



Act (EERA)<sup>1</sup> by unilaterally changing the length of time allocated for lunch for certificated employees. The Modesto Teachers Association, CTA/NEA (MTA or Association) also excepts, challenging the failure of the ALJ to award back pay to the affected teachers.

For the reasons discussed below, we reverse the ALJ's decision and dismiss the complaint in its entirety.

#### FACTS

The District is composed of approximately 30 schools: 23 are K-6, 3 are junior high schools, and 4 are high schools. The Association is the exclusive representative of all certificated employees in the District.

During the 1980-81 school year and several years previous, Beyer High School was on a "modular schedule." The instructional day consisted of eight 45-minute periods, including five instructional periods, a preparation period equivalent to one instructional period, a duty-free lunch period also equivalent to one instructional period, and a student contact period.<sup>2</sup> Teachers did not have an assigned class during the student contact period, but were expected to

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<sup>1</sup>The EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

<sup>2</sup>**Under** a modular schedule, the day consisted of 25 15-minute segments referred to as mods. Three segments made up one period. Greater flexibility was afforded teachers and students in scheduling classes and other activities by using one or more of these segments.

give make-up tests and assignments, provide resource centers, answer questions and generally converse with students. Also, during the contact period, for approximately three weeks per year, teachers were assigned "forum duty" which consisted of supervising a central area where students ate lunch as well as the adjacent locker room area. This assignment lasted the entire 45-minute contact period. Students ate lunch during one of three lunch periods under the modular schedule.

In the 1981-82 school year, Beyer High School changed to a traditional high school schedule and has remained on this schedule.

The traditional schedule is more formal. It consists of seven 50-minute periods, including five instructional periods, one lunch period, and one preparation period. The student contact period has been eliminated, and the number of lunch periods has been reduced from three to two. Teachers are now assigned forum duty for 20 minutes during the lunch period. The length of the forum duty assignment is still approximately three weeks a year. Thus, for a three-week period each year the teachers' 50-minute duty-free lunch period is reduced by approximately 20 minutes. Also, since the number of lunch periods has been reduced from three to two, teachers on forum duty are responsible for supervising more students.<sup>3</sup>

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<sup>3</sup>**There** are approximately 1850 students and 70 teachers at Beyer High School.

Although MTA had advance notice of the change from the modular schedule to the traditional schedule, it was not until the first day of classes, on September 8, 1982, that it became aware of the shift in the forum duty assignment from the student contact period to the previously duty-free lunch period.

Past Practice

Over the years, it was not uncommon for the District to change daily schedules at the various schools. Such changes occurred in the other high schools as well as in the junior high schools and the K-6 schools.<sup>4</sup> In addition, instructional schedules differed among the high schools over the years, as did the number of lunch periods. There is no historical consistency with respect to the schedules adopted by individual high schools. Each operated independently and according to its own needs when adopting daily schedules.

It is undisputed that, prior to 1981-82, teachers at Beyer High School had a 45-minute, duty-free lunch period equivalent to one instructional period. The other high schools also had duty-free lunch periods of varying lengths; for example, 35 minutes at Modesto. Frank Vandervort, a teacher at Davis High School since 1969, testified that he had never been assigned lunchroom duty. He said the overall schedule changed over the years, but the lunch period had always been the

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<sup>4</sup>The other traditional high schools in the District comparable to Beyer are Downey, Modesto and Davis.

equivalent of one instructional period and duty-free for teachers. Administrators and a noncertificated noon-duty supervisor performed lunchroom supervisory duties at Davis. Edward Gonsalves, a teacher at Modesto High School since 1966, described a similar arrangement at that school. Ken McNamara, a teacher at Downey High School since 1980, testified that teachers there have a duty-free lunch period and that lunchroom supervision is done by administrators, the campus supervisor and the assistant campus supervisor. Witnesses from Downey and Modesto High Schools testified that the schedules at those schools were changed in recent years in that the lunch period was shortened by approximately 15 minutes and a 15-minute morning break created. The lunch period remained duty-free and teachers received the 15-minute, duty-free morning break.

During 1979-80, teachers at Downey did have lunchroom duty for 15 or 20 minutes at a time, according to Jim Nicholas, the current principal at Beyer who was then the assistant principal at Downey. Nicholas conceded, however, that no teacher in the high schools in the District had lunchroom duty during 1980-81.

