STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA, Charging party,	)	Case No. LA-CE-2059
v.	)	PERB Decision No. 563
LAKE ELSINORE SCHOOL DISTRICT, Respondent.	)	February 24, 1986

Appearances; A. Eugene Huguenin, Jr., for Elsinore Valley Education Association, CTA/NEA; Parham & Associates, Inc., by James c. Whitlock for Lake Elsinore School District.

Before Hesse, chairperson; Morgenstern and Craib, Members.

DECISION

MORGENSTERN, Member: This case is before the public Employment Relations Board (PERB or Board) on exceptions filed by the Lake Elsinore school District (District) to the proposed decision of a PERB administrative law judge (ALJ), In his proposed decision, attached hereto, the ALJ concluded that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] when it

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

Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:

bypassed the exclusive representative of the District's certificated employees, the Elsinore Valley Education Association, CTA/NEA (Association).

FACTUAL SUMMARY

The ALJ's findings of fact are not in contention, are free from prejudicial error and are adopted by the Board itself. In sum, the Association's charge concerns the employment of two speech therapists, Kathy Mark and Delia Mitchell Christian, for workyears that exceeded those provided for by the parties' negotiated agreement. Specifically, Article 7.4 of the 1982-85 contract provides that the length of the workyear shall be 179 days for returning bargaining unit members and 180 days for new members. The evidence presented to the ALJ conclusively established that, during the 1982-83 and 1983-84 school years, Mark was hired as a speech therapist for a 196-day workyear. For the 1984-85 school year, Mark was offered and accepted a contract that required a workyear of 190 days. Christian was hired as a speech therapist for the 1983-84 and 1984-85 school

---

(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.

years, both specified as 190-day school years. These therapists were paid for the extra days worked based on a per diem rate. Other unit members, save nurses, were paid for extra days based on an established hourly rate.

DISCUSSION

An employer violates its duty to bargain when it bypasses the exclusive representative and bargains individually with its employees concerning the terms and conditions of employment. See Morris, Developing Labor Law, 2nd Ed., Vol. I, page 600 et seq.; Gorman, Basic Text on Labor Law, page 375 et seq. AS the United States Supreme Court noted in J. I. Case v. NLRB (1944) 321 U.S. 332 [14 LRRM 501]:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay . . . collective bargaining . . . .

In Walnut Valley unified School District (1981) PERB Decision No. 160, the Board considered the claim that the employer had bypassed the exclusive representative and held that, in the presence of an exclusive representative, an employer may not unilaterally establish or modify existing policies.

> To prove that the District has unlawfully bypassed CSEA by "negotiating" directly with the four employees in question, it must be demonstrated that the District sought either to create a new overtime policy of general application or to obtain a waiver or modification of existing policy applicable to those employees.

Here, the evidence plainly establishes that two employees agreed to workyears that exceeded the contractual limit. By dealing directly with Mark and Christian, the District sought and obtained a workyear commitment different from that which was negotiated with the therapists' bargaining representative. That conduct flies in the face of the principle of exclusivity and directly affronts the statutory scheme which is the cornerstone of the Act.[2]

The District's arguments raised on appeal afford no basis to depart from this conclusion. The employer cannot refer to its past practice as a benchmark against which to judge its conduct where the unambiguous contract terms spell out the negotiated workyear. Past practice is of relevant concern in unilateral change cases only where no unambiguous bilateral agreement clearly sets out the practice. As we said in Modesto City Schools and High School District (1984) PERB Decision No. 414:

> Established policy may be reflected in a collective agreement . . . , or where the agreement is vague or ambiguous, it may be determined by examining the past practice . . . . (Citations omitted; emphasis added.)

2we are cognizant, of course, of the common practice of having certificated employees sign individual employment contracts. Such contracts are not inherently improper, even if secured without the involvement of the exclusive representative. However, such contracts are unlawful where they usurp the exclusive representative's statutory role or otherwise undermine the integrity of the collective bargaining process required by the Act. The instant case, involving the creation of individual contracts (without the consent of the exclusive representative) with terms contradicting those contained in a collectively bargained agreement, provides one such example.

