*** * * Overruled in part by *County of Santa Clara* (2022) PERB Decision No. 2820-M, p. 7 and *Cerritos Community College District* (2022) PERB Decision No. 2819, p. 31 * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVIS TEACHERS ASSOCIATION,	)	
	)	
Charging Party,	)	Case Nos. S-CE-103
	)	S-CE-104
v.	)	
	)	
DAVIS JOINT UNIFIED SCHOOL DISTRICT,	)	PERB Decision No. 393
	)	
Respondent.	)	August 2, 1984
	)	

Appearances: George A. Cassell for Davis Teachers Association; Gary G. Mathiason, Wendy A. Cheit and Harlan E. Van Wye, Attorneys (Littler, Mendelson, Fastiff & Tichy) for Davis Joint Unified School District.

Before Hesse, Chairperson; Tovar, Jaeger, Morgenstern and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Davis Joint Unified School District (District) to the proposed decision of an administrative law judge (ALJ). The District excepts to the ALJ's conclusion that it violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA or Act)[1] by refusing to negotiate certain proposals put forth for negotiation by the Davis Teachers Association (Association).

[1]The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise indicated.

FACTS

In the fall of 1976, following recognition of the Association as the exclusive representative of the District's certificated employees, the parties began negotiations for their first collective bargaining agreement. By February 1978, they had reached agreement on most issues. However, two articles included in the Association's original negotiating proposal had never been negotiated. The first of these was Article XXV, entitled "Teacher Responsibility For Supervision of Non-teachers." This article consisted of 18 paragraphs, among which were the following:

> 1(c) Instructional aides or volunteer aides shall not perform bargaining unit work unless the performance of such work is under the direct supervision of a teacher and there is no teacher in the District, including teachers with preferential recall rights and teachers who have been involuntarily transferred, effective as of the semester during which such aide is to be employed, who desires such work.
>
> 1(f) A supervising teacher shall not be required to perform additional assignments when he is supervising an instructional aide or volunteer aide.
>
> 2(b) Each supervisory teacher shall be provided with paid released time for attendance at regularly scheduled orientation and evaluation sessions sponsored by a student teacher's college or university.
>
> 2(c) The Board's agreement with the college or university placing student teachers shall provide that such college or university make payment to the student teacher's supervising teacher, in either of the following forms:

(1) Direct case payment of $125 or,
(2) Allowance of ten (10) tuition free semester credit hours.

It is essentially undisputed that the District refused to negotiate Article XXV, maintaining the position that the subject matter of the proposal was outside the scope of representation.[2]

The other article which had not been negotiated was Article XXVIII, entitled "Specialists:"

> There shall be no fewer than the following number of qualified specialists in each of the listed categories:
>
> (a) Elementary School
>
> | | |
> |---|---|
> | Art Teachers | 1 for every 3 schools |
> | Psychologists | 1 for every 2 schools |
> | Music Teachers | 1 for every 3 schools |
> | Reading Teachers | 1 for every school |
> | Librarians | 1 for every school |
> | Counselors | 1 for every 1000 students |
>
> (b) Junior High School
>
> | | |
> |---|---|
> | Guidance Counselors | 1 for every 250 students |
> | Librarians | 1 for every 1000 students |
> | Reading Teachers | 1 for every school |

[2]In its brief to the ALJ, the District made no argument that it had met its obligation under the Act to negotiate the merits of the proposal. Thus, in his proposed decision, the ALJ found that the District's refusal to so negotiate was undisputed. In its exceptions, the District nominally states an objection to the ALJ's finding in this regard; however, it offers no argument to support or explain that contention.

(c) Senior High School

Guidance Counselors	1 for every 250 students
Psychologists	1 for every 2 schools
Librarians	1 for every 1000 students
Reading Teachers	1 for every 1000 students

(d) Systemwide

Psychiatric Social Workers	
Nurses	1 for every 2000 students

While Article XXVIII was part of the original proposed contract submitted by the Association, it was not made the subject of specific discussion until the post-midnight hours of a "marathon" negotiating session held in mid-September 1977. At that time the parties spent no more than a few minutes discussing it. The District's negotiator advanced an initial view that the subject of the proposal was not within the EERA's scope of representation. The Association's negotiator maintained, however, that the proposal was related to hours. Nevertheless, the District continued to argue that the proposal was outside of the scope of representation, pointing out that the subject addressed by the proposal was then pending before the EERB.[3] The District ultimately took the position that it would not negotiate about the proposal unless EERB determined that the matter was within scope. The discussion concluded

---

3Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board. The name was changed in Chapter 1159, Statutes of 1977.

when the District's negotiator suggested that the parties move on to another subject.

While the record here is somewhat sketchy, it appears that the nature of the workload for these specialists varies, as might be expected, according to the classification. High school counselors, for example, are assigned to provide educational, personal and career counseling services to a fixed pool of students. At the time of hearing, each full-time counselor was assigned approximately 337 students. In previous years, the number of students assigned to each counselor ranged from 311 to 360. Unrefuted testimony indicates that counselors are not assigned fixed work hours. Some work through the lunch hour, and it is common for counselors to meet with students and parents in the evening. The testimony also indicates that as the number of students assigned to a counselor increases, the hours he or she must work also increases.

