STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TIM NOLT, et al., Charging Party, v. FRESNO COUNTY BOARD OF EDUCATION AND SUPERINTENDENT OF SCHOOLS, Respondent.	)	Case No. S-CE-462
		PERB Decision No. 409
		September 17, 1984
FRESNO COUNTY SCHOOLS OFFICE EDUCATION ASSOCIATION, Charging Party, v. FRESNO COUNTY DEPARTMENT OF EDUCATION, Respondent.	)	Case No. S-CE-470

Appearances; Finkle & Stroup by Harry Finkle, Brian J. McCully and Mary Beth de Goede for Fresno County Department of Education and Superintendent of Schools; California Teachers Association by Diane Ross for Fresno County Schools Office Education Association.

Before Hesse, Chairperson; Tovar and Burt, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB) on exceptions filed by the Fresno County Department of Education and Superintendent of Schools (County Office or Employer) to an administrative law

judge's (ALJ) proposed decision that it violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) by unilaterally increasing teachers' hours of employment.[1]

We have reviewed the ALJ's proposed decision in light of the entire record, and reverse his finding that the District violated subsections 3543.5(a), (b) and (c). Accordingly, the charges are dismissed.

FACTS

The County Office provides educational services not provided by the local school districts within the county. Included within these services are programs for juveniles at the county's detention facilities. For a period of twelve years, the teachers at the Ashjian Center (the Center), which

---

[1]EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated. Section 3543.5 provides, in relevant part:

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

is primarily a juvenile detention facility, had shared a seventy-minute lunch period with the students at the Center

In November 1977, the Fresno County Schools Office Educators Association (Association) as exclusive representative entered into its first collective bargaining agreement with the County Office. During the term of the first contract, a dispute arose over the length of the teachers' workday. The principal of the Ashjian Center distributed a memorandum fixing the end of the workday at 3:10 p.m. Before this, teachers had been allowed to leave following the conclusion of their last class at 2:40 p.m. Thereafter, teachers were required to remain on the premises to be available for counseling students, meeting with counselors and performing other school-related duties.

A grievance was filed, charging that the change in the length of the workday violated the collective negotiating agreement. The County Office denied the grievance and it was taken to advisory arbitration. Although the arbitrator ruled that the memorandum should be rescinded, the Employer was not bound by the recommendation and, subsequently, rejected the advisory award. Subsequent litigation to compel compliance with the award, instituted by the Association, was dismissed in August 1979 when the court ruled that PERB had exclusive original jurisdiction to review unfair practices.

Negotiations for the 1979 agreement between the Association and the County Office began on January 17, 1979. The Association's opening proposals contained no changes concerning hours and workweek. On February 21, 1979, the County Office submitted its proposals, one of which specifically required a seven hour workday, exclusive of lunch, for teachers.[2]

---

[2]The Employer proposed modifications in work hours, in relevant part, as follows:

> X.3 Work Hours
>
> A. The basic work day is hereby defined as eight (8) hours.
>
> B. Unit members who serve as classroom teachers at single stations are expected to be at assigned locations and on duty no less than seven (7) hours exclusive of lunch. Such duty shall be in accordance with the employer's approved schedule.
>
> C. All other unit members not specifically covered within this article shall work seven (7) hours per day. These unit members may leave after completing seven (7) hour duty day unless there is a conflict with other duties. Their working hours within the eight (8) hour day shall be based on past practice within the Fresno County Department of Education.
>
> D. Unit members are expected to remain on duty after their last class to perform professional responsibilities including, but not limited to, the following: to prepare for the next day, to work with individual students, to counsel parents, to supervise students, and to attend staff or employee meetings and in-service sessions as directed by their immediate supervisor.

On August 22, 1979, the parties met for the first time following the dismissal of the Association's lawsuit. At that session, they explored extensively the dispute concerning hours. The County Office offered a proposal to define the workday as either seven hours exclusive of lunch, or seven and one-half hours including lunch. The Association rejected that proposal on the grounds that the teachers were satisfied with the current contract language on hours.

At the following negotiation session, held September 13, 1979, the County Office again proposed a seven-hour day, exclusive of lunch. The County Office further offered to guarantee employees at the Ashjian Center a thirty-minute lunch period, with the remaining forty minutes of the prior seventy-minute lunch period to be designated preparation and counseling time. This offer was not accepted by the Association.

