STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SAN JACINTO CHAPTER #189,	)	Case Nos. LA-CE-3256 LA-CE-3289 LA-CE-3295
Charging Party,	)	PERB Decision No. 1078
v.	)	December 22, 1994
SAN JACINTO UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: California School Employees Association by Maureen C. Whelan, Attorney, for California School Employees Association and its San Jacinto Chapter #189; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for San Jacinto Unified School District.

Before Caffrey, Carlyle and Johnson, Members.

DECISION

CARLYLE, Member: These cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Jacinto Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). In the proposed decision the ALJ found that in each of these cases, the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it made

[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:

unilateral changes in the hours of various classified bargaining unit employees without providing the California School Employees Association and its San Jacinto Chapter #189 (Association) an opportunity to negotiate the changes in policy and/or the effects of such changes.

The Board has reviewed the entire record in each of the three cases, including the transcripts, exhibits, proposed decision, the District's exceptions and the Association's responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Based upon the foregoing findings of facts, conclusions of law, and the entire record in this case, it is found that the San Jacinto Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code

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> (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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> 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.

section 3543.5(c) by: (1) unilaterally changing its established policy regarding the work schedule of maintenance and grounds employees assigned to work home football games in the fall of 1992; (2) unilaterally changing the hours allotted to the library technician and health clerk positions at San Jacinto Elementary School; and (3) unilaterally changing the workweek of bus drivers assigned to weekend field trips in November 1992. By the same conduct, it has been found that the District also violated EERA section 3543.5(b) and (a).

Pursuant to EERA 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 California School Employees Association and its San Jacinto Chapter #189 (Association), as the exclusive representative of the District's classified unit employees, by making changes in the employees hours and other terms and conditions of employment within the scope of representation;

2. Denying to the Association rights guaranteed by EERA, including the right to represent its members; and

3. Interfering with employees in the exercise of rights guaranteed by EERA, including the right to be represented by their chosen representative.

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

1. In the future, provide notice to the Association of any proposed decision to change the hours or other terms and

conditions of employment of unit members, including the hours of existing unit positions and, upon request, meet and negotiate over the decision and the effects thereof.

2. Pay to all maintenance and grounds employees who worked home football games in the fall of 1992, lost income resulting from the change of their work schedule. The amount of income due each employee shall be calculated as follows: The District shall total the number of overtime hours worked by each affected maintenance and grounds employee during home football games in 1989-90, 1990-92 and 1991-92 and then divide by three. This calculation will produce the average number of extra hours worked in this three year period. The District shall then divide the average number of hours evenly among all maintenance and grounds employees who worked home football games in the fall of 1992. These employees are to be paid the amounts of money they would have received in the fall of 1992 had they worked the calculated number of hours. The amount due each employee shall be augmented by interest at the rate of seven (7) percent per annum.

3. Pay to bus drivers Ethel Marshall (Marshall) and Teresa Austin (Austin) the lost income resulting from the change, to be calculated as follows: The District shall compensate them for the day of regular wages lost on November 10, 1992, offset by the number of hours of regular pay received on November 14, 1992. The same formula described above for calculating backpay for the overtime hours earned by the bus drivers during weekend field

trips shall be used to calculate compensation for the elimination of Marshall's and Austin's overtime hours on November 14, 1992. The amount due each employee shall be augmented by interest at the rate of seven (7) percent per annum.

4. Upon the request of the Association, restore the library technician and health clerk positions at San Jacinto Elementary School to eight hours and five hours per day, respectively.

5. 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. The Notice must be signed by an authorized agent of the 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 this Notice is not reduced in size, altered, defaced or covered by any other material.

6. Make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Member Johnson joined in the Decision.

Member Caffrey's concurrence and dissent begins on page 6.

CAFFREY, Member, concurring and dissenting: I concur in the finding that the San Jacinto Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) when it changed the work schedule of maintenance and grounds employees assigned to cover home football games, and when it changed the workweek of bus drivers assigned to weekend field trips, without providing the California School Employees Association and its San Jacinto Chapter #189 (Association) with notice and an opportunity to negotiate the changes.

I dissent from the finding that the District violated EERA section 3543.5(a), (b) and (c) when it unilaterally changed the hours of two vacant bargaining unit positions.

The Public Employment Relations Board (PERB or Board) has never directly addressed the issue of whether a change in the hours of a vacant bargaining unit position is a subject within the scope of representation. The Board has adopted a test for determining whether a subject not enumerated in EERA section 3543.2(a)[1] is within the scope of representation. A

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[1]**EERA** section 3543.2(a) states:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances

subject will be found to be within the scope of representation if: 1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment; 2) the subject is of such concern to both management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and 3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission. (Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim).)

> pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Applying this test, the Board has concluded that the reduction in hours of an occupied bargaining unit position is a matter within the scope of representation. (North Sacramento School District (1981) PERB Decision No. 193; Pittsburg Unified School District (1983) PERB Decision No. 318; Oakland Unified School District (1983) PERB Decision No. 367; Healdsburg Union High School District, et al. (1984) PERB Decision No. 375.)

However, the Board has consistently held that a decision concerning the level of service to be provided is a fundamental management prerogative which is not subject to negotiations. (Mt. San Antonio Community College District (1983) PERB Decision No. 297 (Mt. San Antonio); Mt. Diablo Unified School District (1983) PERB Decision No. 373; Davis Joint Unified School District (1984) PERB Decision No. 393.) An employer's decisions to establish positions and services, eliminate services, abolish filled or vacant bargaining unit positions, and layoff bargaining unit members, are all matters of management prerogative not within the scope of representation. (Mt. San Antonio; Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (Alum Rock); Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 (Newman-Crows Landing).) However, the effects of these decisions may be negotiable to the extent that they impact terms and conditions of employment of bargaining unit members. (Alum Rock.)

In the instant case, the District in the fall of 1992 increased the hours of a vacant health clerk position at

San Jacinto Elementary School from five hours per day to six hours per day. The District also decreased the hours of a vacant library technician position at San Jacinto Elementary School from eight hours per day to six hours per day.

Applying the Board precedent to the facts of this case, the administrative law judge (ALJ) states that the District's action would not be subject to negotiations if it left the existing positions vacant, created new health clerk and library technician positions, and then allotted hours to the new positions which were different from the hours allotted to the vacant positions. However, the ALJ rejects the District's contention that it established new health clerk and library technician positions at San Jacinto Elementary School. The ALJ then relies on the Board's holding in Rialto Unified School District (1982) PERB Decision No. 209 (Rialto) to conclude that a change in the hours of a vacant bargaining unit position affects the collective interest of bargaining unit members and is, therefore, within the scope of representation.

I disagree with the ALJ's analysis.

To conclude, as the ALJ did, that the District would be exercising its managerial prerogative if it was to fill the vacant five-hour-per-day health clerk position and establish and fill a new one-hour-per-day health clerk position at San Jacinto Elementary School, but can not simply increase the vacant position from five hours to six hours without first negotiating, is to incorrectly elevate the form a level of service decision

takes over the substance of that decision. Similarly, concluding that the District could establish a six-hour-per-day library technician position at San Jacinto Elementary School without first negotiating, but only if it made changes in the duties assigned to the vacant eight-hour position sufficient for it to be considered a new position, creates an artificial standard which invites manipulation and ignores the practical considerations which dictate level of service decisions.