The work of the art teacher specialist is structured quite differently. At the time the specialist proposal was presented at the bargaining table, and continuing through the time of hearing, the District employed just one art teacher specialist, whose assignment was to act as a consultant to the District's elementary school teachers. This individual held workshops for the teachers in the afternoons. Little, if any, of his work involved direct interaction with students.

The District employs one part-time music teacher to provide music instruction for the students in its six elementary schools. This teacher visits each classroom on a rotating basis to conduct musical instruction for the students.

The District's elementary school librarians each provide services to two elementary schools. The librarians work both with the teachers in developing and locating teaching materials and with the students directly in groups, teaching library skills. The elementary school reading teachers similarly perform dual functions, acting as consultants to the classroom teachers and also working directly with certain students.

DISCUSSION

Article XXVIII - "Specialists"

In his proposed decision, the ALJ found that Article XXVIII, dealing with the District's "specialist" personnel, addressed, at least in part, the expressly negotiable subject of hours and that the District had refused to negotiate that proposal. He concluded on that basis that the District had violated subsection 3543.5(c) of the EERA.

On exceptions, the District maintains that the ALJ erred in finding that the proposal addressed a negotiable subject and that, in any event, it never refused to negotiate about the proposal. It contends, therefore, that the ALJ's finding of a violation was in error.

The scope of representation is expressly defined in the EERA at section 3543.2. At the time of the parties' negotiations, that section provided as follows:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.[4]

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board recognized that section 3543.2 did

[4]In 1981, EERA section 3543.2 was amended, designating the above-set-forth provision as subsection (a) and adding new subsections (b) and (c). The text of the current subsection 3543.2(a) is unchanged from its prior form which was applicable to the instant dispute.

not limit the scope of negotiations merely to those subjects expressly listed therein; rather, the statute stated that "matters relating to" any of the listed subjects were also negotiable. The Board, after careful consideration, therefore fashioned a test by which a subject not expressly listed in section 3543.2 could be examined to determine whether it is properly within the scope of representation as intended by the Legislature. This test, set forth in Anaheim Union High School District, supra, provides that a subject will be found within scope if: (1) it is logically and reasonably related to wages, hours or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. This test was subsequently affirmed by the California Supreme Court in San Mateo City School District et al. v. PERB (1983) 33 Cal.3d 850.

Because the ALJ's decision in the instant case pre-dates the Board's Anaheim decision, his rulings on the negotiability of the subjects presented in Articles XXV and XXVIII were not

based on the test set forth above, but on somewhat different criteria. In considering the rulings to which the District has excepted, therefore, we cannot merely review the ALJ's treatment of the issues; rather, we are required to decide these matters on a de novo basis, guided by the test set forth in Anaheim, supra, and cases decided thereunder.

In Article XXVIII, the Association proposed that the District observe certain specified ratios between the number of employees in each specialist classification, on the one hand, and either the number of students or the number of schools in the District on the other. It can readily be seen that such a policy, if adopted, might produce one or both of two discrete effects. First, it could eliminate the District's discretion as to the number of employees it would have on its staff in each specialist classification. Instead, the number of such employees would be determined by application of the specified ratios to either the number of students enrolled in the District or the number of schools, as dictated by the terms of the proposal. Second, the policy could act as a limitation, or ceiling, controlling the amount of work to be performed by the specialists. The District acknowledges in its brief to the administrative law judge that both of these effects may be perceived in the proposal:[5]

5This brief is incorporated by reference into the District's exceptions brief. While the District itself

> . . . [T]his DTA proposed article may be bisected to include: (1) the portion of the proposal that would determine the kind of specialists to be employed, in what number they are to be hired, and at what number they shall be distributed to the various grade levels; and (2) the remaining aspect of the proposal that would set the case and/or workload of counselors, psychologists, etc.

Certainly, these two concepts are not inextricably linked. Thus, a policy providing, for example, that no counselor be assigned more than 250 students would establish a caseload ceiling; it would not, however, require that the District retain a fixed number of counselors, or even any counselors at all. Since the District retains control over the number of students to whom it will offer counseling services, it can reduce the number of counselors on its staff by regulating the number of students to receive counseling. Conversely, a staffing requirement that a school carry one counselor for every 250 students enrolled will not guarantee each counselor a caseload ceiling, since the employer would be in compliance with the staffing quotas if, in a 500 student school, it assigned 100 students to one counselor and 400 to the other.

---

acknowledges that the Association was, at least in part, proposing a caseload ceiling when it presented Article XXVIII, the dissent herein would have us ignore this evidence and refuse to recognize this common understanding of the parties. In our view, where a negotiating proposal says X, but the parties agree that their discussions proceeded on the mutual understanding that it meant Y, the Board's analysis should rely on that mutual understanding rather than on an artificial, externally imposed interpretation.

The District maintains, however, that neither the subject of staffing quotas nor the subject of specialist workload is within the scope of representation. The ALJ found that the subject of staffing quotas is not a negotiable subject, and the Association has filed no exception to this finding. Indeed, nowhere in the record is there an indication that the Association ever advocated that that subject was negotiable. The parties' dispute, then — and thus the issue before us — is whether the workload of the specialists is negotiable. Upon application of the Anaheim test, this Board finds that it is.

