STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION PITTSBURG CHAPTER #44,	)	
Charging Party,	)	Case No. SF-CE-342
v.	)	PERB Decision No. 199
PITTSBURG UNIFIED SCHOOL DISTRICT,	)	March 15, 1982
Respondent.	)	

Appearances: Madalyn J. Frazzini, Attorney for California School Employees Association, Pittsburg Chapter #44; Keith V. Breon, Attorney (Breon, Galgani & Godino) for Pittsburg Unified School District.

Before Gluck, Chairperson; Jaeger and Moore, Members.

DECISION

The Pittsburg Unified School District (District) excepts to the attached proposed decision of a hearing officer of the Public Employment Relations Board (PERB) finding the District violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA)[1] by unilaterally changing the work

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

Subsection 3543.5(c) states:

> It shall be unlawful for a public school employer to:
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> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

schedule of a District employee. Specifically, the District excepts to the proposed findings that:

(1) subsection 3541.5(a)(2)[2] is not a valid defense to

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[2]Subsection 3541.5(a)(2) states as follows:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
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> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
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> . . . . . .
>
> (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it

the charge and that PERB is not therefore obligated to defer to the negotiated grievance procedure which the District argues remained in effect despite the expiration of the collective agreement; and that

(2) the charge states an independent violation of EERA. The District argues that the dispute is solely a question of breach of contract and, thus, pursuant to subsection 3541.5(b),[3] is not subject to the PERB's review. It is the District's contention that it enjoyed the right to make the change in work schedule because of a provision in its policy handbook and its past practices.

The District also argues that, even if the facts constitute an independent unfair practice, charging party should be precluded from seeking redress in two different forums, the grievance procedure and PERB's unfair practice process.

> shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

[3]Subsection 3541.5(b) states as follows:

> (b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

The Board has reviewed the record and finds the hearing officer's findings of fact to be free of prejudicial error and adopts them as its own.

DISCUSSION

Accepting for purposes of this discussion, but not so deciding, that the District is correct in its claim that the negotiated procedure utilized by the charging party survived the expiration of the collective agreement,[4] we find the District's reliance on subsection 3541.5(a) to be misplaced. This section mandates PERB deferral only where the negotiated procedure culminates in binding arbitration (San Dieguito Union High School District (2/25/82) PERB Decision No. 194) or actual settlement by the parties.

The District seems to be claiming here that PERB must defer to any process which might result in settlement. But, such a result would strip PERB of its jurisdiction in every instance where any grievance procedure is available to the party. Such a requirement is not set forth in the Act and, indeed, would reduce to meaningless surplusage the specific requirement that the grievance procedure culminate in binding arbitration. On

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[4]The general rule in the private sector is that the negotiated procedure survives contract expiration. Bethlehem Steel Co. (1963 3d Cir.) 320 F.2d 615 [53 LRRM 2878]; Hilton-Davis Chemical Co. (1970) 185 NLRB 241 [75 LRRM 1036]. Here, however, the grievance procedure is expressly limited to enforcing the specific terms of the contract.

the other hand, PERB's intervention where the parties have arrived at a mutually adopted resolution of the dispute, would be both unnecessary and unwarranted.[5] Here, no settlement was reached, the District having specifically rejected the grievance which the charging party then pursued through the unfair practice procedure. The District's first exception is therefore rejected.

The hearing officer concluded that the change in the charging party's work schedule was an unlawful unilateral change in a matter subject to mandatory negotiations. In reaching this conclusion, he found that the contract had expired and that the issue was solely whether there had been a violation of the statutory duty to negotiate. He further found that the District itself had not relied upon the contract for its authority to make the change but had, instead, taken the position that it could do so on the basis of its policy handbook provision and its past practices. As to these claims, the hearing officer found that neither the District policy handbook nor its past practices authorized the unilateral act taken in this case. We adopt his finding of fact with respect to these matters and we also affirm his conclusions of law with respect to the District's obligation to negotiate a

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[5]Nevertheless, we note PERB's authority to set aside a settlement where it is found to be repugnant to the purposes of the Act. Subsection 3541.5(a)(2), supra.

change in the work schedule and his finding of a breach of that duty by the District's unilateral act.

Finally, we find no basis for supporting the District's opposition to the charging party's use of both the negotiated grievance procedure and PERB's unfair practice process. PERB has acknowledged the desirability of the parties seeking resolution of their disputes through mutually agreed upon procedures. See Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a; State of California, Department of Water Resources, State of California, Department of Developmental Services (12/29/81) PERB Order No. Ad-122-S. To insist that a grievant come to this Board in every instance where a violation of the Act is alleged, would be counter to this policy. But, to deny a party who had utilized the grievance procedure the right also to come to PERB would be to abdicate our statutory obligation to resolve unfair practices, ignore the statutory provision that PERB has initial and exclusive jurisdiction over such charges,[6] and contravene the deferral provision of subsection 3541.5(a)(2), supra, on which the District partially, though erroneously, relies.

