* * * OVERRULED IN PART by *Regents of the University of California* (2026) PERB Decision No. 3010-H, pp. 7-8 * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTOR VALLEY TEACHERS ASSOCIATION, Charging Party, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case Nos. LA-CE-1974, LA-CE-1995, LA-CE-1996 PERB Decision No. 565 April 10, 1986

Appearances; Atkinson, Andelson, Loya, Ruud & Romo by Janae H. Novotny for Victor Valley Union High School District.

Before Morgenstern, Burt and Craib, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondent, Victor Valley Union High School District (District), to the attached proposed decision of a PERB administrative law judge (ALJ).[1] The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[2] by

[1]Charging Party, Victor Valley Teachers Association (WTA or Association), requested oral argument before the Board. That request was denied by letter to the parties dated February 27, 1986.

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

(1) unilaterally implementing in January 1984 a 10-minute-per-day increase in the teachers[1] instructional day (resulting in a 10-minute-per-day decrease in paid preparation time), (2) unreasonably denying paid release time to WTA negotiators for an October 1984 negotiating session, and (3) unilaterally eliminating two pre-class teacher preparation days in September 1984 (by increasing the number of instructional days).

After reviewing the entire record in this matter, including the Proposed Decision and the District's exceptions thereto, we find the ALJ's findings of fact to be free from prejudicial error and adopt them as our own, except as modified below. In accordance with the discussion below, we affirm in part and reverse in part the ALJ's conclusions of law. Specifically, we affirm the finding that the District violated the Act by unilaterally increasing the number of instructional minutes and increasing the number of instructional days. However, with regard to the increase in instructional minutes, we believe the District's waiver defense merits further comment. We reverse the finding that the District unlawfully refused to negotiate release time for the October 1984 negotiating session.

DISCUSSION

The Request for Oral Argument

The Association did not file a response to the District's exceptions, nor did it file any exceptions of its own. On March 21, 1985, the Association filed its request for oral argument. Within that request, the Association acknowledged

that it had "inadvertently" missed the deadline for filing a response to the District's exceptions. However, PERB Regulation 32315[3] requires that a request for oral argument be filed with a statement of exceptions or a response to a statement of exceptions. Therefore, the filing deadlines for requests for oral argument mirror those for statements of exceptions and responses to statements of exceptions. Consequently, where, as here, a request for oral argument is filed after the time to file exceptions or responses to exceptions has passed, such a request is likewise untimely.[4]

While Regulation 32315 provides that the Board may direct oral argument on its own motion, we see no reason to do so in the present case. The record is fully adequate, the matter was fully litigated, and the issues presented are not novel. The Association asserts that oral argument is necessary due to the importance to this case of the impact of Senate Bill 813 (Education Code section 46200 et seq.) However, the District has never claimed Senate Bill 813 as a defense to its actions,

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[3]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

[4]Pursuant to PERB Regulation 32136, a late filing may be excused in the discretion of the Board, but only under extraordinary circumstances. While the Association does not expressly argue that its late filing should be excused pursuant to Regulation 32136, we note that a party's "inadvertent" failure to effect a timely filing does not constitute extraordinary circumstances. Anaheim Union High School District (1978) PERB Order No. Ad-42.

nor could it successfully, for the relevant provisions do not prescribe mandatory action.

Waiver

With respect to the increase in instructional minutes, the District excepts to the ALJ's conclusion that the Association did not waive its right to bargain by failing to request bargaining. The ALJ found that references in District board agendas prior to the two readings of the District's proposal to increase instructional time (December 13 and 27) failed to constitute sufficient notice to WTA. The ALJ also found that teacher and WTA negotiator Don Wilson spoke with his principal (Julian weaver) about the change, but only after the change had been implemented in January 1984. The ALJ went on to speculate that, even if this conversation did take place before the District board's decision, it would not constitute sufficient notice, In fact, it appears from Wilson's testimony that he did speak with Weaver about the change just before the Christmas break (in mid-December), after weaver had informed the entire Victor Valley High faculty of the change.

Nevertheless, we find that the evidence presented is insufficient to demonstrate waiver on the part of the Association, A waiver of the right to bargain must be "clear and unmistakable," evidencing an intentional relinquishment of rights under the Act. LOS Angeles community college District (1982) PERB Decision NO. 252; San Francisco community college District (1979) PERB Decision NO. 105. Prior to arriving at a

firm decision to make a change in a matter within the scope of representation, an employer must provide the exclusive representative of its employees with notice of the proposed change and a reasonable opportunity to negotiate over the change. Arcohe Union School District (1983) PERB Decision No. 360; Arvin Union School District (1983) PERB Decision No. 300; Los Angeles, supra.

Relying on common law agency principles, the Board has previously held that notice to employees not holding any official position in the employee organization is insufficient. See, e.g., Arcohe, supra, and Los Angeles, supra. We take this opportunity to further clarify the character of the notice required prior to making a change in a matter within the scope of representation.

Notice of a proposed change must be given to an official of the employee organization who has the authority to act on behalf of the organization. The notice must be communicated in a manner which clearly informs the recipient of the proposed change. Even in the absence of formal notice, proof that such an official had actual knowledge of the proposed change will suffice. Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. What constitutes a "reasonable amount of time" necessarily depends upon the individual circumstances of each case. As waiver is an affirmative defense, an employer asserting a waiver

of the right to bargain properly bears the burden of proving that the exclusive representative failed to request bargaining despite receiving sufficient notice of the intended change.[5] 5

In the present case, it was not proven that any official of the Association was given formal notice or had actual knowledge of the proposed change in instructional minutes. While Don Wilson was a member of the Association's bargaining team for the 1984-86 contract, it was not shown that he had assumed his duties prior to the District's firm decision on December 27, 1983, nor that he had the requisite authority to act on behalf of the Association. Though the Association received agendas for the District board's December 13 and 27 meetings, the District failed to demonstrate that the agendas clearly informed the Association of the proposed increase in instructional minutes.[6] 6 There was no evidence that any Association representative attended either meeting.

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[5]Walnut Valley Unified School District (1983) PERB Decision No. 289; Brawley Union High School District (1982) PERB Decision No. 266; NLRB v. Transportation Management Corp. (1983) 462 U.S. 393; Witkin, California Evidence (2nd Ed.) p. 180; California Evidence Code section 500.

[6]Citing Arvin, supra, the ALJ concluded that references in District board agendas do not constitute sufficient notice to employee organizations. We find this reading of Arvin to be too broad. Arvin involved the mere posting of agendas at various school sites. An agenda may suffice if it is delivered to a proper official and is presented in a manner reasonably calculated to draw attention to any item(s) reflecting a proposed change in a matter within the scope of representation.

Refusal to Negotiate Release Time for the October 29 Negotiating Session

The ALJ found that, while an earlier refusal by the District to grant additional release time was reasonable, its refusal to consider release time for an October 29, 1984 meeting without the presence of a PERB-appointed mediator reflected unlawful inflexibility in light of changed circumstances. However, since the refusal to consider additional release time took place during the statutory impasse procedures[7] and did not involve a formal part of those procedures, there can be no violation.

