STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HEALDSBURG AREA TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1494
v.	)	PERB Decision No. 1033
HEALDSBURG UNION ELEMENTARY SCHOOL DISTRICT,	)	January 6, 1994
Respondent.	)	

Appearances; California Teachers Association by Ramon E. Romero, Attorney, for Healdsburg Area Teachers Association, CTA/NEA; School and College Legal Services by Noel J. Shumway, Coordinator of Employer/Employee Relations, for Healdsburg Union Elementary School District.

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Healdsburg Union Elementary School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by

[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 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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

unilaterally implementing a policy requiring kindergarten teachers to open their classrooms and begin supervising students during the 15 minutes prior to the start of class. The ALJ dismissed the portion of the complaint which alleged that distribution of the minutes of a District cabinet meeting interfered with employee rights under EERA. The District excepted to the ALJ's finding that it unlawfully implemented a unilateral change.

The Board has reviewed the entire record in this case, and finding the ALJ's decision to be free from prejudicial error affirms the proposed decision.

DISCUSSION

The essence of this case is that the teachers' exclusive representative alleges that the District implemented a unilateral change by requiring kindergarten teachers at Fitch Mountain Elementary to open their classrooms and supervise students during the 15 minutes prior to the time classroom instruction begins. The teachers allege that this requirement is not included in the parties' collective bargaining agreement (agreement) and is inconsistent with past practice. Therefore, the teachers argue,

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employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

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

this new requirement constitutes a unilateral change. The District argues that the requirement was consistent with the parties' agreement and established past practice.

The facts are summarized as follows: The kindergarten teachers at Fitch Mountain Elementary School are required by the parties' agreement to be "on site" at 7:50 a.m. Classes begin at 8:05. Before September 1991, the teachers performed a variety of teaching related duties between 7:50 and 8:05. The precise duties performed and whether the duties were performed in the classroom or elsewhere was left to the teachers' professional discretion. As of September 4, 1991, the teachers were directed by Principal Nancy Baker (Baker) to be in their classrooms supervising their students between 7:50 and 8:05. The directive stated:

> [Kindergarten teachers] are to have their rooms open at 7:50 AM. Either the teacher or instructional assistant is to be in the room supervising. This will continue until further notice.

In order to show that the District implemented a unilateral change, the Healdsburg Area Teachers Association, CTA/NEA (Association) must prove the following elements: (1) the employer implemented a change in policy concerning a matter within the scope of representation; and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

The Association demonstrated that there was no requirement that teachers supervise their students prior to September 1991 and Baker's directive created a new policy. One of the three kindergarten teachers, Charlotte McGannon (McGannon), testified that she never opened her room to students prior to 8:05, but rather, did a variety of teaching-related tasks. Another kindergarten teacher, Carol Novak (Novak), testified that she also did numerous teaching-related tasks before classes began, most of which were performed outside of her classroom. The third teacher, Judith Sanderson Irland (Irland), stated that there was no formalized duty to supervise students before school the previous year, but that she personally felt that it was her professional responsibility. However, she also stated that prior to the directive she had not opened her classroom at 7:50 because she felt it was not required. When asked about her observations of what other teachers did before school, she could not testify to having any personal knowledge of what their practices had been in the 1990-91 school year. She stated that sometimes she and the other teachers would be sitting in a smoking room located at the front of the school from which they could check on their students, who were taught to stay by the door and wait for their teacher.

Baker could not testify to one specific instance in which she had observed a kindergarten teacher supervising students in the morning during the 1990-91 school year. She did, however,

recall observing teachers arriving late after she had issued the directive.

Of all the testimony, no one had personal knowledge of even one kindergarten teacher who routinely supervised their students from 7:50 to 8:05 in the morning. Even Irland, who testified that she did some morning supervision, admitted that she did so out of a sense of professional responsibility rather than the belief that it was required.

The District suggests that the kindergarten teachers must have been supervising their students otherwise Baker would have noticed 75 to 120 children running unsupervised. The teachers testified that the students were trained to wait for them on benches outside the classroom, not to run around the school site. Also, there was unrefuted testimony that parents were instructed to bring their children to school as close to 8:05 as possible. These facts explain why kindergarten children were not seen running unsupervised before 8:05--some of them were not at school yet and others were seated on benches outside the classroom.[2]

Finally, the tone of the directive suggests that it imposes a new policy. It makes no reference to any past practice. It is not phrased as a reminder to adhere to an existing policy. It tells the teachers where and when to supervise their students as well as who can do the supervising. There is no indication that teachers were familiar with this policy. In summary, the

[2]Even if it was shown that the teachers voluntarily supervised the students, this does not establish a past practice which requires the teachers to supervise the students.

evidence clearly supports a finding that Baker's directive established a new practice of requiring the kindergarten teachers at Fitch Mountain Elementary to supervise their students before class began.

To demonstrate that a change in duties during the workday is negotiable, a charging party must show that the change has an impact on the employees' workday. (Imperial Unified School District (1990) PERB Decision No. 825 (Imperial); Cloverdale Unified School District (1991) PERB Decision No. 911.) The Board has held that employers are generally free to alter the instructional schedule without negotiations; however, when changes in the instructional day affect the length of the workday or existing duty-free time, the subject is negotiable. (Imperial: San Mateo City School District (1980) PERB Decision No. 129.) The Board will not presume an effect on length of workday or duty free time. Rather, the charging party has the burden of proving that the employer's change impacted negotiable terms and conditions of employment. (Imperial.)

Here, two teachers testified that their workday was lengthened as a result of the new morning supervision requirement. McGannon testified that she had to lengthen her workday by 15 minutes as a result of supervising her students before school. Among the tasks she previously completed before school were meeting with first and second grade teachers, many of whom did not have a preparation period at the same time as she did. Novak testified that tasks she had performed before school

now had to be completed on her lunch period, after school, or before school, amounting to approximately 20 additional minutes per day. Novak's before school tasks included checking her box, the "green board" in the teachers' room, and conferring with other teachers or the principal. She would also determine if any of the resource teachers or specialists were absent so that she could adjust her schedule accordingly. Many of these tasks had to be completed in the morning before school began and in locations other than the classroom. Thus, teachers had to arrive before 7:50 to accomplish these tasks. Clearly, impact on the teachers' work hours has been established.

In response to the Association's prima facie showing, the District asserts that the complaint should be dismissed for the following reasons: first, before school supervision is required by state regulation; second, there was a past practice of requiring teachers to supervise students before school.

The District argues that the California Code of Regulations section 5570[3] requires teachers to supervise students in their

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[3]The California Code of Regulations 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.

classrooms 30 minutes before classes begin. We find that the parties' agreement supersedes this regulation. The parties' agreement in effect at the time of the change in Article VI, section 6.1 states, in pertinent part:

> Each teacher shall be on site fifteen (15) minutes prior to the beginning of their first class and remain on site fifteen minutes past the end of their last class.

Principal Baker and the teachers agreed that "on site" means on the school grounds.

Robert Latchaw (Latchaw), the District's negotiator since 1977-78, testified about the history of Article VI, section 6.1. He stated that he understood the 15-minute period to be assignable for teaching related duties. However, Latchaw also testified that it would probably be a stretch to say that the section permits the District to assign direct instructional time because that issue was negotiated separately. As far as student supervision during this time, he did not remember that the subject ever came up at the bargaining table, and he agreed that it is certainly not reflected in the contract. In sum, none of the witnesses unequivocally understood "on site" to mean in the classroom supervising students. The parties' contract clearly supersedes the requirements of section 5570 by both shortening the length of time teachers must be present before classes begin and requiring them merely to be "on site." Therefore, we find

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Although the regulation requires all teachers to open their rooms for admission of pupils 30 minutes before classes begin, the regulation also permits the District to alter that provision.

that the teachers' conduct is not governed by California Code of Regulations section 5570.