Here, the parties' contract is sufficient evidence to establish that the parties' agreement effective at that time compelled either a 179- or 180-day workyear.[3]

The District's argument that no actual negotiating took place with Mark or Christian is likewise unpersuasive. First, as the Board stated in Walnut Valley, supra, proof of bypassing the exclusive representative by negotiating directly with employees is demonstrated when the employer obtains a waiver or modification of an existing policy applicable to those employees. Here, by virtue of the collective bargaining agreement, Mark's and Christian's workyears were limited to 179 or 180 days. The individual employment contract each signed, however, is evidence that both employees relinquished their rights to rely on the negotiated workyear limit. Moreover, the injury suffered in a case such as this stems from the employer's failure to negotiate with the exclusive representative. It is the absence of any effort by the District to negotiate the aberrant workyear with the Association that forms the basis of the charge.

---

[3]The Board takes administrative notice of the parties' 1985-86 contractual agreement entered into in September 1985. El Monte union High School District (1980) PERB Decision No. 142; John Swett Unified School District (1981) PERB Decision NO. 188; Delano Union Elementary School District (1982) PERB Decision No. 213a, rev. den. (1983) 5 Civil 7562; San Mateo City School District (1984) PERB Decision NO. 375a. Also, see PERB Regulation 32120, codified at California Administrative Code, title 8, section 31001 et seq. Article 5.5 of that agreement establishes that the workyear shall be 184 days for returning unit members and 186 days for unit members new to the District.

Also without merit is the District's claim that no unlawful conduct is evidenced here because the change in the two speech therapists' workyears was not a change in policy of general application. In fact, the contrary is true. Article 7.3 establishes the number of workdays for all bargaining unit members. By eschewing that limit, the District unilaterally voided its 179- or 180-workday policy which, by its terms, was applicable to all unit members, including these two employees in the speech therapist classification.

Finally, the remaining question is whether the Association's charge was timely filed. Section 3541.5(a)(1) requires that the conduct complained of in an unfair practice charge be based on conduct occurring not more than six months prior to the filing of the charge.

First, with regard to the practice of mailing job announcements by the District superintendent's secretary, Connie Estrella, we are unable to find sufficient evidence from which to impute Association knowledge. Estrella did not testify that she in fact sent the job announcements in question, nor did the Association testify that such were received. Moreover, we are reluctant to base union knowledge of an intent to change the workyear on a one-line entry in a job announcement mailed to the Association president prior to school opening. And, as the ALJ emphasized, the job announcement did not advise the union of its intention to change the workyear.

We also find it of some import that District superintendent Ronald Flora was unaware of the two therapists' workyears until the summer of 1983. And, while he testified that he told "the union" of the workyear problem, he did not indicate when that occurred nor to whom his comment was made. Thus, what we are left with is that, while Flora became aware of the longer workyears in the summer of 1983, the letter from Flora to Dee Thomas, Association president, nearly one year later, is the earliest evidence of the fact that the workyear disparity was conveyed to the union, indeed, the timing of the letter to Thomas may be read to support the statement by Jim Caldwell, chairperson of the Association's bargaining team, that the union was unaware of the divergent workyear until June 1984. For these reasons, we agree with the ALJ's finding that the charge is not untimely.

ORDER

Based on the foregoing facts, conclusions of law, and the entire record in this case, and pursuant to Government code section 3541.5(c), it is hereby ORDERED that the Lake Elsinore School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the contractually established workyear duration in derogation of its obligation to negotiate in good faith and be bound by the contractual agreements reached with the Elsinore Valley Education Association, CTA/NEA.

2. Denying to the Elsinore Valley Education Association, CTA/NEA, rights guaranteed by the Educational Employment Relations Act, including the exclusive right to represent and to negotiate a binding collective bargaining agreement on behalf of its members.

3. Interfering with the employees' rights guaranteed by the Educational Employment Relations Act, including their right to be represented by their exclusive representative.

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

1. Rescind the individual employment contracts of Kathy Mark and Delia Mitchell Christian and adhere to the workyear duration as mandated by the parties' current contractual agreement.