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[6]Section 3541.5 states:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . .

PERB finds that, in unilaterally changing the charging party's work hours and schedule and his eligibility for overtime pay, the District violated its duty under subsection 3543.5(c), supra, to negotiate in good faith proposed changes in existing working conditions of unit employees.

ORDER

Upon the forgoing facts, conclusions of law, and the entire record in this case and, pursuant to Government Code subsection 3543.5(c), it is hereby ORDERED that the Pittsburg Unified School District shall CEASE AND DESIST from:

(1) Unilaterally changing the work schedules of employees in the classified employees unit and,

(2) from failing and refusing upon request to meet and negotiate in good faith with the California School Employees Association and its Pittsburg Chapter No. 44 over proposed changes in the work schedules of said employees.

It is further ORDERED that the District shall take the following AFFIRMATIVE ACTION:

(1) Provide payment to Frank Billeci in the amount of overtime pay lost as a result of the District's rescheduling of his hours of employment from the period beginning September 15, 1978 to the date of his termination of employment with the District with interest at the rate of 7 percent per annum.

(2) Within five days following service of this decision, post copies of the attached notice to employees as set forth in the attached Appendix for a period of twenty (20) workdays in a conspicuous place at such locations as notices to classified employees are customarily posted.

(3) At the end of this posting period, notify the regional director of the Public Employment Relations Board, San Francisco Regional Office, of the action taken to comply with this Order.

By: Harry Gluck, Chairperson

John W. Jaeger, Member

Barbara D. Moore, Member

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-342, California School Employees Association, Pittsburg Chapter No. 44 v. Pittsburg Unified School District, in which both parties have the right to participate, it has been found that the Pittsburg Unified School District violated subsection 3543.5(c) of the Educational Employment Relations Act by unilaterally changing the work schedule of a District employee, Frank Billeci, and by failing to negotiate in good faith on proposals to change work schedules of Pittsburg Unified School District employees with the California School Employees Association. As a result of this conduct, we have been ordered to post this notice and abide by the following. We will:

CEASE AND DESIST FROM:

Unilaterally changing the work schedules of classified employees and from refusing to negotiate upon request of the California School Employees Association, on proposals to change the work schedules of classified employees of the District.

TAKE AFFIRMATIVE ACTION TO:

Pay to Frank Billeci in the amount of overtime pay lost as a result of the District's rescheduling of his hours of employment from the period beginning September 15, 1978 to the date of his termination of employment with the District with interest at the rate of 7 percent per annum.

Pittsburg Unified School District

Dated: _____ By_____
Authorized Agent of the District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) 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, PITTSBURG CHAPTER #44, Charging Party, v. PITTSBURG UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. SF-CE-342 PROPOSED DECISION (10/9/79)

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association, Pittsburg Chapter #44; Keith D. Breon, Attorney (Breon, Galgani & Godino) for Pittsburg Unified School District.

Before Gary M. Gallery, Hearing Officer.

PROCEDURAL HISTORY

This case presents the question of whether a change in the hours worked during a workday of an employee constitutes a violation of Government Code section 3543.5(b),[1] denial of employee organization rights, and/or Government Code section 3543.5(c), failure to negotiate in good faith with the exclusive representative.

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[1]All statutory references are to the California Government Code unless otherwise specified.

On February 5, 1979, California School Employees Association, Pittsburg Chapter #44 (hereafter CSEA) filed an unfair practice charge against the Pittsburg Unified School District (hereafter District) alleging essentially that the District, by changing the working hours of a unit member, denied the employee organization its rights of representation, and the District refused to meet and negotiate in good faith on the matter. An answer to the charge was filed on February 29, 1979. Two additional and separate unfair practice charges (SF-CE-344 and SF-CE-355) were filed by CSEA against the District and were consolidated with SF-CE-342. After an informal conference on March 6, 1979, a formal hearing was held on May 3 and 4, 1979, in San Francisco, California. At the commencement of that hearing, the parties stipulated to the withdrawal of SF-CE-344 and SF-CE-355 subject to contract ratification to be considered later by both parties. The week following the hearing, ratification of an agreement did take place and SF-CE-344 and SF-CE-355 were withdrawn by the charging party. The formal hearing of May 3 and 4 related to evidence and arguments on SF-CE-342 only. During the hearing, the District amended its answer to the charge by deleting the defense of business necessity. The District further moved to dismiss the unfair practice charge on the basis charging party has failed to allege facts sufficient to constitute a cause of action, the evidence presented only goes to the issue of a

grievance being filed and section 3541.5 provides the Public Employment Relations Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on an alleged violation of such agreement that would not also constitute an unfair practice. The motion to dismiss was deferred by the hearing officer to the proposed decision.