EERA section 3543.1(c) provides that:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances. (Emphasis added.)

The Board has held that the subject of release time is within the scope of representation. Anaheim Union High School District (1981) PERB Decision No. 177.

While section 3543.1(c) speaks of the right to reasonable release time "when meeting and negotiating," this right logically applies only when the "meeting and negotiating" in question is required by the Act. Assuming that the agreement to "negotiate" on October 29 did not break the impasse between the parties, the duty to bargain was dormant because the parties

[7]EERA section 3548 et seq.

were in the midst of the statutory impasse procedures.[8] The only duty was to participate in good faith in the impasse procedures.[9] Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191. Since meetings without the appointed mediator are not required by the statutory impasse procedures, the District's denial of release time did not constitute bad faith.

In sum, because the duty to bargain was suspended by the parties' impasse and because meetings without the appointed mediator are not a required part of the statutory impasse procedures, the District was under no obligation to consider or to grant release time for the October 29 meeting. We find no basis for attaching any obligations or conditions upon the District's otherwise purely voluntary participation. Accordingly, we reverse the ALJ's finding of a violation.

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[8]While the October 29 meeting was referred to as a "negotiating session" by both parties, there was no evidence that either party had revealed any proposed concessions sufficient to break impasse at the time of the denial of release time. Clearly, had impasse been broken, the duty to bargain would have been revived, as would the duty to provide reasonable release time. However, the record does not reflect that impasse was broken. It merely reflects that the parties agreed to meet without the appointed mediator.

[9]Failure to participate in good faith in the statutory impasse procedures is a specifically enumerated unfair practice pursuant to EERA section 3543.5(e).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the Victor Valley Union High School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Victor Valley Teachers Association concerning the amount of paid non-instructional time and the number of paid non-student workdays.

2. Denying the Victor Valley Teachers Association the right to represent the employees by failing and refusing to meet and negotiate in good faith concerning the amount of paid non-instructional time and the number of paid non-student workdays.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Victor Valley Teachers Association concerning these subjects.

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

1. Upon request, meet and negotiate with the exclusive representative concerning the amount of paid non-instructional time and the number of paid non-student workdays.

2. Reinstate the amount of paid non-instructional time in effect prior to January 3, 1984, and the number of paid

non-student workdays prior to the first day of classes in effect prior to the 1984-85 school year, until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning non-instructional time and non-instructional workdays.

3. Grant to each of the employees harmed by the unilateral change the amount of time off which corresponds to the number of extra hours worked as a result of the increase in class time implemented on January 3, 1984, and as a result of the elimination of two non-student workdays prior to the commencement of classes in September 1984. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked. However, if subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning these subjects, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

4. Mail copies of the attached Notice to the employees affected by the District's conduct within ten (10) calendar days after this Decision is no longer subject to reconsideration.

5. 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.

6. 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.

It is further ORDERED that all other allegations in Case Nos. LA-CE-1974, LA-CE-1995 and LA-CE-1996 are hereby DISMISSED.

The Association's request for oral argument pursuant to PERB Regulation 32315 is DENIED, as previously communicated to the parties by letter dated February 27, 1986.

This Order shall be effective immediately upon service of a true copy thereof upon the Victor Valley Union High School District.

Members Burt and 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 Nos. LA-CE-1974, LA-CE-1995 and LA-CE-1996, Victor Valley Teachers Association v. Victor Valley Union High School District, in which all parties had the right to participate, it has been found that the Victor Valley Union High School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Victor Valley Teachers Association concerning the amount of paid non-instructional time and the number of paid non-student workdays.

2. Denying the Victor Valley Teachers Association the right to represent the employees by failing and refusing to meet and negotiate in good faith concerning the amount of paid non-instructional time and the number of paid non-student workdays.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Victor Valley Teachers Association concerning these subjects.

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

1. Upon request, meet and negotiate with the exclusive representative concerning the amount of paid non-instructional time and the number of paid non-student workdays.

2. Reinstate the amount of paid non-instructional time in effect prior to January 3, 1984, and the number of paid non-student workdays prior to the first day of classes in effect prior to the 1984-85 school year, until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their

own initiative, reached agreement or negotiated through completion of the impasse procedure concerning non-instructional time and non-instructional workdays.

3. Grant to each of the employees harmed by the unilateral change the amount of time off which corresponds to the number of extra hours worked as a result of the increase in class time implemented on January 3, 1984, and as a result of the elimination of two non-student workdays prior to the commencement of classes in September 1984. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked. However, if subsequent to the District's unlawful action the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning these subjects, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

Date: _____ VICTOR VALLEY UNION HIGH 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

VICTOR VALLEY TEACHERS ASSOCIATION, Charging Party, v. VICTOR VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1974 LA-CE-1995 LA-CE-1996 PROPOSED DECISION (1/28/85)

Appearances; Charles R. Gustafson, Attorney, for Victor Valley Teachers Association; Janae Novotny, (Atkinson, Andelson, Loya, Ruud & Romo), Attorney for the Victor Valley Union High School District.

Before; Martin Fassler, Administrative Law Judge.

INTRODUCTION AND PROCEDURAL HISTORY

The charging party in these cases accused the respondent of implementing two unlawful unilateral changes in teachers' working schedules, one having to do with the school calendar, the other having to do with the daily bell schedule at two schools; of refusing, unreasonably, to allow the teachers' negotiators to have release time from their assignments, beyond a specific hour limit; and of retaliating against the teachers' association by the refusal to grant release time to negotiators for a specific meeting.

The first of the three charges herein was filed April 26, 1984. In it, the Victor Valley Teachers Association (hereafter "WTA" or "the Association") accused the Victor Valley Union

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.

High School District (hereafter "the District") of unilaterally adopting a new bell schedule which increased the instructional time, and reduced the preparation time, for teachers at two of the schools in the District. On May 21 the WTA filed two charges. One alleged that the District had acted unreasonably and illegally by refusing to allow release time for Association negotiators, in connection with contract negotiations, beyond an amount equivalent to four working days for each of five negotiators. The final charge accused the District of unilaterally and thus unlawfully adopting a calendar for the 1984-1985 school year.

Complaints based on the three charges were issued in June and July.

In its Answers to the Complaints, the respondent denied all unlawful conduct. It admitted however, that in January 1984 it increased the amount of "in classroom" instructional time required of certain certificated employees; and that it increased the number of classroom instruction days from 177 in the 1983-1984 school year to 181 in the 1984-85 school year. At the same time, respondent asserted certain affirmative defenses: (1) the number of days of classroom instruction required of unit members is outside the scope of representation as defined by the EERA; (2) the increase in the number of days of classroom instruction was permitted under the terms of the collective bargaining agreement then in effect; (3) the

charging party waived its right to negotiate with respect to the increase in the "in classroom" instructional time required of teachers; and (4) the District was required by law to increase the amount of instructional time per day.

The arguments of the charging party and the respondent will be considered in detail in the "Discussion and Analysis" section below.