Teachers in the Modesto City Schools and the High School District are all in one unit, and are all covered by one collective bargaining agreement. While no teachers from the elementary schools testified, there was testimony from the District personnel director, Mel Jennings, that it was the practice in several of these schools for teachers to perform

lunchroom supervision during lunch.<sup>5</sup>

The Collective Bargaining Agreement

At the time the District changed the schedule at Beyer High School, the parties were bound by a collective bargaining agreement. Article IV, Hours of Employment, states in relevant part:

ARTICLE IV: HOURS OF EMPLOYMENT

- A. The regular employee work day is defined as follows:
  - 1. For grades K-6: 300 minutes including recesses and excluding lunch.
  - 2. For grades 7-8: 341 minutes including a preparation period equivalent to a student instructional period and excluding lunch.
  - 3. For grades 9-12: 330 minutes including a preparation period equivalent to a student instructional period and excluding lunch.
- B. The District and the Association recognize that the varying nature of an employee's day-to-day professional

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<sup>5</sup>Jennings' testimony was corroborated by several documents which he had prepared to summarize the practice in the District. The Association objected to those documents on the grounds that they were hearsay. The ALJ did not find it necessary to rule on this objection, nor do we, since hearsay is clearly admissible in any case under PERB regulation 32176, although it is not sufficient to support a finding unless corroborated. Here Jennings clearly testified from his personal knowledge of the practice in question.

PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

responsibilities does not lead itself solely to a work day of rigidly established length.

In addition to performing duties as assigned during the regular employee work day, employees may be required to perform other duties, many of which shall occur outside of the regular employee work day but are still related to the assigned duties. Such duties include, but are not limited to; planning and selecting and preparing materials for instruction; receiving and evaluating work of pupils, ensuring adequate direction and supervision of students immediately prior and immediately subsequent to the beginning and ending of the student attendance day; bus loading duty; conferring and counseling with pupils, parents, staff and administrators; keeping records; attend faculty, departmental and grade level meetings (see C below), participating in staff development programs and other professional activities relating to the employee's assignment; and studying current literature to keep abreast of developments within the subject matter taught by the employees.

It is understood and agreed that although the over-all amount of time required of employees to perform their duties should be substantially equal, the proportion of time that these duties require the presence of the employee at the work site may vary according to the nature of the employee's duties and responsibilities.

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- D. In addition to "B" above, employees in grades 7-12 may be required to devote a reasonable amount of time to other duties assigned by the building administrator.

As a guideline, the time spent by the employee on such additional duties should not exceed approximately 25 hours during a school year. The local administrator may exceed this guideline only if his/her action is reviewed and approved by the Superintendent. In reviewing the local administrator's action, the Superintendent shall consider the following:

1. Uniform and equitable distribution of duties among employees.
2. Special needs of the school.
3. Special needs, abilities, handicaps, and/or limitations of the individual employee.
4. Efficient use of employee time.
5. Extent of the employees' voluntary contribution of time to school or district activities.

Elsewhere in the agreement, at Article XIV, the agreement provides:

9. Reassignment of employees who work in more than one school shall be made in a way that minimizes travel time in accordance with program needs and insures duty free lunch periods of at least 30 minutes, and where applicable, preparation periods.

Frank Vandervort, chief negotiator for MTA, was the only witness who testified about the bargaining history related to the contract.

With respect to Article IV.A.1.2.3., Vandervort testified that most of the discussions centered on student contact minutes. The parties attempted to reduce extensive language found in the prior agreement to a clear and concise student

contact time requirement. In essence, the parties' efforts were aimed at making the student contact time in the various grade levels, i.e., K-6, 7-8, and 9-12, uniform throughout the District. According to Vandervort's un rebutted testimony, the goal was to get agreement on the student contact minutes and let other related practices, such as the one covering duty-free lunch periods, continue as they had in the past in the various schools. Although there was minimal discussion on the subject, according to Vandervort, MTA was conscious of protecting the preparation period and the duty-free lunch. In fact, there had been no significant discussions about the duty-free lunch period since the 1976 negotiations.