An employment contract, by definition, is at its core an agreement to the exchange of a specified amount of labor for a specified amount of compensation. Thus it is that section 8(d) of the National Labor Relations Act (NLRA),6 which sets forth the scope of bargaining for the collective negotiation of such contracts in the private sector, lists by name only the two subjects of "wages" and "hours." Beyond these two express terms, the parties, in negotiating their employment contract, are directed simply to "other terms and conditions of

---

[6]The National Labor Relations Act is codified at 29 U.S.C. 151 et seq. This federal legislation, as interpreted by the National Labor Relations Board and the federal courts, served as an important reference and model for the California Legislature in the drafting of the EERA. The provisions of the NLRA may be used as guidance in interpreting parallel provisions of the EERA. San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608; Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191.

employment." The special identification of the two terms in the NLRA reflects the exchange of labor for compensation which is the essential and defining element of the employment contract.

The term "wages" as it appears in section 8(d) has long been recognized as designating the negotiability, not merely of pure wage rates, but of any form or measure which may fairly be found to constitute compensation provided to an employee in consideration of his labor. The idea that any form of compensation is negotiable as "wages" to the extent that it is found to constitute contractual consideration was expressed by the Seventh Circuit in Inland Steel Co. v. NLRB, 170 F.2d 247 [22 LRRM 2506] (1948), cert, den. 336 U.S. 960 (1948). Ruling on the negotiability of a pension plan, the Court stated that "such an obligation would represent a part of the consideration for services performed, and . . . would, in our view, be "wages." (Emphasis added.)[7]

7The First Circuit has similarly concluded that the term "wages," as used in NLRA section 8(d), is not meant literally, but was intended to refer to the economic consideration to which the employees are contractually entitled. Thus, in W. W. Cross & Co. v. NLRB, health plan benefits were found negotiable, the Court stating:

> The word "wages" . . . in the Act must have been intended to comprehend more than the amount of renumeration per unit of time worked. . . . At least, . . . the word "wages" in . . . the Act embraces within its meaning direct and immediate economic

Just as the term "wages" has been found to represent the full panoply of economic benefits flowing to the employees as contractual consideration, the term "hours," as it appears in NLRA section 8(d), has been interpreted to authorize the negotiability of the employees' basic contractual obligation to perform labor. And, as the economic benefits to which employees are contractually entitled may take a variety of forms, so the work for which employees are contractually obligated may be measured in a number of ways. Plainly, hours, in its strict sense, is an incomplete standard for the measurement of work. Equally as important as the concept of time in measuring the amount of labor rendered by an employee is the intensity of effort expended. The fundamental, and judicially recognized, labor law concepts of "speedup," "slowdown" and "workload" reflect an understanding of the fact that labor cannot be measured in hours alone. Thus, the term "hours," as used in section 8(d), has never been restricted to its literal definition, but is recognized as authorizing the negotiability of the amount of labor, however quantified, which

---

> benefits flowing from the employment relationship. . . .
>
> 174 F.2d 875 [24 LRRM 2068] (1949).

This Board has itself made clear that its interpretation of the term "wages" is much the same as that of the NLRB. See, Healdsburg Union High School District (1/5/84) PERB Decision No. 375, at pp. 29-30, and PERB Decisions cited therein.

will be provided to the employer by the employees as their obligation under the bargain. Under the terminology of the private sector, negotiations on the amount of labor for which the employees will be contractually obligated are said to address the subject of "workload."[8]

The California courts, in the context of enforcement of the labor relations program embodied in the Meyers-Milias-Brown Act,[9] have also found the subject of workload to be basic to labor negotiations. In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507], the California Supreme Court found that a proposal requiring that certain firefighting functions be performed by a given number of employees would, to the extent it was aimed at limiting

---

8Examples of the different forms which workload negotiations may take are many. Thus, in a case bearing notable similarities to the one before us, the NLRB approved the negotiability of a proposal to increase the number of employees assigned to operate a specific 10-inch mill notwithstanding the obvious implications for staffing policy. (Timken Roller Bearing Co. (1946) 70 NLRB 500, reversed on other grounds (Sixth Cir. 1947) 161 F.2d 949.) In Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 NLRB 953, the NLRB held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an additional machine. Production rates and quotas are also negotiable. (Master Slack Corp. (1977) 230 NLRB 1054.) In a case where the amount of labor required of employees was measured both in hours and in sales quotas, the quotas were held negotiable. (Irvington Motors, Inc. (1964) 174 NLRB 565, enforced, 343 F.2d 759.) See also, Gallenkamp Stores Co. v. NLRB (9th Cir. 1968) 402 F.2d 525, 529.

9The Meyers-Milias-Brown Act is codified at Government Code section 3500 et seq.

employee workload, be negotiable. In its opinion, the Court approved the holding of the court of appeal in Los Angeles County Employees Assn. v. County of Los Angeles (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625]. In that case, the court held that the scope of bargaining compelled the county to negotiate a union proposal to reduce workload by limiting the size of the caseload carried by social service eligibility workers.

Both the federal and California authorities, then, have recognized that the right of employees to negotiate the fundamental elements of their employment contracts - economic compensation in exchange for labor - should not be limited by literal interpretation of the terms "wages" and "hours." In the context of the EERA, the notion that the scope of representation is not limited by strictly literal definitions of the listed subjects of negotiation is not merely implied, as in the NLRA, but, a fortiori, is express. Thus, the first sentence of section 3543.2 provides that the scope of representation embraces "matters relating to" the enumerated subjects. Early on, this Board recognized that the enumeration of "hours" at section 3543.2 embraced, through the "relating to" language of the section, much more than the mere literal definition of the term. Thus, in Fullerton Union High School District (5/30/78) PERB Decision No. 53, we noted that:

> Negotiations on hours must include not only the stated length of the workday, but the ability of the employees to complete their

> assigned work within the workday. Setting the hours of the workday is meaningless if the work can never be performed within those hours.

