STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANGELS CAMP EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. MARK TWAIN UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	Case Nos. SA-CE-2014-E SA-CE-2017-E PERB Decision No. 1548 September 26, 2003

Appearances: California Teachers Association by Diane Ross, Attorney, for Angels Camp Educators Association, CTA/NEA; Kronick, Moskovitz, Tiedemann & Girard by Robert A. Rundstrom, Attorney, for Mark Twain Union Elementary School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Angels Camp Educators Association, CTA/NEA (Association) to a proposed decision (attached) of the administrative law judge (ALJ). The ALJ held that the Mark Twain Union Elementary School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally increasing the hours of work for teachers. As a remedy, the ALJ

[1] EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 states, in pertinent part:

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

ordered the District to provide the affected teachers compensatory time off (comp time). The Association excepts to the proposed remedy and argues that the ALJ should have awarded backpay instead of comp time.

After reviewing the entire record in this case, including the proposed decision, the Association's exceptions, the informational brief of the California Federation of Teachers[2], and the District's responses, the Board modifies the proposed remedy as discussed below.

BACKGROUND

Since neither party excepts to the ALJ's finding that the District violated EERA, the only background necessary is the ALJ's ruling, which is as follows:

> The District has been found in violation of its duty to meet and negotiate in good faith by unilaterally increasing the work hours of teachers. The District increased the work hours for teachers during the 2000-2001 school year by: (1) requiring teachers at Mark Twain Elementary School to report at 7:30 a.m., 10 minutes earlier than their regular start time, every Monday from the commencement of the school year until October 6, 2000; (2) lengthening the workday for all teachers by lengthening the instructional workday, a change that had the effect of requiring teachers to remain at school 8 to 10 minutes longer every day of the school year; (3) increasing from six to seven the number of instructional periods for the 7th and 8th grade classes at Mark

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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. 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.

[2] The Board granted a request by the California Federation of Teachers, AFT, AFL-CIO to submit an informational brief on September 6, 2002.

> Twain, a change that required teachers to teach an additional subject thereby lengthening their workdays by 10 to 30 minutes per day. [Proposed dec. at p. 27.]

PROPOSED REMEDY

To remedy the violation of EERA, the ALJ ordered the District to "make whole" any teachers who were affected by the change in hours. The ALJ then conducted a comprehensive review of PERB cases to determine whether the "make whole" remedy should consist of comp time or backpay. After reviewing the relevant cases, the ALJ noted that early PERB cases favored the backpay remedy. (San Mateo City School District (1984) PERB Decision No. 375a (San Mateo); Rio Hondo Community College District (1982) PERB Decision No. 279 (Rio Hondo); Oak Grove School District (1986) PERB Decision No. 582 (Oak Grove).) However, more recent cases have favored a comp time remedy. (Healdsburg Union Elementary School District (1994) PERB Decision No. 1033 (Healdsburg); Cloverdale Unified School District (1991) PERB Decision No. 911 (Cloverdale); Corning Union High School District (1984) PERB Decision No. 399 (Corning).) In one case, PERB ordered either comp time or backpay. (Fountain Valley Elementary School District (1987) PERB Decision No. 625.)

Only in Corning did the Board discuss the rationale underlying its remedial order. The ALJ quoted the following passage from Corning:

> . . . while hours can be properly translated into dollars, the direct and immediate result of the unilateral change was that the teachers were required to work extra hours. In our view, therefore, the most appropriate way to make the affected employees whole would be by ordering the District to afford the teachers a corresponding amount of time off. [Corning at p. 10.]

Based on the rationale expressed in Corning, and the fact that a majority of decisions have awarded comp time, the ALJ ordered the District to provide the affected teachers comp time. During the hearing, the Association had objected to any award of comp time because it "ignores the reality of how teachers work." Specifically, the Association argued that providing teachers comp time would create more work for teachers because they would have to spend time preparing lesson plans for substitute teachers. In order to avoid this problem, the ALJ ordered that the comp time be granted as an across-the-board reduction of the work day. Using this approach, the ALJ reasoned that there would be no need for substitute teachers.

The ALJ then ordered the District and Association to meet and confer over a schedule for the shortened work days. In the event negotiations were unsuccessful, the ALJ provided that the Regional Director "shall direct the time and manner in which affected employees are to receive compensatory time off." As an alternative, the ALJ provided that the District could elect to provide backpay to the teachers.

ASSOCIATION'S EXCEPTIONS

The Association asserts that PERB has awarded comp time and backpay in almost equal proportion and that there is no clear standard on which remedy is appropriate. The Association urges the Board to establish backpay as the appropriate remedy for unilateral increases in teacher work hours. In support of its position, the Association cites to Atlas Tack Corp. (1976) 226 NLRB 222 [93 LRRM 1236] enforced 559 F.2d 1201 (1st Cir. 1977) and Corrections Corp. of America (2000) 330 NLRB 663 [166 LRRM 2135] for the proposition that backpay is the preferred remedy under the National Labor Relations Act. The Association also asserts that every state labor relations board that has considered the issue has also awarded backpay. In

addition, the Association argues that backpay is required because the Fair Labor Standards Act (FLSA) generally prohibits the use of comp time.

Finally, the Association argues that comp time is an "ineffective and undesired remedy." According to the Association, comp time does not make teachers whole because it ignores the additional burdens placed on teachers when a substitute is required and ignores the fact "that teachers dislike being absent from their classrooms." The Association concedes that under the proposed remedy substitute teachers will not be required. However, the Association maintains that there will still be additional work associated with the shortened days because teachers will have to "rework their lesson plans." Thus, the Association argues that only backpay will make them whole.

DISTRICT'S RESPONSE

The District argues that there are strong public policy reasons for awarding comp time instead of backpay. First, "public policy dictates that school district funds should be used to further the education of its students." Thus, the District argues that PERB should minimize the fiscal impact of any remedial order. Next, the District notes that there is no evidence that it acted with animus or improper motive. Finally, the District argues that comp time is the best comprehensive remedy because it is available "tax-free," makes the teachers whole, and minimizes the fiscal impact on the District.

The District disputes the Association's assertion that comp time will result in more work for teachers. The District notes that the reduction in work hours will only be a matter of minutes which should not have any impact on the level of preparation required. Lastly, the District urges the Board to take into account the severe budget deficit facing public schools.

DISCUSSION

The Association correctly notes that early PERB cases awarded backpay as the remedy for unilateral changes in work hours. (San Mateo; Rio Hondo; Oak Grove.) In Oak Grove, the Board provided the following simple rationale for awarding backpay:

> However, it is appropriate to order the employees compensated for any additional time worked as a result of the District's unlawful action. When employees' worktime is increased without a proportionate increase in pay, the employees are being paid less per unit of time worked than bargained for. See, for example, Delano Union Elementary School (1982) PERB Decision No. 213a; Corning Union High School District (1984) PERB Decision No. 399. Thus, this remedy is not punitive, but compensatory. [Oak Grove at p. 30.]