As noted above, the Board has consistently held that the level of services that an employer decides to provide is not a negotiable subject of bargaining. An employer may decide to establish positions, abolish positions which are filled or vacant, and decide to layoff employees occupying the positions designated to be abolished, all consistent with its exercise of managerial prerogative. In Newman-Crows Landing, the Board explained its rationale for concluding that the decision to layoff employees is a matter of managerial prerogative, even though it impacts fundamental terms and conditions of employment of bargaining unit members:

> The layoff of employees unquestionably impacts on their wages, hours and other conditions of employment. It may concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.

A decision by the employer to change the hours of a vacant bargaining unit position is a decision to change the level of service to be provided by that position. Clearly this decision is akin to those level of service decisions the Board has previously held to be outside of the scope of representation, such as the decision to abolish a position altogether, regardless of whether it is vacant. Accordingly, consistent with the Board's prior application of the Anaheim test to an employer's level of service decisions, I conclude that an employer's decision to change the hours of a vacant bargaining unit position is not a matter within the scope of representation as set forth in EERA section 3543.2(a).[2]

While level of service decisions are fundamentally exercises of management prerogative, those decisions may well impact bargaining unit members. Therefore, the Board has held that the effects of those decisions may be negotiable to the extent that

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[2]The ALJ's reliance on Rialto to reach the opposite conclusion is misplaced. In that case, the employer unilaterally transferred work specifically described in the unit description of the certificated unit from that unit to a classified unit. The level of service to be provided was not the issue. Furthermore, while in Rialto the Board addressed itself to the "diminution of unit work" which resulted from the transfer between bargaining units, Rialto should not be read to prohibit a unilateral increase in bargaining unit work such as occurred in this case through the increase in hours of the vacant health clerk position.

I also note that Rialto predates the key Board cases holding that level of service decisions are matters of fundamental managerial prerogative. (Newman-Crows Landing; Mt. San Antonio; Alum Rock.) To the extent, if any, that Rialto may conflict with these subsequent decisions, it has been effectively overruled by them.

they impact terms and conditions of employment of bargaining unit members. (Alum Rock.) Consistent with this Board precedent, I conclude that the effects of an employer's decision to change the hours of a vacant bargaining unit position are negotiable to the extent that they impact terms and conditions of employment of bargaining unit members.

An employer's decision regarding the level of services to be offered is outside the scope of representation and, therefore, a nonmandatory subject of bargaining. However, EERA section 3543.2 expressly permits the parties to engage in negotiations over such a subject. In this case, the collective bargaining agreement (CBA) between the District and the Association specifically includes in Article V (District Rights) the agreement that level of service decisions are the exclusive province of the District. Among those powers assigned to the District in Article V are "the exclusive right" to "determine the kinds and levels of services to be provided and the methods and means of providing them," to "determine staffing patterns," and to "determine the number and kinds of personnel required." The District's decision to increase a vacant health clerk position from five to six hours, and to decrease a vacant library technician position from eight to six hours is a determination of the level of service to be provided, and/or the staffing pattern to be utilized, and/or the number of personnel required at San Jacinto Elementary School. Therefore, by the express terms of the parties' CBA, the District acted within its rights when it took this action.

Based on the foregoing, I conclude that the District did not violate EERA section 3543.5(a), (b) and (c) when it changed the hours of two vacant bargaining unit positions at San Jacinto Elementary School without providing notice and an opportunity to negotiate over the decision to the Association.

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 Nos. LA-CE-3256, LA-CE-3289, and LA-CE-3295, California School Employees Association and its San Jacinto Chapter #189 v. San Jacinto Unified School District, in which all parties had the right to participate, it has been found that the San Jacinto Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c). The District violated EERA by: (1) unilaterally changing its established policy regarding the work schedule of maintenance and grounds employees assigned to work home football games in the fall of 1992; (2) unilaterally changing the hours allotted to the library technician and health clerk positions at San Jacinto Elementary School; and (3) unilaterally changing the workweek of bus drivers assigned to weekend field trips in November 1992. By the same conduct, it has been found that the District also violated EERA section 3543.5(b) and (a).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its San Jacinto Chapter #189 (Association), as the exclusive representative of the District's classified unit employees, by making changes in the employees hours and other terms and conditions of employment within the scope of representation;

2. Denying to the Association rights guaranteed by EERA, including the right to represent its members; and

3. Interfering with employees in the exercise of rights guaranteed by EERA, including the right to be represented by their chosen representative.

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

1. In the future, provide notice to the Association of any proposed decision to change the hours or other terms and conditions of employment of unit members, including the hours of existing unit positions and, upon request, meet and negotiate over the decision and the effects thereof.

2. Pay to all maintenance and grounds employees who worked home football games in the fall of 1992, lost income resulting from the change of their work schedule. The amount of income due each employee shall be calculated as follows: The District shall total the number of overtime hours worked by each affected maintenance and grounds employee during home football games in 1989-90, 1990-92 and 1991-92 and then divide by three. This calculation will produce the average number of extra hours worked in this three year period. The District shall then divide the average number of hours evenly among all maintenance and grounds employees who worked home football games in the fall of 1992. These employees are to be paid the amounts of money they would have received in the fall of 1992 had they worked the calculated number of hours. The amount due each employee shall be augmented by interest at the rate of seven (7) percent per annum.

3. Pay to bus drivers Ethel Marshall (Marshall) and Teresa Austin (Austin) the lost income resulting from the change, to be calculated as follows: The District shall compensate them for the day of regular wages lost on November 10, 1992, offset by the number of hours of regular pay received on November 14, 1992. The same formula described above for calculating backpay for the overtime hours earned by the bus drivers during weekend field trips shall be used to calculate compensation for the elimination of Marshall's and Austin's overtime hours on November 14, 1992. The amount due each employee shall be augmented by interest at the rate of seven (7) percent per annum.

4. Upon the request of the Association, restore the library technician and health clerk positions at San Jacinto Elementary School to eight hours and five hours per day, respectively.

Dated: _____ SAN JACINTO 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

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #189, Charging Party, v. SAN JACINTO UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case Nos. LA-CE-3256 LA-CE-3289 LA-CE-3295 PROPOSED DECISION (4/22/94)

Appearances: George Holihan, Field Representative, for California School Employees Association and its Chapter #189; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for San Jacinto Unified School District.

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

An exclusive representative charges the employer with making unilateral changes in the hours of various classified bargaining unit employees without providing their representative with notice or an opportunity to negotiate the changes in policy and/or the effects of such changes.

The employer insists that its conduct is consistent with a long-standing practice of rearranging employees' hours to meet its operational needs and, further, that it has negotiated the right with the exclusive representative to change the hours of its classified staff to accommodate such needs.

PROCEDURAL HISTORY

This case involves three separate charges filed by the California School Employees Association and its Chapter #189 (CSEA or Association) against the San Jacinto Unified School

District (District) alleging violations of the Educational Employment Relations Act (EERA or Act).[1]

LA-CE-3256

Case No. LA-CE-3256, filed on November 20, 1992,[2] alleges that on or about September 1, 1992, the District changed the work schedule for maintenance and grounds employees who work the home football games held at the high school campus.

Prior to September 1, 1992, the District allegedly assigned bargaining unit employees to every home football game to handle any operating problems that might arise. Unit members so assigned worked their normal schedule and returned in the evening for approximately four to five hours of overtime to work the football games.