The District alternatively argues that the practice at the District's other kindergarten, or in other grades, establishes a past practice for the Fitch Mountain kindergarten. The only other school in the District with a kindergarten is Healdsburg Elementary. The 1990-91 school year was the first year that Healdsburg Elementary had a kindergarten. The principal, Don Elsbree (Elsbree), testified that he and the kindergarten teachers came to an agreement concerning before-school supervision of students. They originally agreed that the teachers would supervise their students from 7:50 - 8:05. During the school year the time was changed to 7:55 - 8:05 because Elsbree wanted the teachers to check the bulletin board for announcements prior to classroom instruction beginning. Elsbree distinguishes this agreement from Baker's directive in that his teachers need not be in their rooms supervising, whereas Baker required the teachers to "have their rooms open at 7:50 AM." The District's argument that this agreement established a past practice for Fitch Mountain must be rejected. The agreement at Healdsburg Elementary was specific to the kindergarten at that school. There is no evidence that it was intended or enforced as an established district policy. Rather, it was an agreement worked out by those to whom it applied.

The District asserts that the practice in other grades is relevant to whether a past practice was established at the Fitch

Mountain kindergarten. For example, first and second grade teachers do rotational duty at various times during the day. There are 11 teachers available to cover various recesses during the day. Only one or two of these teachers have the 7:50 to 8:05 duty. Each teacher has duty only once or twice a week. These teachers are on an entirely different schedule. This is not comparable to the kindergarten setting in which the teachers must cover all of their own recesses throughout the day. In Imperial, the Board found that consideration of other grades was inappropriate to establish a past practice and that it was proper to compare schools at the same grade level within a district due to their unique educational requirements. We find that the first and second grade schedules are not helpful in resolving whether there has been a unilateral change in the kindergarten teachers' schedule.

CONCLUSION

Based on the entire record in this case, it is concluded that the District breached its obligation to negotiate under EERA when Baker unilaterally implemented a policy requiring kindergarten teachers to be present in their classrooms and supervise students from 7:50 to 8:05, in violation of EERA section 3543.5(c). This conduct interfered with the Association's right to represent its members in their employment relations with the District, in violation of section 3543.5(b). The same conduct interfered with individual kindergarten teachers' rights to be represented by their chosen representative

in their employment relations with the District, in violation of section 3543.5(a).

REMEDY

Under EERA section 3541.5(c), the Board is given the power to issue a decision and order directing the offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA. In this case it has been found that the District breached its obligation to negotiate in good faith when it unilaterally implemented a policy requiring kindergarten teachers to be present in their classrooms and supervise students from 7:50 to 8:05. This conduct violated section 3543.5(c), (b) and (a).

It is therefore appropriate to order the District to cease and desist from such activity in the future, return to the status quo which existed at Fitch Mountain Elementary School prior to the unilateral change and, upon request, meet and negotiate with the Association prior to making future changes in negotiable terms and conditions of employment.

Under the circumstances presented here, it is also appropriate to order the District to make whole the employees affected by the unilateral change in policy. This shall consist of providing the kindergarten teachers at Fitch Mountain Elementary School affected by the change with an amount of time off which corresponds with the additional work performed as a result of the change. If the District and the Association cannot agree on the manner in which compensatory time is granted,

affected employees shall be awarded monetary compensation commensurate with the extra hours worked, including interest at the statutory rate of seven (7) percent per annum. Disputes regarding the implementation of the foregoing remedy will be resolved through the Board's compliance procedure. It is further appropriate that the District be ordered to post a notice incorporating the terms of the order herein. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Healdsburg Union Elementary School District (District) violated Government Code section 3543.5(c) of the Educational Employment Relations Act (EERA) by unilaterally implementing a policy requiring kindergarten teachers to open their classrooms and begin supervising students during the fifteen (15) minutes prior to the start of classes. By the same conduct, it has been found that the District violated EERA section 3543.5(b) and (a).

Pursuant to section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Healdsburg Area Teachers Association, CTA/NEA (Association) concerning the policy requiring kindergarten teachers to open their classrooms and begin supervising students during the 15-minute period prior to the start of classes;

2. Denying the Association the right to represent employees in their employment relations with the District; and

3. Interfering with the employees in the exercise of the right to be represented by the Association in their employment relations with the District.

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

1. Reinstate the practice which existed prior to the September 4, 1991 directive concerning the requirement of kindergarten teachers to open their classrooms and begin supervising students during the 15 minutes prior to the start of classes and, upon request, meet and negotiate any proposed change in the practice with the Association.

2. Grant to each kindergarten teacher the amount of compensatory time off which corresponds to the number of extra hours worked as a result of the unilateral change referred to in paragraph (1). Should the parties fail to reach agreement as to the manner in which such compensatory time will be granted, then such employees will be granted monetary compensation commensurate

with the additional hours worked, with interest at the rate of seven (7) percent per annum.

3. 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 are customarily 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.

Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Member Hesse joined in this Decision.

Member Caffrey's concurrence and dissent begins on page 15.

CAFFREY, Member, concurring and dissenting: I concur in the majority's dismissal of the allegation that distribution of the Healdsburg Union Elementary School District (District) cabinet meeting minutes interfered with employee rights under the Educational Employment Relations Act (EERA).

I dissent from the majority's conclusion that the District unilaterally imposed a morning classroom supervision assignment on Fitch Mountain Elementary School kindergarten teachers in violation of EERA. I find that the Healdsburg Area Teachers Association, CTA/NEA (Association) has not met its burden to demonstrate that a new regular work assignment impacts the total number of hours worked and represents a negotiable change in the terms and conditions of employment.

A review of the evidence in this case establishes that while some student supervision outside of instructional hours is a normal teacher duty, there was no consistent pattern or practice within the District of assigning morning classroom supervision duties to kindergarten teachers. Consequently, Fitch Mountain School Principal Nancy Baker's (Baker) September 4, 1991 directive represented a new regular work assignment for Fitch Mountain kindergarten teachers.

The Public Employment Relations Board (PERB or Board) has held that the assignment of teacher duties within the workday is a management prerogative[1] and outside the scope of bargaining

[1]Kindergarten teacher Charlotte McGannon (McGannon) testified that prior to Baker's directive the decision regarding duties to be performed in the 7:50 - 8:05 period "was totally up

when it does not affect the total number of hours worked. (Moreno Valley Unified School District (1982) PERB Decision No. 206 (Moreno Valley).) Therefore, having established that the District gave a new regular work assignment to Fitch Mountain kindergarten teachers by requiring morning supervision, the Association has the burden of demonstrating the impact of that assignment on the total number of hours worked by those teachers in order to establish that it represents a unilateral change in violation of EERA. As the Board stated in Imperial Unified School District (1990) PERB Decision No. 825 (Imperial):

> PERB law generally views the length of the instructional day as a management prerogative which is outside the scope of representation. [Citation.] Thus, employers are generally free to alter the instructional schedule without prior negotiation with employee organizations. However, when changes in the instructional day in turn affect the length of the working day or existing duty-free time, the subject is negotiable. (Emphasis in original.)