FINDINGS OF FACT

Frank Billeci was employed by the Pittsburg Unified School District from 1965 until April 16, 1979. He was employed from 1965 to 1971 at the Village Elementary School as a gardener. Billeci bid for and obtained the position of stadium gardener at the Pittsburg High School in 1971 where he worked the regular day shift (7:00 a.m. to 4:00 p.m.). One of the main reasons Billeci took the high school job was because of the extra pay from athletic activities, more particularly described below.

Prior to September 1978, at least since 1971 and possibly before that time, the stadium gardener was called upon by the District to cover football, basketball and track activities held at the high school campus. For football, this routinely involved working the regular 7:00 a.m. to 4:00 p.m. on Friday shift, and then continuing on to about 11:00 p.m. for the school home games.

During basketball season, the gardener worked 7:00 a.m. to 4:00 p.m. on Tuesdays and Thursdays, and then two additional hours each day. In 1974 or 1975, however, Billeci was replaced by teachers for basketball coverage. The record is unclear as to what date he began, but Billeci also covered Thursday afternoon freshmen football games until 7:00 p.m. He would work for an additional two and one-half to three hours beyond the normal 7:00 a.m. to 4:00 p.m. shift.

From 1971 until sometime in 1973, Billeci was paid a flat rate, $25 for a varsity game or any other overtime work session. Until that time the funds used to pay for the additional service came from student body funds.

In 1973, the District commenced paying Billeci time and a half per hour of his regular rate for those hours in excess of the regular eight-hour day.

In 1973, there was a classification study in the District and while Billeci wanted a five step increase in his classification, which would have represented a 10 percent increase in his salary, he was given only a two step increase. Billeci was informed that the five step increase would have resulted in his making more than the custodians when his overtime was taken into consideration.

At all times material hereto, there have been separate job duty statements for the stadium gardener and the custodian. While a more senior stadium gardener could bump a less senior

custodian, a more senior custodian could not bump a less senior stadium gardener in layoff situations. The pay for the stadium gardener was higher than for the custodian. The District maintains a listing of job classifications and the stadium gardener is listed separately from that of the custodian. Padilla, business manager for the District, believed the two classifications were the same because the jobs were interchangeable. He testified "during inclement weather we have a policy where you put a gardener inside to do custodial work." Padilla also testified that clerks and typists were in the same classification.

On September 14, 1978, the day before a school football game, Padilla and two other District employees personally and orally informed Billeci that he was being "slip scheduled" for the next day and his shift for Friday, September 15, would be 4:00 p.m. to 11:00 p.m.

On Monday, September 18, 1978, Billeci received a memo from Padilla in his mail box at the high school. The memo, in pertinent part, stated:

> This is to inform you that your assigned hours of 7:00 a.m. to 4:00 p.m. are to be changed for slip scheduling during the days when a football game is scheduled on Friday nights at the Pittsburg High School Stadium.
>
> Those hours will be for those days only from 3:00 p.m. to 11:00 p.m. You will be informed on Thursday morning either by myself or your immediate supervisor that

> this would occur. You will be provided with a twenty-four (24) hour notice. This is to officially document, in writing, for future reference.
>
> If you have any questions pertaining to this slip scheduling, you may do so within five days from the date of this notice.
>
> The slip schedule is in compliance with the Rules and Regulations in the Classified Handbook under Section 13.7, "Civic Center and Additional School Activity Assignments", Page 30, Paragraph 1.

Padilla told Billeci on Thursday that the board passed a ruling that there was to be no more overtime and that, therefore, the District had to slip schedule him.[2]

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[2]The Resolution provided:

> WHEREAS, Proposition 13, known as the Jarvis-Gann Initiative, has been approved by the voters of the State and is now in effect; and
>
> WHEREAS, the total revenue of the Pittsburg Unified School District has been thereby diminished; and
>
> WHEREAS, the funds formerly restricted to categorical areas have now been made a part of the General Fund; and
>
> WHEREAS, one of those funds, the Community Services Fund, no longer exists as restricted monies;
>
> NOW THEREFORE BE IT RESOLVED, that the following regulations shall apply herewith:
>
> 1. Civic Center Act activities be permitted to continue only where regular (non-overtime) staff would be present to serve them;

Billeci contacted three members of the board: Orin Allen on Thursday evening, Nancy Parent and Lefty Abono on Friday. All three indicated the board had cut overtime but that there was still $10,000 for overtime within the school budget and that it was up to the discretion of the administration on how they used it.