Comp time was not awarded as a remedy until Corning. As noted by the ALJ, the Board in Corning concluded that comp time was an appropriate "make whole" remedy for a unilateral change in hours. More recent cases have continued to award comp time based on the Corning rationale. Although the Board in Corning awarded comp time, it is important to note that the decision did not stop there. Immediately after finding that comp time was an appropriate award, the Board continued:

> We direct the District to grant the seven harmed employees the amount of time off which comports with the number of extra hours each employee actually worked. <u>However, monetary compensation is a valid alternative measure of the harm suffered. Therefore, we direct that, if the District and the Association cannot agree on the manner in which the time off will be granted, the employees concerning whom there is no agreement shall receive monetary compensation commensurate with the extra hours worked.</u> Any harmed employee who no longer is employed by the District would be immediately compensated monetarily. (Corning at p. 10, emphasis added.)

Thus, Corning did not limit its remedial award to comp time. Rather, the Corning decision allows for the option of backpay if negotiations regarding comp time are unsuccessful. The

Board in Corning expressly stated that its remedial award, "incorporates two methods of accommodating for the [unilateral] change." (Corning at p. 10, emphasis added.) Accordingly, Corning is not accurately described as a "comp time" case. It is a more balanced approach that utilizes both comp time and backpay in an effort to "make whole" the affected employees.

In the proposed decision, the ALJ awarded comp time to the affected teachers and ordered the District and Association to negotiate over a schedule for shortened work days. However, the proposed decision does not provide for the option of backpay in the event negotiations are unsuccessful. Instead, the regional director of PERB is given the authority to "direct the time and manner in which affected employees are to receive compensatory time off."

While the Board agrees with the ALJ's award of comp time, the Board believes that the manner in which comp time is awarded should be a subject of negotiations. The Board also believes that teachers should have the option of backpay in the event negotiations over comp time are unsuccessful. As discussed below, such a remedy is most likely to "make whole" the affected teachers and satisfies the concerns of both the Association and District.

First, providing the option of backpay addresses the concerns of the Association that comp time may not "make whole" every affected teacher. Although the ALJ attempted to fashion a comp time remedy that would avoid the use of substitutes, the ALJ's remedy may not be satisfactory for all teachers. There are a variety of reasons why some teachers may be unable to take advantage of shortened work days. In these situations where negotiations are unsuccessful, the affected teachers should have the option of backpay. This provides affected teachers the remedy that best meets their individual situation.

Second, the Board's remedy also addresses the concerns of the District. Although the Board's decision provides for the option of backpay, the Association must first negotiate in good faith over comp time. If the District makes an effort to meet the concerns of the Association, it may find many teachers opting for the comp time remedy. Further, if the District is truly in dire financial straits, negotiations provide it the opportunity to avoid the financial impact of backpay by offering incentives to the affected teachers to select the comp time option.

In its exceptions, the Association objects to any award of comp time on the ground that its violates the FLSA and the California law. The Association cites to Section 207(o) of the FLSA and Labor Code section 204.3 for the proposition that employers are prohibited from paying employees comp time unless negotiated in a collective bargaining agreement. (29 U.S.C. sec. 207(o); Lab. Code, sec. 204.3.) However, these sections only address the use of comp time as payment for overtime hours. Teachers are exempt from the overtime requirements of the FLSA. (29 C.F.R. sec. 541.314(a); 8 Cal. Code Regs., sec. 11040(1)(B).) Accordingly, the Association's arguments must be rejected.

In responding to the Association's exceptions, the District argues that awarding backpay is improper because it did not act with animus or an improper motive. However, the District's intent is only relevant if the Board was imposing punitive damages, which are intended to punish. It is well-settled that the Board cannot order such damages. (State of California (Secretary of State) (1990) PERB Decision No. 812-S.) As discussed above, the backpay award is intended to compensate teachers for the injuries they suffered, not to punish the District. By definition, compensatory or "make whole" remedies are not considered

punitive. (Rest.2d, Torts, sec. 908; 6 Witkin, Summary of Cal.Law (9th ed. 1988) Torts, sec. 1327-28.) Accordingly, the Board may properly award backpay as a make whole remedy.

MODIFIED REMEDY

In conclusion, the Board modifies the proposed remedy as follows. The District shall make the affected teachers whole by providing them comp time, which at a minimum, comports to the extra hours that each affected teacher actually worked. The District and Association shall meet and negotiate over the manner in which the comp time is granted. The parties may consider, but are not required to adopt, the ALJ's proposed "across-the board" reduction in the school day as the manner in granting comp time.

In the event negotiations over the manner of granting comp time are unsuccessful, the affected teachers shall be entitled to backpay for the extra hours worked. Further, any affected teacher who is no longer employed by the District shall be entitled to backpay. All backpay awards shall include interest at seven (7) percent per annum. Any disputes over this order shall be submitted to the office of the general counsel.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Mark Twain Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) by unilaterally increasing the work hours of teachers in the following manner: (1) requiring teachers at Mark Twain Elementary School to report at 7:30 a.m., 10 minutes earlier than their regular start time, every Monday from the commencement of the school year until October 6, 2000; (2) lengthening the workday for all teachers by lengthening the instructional workday, a change that had the effect of requiring teachers to remain at school 8 to 10 minutes longer

every day of the school year; (3) increasing from six to seven the number of instructional periods for the 7th and 8th grade classes at Mark Twain Elementary School, a change that required teachers to teach an additional subject thereby lengthening their workdays by 10 to 30 minutes per day.

By changing the past practice without first meeting and conferring with the Angel Camp Educators Association, CTA/NEA (Association), the District failed to meet and negotiate in good faith in violation of section EERA section 3543.5(c). Because this action had the additional effect of interfering with the right of the Association to represent its members, the failure to meet and confer in good faith also violated EERA section 3543.5(b). Because the action had the further effect of increasing the work hours of teachers, the District's action violated EERA section 3543.5(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally increasing the hours of work for teachers;

2. Interfering with the right of the Association to represent its members; and

3. Interfering with the right of individual teachers to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, if the District has not already done so, reinstate the work schedule for teachers that existed prior to the commencement of the 2000-2001 school year.

2. Before the conclusion of the school year that follows the year in which this decision becomes final, grant to District teachers compensatory time off that at least equals the amount of additional time teachers were required to work during the 2000-2001 school year. The District shall meet and negotiate with the Association over the manner in which the compensatory time off is granted. If the District and Association are unable to reach agreement, the affected teachers shall be entitled to backpay for the amount of additional time each teacher was required to work during the 2000-2001 school year. Any affected teacher who is no longer employed by the District shall also be entitled to backpay. All backpay awards shall be with interest at the rate of seven (7) percent per annum.

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices to members of the certificated employee bargaining unit are customarily posted, 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 work days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento regional director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Members Whitehead and Neima joined in this Decision.

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. SA-CE-2014-E and SA-CE-2017-E, Angels Camp Educators Association, CTA/NEA v. Mark Twain Union Elementary School District, in which all parties had the right to participate, it has been found that the Mark Twain Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) by unilaterally increasing the work hours of teachers in the following manner: (1) requiring teachers at Mark Twain Elementary School to report at 7:30 a.m., 10 minutes earlier than their regular start time, every Monday from the commencement of the school year until October 6, 2000; (2) lengthening the workday for all teachers by lengthening the instructional workday, a change that had the effect of requiring teachers to remain at school 8 to 10 minutes longer every day of the school year; (3) increasing from six to seven the number of instructional periods for the 7th and 8th grade classes at Mark Twain Elementary School, a change that required teachers to teach an additional subject thereby lengthening their workdays by 10 to 30 minutes per day.