2. Make both employees whole for any financial loss suffered as a consequence of the District's failure to compensate them in accordance with the established method of compensation for the extra days each worked. Monetary compensation shall include interest at a rate of ten (10) percent per annum.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive

workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his instructions.

This Order shall become effective immediately upon service of a true copy thereof upon the Lake Elsinore School District.

Chairperson Hesse and Member Craib joined in this Decision.

APPENDIX

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

After a hearing in unfair Practice Case NO. LA-CE-2059, Elsinore Valley Education Association, CTA/NEA v. Lake Elsinore School District, in which all parties had the right to participate, It has been found that the District violated Government Code section 3543.5(a), (b) and (c) by bypassing the certificated employees' exclusive representative and establishing the workyears for two speech therapists at odds with those mandated by the parties' negotiated contract.

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

A. CEASE AND DESIST FROM:

1. unilaterally changing the contractually established workyear duration in derogation of our obligation to negotiate in good faith and be bound by the contractual agreements reached with the Elsinore Valley Education Association, CTA/NEA.

2. Denying to the Elsinore Valley Education Association, CTA/NEA, rights guaranteed by the Educational Employment Relations Act, including the exclusive right to represent and to negotiate a binding collective bargaining agreement on behalf of its members.

3. Interfering with the employees' rights guaranteed by the Educational Employment Relations Act, including their right to be represented by their exclusive representative.

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

1. Rescind the individual employment contracts of Kathy Mark and Delia Mitchell Christian and adhere to the workyear duration as mandated by the parties' current contractual agreement.

2. Make both employees whole for any financial loss suffered as a consequence of the District's failure to compensate them in accordance with the established method of compensation for the extra days each worked. Monetary compensation shall include interest at a rate of ten (10) percent per annum.

Dated: _____ LAKE ELSINORE SCHOOL DISTRICT

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2059
v.	)	PROPOSED DECISION (5/13/85)
LAKE ELSINORE SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: A. Eugene Huguenin, Jr., Attorney, California Teachers Association, for Charging Party; James C. Whitlock, Parham & Associates, for Respondent.

Before Gary M. Gallery, Administrative Law Judge.

STATEMENT OF CASE

The District employed two members of the bargaining unit under employment contracts for more days of service than provided for in the collective bargaining agreement with the exclusive representative.

PROCEDURAL HISTORY

On September 27, 1984, the Elsinore Valley Education Association, CTA/NEA (EVEA or Association) filed an unfair practice charge against the Lake Elsinore School District (District) alleging violation of Government Code subsections 3543.5 (a), (b) and (c)[1] in that the District bypassed the

[1]3543.5. UNLAWFUL PRACTICES: EMPLOYER

It shall be unlawful for a public school

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

Association and negotiated with two speech therapists upon terms and conditions of employment, namely the work year and compensation. A complaint incorporating the charge was issued on October 31, 1984. On October 22, 1984, Respondent filed motions to defer and to dismiss the complaint, both of which were denied on December 6, 1984. Respondent's answer was filed November 15, 1984, denying violations of the EERA. The parties waived a settlement conference. The formal hearing was held on January 17, 1985. Post hearing briefs were filed by the parties and the matter submitted on March 20, 1985.

FINDINGS OF FACT

The District is a public school employer within the meaning of subsection 3540.1(e). The Association is the exclusive representative within the meaning of subsection 3540.1(f) of certificated employees of the District.

> 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.

These subsections are a part of the Educational Employment Relations Act (EERA or Act) commencing with Government Code section 3540. All references are to the Government Code unless otherwise noted.

Prior to July 1983, the District and the Elsinore High School District employed the same superintendent with a common administration. Each district had a separate board of trustees. In July 1983 separate superintendent positions and administrations were established. James Flora, who had been superintendent of both districts since 1981, continued as superintendent of the Respondent.

A collective bargaining agreement between the parties expired in June 1982. Negotiations on a successor contract continued until April 1983 when a new agreement, retroactive to July 1982 was reached. The term of that agreement is July 1982 to June 1985.