As a result of the District's action, Billeci's schedule was changed, generally, as follows:

On Fridays he would come in at 3:00 p.m. and work until 11:00 p.m.

On Thursdays he would work from 10:30 a.m. until 7:00 p.m. and days of track meets from 10:00 a.m. until 7:00 p.m.

The compilation made by Billeci, and uncontroverted as to accuracy, was as follows:

(Ftn. 2 cont.)

2. All other activities previously serviced by this fund be eliminated, closing all buildings and sites where additional service would be required to be provided without charge;

3. The present fee schedule be revised and enforced where required and permitted;

4. The noon-duty supervisors previously provided by these monies be eliminated, and noon-duty supervision be returned to the school staffs.

FRIDAY NIGHT VARSITY GAMES

Date	Hours Lost
9/15	7
9/22	7
9/29	7
10/13	7
10/20	7

THURSDAY AFTERNOON FRESHMAN GAMES

Date	Hours Lost
10/5	2-1/2
10/26	2-1/2
11/2	2-1/2
11/8	2-1/2

TOTAL HOURS LOST 45

Billeci's ovetime pay for the period in question was $9.02 per hour. His base pay was $6.00 per hour.

CSEA and the District had a one-year agreement for 1977-78 that terminated on June 30, 1978.[3]

Billeci contacted Rose Greenup, president of the Chapter of CSEA, who in turn called Marjorie Ott, CSEA field representative. Ott called Padilla, on or about the 14th or 15th of September 1978, the District business manager about the changes in Billeci's hours. Padilla contended that the Classified

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[3]CSEA represented both aides and the clerical and operation unit. Their representation of the latter unit was challenged by SEIU Local 390 and PSU Local 1, and negotiations were held in abeyance until after October 1, on which date PERB ordered the challenges invalid.

Employees Handbook allowed for slip scheduling. Ott responded that the rule applied only to custodians, that the contract dealt with overtime and therefore invalidated the handbook rule, and that the change was a change in the contract without negotiating with the CSEA.

CSEA, on behalf of Billeci, pursued a grievance filed October 5, 1979, in part because they thought they had an agreement, and in part because the District led them to understand that the grievance procedure went forward even though arbitration (as under the contract) did not (because there was no contract) and even though there was no contract to underlie the procedure.

The parties addressed the grievance at the step II level, before the superintendent, who denied the claim and then the board itself denied the claim in January of 1979.

In July of 1978, CSEA had asked for an interim agreement but the parties did not agree and negotiations on the 1978-79 contract continued through May of 1979.

The matter was next brought up at the September 22, 1978 negotiating session. It was CSEA's position that the change constituted a unilateral change in hours.

The next negotiation session, November 13, 1978, was preceeded by a letter from Ott to Rothschild wherein Ott alerted the District negotiators that they are asked to negotiate "this matter."

CSEA was going to propose the same work day/work week language as in the 1977-78 contract[4] for the 1978-79 contract but at the November negotiating session they brought in a revision to the work day/week/year provision.[5]

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[4]The 1977-78 contract provision on Work Day/Work Year provided:

> The work week shall consist of five (5) consecutive days, Monday through Friday. Eight (8) hours per day and forty (40) hours per week. The District may extend the regular work day or work week on an overtime basis when such is necessary to carry on the business of the District. The hours of the work days for each classified assignment shall be designated by the District. (Article IV).

[5]The CSEA Proposal reads as follows:

HOURS OF WORK

Assigned Hours: The actual hours of duty time will vary at work locations dependent upon individual school assignments to be determined annually.
Once the hours of work are established by the immediate supervisor, including variables in yearly work assignments; such as, student vacation periods and modified school day, they will not be varied without just cause given the employee in writing, subject to challenge in the grievance procedure. In no case will the beginning or ending time vary more than one (1) hour each workday of the week unless voluntarily consented to by the employee. The voluntary agreement shall be reduced to writing.
Each bargaining unit employee shall be assigned a fixed, regular and ascertainable minimum number of hours. No employee shall be assigned less than four (4) hours per day.

The District countered with a work day/week proposal[6] which expressly provided for management's right to change the hours of a given work day.

Two subsequent negotiating sessions took place but Billeci's matter was not brought up again until impasse was reached, and then in late January at the first meeting with the mediator the matter of hours was discussed.