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

A. CEASE AND DESIST FROM:

1. Unilaterally increasing the hours of work for teachers;

2. Interfering with the right of the Angels Camp Educators Association, CTA/NEA (Association) to represent its members; and

3. Interfering with the right of individual teachers to participate in the activities of an employee organization.

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

1. Reinstate the work schedule for teachers that existed prior to the commencement of the 2000-2001 school year.

2. Before the conclusion of the school year that follows the year in which this decision becomes final, grant to District teachers compensatory time off that at least equals the amount of additional time teachers were required to work during the 2000-2001 school year. The District shall meet and negotiate with the Association over the manner in which the

compensatory time off is granted. If the District and Association are unable to reach agreement, the affected teachers shall be entitled to backpay for the amount of additional time each teacher was required to work during the 2000-2001 school year. Any affected teacher who is no longer employed by the District shall also be entitled to backpay. All backpay awards shall be with interest at the rate of seven (7) percent per annum.

Dated: _____

MARK TWAIN 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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ANGELS CAMP EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. MARK TWAIN UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NOS. SA-CE-2014-E and SA-CE-2017-E PROPOSED DECISION (3/14/02)

Appearances: Diane Ross, Attorney, for Angels Camp Educators Association, CTA/NEA; Kronick, Moskovitz, Tiedemann & Girard by Robert Runstrom, attorney for Mark Twain Union Elementary School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

In these consolidated cases, a union contends that a public school employer made a series of unilateral changes that affected the length of the teacher workday in the fall of 2000. The public school employer replies that most of the actions it took that year were consistent with the past practice and the one change it acknowledges involved a nonnegotiable matter.

This action was commenced on February 7, 2001, when the Angeles Camp Educators Association, CTA/NEA (Union), filed four unfair practice charges against the Mark Twain Union Elementary School District (District).[1] The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) followed on March 30, 2001, by issuing a complaint against the District.

[1]Also filed on the same day was case SA-CE-2015-E, which was settled and withdrawn on March 30, 2001, and case SA-CE-2016-E which was settled and withdrawn on April 27, 2001.

The complaint in case SA-CE-2014-E alleges that before August 17, 2000, it was the District's policy that teachers of grades 7 and 8 had no yard duty assignment and that teachers of grades 1 through 6 were assigned to one 10-to-15 minute period of yard duty for one semester each year. The complaint alleges that on August 17, 2000, the District changed this policy by assigning all teachers to work 10 to 20 minutes of yard duty every day.

The complaint in case SA-CE-2017-E alleges that on August 17, 2000, the District increased the amount of teacher/student contact time by 10 minutes for teachers of grades 1 through 6 and by 45 minutes for teachers of grades 7 and 8. The complaint alleges that on the same date, the District increased the teacher/student contact time for kindergarten teachers by 44 minutes at Mark Twain School and by 10 minutes at Copperopolis School. Finally, the complaint alleges that on August 17, 2000, the District increased the number of teaching periods for 7th and 8th grade teachers from six to seven.

By making these changes, the complaints allege, the District violated Educational Employment Relations Act (EERA) section 3543.5(c) and, derivatively, (a) and (b).[2]

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[2] Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> 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 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.

The District filed an answer to the complaint on April 19, 2001, admitting all jurisdictional facts but denying all other allegations. The cases were consolidated for hearing. On the motion of the Union, the complaint was amended at the hearing to add the allegation that on late start Mondays teachers were required to work "during their 30 minutes before school that had previously been duty-free time."[3]

The hearing was conducted in Angels Camp on December 4-5, 2001. With the filing of briefs, the matter was submitted for decision on February 21, 2002.

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k) of the EERA. The Union is an employee organization as defined in section 3540.1(d). At all times relevant, the Union has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's certificated employees. A collective bargaining agreement was in effect between the parties during the relevant period. However, it contains no provision that arguably prohibits the conduct at issue. The District operates two schools, Mark Twain for students in kindergarten through the 8th grade and Copperopolis for students in kindergarten through the 6th grade. Mark Twain is located in Angels Camp and has 28 teachers. Copperopolis is located in Copperopolis, about 14 miles from Angeles Camp, and has 10 teachers.

The contract between the parties requires teachers to be on campus 30 minutes before the start of the instructional day for students and to remain on the campus until 30 minutes

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

[3] See Reporter's Transcript, Vol. I, at pp. 92 through 94. In footnote 1 of its reply brief, the Union withdraws this amendment.

after the students are dismissed for the day. When they have no assigned duties, teachers have been free to use these two 30-minute periods as they desired. This has included preparing for class, grading papers, copying papers, recording grades, meeting with students and/or parents, calling parents. Faculty meetings also have been conducted during the 30-minute periods. Some teachers previously have had duties during one or both of the 30-minute periods. This has included watching over students during pre-school playground activities and watching them after school while they wait for the arrival of school buses. Time spent monitoring students on the playground, either before school or at recess, is known in the District as "yard duty." Time spent monitoring students while they wait in the afternoon for the arrival of buses is known as "bus duty."

Yard and Bus Duty

The Union introduced a number of school schedules and called several teachers as witnesses to describe the District's prior practice regarding yard duty and bus duty. The District called several administrators who in prior years had been teachers. Collectively, the evidence does not reveal a consistent practice among the grade levels, between the two schools or over the years. This testimony of the witnesses is summarized below by school and grade level.

At Mark Twain Elementary School: Kindergarten teachers, prior to the 2000-2001 school year, did not perform yard duty. They did perform bus duty for two 15-minute periods each day. In 2000-01, pursuant to a schedule announced in August at the pre-school inservice days, kindergarten teachers worked 15 minutes of yard duty every day before school. They

continued twice a day bus duty for 15 minutes each. In 2001-2002, the schedule of kindergarten teachers returned to what it had been prior to 2000-2001.[4]

The testimony of Union witnesses is inconsistent about the yard duty obligations prior to 1999-2000 for Mark Twain 1st through 6th grade teachers. Darcy Zimmerman, a 4th grade teacher who started at Mark Twain in the fall of 1997, testified that she had no yard duty prior to the fall of 2000. Her only obligation was 15 minutes of bus duty for one-half of the year. However, Mary Pino a 2nd grade teacher who started at Mark Twain in the fall of 1996, testified that in 1996-97 and 1997-98, she worked a daily total of 15 or 20 minutes of yard or bus duty on a rotating schedule for four out of every five weeks. This was a combination of before school and recess yard duty and after school bus duty. She said there was no increase in yard and bus duty in 1998-99, although it may have been configured differently from the previous years.

Mary Cosgrave, the current principal at Mark Twain and a District employee for 32 years, testified that prior to the 1999-2000 school year, teachers at all grade levels had done yard duty in various years as assigned by the principal. She testified that she herself had worked yard duty over the years and she had seen other teachers working yard duty. She testified that some principals would advise the teachers about the locations and times that had to be covered and the teachers would work out the schedule which the principal would then publish as the assignments for the year.