The evidence in the instant case shows that, for the District's counselors, work is assigned on a caseload basis. Competent testimonial evidence indicates that at least some of the counselors were never assigned a workday of a fixed, specified length. The starting and ending times of the counselors' workday, as well as lunch hours, were determined to a great extent by each individual counselor. Similarly, evening meetings with parents were held at the discretion of the counselor on an as-needed basis. The testimony also indicates that in previous years the caseload of counselors varied from approximately 311 students to 360. The time required of the counselors to deliver the services required of them has varied proportionately with the number of students assigned to them.

Where, as here, the work to be performed is in the nature of casework — that is, a set of tasks, assigned by management, to be performed on a student-by-student basis — the relationship between the number of cases and the hours needed to complete the work is reasonably and logically apparent. Given a particular level of service established by management, the counseling of a given number of students each day will result in a workday of a certain length, on the average. If the number of students to be counseled is increased, it is

plain that, absent a modification of the services to be rendered, more time will be required to complete the job. Indeed, the relationship between a case worker's hours of employment and his or her caseload is so close that, in the context of this case, a finding that caseload was not related to hours would effectively negate the language at section 3543.2 that "matters relating to" the listed subjects, as well as the subjects themselves, are within the scope of representation.

The workload of the employees in the remaining specialist classifications raises somewhat different concerns. We have noted that the essential and defining feature of an employment contract is the exchange of labor for compensation. Thus, we found, the collective negotiation of such a contract, as authorized both in the NLRA and the EERA, logically extends to both the amount of compensation which the employer must pay, on the one hand, and the amount of work which the employees will be obligated to perform, on the other.

Certainly, work assignments are structured in a variety of ways. Under one common model, the employees' obligation begins and ends with the responsibility to be present at the work place and make their labor available for a specified period of time — typically the eight hours between 9:00 a.m. and 5:00 p.m. Under such an arrangement, the employee is entitled to end the workday at the prescribed hour without regard to the

tasks which may or may not have been completed to that point. Where management has structured the job in such a fashion, workload will be a product simply of the time spent at work. Thus, workload negotiations would proceed directly on the subject of hours.

Under other models of job structure, the employee's work obligation is different. In addition to the obligation to be present and available to work for a prescribed time period, an employee may be obligated to complete certain tasks, on a daily basis or otherwise, as a requirement of the job. Where fixed production levels are made a part of the job, they clearly become a factor which determines the employee's workload. For an assembly line worker who is required to perform an operation on each object which passes by on the line, his or her workload is clearly a product of both the time he or she spends at the work station and the rate at which the belt brings the objects to be dealt with.

Other jobs may be structured such that a fixed time period is not a part of the employees' work obligation at all. A pure piece-rate work assignment is the simplest example of such an arrangement. In the area of professional employment, an employee frequently is charged with the obligation to fulfill certain specified duties according to professional standards. Such a professional position may have attached to it a workday of a nominally stated length. By this we mean that the

position may be described or spoken of in certain contexts as having a particular workday, as from 9:00 a.m. to 5:00 p.m., while in practice the work time required of the employee will be no less than that which is required to properly discharge the assigned duties. The nominally stated length of the workday may in practice serve as a minimum requirement of job attendance, or it may have no relationship to the employee's actual work time at all.

In the case before this Board, we have found that the job of the counselors is structured upon a caseload model. On that basis we have concluded that the number of cases assigned to them is a negotiable matter. In the case of employees in the remaining classifications, the record indicates that their work assignments are structured quite differently. The District's art teacher, for example, was assigned to provide consultation services to the elementary school teachers by holding workshops at each school. The District's music teacher was assigned to visit each elementary classroom to provide instruction on a rotating basis. While the District claims that these teacher specialists were assigned specific work hours, there is no evidence that the teachers were authorized to drop their work tasks at the close of the last nominally assigned work hour. Their assignment, then, was not simply to work for the stated hours, but to service a certain number of schools, or classes, as the case may be, and to complete their assignments. Thus,

the amount of work to be performed by these specialists is not to be determined by the nominally stated length of the workday, but by factors such as the number of classroom teachers to be served by the art teacher, or the number of classes to be visited by the music teacher. Because these factors determine the specialists' workload, they are logically and reasonably related to hours of work for purposes of the Anaheim test.

The second step of the Anaheim test requires little elaboration. As we have noted above, the subject of workload goes to the very core of the employment contract. As such, it is plainly a subject of central concern to both management and employees which may appropriately be resolved via the process of collective negotiation.

The third step of the Anaheim test provides that, notwithstanding the first two steps, a subject will not be negotiable if the employer's obligation to negotiate it would significantly abridge the employer's freedom to exercise those managerial prerogatives essential to the achievement of its mission.

The concern has been raised that the negotiability of specialist workload (including counselor caseload) may interfere with management's control over staffing decisions. Certainly it is indisputable that a policy which sets workload ceilings could have an effect on the District's staffing decisions. For example, if, at a school of 1,000 students, a

counselor caseload limit is set at 250, then a managerial decision to guarantee each student a counselor will in turn eliminate the District's ability to operate the school with fewer than four counselors. It would not, however, abridge the District's right to decide that all students will receive counseling or, for that matter, that only some, or none, will be offered counseling.