During the subsequent negotiating session on September 27, 1979, tentative agreement was reached on the subject of hours. The language to be included in the contract defined the basic working day to include seven hours and fifteen minutes, including a duty-free lunch period of thirty minutes.[3] No

---

X.6 All unit members shall be entitled to uninterrupted duty free lunch period of at least thirty (30) minutes.

[3]The 1979-81 collective bargaining agreement contains the

attempt was made to reconcile this language to the carry-over provision of the prior contract that unit members would receive a duty-free lunch period of "at least thirty minutes."

Negotiations then continued on other subjects for more than three months. The collective bargaining agreement was finalized on January 8, 1980 with its term extending from 1979 through 1981.

Shortly after the contract was agreed to, questions arose as to the application of the new seven-hour, fifteen-minute day. When the District Special Education Administrator was asked whether teachers with a lunch period of more than

---

following language in relevant part:

> ARTICLE X HOURS/WORK YEAR
>
> X.1 The County Superintendent recognizes that the varying nature of a unit member's day-to-day professional responsibilities does not lend itself to an instructional day of rigidly established length. Unit members who are regular classroom teachers are generally expected to be at assigned location responsible for instructional and other assigned duties thirty (30) minutes prior to their first class. The basic working day for all members of this Unit shall be seven (7) hours and fifteen (15) minutes, including a duty free lunch period of thirty (30) minutes.
>
> . . . . . .
>
> X.4 All unit members shall be entitled to an uninterrupted duty free lunch period of at least thirty (30) minutes.

thirty minutes would have to remain at the Center for more than the seven-hour, fifteen-minute day, he replied, "no." For the remainder of the 1979-80 school year, as well as for the entire 1980-81 school year, teachers at the Ashjian Center continued to take a seventy-minute lunch break.

At the beginning of the 1981-82 school year, the principal of the Ashjian Center notified employees that the lunch period would be reduced from seventy to forty minutes. For thirty minutes after lunch, the staff would be expected to be in their classrooms attending to school related matters.

On November 18, 1981, an Association representative formally protested the change and asserted that the reduction of the lunch period was a violation of EERA. Thereafter, on January 7, 1982, four unit members filed case number S-CE-462, alleging that the reduction of the lunch hour from seventy minutes to forty minutes violated subsections 3543.5(b) and (c). On February 1, 1982, the Association similarly filed case number S-CE-470 alleging violations of the EERA, including the reduction of the lunch hour.

Complaints were issued in both cases on March 19, 1982 by PERB, and the charging parties amended their charges several times. An unsuccessful settlement conference was held and then the cases were consolidated for hearing. After three days of hearings, however, the parties reached a partial settlement. All portions of the two charges and their various amendments

were withdrawn with prejudice except for the contention in both charges that the Employer unilaterally reduced the length of the lunch period at the Ashjian Center from seventy to forty minutes.

DISCUSSION

The ALJ ruled that the Employer made a unilateral change in employee hours, a matter within the scope of representation, and thereby violated its duty to negotiate in good faith. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. The Office denies that it was obligated to negotiate over the change in the lunch period, arguing that the subject of the lunch period was negotiated extensively in 1979.

The County Office also argues that the Association waived its right to bargain over a change in the length of a duty-free lunch period when it agreed in the collective bargaining agreement to a thirty-minute lunch. The ALJ had ruled that there was no waiver of the Association's right to negotiate over the shortened lunch period when it signed off on the 1979-81 collective negotiating agreement. He noted that, in order to establish an intent to waive a right, "clear and unmistakable" language or behavior must be shown, and he found that such a showing had not been made, citing Los Angeles Community College District (10/18/82) PERB Decision No. 252. Looking at the new provision and the carry-over language

providing for the duty-free lunch,[4] the ALJ decided the collective bargaining agreement was ambiguous on its face. To resolve this apparent inconsistency, the ALJ turned to the bargaining history and the subsequent behavior of the parties after the contract had been adopted. He concluded that the Employer, in negotiating the 1979-81 contract, had been more concerned with the length of the school day rather than merely the length of the lunch period. Therefore, there was no evidence of "clear and unmistakable" intent on the part of the Association and the County Officer's waiver defense was rejected.