Speech therapists are members of the unit covered by the agreement (Article 3.2). The agreement provides that the work year for returning teachers is 179 days and for new teachers 180 days (Article 7.4).

In July or August of 1982, Kathy Marks was hired as a speech therapist for the 1982-83 school year. The job announcement provided that the work year was 196 days, and she was told she would be working that number of days during her interview for the position. Marks was hired by Earl Hooper who was Director of Special Education Services when there was a common administration. In May 1983 the District extended to Marks an employment contract that stated 196 workdays for the 1983-84 school year. The salary class was identified as D-5.

Among the stated conditions of employment was the provision "This offer is subject to your having on file with the County Superintendent of Schools of Riverside County requisite credentials for services." Under the styling of ACCEPTANCE OF OFFER was a statement that the signatory stated "I accept the above offer of employment and will report for duty as directed." Marks signed the document later in May 1983, and worked 196 days for the 1983-84 school year. On a document titled "Contract/Offer of Employment" dated May 4, 1984, with the same substantive provisions as the one described for the 1983-84 school year, Marks was offered and on July 14, 1984, accepted employment for the 1984-85 school year. She was told by her then supervisor, Devena Reed, that she would be working 10 extra days for that school year. The salary class was designated D-6 on the salary schedule.

Delia Christian (formerly Mitchell) was hired in July 1983 as a speech specialist for the 1983-84 school year. The employment contract was in exactly the same format as Marks[1] 1983-84 employment contract except it called for 179 days plus 11 anticipated extra days. The salary was D-l of the salary schedule. Christian signed her acceptance of the contract on July 13, 1983. Christian testified that the District advised her by letter in August 1984 that her 1984-85 work year would be 190 days.

Both Marks and Christian denied that District representatives had made any effort to negotiate a change in work years that either was employed.

Connie Estrella, secretary to the superintendent, testified that under standard procedures job announcements are to be posted and distributed in the school mail and by regular mail to the Association president. In July or August 1982 Estrella caused to be distributed copies of a job announcement for the position of Itinerant Language, Speech and Hearing Specialist, at the District which called for a work year of 196 days. The salary specified was placement on the teachers' salary schedule. In July 1983 Estrella caused to be distributed a notice for the same position which called for a work year of 196 days. Again the salary was placement on the salary schedule. The notice she said was posted, placed in the school mails and sent to the home of the president of the Association.

Ron Flora, superintendent of the District, testified that in the summer of 1983 he learned that the speech therapist was working a longer year than regular unit members. He was unable to find rationalization for the 196 workdays. He did hire a speech therapist in that summer for 190 days (Mitchell). The flyer, announcing the position, he said, stated 190 days.

Flora testified that he told the Association that he had a problem. However, he was not specific about when or who in the Association he spoke to. The District did try to reduce the

work year for both speech therapists said Flora. The first formal evidence of this effort is a May 18, 1984, letter to Dee Thomas, president of EVEA which alluded to, among other things, "standardization and evaluation of speech teachers with five additional days". Also, included within the District's reopener provisions (for 1984-85) was language providing that the District would have authority to extend individual unit member's work year by individual contracts.

Flora denied negotiating with either of the speech therapists. However, after a grievance proceeding he had a discussion with one of the therapists, he said, about the confusion. The therapist had come to see him. He told the person that "they should keep things the way they were at present."

James Caldwell, at the time the chief negotiator and the grievance chairman for the Association, said that he learned of the extra workdays for Kathy Marks for the first time on June 4, 1984. The grievance committee then met with Flora on the issue. Caldwell said he thought a resolution had been reached. Flora testified that he told EVEA the District had made a mistake. In response to an Association request, however, he was unwilling to reduce to writing that the District was in error. He said he reneged on the conversation with the union after speaking with the District representative

about the matter. He was uncertain that the District had made a mistake.