In Imperial, without negotiating with the exclusive representative, the district increased the instructional minutes of each class. The district took the additional 15 instructional minutes from the limited amount of on-duty, noninstructional time before and after classes during which teachers were required to be at school but were not engaged in actual student instruction.

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to the teacher." Kindergarten teacher Carol Novak (Novak) testified that the contract only required her to be "on site" from 7:50 - 8:05 and since it specified no duties to be performed in this period, she could fill the time at her discretion, such as by choosing to "write a personal letter." These statements reflect a misunderstanding of the fundamental management prerogative to assign duties during the workday.

Despite the fact that a significant portion of the teachers' on-duty, noninstructional time was lost through the district's action in Imperial, the Board reversed the violation found by the administrative law judge, finding that the burden of showing a change in the total number of hours worked by teachers as a result of the schedule change had not been met. Moreover, the Board emphasized that the burden of demonstrating workday impact rests firmly on the charging party by overruling a portion of Moreno Valley. In Moreno Valley, the elimination of five minutes of a fifty-minute preparation period was found to have an "apparent" impact on the teacher workday because the record did not indicate that the district had agreed to accept a reduced level of preparation from teachers. The Board in Imperial specifically overruled that finding, concluding that this presumption of impact had inappropriately lifted the burden from the charging party. Essentially, the Board described the charging party's burden as demonstrating that after the schedule change the district demanded a level of preparation which exceeded the amount of time that remained available for that purpose in the teacher workday.

The instant case presents circumstances similar to those of Imperial in that teachers were given a new specific work assignment of 15 minutes duration which was to be performed during the existing workday. This case differs from the circumstances of Imperial, however, in that it does not involve a

change in instructional or preparation time, but the assignment of specific duties during on-duty, noninstructional time.

Applying the burden on the charging party as described in Imperial to this case, a showing of workday impact by the Association must demonstrate that after requiring the morning classroom supervision, the District demanded performance of duties which exceeded the amount of time that remained available in the workday to perform them.

I conclude from the record that the Association has failed to meet this burden. At the time of Principal Baker's September 4 directive, kindergarten teachers at Fitch Mountain School had in excess of 11 hours of on-duty, noninstructional time per week.[2] Simultaneous with the morning classroom supervision assignment, Principal Baker assigned Fitch Mountain kindergarten teachers an additional one hour per day, five hours per week, of instructional duty assisting first and second grade teachers. The five hours were diverted from the two hours of afternoon on-duty, noninstructional time kindergarten teachers had in their workday. These facts establish that kindergarten teachers had time available in their workday which did not carry specific assignments and could accommodate significant new regular work assignments at the time of Baker's September 4 directive. They also establish that following the directive,

[2]In addition to the 15 minutes prior to the beginning of classes, kindergarten teachers at that time had on-duty, noninstructional time from 12:35 p.m. to 2:35 p.m. each day.

kindergarten teachers continued to have at least one hour of on-duty, noninstructional time remaining in their workday.

The record includes very little evidence or testimony describing any specific duties kindergarten teachers performed during this remaining hour per afternoon of on-duty, noninstructional time. McGannon described this hour as "planning time," "quiet time," and time when she did "a lot of thinking and prepping" in her classroom (TR. 1, p. 124). Novak responded affirmatively to the Association counsel's description of the time as "a preparation period" (TR. 1, pp. 177-178). Despite these characterizations, the record clearly indicates that the workday of kindergarten teachers in this District does not include a preparation period by the express terms of the collective bargaining agreement in effect between the parties. The Board has held that "[t]he mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so." (Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 10; State of California (Department of Personnel Administration) (1993) PERB Decision No. 995-S.) Therefore, while kindergarten teachers used their afternoon on-duty, noninstructional hour essentially as a preparation period, they had no contractual right to do so and this time is subject to the fundamental management prerogative to assign teacher duties within the workday. Since the record is devoid of evidence that kindergarten teachers perform specific duties during their

remaining hour of afternoon on-duty, noninstructional time the Association has failed to demonstrate that this time is unavailable to accommodate new regular work assignments.

In addressing the workday impact of the morning classroom supervision assignment the Association concentrates on the duties kindergarten teachers performed in the 7:50 - 8:05 period prior to the September 4 directive. McGannon and Novak testified to the difficulty of performing some of those duties later in the workday. For example, meetings with first and second grade teachers became difficult to schedule because those teachers had instructional responsibilities during the afternoon on-duty, noninstructional time of kindergarten teachers. Novak testified to some inconvenience in performing duties such as copying and materials preparation later in the workday, but acknowledged that it was possible to do so. As a result, McGannon and Novak testified that after the September 4 directive they began their workday 15-20 minutes prior to 7:50 in order to continue performing these duties in the morning. The Association argues that this testimony demonstrates the workday impact of the morning classroom supervision assignment.[3]

The testimony of McGannon and Novak clearly indicates that continuing to perform certain duties in the morning was more convenient and more efficient for them. The convenience or efficiency of performing duties during a particular time within

[3]Kindergarten teacher Judith Sanderson Irland testified that she experienced no workday impact as a result of the new assignment.

the workday is not instructive in determining the workday impact of a newly assigned duty, however. In this case, an assessment of the impact of the new regular work assignment on the workday of Fitch Mountain Kindergarten teachers must address whether those teachers have time available within their afternoon hour of on-duty, noninstructional time to perform the duties they performed in the 7:50 - 8:05 period prior to the September 4 directive. The evidence offered by the Association fails to adequately address this issue and, therefore, fails to meet the burden of demonstrating that the workday of kindergarten teachers could not accommodate the new morning supervision assignment.

I conclude that the Association has failed to meet its burden of showing that the new regular work assignment given Fitch Mountain School kindergarten teachers exceeded the time available in their workday to perform those duties. Therefore, I would dismiss the charge that the District violated EERA section 3543.5(a), (b) and (c) when Principal Baker issued the September 4 directive.

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. SF-CE-1494, Healdsburg Area Teachers Association. CTA/NEA v. Healdsburg Union Elementary School District, in which the parties had the right to participate, it has been found that the Healdsburg Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Healdsburg Area Teachers Association, CTA/NEA (Association) concerning the policy requiring kindergarten teachers to open their classrooms and begin supervising students during the 15-minute period prior to the start of classes;

2. Denying the Association the right to represent employees in their employment relations with the District; and

3. Interfering with the employees in the exercise of the right to be represented by the Association in their employment relations with the District.

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

1. Reinstate the practice which existed prior to the September 4, 1991 directive concerning the requirement of kindergarten teachers to open their classrooms and begin supervising students during the 15 minutes prior to the start of classes and, upon request, meet and negotiate any proposed change in the practice with the Association.

2. Grant to each kindergarten teacher the amount of compensatory time off which corresponds to the number of extra hours worked as a result of the unilateral change referred to in paragraph (1). Should the parties fail to reach agreement as to the manner in which such compensatory time will be granted, then such employees will be granted monetary compensation commensurate

with the additional hours worked, with interest at the rate of seven (7) percent per annum.

Dated: _____

HEALDSBURG UNION ELEMENTARY 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

HEALDSBURG AREA TEACHERS ASSOCIATION, CTA/NEA, Charging Party, V. HEALDSBURG UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1494 PROPOSED DECISION (7/24/92)

Appearances: Ramon Romero, Attorney, for Healdsburg Area Teachers Association, CTA/NEA; School and College Legal Services, by Margaret M. Merchat, Attorney, for Healdsburg Union Elementary School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by the Healdsburg Area Teachers Association, CTA/NEA (Association or Charging Party) against the Healdsburg Union Elementary School District (District or Respondent) on August 9, 1991.