Acknowledging that the negotiation of workload may have some staffing implications, this in itself is not inevitably fatal to the negotiability of the subject. In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3 608, supra, the California Supreme Court specifically considered the negotiability of employee workload in the face of the city employer's contention that the impact of workload negotiations on the city's staffing decisions put the matter out of scope. Although this case arose in the context of the Meyers-Milias-Brown Act, the Court gave careful consideration to the very managerial interests in operational control which we are required to consider under Anaheim.

The Court's framing of the issue reveals that the parties presented precisely the arguments now before us:

> The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a

> particular standard of fire prevention within the community, the city's objection would be well taken.
>
> The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of work each fire fighter must perform. (Fire Fighters Union, supra, at p. 619. Emphasis in the original.)

Clearly, the city's interest in unilateral control over fire prevention policy is exactly the same, for our purposes, as the District's interest in educational policy. Significantly, then, the Court concluded that a negotiating proposal which is in fact aimed at workload cannot be rejected as nonnegotiable merely because it is framed in terms which may have implications for management's control over staffing:

> Insofar as the manning proposal at issue in fact relates to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is [negotiable]. First the federal authorities uniformly recognize "workload" issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer . . .
>
> Moreover, a recent California public employment case, Los Angeles Employees Assn. Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625] , affords additional support for the union's position. In interpreting the scope of

> bargaining language in the Meyers-Milias-Brown Act - language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter - the Los Angeles County Employees court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in Los Angeles County Employees was in reality comparable to bargaining over "manning" levels. In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

We find that the principle of managerial control over operational policy addressed by the Court in Fire Fighters Union is precisely the principle identified at step three of the Board's Anaheim test. On that basis we find the Court's decision dispositive, and conclude that a proposal to limit the workload of the District's specialists meets Anaheim's third requirement for negotiability.

It is unclear to us, however — as it may have been to the District -- exactly how, in each case, the specific proposals set forth by the Association in its Article XXVIII would act to regulate the workload for each specialist classification. As with the proposal addressed by the Court in Firefighters, the proposal before us is drafted in terms which may suggest a purpose of setting staffing quotas as much as workload

limits.[10] Where, for example, a specialist's workload is based on the number of students he or she sees, a proposal establishing a ratio of such specialists to schools would do little to establish workload levels, since student population at a school may vary widely from year to year. Such a proposal, in such a context, would, rather than setting workload, set staffing patterns.

The ambiguity in the Association's specific proposals, however, does not dispose of the District's obligation under EERA section 3543.3 to negotiate with the Association. The District acknowledges in its brief, quoted above, that Article XXVIII is aimed at least in part at workload levels, a subject which we have here found negotiable. In Healdsburg Union High School District (1/5/84) PERB Decision No. 375, decided on remand from the California Supreme Court, the Board explained that an employer has the obligation to seek clarification of ambiguous proposals and to inform the exclusive representative of the reasons for its belief, if it so believes, that a proposal is out of scope. In our view, it appears reasonably

[10]In Fire Fighters, the parties' ultimate dispute was whether the city was obligated to submit the proposal to its arbitration procedure. This question itself turned on whether the proposal was within scope as defined in the Meyers-Milias-Brown Act. The Court, in the face of the proposal's ambiguous negotiability, ordered that the proposal should be so submitted, taking the view that the development of a factual record at such a proceeding would in all likelihood remove the ambiguity.

likely that a response by the District along the lines described in Healdsburg would have resulted in the presentation of a new proposal the validity of which could be more readily decided. However, the District gave no such response. Instead, the District steadfastly maintained that it had no obligation to negotiate the Association's proposal and that it would not do so unless and until a contrary directive was issued by this Board.

Upon the foregoing discussion, we conclude that the District failed to meet its obligation under section 3543.3 of the EERA to negotiate with the Association, and thus violated subsection 3543.5(c) of the Act.

Article XXV - "Supervision of Teachers' Aides"

In paragraph 1(c) of Article XXV, the Association proposed a limitation on the right of the District to contract out teachers' unit work to the teachers' aides. The District objects to the ALJ's conclusion that this proposal is within scope, arguing on exceptions that the proposal is an attempt to negotiate working conditions for employees outside the unit.

In Healdsburg Union High School District (1/5/84) PERB Decision No. 375, the Board, in the context of a similar proposal, considered the argument here raised by the District. We were unpersuaded. As we did in that case, we conclude here that the proposal "seeks only to preserve the work of existing bargaining unit members" and, as such, relates to wages, hours

and enumerated terms and conditions of employment. Healdsburg, supra, at p. 42.

In paragraph 1(f), the Association proposed a limitation on the right of the District to assign additional duties to a teacher who has taken on the supervision of a teacher's aide. The District argues that the ALJ erred in finding that such additional assignments affect hours and that the matter is therefore negotiable.

While there is some evidence to suggest that the presence of a teaching assistant in a classroom may affect the hours of work put in by a teacher, the instant proposal impermissibly trespasses on the managerial prerogative to determine what work is to be performed by employees. Unlike the article on specialist workload, which addressed only the quantity of work performed, the proposal here seeks to give the Association a role in assigning work tasks. Such direction of the workforce is at the core of managerial control.[11]

In paragraph 2(b), the Association proposed that teachers be given release time for the purpose of attending orientation or evaluation sessions held by a student teacher's college or

---

[11]We note that management's unilateral authority to determine and assign the tasks which will be performed by its employees is not unlimited. It applies only to those tasks which are reasonably understood to be among the duties of the classification as established by job description, past practice or otherwise. Rio Hondo Community College District (12/31/82) PERB Decision No. 279.

university for the teacher's subordinate student teacher. The District maintains on exceptions that the proposal is out of scope.