Later, the grievance committee requested information from the District. Information provided by the District in the first week of August 1984 confirmed that Marks had worked 196 days the previous two school years and that Mitchell had worked 190 days. The District also provided copies of the employment contracts for Marks and Christian described above and a copy of a memo from Reed to Flora dated August 17, 1984, regarding the workdays for the therapist for the 1984-85 school year. Reed noted,

> Although the matter has not been settled by the negotiation team, a practical decision is to bring both Kathy Marks and Delia Mitchell in one week ahead of all teachers. Therefore, their first working day will be August 21, 1984, and I am sending letters to both of them in that regard.

Caldwell testified that nurses and speech therapists are paid a per diem salary for days in excess of the number of days per year regular teachers are employed.[2] The per diem rate is established by dividing the salary schedule rate by 179. However, when a teacher is employed for an extra day, he or she is paid an hourly rate based upon the contract salary schedule. Caldwell's testimony was not rebutted by the District.

---

[2]Nurses work 185 days according to Caldwell.

ISSUE

The issue in this case is whether the District violated subsection 3543.5(c) by contracting with and employing the two speech therapists for more days than provided for in the contract.

CONCLUSIONS OF LAW

The Public Employment Relations Board has established that an employer's unilateral change about any matter within the scope of representation is a per se violation of the statute. See Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51 [2 PERC 2107]; San Mateo County Community College District (6/8/79) PERB Decision No. 94 [3 PERC 10080]; San Francisco Community College District (10/12/79) PERB Decision No. 105.

Government Code section 3543.5 provides that it is unlawful for a public school employer to deny to employee organizations rights guaranteed to them by the Educational Employment Relations Act (hereafter EERA) or to refuse or fail to meet and negotiate in good faith with an exclusive representative.

Under section 3543.1(a) the exclusive representative is granted the right to represent their members in their employment relations with the employer. The latter is charged with an absolute duty to meet and negotiate with the exclusive representative upon request with regard to matters within the scope of representation. (Section 3543.3.)

In Walnut Valley Unified School District (3/30/81) PERB Decision No. 160, the board addressed a charge of bypassing the exclusive representative where the employer extended overtime opportunities to four members of the bargaining unit. Said PERB:

> The law regarding employers negotiating directly with their employees and bypassing the designated bargaining representative is clear. Section 3543.3 of the EERA, requires the employer to negotiate and bargain in good faith once an employee organization has been duly designated as the exclusive representative for a given group of employees.[3] This obligation imposes on the employer the requirement that it provide the exclusive representative with notice and the opportunity to negotiate on proposed changes of matters within the scope of representation. Unilateral action taken without fulfilling this obligation constitutes a refusal to negotiate in good faith. San Mateo County CCD PERB Decision No. 94 (6/8/79). An employer may not, in the presence of an exclusive representative, unilaterally establish or modify existing policies covering, for example, overtime pay ~~rates,~~ the selection of employees to work overtime, or the definition of overtime hours. (Underlining in original. Footnote as per original, renumbered below.)

---

[3]Section 3543.3 reads:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

PERB held that to prove that the employer has unlawfully bypassed the exclusive representative by "negotiating" directly with employees, it must be demonstrated that the District sought either to create a new overtime policy of general application or to obtain a waiver or modification of existing policy applicable to those employees.

This case does not address overtime policy per se but rather the employees work year and rate of pay for extra days worked. In the summer of 1982 while negotiating with the exclusive representative for the speech therapists, among others, on a successor contract including the work year, the District separately offered and secured the services of Marks for a work year different than that secured for the other unit members and at a different rate of pay. Again in 1983 for the 1983-84 school year, after an agreement had been secured with the exclusive representative for a firm work year for unit members (179 days for returning teachers and 180 days for new teachers), the District again secured work years from Marks (for 196 days) and from Christian (for 190 days) which were separate and different than that for other unit members. Finally in 1984 regarding the 1984-85 work year, the employer negotiated different work years and different pay for the speech therapists from other unit members. Thus, in 1982 the District, by dealing directly with Marks, sought and obtained a work year different from that negotiated with the exclusive

representative, and in 1983 and the following year, obtained modification of the work year it had bargained for and was committed to by agreement with the exclusive representative. In both instances, its conduct falls within the ambit of Walnut Valley Unified School District, supra.