The General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on December 27, 1991. The complaint alleges that the District (1) distributed coercive statements to bargaining unit members, and (2) unilaterally implemented a requirement that kindergarten teachers supervise students during the fifteen (15) minute period before school begins.[1] These actions, the complaint alleges, violated the

[1]Additional allegations in the complaint that the District (1) unilaterally adopted an open house requirement, (2)

Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).[2] The District's answer, filed on January 17, 1992, denied all allegations.

A settlement conference was conducted by a PERB administrative law judge (ALJ) on February 7, 1992, but the dispute was not resolved. The undersigned ALJ conducted a formal hearing on April 7 and 8, 1992, in Santa Rosa, California. With receipt of the final brief on July 1, 1992, the case was submitted.

FINDINGS OF FACT

Jurisdiction

The District is a public school employer within the meaning of section 3540.l(k). The Association is an employee

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negotiated directly with teachers, and (3) unilaterally adopted a date by which teachers were to announce their intent to remain in service for the following school year were withdrawn by Charging Party at the beginning of the hearing.

[2]The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5(a), (b) and (c) make it unlawful for a public school employer to:

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

organization within the meaning of section 3540.l(d), and the exclusive representative of a unit of the District's certificated employees within the meaning of section 3540.l(e).

Morning Supervision

There are three elementary schools in the District: Fitch Mountain includes kindergarten through second grade, Healdsburg includes kindergarten through sixth grade, and Foss Creek includes grades three through six. Central to the resolution of this case is the past practice concerning activities performed by kindergarten teachers between 7:50 and 8:05, prior to the start of classes.[3]

Nancy Baker (Baker) has been the principal at Fitch Mountain Elementary School since 1988. During the 1990-91 school year, Baker told at least two kindergarten teachers that student supervision was required during the 15 minute period - from 7:50 to 8:05 - prior to the start of classes. She believed that classroom supervision during this time was required under the collective bargaining agreement. According to Carol Novak, (Novak) a Fitch Mountain kindergarten teacher and Association representative, Baker raised this issue during the end of the 1990-91 school year, but the matter was not resolved.

[3]During the course of the hearing, the parties presented detailed evidence about the daily schedule of all classroom teachers. Since kindergarten teachers follow a different schedule than other classroom teachers, only evidence about the kindergarten teacher schedule will be considered here. Moreover, since this case deals only with the change in practice during the 7:50 to 8:05 time frame as it affects kindergarten teachers, only that part of the kindergarten teacher schedule is relevant to the resolution of this dispute.

During an August 29, 1991, meeting with the Fitch Mountain kindergarten teachers, Baker announced that they were to be in their classrooms supervising students between 7:50 and 8:05 a.m. Charlotte McGannon (McGannon), an Association negotiator and past grievance representative, protested that Baker's announcement constituted a change in past practice and therefore was negotiable. Other kindergarten teachers at Fitch Mountain supported McGannon's position at the meeting. These teachers announced that they would not honor the requirement, that they open their classrooms at 7:50 to supervise students. Another meeting was set for September 3, 1991.

When she arrived at the September 3 meeting, Baker noticed that Association field representative George Cassel was present. Because she did not have a District representative present, Baker postponed the meeting. On September 4, before another meeting was held, Baker issued the following written directive to kindergarten teachers at Fitch Mountain.

> [Kindergarten teachers] are to have their rooms open at 7:50 AM. Either the teacher or instructional assistant is to be in the room supervising. This will continue until further notice.

This policy remains in effect.

There is a dispute concerning whether kindergarten teachers are required to open classrooms and supervise students between 7:50 and 8:05. Baker testified that, under the contract and past practice, kindergarten teachers are required to open classrooms at 7:50 and supervise students in the classroom until classes

begin at 8:05. According to Baker, this requirement may be satisfied either by teachers, classroom aides, or an arrangement where teachers and aides share the responsibility. Based on her admittedly sporadic observation during the past two years, Baker believed that kindergarten teachers had acted in accordance with this requirement.

Three of the five Fitch Mountain kindergarten teachers testified about their actual practice. All three gave testimony inconsistent with that given by Baker. McGannon testified that kindergarten teachers were required to be "on site" 15 minutes prior to the start of school,[4] but no requirement existed to open classrooms and supervise students during this 15 minute period. In fact, McGannon testified, she has "never" opened her classroom prior to 8:05, or the start of school, except when she chose to do so in order to complete some task such as meet with a parent. During the 15 minute period prior to the start of classes, McGannon typically performs a variety of tasks. She meets with other teachers who may not be available later in the day, prepares for classes, holds parent conferences, checks her mail, etc. According to McGannon, these duties cannot realistically be accomplished with students in the classroom. During this time,

[4]As more fully discussed below, the collective bargaining agreement does not expressly include the requirement that kindergarten teachers open their classrooms and begin supervising students during the 15 minute period prior to the start of classes. Section 6.1 of the contract requires only that teachers be "on site" during this time. There is no dispute that, under the contract, the term "on site" means only on school property.

McGannon's students typically wait outside her classroom on a bench.

McGannon also disputed Baker's testimony that aides were available to assume responsibility for supervising students during the 15 minute period prior to the start of school. In McGannon's view, the decision to seek assistance from aides was totally the teacher's prerogative. Moreover, McGannon testified, aide participation in supervising students during the 7:50 to 8:05 period prior to the start of classes is problematic because aides do not generally arrive until 8:00.

Carol Novak corroborated McGannon's testimony in key respects. She testified that, during the 1990-91 school year, the 7:50 to 8:05 time slot was used largely to accomplish tasks of the type described by McGannon. She typically opened her classroom between 8:00 and 8:05. Novak's students, like those of McGannon, waited outside the classroom on a bench until the room was opened.

Judy Irland (Irland), a Fitch Mountain kindergarten teacher who was called as a witness by the District, testified that she has a "professional responsibility" to supervise students from 7:50 to 8:05. She said that this responsibility was "assumed" during the 1990-91 school year, but it has been "clearly stated" during the 1991-92 school year as a result of Baker's September 4 memo. Irland admitted that she "didn't begin at 7:50 last year or any other year, because it had not been clarified." She said that she did not go to her room until approximately 7:55, and her

students were taught to wait for her at the door to the classroom until she arrived. Further, Irland's testimony suggests that the practice of the remaining two kindergarten teachers at Fitch Mountain was not consistent. At one point she testified that the other kindergarten teachers "by choice" arrive "very early," about 7:30 or 7:35. At another point she said that "sometimes we would all be sitting together until about [7:55] and then go off. And I assumed they were going off to open their doors, too."

The practice at Healdsburg Elementary School is relevant to determine the extent of the practice in the District. Like Fitch Mountain, classes at Healdsburg start at 8:05. According to Don Elsbree (Elsbree), principal at Healdsburg, the 1990-91 school year started with kindergarten teachers picking up their students from various on-site locations at 7:50. At some point during the school year, Elsbree told teachers he wanted them to check the bulletin board for announcements prior to school starting. Teachers responded that they did not have the time to do so and still gather their students at 7:50. This resulted in Elsbree and the Healdsburg kindergarten teachers entering into a mid-year agreement which gave teachers time to check the bulletin board prior to picking up students on the playground or in the library at 7:55.[5] This practice remained in effect during the 1991-92 school year.