After the County Office had filed its exceptions, PERB issued its decision in the case of Marysville Joint Unified School District (5/27/83) PERB Decision No. 314. The County Office filed a supplemental brief citing Marysville in support of its exceptions. The Employer argues that the facts in Marysville are similar, if not identical, to the facts in the instant case and, therefore, the Board must overturn the ALJ's decision.

We find merit to the County Office's suggestion that the holding in Marysville is applicable to this case, and we therefore overturn the ALJ's decision. In Marysville, the reduction in length of a lunch period was found to be pursuant

---

4see footnote 3 supra.

to a collective bargaining agreement, even when that reduction did not occur for several years after the agreement was negotiated. No violation of the EERA was found because the Association had waived its right to negotiate about the change to a 30 minute lunch by agreeing to the relevant language in the collective bargaining agreement that provided for "one duty free lunch break of no less than 30 minutes each day."

In Marysville, PERB ruled that the contractual language evidenced an intention by the parties that the association would waive its rights to negotiate over a change in the lunch period as long as the change did not violate the provisions of the collective bargaining agreement by reducing the time to less than thirty minutes. If the similarities between Marysville and the instant case are significant, then we must hold that the Association here waived its right to negotiate over a reduction in the lunch period, as long as any change made still left the teachers a duty-free lunch period of at least thirty minutes.

The similarities between Marysville and the case before us are numerous. First, they both involve the reduction of a lunch period. Second, this case and Marysville involve similar contract language. In Marysville, the contract stated that the teachers were entitled to "one duty-free lunch break of no less than 30 minutes each day." Here, the contract language entitled teaches to "an uninterrupted duty-free lunch period of

at least 30 minutes." Finally, the district in Marysville did not enforce the reductions in the lunch period until some two years after the contract was actually negotiated. Similarly, the enforcement here came eighteen months after the contract was negotiated.

The Association, however, urges that there are significant differences present here that would make Marysville inapplicable. Namely, the negotiating history here is extensive and shows clearly that the Employer did not have the right to reduce the lunch period based on a "waiver" theory.

We are unpersuaded, however, by the Association's interpretation of the bargaining history. The proposals exchanged between the parties, especially those concerning the discussion over the length of the school workday, were always phrased in terms of the teacher's having a thirty-minute lunch break, not one that varied widely according to past practice.[5]

The collective negotiating agreement gave the County Office the right to enforce a thirty-minute lunch period if it so chose. The language identified only a minimum that needed to be granted, and, except that the County Office could not

[5]Only after agreeing to the terms of the collective negotiating agreement did members of the Association's negotiating team question the Employer as to the application of the contract provisions to the teachers at the Ashjian Center. The teachers were told that those who had lunch periods longer than thirty minutes would not have to stay additional time after a seven-hour, fifteen-minute day.

require teachers to remain beyond a seven-hour and fifteen-minute day, the Employer was free to set the length of the teachers' lunch period, so long as the minimum was honored.

In Marysville, PERB resolved the question of the length of the lunch period the district was required to provide by stating:

> The provision guaranteed employees a duty-free lunch period of no less than 30 minutes each day. There is nothing in the provision granting teachers a lunch period in excess of 30 minutes; nor conversely, does the provision prohibit management from assigning teachers to a lunch period of just 30 minutes in length. (Marysville, supra, p. 9.)

We find that reasoning appropriate in this case as well.

Additionally, the Association here argues that the ambiguity caused by the new contract language and the carry-over language can only be resolved by reference to past practice. We believe these two sections are not truly ambiguous and can be harmonized, however. While one section provides for a lunch period of thirty minutes, and the other provides for one of at least thirty minutes, in reality neither section does anything other than provide for the minimum lunch period that must be granted to teachers. Neither section restricts the Employer from granting more time for a lunch period if it so chooses.

Therefore, the Association waived its right to negotiate over the County Office's reduction of the lunch period from

seventy minutes to forty minutes by agreeing to contractual provisions, permitting the District to grant teachers a lunch period of thirty minutes or longer at its discretion.

ORDER

Upon the foregoing Decision, and the entire record in this matter, it is hereby ORDERED that the unfair practice charges in Case Nos. S-CE-462 and S-CE-470 are hereby DISMISSED.

Members Tovar and Burt joined in this decision.