The employer's defense is predicated upon two grounds. It argues that the facts do not support a finding that the District negotiated with the speech therapists, as the number of days were set before the employees were hired. The employer further argues that the practice of hiring speech therapists for a longer work year was common knowledge for several years and that the Association was alerted to the practice by virtue of the superintendent's secretary mailing notice of the positions to the Association's president and distributing them to all the school sites. These arguments are not persuasive.

Both Marks and Mitchell testified that they did not negotiate with the District about the number of workdays they were to be employed. However, it is clear that the simple transaction of the District's offering positions to them for days numbering more than was provided for in the collective agreement, and their acceptance of the employment contracts was a form of negotiation, albeit limited. The District unilaterally altered the number of workdays, from that called for in the agreement and further, varied the terms between the two speech therapists by giving Marks a contract for 196 days

and Mitchell a contract for 190 days. In each instance, the District was conveying the terms of a proposed work year, and the therapists were accepting those terms. Those agreements were a variance from what was provided for in the agreement negotiated with the exclusive representative of certificated employees, including speech therapists. In addition, according to the unrebutted testimony of Caldwell, the speech therapists were paid a rate of salary for the extra days services different from other unit members rate of pay for added days worked.

In J.I. Case Co. v. National Lab NLRB (1944) 321 U.S. 322, 88 L.Ed. 762 cited by PERB in San Francisco Community College District (10/12/79) PERB Decision No. 105, the United States Supreme Court said:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

In Modesto City Schools (3/8/83) PERB Decision No. 291, the PERB found a direct offer to employees, without first such offer being communicated to the exclusive representative to be a violation of the employer's obligation to bargain only with the exclusive representative. Here, not only did the District make offers of employment at variance from the negotiated

collective agreement to members of the unit without first providing the Association with an opportunity to negotiate the matter, but consummated the agreements, with different terms between the two unit members.

The District further urges that principles of equitable estoppel be invoked to the facts in this case. It urges that the extended work year for the therapists was common knowledge for the past several years. Further, it notes the testimony of Estrella, secretary to the superintendent, that she distributed notices of the positions to the school sites and mailed copies to the home of the Association president. These arguments do not involve equitable estoppel but are contentions that the union waived its right to bargain the extended work year. They too, are without merit.

Waiver is an affirmative defense that must be raised in the Respondent's answer or the defense itself is waived. Walnut Valley Unified School District (2/28/83) PERB Decision No. 289. See also PERB Regulation 32644(c)(6), California Administrative Code, title 8. The District's answer did not refer to the Association's conduct by way of contending waiver.

Moreover, for an employer to show that a union waived its right to negotiate, it must demonstrate either "clear and unmistakable" language, or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. Sutter Union High School District

(10/7/81) PERB Decision No. 175; San Mateo Community College District, supra; and see Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. Additionally, a waiver must be an intentional relinquishment of the union's rights under EERA. San Francisco Community College District (10/12/78) PERB Decision No. 105. Los Angeles Community College District (10/18/82) PERB Decision No. 252.

There is simply no evidence to suggest that the extended work year was common knowledge. The evidence shows that the 1982-83 was the first year that a speech therapist (Marks) worked longer than provided in the collective agreement. Even Flora, the superintendent, was not aware of a longer work year for therapists until the summer of 1983. While he testified that he told the union of the problem, he did not specify when he conveyed that information to the union. Caldwell, the Association grievance chairperson, did not learn of the problem until June 1984. The District failed to establish facts that the extended work year was common knowledge for several years.

Nor does the evidence that the superintendent's secretary caused copies of the job announcements to be distributed to the school sites and mailed to the Association president establish waiver.

In the first place Estrella testified that it was "standard procedure" for the District to send notices of job announcements to the Association president along with other

distribution patterns. She did not testify that she did in fact send the 1982 job announcement to the individual then holding office with the Association. There is no evidence that the Association did in fact receive the notice of the job announcements.