The District continued to take the position that Billeci's particular case was a grievance and not to be discussed at the bargaining table. The District would, however, discuss hours in general.

It is without question that the District did in fact negotiate on the matter of hours generally. The negotiations did lead to a provision in the new contract that differed from that in the contract covering 1977-78 school year.

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[6]Article IV;

The work week shall consist of five (5) consecutive days, normally Monday through Friday, of eight (8) hours per day and forty (40) hours per week. The District may extend the regular workday or work week on an overtime basis or may change the working hours of a given day to meet the needs of the District when such is necessary to carry on the business of the District. The hours of the work day assigned for each assignment shall be designated by the District. If the District changes the hours of the work day on a permanent basis, the employee shall be given two weeks prior notice. If the assigned hours are changed for a given work day, the employee shall be given 24 hours prior notice.

The District did not, however, notify CSEA or any of its agents about the board policy or its implementation via the verbal and written notice to Billeci that he was thenceforth going to be slip scheduled.

It was the position of the District that there was no contract in effect at the time the change in Billeci's hours took place.

The District relies upon a classified employee's handbook and, in particular, section 13.7 which provides:

> Whenever school connected groups or certain groups or organizations who qualify under the Civic Center Act schedule evening meetings in a school building for which no charge for custodial time is made, the working hours of the custodian shall be changed for that day. This slip scheduling of the custodian's hours will provide for custodian on duty while the meeting is conducted.
>
> Overtime pay must normally be paid on the first supplemental pay day following the pay period in which it is earned.
>
> For the purpose of computing the number of hours worked, time during which an employee is excused from work because of holidays, sick leave, vacation or other paid leave of absence shall be considered as time worked by the employee.

Billeci stated that during the 1978-79 school year, just before Christmas, two custodians were called in for Saturday morning cleanup and were paid overtime. Also there was a fire for which overtime was paid. During 1978-79 to the date of the

hearing, the District paid out over $8,000 in overtime pay for custodial, gardening and transportation services.

Padilla testified as to past practices with regard to "slip scheduling." In response to direct questioning, Padilla said:

> Q. Could you give us some examples or some discussion of that practice?
>
> A. Yes. In the custodian staff we have slip scheduled individuals to meet situations where buildings would be available for a community use. We also slip schedule a gardener. A while back in 1971 I know that I have received information that Mr. Billeci in 1971 himself was slip scheduled as a gardener at Village Elementary School. Another gardener at the same school on a later date was also slip scheduled for helping park during an activity going on at the Community of Arts Building. His time was slip scheduled. And this year I've informed Mr. Billeci that because due to the fact the Community Services budget was no longer in existence because of SB 154 those funds would no longer be available for overtime. Only monies available for emergency overtime, or monies that were being reimbursed to the District would be available for overtime. On this basis I informed Mr. Billeci that there would be no overtime for football overtime, therefore, we slip scheduled him from 3:00 to 11:00.

Padilla also testified that there had been voluntary slip scheduling during the 1977-78 year, both by a large number of aides to attend school and by a custodian at the administration building.

Finally, some reference was made to a blanket request by CSEA to slip schedule classified employees to attend a meeting in which groups of employees <u>could</u> have included stadium gardeners. The request was later withdrawn.

Billeci has never been slip scheduled prior to the September 1978 football game.[7]

CONCLUSIONS OF LAW

The issue in this case is whether the District's action in "slip scheduling" Billeci was a violation of Government Code section 3543.5(b) or (c) or both.[8]

Respondent's motion to dismiss made at the hearing in this matter[9] and arguments advanced in its post hearing brief pose jurisdictional questions that are appropriately resolved at the onset.

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[7]Padilla testified that Billeci and another had been slip scheduled prior to or in 1971 at the Village School. Padilla on cross-examination admitted this information was not of his own knowledge but rather information he had obtained from Matt Lifschey who may or may not have gotten the information from the Village School principal. This information is hearsay and is not, therefore, sufficient in itself to support a finding that either had in fact been slip scheduled.

[8]Government Code section 3543.5 provides in pertinent part:

> It shall be unlawful for public school employer to:
> (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.

[9]The Motion is set forth in the statement of this case.

The District argues that CSEA is alleging a violation of an agreement, and that PERB does not have authority to enforce agreements between the parties.[10]

It is undisputed that the contract had expired June 30, 1978. The Association seeks not to have a contract enforced, but rectification of a unilateral act of the employer. The contract itself is not dispositive of PERB's determination of whether an unfair practice was committed by the District. The legislative purpose in constraining PERB's authority simply removes the parties to a different forum, i.e., the judiciary when breach of contract is the nature of the dispute.