On September 1, 1992, the District directed employees to report at 12 noon on the days of the games and work until 9 p.m., with a one-hour lunch break.

Based on these allegations, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on January 29, 1993, alleging that the

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

[2]The charge was amended on April 7, 1993; however, the amendment made no substantive changes in the original allegation.

District's conduct described above was in violation of section 3543.5(a), (b), and (c).[3]

An informal conference on February 9, 1993, failed to resolve the dispute.

The District answered the complaint on February 19, 1993, admitting certain facts but generally denying allegations of unlawful conduct. The District also advanced a number of affirmative defenses.

LA-CE-3289

Case No. LA-CE-3289, filed on March 10, 1993, and amended on April 8, 1993, alleges that the District changed the hours of two bargaining unit positions at one school site.

Prior to October 21, 1992, the library technician position was assigned eight hours per day, ten months per year and the health clerk position was five hours per day, ten months per year.

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[3]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, or 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. 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.

In a vacancy posting issued in late October 1992, the District changed the hours of both positions to six hours per day.

PERB issued a complaint on April 16, 1993, alleging that the conduct described above violated section 3543.5(a), (b) and (c).

The District answered the complaint on May 6, 1993, denying all material allegations of unlawful conduct and asserting various affirmative defenses.

An informal conference held on May 13, 1993, failed to resolve the dispute.

LA-CE-3295

In this charge, filed on March 29, 1993, and amended April 7, 1993, CSEA alleges that on or about October 27, 1992, the District changed its policy concerning the work hours of bus drivers by requiring the drivers assigned to weekend field trips to take a day off during the preceding week so that compensation for overtime would be avoided.

PERB issued a complaint on May 13, 1993, alleging that the conduct described above violated section 3543.5(a), (b), and (c).

An informal conference held that same day failed to resolve the dispute.

The District answered the complaint on June 1, 1993, denying all material allegations of unlawful conduct and asserting a number of affirmative defenses.

The three cases were consolidated for a formal hearing held by the undersigned on June 8 and 9, 1993. Post hearing briefs

were filed on August 16, 1993, and the cases were thereafter submitted.

FINDINGS OF FACT

The parties stipulated, and it is therefore found, that the District is a public school employer and CSEA is an employee organization as those terms are defined in EERA. CSEA is the exclusive representative of a comprehensive unit of the District's classified employees. There are approximately 220 employees in the bargaining unit. The District has eight school sites.

CSEA and the District are parties to a collective bargaining agreement (CBA) with a term from October 30, 1989 to October 30, 1992. At the time of the hearing, the parties had not completed negotiations for a successor agreement.[4]

Change of the Work Schedule for Home Football Games

The regular work hours for the District's maintenance and grounds employees has been 7 a.m. to 3:30 p.m. During the 10-week summer recess when most schools are not in session, the hours of these employees are changed to 6 a.m. to 2:30 p.m. because of the extreme heat in the area.

Historically during the football season at San Jacinto High School, two maintenance and grounds employees are assigned to work during the school's home football games. There are normally five home games and the employees have volunteered for these

[4]It is noted that Article XXIII (Duration) provides that the CBA ". . . thereafter shall continue in effect year-by-year until superseded by a subsequent agreement."

assignments as overtime work beyond their regular eight-hour day.

During the games, these employees are responsible for handling any electrical or sprinkler problems that arise. After the games, they are responsible for putting away the equipment and securing the football field area. Employees working the home football games average four to five hours of overtime, and are compensated at time and one-half per hour of their regular rate of pay.

On September 1, 1992, Jim Bell (Bell), the coordinator of maintenance, operations and transportation (MOT) services, issued a memorandum to maintenance and grounds personnel informing them of a change in the football work schedule. Bell is the immediate supervisor of MOT personnel. The memo read, in relevant part, as follows:

> The following schedule will be used for M.O.T. personnel to cover home football games.
>
> Maintenance and ground personnel assigned to work games will report to work at 12:00 noon on the day of the game and will work till [sic] the completion of the game and all areas are secured. They will take a one-hour lunch break at 4:00 o'clock till [sic] 5 p.m.

The memo listed the five home games scheduled from September 11 to November 6, 1992, with the names of the two employees assigned to each game. Seven different employees were assigned to work the five games.

No notice of this change was given to either the MOT employees or CSEA before Bell's memo was issued.

Gary Bossingham (Bossingham) is employed as a senior skilled maintenance worker. Bossingham is also the CSEA job steward for MOT employees. Bell's September 1 memo indicated that Bossingham and Art Avalos (Avalos), a grounds employee, were scheduled to work the home football game on October 16, 1992.

On September 11, 1992 Raymond Spence (Spence), a skilled maintenance worker, and Avalos worked the first home football game as they were assigned. Spence worked two hours of overtime for which he was compensated at the overtime rate of pay.

Shortly after September 11, Spence approached Bossingham to discuss filing a grievance about the change of his work schedule. Spence was also scheduled to work the game on November 6, 1992. Bossingham was unsure about whether the change was grievable, so he took Spence's complaint to LaVern Laughlin (Laughlin), the CSEA co-president.

Laughlin contacted Frederick Richardson (Richardson), the District director of personnel services, to schedule a meeting about the matter. Laughlin, Joe Lira (Lira), the other CSEA co-president, and Richardson met sometime in late September to discuss CSEA's complaint about the change of the work schedule and the selection process used by Bell for assigning employees to the games. The issue was not settled at that meeting.

A second meeting was held between CSEA and District representatives in early October 1992, but the matter still was not completely resolved.

Thereafter, District Superintendent Sandra Shackelford (Shackelford), who had attended the second meeting, sent a letter to Lira and Laughlin on or about October 15, 1992. Shackelford's letter acknowledged the legitimacy of the concerns expressed by CSEA at the meeting. However, it indicated that the District, because of budget reductions, would not reinstitute full funding for overtime in the maintenance department for personnel assigned to the home football games.

There was no further contact between the parties regarding this issue after Shackelford's October 15 letter. Prior to his October 16 assignment, Bossingham had not worked football games for four to five years. And he did not work the game on October 16. The record does not show who worked in his stead.

Spence and Mike Leavitt, a groundskeeper, worked the November 16 game as scheduled. Each employee received approximately two hours of overtime for which they were compensated at the overtime rate of pay. It is unknown which maintenance and grounds employees worked the other games and how much, if any, overtime they earned.

Change of Hours in the Librarian Technician and Health Clerk Positions

Classified employees working for the District as library technicians are responsible for overseeing and managing the libraries at the elementary and middle schools. There are five unit members in this classification. They work varying numbers of hours per day, depending on their site assignment.

For the five years prior to October of 1992, there was an eight-hour per day library technician position at San Jacinto Elementary School. In the fall of 1992, the position became vacant.

Health clerks are responsible for maintaining the site health services office, administering basic first aid and conducting health-related tests to students. The number of hours per day allotted to the six health clerks employed by the District varies according to the needs of a particular school site.

In the fall of 1992, the health clerk positions at San Jacinto Elementary and San Jacinto High Schools became vacant. For the previous five years, the position at the elementary school was assigned five hours per day. The high school position was four hours per day.

On or about October 21, 1992, the District posted vacancy notices listing both the library technician and health clerk positions at San Jacinto Elementary School at six hours per day. The hours listed for the health clerk position at San Jacinto High School were not changed.