Informal settlement conferences were held on July 10 and September 14, but the disputes were not resolved. The complaints were consolidated for the hearing, which took place on October 24 through 26.

During the hearing, based on evidence of an incident which took place on one of the hearing days, WTA moved to amend the complaint to allege that the District had refused to allow reasonable release time for the WTA negotiators, for a meeting scheduled for October 29, 1984, and had done so in retaliation for the WTA's filing of unfair practice charges against the District. The motion was granted.

Both parties filed a post-hearing brief on January 4, 1985. A final post-hearing reply brief was submitted by the respondent on January 16, 1985, and the matter was then submitted.

FINDINGS OF FACT

A. The Class Schedule Change

The collective bargaining agreement between the District

and the WTA which was in effect during the 1983-84 school year had a one-sentence article entitled "Hours of Employment:"

> All employees within the bargaining unit shall be assigned a work day of not more than six hours and twenty-five (25) minutes, exclusive of lunch, staff meetings, and non-paid extra duty.

Article VIII of the agreement, entitled "District Rights," included the following:

> It is understood and agreed that the District retains all of its powers \and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the rights to: . . . determine times and the hours of operation . . .

The introduction to the agreement states:

> This agreement shall remain in force and effect from October 1, 1981 until September 30, 1984, or ratification of the next contract.

The District's policy with respect to class schedules was to allow each school principal to determine his or her school schedule, within the limits set by the 6-hour, 25-minute provision of the collective bargaining agreement.

The WTA's allegation with respect to bell schedules had to do with the schedules at two of the District's schools, Apple Valley High School and Victor Valley High School.

Prior to January 3, 1984, the Victor Valley High School class schedule began at 7:25 a.m., and ended at 1:50 p.m. Each class period was 54 minutes long; 6 minutes was allotted for a "passing period" between class periods. The faculty handbook

required each teacher to be "on duty" 15 minutes prior to the start of school, and at least 10 minutes after the teacher's last class or preparation period. Thus, each teacher's working day began at 7:10 a.m., and ended at 2:00 p.m. Since each teacher had a 30-minute duty free lunch period, each teacher had a schedule which included 6 hours and 20 minutes of work time.

A typical teaching schedule included 5 teaching periods and one preparation period, which was also 54 minutes long. Presumably, the 15 minutes before the first class, and the 10 minutes after the class was time in which a teacher could prepare lessons, grade papers, talk to students or parents—perform the non-classroom duties which are necessary parts of a teaching assignment. Total non-classroom instruction time within the 6-hour-20 minute workday amounted to 79 minutes: 15 minutes at the beginning of the day, 54 minutes during the day, and 10 minutes at the end of classes.

At Apple Valley High School, prior to January 3, 1984, the first class began at 7:30 a.m., and the last class ended at 2:54 p.m. Although there was no testimony describing a typical teaching day, it may be inferred that some teachers worked periods 1 through 6, while other teachers worked periods 2 through 7.[1] A teacher working the "early" shift would

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[1]This inference is based on Don Wilson's testimony about the mechanics of a similar schedule at Victor Valley High

have a workday of exactly six hours: 7:24 a.m., until 1:54 p.m., excluding a 30-minute lunch period. A teacher on the "late" shift, would have a workday of exactly the same length: from 8:24 a.m., until 2:54 p.m., excluding a 30-minute lunch period. Each teacher would have 5 classroom periods, and a 54-minute preparation period sometime during the school day.

The use of each teacher's preparation time was within the discretion of the teacher; it was generally used for preparation of lessons, grading of examinations or other written work, or conferences with individual students.

On December 27, 1983, at the recommendation of the District administration, the District board voted in favor of a resolution which required the following:

(1) All class periods must be at least 55 minutes long;

(2) Any four consecutive classes in the school must be at least 240 minutes, including the three passing periods between classes;

(3) Each senior must be enrolled in at least five periods;

(4) Every other student must be enrolled in at least six periods; and

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School during the 1984-85 school year (TR: 361-362) and on the contract's 6-hour and 25-minute limit on the working day. A teacher could not have a 7:30 to 2:54 schedule, because that would amount to a workday, excluding lunch, of 6 hours and 54 minutes. Transcript references will take the form "TR:_____" with the page number following the abbreviation TR."

(5) Any student may enroll in one less than these minimum requirements if he or she is enrolled concurrently in a college, ROP, adult, or work-experience class.

Both the 55-minute and the 240-minute provisions required changes in the class schedules at the 2 high schools. Each high school had class periods of 54 minutes, not 55 minutes; and, if only 3 passing periods between class periods were included in a calculation of the time taken up by 4 consecutive classes, the total fell 6 minutes short of 240 minutes.

The December 27 resolution was prepared for the District by John Kramar, assistant superintendent for instruction. Kramar testified about the reasons the District adopted the changed policy, as follows:

Education Code section 46141 requires that the minimum school day in any high school, with exceptions not applicable to either Victor Valley High School or Apple Valley High School, be set at 240 minutes.[2] Since the District's policy

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[2]Section 46141 read, in its entirety:

> The minimum schoolday in any high school, except in an evening high school, a regional occupational center, an opportunity school and in opportunity classes, a continuation high school, in continuation education classes, in late afternoon or Saturday occupationally organized vocational training programs conducted under a federally approved plan for vocational education, and for students enrolled in a work experience education program approved under the provisions of Article 7 (commencing with section 51760) of Chapter 5 of Part 28 of this division, is 240 minutes.

was to allow a senior to enroll in only 4 classes, if he or she also enrolled in certain outside programs, those seniors would be at school for the required 240 minutes only if the 6-minute "passing period" prior to that student's first class were included in the calculation.[3]

No other students were in jeopardy of having less than 240 minutes of school time. All other students were required to be enrolled in at least 5 classes of 54 minutes each, a total of 270 minutes without counting any passing time.

Kramar testified that sometime in the fall of 1983 he received, from the County Board of Education, a memorandum from the state department of education, saying that the passing time prior to a student's first class could not be counted as part of the 240-minute minimum. The memorandum was not placed in evidence.

Kramar testified that if the District did not change its high school class schedules to comply with these state requirements, the District stood to lose a sizeable amount of aid money from the state, through the "ADA" (average daily attendance) program. In addition, he said, the District might

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[3]That is, 4 periods of 54 minutes each, or 216 minutes, plus 4 6-minute passing periods, for a total of 240 minutes. Without including the "passing period" prior to the first class, the total would be 234 minutes.

Kramar testified there were approximately 160 students enrolled in the outside programs, but cautioned that the number was an estimate.

be subject to a state effort to recoup money given to the District while the District's minimum day was too short for certain students.

Except for placing the matter on the Board of Trustees formal meeting agenda, the District made no effort to inform the Association of its intention to increase class time, or to give the Association an opportunity to negotiate about the subject.

On the first day after the Christmas vacation, the principals of Apple Valley High School and Victor Valley High School put into effect new bell schedules. At Victor Valley High School, the first class period began at 7:25 a.m., as before. However, the last period ended at 2:01 p.m., rather than at 1:50 p.m., as it had earlier. Each class period was now 56 minutes in length. As before, the passing time designated for between classes was 6 minutes. The lunch period was 30 minutes.

As a result of the changes, each teacher with a typical full schedule was required to teach five 56-minute periods, for a total of 280 minutes per day. Prior to the Christmas break, each teacher was required to teach five 54-minute periods, for a total of 270 minutes per day. Beginning January 3, each teacher had a 56-minute preparation period, as compared to the 54-minute preparation period available prior to the Christmas holiday break.

At Victor Valley, Don Wilson, a member of the WTA negotiating team and a long-term science teacher in the District, asked Principal Julian Weaver whether the section of the faculty manual which required teachers to report for duty, 15 minutes before the beginning of classes, and to remain at school for 10 minutes after the last class or preparation period remained in effect. Weaver, after conferring with Kramar told Wilson that provision would not be enforced. Weaver testified he has not made any effort to enforce that provision of the teacher's manual, although he inadvertently neglected to remove that requirement from the manual distributed to teachers at the high school at the beginning of the 1984-1985 school year. Also, Weaver testified he never made a general announcement to teachers at the school that the section was not in effect.

Apple Valley High School also adopted a schedule which included class periods of 56 minutes, rather than the 54 minutes previously assigned. As a result, the "early" schedule began at 7:24 a.m., and continued until the end of the sixth class period at 2:06 p.m. Teachers on this schedule thus have a workday of 6 hours and 12 minutes, excluding a 30-minute lunch period, and one preparation period of 56 minutes. Teachers on the late schedule began their workday at 8:26 a.m., and continued until 3:08 p.m. Excluding the 30-minute lunch period, they, too, had a 6 hour and 12 minute day, and a

56-minute preparation period. Like the teachers at Victor Valley High School, teachers now had a day of 280 minutes of classroom contact time.

Two teachers testified about the impact which the Board's decision to lengthen class periods had on their work. Helen Laney, a typing teacher in her fourteenth year with the District, testified that after the Board voted to lengthen the class periods, she had to revise her lesson plans to fit the longer hour. Generally, she said, the lessons in the typing textbooks are designed for 48 to 51-minute periods. To fill out the 54-minute periods, she had customarily added specific exercises from earlier lessons which the students had had trouble with. As a' result of the longer class periods after January 2, Laney said she was required to revise (expand) those extra assignments which she had already chosen, so that the students would not have unused class time. (TR: 19 2-200.)

Don Wilson, a science teacher at Victor Valley High School in his twenty-first year with the District, testified that the schedule change made his work more difficult in two ways. The slightly longer periods required additional preparation on his part to prepare longer lectures for each class (TR: 208). Second, by eliminating the 10-minute non-teaching time at the end of the workday, it eliminated time during the workday when teachers prepared progress reports for students, graded papers,

or carried out similar chores. He now carries out those tasks after the regular workday, Wilson testified.

Aside from these details, though, the witnesses who testified on the subject, including the District's Assistant Superintendent Kramar, shared an understanding that fulfillment of a teacher's responsibilities, as these are understood by the Victor Valley Union High School District requires more time than the 6 hours and 25 minutes daily specified in the contract. This was Kramar's testimony:

> Q. (by WTA counsel) : And the District gave the teachers enough work to do, so they had work to do for the 6 hours and 25 minutes. And some of them even work longer than that?
>
> A. It's our intention that there's enough work for them to do. I haven't had any complaint that there wasn't. And having been a teacher myself, there's always more than what you do at school. That's part of being a professional.... As a math teacher, as a chemistry teacher, there were times when I graded papers at home, I prepared examinations. I prepared lesson plans. That's part of being a teacher.
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> Q. Those were things you didn't have time to do during the regular work day.
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> A. Absolutely. (TR: 183-184)

Both Wilson and Laney testified that they regularly work at home to complete or prepare work required by their jobs.

B. Released Time Made Available by the District

During negotiations for the 1978-79 collective bargaining agreement between the WTA and the District, the District

allowed WTA negotiators 50 hours release time to take part in negotiations. During the 1980 negotiations, four WTA negotiators were each given four days of release time. Assuming the workday in 1980, as it was in 1983, was between 6 hours and 6 and 1/2 hours, that amounted to a total of between 96 and 100 hours release time. A full agreement between the two parties was reached within that (approximate) 100-hour period.

During negotiations which began in the spring of 1981, the District again gave release time to four WTA negotiators, for four days each. Although the District and the WTA did not reach agreement during those four meetings, they reached agreement during a later meeting which took place with the assistance of a PERB-appointed mediator. The District also provided release time to the WTA negotiators for this meeting with a mediator.

Efforts by the District and WTA to reach agreement on release time for negotiations on the 1984-85 contract began in early April 1984. Michael Kilgore, the District's chief negotiator, and Julie McGill, WTA's chief negotiator, met in Kilgore's office during the first week of April. They began by discussing the ground rules used by the parties during the last round of negotiations. They apparently agreed that most of the rules were not needed, or that agreement could not be reached on most of them.

On April 11, Kilgore sent McGill a ground rule proposal which included only three proposed ground rules. Since the only relevant aspect of the ground rule negotiations has to do with scheduling and release time, no other ground rules will be discussed herein.

Kilgore's proposal suggested four meeting dates—May 1, at 7:30 a.m., May 14, 24, and 31, and a meeting on June 8, if needed, as a "non-paid release day." The District proposed to limit release time to four working days for each of five WTA negotiators. Since a teacher's working day, as provided by the contract in effect, was 6 hours and 25 minutes, the District was offering slightly more than 128 hours of released time.[4]

WTA on April 13 sent Kilgore a counter proposal. This suggested six meeting dates (including four of the five suggested by Kilgore); and release time for five WTA negotiators, with no specific limit on the number of days or hours for which release time would be given.

Kilgore sent a reply to WTA which was virtually identical with his first proposal: it suggested the same four dates and the fifth, if necessary, as a "non-paid release day." It retained the initial District language limiting release time to four working days for each of five negotiators.

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[4]The total of 128 hours is reached by multiplying 6 hours and 25 minutes by 4 (25 hours, 40 minutes) and then multiplying this figure by five.

WTA's reply to Kilgore made this main point:

> Since the main issue is contract negotiations and not ground rules, we feel that the ground rules should be eliminated and that we begin negotiations as soon as possible.

On April 23 Kilgore sent McGill another note, repeating the District's previous positions exactly, except that the proposed fifth day of negotiating was not mentioned. On April 27, McGill wrote to Kilgore, again asking to eliminate ground rules for the negotiations and to begin negotiations on May 3 or May 4.

Kilgore and McGill met on April 30. Kilgore indicated the District's final offer on release time was 120 hours maximum for the negotiators as a whole. He told McGill the District would provide no release time at all until the parties reached agreement on ground rules, including one concerning release time.[5] McGill said the Association's position was that there should be no specific hourly limitation on release time. She testified:

> There were too many issues to be discussed.
>
> And we wanted release time on a day to day basis, if that was necessary to get a contract settled. (TR: 129.)

McGill told Kilgore the District should grant release time without requiring the teachers to agree to a specific limit.

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[5]This finding is based on testimony by McGill. Kilgore was not asked about this meeting.

On May 1 McGill wrote to Kilgore again, repeating the Association's position. WTA believed the District's proposed limit on the amount of release time available was not reasonable. The Association was willing to meet on each of the dates previously suggested, the earliest being May 4, then only three days away. The Association indicated that it was willing to begin negotiations during the day, or the evening, suggesting that it might be willing to meet without release time.

The next day, Kilgore wrote to McGill noting that the District,

> (I)ncreased the amount offered and paid release time, for WTA certificated negotiators from 100 total hours to 120 total hours.

Kilgore's memorandum also said that the District Board of Trustees had reviewed the District's position and found it to be "more than reasonable." Kilgore said the District was willing to meet May 4, "outside the contractual and instructional work schedule," as well as on May 14, 24, 31, and June 8, on paid release time. On May 3, McGill sent Kilgore a note which said the Association agreed to have the first negotiating meeting with the District on May 4, at 6:00 p.m., at the District office.[6]

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[6]Some confusion apparently remained, since on May 3, Kilgore told WTA president Casi Wilson that the District would not meet with WTA until the two parties had agreed on ground

The parties met on the evening of May 4. At the end of the meeting, which went from 6:00 to 11:00 p.m., the WTA negotiating team asked about release time for the following meeting. Kilgore said the WTA negotiators would not be given release time until the organization signed off on the ground rules.[7]

McGill replied that the next meeting would again be in the evening; that is, the WTA was not yet willing to sign off on the ground rules, and since there would therefore be no "release time" for negotiators, the next meeting would again have to be in the evening.

The parties met again on May 14, from 6:00 to 11:30 p.m. No evidence was presented concerning events at this meeting.

On May 21 the Association filed the unfair practice charge which underlies this proceeding. On May 23 Kilgore sent McGill another memorandum in which he said the District Board of Trustees had directed him to authorize 100 hours of paid release time for negotiations, to be concluded on or before June 13.

McGill and Kilgore met face to face later that day and reached agreement on scheduling. This agreement is in evidence

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rules. Five minutes later, Kilgore retracted this statement, and told Wilson the WTA and the District would be meeting the next day.

[7]Again, the finding is based on uncontradicted testimony by McGill.

as Respondent's Exhibit 4. It is in the form of a memorandum from Kilgore to McGill, signed by McGill at the bottom. It indicates that the parties agreed to meet on May 29,, from 7:30 a.m., until 3:00 p.m., on May 31, from 7:30 a.m., until 4:00 p.m., and on June 8, beginning at 7:30 a.m., with no end point designated. The memorandum also noted that each teacher/negotiator had responsibility for "obtaining and releasing substitutes." McGill testified that the last meeting was left open-ended because neither negotiating team had any other commitment which required an early end to the meeting, and Kilgore and McGill hoped that if the parties were close to an agreement, they would continue to meet for an extended period of time. McGill also testified,

> There was also talk that if we were close after these three, there would be possibly another day or two (of release time), depending on how close we were to an agreement. (TR: 137).

No provision of the memorandum refers to any limit on the use or availability of District-paid release time.

The District and WTA met on May 29 for six and one-half hours, on May 31 for seven and one-half hours, on June 8 for twelve hours and on June 12 for seven hours, each of these sessions beginning at 7:30 a.m. The District gave each of the five WTA negotiators release time on each of these days. In a summary chart placed in evidence, Kilgore calculated each day at 6 hours and 25 minutes. Therefore, the release time

associated with each negotiating day, taking 5 negotiators together, was 32 hours and 5 minutes. The total release time for all 4 days amounted to 128 hours and 20 minutes.

Kilgore testified that despite the Board's position of wanting to limit release time for negotiations to 100 hours, he acted on his own to allow the total release time figure to go as high as 128 hours. He did so, he testified because he believed, near the end of the June 8 session (which brought the total release time to 96 hours-plus), that the two parties were making progress in reaching an agreement. (TR: 3 26.) Kilgore said he reported this to the District Board after the fact, and the Board approved it retroactively, but instructed Kilgore not to agree to any additional release time without board approval (TR: 251.)

Although Kilgore's version of this sequence of events was not contradicted by any other testimony, it does not square with his own testimony in other respects. From the outset, Kilgore, acting for the District, stated the District's willingness to allow the WTA four days' release time for each of five negotiators. Therefore, his assertion that the granting of release time for June 12, the fourth day of negotiations, was done without prior authorization, cannot be accurate. He was doing no more than the District had initially offered to do. Similarly, Kilgore's statement (in his testimony and in his May 23 note to McGill) that the Board

wanted to limit release time to 100 hours cannot be correct, since the District's original offer of four full days for each of five negotiators amounted to at least 120 hours of release time.[8] The District and WTA met again in negotiations on August 20 from 9:00 a.m. to 3:30 p.m.; on August 24, for most of the morning; and on August 30 for five hours. No release time was involved in any of these meetings.

The parties reached impasse, and PERB appointed a mediator. The parties met with the mediator on October 15 (nine days before this hearing commenced) for three hours in the morning. The District granted the teacher-negotiators release time for this meeting, in view of the District's belief that participation in mediated negotiations with a PERB-appointed mediator is a state-mandated program.

At a District board meeting the evening before this hearing began, Scott Davis, the chief negotiator for the teachers, asked the board to direct its negotiating team to return to the negotiations with the WTA team, without the presence of a mediator.[9] Board Chairman Claude Noel responded

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[8]Four days for each of 5 teachers amounts to 128 hours plus, if a workday is taken to be 6 hours and 25 minutes. If a workday is taken to be 6 hours (see pages 5-6 ~~supra~~), 4 days for each of 5 teachers amounts to 120 hours.

[9]In October McGill was appointed by the District Board to an administrative position. She was then replaced as WTA's chief negotiator by Davis.

affirmatively, and suggested meeting the next day. Davis and District Superintendent Tarr both pointed out that this unfair practice hearing was scheduled to take place the next three days, Wednesday through Friday. Noel then suggested a meeting the following Monday, October 29, which Davis agreed to.

Although there was no explicit statement during the meeting about the time of the negotiation session, Davis, and apparently other teachers who were present at the meeting, assumed the board intended to meet on Monday morning; they also assumed that release time would be given to the negotiators.

After the meeting, Davis received a telephone call from Kilgore, who suggested a meeting beginning at 3:00 or 3:30 p.m. There is a conflict in the testimony of Davis and Kilgore about the substance of the conversation with respect to release time. Davis testified he asked why there would be no release time (Davis apparently assumed that for a meeting scheduled outside class hours no release time may be granted).[10] Kilgore said, according to Davis, that the Board voted unanimously not to allow release time.

Kilgore, on the other hand, testified that he explained to Davis that there would be no release time because the meeting

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[10]This assumption is not correct. In Sierra Joint Community College District (11/5/81) PERB Decision No. 179, at pp. 4-6, PERB indicated that release time may be granted for time spent on negotiations, even if negotiating sessions and teaching duties do not actually coincide.

was taking place without a mediator. Kilgore specifically denied that the Board had voted to deny release time to retaliate against the WTA for the filing of of the unfair practice charge which underlies this case.[11] Kilgore did not specifically deny telling Davis that the trustees had voted on whether to grant release time, "retaliation" aside.

It is not necessary to resolve this possible conflict in the evidence. What is undisputed is that Kilgore told Davis the District would not grant release time for the meeting scheduled to take place on Monday, October 29.

On October 25, two days after the Board meeting at which the negotiating meeting was arranged, Casi Wilson asked superintendent Tarr why the October 29 session could not begin in the morning, with release time given to the WTA negotiators. Tarr told Wilson that the District could not, or would not, give release time for that session because there was an unfair practice charge pending regarding release time. Wilson and McGill (who overheard the exchange) both testified to this conversation having taken place.

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[11] Q. (by District counsel). In your telephone conversation with Mr. Davis, did you inform him that negotiations could not begin on the morning of October 29, since the governing board had voted in closed session not to give paid release time, for Association negotiating team members, because of the pending unfair practice charge on release time.

A. No, ma'am, I did not. (TR: 332-333.)

Tarr acknowledged that he had said "words to that effect." Tarr explained, however, that he made the statement because it was the Board's belief that its position would be upheld in this hearing; that the Board would be found to have acted reasonably with respect to the limit it placed on release time; and that, therefore, it had no obligation to grant any additional time. Tarr specifically denied that the District had denied release time as a means of retaliation against the WTA for filing an unfair practice charge. (TR: 350-351.)

Tarr's explanation of his ambiguous remarks was plausible and I credit his testimony.

C. The Adoption of the 1984-1985 School Calendar

1. The District's Contract and Past Practice.

The collective bargaining agreement in effect for three years ended September 30, 1984, included Article V, entitled "Calendar," which read as follows:

> The District agrees that the work year for all Bargaining Unit Members shall begin no earlier than September 1, and shall not exceed 182 days exclusive of Saturdays and Sundays.

The contract included no other provision regarding the subject, nor was there a specific calendar included in the contract for any of the three school years covered.

During the 1981-82 school year, there were 175 student days, and 182 total workdays for teachers. During the 1982-83 school year, and again during the 1983-84 school year, there

were 177 student days and 182 total workdays for teachers. In 1983-84, the five working days for the teachers on which the students were not present consisted of three preparation days before school began in September, one day in January between semesters, and one day after the last day of classes in June. Although there was no explicit testimony given about the 1982-83 non-student workdays, it may be inferred that the distribution of these was the same as in the 1983-84 school year. During the 1981-82 school year, the seven non-student workdays for teachers consisted of four preparation days in September before school began, one day in January, and two days after the last day of classes in June.

2. The District Board's Decision on the Student Calendar

At the District board's February 27 meeting, the administration proposed a student calendar for the 1984-1985 school year. Under the proposal, students would attend classes on 181 days. September 10 would be the first day of classes, June 19 would be the last day of classes. The Christmas holiday vacation would begin Saturday, December 22, and conclude on Tuesday, January 1. The board did not vote on adoption of the calendar at that meeting.

At various times in March, WTA President Casi Wilson tried to persuade the board to change this calendar, to give students and teachers a full two-week vacation at the end of December and beginning of January. She spoke to the District board at

its March meeting, suggesting several alternative arrangements which would have included a full two-week vacation during the Christmas-New Year period. Her efforts were unsuccessful, and the board voted at its late April meeting to adopt the student calendar as described above.[12]

3. Negotiations Concerning the 1984-85 Calendar.

The initial WTA contract proposal to the District included an article concerning the student calendar. One provision set the work year for all bargaining unit members at a maximum of 182 days, to begin no earlier than September 1. Another provision set the number of student instructional days at 180.

The District's initial proposal on the subject consisted entirely of the following:

> The District agrees that the work year for all bargaining Unit Members shall not exceed 182 work days.

As noted above, negotiations between the District and the WTA began in early May 1984. As of the time of the hearing, the work calendar had been discussed by the parties, but there had not been agreement on language. And, as noted above, the parties had reached impasse on over-all contract negotiations,

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[12] Wilson may have sent a letter to the board on April 5 in which the Association asked to negotiate about "any proposed calendar that changes instructional time." The letter in evidence is unsigned, and Tarr and Kilgore both deny having seen the letter prior to the hearing. The dispute need not be resolved, since it is undisputed that once negotiations began, in May, the District and the Association did negotiate about the teachers' work year.

had met once with the presence of a mediator, and had scheduled another meeting without a mediator.

4. The Beginning of the School Year

Although there is no direct evidence on the point, teachers employed by the District apparently were informed sometime in August 1984 or earlier that there would be one teacher preparation day before the start of classes on September 10, and that day would be September 7. In evidence are letters to faculty members from the principals of Hesperia Union High School, the new Hesperia High School, and Victor Valley High School, each of these referring to the September 7 preparation day, and the schedules arranged by the respective principals for that day. Each of the three principals informed the teachers that keys to the classrooms assigned to them would be available before September 7 (thus allowing teachers to begin classroom preparation before that day). Apparently, this practice had been followed by all or most District principals in the past.

Three of the four letters in evidence invite teachers to begin their preparations before September 7, but there is nothing in any of the letters requiring early preparation efforts.

All four teachers who testified described the time they spent during the summer of 1984, prior to September 7, preparing to teach their courses during the 1984-85 school year.

Casi Wilson (who teaches English and social studies at Hook Junior High School) spent five or six days, of six hours each, preparing lessons, her classroom bulletin board, and classroom furniture, before school began in September 1984.[13] She also testified that in past years she had spent considerable amount of time doing this kind of preparation before class began.

Don Wilson, a science teacher and chairman of the science department at Victor Valley High School, testified that scheduled meetings on September 7 (of all faculty members, of teachers within his department, and of chairmen of the various departments) left him no time on September 7 to prepare classes or laboratory supplies he was to work with during the coming year.[14] Wilson said he prepared his classes and his laboratory on four days prior to September 7, working approximately six hours on each day. In the past, Wilson had spent two to three days, in addition to the preparation days designated by the official school calendar, preparing for his classes.

Helen Laney, of Apple Valley High School, testified that she prepared lessons at the school on September 5 and

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[13] By the time of the hearing, Wilson had been promoted to an administrative position with the District, and was no longer teaching. However, she began the school year as a teacher.

[14] Don Wilson is a member of the teachers' bargaining unit despite his position as department chairman.

September 6. Laney worked from 8:00 a.m. until 3:30 p.m. on September 6 and apparently until sometime in the afternoon on September 5. She testified that she observed the school parking lot full of cars (many of them, presumably, belonging to teachers doing similar preparation work) on each of those days.

Julie McGill testified she spent all or part of approximately 20 days during June, July and August at work in her classroom at Hesperia High School, the school which opened in September 1984. McGill, a business education teacher, said the unusually high pre-school time commitment was required because of many difficulties in setting up and testing new computers and typewriters. She and other school personnel discovered that the typewriters and computers were not compatible, requiring major adjustments during the summer. McGill said she also worked Tuesday through Thursday, September 4 through 6 preparing for the opening of school, and for four hours on Sunday, September 9. She testified she observed between 20 and 40 teachers at school, preparing lessons or equipment, on each of the 3 days preceding September 7.

McGill testified that in past years she has not used any time, other than the days designated by the District as preparation days, to prepare herself or her lessons for the upcoming school year.

The District did not dispute that many teachers worked significant lengths of time in the summer of 1983 to prepare for their classes, aside from the one day designated by the District as a preparation day, September 7. During the hearing, I notified the parties that I would take notice of the following. Neither party objected. I hereby take notice that:

> With few exceptions, teachers in the Victor Valley Union High School District who are assigned a full teaching load utilize at least three or four days prior to the first day of classes in September to prepare their classrooms, lessons, and materials, and to prepare themselves for the school year. The amount of time utilized by each teacher for this preparation varies with the number and nature of classes assigned to that teacher, and may also depend on the frequency with which the teacher has previously taught the classes or courses assigned to her or to him.

There was sketchy evidence of District sponsored training of various form that had been provided for teachers in previous years. Kramar for example, testified of a one-day meeting of all certificated personnel which the District held prior to the commencement of classes in 1974. He also testified that in certain years, which he did not identify, the District had provided training for added responsibilities which teachers would have in connection with the transfer of students from "special education" classes to regular classes. (TR: 265-266.)

Tarr testified that the District had eliminated the "student rush" method of enrolling students in specific classes, but there was evidence that the system had been used

only at Apple Valley High School, for a brief period, and it was not clear that the system had been in use during the 1983-84 school year.

There was no other evidence of reduced work or responsibility associated with the reduction in the number of pre-class preparation days.

At the time of the hearing, other aspects of the work calendar—such as those concerning non-instructional days between semesters, and the non-class workdays in the second semester—remained unsettled, pending the outcome of negotiations.

DISCUSSION AND ANALYSIS

A. The Increase in Class Time

The District's decision in January 1984 to increase the length of each class by two minutes had the direct and intended effect of increasing the amount of daily instructional time (or class time or student contact time) of each classroom teacher. As the testimony of Laney and Don Wilson indicated, it had the effect of increasing the effort required of these two teachers to prepare for their series of classes each day and each week. It is a fair inference that other teachers were affected similarly, while it may be acknowledged that the increase in effort flowing from the two-minute addition to each class may have been quite small in many cases.

The decision to increase instructional time during the class day had the indirect but wholly predictable effect of increasing the amount of non-class work which each teacher in the two high schools had to do on his or her own time; that is, over and above the six-hour, 25-minute ostensible limit in the collective bargaining agreement. The class schedule change led to a net increase of ten minutes in class-time during the course of the workday. By expanding the class time within the workday by a net of ten minutes, the District reduced by ten minutes the time available during the workday for preparation. The District thus required teachers to use an extra ten minutes per day outside the scheduled workday to prepare for classes.

If, prior to the change in class schedules, a teacher spent 2 hours a week outside the scheduled day preparing for classes, grading papers, etc., that teacher was now required to spend 2 hours and 50 minutes per week on these same tasks outside the regular workday. Thus, the District's decision to lengthen each class period amounted to an extension of the employees' workday.

An increase in student instructional time is within the District board's managerial discretion; it may properly be viewed as a matter of educational policy, among the matters to be determined solely by the District. However,, while the District may decide without negotiations to increase student instructional time, it may not unilaterally modify the

teachers' working time or refuse to negotiate proposed changes in the teachers' working time.

In a series of decisions issued over several years, the PERB has held that the length of preparation time and the length of instructional time within each school day are both negotiable; and that an employer who unilaterally alters either, while refusing to allow the organization representing certificated employees an opportunity to negotiate about the subject, violates section 3543.5(c) of the Educational Employment Relations Act.[15] Sutter Union High School District (10/7/81) PERB Decision No. 175; Moreno Valley Unified School District (4/30/82) PERB Decision No. 206; aff'd Moreno Valley Unified School District v. PERB (1983) 142 Cal.App. 3d 191; Healdsburg Union High School District (6/20/84) PERB Decision No. 375, at pp. 108-109.

In Sutter Union High School District, the Board specifically rejected the notion that a school district had the right, as a managerial prerogative, to alter teachers' assignments, and specifically to eliminate preparation time and add instructional time, "as long as the total workday remained constant."[16]

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[15]Under EERA section 3543.5(c) it is an unfair labor practice for an employer to "refuse or fail to meet and negotiate in good faith with an exclusive representative." The EERA is codified at Government Code Sections 3540 et.seq.

[16]The best discussion of the Board's perspective on this issue appears in San Mateo City School District (5/20/80), PERB

The District puts forward several defenses to this charge: (1) the change of schedule was necessitated by state law and therefore the subject is outside the scope of representation under the EERA; (2) the change was consistent with the District's past practice (that is, the practice of establishing class schedules consistent with state requirements); (3) WTA waived its right to negotiate about this subject, by virtue of agreeing to the management rights clause and the "zipper" clause of the collective bargaining agreement; and (4) WTA made no request to negotiate with the District about the matter.

None of these asserted defenses is helpful. First, the legal necessity argument is rejected. The District had one obvious alternative available to it, to meet the 240-minutes minimum standard: it could have altered the schedules of the (approximately) 160 senior students who were in school for less than 240 consecutive minutes, rather than change the working schedules of all the teachers in the two high schools. Alternatively, if the District wished to continue the programs

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Decision No. 129 at pp. 15-19. That decision was reviewed by the Supreme Court in San Mateo City School Department v. PERB (1983), 33 Cal. 3d 850. The Supreme Court there annulled PERB's Order of May, 1980, and remanded the case to the Board with instructions to decide it by applying standards developed by PERB in later cases in which the scope of representation under EERA was at issue. On remand in June 1984 PERB came to the same conclusion that it had reached initially with respect to the San Mateo District's obligation to negotiate about instructional time and preparation time. Healdsburg Union High School District, supra.

of those students unchanged, the District had the legal obligation to give the WTA an opportunity to negotiate about the contemplated change in working schedule before putting it into effect.

The District argues that when a school district faces a state-imposed legal requirement in connection with some aspect of its operation, it is exempt from EERA's good-faith negotiation requirement with respect to that aspect of its operation; it is outside the scope of representation. The PERB has consistently rejected such arguments. In San Mateo Community College District (6/8/79) PERB Decision No. 94, and in San Francisco Community College District (10/12/79), PERB Decision No. 105, PERB rejected contentions by two school districts that because of the financial changes brought about by the passage of Proposition 13 in June 1978 and statutory requirements regarding school district budget adoption, the districts were freed of the obligation of negotiating with employee organizations about certain unilateral changes.[17]

[17]This discussion assumes that the state department of education memorandum did, as Kramar testified, disallow inclusion of passing times before the first class period, and that it was applicable in the circumstances presented. The District did not present as evidence either the state department's memorandum, or the county board of education communication to the District. Kramar's testimony might be viewed with some skepticism, in view of the absence of the documents themselves.