Here there is no contract. CSEA's charge with regard to the alleged 3543.5(c) does not refer to the contract but rather to the act of the District in changing the hours of a member of the bargaining unit.

The District's argument is therefore rejected.

The District's next argument is that the PERB should defer to binding grievance procedure. Citing the so-called "Collyer

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[10]Government Code section 3541.5(b) provides:

> The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violaton of such an agreement that would not also constitute an unfair practice under this chapter.

Doctrine" where the NLRB in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931], deferred to arbitration a charge of unilateral change where there existed a contract with provision for binding arbitration.

The District's argument is premised upon the existence of a contract between the parties. In the instant case the only contract between the parties expired on June 30, 1978. Moreover, California has enacted its own form of the Collyer Doctrine in Government Code section 3541.5(b), wherein 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."

While PERB has yet to address the applicability of the Collyer Doctrine to the EERA, the fact that no agreement exists in the instant case, makes that doctrine inapplicable. The legislation clearly requires that deferral take place only if there is settlement or binding arbitration. Even if the contract were in effect, the rule would still not be applicable, as the contract called for advisory arbitration only.[11] In addition, the District refused to arbitrate and

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[11]Article XI(H) (6) provides "after hearing the evidence, the arbitrator shall submit his/her findings and advisory decision in writing to the Board of Education with copies to CSEA, and the grievant."

offered only a procedural hearing before the board of trustees itself to finalize the denial of the grievance initiated by Billeci. This contention is therefore rejected.[12] Respondent's motion to dismiss insofar as it addresses PERB's jurisdiction is denied.

As the charging party's primary thrust in its post hearing brief regards section 3543.5(c), that provision is discussed before the section 3543.5(b) charge.

Section 3543.5(c) makes it an unfair practice for the employer to "refuse or fail to meet and negotiate in good faith about a matter within the scope of representation."[13]

The general rule applicable here is that the employer may not take unilateral action on conditions of employment without first negotiating with the exclusive representative. Section 3540.1(h) states that "meeting and negotiating" means:

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[12]The District further argues in conjunction with its discussion on Collyer, that cases cited by charging party on the issue of whether working schedules fall within "hours" for purposes of unilateral action on a matter within scope of representation were founded on section 8(a)(1) of the NLRA rather than the section 8(a)(5) provision of NLRA that parallels section 3543.5(c).

The cases under attack are not cited to establish [non-deferral] as in Collyer but, rather to establish the daily working schedule as within the scope of representation. The distinction drawn by the District is not germane to non-deferral. As was discussed above, section 3541.5(a) requires the existence of a contract and binding arbitration, neither of which is present in the existing case.

[13]San Mateo Community College District (6/8/79) PERB Decision No. 94 (3 PERC 10080).

> Meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation . . . .

In San Mateo, PERB reiterated its rule of Pajaro[14] adopting the federal rule barring an employer's unilateral change of conditions within the scope of representation. In NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] the Supreme Court held that the Board may hold such unilateral action to be an unfair labor practice in violation of 8(a)(5)[15] without also finding the employer guilty of overall subjective bad faith.

San Mateo, supra, also reiterates the PERB's rule of Sweetwater Union High School District (11/23/76) PERB Decision No. 4 (1 PERC 113) that the duty to negotiate derived from section 8(a)(5) of the Labor Management Relations Act may be used to guide interpretation of similar language in the EERA.

Working hours and workdays have been held to be bargainable subjects under the NLRB. In Meat Cutters v. Jewel Tea (1965)

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[14]Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51 (2 PERC 2107).

[15]National Labor Relations Act (as amended; 29 U.S.C. section 151 et seq.) section 8(a)(5) provides as follows:

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

381 U.S. 676, the U.S. Supreme Court held that the limitation on work hours of butchers to the period of 9:00 a.m. to 6:00 p.m. was a mandatory subject of bargaining. "We conclude that schedule of hours is a negotiable issue."