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[5]At some unspecified time after this agreement was reached, two of the four kindergarten teachers at Healdsburg voiced their objection to Elsbree that they did not feel they were required to supervise students from 7:50 to 8:05.

The final witness to testify about the obligation to supervise students prior to 8:05 was Toni Saunders (Saunders), a kindergarten teacher at Healdsburg. She agreed with Elsbree that the current practice at Healdsburg requires kindergarten teachers to pick up students at 7:55 for supervision prior to the start of classes at 8:05. Contrary to Elsbree, however, Saunders testified that, under the 1990-91 practice, kindergarten teachers at Healdsburg were not required to pick up students for supervision until 8:05.

Based on the testimony of these six witnesses, it is concluded that prior to September 4, 1991, no established practice existed of kindergarten teachers opening their classrooms at 7:50 to begin supervising students. Every kindergarten teacher who testified stated convincingly that in actual practice she did not open her classroom and begin to supervise students at 7:50 prior to Baker's September 4 directive. Even Judy Irland, who was called to testify by Respondent, admitted that in 1990-91 she did not open her classroom and begin to supervise students at 7:50. It appears that, on occasion, some kindergarten teachers opened their classrooms at 7:50 to perform various duties, such as meeting with parents, preparing for class, etc., and there may have been instances when Baker observed them doing so. But Baker testified that she did not regularly patrol classrooms and thus her admittedly sporadic observations of kindergarten teachers in their classrooms prior to 8:05 does not outweigh the testimony of

all kindergarten teachers that the opening of classrooms before 8:05 was only by choice, and not done with sufficient frequency to be realistically described as an established practice.

Nor does the testimony about Healdsburg Elementary School tend to support the existence of a consistent past practice in the District. Even under Elsbree's testimony, kindergarten teachers at Healdsburg pick up their students at 7:55, not 7:50 as Baker claimed is required by past practice and the contract.

Two teachers gave specific testimony concerning the impact of Baker's September 4, 1991, memo on their work day. McGannon testified that she now arrives on site at approximately 7:35 and spends an additional 15 minutes per day performing the various tasks previously accomplished from 7:50 to 8:05. Novak similarly testified that the supervision requirement prior to the start of classes has forced her to perform the duties normally accomplished from 7:50 to 8:05 at other times, thus extending each workday approximately 20 minutes. Irland, on the other hand, testified that supervising students for the 15 minute period before school starts has not impacted on her hours. In fact, she testified, being in her classroom during this period enables her to accomplish various noninstructional tasks.

Bargaining History

Pursuant to Article 6, section 6.1, of the collective bargaining agreement, "each teacher shall be on site fifteen minutes prior to the beginning of their first class and remain on site fifteen minutes past the end of their last class." Thus,

since classes begin at 8:05 a.m., teachers are required to be on site at 7:50.

Robert Latchaw (Latchaw), who has negotiated the collective bargaining agreement for the District since 1977-78, testified about the history of Article 6, section 6.1. In his view, applicable law requires teachers to be in their classrooms to supervise students 30 minutes prior to the beginning of classes, unless there is an agreement to the contrary. This requirement, Latchaw further testified, formed the basis for early versions of Article 6, section 6.1. The 30 minute period was meant to be a time when the District could assign teachers noninstructional, teaching related duties. He said: "[T]he bargaining history became that absent any contract . . . language. Teachers had to be there. . . . [T]he District could require 30 minutes prior because that was in the code. That was before the cases about harmonizing the language and the code and all that from the unfair decisions." Latchaw said this period was not meant to provide prep time. In fact, Latchaw testified, a number of prep time proposals were presented over the years and rejected by the District. "Its really kind of unbelievable to me that this has turned around into an argument over prep time. . . . [I]t was my clear understanding that this 15 minutes prior was assignable time for teaching related duties. . . ."

However, Latchaw also testified that "it would probably be a stretch to say that [section 6.1 permits the District to] assign direct instructional time because we negotiated that issue

separately," but "as far as supervision duty of students, I don't remember that it ever came at the table, and its certainly not reflected in the contract." Asked by the ALJ if "assignable time for teacher related duties" is reflected in the contract, Latchaw answered:

> That's my belief of the interpretation when it was negotiated because later on we -- when this language was first put in the contract, we never actually negotiated directed student contact time. The first time we negotiated the student contact time was in a relationship to SB 813, to get people up to the minimum required. And so there are -- you've got these little pockets of time that have been negotiated. And whenever prep time was addressed as an issue, it was pointed out how expensive prep time was and that it took away from the duties that teachers could be assigned. And, as you can see, there's a fairly minimal prep time language in here included in 6.5.

In later contracts, the parties agreed to reduce the time in Article 6, section 6.1, from 30 minutes to 15 minutes. This section of the contract has not been discussed by the parties in negotiations since 1986.

The Cabinet Meeting Minutes

The superintendent's cabinet is a 13 member body made up of all principals and various District administrators. The cabinet meets weekly and operates from a prepared agenda. Agenda items are typically labeled "open" or "closed" by the person proposing the particular item for discussion. The label "open" means that minutes reflecting the discussion on that item are distributed to, among others, Association representatives and teachers. The designation "closed" means the matter is confidential in nature

and meant for discussion only by cabinet members. Minutes of the discussion of a "closed" item are not distributed.

Minutes of the cabinet meeting of May 28, 1991, indicate that Baker proposed to discuss her relationship with the Association as a "closed" topic under the general heading of "union information." The "Action desired/Resolution" is described in the minutes as "Working with union to provide change in the district." The results of the discussion are summarized in the minutes as follows:

> RESULTS: Frustration at kindergarten level; situation in working within the constraints of contract. Discussion on how to accentuate the positive, work together, work directly with principal rather than 'go to union'. Suggested a committee with board members, quarterly work sessions, school visitations, use of curriculum session are ideas to work on. Larry[6] suggested bringing in a teacher rep to workshop once a month to develop a plan - open communication - research on comanagement.

The workshop referred to in the minutes was conducted in September, 1991, by Latchaw. However, no Association representative was present.

McGannon testified that copies of the minutes were placed in teacher mail boxes at Fitch Mountain. She personally received a copy of the minutes, as did Carol Novak. The minutes were also distributed at Foss Creek Elementary School.

Baker did not personally distribute the minutes, and she said it was a "mistake" to distribute minutes which contained

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[6]Larry Machi is the District superintendent.

discussion of a "closed" item. In fact, Baker did not learn that the minutes had been distributed until she received a copy of the instant unfair practice charge, on August 14, 1991. Baker does not know who distributed the minutes.

Several witnesses described the environment at Fitch Mountain in which the minutes were distributed. McGannon testified that processing grievances was difficult because of Baker's "demeanor, her anger and her unwillingness to compromise." Baker's attitude, McGannon testified, had a chilling effect on employee willingness to file grievances, as well as on employee willingness to serve as an Association grievance representative. McGannon admitted, however, that some grievances were filed and settled. Novak similarly testified that Baker is "extremely stern and very opinionated and wishes for her way to be the right way. And when anybody ever challenges or contributes a different viewpoint, it is not readily accepted."

Baker, on the other hand, denied that she has a communication problem with teachers in general. She admitted, however, that a communication problem exists with some teachers, including McGannon and Novak. Baker further admitted to some degree of frustration stemming from her unsuccessful attempt to get McGannon and Novak to address concerns in a "collaborative method." Baker also candidly admitted that she has raised her voice on occasion with teachers. It appears that Baker's style

and manner stood in stark contrast to her predecessor, who Irland described as "more relaxed, more laid-back."