I conclude that although Ms. Zimmerman had no yard duty prior to the fall of 2000, her experience was not typical. I conclude that with the exception of the 1999-2000 school year

[4] These conclusions are based on testimony found in the Reporter's Transcript at Vol. I, pp. 127-129, 132-135, and 165, and Charging Party Exhibits 5 and 11.

most Mark Twain 1st through 6th grade teachers did have both types of duty prior to the fall of 2000.[5]

In the 1999-2000 school year, at the request of the teachers, the principal assigned aides to cover all yard duty at Mark Twain. Teachers continued to do after school bus duty. In 2000-2001, Mark Twain teachers in grades 1 through 6 worked 20 minutes of yard duty each day. They worked 15 minutes of bus duty two days per week for one half of the year and one day per week for the other half. In 2001-2002, teachers of grades 1 through 6 work 10 to 20 minutes of yard duty either before school or at recess. They work 15 minutes of bus duty two days per week for one-half of the year and one day per week for the other half of the year.

Teachers of grades 7 and 8 at Mark Twain, some years ago, worked yard duty for "a limited amount of time for a portion of the year." The record does not reflect when this occurred or how much time they worked. Subsequent to that time, they worked no yard duty until 2000-2001. They did work bus duty every day for 10 to 15 minutes. In 2000-2001, 7th and 8th grade teachers were assigned to work 10 minutes of recess yard duty for the entire year. Only two teachers were assigned to after school bus duty.[6] It is not clear in the record whether the 7th and 8th grade teachers at Mark Twain have yard and bus duty in the 2001-2002 school year.

At Copperopolis Elementary School: The record does not indicate that kindergarten teachers at Copperopolis have worked a yard and bus duty schedule different from that of

[5] These conclusions are based on testimony found in the Reporter's Transcript at Vol. I, pp. 17-19, 27, 30, 33-35, 98-101, 165-166, and in Vol. II at pp. 29-32, 35-46 and Charging Party Exhibits 12 and 13.

[6] These conclusions are based on testimony found in the Reporter's Transcript at Vol. I, pp. 77-79 and 155-156 and in Vol. II at pp. 29-32, 35-46.

primary grade teachers. In 1998-99, all teachers worked 15 minutes of before school yard duty one morning a week. In addition, primary teachers worked 20 minutes of recess one morning a week and intermediate teachers worked 15 minutes of recess one morning a week. All teachers also worked 15 minutes of bus duty one afternoon a week.[7] In the 1999-2000 school year teachers worked no yard duty. At their request, they were excused from yard duty by the principal who assigned aides to cover all yard duty. Teachers continued to work 15 minutes of bus duty one day a week. In 2000-2001, primary teachers worked 20 minutes of recess yard duty three days per week. Intermediate teachers worked 15 minutes of yard duty either two or three days per week. All teachers continued to work 15 minutes of after school bus duty two days per week.[8]

Julia Tidball, the current principal at Copperopolis and a teacher there beginning in 1994, testified that with the exception of the 1999-2000 school year, teachers have consistently had both recess and after-school bus duty. This testimony was consistent with that of Stephany LaLonde who was the principal at Copperopolis from October of 1998 through June of 2001.[9] Ms. LaLonde excused the teachers from working yard duty for the 1999-2000 school year because "several teachers" approached her and asked if the aides could do recess "and in looking at the schedule I was able to accommodate that."

In the fall of 1999, newly appointed District Superintendent Chris von Kleist learned that a claim of inadequate playground supervision was alleged in a lawsuit that had been filed

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[7]One witness testified that she had worked this same yard and bus duty schedule for the two years prior to 1998-99. See Reporter's Transcript at Vol. I, p. 42.

[8]These conclusions are based on testimony found in the Reporter's Transcript at Vol. I, pp. 38-42 and Charging Party Exhibit 10.

[9]See Reporter's Transcript at Vol. II, pp. 9-12 and 20-21.

against the District. This led to his examination of playground supervision. He learned that at both schools in the fall of 1999 teachers had been relieved of responsibility for playground supervision, which had been assumed entirely by teachers aides. He concluded that this was not a proper use of aides whose salaries were paid with federal funds under Title 1 of the Elementary and Secondary Education Act. He believed that such aides were supposed to be used in one-on-one instruction and not yard supervision.

When the superintendent discovered that in previous years teachers had been responsible for some yard duty, he directed the principals at Mark Twain and Copperopolis to put the teachers back on yard duty in the fall of 2000. The amount of yard duty assigned to teachers was affected further by a reduction in the number of aides employed by the District in the fall of 2000. At Mark Twain, there was a net reduction of eight aide positions between 1999-2000 and 2000-2001.

Teacher witnesses testified that their assignment to yard duty in the fall of 2000 resulted in less time available during the school day for preparation and other work duties. They testified that they were required to make up this lost time by working extra minutes after the end of the workday.

Change in Instructional Minutes

Until the 1999-2000 school year, state law had permitted school districts to have up to eight non-teaching "school improvement days" (SIP days) each year. In the District, SIP days were used for collaboration among teachers, staff development and training, curriculum meetings, review of new textbooks, review of the State of California instructional framework and preparation of student report cards. In 1999-2000, the number of SIP days was reduced from eight to three, the other five days being converted to instructional time. In anticipation of

this change, a committee was formed in September of 1998 to develop a way to accomplish the activities formerly done on the five SIP days that were to be lost. The committee was composed of four teachers and the then principal of Mark Twain, Dan Ziesler, and the then District Superintendent Gary Mills. Because one consideration of the committee was to involve both schools in the same program, the teachers on the committee favored having one day a week on which students were released from school early. Teachers from the two schools would meet for the balance of the school day and participate in the staff development program. The teachers also argued that no time would have to be made up because even with the early release days, the District still exceeded the state-required minimum number of instructional minutes per day. The two administrators ultimately acceded to the teacher position and there was a consensus that the SIP days would be replaced with "early release Mondays."

Mr. von Kleist succeeded Mr. Mills as superintendent and with this change the proposed "early release Mondays" became the actual "late start Mondays." In Mr. von Kleist's view, the early release of students caused too many administrative problems. He said some parents did not favor the early release of students because it caused them problems with child pickup. He said early release also complicated school bus routes. Mr. von Kleist did not continue meeting with the committee that had been formed under his predecessor and his plan to change to late start Monday was not known to teachers until the start of school in the fall of 2000. There was some brief discussion at the negotiating table about the need to replace the SIP days with other collaborative activities among teachers but the parties did not enter an agreement about the subject. However, there was no discussion about the institution of late start Mondays.

The agendas for the May 9 and May 23, 2000, meetings of the District school board both include the following item for school board action: "Consider Approval of Late Start Schedule for staff development, Mondays, 2000-2001 School Term." The action was approved and reported in the minutes for the May 23, 2000, meeting. Copies of the agendas and minutes are routinely sent to the Union president. Kathryn Casas, Union president in the spring of 2000, testified that she did not recall reading a school board agenda with an item about late start Mondays. She said school board agendas were left in her box a day or two before a meeting and she looked through them quickly.

On August 17, 2000, at the first teacher meeting day prior to the beginning of school, the District announced that instruction for students would begin late on all Mondays during the 2000-2001 school year. On late start Mondays, student instruction commenced at 9 a.m. instead of 8:10 a.m. as on regular school days. At the beginning of the school year, the workday for teachers on late start Mondays commenced at 7:30 a.m. instead of the normal starting time of 7:40 a.m. This continued until October 6, 2000, when the District returned the start time to 7:40 a.m. following a complaint from the Union.

There was some prior practice of occasional faculty meetings at 7:30 a.m. Charles Holland, a former principal at Mark Twain, testified that before and during his tenure there were regular staff meetings every other Wednesday from 7:30 a.m. to 8 a.m. He testified that he also scheduled some faculty meetings after school.