Other instances of federal precedent demonstrating that change of work schedule is a unilateral act are: Camp & McInnes Inc. (1952) 100 NLRB No. 85 [30 LRRM 1310], reduction of lunch period from one hour to 30 minutes and advanced the quitting hour from 5:00 p.m. to 4:30 p.m. Good Hope Industries Inc. D/B/A as Gasland Inc. (1977) 230 NLRB No. 170 [95 LRRM 1518], employees' work schedules changed from four-day work week to a work week consisting of four days and additional on-call day. John Dory Boat Works Inc. (1977) 229 NLRB No. 121 [96 LRRM 1078], change of working hours of its production employees. Texaco, Inc., (1977) 233 NLRB No. 43 [96 LRRM 1534] change of starting time from 8:00 a.m. to 7:00 a.m. Steelworkers v. NLRB (1976) 212 NLRB No. 50 [91 LRRM 2275], the U.S. Court of Appeal, change from seven consecutive days on and two days off work week to five consecutive days on and two days off work week. Loss of overtime direct effect. American Oil v. NLRB (1978) 238 NLRB No. 44 [99 LRRM 1253], change of schedule of working hours for one division of its refinery. Loss of 11 days per year has substantial and material effect on conditions of employment. Willamette Industries, Inc. (1975) 220 NLRB No. 108 [90 LRRM 1478] change from Monday through

Friday with overtime to Monday through Saturday on or Sunday. NLRB v. Amoco Chemicals (1976) 211 NLRB No. 84 [91 LRRM 2837], reduction to 40 hours per week and five-hour limit on overtime.

Finally, in Woodworkers Local 3-10 v. NLRB (1967) 160 NLRB No. 123 [65 LRRM 2633], the U.S. Court of Appeal held that the employer's altering of the work schedule of one employee, without prior consultation with union was a violation of section 8(a)(5).

In California, the language of the Meyers-Milias-Brown Act[16] "hours" has been held to include working schedules.

Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608 [116 Cal.Rptr. 507], the court stated "the issue of schedule of hours by which the union proposed a maximum of 40 hours per week for fire fighters on eight-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable." See also Huntington Beach Police Officers Association v. City of Huntington Beach (1976) 58 Cal.App.3d 492, and Dublin Professional Fire Fighters Local 1885 v. Valley Community Service Dist. (1975) 45 Cal.App.3d 116 [119 Cal. Rptr. 182] where the court stated "[t]he assignment of overtime work to temporary service personnel will have an abvious effect on the workload and compensation of the regular employees,

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[16]Government Code section 3500, et seq.

since the regular employees will be deprived of their customary priority in seeking such work."

Moreover, the District does not dispute the hours of employment is within the scope of negotations.

The working schedule of unit members thus being within the scope of representation, the District will have committed an unfair practice if it unilaterally changed that practice without meeting and negotiating with the exclusive representative.

While not raised in its post-hearing brief, the District presented evidence during the hearing suggesting that the slip scheduling was in fact consistent with its past practice. Employer modifications consistent with past patterns of changes are not a change in working conditions within the meaning of the Katz rule. Pajaro Valley Unified, PERB Decision No. 51, (2 PERC 2107).

As evidenced by the findings, however, the District had not slip scheduled Billeci, nor involuntarily slip scheduled any other member of the unit since 1971, if ever. Those instances of voluntary slip scheduling cannot be relied upon by the District as a basis of its taking action, unilaterally, and holding the union for failure to object.

Moreover, the District relied upon the handbook, not the contract, for its authority to slip schedule. The handbook did not refer to Billeci's classification - stadium gardener, but

rather to custodians - a classification, while of the same bargaining unit, by District policy a separate job with separate classification, pay and bumping rights.

It is concluded that slip scheduling of the stadium gardener was not within the history of the District's practice. Padilla testified as to custodial staff being "slip scheduled" without reference to where one other gardener besides Billeci was supposedly slip scheduled at Village Elementary School. These vague instances, the latter two of which are not acceptable (see footnote 8, supra) do not establish a practice of slip scheduling of members of the unit, let alone the stadium gardener. Padilla also cited the September 1978 slip scheduling of Billeci as an example of the practice. That evidence is not demonstrative of slip scheduling practice, as it is the first of the acts complained of in the unfair practice charge.

Even if the District had slip scheduled in the past, its evidence thereof is so isolated and remote as to time that no definitive practice is established.

Finally, the District urges that consummation of an agreement in May of 1979 renders the unfair practice charge moot.

The District cites that ratification of the agreement in May of 1979 and the testimony of Marjorie Ott[17] as evidence of the parties' resolution of the matter. While the agreement ratified subsequent to the hearing in this matter may have resolved the parties' concerns over future changing of hours or "slip scheduling" it did not resolve the action of the District in September of 1978 and thereafter when Billeci was subject to the change in his working hours and lost the overtime pay that he had obtained for the previous seven years. That was the gravamen of the District's action under attack and that action is the basis of the unfair practice charge. Amador Valley Joint High School District (October 2, 1978) PERB Decision No. 74 (2 PERC 2192) held that a "case in controversy becomes moot when the essential nature of the complaint is lost because of some superseding act or acts of the parties." Further, PERB stated that "If any material question remains to be answered, the case is not moot and an appeal will not be dismissed."