Vandervort has always understood that the lengths of the lunch periods varied from school to school. However, he has also understood that the duty-free nature of the lunch period has been a consistent practice in the District. Thus, when he agreed to Article IV.A.1.2.3, he did so under the assumption that the language therein expressly defined student contact minutes, included a preparation period, and left the lunch time to continue duty-free as it had been in the past.

With respect to the history surrounding Article IV.B., Vandervort described what amounts to a trade-off in reaching agreement. In the past, teachers were required to report 30 minutes before the start of the instructional day and stay 30 minutes after the end of the instructional day to satisfy

work-related responsibilities such as counseling students, giving make-up exams, etc. In return for the District's dropping the rigid reporting requirement, MTA agreed to complete all work-related assignments either during the workday or after the workday as necessary. According to Vandervort, MTA, by this agreement, recognized that teachers are professionals and would complete necessary work-related assignments when necessary without the need for the rigid reporting requirement.

Article IV.D. covers extracurricular activities, such as supervising dances, athletic events, etc. According to Vandervort, MTA introduced the 25-hour concept; this clause means that teachers were responsible for up to 25 hours of extracurricular assignment.

Lastly, Article XI of the contract includes a standard management rights clause about which there was no testimony.

#### DISCUSSION

The ALJ found that the District's change in the duty-free lunch period constituted an unlawful unilateral change in a matter related to wages, hours, etc., according to this Board's decisions in Anaheim Union High School District (10/28/81) PERB Decision No. 177 and Healdsburg Union High School District, et al. (1/5/84) PERB Decision No. 375 and that the District therefore violated its duty to negotiate in good faith. Contrary to the ALJ, we find that the length of the duty-free

lunch need not be analyzed to determine whether it is related to a matter within scope. The length of the lunch period is the issue of hours itself and falls directly within the scope of negotiations enumerated by EERA. As the Board held in San Mateo City School District (5/20/80) PERB Decision No. 129,6 p. 15;

the negotiability of hours of employment includes, of necessity, negotiability of the hours during which employees are not required to work. . . . [I]t is inherent in the negotiability of the workday that one may deal with the placement and duration within that time frame of lunch periods and the designation and nature of relief time from the performance of one's duties.

See also Marysville Joint Unified School District (5/27/83) PERB Decision No. 314; Fresno County Board of Education, et al. (9/17/84) PERB Decision No. 409.

An employer violates its duty to negotiate in good faith when it unilaterally changes an established policy affecting a matter within the scope of negotiations without affording notice and an opportunity to negotiate to the exclusive representative. Grant Joint Union High School District (2/26/82) PERB Decision No. 196; Pajaro Valley Unified School

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<sup>6</sup>This decision was annulled by the California Supreme Court in San Mateo City School District, et al. v. PERB (1983) 33 Cal.3d 850. In that decision, however, the Court upheld the Board's approach to determining whether matters are within the scope of negotiation, and directed the Board to reconsider San Mateo, supra and Healdsburg, supra, in light of its decision. The Board did so in Healdsburg Union High School, et al. (1/5/84) PERB Decision No. 375.

District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

Established policy may be reflected in a collective agreement, Grant, supra, or where the agreement is vague or ambiguous, it may be determined by examining the past practice or relevant bargaining history, Rio Hondo Community College District (12/31/82) PERB Decision No. 279; Pajaro Valley, supra.

Here the collective agreement makes several references to the hours to be worked, but is silent on the issue of the duration of the lunch period. The agreement specifies that teachers in grades 9-12 are to work 330 minutes per day. The agreement does not give the length of the lunch hours, but specifies that the preparation period shall be equivalent to a student instructional period. No such qualification is added with regard to lunch. Clearly there is provision for a duty-free lunch of some length, since the 330 minutes excludes lunch, but the length is unspecified.

The District notes in its brief that it is required by other regulations<sup>7</sup> to provide a duty-free lunch period of at least 30 minutes, and it argues that it has discretion to establish the length of the lunch period, based on the needs of the school. This 30-minute figure is used elsewhere in the

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<sup>7</sup>The District does not specify the regulations in question, but we presume it refers to regulations adopted pursuant to the Education Code.

contract, ensuring that teachers who travel between schools have a duty-free lunch of at least 30 minutes. Other contract sections dealing with additional duties to be performed do not reference lunch duty at all.