There were 30 late start Mondays in the 2000-2001 school year. A variety of activities took place on those mornings. Mentor teachers conducted in-service training for their fellow faculty members on physical education, computer operation and science. There were discussions about textbooks, holiday programs, field trips and student testing. School

curriculum committees met and there were coordination meetings among teachers of students in the same grade level. On several occasions at the end of the semester, teachers were released from late start Monday meetings in order to work on their grades. Teacher witnesses estimated variously that "half" or "65 to 85 percent" or "most" of what was accomplished in late start Mondays was new compared to what had been done on SIP days and at other meetings in previous years.

On late start Mondays teachers usually were occupied with the program until just before the start of instruction. As a result, they lost whatever time otherwise would have been available for preparation, paper grading or other non-teaching duties.

Along with the introduction of late start Mondays, the District increased the amount of time teachers spent with students on the other days of the week. Teacher-student contact time is measured in the District as "instructional minutes." District administrators were instructed by the school board that when they instituted late start Mondays they should ensure that the amount of teaching time was not reduced from the prior year. Superintendent von Kleist explained:

> We reduced roughly an hour of instructional time on Mondays, and so we divided that hour into minutes and spread them over the remainder of the days, the week, so the students wouldn't lose any instructional time.

Both the District and the Union agree that the schedule as actually implemented in the two schools increased the amount of instructional time. By the Union's calculation, the schedule for 2000-2001 increased by 20 minutes the instructional day for morning kindergarten teachers at Mark Twain Elementary School for the entire year. For afternoon kindergarten teachers, the Union calculates, the instructional day was increased by 10 minutes from August 21 until October 6 and by 3 minutes a day thereafter. For 1st through 3rd grade teachers

at Mark Twain, the Union calculates, the 2000-2001 schedule increased the instructional day by 10 minutes until October 6 and by 8 minutes a day thereafter. For 4th through 6th grade teachers, the Union calculates, the 2000-2001 schedule increased the instructional day by 15 minutes until October 6 and by 8 minutes thereafter. For 7th and 8th grade teachers at Mark Twain, the Union calculates, the 2000-2001 schedule increased the instructional day by 21 minutes until October 6 and by 3 minutes a day thereafter.

At Copperopolis, the Union calculates that the 2000-2001 schedule increased the instructional workday by 10 minutes for morning kindergarten teachers. There was no increase in minutes for afternoon kindergarten teachers, according to the Union's calculation. The instructional day for 1st through 6th grade teachers was increased by 10 minutes per day, the Union calculates.

By the District's calculation, the schedule adopted for the 2000-2001 school year increased by 0.67 minutes per day, or 2 hours per year, the instructional day for 1st through 3rd grade teachers at Mark Twain. The District calculates that the schedule increased by 1.83 minutes per day or 5.5 hours per year, the instructional day of 4th through 6th grade teachers. The District calculates that the 2000-2001 schedule increased by 2.42 minutes per day, or 7.27 hours per year, the instructional day of 7th and 8th grade teachers at Mark Twain. For 2001-2002, the number of instructional minutes worked by Mark Twain teachers is the same as in 1999-2000.

For Copperopolis, the District calculates that the 2000-2001 schedule increased by 0.39 minutes per day, or 1.17 hours per year, the number of instructional minutes worked by 1st through 3rd grade teachers. The District calculates that the schedule increased by 0.44 minutes per day, or 1.33 hours per year, the instructional day of 4th through 6th grade teachers. For

2001-2002, the number of instructional minutes worked by Copperopolis teachers is the same as in 1999-2000.

Teacher witnesses testified that the increase in instructional minutes reduced the amount of time available for preparation and other non-teaching duties. "The work that I would have accomplished during that time had to be done at another time when students weren't there," testified Carol Aardal, a teacher at Copperopolis. Ken Swanner, a 7th and 8th grade teacher at Mark Twain, testified that the increase in student contact time lengthened his workday by a comparable amount of time.

The increases in instructional minutes resulted in later student dismissal times at the end of the day. At Copperopolis, for example, 1st through 3rd grade students were released at 2 p.m. in the 1998-1999 and 1999-2000 school years. In 2000-2001, 1st through 3rd grade students were released at 2:10 p.m. The start time was 7:55 a.m. in all three years. For 4th through 6th grades, the afternoon dismissal time went from 2:05 p.m. to 2:15 p.m. The morning start time remained at 7:55 a.m.[10] At Mark Twain, the regular schedule dismissal time for 4th through 6th graders was 2:30 p.m. in the 1999-2000 school year. After October 6, 2000, the regular schedule dismissal time for 4th through 6th graders at Mark Twain was 2:38 p.m. In both years, the start time was 8 a.m.[11] There were comparable extensions of the school day at all other grades. The extension of the student day had the companion effect of increasing the length of the teacher workday. Because teachers are required to remain at school for 30 minutes following the dismissal of students, the increase in instructional minutes effectively increased the length of the teacher workday by a comparable amount.

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[10]See Charging Party Exhibit 4.

[11]See Charging Party Exhibits 5, 8 and 9.

Seven Period Day for 7th and 8th Grades

In 1999-2000, teachers of the 7th and 8th grades at Mark Twain taught six periods a day. Toward the end of the school year, there was a meeting between then principal Holland and all but one of the 7th and 8th grade teachers to develop an accommodation plan for students who wished to participate in the band or chorus.[12] The objective was to develop a way for band and choral students to participate in those activities without losing instructional time in their other classes. During the course of this discussion, some participants suggested that instruction for 7th and 8th grade students be converted into a seven-period day. Mr. Swanner, who was in attendance at that meeting, testified that the proposal was to shorten the other periods. He said there was no discussion about increasing instructional time for teachers.

When teachers reported in August for the commencement of the 2000-2001 school year, they were informed that the instructional day for 7th and 8th graders would be increased to seven periods. The additional period would be the first of the day, a homeroom followed by instruction in study skills. Band and choral students would be released during the first period when their classmates received the study skills training.

At the time they were advised about the creation of the seven-period day, teachers were told that a study skills curriculum would be provided for them. However, the curriculum did not arrive until the second semester of the 2000-2001 school year. Mr. Swanner testified that he spent 10 to 15 minutes a day preparing a curriculum for the study skills class. He described this as "minimal" compared to other courses. He said he taught study skills during the first

[12] The one teacher who was absent was Tom Owens, a member of the Union bargaining team.

quarter of the school year. After that, he allowed students to use the class period as a study hall and he occupied his time in tutoring students individually, as needed. Jeff Airola, a 7th and 8th grade teacher at Mark Twain, testified that he spent 30 minutes per day of preparation time for study skills. Mr. Owens testified that he spent 14 to 20 minutes a day preparing for study skills. He said he never got a curriculum from the District and he had to create his own. The three teachers testified that the time spent on study skills was in addition to the time spent on their other classes which already had extended beyond the regular workday.

Mr. Holland, the principal when the seven period day was instituted, expressed a view that teacher preparation for study skills was minimal. He said that during the first part of the period teachers would be occupied in homeroom activities such as taking roll and getting a lunch count. He said the preparation needed to teach study skills was minimal, nothing like the preparation required to teach an academic class.

The seven period day for 7th and 8th grade students at Mark Twain was eliminated in the 2001-2002 school year.