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[17]At the unfair practice hearing counsel for CSEA, Chapter 44 questioned and Marjorie Ott, field representative for CSEA, answered as follows:

Q. Now up to the present day's date has an agreement been reached between the parties with regard to the assignment of hours and the amount of wages being received by the stadium gardener position?

A. There is a tentative agreement. It has not been ratified by either party. (HT-I, p. 39, 22-27)

Here the District's action was taken without consultation with CSEA. The subsequent agreement had no bearing on the consequences of that action. Resolution of the action is still appropriate. It is concluded that the subsequent ratificaton of an agreement did not render the matter moot.

In sum, the District took unilateral action in September of 1978 when it changed the working hours of Frank Billeci without consultation with the exclusive representative of the unit of which he was a member. That action was an unfair practice within the meaning of section 3543.5(c). The subsequent negotiations and resolution of language governing working hours does not mitigate the unfair practice found to exist.

Respondent's motion to dismiss for failure to state a cause of action is, for the foregoing reasons, denied.

CSEA also alleged a violation of section 3543.5(b) in that the Association was deprived of its rights to represent their bargaining members as guaranteed by section 3543.1(a).[18] A determination of an unfair practice under section 3543.5(c)

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[18]Government Code section 3543.1(a) provides as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to sections 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

renders unnecessary, however, a finding under 3543.5(b), Placerville Union School District (September 18, 1978) PERB Decision No. 69 (2 PERC 2185).

THE APPROPRIATE REMEDY

PERB has 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 reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. (Gov. Code sec. 3541.5)

The District violated section 3543.5(c) by unilaterally altering Billeci's work days on days of athletic activities and refusing to negotiate with the exclusive representative on the scheduling. An appropriate remedy is restoration of the benefits lost thereby to the unit member Billeci. (Steelworkers v. NLRB, supra.) Interest thereon is further appropriate (San Mateo, supra). To publish the decision by posting will effectuate the purposes of the EERA, that employees be informed of the resolution of this controversy. Placerville Union School District, supra. A cease and desist order is appropriate in refusal to negotiate cases, notwithstanding subsequent agreement on a new contract, in order to clarify parties' obligations, without requiring parties to forego a contract during the period in which it

challenged an alleged refusal to negotiate. (Fremont Unified School District, 3 PERC 10001.)

The remaining charge based upon 3543.5(b) should be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ordered that the Pittsburg Unified School District, its governing board, and its representatives shall take the following affirmative steps to effectuate the policies of the EERA:

CEASE AND DESIST from failing and refusing, upon request, to meet and negotiate in good faith with CSEA and its Pittsburg Chapter #44 as the exclusive representative of the classified employees' negotiating unit over proposed changes in working conditions.

Take the following AFFIRMATIVE ACTION:

1. Provide payment to Frank Billeci in the amount of overtime pay lost as a result of the District's rescheduling of his hours from September 15, 1978 to the date of his termination of employment with the District, with interest at seven percent.

2. Within five days after this decision becomes final, copies of the NOTICE TO EMPLOYEES set forth in Appendix A must be posted for twenty (20) working days in a conspicuous place at the locations where notices to classified employees are customarily posted.

3. At the end of this posting period, notify the Regional Director of the Public Employment Relations Board, San Francisco Office, of the action taken to comply with this order.

It is further ordered that the unfair practice charge based upon section 3543.5(b) is dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on October 29, 1979 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on October 29, 1979 in order to be timely filed. See California Administrative Code, Title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Dated: October 9, 1979

Gary M. Gallery
Hearing Officer

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD,
An Agency of the State of California

After a hearing in case no. SF-CE-342 in which all parties had the right to participate, it has been found that the Pittsburg Unified School District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA) by taking unilateral action altering a stadium gardener's work days on days of athletic activities without meeting and negotiating in good faith on the scheduling with the exclusive representative, the California School Employees Association, Pittsburg Chapter #44. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

> CEASE AND DESIST from failing and refusing, upon request, to meet and negotiate in good faith with CSEA and its Pittsburg Chapter #44 as the exclusive representative of the classified employees' negotiating unit over proposed changes in working conditions.
>
> Take the following AFFIRMATIVE ACTION:
>
> 1. Provide payment to Frank Billeci in the amount of overtime pay lost as a result of the District's rescheduling of his hours from September 15, 1978 to the date of his termination of employment with the District, with interest at seven percent.

Dated:

PITTSBURG UNIFIED SCHOOL DISTRICT

By: _____

Superintendent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 20 CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.