Association witnesses cited specific incidents upon which they base their characterization of Baker's conduct. Chief among these is the so-called open house incident. In brief, Baker and certain parents wanted to have an open house, but questions were raised concerning contract compliance, timing, and whether any-open house should be limited to Fitch Mountain or held District-wide. The topic was discussed at a meeting.

According to Novak, when she raised these issues at the meeting, Baker "screamed and yelled . . . pointed her finger . . . and berated [Novak]." Novak said Baker accused teachers of lacking dedication and being selfish.

Paula Wurlitzer (Wurlitzer), a parent who was present at the meeting disputed Novak's testimony about Baker's conduct. She described the tone of the meeting as "a little emotional" on both sides, but not unprofessional. There was no yelling or screaming or finger pointing. Wurlitzer never became uncomfortable or formed the opinion that the meeting was "out of control." Baker's testimony concerning this incident is consistent with the testimony given by Wurlitzer.

The Association also presented hearsay testimony by McGannon to the effect that several teachers transferred from Fitch Mountain to Healdsburg Elementary School because they were intimidated by Baker. Only one of these teachers, Toni Saunders, was called to testify. Saunders testified that she transferred

from Fitch Mountain because she felt intimidated by Baker. She also said that in her conversations with other teachers she "felt a lot of the same feelings were coming from them." Asked for an example of an incident where Baker intimidated her, Saunders replied:

> A. What I remember is that she came into the meeting -- we were sitting at a table, the teachers were all sitting at a table, and Nancy came in and did not sit down and she did not greet us, she just listened for awhile.
>
> Q. And so that was concerning to you. You felt that that was intimidating?
>
> A. It felt so to me.

ISSUES

1. Whether the September 4, 1991, directive requiring kindergarten teachers to open their classrooms and begin supervising students at 7:50 a.m. constituted a unilateral change in a negotiable subject, in violation of section 3543.5(a), (b) and (c)?

2. Whether distribution of the minutes from the superintendent's cabinet meeting interfered with rights under the EERA, in violation of section 3543.5(a) or (b)?

CONCLUSIONS OF LAW

I. Morning Supervision

It is well settled that a pre-impasse unilateral change in a negotiable topic violates the duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights

and are a failure per se of the duty to negotiate in good faith. (See San Mateo County Community College District (1979) PERB Decision No. 94; Davis Unified School District et al. (1980) PERB Decision No. 116.)

Established practice may be reflected in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history (Colusa Unified School District (1983) PERB Decision Nos. 296 and 296(a)) or the past practice (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51).

An employer makes no unilateral change, however, where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Further, only unilateral changes which violate district-wide practices are unlawful. (Modesto City Schools and High School District (1985) PERB Decision No. 541.)

In this case, I have determined that, prior to Baker's September 4, 1991, directive, there was no established District-wide practice requiring kindergarten teachers to open their classrooms at 7:50 and began supervising students. (See Findings of Fact, supra, pp. 8-9.) At the only two schools offering

kindergarten classes, teachers used all or part of the 15 minute period between 7:50 and 8:05 to perform a variety of preparatory duties. At neither school was there a hard and fast rule which required classroom supervision during this 15 minute block of time prior to the start of classes. Elsbree reached ah agreement with kindergarten teachers at Healdsburg which called for classroom supervision to begin at 7:55, not 7:50. And Baker was in the process of meeting with kindergarten teachers at Fitch Mountain when she issued the September 4, 1991, directive. Prior to this time, there was no clear understanding between Baker and the kindergarten teachers at Fitch Mountain. Individual teachers used the 15 minutes prior to the start of classes to perform a variety of teaching-related tasks. McGannon opened her classroom prior to 8:05 only when she chose to do so. Novak typically opened her classroom between 8:00 and 8:05. Even Judy Irland, a witness called to testify by the District, admitted that she too typically opened her room at 7:55, not 7:50. According to Irland, other teachers were on different schedules, some times arriving as early as 7:30, other times not going to their classrooms until 7:55. In none of these instances is there evidence that teachers reached an agreement with classroom aides to began supervising students in the classrooms at 7:50, as Baker contended was possible. Therefore, it is concluded that no consistent District-wide practice existed at schools offering kindergarten classes prior to Baker's September 4, 1991,

directive. (Imperial Unified School District (1990) PERB Decision No. 825, p. 6.)[7]

The change in this case involved an increase in student supervision time prior to the start of classes; essentially, Baker's September 4 directive imposed a new work assignment on a regular basis. This, in turn, dictated that some teachers work more minutes per day. The change here did not involve an increase in actual instructional minutes, nor did the change modify a negotiated prep period. Nevertheless, since employer changes in the areas of prep time and instructional minutes are analogous to the change which forms the basis of the instant dispute, Board precedent in these areas provides useful guidance here. In Imperial Unified School District, supra, the Board established standards to measure the effects of changes on the workday:

> PERB law generally views the length of the instructional day as a management prerogative which is outside the scope of representation. (Jefferson School District (1980) PERB Decision No. 133.) Thus, employers are generally free to alter the instructional schedule without prior negotiation with employee organizations. However, when changes in the instructional day in turn affect the length of the working day or existing duty-free time, the subject is negotiable. . . . (San Mateo City School District (1980) PERB Decision No. 129 underlining in original.)

[7]It is noteworthy that, prior to the 1990-91 school year, Fitch Mountain was the only school in the District providing kindergarten classes. Healdsburg did not offer kindergarten classes until the Fall of 1990. Thus, the prior District-wide practice over the past several years is primarily formed by the events at Fitch Mountain.

(Imperial Unified School District (1990) PERB Decision No. 825, pp. 7-8; see also Cloverdale Unified School District (1991) PERB Decision No. 911, pp. 16-17.)

In a long line of cases, the Board has held that employer unilateral action which impacted either the employees' workday or duty free time was negotiable. (See e.g., Fountain Valley Elementary School District (1987) PERB Decision No. 625; Corning Union High School District (1984) PERB Decision No. 399; Victor Valley Union High School District (1986) PERB Decision No. 565; Cloverdale Unified School District, supra. PERB Decision No. 911.) However, even where unilateral changes are made, the Board will not presume an effect on length of workday or duty free time. The Charging Party has the burden of proving that the change impacted on negotiable terms and conditions of unit employees. (Imperial Unified School District, supra, p. 9-10 (inconclusive testimony by bargaining unit members did not show impact on nonwork time).)

In this case, the Association has met this burden. It may be acknowledged that the impact of Baker's directive was not great, nor did it affect every bargaining unit member. Nevertheless, the Board has found violations when even relatively minor increases in the workday have occurred without the benefit of negotiations. (See e.g., Victor Valley Union High School District, supra, PERB Decision No. 565, adopting decision of administrative law judge at 10 PERC Para. 17079.) The evidence here shows that McGannon now arrives on site at about 7:35 and

spends an additional 15 minutes per day performing the noninstructional preparatory duties she previously accomplished between 7:50 and 8:05. And Novak now performs similar duties at times other than between 7:50 and 8:05, thus extending each workday approximately 20 minutes. The fact that the change in question here had no impact on Irland's working conditions does not cure Baker's directive of its unlawful character. The Board has determined that a unilateral change, to be found unlawful, need not effect every member of the unit. (See e.g., Jamestown Elementary School District (1990) PERB Decision No. 795, p. 6.)