LEGAL ISSUES

Did the District make a unilateral increase in the work hours of teachers in the fall of 2000 and thereby fail to meet and negotiate in good faith by:

1. Increasing the amount of yard and/or bus duty worked by teachers?

2. Increasing the amount of teacher-student contact time?

3. Increasing from six to seven the number of teaching periods required for teachers of the 7th and 8th grades?

CONCLUSIONS OF LAW

If an employer makes a pre-impasse unilateral change in an established, negotiable practice that employer violates its 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. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was 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 the terms and conditions of employment of bargaining unit members); 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); State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

Yard Duty

In the past, the Union argues, the teachers were obligated to work no yard duty at both Mark Twain and Copperopolis schools. By the Union's calculation, the increase in yard duty amounted to 50 to 100 minutes per week at Mark Twain and 30 to 60 minutes per week at Copperopolis. Moreover, the Union continues, the change affected a negotiable matter because all teachers testified that the time they spent on yard duty in 2000-2001 was time that

previously had been available to use as they saw fit. Because this was duty free time, the Union argues, the loss of time impacted hours and was negotiable. Furthermore, the Union continues, the testimony established that the assignment of substantial amounts of yard duty increased the amount of work time teachers had to spend outside the regular workday, thereby increasing their hours of work. Thus all elements of a unilateral change have been established, the Union concludes, and a violation must be found in the assignment of yard duty.

The District argues that during the 1998-1999 school year, teachers at both Copperopolis and Mark Twain had had recess yard duty assignments. Then, the District continues, the teachers at both schools approached their respective principals and requested that yard duty be assigned to aides in the following year. The principals granted this request, which was made, the District observes, without negotiations. Then, in 2000-2001, the District continues, the superintendent became concerned that the use of federally financed aides for such duties might be improper. Therefore, the District argues, he directed that the teachers return to the prior practice of supervising students during recess. However, the District asserts, the requirement that teachers perform yard duty in the 2000-2001 school year was nothing more than a return to the previous status quo. It was the long-standing past practice that teachers work yard duty at both schools, the District argues, and the 1999-2000 school year was the exception and not the practice.

Under the standard the Board has adopted, to be binding a past practice:

> . . . must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. [Citation.] The Board has . . . described a valid past

> practice as one that is "regular and consistent" or "historic and accepted. . . ."[[13]]

I do not find anything about the history of yard duty for District teachers that is unequivocal, clearly enunciated or readily ascertainable over a reasonable period as a fixed and established practice. The negotiated agreement is silent about the amount of yard duty that teachers must work and as a result the amount of yard duty to be worked has varied. It has varied between schools. It has varied between years. It has varied among the grade levels. It has varied among teachers. Contrary to the allegation in the complaint, there was no uniform past practice whereby teachers in grades 7 and 8 had no yard duty and teachers in grades 1 through 6 had only one 10-to 15-minute period of yard duty for one semester per year.

The Board does not recognize a practice that is not consistent throughout the bargaining unit of a school district as establishing a status quo that can be changed only by negotiations. This is especially true where, as here, there is a history of discretionary changes in that practice by management.[14] The record establishes that over the years District principals have made unilateral adjustments in the yard and bus duty assignments of the teachers they supervise. Thus, the practice that existed was that the District unilaterally fixed the amount of yard duty. The most dramatic example of this was in the fall of 1999 when the principals at the two District schools unilaterally removed all responsibility for yard duty from the teachers. Granted that this was a change made at the request of individual teachers and was a change that

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[13]Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 adopting the administrative law judge decision at p. 13.

[14]See Modesto City Schools and High School District (1985) PERB Decision No. 541 and Modesto City Schools and High School District (1984) PERB Decision No. 414.

benefited them. It was, nevertheless, a unilateral action made entirely without prior negotiations with the Union.

Assuming, but not deciding, that the amount of yard duty teachers must work is a negotiable subject, it is clear that the District has set the schedules unilaterally in the past. Teachers worked the schedule set each fall by the school administration. As the District observes in its brief, "the decision to return to the previous recess yard duty supervision was made in the same fashion as in prior years, that is, without subjecting that duty to the negotiating process." That is to say that even if the subject is within the scope of bargaining, the past practice is that the District unilaterally sets the amount of yard duty that teachers shall work. This is the status quo and the District does not make a unilateral change by continuing it until changed through bargaining. Accordingly, I conclude that the District made no unilateral change when in the fall of 2000 it reassigned teachers to supervise students in yard duty.

Change in Instructional Minutes

It is undisputed, the Union argues, that the District altered an established past practice when it changed the number of instructional minutes that teachers are required to work each day. A change in instructional minutes is negotiable, the Union argues, if it results in a corresponding increase in the length of the teachers' assigned duty day, citing Imperial Unified School District (1990) PERB Decision No. 825. Here, the Union contends, the length of the duty was increased and the change was therefore negotiable.

The District argues that there was no unilateral change because the District negotiated the late start Monday program in meetings with the Union the prior spring. Although there was no formal agreement about the subject, the District continues, the matter had been discussed at the table and the superintendent believed that he had reached an understanding

with the Union. Moreover, the District continues, it met its obligation to provide notice and an opportunity to bargain when it sent the president of the Union a copy of the agenda for the meeting of the school board that clearly disclosed a proposal to implement the late start Monday program. By its failure to request bargaining upon receipt of the agenda, the District asserts, the Union waived its right to bargain about the subject and the District's unilateral implementation of late start Monday was not a failure to negotiate in good faith.

The Union rejects the assertion of waiver. There was no agreement in negotiations about the change and, the Union observes, all of its witnesses credibly testified that the superintendent did not inform the Union team that the implementation of late start Monday would result in an increase in instructional minutes. The Union urges that any countering testimony of the superintendent be rejected as not credible. The Union rejects the assertion that mailing the agenda of a school board meeting to the Union president provided notice of an intent to increase instructional minutes. The Union points out that the applicable agenda item offers no notice that there would be an increase in the instructional workday. Because the agenda item did not disclose a possible change in instructional minutes or the overall length of the teacher workday, it did not provide valid notice. Therefore, the Union reasons, there was no waiver.

An employer may take unilateral action if it can demonstrate that the exclusive representative waived its right to negotiate. But any waiver of the right to bargain will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) For an employer to show that an exclusive representative has waived its right to negotiate, the employer must produce evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74) or demonstrative behavior

waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (San Mateo County Community College District (1979) PERB Decision No. 94.) A waiver can be shown by contractual terms, by negotiating history or by inaction on the part of the exclusive representative. (Los Angeles Community College District (1982) PERB Decision No. 252.) By whichever method, however, the evidence must indicate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1978) PERB Decision No. 105.) Where an employer does not provide adequate notice of a proposed change, a union's failure to request bargaining is not a waiver. (Beverly Hills Unified School District, (1990) PERB Decision No. 789; Los Angeles Community College District (1982) PERB Decision No. 252.)