The evidence presented regarding bargaining history is similarly inconclusive. The parties apparently were concerned with defining the actual working minutes and the general amount of time to be spent on additional duties, but there was little or no discussion with regard to the length of the duty-free lunch, which the parties knew varied from school to school. Since the language of the contract is silent with regard to the length of the duty-free time for lunch, and the negotiation history is similarly vague, we find it appropriate to turn to the past practice in the District to determine whether there has been a change in policy as alleged by the Association.

Clearly there was a change between 1980-81 and 1981-82 in the length of the duty-free lunch period for teachers at Beyer—for three weeks it was shorter, and for the rest of the year it was slightly longer.<sup>8</sup>

However, Beyer is only one of four traditional high schools in the District and the record indicates that the past practice

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<sup>8</sup>There were several other time changes as a result of the switch from the modular to the traditional schedule. No charges were filed with regard to other changes, and there is insufficient evidence in the record to determine the effect of those changes on the contractually agreed-upon 330-minute maximum workday.

in the District varied at each school. While the ALJ acknowledged that the past practice in the District was varied, he unaccountably concluded that these aberrations "do not detract" from the established past practice at Beyer.

On the contrary, we find the varied practice in the District to be highly significant. The evidence indicates a great deal of variation among the schools with regard to the length of the lunch period, and reflects as well a great deal of flexibility in scheduling. While the practice at Beyer appears relatively consistent in offering a duty-free lunch of the same length as one instructional period, the lunch period was shorter at Modesto and Downey. Further, one witness testified without contradiction that teachers at Downey did have lunchroom duty at some period in the past. We specifically reject the ALJ's suggestion that the past practice at schools in the District other than Beyer is irrelevant. Teachers in the District belong to one unit and are covered by one contract. Absent any evidence of any contrary intention, past practice throughout the unit is relevant in determining whether or not a unilateral change in policy has occurred. Grant, supra.

Here, because there is evidence of a varied past practice in the length of the duty-free lunch for teachers, we conclude that the Association has failed to demonstrate that the District has made a unilateral change in policy so as to

violate EERA. For that reason, we overturn the decision of the ALJ, and order the complaint dismissed.

We also deny the Association's request for costs, since we find it to be without merit, and we deny the District's request for oral argument since we find that no novel issues are presented.

Further, we hereby deny the Association's appeal of the executive director's rejection of its response to exceptions because the response was untimely filed. The executive director has correctly interpreted PERB regulation 323109 controlling the time for filing of response, and the Association's filing was indeed untimely.

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<sup>9</sup>PERB regulation 32310 states:

Within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself an original and five copies of a response to the statement of exceptions and a supporting brief. The response shall be filed with the Board itself in the headquarters office. The response may contain a statement of any exceptions the responding party wishes to take to the recommended decision. Any such statement of exceptions shall comply in form with the requirements of Section 32300. A response to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of this Section. Service and proof of service of these documents pursuant to Section 32140 are required.

ORDER

Upon the foregoing decision, and the entire record in this matter, it is hereby ORDERED that the unfair practice charge in Case No. S-CE-485 is hereby DISMISSED.

It is further ORDERED that the Association's appeal of rejection of its response to exceptions is hereby DENIED.

Member Jaeger joined in this Decision.

Tovar, Member, concurring and dissenting: I would affirm the ALJ's proposed decision finding that the District unilaterally altered the policy of a duty-free lunch period equivalent to one instructional period without first providing notice and an opportunity to negotiate to MTA, the exclusive representative of the certificated employees in the District. I agree with the ALJ's assessment that the variations which existed in the District do not diminish the fact that, for almost ten years at Bayer High School, the practice had been that the duty-free lunch time equaled an instructional period in length. The variations were primarily a result of changes in the length of the school periods, depending on preparation time, contact time and what scheduling system was in practice at the time (traditional or modular). However, unrebutted testimony reveals that at Bayer, and generally at the other high schools in the District, teachers had a duty-free lunch

period with student supervision being provided by the administrators at the schools and/or noon-time supervisors outside the bargaining unit.

I concur with the rest of the determination made by my colleagues regarding the request for costs and the Association's appeal of the executive director's rejection for lack of timeliness of its response to exceptions.