Therefore, it is concluded that the September 4, 1991, directive, which required kindergarten teachers at Fitch Mountain Elementary School to open their classrooms at 7:50 a.m. and begin supervising students on a regular basis, altered the status quo by its impact on a negotiable term and condition of employment. Absent a valid defense, the District will be held in violation of its obligation to negotiate under the Act.

A. District Defenses

The District points to the collective bargaining agreement and underlying bargaining history to support its argument that the Association waived its right to negotiate and thus there was no unlawful unilateral change here. The Board has long followed the "clear and unmistakable" test in deciding whether a waiver of a statutory right exists. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) More recently, the Board has observed that "finding that an employee organization has

waived its right to bargain is a serious matter, not to be found without convincing evidence of the organization's intent." (Compton Community College District (1989) PERB Decision No. 720, p. 18.) Not only must the employer bear the burden of proving the affirmative defense of waiver, but "any doubts must be resolved against the party asserting waiver." (Ibid.) This standard "requires that evidence of waiver be conclusive." (Ibid.) Applying this standard here, I conclude that the Association has not waived its right to bargain.

The express language of the contract does not cover the matter at issue here. Section 6.1 provides only that "each teacher shall be on site fifteen minutes prior to the beginning of their first class and remain on site fifteen minutes past the end of their last class." The parties are in agreement that the term "on site" means only on school property. Thus, the only contractual directive which can be drawn from this language is that teachers must be on school property 15 minutes prior to the start of classes. There is no express language in the contract which can reasonably be interpreted as authority to impose a classroom supervision requirement on kindergarten teachers. Accordingly, there has been no clear and unmistakable waiver by contract.

Latchaw's testimony about bargaining history similarly does not establish waiver under Board law. In order to evaluate the bargaining history for waiver purposes, it is necessary to recall the three distinct types or categories of time identified by

Latchaw in his testimony. The first is what was described in the record as "assignable time" for "noninstructional" or "teaching related duties." The second category of time is student contact or actual instructional time. The third is prep time.

According to Latchaw, assignable time for noninstructional teaching related duties is not to be confused with either actual instructional minutes or prep time. Student contact time, he said, was negotiated into the contract long after section 6.1 was adopted. In addition, the Association has made various prep time proposals over the years and the District, in large part, has resisted their placement into the contract.[8] Thus, student contact time and prep time was discussed at the table and related language inserted into the contract.

The same cannot be said about the third category of time. Latchaw testified that he formed a "clear understanding that this 15 minutes prior was assignable time for teaching related duties." The Association's arguments do not dispute this understanding. McGannon and Novak, for example, testified that they arrive on site and perform a variety of teaching related duties prior to the start of classes. The heart of the dispute here lies in the requirement that kindergarten teachers open classrooms and begin supervising students during the 15 minute period. As to this requirement, Latchaw candidly admitted that

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[8]A minimal prep time provision in the contract is in section 6.4. It provides only that "teachers assigned to teach regular or special day class grades 4 through 6 shall be entitled to 30 consecutive minutes of preparation time per week."

the "supervision of students" was never discussed and "its certainly not reflected in the contract." Thus, even under Latchaw's testimony, it cannot be concluded that the topic of classroom supervision prior to the start of classes was "fully discussed" or "consciously explored" and the Association "consciously yielded" its interest in the matter. (Los Angeles Community College District (1982) PERB Decision No. 252, p. 13.)

More importantly, the parties negotiated a provision (section 6.1) which specifically covers the obligations of teachers during the period of time immediately prior to the start of classes. Yet they chose not to include the student supervision requirement in this section, agreeing instead to require teachers merely to be "on site" during this time. Meanwhile, a practice developed over the years under which teachers arrived "on site" and used the 15 minutes prior to the start of classes to perform certain teaching related duties, as Latchaw expected. But opening classrooms and supervising students during this time plainly was not part of that practice.

Balanced against the plain language of the agreement and the clear past practice, Latchaw's testimony about bargaining history, is not the kind of "convincing" and "conclusive" evidence which will support a finding that the Association has clearly and unmistakably waived its right to negotiate. (Compton Community College District, supra, p. 18.)

The District next argues that the California Code of Regulations, Title 5, Division 1, Section 5570, played a pivotal

role in the negotiations and requires that teachers be in their classrooms supervising students prior to the start of classes. Section 5570 provides:

> 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 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.

Latchaw testified that this section formed the basis of section 6.1 when it was first placed in the contract. Later, during the 1986 negotiations, the 30 minute requirement was changed to 15, and the parties have not addressed this topic in negotiations since 1986.

Neither the plain language of section 5570 nor Latchaw's testimony on this point provide the District with a valid waiver defense. First, there is nothing in section 5570 which sets an "inflexible standard or insure[s] immutable provisions" to preclude negotiations about its content. (San Mateo City School District (1984) PERB Decision No. 375.) Section 5570 contains a requirement that teachers be present at their respective rooms and open them for admission of students 30 minutes prior to the start of school. In the absence of the collective bargaining agreement and the past practice which exists here, section 5570 would be controlling. However, the District, by its own action, has severely undercut the application of section 5570 here.

Specifically, section 5570 provides that the governing board of the district has the authority to agree to a rule which differs from that expressly set out in the section. The District has done so in this case, agreeing with the Association in section 6.1 of the contract that teachers need only be "on site" 15 minutes prior to the beginning of their first class. The agreement plainly does not require teachers to open classrooms and begin supervising students. In fact, as found above, the District has acquiesced in a practice under which teachers were not required to open their classrooms and supervise students for the 15 minute period prior to the start of classes. Under these circumstances, any argument that section 5570 required kindergarten teachers to open classrooms and begin supervising students 15 minutes prior to the start of classes is not convincing.

The District next asserts that it has an inherent managerial right to direct the work of its employees, including the right to determine duty assignments within the hours provision of the contract. Even accepting this statement of managerial prerogative, the District's action cannot be excused under relevant Board law. The hours provision of the contract does not cover the matter at issue here. Although the employer is generally free to alter working conditions in areas which involve inherent managerial prerogatives, it is well established that the impact or effects of such decisions are negotiable. When managerial decisions affect the length of the working day or

existing duty-free time, the impact of management's decision must be negotiated with the exclusive representative. (See e.g., Imperial Unified School District, supra, p. 7; Victor Valley Union High School District, supra, PERB Decision No. 565.)

II. The Cabinet Minutes

In Rio Hondo Community College District (1980) PERB Decision No. 128, pp. 18-20, the Board found that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate." To decide whether employer speech is lawful, the Board established the following test.

> [T]he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (Id. at p. 20.)

Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (California State University (California State Employees' Association, SEIU Local 1000) (1989) PERB Decision No. 777-H, adopting decision of administrative law judge at 12 PERC Para. 19063, pp. 292-294) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact "[T]hat employees may interpret statements, which are

otherwise protected, as coercive does not necessarily render those statements unlawful." (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1955) 113 NLRB 823 [36 LRRM 1397].) The Board has also held that statements made by an employer are to be viewed in their overall context to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

In addition, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts (1986) PERB Decision No. 560, p. 16; Muroc Unified School District (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful. Under these standards, the individual statements reflected in the cabinet minutes, standing alone or taken as a whole, did not carry the threat of reprisal or force, or promise of benefit.

As a threshold matter, it cannot be overlooked that the minutes were not intended for distribution. Baker convincingly testified that distribution of the minutes was a "mistake" and she didn't learn of it until the unfair practice charge was filed. Nor is there a claim challenging the accuracy of the minutes.