The subject of release time for school employees was addressed in Healdsburg Union High School District, supra. The subject of hours, even in its most literal sense, refers to the question of when employees will work and when they will not. A proposal for release time simply proposes a time when employees will not work. Thus, in Healdsburg, at p. 23, we concluded that release time proposals are negotiable because they directly concern hours of employment.

In paragraph 2(c), the Association proposed that the District should secure an agreement with neighboring colleges which would provide that each college must pay a stipend to each District teacher who supervises one of its student teachers. The District argued before the ALJ that the proposal would impermissibly enter into the relationship between the District and third parties. The ALJ agreed with the District that its relations with third parties lay outside the scope of representation; nevertheless, the ALJ, apparently on his own initiative, found that the proposal could be construed as being primarily a wage demand, with the source of the wages being a secondary concern. As such, he concluded that the District had a negotiating obligation with respect to it.

In acting to, in effect, redraft paragraph 2(c) on his own initiative, we find that the ALJ exceeded his authority. In Healdsburg, supra, we explained that a negotiating party who is presented with an ambiguous or unclear proposal has a duty under the EERA to seek clarification of the matter. Until the matter can be accurately understood, after all, it is logically impossible to determine whether it is in or out of scope, and, if in, whether it is agreeable or problematic. Here, however, the proposal appears quite straightforward. We agree with the District and the ALJ that the proposal, on its face, exceeds the scope of representation. Because the proposal is clear, no further analysis is required here. We find that the District was within its rights to refuse to negotiate the proposal as presented.

ORDER

Upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Davis Unified School District shall:

A. CEASE AND DESIST FROM:

Failing and refusing to meet and negotiate in good faith upon request with the exclusive representative of its certificated personnel with respect to terms and conditions of employment as defined in Government Code section 3543.2, and specifically with respect to the subjects contained in the

following portions of the Davis Teachers Association's 1976 contract proposal:

1. Article XXVII to the extent it relates to the caseload of non-teaching certificated personnel;

2. Article XXV, paragraphs 1(c) and 2(b).

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

1. Upon request of the exclusive representative of the District's certificated employees, meet and negotiate in good faith regarding the matters identified in part A of this Order.

2. Within thirty-five days after the date of service of this Decision, post copies of the Notice to Employees attached as an appendix hereto. Such posting shall be maintained for at least thirty consecutive workdays at the District's headquarters office and in conspicuous places at the locations where notices to certificated employees are customarily posted. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, defaced, altered or covered by any material.

3. 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 her instructions.

C. All other charges are DISMISSED.

Member Burt joined in this Decision.

Member Jaeger's concurrence begins on page 31.

The concurrence and dissent of Chairperson Hesse and Member Morgenstern begins on page 33,.

Jaeger, Member, concurring: I find that counselor caseload bears a reasonable and logical relationship to employees' hours of employment and that Anaheim's test of negotiability is also otherwise satisfied.

As to the proposals for specialist-school ratios, I find it unnecessary to decide whether they are, per se, negotiable. The District admits that these proposals can be interpreted as concerning either staffing or workload. In either event, the District continues, it will not negotiate; neither is within scope. If the proposals for specialist-school ratios had been determined to be efforts to negotiate pure staffing decisions, the District may well have been acting within its rights. But, since it concedes that the Association may have intended to negotiate workload, its categorical insistence that the proposals were nonnegotiable was improper.

By its admission, the District has violated its duty under subsection 3543.5(c). This Board has found that workload is negotiable. Fullerton Union High School District (5/30/78) PERB Decision No. 53. Although I do not subscribe to certain of the Board's comments in Fullerton which I consider mere dicta, I agree that the quantum of work to be completed during the workday, which in this case is expressed as caseload, has an inherent relationship to hours of work. It is this quantifiable amount of work that employees are expected to perform during work hours that distinguishes workload proposals

from those that are essentially efforts to bring nonnegotiable staffing proposals to the bargaining table.[1]

I simply do not understand my dissenting colleagues' judgment that the Association's case is flawed by its failure to provide a factual record. These are initial proposals by the exclusive representative. The threshold question is whether the subject itself is negotiable or nonnegotiable and a test of negotiability does not depend on the submission of evidence as the needed wad to trigger negotiations. Employees certainly are not required to prove that their workday is too long, or that they cannot complete their work within the scheduled hours, in order to place an hours-proposal on the table. The negotiability of wages does not depend on proof that the purchasing power of the dollar has increased or been eroded before management will consider a proposal for higher salaries. Members Hesse and Morgenstern seem to convert what may be the employees' arguments at the table into a test of whether they are entitled to sit there in the first place.

[1]I agree with the majority's conclusion that a proposal is not removed from scope simply because it has some staffing implications. Besides, if management determines that there is an encroachment into areas of staffing policy, the word NO has not yet been stricken from the labor relations lexicon and may be uttered with impunity by management.