The Board several times has considered the adequacy of an item published in a school board meeting agenda as notice to the union of an impending negotiable change. In Arvin Union School District (1983) PERB Decision No. 300, the Board concluded that "general publication of the [school] board agenda does not constitute effective notice to the exclusive representative of proposed changes in scope matters." (See also Calexico Unified School District (1983) PERB Decision No. 357 at fn. 9 of the decision of the administrative law judge.) In Victor Valley Union High School District (1986) PERB Decision No. 565 (Victor Valley), the Board concluded that publication in a school board agenda was not adequate notice because the employer "failed to demonstrate that the agendas clearly informed the Association of the proposed [change]." The Board concluded, however, that publication in a meeting agenda "may suffice if it is delivered to a proper [union] official and is presented in a manner reasonably calculated to draw attention to any item(s) reflecting a proposed change in a matter within the scope of representation." (Id. at fn. 6.) In Modesto City and High School Districts (1986) PERB Decision No. 566, the Board found an

occasion where publication in the agenda of a school board meeting was adequate notice and the union's failure to demand bargaining constituted waiver. There, the agenda gave clear notice of an intent to adopt a school calendar. The union official knew of the contents of the agenda and the District acknowledged its obligation to bargain. The Board held that the union's failure to demand bargaining in the face of clear notice constituted waiver.

Here, I do not find in an agenda item that the school board would "Consider Approval of Late Start Schedule for staff development, Mondays, 2000-2001 School Term" notice that the number of instructional minutes would be increased or that teacher work hours would be lengthened. The agenda item did not describe a proposed change "in a manner reasonably calculated" to draw the Union's attention to a proposed change in a negotiable matter. A Union officer reading the agenda entry would have to be prescient to understand its negotiable effects. Nor do I find a waiver in the discussions about staff development and early release Mondays that took place in negotiations in the spring of 2000. There is no evidence that the parties ever traded proposals about the subject. What seems to have occurred is little more than a philosophical discussion in the context of an interest-based negotiating session. There is no evidence that the Union was ever put on notice of an impending change in instructional minutes and its effects on a mandatory subject. Waiver is an affirmative defense and any doubts must be resolved against the party asserting it. (Placentia Unified School District (1986) PERB Decision No. 595.) In the absence of any indication of a "clear and unmistakable" abandonment of interest in negotiating, I find that the Union did not waive its right to bargain about the increase in instructional minutes and/or its effects.

The Board has held that the length of the instructional day is a nonnegotiable managerial prerogative outside the scope of representation. (Imperial Unified School District (1990) PERB Decision No. 825.)

> . . . 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. Similarly, to the extent changes in preparation time affect the length of the employees' workday or existing duty-free time, that subject is negotiable. [Ibid; Emphasis in original.]

Thus the critical question here is whether the changes made by the District when it instituted late start Mondays in the fall of 2000 had an impact on the existing duty free time of teachers or otherwise changed the hours of work.

There is no dispute, initially, that at Mark Twain the length of the teacher workday was increased on every Monday from the commencement of the 2000-2001 school year until October 6. Until that date, teachers were required on Mondays to be at school by 7:30 a.m., ten minutes earlier than previously required. This was an increase in hours, a negotiable subject, and because it was done unilaterally, a failure to negotiate in good faith.

The more difficult question is whether the institution of late start Mondays and the accompanying change in instructional minutes had any other negotiable effect on hours. It is not disputed that the instructional day was increased in the 2000-2001 school year. Although the parties do not agree about how many minutes the instructional day was increased, there is no question that it was increased. A preponderance of the evidence also establishes that more than half of the time teachers spent at meetings on late start Mondays was occupied with new matters they would not have done previously at faculty meetings or other meetings. It thus is clear that for the most part,

attendance at the late start Monday meetings did not relieve teachers from duties they otherwise would have been required to complete.

Teacher witnesses testified that the additional instructional minutes they worked in the 2000-2001 school year were taken from non-teaching work time that otherwise would have been available for preparation and other duties. All teachers testified that they regularly perform work in the time they are obligated to be at school before and after the commencement of teaching and during duty-free periods during the day. They all testified that in addition they take work home with them and grade papers and do other preparation in the evening. Teachers testified that the increase in instructional minutes came directly out of the non-teaching time that otherwise would have been available for preparation. The teacher witnesses all testified that time lost for preparation by the increased instructional minutes had to be made up by increasing the hours worked outside the regular workday.

If an increase in instructional time is taken from non-teaching time that teachers otherwise had used for preparation, it is apparent that, as the teachers testified, there will be a comparable impact on after-school work time. This obvious relationship has been noted in prior decisions of the Board:

> The decision to increase instructional time during the class day had the indirect but wholly predictable effect of increasing the amount of non-class work which each teacher . . . had to do on his or her own time; that is, over and above the . . . ostensible limit in the collective bargaining agreement.. . . [[15]]

Here, it appears that the District did not take the increased instructional minutes out of non-teaching preparation time. Rather, a review of the school schedules reveals that the District lengthened the school day for students and teachers by 8 to 10 minutes This was done

[15] Victor Valley at p. 31 of the decision of the administrative law judge.

by instituting later dismissal times for students at all grade levels in both schools. Morning reporting times remained the same. The later dismissal times for students required teachers to stay on campus until later in the day because of the contractual requirement that teachers must remain on campus until 30 minutes after the dismissal of their students. The District thus increased the number of minutes teachers were required to remain on campus each day and modified the work schedule. Hours of work is a mandatory subject of bargaining specifically listed within the EERA scope of representation provision.[16] I conclude, therefore, that the District increased the hours of work in the 2000-2001 school year. This change was made without notice to the Union and without affording the Union an opportunity to negotiate. It was, therefore, a failure by the District to meet and negotiate in good faith.

Seven Period Day for the 7th and 8th Grades

The Union argues that the District made a unilateral change in the past practice when it changed from six to seven the number of instructional periods taught by 7th and 8th grade teachers at Mark Twain. This change increased the amount of preparation time required of the affected teachers and, the Union argues, the hours of work. Because the change was made unilaterally and without any opportunity to bargain the Union concludes, it constituted a failure to negotiate in good faith.

The District asserts that fixing the number of class periods in the instructional day is a management prerogative, which is not subjective to collective bargaining. The District rejects the assertion that the change had any effect on the amount of preparation time required of 7th

[16]See section 3543.2.

and 8th grade teachers. The District argues that because there was a decrease in the number of instructional minutes in the other classes, there was a corresponding decrease in the preparation time needed in those classes. Moreover, the District continues, because the newly created period was a homeroom coupled with a study skills class, the preparation time required was minimal at most.

The Board previously has held that a change in the number of teaching periods is negotiable if it affects the number of hours teachers must work, be it by increasing the number of papers to grade or the amount of time needed to prepare. (Sutter Union High School District (1981) PERB Decision No. 175.) The record establishes that 7th and 8th grade teachers at Mark Twain did have an increase in their off campus duties as a result of the change from six to seven periods per day. The three teacher witnesses all testified that they had to write a curriculum for the study skills class because of a delay in the arrival of a prepared curriculum. While the amount of time required to teach study skills was described as "minimal" compared to their other courses, the witnesses estimated it as ranging from 10 to 30 minutes per day.

I am not persuaded by the District argument that because the number of instructional minutes were reduced in the other periods that the preparation time for those courses was reduced by the amount of time required to prepare for the study skills class. The teachers did not describe such an effect and it does not seem logical that a drop of several minutes of class time would have any impact on the level of preparation required.

Accordingly, I conclude that the District unilaterally increased the hours of 7th and 8th teachers at Mark Twain Elementary School by the conversion to a seven period day in the fall of 2000.