Shortly after seeing the vacancy notices, Laughlin telephoned Richardson inquiring about the reason for the change of hours for the two positions at San Jacinto Elementary. Subsequently, during a meeting sometime in November 1992, the parties discussed CSEA's opposition to the change of hours. CSEA took the position that the change in hours of any unit position

was negotiable and the District disagreed. The parties' differences remained unresolved. There was no further communication about this issue following the November meeting. Both positions were later filled at six hours per day.

Richardson testified that the District did not abolish nor change the hours of either vacant position. Instead, new positions were created at the hours listed in the October 1992 vacancy postings. Richardson, however, did acknowledge that neither the duties, nor the salaries of the new hirees have changed from those of the prior incumbents.

From time to time the District does not fill vacated unit positions. However, Richardson could recall only one prior instance during the 1988-89 school year when a vacated eight-hour projects clerk typist position was not filled and the District created a new seven-hour position at the same site.

Change in The Bus Drivers' Workweek

The normal workweek for full-time bus drivers is Monday through Friday. In the fall of 1992, the bus drivers' regular hours varied from six and three-quarters to seven hours per day.

Occasionally, bus drivers are assigned to do student field trips on Saturdays. Saturday field trips usually involve some overtime hours at time and one-half the regular rate of pay.

In the fall of 1992, the District employed four bus drivers, including Teresa Austin (Austin), who also performs supervisory duties. On October 27, 1992, Austin told the other drivers that, effective immediately, if they were assigned to work a weekend

field trip, they would have to take a day off during the week preceding the weekend assignment. Austin's oral notice was never reduced to writing.

Ethel Marshall (Marshall) has worked for the District as a bus driver approximately nine and one-half years. Prior to October 27, 1992, Marshall worked an average of six and three-quarters hours per day, five days a week.

In November 1992, Marshall was assigned to do a field trip on Saturday, November 14. Marshall was required to take Tuesday, November 10, as a day off without compensation. A substitute bus driver drove her route on November 10. On November 14, Marshall worked four and three-quarters hours and received straight time compensation. Austin worked the same schedule that week as did Marshall.

When Marshall discussed the change of her workweek with CSEA, it considered a grievance, but no grievance was ever filed.

Austin apparently rescinded the October 27 policy sometime after November 14, 1992, because thereafter none of the other bus drivers assigned to work a weekend field trip were required to take a day off during the preceding week.

Neither the bus drivers nor CSEA were given notice of this change of policy prior to October 27. Nor did CSEA and the District have any communications or meetings about this policy change prior to the filing of the instant unfair practice charge.

Relevant Provisions of the CBA

The CBA contains two articles that are relevant to these cases.

Article V is entitled "District Rights" and reads as follows:

> 5.1 It is understood and agreed that the District retains all its powers and authority to direct, manage and control to the full extent of the law. Included in, but limited to, those duties and powers are the exclusive right to: determine its organization; direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided, and the methods and means of providing them; establish its education opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine the curriculum; build, move or modify facilities; establish budget procedures and determine budgetary allocation; determine the methods of raising revenue; contract out work (except as forbidden by law), and take action on any matter in the event of an emergency. In addition, the District retains the right to hire, classify, assign, evaluate, promote, terminate, and discipline employees unless it is contrary to the provisions of this Agreement.
>
> The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and use of judgment and discretion in connection therewith, shall be limited only to the extent such specific and express terms are in conformance with law.
>
> The District retains the right to amend, modify, or rescind policies and practices referred to in this Agreement in cases of emergency. An emergency is a sudden, urgent, unforeseen occurrence or occasion requiring immediate action.

Article XVIII contains provisions covering unit members' hours, overtime and allowances. It reads, in relevant part, as follows:

> 18.1 Work Schedule
>
> The workweek begins at 6:00 a.m. on Monday and ends at 6:00 a.m. the following Monday. An employee's normal work schedule shall not exceed five (5) consecutive days, eight (8) hours per day, nor forty (40) hours per week. Each unit member shall be assigned a fixed regular and ascertainable minimum number of hours per day as near as practicable.
>
> This does not preclude the extension of the workweek or the workday on an overtime basis as authorized by the Superintendent or his/her designee.
>
> 18.2 Uncompensated Time
>
> Any break in time worked which is the result of a regular schedule will be considered uncompensated time. The District will include notice of such uncompensated time in job postings and schedule changes to ensure that applicants are advised of this condition of employment.
>
> 18.3 Lunch Periods
>
> All unit members covered by this Agreement shall be entitled to an uninterrupted lunch period without pay after the unit member has been on duty for five (5) hours. The length of time for such lunch period shall be for a minimum of one-half (1/2) hour and shall be scheduled for full-time employees at or about the midpoint of each work shift. Exceptions may be granted by mutual agreement between the unit member and his/her supervisor.
>
> 18.5 Overtime
>
> Except as otherwise provided herein, all overtime hours as defined in this Section

> shall be compensated at a rate of pay equal to time and one-half the regular rate of pay of the member for all work authorized. Overtime is defined to include any time worked in excess of eight (8) hours in any one day or on any one shift or in excess of forty (40) hours in any calendar week, starting time or subsequent to the assigned quitting time. All hours worked beyond the workweek of five (5) days shall be compensated at the overtime rate commencing on the sixth day of work.

Bargaining History and Past Practice

Over the past several years, the provisions of Article V have been the subject of negotiations between CSEA and the District, but the language has remained unchanged from that found in predecessor CBAs.

In November 1987, the parties met concerning the hours of a unit employee with a split assignment. CSEA felt that the employee had excessive "lag-time," in other words, "time off the clock" during her workday. Following this meeting, CSEA agreed with the District's rationale for maintaining the existing "lag time" providing that the employee received the proper amount of assigned hours per day.

There is considerable evidence in the record of a past practice in the District of temporarily modifying the work schedules of maintenance, grounds and custodial employees during the summer recess and holiday breaks. During these periods, the employees have typically worked from 6 a.m. to 2:30 p.m. The schedule during the regular school year and at the year-round school is typically 7 a.m. to 3:30 p.m, except for custodial employees assigned to an afternoon shift. However, Richardson

was unaware of a work schedule change for maintenance and grounds employees assigned to home football games as was done in September 1992.

On one occasion within the past two years, the hours of two maintenance employees were adjusted so that they started work very early in the morning to make necessary repairs to a malfunctioning air conditioning system.

In March 1991, the starting and ending times for most custodial employees on the afternoon shift were modified during the Christmas break to standardize their hours. During summer recess, occasionally custodians who normally work the afternoon shift move to the day shift temporarily and then return to their regular shift during the school year.

One school, Hyatt Elementary (Hyatt), has a year-round program. The program is divided into four separate tracks with one track "off schedule" at designated periods during the year.

The schedules at Hyatt for instructional aide during school years 1990-91 through 1992-93 show that changes were made in the starting and ending times for some employees, depending upon the instructional needs of the track to which the aide was assigned.

The starting and ending times for bus drivers are frequently adjusted, especially at the beginning of the school year when the bus routes and schedules are being worked out. In school year 1991-92, approximately 100 such changes were made to accommodate the busing schedules. With the exception of the case at issue,

none of these changes, however, involved a change of the drivers' basic workweek of Monday through Friday.

ISSUES

Whether the District violated section 3543.5(a), (b) and (c) when it changed:

1. The work schedule of maintenance and grounds employees assigned to cover home football games;

2. The hours of two bargaining unit positions; and

3. The workweek of bus drivers assigned to weekend field trips?

DISCUSSION

I. Legal Principles Relevant to Unilateral Actions

To establish a prima facie case of a unilateral change, the charging party must demonstrate facts sufficient to establish: (1) the employer breached or altered the parties' written agreement or previous understanding, whether that understanding is embodied in a contract or evidenced from the parties' past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit member's terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); Pajaro Valley Unified School District (1978) PERB

Decision No. 51 (Pajaro); Davis Unified School District, et al. (1980) PERB Decision No. 116.)

An employer makes no unilateral change, however, where the action taken 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 pattern of changes in employment." (Pajaro.) In determining whether an employer's action constituted a unilateral change, the trier of fact may interpret terms of a collective agreement or examine the established practice. (Pajaro; Rio Hondo Community College District (1982) PERB Decision No. 279.)

Absent a valid defense, unilateral actions taken by an employer without providing the exclusive representative with notice and an opportunity to negotiate on proposed changes of matters within the scope of representation constitutes a refusal to negotiate in good faith in violation of section 3543.5(c). (San Mateo County Community College District (1979) PERB Decision No. 94.)

It is undisputed that the subject of "hours of employment" is a negotiable topic under EERA.[5] However, "hours of employment" is not limited to the total number of working hours required of employees. It includes what days of the week and

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[5]Section 3543.2 provides, in relevant part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and condition of employment....

hours of the day are to be worked. (Saddleback Community College District (1984) PERB Decision No. 433.) Thus, a decision to change work schedules, workweek, or the number of hours per day assigned to employees, and the effects thereof, are negotiable subjects of bargaining. (Pittsburg Unified School District (1982) PERB Decision No. 199; North Sacramento School District (1981) PERB Decision No. 193.)

Here, the District defends its unilateral actions by maintaining that the changes of hours challenged by CSEA were consistent with a long-standing practice of rearranging employee's hours to meet its operational needs. Additionally, it asserts a contractual right, based on the management rights language of Article V, to make such changes without further negotiations with CSEA.

PERB has adopted the standard for waiver used by the National Labor Relations Board (NLRB), which requires that a waiver of statutory rights be "clear and unmistakable." A waiver will not be lightly inferred. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Placentia Unified School District (1986) PERB Decision No. 595.)

In resolving whether a waiver of a course of action or bargaining rights was "clear and unmistakable," express contractual terms as well as evidence of negotiating history reflecting a conscious abandonment of the right to bargain over a particular subject can be examined. (Palo Verde Unified School District (1983) PERB Decision No. 321.)

The legal principles discussed above will be applied in analyzing the facts of each case.

II. A. Unilateral Change of the Work Schedule for Football Games (LA-CE-3256)

Although the parties have contractual provisions pertaining to the work schedule of unit employees, the language of Article XVIII does not specify a particular shift or work schedule for maintenance and grounds employees. However, there was an established policy for these employees.

Prior to September 1, 1992, the regular work hours for maintenance and grounds employees were either 7 a.m. to 3:30 p.m. or 6 a.m. to 2:30 p.m, including a one-half hour uncompensated lunch break. Also historically, during the football season at San Jacinto High School, maintenance and grounds employees volunteered to work the home football games as overtime assignments beyond their regular eight hour workday.

Bell's September 1, 1992, memo changed this practice in several respects. First, the change substantially altered the starting and ending times for the employees on the days that they were assigned to work the games. Their hours on game days were 12 noon to 9 p.m. Next, this change lengthened the usual lunch period for the employees from thirty minutes to one hour. Since lunch breaks are uncompensated time, the additional thirty minutes represented an extension of the affected employees' regular workday on an uncompensated basis. Finally, it removed the voluntary nature of assignments to home football games by specifically designating the employees who were to work each

game. Thus, the District's September 1 action represented a substantial departure from the established practice relative to the work schedules of maintenance and grounds employees assigned to work home football games.

The District does not deny that it took the September 1 action without giving prior notice to CSEA. The parties engaged in after-the-fact discussions, during which CSEA raised, among other things, the negotiability of the hours issue. However, the District refused to rescind the policy or return to the established practice with respect to the overtime issue.

The District argues that the since the September 1, 1992, change in the employees' work schedule was a temporary arrangement, it did not represent a change of policy. It is the "effect" of an employer's unilateral action, not necessarily its period of duration, that determines whether it constitutes a change of policy.

During the two-month period that the football game work schedule policy existed, it clearly had a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment. For example, skilled maintenance worker Spence, who had regularly worked home football games on an overtime basis for several years prior to September 1992, averaged five hours of overtime per game before September 1992. He and two other unit members worked the games as scheduled on September 16 and November 6, 1992. Each employee received one to two hours of overtime compensation per day. Other than Spence,

Avalos and Leavitt, the record does not reveal the exact number of additional maintenance and grounds employees impacted by the District's September 1, 1992, action. However, the Board has determined that a unilateral change, to be found unlawful, need not affect every member of the unit. (See Jamestown Elementary School District (1990) PERB Decision No. 795.) In this case, the District's action impacted unit members' hours and wages. The change of work schedule for those employees assigned to work the football games resulted in a change of hours; and for those employees who did work the different schedule, a loss of income in the form of overtime compensation. (See Lincoln Unified School District (1984) PERB Decision No. 465.)

Upon these facts, it is concluded that the District's change of the work schedule of maintenance and grounds employees was a unilateral action affecting wages and hours, matters within the scope of representation. Absent a valid defense, the change was a failure per se to negotiate in good faith and a violation of section 3543.5(c). An employer's failure to meet and negotiate in good faith with an exclusive representative, when obligated to do so, violates the rights of both the exclusive representative and the employees it represents as set forth in sections 3543.5(b) and (a).

B. District Defenses

The District's primary defense to this unilateral change allegation is that it's action was consistent with a long-standing practice of rearranging the hours of maintenance and

operations employees to meet its operational needs without negotiating with CSEA prior to such changes in hours.

The evidence shows that the District has had a historic and accepted practice of modifying the starting and ending times for maintenance and operation employees during recess periods such as summer recess or holiday breaks. There is also evidence that the work schedules of some maintenance and grounds employees have been modified on a short-term basis to accommodate a situation requiring immediate or urgent action such as air conditioner repair. Some of these schedule modifications were made at the request of the employees themselves.

However, there is no evidence of an instance prior to September 1, 1992, where the District altered these employees' work schedule to accommodate scheduled athletic events. Nor is there any indication of a prior instance where employees were assigned to work home football games, other than on a voluntary basis. This conclusion is supported by Richardson's acknowledgement that during his 22 years of employment with the District, he has no knowledge of the District's ever altering the employees' starting and ending times in conjunction with their assignments to work school athletic events.

The District has thus failed to establish that its action regarding the football schedule was the same type of schedule modifications it had made in the past. It does not meet the "regular and consistent" past pattern test required by Pajaro. The past practice defense is therefore rejected.

The fact that the District has previously changed work schedules of maintenance and operations employees without bargaining does not preclude CSEA in this instance from effectively demanding to bargain over the District's September 1992 action. "[A] union's acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times." (See Johnson-Bateman Co. (1989) 295 NLRB No. 26 [131 LRRM 1393].)

C. Contractual Waiver

The District next asserts that it has the authority to arrange the hours of its employees to meet its operational needs on the basis of the authority reserved to it in the management rights language clause found in Article V. Specifically, it argues that the terms "to determine the times and hours of operation . . . and to assign . . . employees . . ." gives it the contractual right to unilaterally change employee's assigned hours as it deems appropriate for operational needs. CSEA and the District have continuously disputed the District's interpretation of this language.

Even accepting the District's assertion of managerial prerogative, the District's action cannot be excused on the basis of contractual waiver. The terms "times and hours of operation" are not necessarily synonymous with the employees' starting and ending times, i.e., the work schedule of individual employees. As noted by the Board in Davis Joint Unified School District (1984) PERB Decision No. 393,

> [T]he subject of hours, even in its most literal sense, refers to the question of when employees will work and when they will not . . . .

Here, the language relied on by the District does not expressly address the hours that its employees will work or when they will not.

A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights. (See Dubuque Packing Co. (1991) 303 NLRB No. 66 [137 LRRM 1185].) Since the language of the Article XVIII does not address specific starting and ending times for unit members, it is found that there is no "clear and unmistakable" contractual waiver by CSEA.

D. Bargaining History

In the absence of express contractual language evincing a waiver of bargaining rights, the parties' history may also be examined for evidence of a waiver of such right.

There is scant evidence of negotiations regarding Article V.

In light of a complete absence of any evidence that the parties discussed or came to an understanding about the meaning and potential implications of the management rights clause within the context of the hours provision, in particular, during the 1986-87 and 1987-88 negotiations, it cannot be inferred that CSEA waived its right to bargain about the employer's change of unit members' work schedule.

For all the reasons discussed above, it is concluded that the District has failed to establish a defense that justifies or excuses its unilateral action of September 1, 1992.

III. Unilateral Change in Hours Assigned to the Library Technician and Health Clerk Positions (LA-CE-3289)

A. Positions of the Parties

CSEA contends that the District implemented a unilateral change in the number of hours assigned to two bargaining unit positions, namely the library technician and the health clerk positions at San Jacinto Elementary School, without a justifiable defense to its actions.

The District maintains that it did not change the hours of the existing vacant positions. Instead it exercised its managerial prerogative to create new positions in an existing classification, and to unilaterally determine the number of hours assigned to each newly-created position.

The District also asserts that the management rights clause of the CBA gives it the contractual right to make assignments and to determine the hours and times of its classified workforce within the parameters set by Article XVIII.

B. Scope of Representation

A threshold issue presented here concerns a determination of the exact nature of the District's "classification." This determination relates to whether or not the District's action concerned a matter within the scope of representation. If, as the District asserts, it merely created new positions in an existing classification and allotted hours different from those allotted to the existing positions, then the District's action was within the scope of management prerogative and, therefore, not negotiable. However, the effects of its action may have been

negotiable if it impacted matters within the scope of representation. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322.)

In a number of decisions, PERB has held that the level of services that an employer decides to provide is not a negotiable subject of bargaining. (See, e.g., Mt. San Antonio Community College District (1983) PERB Decision No. 297, at p. 3; Davis Joint Unified School District, supra. PERB Decision No. 393, at pp. 26-27.) Thus, if the District (1) left the existing library technician and health clerk positions vacant, (2) created new positions bearing the same classification titles, and (3) determined that the number of hours per day allotted to these positions were to be different from the hours of the vacant positions, its action would have been an exercise of managerial prerogative.

The only evidence supporting the District's claim of newly-created positions was the testimony of Richardson, the District director of personnel services. However, on cross-examination, Richardson admitted that both "new" positions are located at the same school site as the vacant positions. In addition, he admitted that the District made no change in title, duties, or salaries of the employees hired to fill the "new" positions, nor did the governing board or District administration take any other action which would indicate the creation of new positions. Although Richardson's testimony was unrebutted, it also was not

corroborated by more convincing evidence of the creation of new positions.

For these reasons, it is concluded that the District has not carried its burden of showing that it established either a new librarian technician or a health clerk position in October 1992 at San Jacinto Elementary School. Instead, it is found that the District unilaterally changed the hours of the positions which were temporarily vacant.

It is undisputed that the District took these actions without prior notice of CSEA. Even in the face of CSEA's protest about the negotiability of any change in hours of unit positions prior to the positions being filled, the District refused to negotiate the subject or to rescind its action.

PERB has never directly decided the issue of whether modification of the hours of a vacant unit position is within the scope of bargaining.[6] Therefore, the relationship of this subject to other PERB decisions concerning scope of representation will be discussed.

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[6]In Oakland Unified School District (1983) PERB Decision No. 367, the Board rejected the employer's contention that a reduction in the hours of positions was distinguishable from the effects on employees by finding that incumbent employees were affected by the decision. In South San Francisco Unified School District (1983) PERB Decision No. 343, the Board found a violation for the employer's unilateral change in hours of a position based upon a contract prohibition against such change. In Eureka City School District (1985) PERB Decision No. 481, the employer contended that because affected employees could transfer to other positions, it had reduced the hours of "positions" rather than the hours of "employees." The Board rejected this argument and found a violation based on the unilateral reduction of the hours of an incumbent employee.

PERB has held that an employer's decision to abolish a position in order to discontinue a service is a management prerogative not subject to bargaining. (Alum Rock Union Elementary School District, supra, PERB Decision No. 322.) However, the effects of such decisions may be negotiable. (Healdsburg Union High School District, et al. (1984) PERB Decision No. 375.)

However, in Rialto Unified School District (1982) PERB Decision No. 209, the Board indicated that the withdrawal of "actual or potential work" from the unit is a withdrawal of wages and hours associated with the work, affects the potential for promotion for unit employees, and weakens the collective strength of employees in dealing with the employer. In balancing employees' interests against management prerogative, the Board has found these types of decisions nonessential to the employer's mission. They involve economic considerations without significant change in the level or kinds of services to be performed.

Relying upon the precedent cited above, it is concluded that a reduction or other change in hours of a vacant position is a matter within the scope of bargaining as set forth in section 3543.2(a) inasmuch as it affects the "collective interests" of bargaining unit members. In this case, the net effect of the District's changes was an actual diminution of unit work.

Absent a valid defense, the District's unilateral change in a matter within the scope of representation without prior

notification to CSEA and an opportunity to bargain the proposed change will amount to a violation of section 3543.5(c).

C. District Defenses

1. Past Practice.

The record does not factually support the District's claim that it has an established practice of leaving unit positions vacant and creating new positions in the same classifications at different hours. Only one instance of this alleged practice was documented. An eight-hour clerk-typist position at Hyatt Elementary School was vacated in the 1988-89 school year. A new seven-hour position was created at the same site and filled at less hours and a different salary range. CSEA apparently did not challenge this action.

A definitive past practice cannot be established where the occurrences of the claimed practice are isolated and remote in time. (Pittsburg Unified School District, supra, PERB Decision No. 199.) Thus, a one-time occurrence of a reduction in hours of a vacant position does not establish that hours of vacant positions have been changed unilaterally as a past practice. This defense is therefore rejected.

2. Contractual Waiver.

Clearly the management rights clause in Article V gives the District the right "to determine the kind and levels of services to be provided." Nonetheless, for the same reasons discussed above in Part II, section C, supra, it is concluded that the generalized provision of this clause do not authorize the

District to adjust hours of vacant unit positions to suit its operational needs without first providing notice to CSEA and an opportunity to negotiate over the proposed change. Nor does any language in Article XVIII authorize the District to take such action.

Therefore, it is concluded that the District violated section 3543.5(c) by failing and refusing to negotiate changes in hours allotted to two bargaining unit positions. This conduct concurrently violated the section 3543.5(b) rights of CSEA to represent its members and interfered with the employees' exercise of their right to representation proscribed by section 3543.5(a).

IV. Unilateral Change of the Bus Driver's Workweek (LA-CE-3295)

CSEA maintains that the District changed the workweek of the bus drivers assigned to weekend field trips to eliminate overtime hours earned by drivers during such field trip assignments. This change of policy, it is argued, not only affected the hours of unit employees, but also their wages.

The District argues that since the complained-of change was implemented on only one occasion, its action did not amount to a change of policy. If anything, it was nothing more than a breach of contract, which could have been addressed through the contractual grievance machinery.

Alternatively, the District argues that the change of workdays for the bus drivers was consistent with its practice of routinely adjusting bus driver's hours and days of work to accommodate its operational need.

As noted above, to establish a prima facie case of an impermissible unilateral change, a charging party is required to present facts sufficient to establish that the change of a matter within the scope of representation amounts to a change of policy, having a generalized affect or continuing impact upon unit members' terms and conditions of employment. (Grant.) The employer's action will first be examined vis-a-vis CBA provisions concerning the employees' hours and overtime.

Section 18.1 provides that an employee's normal work schedule "shall not exceed five consecutive days, eight hours per day, nor forty hours per week." This provision also allows for an extension of the workweek on an overtime basis. Section 18.5 defines what constitutes overtime and its rate of pay. It also requires that

> all hours worked beyond the workweek of five days shall be compensated at the overtime rate commencing on the sixth day of work.

The normal workweek for bus drivers was the five consecutive days from Monday through Friday. The past few years prior to October 27, 1992, most drivers worked an average of six and three-quarters to seven hours per day. Bus drivers assigned to work on field trips usually earned some overtime hours and were paid at the rate of pay provided for in section 18.5.

The directive from transportation supervisor Austin on October 27, 1992, indicated that drivers assigned to weekend field trips would have to take a day off the preceding week. The day worked during the weekend field trip assignment thus would

become a part of the employee's normal workweek, instead of an overtime assignment. Nothing in section 18.1 or 18.5 authorizes the District to extend the workweek on this basis. Thus, this change in the employee's workweek appears to have been a repudiation of the hours and overtime provisions of the CBA.

In Grant, and other cases, the Board has addressed the question of when an employer's unilateral breach of a contract amounts to a "change of policy." The PERB precedent discussed in Trinidad Union Elementary School District/Peninsula Union School District (1987) PERB Decision No. 629 (Trinidad) is instructive in this area. In Trinidad, PERB decided that the determinative factor is whether or not the change had a "material and significant effect or impact upon the terms and conditions of employment." (Trinidad, at p. 9, citations.) The Board pointed out, that in order for this standard to be met,

> [T]here must be some cogent evidence that changes have happened or will happen, which have significantly changed or will significantly change employee benefits. (Trinidad, at p. 15, fn. 5; emphasis in original.)

The directive issued by Austin was intended to institute a new policy with respect to the workweek and opportunity for overtime compensation for all bus drivers in the unit who were assigned to weekend field trips. The change was also intended to affect the employee's wages by requiring them to take an unpaid day during their normal workweek and work a weekend assignment at their regular hourly wage rate. Although this change was only in effect for approximately three weeks, and affected just two unit

employees, those two employees (one of whom was Austin herself) suffered a loss of hours and wages on November 10, 1992, and a loss of overtime compensation on November 14, 1992, the day of the field trip assignment. In light of this evidence, it must be concluded that the District's action amounted to a change of policy of material impact upon terms and conditions of employment of unit employees.

The District instituted this change of policy without notice to CSEA or an opportunity to negotiate over the subject prior to the implementation of the change. Thus, absent a valid defense, it is concluded that a violation of section 3543.5(c) occurred.

A. District Defenses

1. Deferral to Arbitration.

In its answer, the District asserted, as an affirmative defense, that the subject matter of this charge is deferrable to the contractual grievance machinery. Although the District did not file a motion to dismiss either before or during the hearing on the grounds of deferral, it argued in its post-hearing brief that the matter is subject to the grievance machinery since Marshall filed a grievance challenging the change of her workdays.

Although Marshall testified that she thought a grievance was going to be filed, there is no evidence that a grievance was filed by, or on behalf of, Marshall during the time in question.

Article VII of the CBA contains the provisions of the grievance procedure which culminates in final and binding

arbitration. Section 7.1.1 of the article defines a "grievance" as

> . . . a claim by one or more employees that there exists a dispute regarding the interpretation or application of a provision of this Agreement.

Section 3541.5(a)(2) provides that PERB is precluded from issuing a complaint

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

In determining whether a charge or portion thereof must be deferred to arbitration, it must be initially ascertained whether the disputed issue is covered by the parties' contractual grievance procedure, and whether those procedures culminate in binding arbitration. (Lake Elsinore School District (1987) PERB Decision No. 646 (affd. nonpub. opn.) Elsinore Valley Education Association, CTA/NEA v. PERB/Lake Elsinore School District E005078, 4th Dist. Court of Appeal; Los Angeles Unified School District (1990) PERB Decision No. 860.) Although PERB has no authority to enforce a CBA, it does have the authority to interpret a contract to determine if an unfair practice has been committed. (Grant.)

It has already been determined that sections 18.1 and 18.5 of the CBA cover the normal workweek and overtime provisions for bus drivers. Therefore, to the extent that the District changed two drivers' workweeks and denied them the opportunity to earn

overtime compensation during work at a weekend field trip, it engaged in conduct violative of those provisions of the CBA.

However, PERB has refused to defer a charge to arbitration where the subject matter is arguably covered by the grievance machinery of the CBA, but the CBA does not grant authority to the exclusive representative to file grievances in its own name. (Inglewood Unified School District (1991) PERB Order No. Ad-222.) Under the language of Article VII, CSEA apparently lacks the right to file a grievance in its own name. Thus, CSEA lacks standing to file a grievance in this matter. The precedent established by Inglewood is applicable to this situation. Therefore, it is concluded that the charge is not subject to pre-arbitration deferral.

2. Past Practice.

Again the record shows that the District has had a long-standing and accepted practice of modifying the hours per day for bus drivers due to the fluctuations of student attendance and the accompanying changes of bus routes. However, no evidence was presented to show that the District had ever changed the workdays of bus drivers in connection with weekend field trip assignments.

The record thus lends no support to the District's claim that the changes at issue here were consistent with its long-standing practice of changing the hours of bus drivers to comport with the needs of its transportation services. This defense lacks merit and it is rejected.

CONCLUSION

Based on the entire record in this case, it has been concluded that the District breached its obligation under EERA to negotiate when it unilaterally (1) changed its established policy regarding the work schedule of maintenance and grounds employees assigned to work home football games, (2) changed the hours allotted to the library technician and health clerk positions at San Jacinto Elementary School, and (3) changed the workweek of bus drivers assigned to weekend field trips. Based upon this conduct, it has been found that the District violated section 3543.5(c). This conduct also interfered with CSEA's right to represent its members in their employment relations with the District, in violation of section 3543.5(b). The same conduct also interfered with individual unit members' rights to be represented by their chosen representative in their employment relations with the District, in violation of section 3543.5(a).

REMEDY

Section 3541.5(c) gives the Board 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 with CSEA when it (1) unilaterally changed its established policy regarding the work schedule of maintenance and grounds employees assigned to work home football games; (2) unilaterally changed the hours

allotted to the library technician and health clerk positions at San Jacinto Elementary School; and (3) unilaterally changed the workweek of bus drivers assigned to weekend field trips. This conduct violated section 3543.5(c), (b) and (a).

CSEA seeks an order that the District be required to cease and desist from its unlawful conduct and that affected unit members be made whole for any loss of wages and benefits, with interest.

The ordinary remedy in unilateral change cases is to order the employer to cease and desist from conduct found to be in violation of the Act. PERB also normally orders the restoration of the status quo ante in order to ensure that the employer does not benefit from its wrongful act. Since the District has already restored the work schedules for maintenance and grounds employees and bus drivers that were in effect prior to the unilateral changes, it is unnecessary to order a return to the status quo ante for these employees. Restoration of the status quo is appropriate for the library technician and health clerk positions at San Jacinto Elementary School. This would require that the library technician position be restored to its prior allotment of eight hours per day and the health clerk position restored to five hours per day. Since the change in hours of these two positions was done prior to the positions being filled in or about late October 1992, the current employees, if any, had no "vested" interest in the previous staffing levels of these positions. Therefore, restoration of the status quo is

conditioned upon the affirmative desire of the affected employees for such, as expressed through CSEA, their exclusive representative. (Unico Apparel, Inc. (1974) 215 NLRB 89 [88 LRRM 1238].) In addition, the District will be ordered, upon request, to negotiate changes in the hours allocated to these positions with CSEA, the exclusive bargaining representative of the classified unit.

It is also appropriate to make employees whole for any losses, economic or otherwise, suffered as a result of the District's unilateral actions. Interest at the rate of 7 percent per annum shall be paid on economic losses. (See San Francisco Unified School District v. San Francisco Classroom Teachers Association, CTA/NEA (1990) 222 Cal.App.3d 146- [272 Cal.Rptr. 38].)

In the calculation of the amount of backpay due affected maintenance and grounds employees, the backpay should be based on the difference between the number of overtime hours each employee earned on the day(s) they worked home football games between September 11 and November 6, 1992, and the average amount of overtime they earned for such work prior to the unilateral change. To determine the proper number of hours, the District shall use the three years prior to the change of the football work schedule as a guide. The District shall total the number of overtime hours worked by each affected maintenance and grounds employee during home football games in 1989-90, 1990-91 and 1991-92 and then divide by three. This calculation will produce the

average number of extra hours worked in this three year period. The District shall then divide the average number of hours evenly among all maintenance and grounds employees who worked home football games in the fall of 1992. These employees are to be paid the amounts of money they would have received in the fall of 1992 had they worked the calculated number of hours.

Inasmuch as the football game assignments were ordinarily worked as overtime, the amount of money paid to each employee should be computed at the overtime rate, offset by the number of hours for which the employee received overtime compensation for games worked between September 11 and November 6, 1992. The amount due each employee shall be augmented by interest at the rate of 7 percent per annum.

With respect to the change in workweek of bus drivers Marshall and Austin, the District shall compensate them for the day of regular wages lost on November 10, 1992, offset by the number of hours of regular pay received on November 14, 1992. The same formula described above for calculating backpay for the overtime hours earned by the bus drivers during weekend field trips shall be used to calculate compensation for the elimination of Marshall's and Austin's overtime hours on November 14, 1992.

However, it is inappropriate to order a make whole remedy for the employees hired after October 1992 to the library technician and health clerk positions at San Jacinto Elementary School. Compensation normally awarded to affected employees would constitute an unwarranted windfall for the person employed

in the library technician position. As noted above, these employees voluntarily accepted the work and had no "vested" interest in the previous staffing levels for these positions.

Both PERB and the NLRB have recognized that they are not required to order backpay awards without considering the circumstances of each case. (Solano Community college District (1982) PERB Decision No. 219; Shepard v. NLRB (1983) 459 U.S. 344 [112 LRRM 2369].) Therefore no backpay is awarded.

Disputes regarding implementation of the foregoing remedy will be resolved through the Board's compliance procedure.

It is 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, will provide employees that the District has acted in an unlawful manner, has been ordered 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 a 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

Based upon the foregoing findings of facts, conclusions of law, and the entire record in this case, it is found that the San Jacinto Unified School District (District) violated Government Code section 3543.5(c) of the Educational Employment Relations

Act (EERA) by: (1) unilaterally changing its established policy regarding the work schedule of maintenance and grounds employees assigned to work home football games in the fall of 1992; (2) unilaterally changing the hours allotted to the library technician and health clerk positions at San Jacinto Elementary School; and (3) unilaterally changing the workweek of bus drivers assigned to weekend field trips in November 1992. By the same conduct, it has been found that the District also violated EERA section 3543.5(b) and (a).

Pursuant to section 3541.5(b) 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 California School Employees Association and its Chapter #189 (CSEA), as the exclusive representative of the District's classified unit employees, by making changes in the employees hours and other terms and conditions of employment within the scope of representation;

2. By the same conduct, denying to CSEA rights guaranteed by EERA, including the right to represent its members; and further

3. By the same conduct, interfering with employees in the exercise of rights guaranteed by EERA, including the right to be represented by their chosen representative.

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

1. In the future, provide notice to CSEA of any proposed decision to change the hours or other terms and conditions of employment of unit members, including the hours of existing unit positions and, upon request, meet and negotiate over the decision and the effects thereof.

2. Pay to all maintenance and grounds employees who worked home football games in the fall of 1992, lost income resulting from the change of their work schedule. The amount of income due each employee shall be calculated as follows: The District shall total the number of overtime hours worked by each affected maintenance and grounds employee during home football games in 1989-90, 1990-91 and 1991-92 and then divide by three. This calculation will produce the average number of extra hours worked in this three year period. The District shall then divide the average number of hours evenly among all maintenance and grounds employees who worked home football games in the fall of 1992. These employees are to be paid the amounts of money they would have received in the fall of 1992 had they worked the calculated number of hours. The amount due each employee shall be augmented by interest at the rate of 7 percent per annum.

3. Pay to bus drivers Ethel Marshall and Teresa Austin lost income resulting from the change of their workweek in November 1992. the amount of income due each of these drivers shall be calculated as follows: The District shall compensate them for the day of regular wages lost on November 10, 1992,

offset by the number of hours of regular pay received on November 14, 1992. The same formula described above for calculating backpay for the overtime hours earned by the bus drivers during weekend field trips shall be used to calculate compensation for the elimination of Marshall's and Austin's overtime hours on November 14, 1992. The amount due each employee shall be augmented by interest at the rate of 7 percent per annum.

4. Upon the request of CSEA, restore the library technician and health clerk positions at San Jacinto Elementary School to eight hours and five hours per day, respectively.

5. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the 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 insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Los Angeles 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.)

W. JEAN THOMAS
Administrative Law Judge