HESSE, Chairperson, and MORGENSTERN, Member, concurring in part and dissenting in part: We find we must dissent from that portion of the decision that holds the District in violation of Government Code subsection 3543.5(c) based upon the District's refusal to negotiate Article XXVIII.

As worded by the Association in its initial bargaining proposal, the Association sought to have

> . . . no fewer than the following number of qualified specialists in each of the listed categories:
>
> (a) Elementary School
>
> | | |
> |---|---|
> | Art Teachers | 1 for every 3 schools |
> | Psychologists | 1 for every 2 schools |
> | Music Teachers | 1 for every 3 schools |
> | Reading Teachers | 1 for every school |
> | Librarians | 1 for every school |
> | Counselors | 1 for every 1000 students |
>
> (b) Junior High School
>
> | | |
> |---|---|
> | Guidance Counselors | 1 for every 250 students |
> | Librarians | 1 for every 1000 students |
> | Reading Teachers | 1 for every school |
>
> (c) Senior High School
>
> | | |
> |---|---|
> | Guidance Counselors | 1 for every 250 students |
> | Psychologists | 1 for every 2 schools |
> | Librarians | 1 for every 1000 students |
> | Reading Teachers | 1 for every 1000 students |
>
> (d) System-Wide
>
> | | |
> |---|---|
> | Psychiatric Social Workers | |
> | Nurses | 1 for every 2000 students |

The District refused to bargain over this proposal because it believed it to be outside the scope of representation. In his proposed decision, the ALJ found that some of the above

proposals (those worded on a "per-school" basis) were related to staffing requirements and were thus out of scope, but that others (those worded "per-student") were related to workload or caseload demands and thus within scope.[1]

The majority holds that, whether the proposal is formulated on a per-student or per-school basis, it could be interpreted either as staffing requirements, or caseload requirements, or both. Thus, it holds the District guilty of having failed to bargain, or at least having failed to clarify the ambiguities, on the entirety of Article XXVIII. Such an interpretation is simply unsupported by the plain language of the proposal.

The words "no fewer than the following number of qualified specialists" are not at all ambiguous. Rather, this is a simple, straightforward formula that would set a floor for staffing beneath which the District could not go.

Ignoring the clear language of the Association's proposals, the majority launches a discussion on the difference between a caseload ceiling and a staffing requirement and, in an effort to demonstrate the supposed ambiguity of the Association's proposals, demonstrates rather that it has lost sight of the actual proposals before the Board. Thus, at page 10, it explains that a policy providing that no counselor be assigned

[1]The ALJ relied on the Board's decision in Fullerton Union High School District (5/30/78) PERB Decision No. 53. The majority in this case seems reluctant to apply Fullerton, perhaps because it realizes it is in error.

more than 250 students would constitute a permissible caseload ceiling while ignoring the fact that the proposals at issue here are not worded so as to limit the number of students assigned to the specialists. To the contrary, the Association's demands clearly state that "there shall be no fewer than" one counselor for every 1000 elementary school students. The majority appears to recognize this because, at p. 10, it states:

> Conversely a staffing requirement that a school carry one counselor for every 250 students enrolling will not guarantee each counselor a caseload ceiling . . . .

Thus, the majority's own analysis demonstrates that the plain words of the proposals actually before us place those proposals beyond that which the majority itself considers to be legitimate areas of negotiability. But then, remarkably, the majority turns around and decides the proposals still could somehow be interpreted as relating to workload, which it finds is necessarily related to hours. Thus, management is required to clarify the clear and/or negotiate the nonnegotiable.

Even more disturbing is the majority's unwillingness to rely on the factual record that was made by the parties in this case. By its admission that the record is "somewhat sketchy," the majority would have us believe that there is some ambiguity surrounding the critical testimony regarding the relationship between the counselors' hours and the number of students assigned. Further, the majority's decision repeatedly asserts

that the increase in the number of assigned students correspondingly results in an increase in hours. However, even if the proposal were stated in terms of the number of students assigned, the record is not ambiguous, and the evidence is exactly contrary to the majority's finding. The only counselor to testify, Paul Ochs, not only stated that his hours were basically the same whether he had 311 or 337 students assigned but also said that the average amount of time he spends with each student per year has varied from 20 minutes to 7 hours. Obviously, if the amount of time expended doing counseling work with each student varies so widely, it is illogical even to suggest any correlation between the number of students assigned and the actual hours of work required unless there is some evidence, or at least an assertion, that the District imposed some sort of per-case time requirement, or in some other way (through discipline or the counselor's evaluations) mandated a specified level of work per case. But evidence as to the District's time requirement was supplied by Ochs, the Association's witness and a counselor for nine years:

> I heard . . . the director of pupil services said last week to the counselors, just, all you can do is what you, you know, don't, you know, all you can do is just put in a day's work, don't worry about what you can't do.

Furthermore, there is absolutely no evidence here that the District tried in any way to impose longer hours, a speed-up, or any increased effort or work on these employees. Competent evidence was given that the District did not require

specialists (in this case, only testimony relating to counselors was given) to work any longer than they ever had, no matter what the caseload was. A fair reading of the testimonial evidence plainly reveals that, while the number of students assigned may affect the type or quality of services a counselor provides, it does not affect the number of hours that the District requires a counselor to work. The type of counseling services students receive and the quality of those services are important matters, and the concern that the Association and its members demonstrate is admirable. This notwithstanding, these matters are not mandatory subjects of bargaining under EERA, and we categorically reject the majority's contrary finding.