REMEDY

The PERB in section 3541.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District has been found in violation of its duty to meet and negotiate in good faith by unilaterally increasing the work hours of teachers. The District increased the work hours for teachers during the 2000-2001 school year by: (1) requiring teachers at Mark Twain Elementary School to report at 7:30 a.m., 10 minutes earlier than their regular start time, every Monday from the commencement of the school year until October 6, 2000; (2) lengthening the workday for all teachers by lengthening the instructional workday, a change that had the effect of requiring teachers to remain at school 8 to 10 minutes longer every day of the school year; (3) increasing from six to seven the number of instructional periods for the 7th and 8th grade classes at Mark Twain, a change that required teachers to teach an additional subject thereby lengthening their workdays by 10 to 30 minutes per day.

It is appropriate therefore that the District be directed to cease and desist from making unilateral changes and, if it has not already done so, to reinstate the past practice. It also is appropriate that the District be directed to make whole any members of the District's certificated bargaining unit who were affected by the change in hours.

The Union argues that the proper remedy to make the teachers whole is to compensate them monetarily for the additional hours worked. In a comprehensive review of PERB cases on remedy for increased hours of work, the Union acknowledges that PERB most frequently has granted compensatory time rather than money. Still, the Union argues, PERB's earliest

decisions granted a monetary award which, the Union argues, is the standard remedy granted by labor boards in the United States. Compensatory time off, the Union argues, is a remedy that ignores the reality of how teachers work. Citing testimony from witnesses at the hearing, the Union argues that when teachers know they will be absent from school they must prepare plans for the substitute teacher. Then, upon return, the Union continues, teachers must correct the work that was done, deal with any discipline problems that arose with the substitute and reorganize the classroom. Because of these factors, the Union concludes, a remedy of time off is not a remedy at all.

The District opposes a financial remedy as punitive and out of line with previous PERB decisions. Noting that the State of California currently has a budgetary shortfall, the District argues that it is in the public interest to minimize the financial impact of an adverse decision. The District asserts that the proper remedy for increased hours of work is decreased hours of work. "There are strong public policy reasons for awarding compensatory time off, rather than monetary compensation," the District contends. ". . . [P]ublic policy dictates that school district funds should be used to further the education of its students. This purpose can be enhanced by minimizing the fiscal impact of any unfair practice charge finding against the district." The District rejects the assertion that compensatory time is ineffectual and proposes that the parties negotiate to avoid the disruptions or burdens that might be associated with time off rather than compensation.

As is made clear by the Union's summary of PERB decisions, the Board has not established a consistent remedy for cases involving an increase in hours. In San Mateo City School District (1984) PERB Decision No. 375(a) (San Mateo), the Board amended its order in San Mateo City School District (1980) PERB Decision No. 129 and awarded back pay to

teachers who had worked additional time. The Board also has awarded a monetary remedy in Rio Hondo Community College District (1982) PERB Decision No. 279 and in Oak Grove School District (1986) PERB Decision No. 582 (Oak Grove). However, the Board has awarded compensatory time off as a remedy in Healdsburg Union Elementary School District (1994) PERB Decision No. 1033, Cloverdale Unified School District (1991) PERB Decision No. 911; Victor Valley; and Corning Union High School District (1984) PERB Decision No. 399 (Corning). In Fountain Valley Elementary School District (1987) PERB Decision No. 625, the Board awarded what the Union appropriately described as an "either or" remedy, either time off or money.

There is no clear policy rationale in the various Board decisions that identify which case is appropriate for compensatory time and which for back pay. In San Mateo, the Board on its own motion amended the order in an earlier decision because it "failed to require the District to make employees whole for the increase in hours." Less than two months later, the Board in Corning awarded time off rather than money writing:

> . . . while hours can be properly translated into dollars, the direct and immediate result of the unilateral change was that the teachers were required to work extra hours. In our view, therefore, the most appropriate way to make the affected employees whole would be by ordering the District to afford the teachers a corresponding amount of time off.

In Oak Grove the Board awarded back pay because it found that a return to the prior schedule would have a disruptive effect on the educational program in the District. That conclusion left the teachers in the position of working more hours and thus entitled additional compensation.

In subsequent cases, the Board has awarded time off without discussion about whether back pay or compensatory time was the more appropriate remedy. Because the majority of Board decisions, as well as the most recent decisions, grant time off rather than back pay, I will

award compensatory time off. In order to avoid the problem of requiring teachers to do additional work to prepare for substitutes, I will direct that the time off be granted in the same manner as the extra time was worked, that is, an across-the board reduction in the school day. The District will be directed to provide as many shortened school days during the year in which this decision becomes final and/or the subsequent year as are necessary to equal the amount of extra time teachers worked in the 2000-2001 school year. The parties are directed to meet and negotiate about a schedule for the shortened days. If they are unable to reach agreement, then the regional director after meeting with the parties shall direct the time and manner in which affected employees are to receive compensatory time off. As a alternative to this remedy, the District may provide financial compensation with interest at the rate of 7 percent if it so chooses.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. 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 EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Mark Twain Union Elementary School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(c), (b) and (a). The District violated the Act during the 2000-2001 school year by unilaterally increasing

the work hours of teachers in the following manner: (1) requiring teachers at Mark Twain Elementary School to report at 7:30 a.m., 10 minutes earlier than their regular start time, every Monday from the commencement of the school year until October 6, 2000; (2) lengthening the workday for all teachers by lengthening the instructional workday, a change that had the effect of requiring teachers to remain at school 8 to 10 minutes longer every day of the school year; (3) increasing from six to seven the number of instructional periods for the 7th and 8th grade classes at Mark Twain, a change that required teachers to teach an additional subject thereby lengthening their workdays by 10 to 30 minutes per day.

By changing the past practice without first meeting and conferring with the Angels Camp Educators Association, CTA/NEA (Union), the District failed to meet and negotiate in good faith in violation of section 3543.5(c). Because this action had the additional effect of interfering with the right of the Union to represent its members, the failure to meet and confer in good faith also violated section 3543.5(b). Because the action had the further effect of increasing the work hours of teachers, the District's action violated section 3543.5(a).

All other allegations against the District are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Unilaterally increasing the hours of work for teachers;

2. Interfering with the right of the Union to represent its members;

3. Interfering with the right of individual teachers to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, if the District has not already done so, reinstate for teachers the work schedule that existed prior to the commencement of the 2000-2001 school year.

2. Before the conclusion of the school year that follows the year in which this decision becomes final, grant to District teachers sufficient compensatory time off to equal the amount of additional time teachers were required to work during the 2000-2001 school year. Grant the time off through the use of shortened days or such other method that will have the effect of releasing all teachers from school at the same time, thereby avoiding any requirement for teachers to prepare materials for substitute teachers during the time they receive their compensatory time off. The District shall meet and negotiate with the Union regarding a schedule for the shortened days. If the District and the Union are unable to reach agreement, then the regional director after meeting with the parties shall direct the time and manner in which affected employees are to receive compensatory time off. As a alternative to this remedy, the District may provide financial compensation with interest at the rate of 7 percent if it so chooses.

3. If there are any employees who were affected by the increased hours in the District but who no longer are employed by the District, the District shall compensate those persons at the daily rate of pay plus interest at the rate of 7 percent for the additional time worked.

4. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to members of the certificated employee bargaining unit customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge