term used in Section II of the rules which refer to the 20-minute periods as part of the "duty hours" of the workday, are, absent greater definition, ambiguous and susceptible to misinterpretation by the employees who are subject to them. Because this amibiguity has resulted in interferences with the exercise of statutory rights, the rule must be declared invalid as applied. As presently worded, the combination of the phrases "duty hours" and "duty time" with the definitions of "non-duty times," which includes lunch and the nutritional

breaks, do not sufficiently clarify the rules to the extent that an employee will understand that restrictions on solicitation or distribution during the 20-minute periods do not apply when the employees are not actually engaged in a specific work assignment during such periods of time.[24]

The same finding is made concerning section II, paragraph B of the regulations which bans the employees personal business by employees during "duty hours," including the 20-minute periods. There has been no showing that this rule is necessary to maintain production or discipline. (See McDonnell Douglas, supra, citing Chrysler Corp. (1977) 227 NLRB 1256 [101 LRRM 2837]

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[24]See McDonnell Douglas Corp. (1979) 240 NLRB 794 [100 LRRM 1483]. In this case the NLRB affirmed an administrative law judge decision declaring invalid a rule prohibiting "distribution of notices, pamphlets, advertising matter or any kind of literature on company property without permission of management excepting matter that distribution of which is protected by Section 7 of the National Labor Relations Act as amended." This rule had been promulgated in response to an earlier NLRB decision finding previous no-distribution rules invalid. In this case, the ALJ stated:

> [T]o the extent this rule applies to employees exercise of their Section 7 rights by distributing such material in non-working areas during non-working time, current Board decisions point to a determination that this rule is invalid on its face because it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act. (240 NLRB at 802.)

at 1259.)[25] Additionally, no evidence was presented illustrating that permitting individual employees to consult with Association representatives during non-working times of the 20-minute periods in non-working areas is likely to be disruptive of the educational process. Thus, the enforcement of this restriction during such times is unreasonable and violates rights guaranteed by the Act.

The Association also challenges the provision in section II, paragraph A, which restricts Association business in non-work areas during non-work periods "away from students and other non-employees."[26] During the hearing, the District offered no explanation for this particular restriction.

In Richmond Unified School District/Simi Valley Unified School District, supra, the Board concluded that "reasonable" school employer regulations under section 3543.1(b) should be narrowly drawn to cover the time, place and manner of employee organization activities without impinging on the content of those activities unless they present a substantial threat to peaceful school operations. Thus a public school employer may legitimately promulgate rules to prohibit disruptive conduct.

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[25]However, it should be noted that in Chrysler Corp. (6th Cir. 1979) 595 F.2d 364 [101 LRRM 2837], the Sixth Circuit denied enforcement of this decision, concluding that the employer's rules involved in this case were not invalid on their face, not vague, ambiguous nor confusing.

[26]See full text, supra at p. 11.

In this instance, the District failed to offer any special interest of the employer, its students or others, that justifies why Association business, which is to be conducted in non-work areas during non-work periods, must further be restricted from the presence of students and other non-employees such as those listed in the examples in the regulation.

In Regents of the University of California, University of California at Los Angeles Medical Center (8/5/83) PERB Decision No. 329-H, the Board held that employee and non-employee representatives enjoy a presumptive right of access to the work place under EERA and HEERA. However, the employer is free to rebut the presumption by demonstrating that such access would be disruptive. The Board further recognized that in a given situation, access by non-employees might be disruptive, while access by employees would not.

In this case there has been no evidence demonstrating that the conduct of Association business in non-work areas where students or other non-employees might be present would cause disruption or confusion at the work place. Hence, it is found that this portion of the regulation is so vague and over-broad, that it is invalid on its face. It is further concluded that this prohibition is an impermissible denial of access under EERA.

C. Conference/Preparation Periods

The Association additionally asserts that the same restrictions on Association business found in section II, paragraphs A and B of the regulations are unreasonable as applied to the scheduled conference/preparation periods of individual teachers.

Article V, section A, paragraph 8, of the CBA states that the preparation period is "paid working time" for specific purposes related to teaching responsibilities or duties as assigned by the principal. Article V, section A, paragraph 9 provides for preparation time for elementary school teachers.[27]

The District asserts that these contract terms serve as the authority for its imposition of the "no access" rule during the conference periods, and that by these specific terms, TALB has waived its right to object to such restrictions on access.

TALB asserts that the issue regarding the conference/preparation period is not whether the employees are on "paid working time" but whether they are actually engaged in specific non-discretionary assignments or duties during this time. In its brief TALB further argues that the District has failed to demonstrate that the conference/preparation periods are expressly and/or uniformly reserved for preparation or

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[27]See full text of these provisions, supra at p. 23.

work assignments. Additionally, it is contended that there is no basis, contractual or otherwise, for restricting access to employees at least on a one-to-one basis for discussions or investigations of such matters as grievances. For the reasons stated below, these arguments are rejected.

It is noted that the Board in Long Beach, supra, was not presented with the question and therefore did not make a finding on whether the conference/preparation periods are "working time." Also the Board was not confronted with the situation where the litigating parties have specific contractual provisions covering the subject being contested in the employer's rules.

In this instance, the relevant contract language specifically refers to the conference/preparation period as "working time." Under the precedent of Long Beach, supra, regarding the meaning of "working time," this language raises the question of a waiver. When this provision was first negotiated in 1979, the parties did not have the precedent of Long Beach, supra, available to them. Even so, this language seems unmistakably clear within the context of the rest of this provision. Following the issuance of Long Beach, there is no evidence that either side intended or tried to negotiate a change in this language.

In contradistinction to the ambiguous terms used in Article IV, section A and C, as discussed above, the language

in the cited paragraphs of Article V appear clear as to their intent and purpose for the use of this time. The weight of the evidence supports this finding. All witnesses indicated a clear understanding and a fairly uniform practice about how this time is spent during the instructional day. The majority of teachers use this time performing the kind of teaching type duties described earlier. The use of the conference/preparation period as a break time or variations in use for unauthorized personal business is the exception, rather than the rule. Even though most teachers do not have regular specific assignments during this period, it is not perceived as a time during which they have an option about working or not working. Absent a specific assignment by the principals, the individual teacher can generally exercise discretion about which work-related duties that person will perform. However, the teachers understand that this period is expressly reserved for non-classroom work.

Although PERB has yet to be confronted with the question of waiver of statutorily prescribed access rights, the matter has been considered in the private sector.

In NLRB v. United Technologies, Corp. (2d Cir. 1983) 706 F.2d 1254 [113 LRRM 2320] the Court held that an employer rule, prohibiting employees from engaging in union solicitation during paid non-working time, did not violate the employees' Section 7 rights under the NLRA. This case grew out of a

challenge by the employer to an earlier determination by the court in United Aircraft Corporation v. NLRB (2d Cir. 1971) 440 F.2d 85 [76 LRRM 2761] which upheld a Board determination that the limited no-solicitation rule, maintained by the employer (then known as United Aircraft Corporation), which was substantially identical to the rule challenged here, was authorized under the collective bargaining agreement with the union and did not infringe fundamental employee rights under Section 7 of the NLRA.28

Absent PERB precedent, it is appropriate to apply private sector precedent. Applying the precedent of United Technologies to this case, it is concluded that the restriction against access for association business as applied to the conference/preparation periods is expressly authorized by clear and unmistakable terms of the CBA. Those same terms constitute a waiver of the Association's right to object to the restriction during such periods of the instructional day.

28The earlier decision was challenged by the union following the Supreme Court's decision in NLRB v. Magnavox Company (1974) 415 U.S. 322 [85 LRRM 2475], which the Union contended effectively overruled the court's decision in the earlier United Aircraft case. In Magnavox, the union challenged a company rule that prohibited employees from distributing literature anywhere on the company property at any time. The no-distribution rule had been maintained for some 16 years, antedating the first collective bargaining agreement between Magnavox and the union. The NLRB found that the blanket no-distribution rule violated fundamental employee rights that could not be waived by the union and collective bargaining.

Furthermore, since the enforcement of this restriction is to be limited to specific "working time" during the duty hours of the workday, it is presumptively valid. Because the parties have contractual provisions which permit released time during the instructional day for personal matters such as grievance processing, this restriction does not infringe upon fundamental employee rights guaranteed by EERA.29

D. Advance Arrangement Rule Regarding Use of District Facilities

TALB further challenges the reasonableness of the District's regulation requiring that room arrangements for informal or formal meetings with large groups of employees be made at least one day in advance of the meeting. Additionally, TALB considers the rule which permits site managers to specify the locations where its representatives can meet with employees to be an additional unreasonable restriction on its rights to use District facilities. These two regulations are found in section V, paragraph C, subparts 1 and 2.30

The District responds to this challenge by asserting that these rules are reasonable in that they were promulgated pursuant to the express authorization of Article IV, section A,

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29See full text of Article XIV, section G, paragraph 4, supra at p. 25. No attempt is made here, nor is it necessary to interpret section A, paragraph 1 of this Article as to what constitutes a "grievance" for purposes of application of the released time provision.

30See full text of these regulations, supra at p. 14.

paragraph 2 of the CBA.[31] The District argues the reasonableness of the 24-hour advance request requirement, contending that this rule is actually less restrictive than the language of the contract provision. It adds that a rule of this type is necessary to enable the District to properly accommodate the various requests made by student, faculty and civic groups who use the facilities for various types of meetings and activities. The District buttresses this argument by citing that because its Civic Center Act obligation as a public school employer to make its facilities available as a community resource, the 24-hour advance request rule is merely an advance scheduling requirement, which is imposed on all groups who utilize District facilities. Thus, pursuant to its established policy, all groups desiring to use the facilities under the Civic Center Act, must submit applications for permits at least two weeks prior to the date of the event for which the site will be needed.

Thus two prior arrangement rules also present the question of whether the Association has contractually agreed to certain time, place and manner restrictions upon its access rights and, if so, whether such agreement constitutes a waiver of the right to later challenge enforcement of the rules.

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[31]See full text of this provision, supra at p. 19.

A reading of Article IV, section A, paragraph 2 indicates that TALB has expressly agreed that its employee and non-employee representatives must make a 24-hour advance request and obtain approval of the site manager before utilizing certain areas of a campus for Association business. At the hearing no evidence was presented to indicate that a different interpretation should be given to this language.

This language, on its face, seems clear and unmistakable as to the particular limitations placed on the Association's right of access during the District's hours of operation.

In Richmond/Simi, supra, the Board concluded that narrowly drawn "time, place and manner" access regulations are reasonable within the meaning of section 3543.1(b). Here, the above contract provision can be characterized as a "time, place and manner" limitation which constitutes a clear and unmistakable waiver of unfettered rights of access by TALB.

The District's prior arrangement and approval rules are not inconsistent with this contract provision. Generally, in practice it has not applied this requirement as strictly as the contract would permit it to.

Even though a waiver is found to exist, it is not impermissible since the contract and the rules do not totally foreclose the Association's right of access to the employees or their place of work. In fact in practice, the Association is not required to make a one-day advance request for access to

the teachers' lounges or dining rooms to conduct its regularly scheduled visitations unless a large group meeting is to be held.

Even if it is argued that the contract provision does not constitute a clear and unmistakable waiver of the right to use District facilities without making a 24-hour advance request, this rule, under the circumstances, would not be unreasonable. In Long Beach Unified School District, supra, the Board considered a similar prior arrangement rule that required the employee organizations to make one day advance room arrangements. In that case AFT, the charging party, challenged a rule requiring that prior arrangements be made for small group meetings.[32] In Long Beach the Board found the prior arrangement requirement to be reasonable and justified where an employee organization wanted to secure use of rooms not normally used by non-working employees. However, the Board found that to the extent that the District's rule appeared to require that all meetings with four or more employees be conducted at such pre-arranged facilities, the regulation was unreasonable as an artificial limitation based on the number of employees with whom the representative met.

The District here has shown ample justification for its one-day advance notice requirement for special room use. The demand for use of rooms before, during and at the end of the

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[32]See full text of this regulation, supra at p. 9.

instructional periods, particularly at the junior high and senior high levels, is fairly substantial. Based on the evidence of the number of rooms available at a particular site for assignment at a given time, and the number of rooms actually used by students, faculty and other organizations, the requirement of advance room arrangement is justified. This requirement has not had the effect of denying TALB the use of District facilities for organizational activities conducted during non-working hours.

TALB presented several instances where its representatives were denied the use of a particular room by a site manager with the result that the rooms to which they were assigned were considered by them to be less desirable or suitable for the type of meeting that was conducted than the teachers' lounges or dining rooms. However, a close examination of the instances where the room use was denied indicates that the local faculty representative failed to submit the request at all or failed to submit it at least one day in advance of the scheduled meeting.

There is evidence of some inconsistency with respect to the interpretations by some local site managers as to what areas constitute work versus non-work areas for purposes of meetings. On one occasion when Goddard appeared at a facility for a meeting where a 24-hour advance request had been

submitted, he and the teachers were denied the use of a classroom, even though the room was not in use or scheduled to be used at the time of the meeting. The reason given by the site manager for changing the location was that the classroom was a "work area." Although this instance of enforcement might be viewed as an unreasonable application of a valid rule, the TALB representative was not actually denied access nor did the alternative room provided result in an artificial limitation of the Association's right of access to its unit members. Although there are other instances where TALB representatives and site managers had disputes over the enforcement of the 24-hour advance request requirement, there is no evidence that where the contract and regulation requirements were abided by, access was unreasonably denied or the rules were discriminatorily applied to TALB representatives. The fact that some of the assigned rooms have not always satisfied the specific desires or preference of TALB representatives does not mean that the enforcement of these rules constitutes either an unreasonable application or violation of the Act.

E. Summary of Findings

It has been found that the District's promulgation and application of its rule prohibiting all Association business during the 20-minute periods before and after the instructional day is an unreasonable ban on organizational access with respect to those employees who are not performing assigned work

and are in non-working areas during these periods. This rule, as applied during these times is unreasonable for the following reason. Although the 20-minute periods are clearly part of the teachers' duty hours of the workday, these times are not expressly and/or uniformly reserved or utilized for specifically assigned duties. Thus it is found that the application of this ban against access during these times of the workday has unreasonably denied to the employee organization rights guaranteed by section 3543.1(b) and constitutes a violation of section 3543.5(b) and 3543.5(a) derivatively.

Additionally, it has been found that the part of this rule prohibiting Association business in non-working areas during non-work times from occurring in or near the presence of students or other non-employees is impermissibly over-broad and vague on its face. As presently worded and if applied, this rule has the potential effect of imposing unreasonably broad restrictions on the employee organization's right of access. It therefore is also violative of section 3543.5(b), and of section 3543.5(a) derivatively.

The same rule banning Association business during duty hours was found to be reasonable as applied to the conduct of unauthorized organizational activities during the assigned conference/preparation periods. Additionally, it was concluded that the enforcement of the ban during this time is expressly

authorized by the CBA. This contract provision was held to be a permissible waiver of the right of access during a non-classroom period expressly referred to in the CBA as "working time" during the duty day. Therefore this part of the allegation is dismissed.

It was also found that the regulation mandating 24-hour advance request and prior approval of room arrangements is reasonable as a legitimate scheduling requirement. Although there are some apparent inconsistencies in the way in which this rule has been interpreted by administrative personnel, there is no evidence that TALB has been unreasonably denied access where its representatives have complied with the District's access procedure. Additionally, it was determined that this rule also is authorized by the CBA. This contract term is found to be a permissible limitation on access. Thus, this part of the allegation is also dismissed.

REMEDY

The Educational Employment Relations Act provides that upon the finding of a violation of its terms, PERB has broad remedial powers to "take such action . . . as will effectuate the policies of [the Act]" (section 3541.5(c)).

It having been found that the employer has violated section 3543.5(a) and (b) of EERA, it is appropriate to order that the District cease and desist from unreasonably denying and interfering with the employee organization's right of access granted by section 3543.1(b) of the Act.

Specifically, the District should be ordered to cease and desist from enforcing its regulations so as to deny to the Association and its representatives, the right of access to employees during the 20-minute periods before and after the instructional day when such employees are not performing specifically assigned work and are in non-work areas.

Additionally, the District should be ordered to cease and desist from unreasonably requiring that Association activities with non-working employees in non-work areas be conducted away from students or other non-employees. The District should be ordered to cease and desist from enforcing its regulations so as to interfere with the rights of employees to participate in the activities of employee organizations, or refrain from doing so, by unreasonably denying access as set forth above.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and it is being required to cease and desist from this activity. The notice effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (See Placerville Union School

District (9/18/78) PERB Decision No. 69.) Also, in Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580,587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is hereby ORDERED that the Long Beach Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Enforcing the District regulation which prohibits the Teachers Association of Long Beach from having access to employees to conduct organizational business during the time employees are present at the District facilities, in non-work areas and not engaged in assigned work during the 20-minute periods before or after the instructional day.

(b) Enforcing the District regulation which prohibits employees from having access to the Teachers Association of Long Beach during the time employees are present at District facilities, are in non-work areas and not engaged in assigned work during the 20-minute periods before or after the instructional day.

(c) Enforcing the District regulation which requires that the Teachers Association of Long Beach conduct organizational business with employees during non-work times in non-work areas which are away from students or other non-employees.

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

(a) Within ten (10) workdays of service of a final decision in this matter, prepare and post copies of the Notice to Employees attached as an appendix hereto, signed by an authorized agent of the employer, indicating that the employer will comply with the terms of this Order. Such posting shall be maintained for at least thirty (30) consecutive workdays at the employer's headquarters office and at all locations where notices to certificated employees are customarily posted. The notice must not be reduced in size and reasonable steps should be taken to insure that it is not defaced, altered, or covered by any material;

(b) Unless otherwise directed by the Los Angeles Regional Director of the Public Employment Relations Board, written notification of the actions taken to comply with this order shall be made to the Regional Director within thirty (30) workdays from the date of service of the final decision herein. All reports to the regional director shall be served concurrently on the Charging Party herein.

IT IS FURTHER ORDERED that all other allegations of the Charge and Complaint are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 20, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 20, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: May 31, 1984

W. JEAN THOMAS
Administrative Law Judge