The minutes refer to Baker's apparent desire for employees to bring problems directly to her rather than to the Association, but the overall tone and content of the minutes outweigh any negative connotation which might otherwise be drawn from this isolated comment. For example, the minutes plainly state that the "action desired" or "resolution" is "working with the union to provide change in the district." Specific topics are discussed as vehicles to achieve this goal. Even the superintendent, Larry Machi, is described in the minutes as suggesting positive approaches such as workshops with teacher representatives aimed at developing "open communication" and "comanagement." On balance, the minutes reflect more of a desire to improve the labor-management relationship than they do an attempt to inhibit communications with the Association or with teachers in general.

Further, the expression of "frustration" at working within the constraints of the contract at the kindergarten level is not necessarily coercive. It is a statement of fact, reflecting Baker's personal opinion or feeling, which does not on its face carry a threat or promise of benefit. By its very terms, a collective bargaining agreement is designed to impose certain restrictions on the employer's discretionary authority as to those terms covered by the agreement. Administration of a collective bargaining agreement frequently brings parties into disagreement and causes frustration. It would be a wholly unrealistic application of the Act to construe this mere

expression of frustration as a vehicle of coercion. The Board has viewed much stronger statements by both union and management alike as permissible speech. (See e.g., Regents of the University of California (1983) PERB Decision No. 366-H, adopting decision of administrative law judge at 7 PERC Para. 14083 (statements by a police chief, while being interviewed by a panel of unit employees, that he did not like the "adversary climate" created by collective bargaining, collective bargaining was a "shame," and the union is a "sour union," were held as permissible speech); Rio Hondo Community College District (1982) PERB Decision No. 260 (during question and answer session with superintendent at end of faculty meeting, teacher's utterance of the word "chickenshit" in response to superintendent's comment viewed by Board as permissible).)

The Association argues that the "environment of coerciveness" which existed at Fitch Mountain is a factor which supports its contention that the minutes interfered with employee rights under the Act. It is largely undisputed that Baker's relationship with Association representatives and some teachers was at times acrimonious, she sometimes raised her voice when dealing with teachers, and Association witnesses perceived her as, among other things, stern, opinionated and uncompromising. But even accepting the Association's description of Baker's relationship with teachers, in the context of this record these qualities do not create the kind of atmosphere which would transform the cabinet minutes at issue here into a coercive or

threatening communication. In the ordinary give and take of employer-employee relations, it is not unexpected that union representatives and employees will encounter employer representatives who are unyielding. Nor are sharp exchanges in the labor relations context uncommon; voices are raised in the heat of robust debate. Therefore, while Baker's relationship with Association representatives and some teachers can fairly be described as rocky at times, it does not follow that her conduct constitutes the kind of extraordinary circumstances which tend to cast the cabinet minutes in a more ominous light than they appear on their face.

Testimony about teachers who transferred from Fitch Mountain because they were intimidated by Baker does not alter this conclusion. First, the testimony about why individual teachers transferred is largely hearsay. Second, the only transferee who testified was Toni Saunders. She said her transfer was prompted by intimidation directed at her by Baker. Asked for an example of an incident where Baker intimidated her, Saunders described a scene where Baker entered a room where teachers were meeting. She said Baker "did not sit down and she did not greet us, she just listened for awhile." This certainly falls short of establishing that there were wholesale transfers from Fitch Mountain because teachers were intimidated by Baker. As such, it similarly falls short of establishing the kind of coercive atmosphere sufficient to transform the cabinet minutes into unlawful communication under the EERA.

CONCLUSION

Based on the foregoing findings of fact, conclusions of law and the entire record herein, it is concluded that the District breached its obligation to negotiate under the EERA when Baker unilaterally implemented a policy requiring kindergarten teachers to be present in their classrooms and supervise students from 7:50 to 8:05, in violation of section 3543.5(c). This conduct interfered with the Association's right to represent its members in their employment relations with the District, in violation of section 3543.5(b). The same conduct interfered with individual kindergarten teachers' rights to be represented by their chosen representative in their employment relations with the District, in violation of section 3543.5(a).

In addition, it is concluded that the distribution of the cabinet minutes did not interfere with employee rights under the EERA. Distribution was a mere mistake, and, under the totality of the circumstances presented here, the express language of the minutes cannot be read to carry a threat of reprisal or promise of benefit. Accordingly, that portion of the complaint dealing with distribution of the cabinet minutes is hereby dismissed.

REMEDY

Under section 3541.5(c), the Board is given the power to issue a decision and order directing the offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA. In this case it has been found that the District breached its obligation to

negotiate in good faith when it unilaterally implemented a policy requiring kindergarten teachers to be present in their classrooms and supervise students from 7:50 to 8:05. This conduct violated section 3543.5(c), (b), and (a).

It is therefore appropriate to order the District to cease and desist from such activity in the future, return to the status quo which existed at Fitch Mountain Elementary School prior to the unilateral change, and, upon request, meet and negotiate with the Association prior to making future changes in negotiable terms and conditions of employment.

In a long line of analogous cases, the Board has fashioned a make whole remedy for employees affected by a unilateral change in policy. Under this line of cases it is appropriate to order the District to provide kindergarten teachers at Fitch Mountain Elementary School affected by the change with an amount of time off which corresponds with the additional work performed as a result of the change. If the District and the Association cannot agree on the manner in which compensatory time is granted, affected employees shall be awarded monetary compensation commensurate with the extra hours worked, at the rate of seven (7) percent per annum. (Corning Union High School District, supra? Victor Valley Union High School District, supra; Fountain Valley Elementary School District, supra; Cloverdale Unified School District, supra.) Disputes regarding the implementation of the foregoing remedy will be resolved through the Board's compliance procedures. (Corning Union High School District,

supra; Victor Valley Union High School District, supra.)

It is further appropriate that the District be ordered to post a notice incorporating the terms of the order herein. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, it is found that the Healdsburg Union Elementary School District violated Government Code section 3543.5(c) of the Educational Employment Relations Act by unilaterally implementing a policy requiring kindergarten teachers to open their classrooms and begin supervising students during the fifteen (15) minutes prior to the start of classes. By the same conduct, it has been found that the District violated section 3543.5(b) and (a). Pursuant to section 3541.5(c), it is hereby ordered that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Healdsburg Area Teachers Association concerning the policy requiring kindergarten teachers to open their classrooms and begin supervising students during the 15 minute period prior to the start of classes.

(2) By the conduct described in paragraph (1), denying Healdsburg Area Teachers Association the right to represent employees in their employment relations with the Healdsburg Union Elementary School District.

(3) By the conduct described in paragraph (1), interfering with the employees in the exercise of the right to be represented by the Healdsburg Area Teachers Association in their employment relations with the Healdsburg Union Elementary School District.

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

(1) Reinstate the practice which existed prior to September 4, 1991, concerning the requirement of kindergarten teachers to open their classrooms and begin supervising students during the 15 minutes prior to the start of classes, and upon request, meet and negotiate any proposed change in the practice with the Healdsburg Area Teachers Association.

(2) Grant to each kindergarten teacher the amount of compensatory time off which corresponds to the number of extra hours worked as a result of the unilateral change referred to in

paragraph (1). Should the parties fail to reach agreement as to the manner in which such compensatory time will be granted, then such employees will be granted monetary compensation, at the rate of seven (7) percent per annum, commensurate with the additional hours worked.

(3) Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of Healdsburg Union Elementary School District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

(4) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the Regional Director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page

citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of. Regs., tit. 8, secs. 32300, 32305 and 32140.)

Fred D'Orazio
Administrative Law Judge