This factual inaccuracy is emphasized because the connection between counselor caseload and hours of work or any other negotiable subject is essential to satisfying the first prong of the Anaheim test.

Unlike the National Labor Relations Act (NLRA), EERA limits the scope of negotiations to matters related to wages, hours and certain other enumerated terms and conditions of employment. Workload is not such an enumerated item and, thus, is negotiable only if it is related to such an item. Thus, the fact that cases that find workload (whether in some generic sense, or in the specifics of a given situation) to be negotiable as a term and condition of employment under the NLRA can be found, does not dictate the same result under the more restricted terms of EERA.

The Association and the majority argue that workload is related to hours but, as the majority decision itself attempts to point out, workload is not easily definable. It may relate to different things in different situations. Thus, it is impossible to determine whether workload in any given situation is in fact related to hours without accurately addressing the facts in the case at hand.

As to the cases cited under the Meyers-Milias-Brown Act, that law has a scope of representation that

> shall include all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours and other terms and conditions of employment.

Clearly, the fact that a matter is negotiable under this most broad scope is again not indicative that we should reach the same result under EERA as the majority implies in citing Fire Fighters Union v. City of Vallejo. There is another essential point in the Fire Fighters Union v. City of Vallejo case that the majority misses. In that case, the court found that, by reducing the number of fire fighters available to fight a fire, management automatically increased the workload because it could not reduce the amount of work to be done on a fire. The exact opposite is true in this case. The Association's witness clearly and directly points out that the amount of work to be done in any counseling situation can be and is adjusted by the counselor himself or herself, and he testified that management has directed them to do exactly that. Thus, the facts are

totally different from those in Fire Fighters Union v. City of Vallejo.

Further, the majority asserts that a restriction on the number of students assigned to each counselor would not adversely impact management's ability to manage because management may choose to not assign some or all of its students to a counselor. But the majority fails to point out that management, if it must adhere to a student to counselor ratio, is effectively deprived of another option, that of simply reducing the amount of counseling each student receives and, therefore, having all (or more) students counseled, but counseled less. It is entirely improper for this Board to require negotiations on how much counseling each student should receive. Yet, this is precisely what the majority decision would do.

It must also be noted that the majority decision contains a lengthy digression on the broad definition of wages that has evolved under federal law. Unfortunately, we find that digression irrelevant to any facts or to any issues raised by the parties in this case. The majority's discussion of the broad and complex question of workload may be somewhat more related to the issues found here, but the result is totally inconsistent with the issues as they are framed by this case.

The majority discusses speed-up, piecework, rate of work, professional standards and something it calls the amount of work which employees are obligated to perform. Despite 50

years of NLRA history, the precedents there on these matters are few and mostly related to unilateral changes not alleged here. We should not consider such issues in the abstract. Can speed-up be said to occur when we have no knowledge of the previous work level and no illegal change is charged? Can we make findings on the nature and extent of the work (or conduct of work) in the virtual vacuum (or the "somewhat sketchy" record) found here?

It may well be that in some circumstances work is so organized that workload or caseload demands necessarily relate to hours of work or other enumerated items. Similarly, the Board may find that unilateral changes in workload or caseload in a given situation directly impact on hours and/or other enumerated subjects. In such situations, after weighing the facts, we can then determine if these matters are within scope by the application of the second and third prongs of the Anaheim test. In accord is the decision of the Pennsylvania Supreme Court in Joint Bargaining Committee of the Penn. Social Service U., et al. v. Penn. Labor Relations Board (12/29/83) 449 F.2d 96, 15 PPER para. 15017. That case held squarely that the Commonwealth was not required to bargain about social workers' caseload, as it was a matter of inherent managerial policy. Only if the record shows a relationship between caseload and wages, hours or working conditions could caseload be negotiable.

Since the facts in this case do not support such a showing, we must disassociate ourselves from any highly speculative and injudicious conclusions. The one counselor who testified in this case presented no evidence that workload or caseload relates to the hours of a single specialist or to any other enumerated subject. As nine years or more of these circumstances produced no evidence, the Board would do better to judge the facts at hand than opt for a potentiality that may never evolve.

Finally, Member Jaeger faults the dissent for requiring the Association to prove adverse impact on hours of employment before it may place an hours proposal on the table. Not so. Our argument, simply put, is that there must be some facts or logic other than a mere assertion by the Association to demonstrate that a proposal is in fact related to an enumerated item. Here, the Association and the majority say the "caseload" demands are related to hours, but the facts in the case, which they continue to scrupulously avoid discussing, contradict them.

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. S-CE-103 and S-CE-104, Davis Teachers Association v. Davis Joint Unified School District, in which both parties participated, it has been found that the District violated Government Code subsection 3543.5(c) when it refused to negotiate with the Davis Teachers Association regarding certain portions of the Association's 1976 contract proposal.

As a result of this conduct, we, the District, have been ordered to post this Notice and will abide by the following. We will:

A. CEASE AND DESIST FROM:

Failing and refusing to meet and negotiate in good faith, upon request, with the exclusive representative of its certificated personnel with respect to terms and conditions of employment within the scope of representation as defined at Government Code section 3543.2.

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

Upon its request, meet and negotiate in good faith with the exclusive representative of our certificated employees regarding the matters found to be negotiable in the above-entitled case.

Dated: _____ DAVIS JOINT UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

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