In the second place, assuming notice was sent to the Association president, what was sent was a notice of a deadline for time to file for a position, not an intention by the District to change the work year policy applicable to unit members.[4]

The District is required to give prior notice to the Association of an intended change in policy. Archohe Union School District (11/23/83) PERB Decision No. 360. In 1983 the District sent notice of the job announcement on Marks' position but there is no evidence that it did so on the position occupied but later filled by Christian. In any event, notice after the fact is not notice in compliance with the requirements of good faith bargaining. The District

[4]It is noteworthy that in the summer 1982, when the first notice was distributed, the District and the Association were in negotiations for a successor agreement to the one that expired in June 1982. No agreement on a successor agreement was reached until April 1983. In LA-CE-2028, a companion case involving the same parties, and the formal hearing of which was held on the same day as the instant case, it was established that the parties reached a tentative agreement on the 1982-83 work year for unit members in September 1982. Thus at the time the 1982 notice was sent the parties were then bargaining the work year for unit members.

unilaterally made the decision to employ two speech therapists for more days than unit members and then sent notices out. Request for negotiations would have been futile at that point. Arvin Union School District (3/30/83) PERB Decision No. 300.

The job announcement was not to the Association of a matter about which the District was extending an opportunity to negotiate, but rather, of a decision already made by the District that the work year was to be 196 days, in the case of Marks' position, and 190 days, in the case of Mitchell's position. Finally, the job announcement did not convey notice to the Association that the pay arrangements were to be different than the arrangement described by Caldwell. That is, extra days of service were to be on an hourly rate. As he testified without refutation, the therapists were paid a per diem rate for the extra days of work. For the foregoing reasons, no waiver is found in this case.

It is concluded that the District violated its duty to bargain in good faith by bypassing the exclusive representative and securing employment contracts with individual members of the unit, with terms different than what was provided by the collective bargaining agreement. This conduct is a violation of subsection 3543.5(c). It is concurrently a violation of subsections 3543.5(a) and (b). San Francisco Community College District, supra.

REMEDY

Under subsection 3541.5(c) PERB has the power,

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

In the instant case, it has been found that the District violated subsections 3543.5(a), (b), and (c) by bypassing the Association and negotiating with unit members regarding work year and rates of pay. It is appropriate that the District be ordered to cease and desist from such conduct.

The Association seeks an order restoring the status quo conditional upon the request of the Association. Restoration of the status quo ante of the employer's unlawful act is the traditional remedy for a unilateral change in terms and conditions of employment by the employer. Rio Hondo Community College District (3/8/83) PERB Decision 292. It is appropriate therefore to order the District, upon the request of the Association, to restore the speech therapists work year to that prevailing at the time of the unlawful change.

Finally, it is appropriate that the District should be required to post a notice incorporating the terms of this Order attached as an appendix hereto. The notice should be subscribed by an authorized agent of the Lake Elsinore School District indicating that they will comply with the terms of

this Order. The notice shall not be reduced in size. Posting of such notice will provide employees with an additional statement that the District has acted in an unlawful manner and is being required to cease and desist from such activity and take such other remedial steps. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the posting of such notice will announce the District's readiness to comply with the ordered remedy. (Placerville Union High School District (9/18/78) PERB Decision No. 69; Pandol & Sons v. ALRB & UFW (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. [8 LRRM 415].)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Lake Elsinore School District, its Board of Trustees, Superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Unilaterally making changes in the employee work year and rates of pay without providing notice and a reasonable opportunity to negotiate to the Elsinore Valley Education Association, CTA/NEA.

2. Denying to the Elsinore Valley Education Association, CTA/NEA, rights guaranteed by the Educational

Employment Relations Act, including the right to represent its members.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

1. Upon request, meet with and negotiate with the exclusive representative regarding the work year and rate of pay for speech therapist positions.

2. Upon request of the Association, reinstate the speech therapists work year and rate of compensation to that of unit members at the time of the unlawful change.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to certificated employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this notice is not reduced in size, altered, defaced or covered by any material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to

the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 3, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on June 3, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: May 13, 1985

GARY M. GALLERY
Gary M. Gallery Law Judge

Administrative Law Judge