The District argues that the post-Proposition 13 cases are distinguishable in that,

> Proposition 13 did not mandate any affirmative action on the part of school districts. In this case, state law mandates certain action by the District, and the consequences of noncompliance are certain, not speculative.

Contrary to this contention, the particular change adopted by the District was not mandated by state law, nor by state regulation. As noted above, the District had at least one alternative available to it--modification of the schedules of the seniors who were the only students who had a school day of less than 240 minutes. As yet another alternative, the District might have sought from the appropriate state agency an exemption from the 240-minute requirement for those students, for the remainder of the school year. It cannot be said that a unilateral increase in class time was the only alternative available to the District in the circumstances.

Second, the contention that the District's conduct was consistent with past policy (compliance with state law on minimum class day for students) is based on a misuse of the phrase "past practice." There is no question that the District had a consistent past practice of complying with state law regarding the length of school days for students (or, at the least, complying with state laws as the District understood them). Certainly, the District cannot be criticized for taking steps to bring its practices into compliance with state law,

once the District finds that it has a shortcoming of some kind. But that form of "past practice," cannot justify a unilateral change in working conditions for a specific and fairly large group of the District's employees. When used in the labor law context, "past practice" refers to rules governing employee conduct, not to educational policy.

Third, the waiver argument is based on the text of Article VIII of the collective bargaining agreement, "District Rights," and Article XV, "Effect of Agreement." Article VIII is a management rights clause, which mentions a number of specific areas in which the District retains the right to make its own decision. Included is a provision which reads:

> Included in but not limited to those duties and powers are the rights to: . . .determine times arid the hours of operation . . .

Article XV provides that:

> In the absence of specific provisions in this Agreement, such practices and procedures are discretionary with the District, as provided for in the State of California Labor Code.

No other provision is arguably related to the change made here, increase in instructional time and reduction of preparation time during the course of a day.

PERB has followed the NLRB lead in holding that it will not find that an employee organization has waived its right to negotiate about a subject unless the employer can point to "clear and unmistakable" contract language indicating an

organization's knowing waiver of right to negotiate about a subject. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74; Los Angeles Community College District (10/18/82) PERB Decision No. 252. Neither the Article VIII language nor the Article XV language makes any specific reference to the subjects at issue here--the division of the working day into instructional time and preparation time. In the absence of any evidence that the cited language was intended to apply to the subject matter here, no waiver can be found. In a 1982 decision, PERB refused to find a waiver by an employee organization because of a management rights clause which included similarly broad language. Solano County Community College District (6/30/82), PERB Decision No. 219, fn. 6.

In South San Francisco Unified School District (9/2/83), PERB Decision No. 343, the Board upheld an employer's contention, based in part on contract language similar to that found in Article XV here, that the employee organization had waived its right during contract negotiations to negotiate about layoff effects. However, in that case, the Board's conclusion was based on extensive evidence of negotiations on the specific point at issue, which preceded the organization's agreement to the contract provision. The employee organization had had an opportunity, during contract negotiations, to

discuss and negotiate about layoff procedures, had done so at the time, had agreed to a provision, and was thus not entitled to a mid-contract second round of negotiations about the same subject. In this case, in contrast, there is no evidence of negotiations which preceded the provision on which the District bases its argument.

Fourth, the WTA did not waive its right to negotiate about the length of class time by its failure to request negotiations after receiving the December board agendas. A District board's reference in a formal agenda to a specific subject does not constitute notice to an employee organization; an agenda reference does not provide an employee organization with a timely opportunity to negotiate with the employer prior to the time a decision is made on the subject. Arvin Union School District (3/30/83) PERB Decision No. 300.

The District also argues that the WTA had notice of the contemplated change as a result of a conversation between Julian Weaver, principal of Victor Valley High School, and Don Wilson, a member of the Association negotiating team. However, the only conversation about which there was specific evidence took place after the change was implemented, not before. (TR: 299.) In any event, it is doubtful that a conversation of this sort would be adequate notice to the Association of a contemplated change in practice.

B. The District's Limitation on the Amount of Released Time to be Given to WTA Negotiators.

EERA section 3543.1(c) provides:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

PERB has held that the extent of released time to be granted to an organization's negotiators is itself subject to negotiations. An employer's refusal to negotiate about the subject with the employee organization is a violation of EERA section 3543.5. Anaheim Union High School District (10/28/81) PERB Decision No. 177. An employer's refusal in negotiations about release time to approach the subject with an open mind and with a degree of flexibility constitutes a violation of section 3543.5(b) Magnolia School District (6/27/77) EERB Decision No. 19.

PERB's general attitude toward an employer's obligation with respect to release time requests is best described in the following paragraph from the Magnolia School District decision:

> "Reasonable released time" means, at least, that the District has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. The District may have to readjust its allotment of released time based upon the reasonable needs of the District, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations and other

> relevant factors. A District's policy does not provide for reasonable periods of released time if the policy is unyielding to changing circumstances. (Magnolia School District, supra, at p. 5)

Although PERB has not, in its reported decisions, held that a district violates section 3543.5(b) solely because of a limited number of hours which it will allow as released time, or because of a limited number of employees to whom released time will be given, the Board has indicated in at least one decision that such limitations might be the basis of a finding. Sierra Joint Community College District (11/5/81) PERB Decision No. 169.[18]

It might be argued in this case that the District ran afoul of EERA section 3543.5(b) both by its inflexibility in adhering to an unchanging position on the limit of released time it would grant during the contract negotiations, and by the specific hour-limitation which it eventually placed on the amount of released time to be granted.

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[18] In that decision, PERB noted,

> The question as to the reasonableness of the number of employees granted released time or the amount of released time granted is one of fact and depends upon the particular circumstances in which negotiations take place.

In that decision, however, PERB's conclusion that the employer had violated section 3543.5(b) was based on the employer's refusal to negotiate about the issue, not on the particular limitation on the hours of released time or number of negotiators.

The standard established by the EERA in the Magnolia case may be applied to both contentions. That is, both the numerical limitation imposed by the District, and the District's willingness to satisfy its negotiating obligation may be measured by the standard which requires an "open attitude . . .so that the amount (of released time to be allowed) is appropriate to the circumstances." These "circumstances" include a number of factors, including the progress of negotiations.

When this standard is applied, it cannot be said that the District's position of seeking to limit the hours of released time to 128 hours plus (four days each for five negotiators) was unreasonable during the May and June meetings. While the District remained steadfast in this position, it presented during the hearing an easily understood and plausible reason for adhering to this position. The District's own experience in past negotiations with the WTA led it to conclude that 128 hours would be enough to complete negotiations concerning the terms of a new contract.

The WTA presented no evidence to challenge the accuracy of the District's assertion that comparable release time arrangements were sufficient in the past. Nor did WTA present evidence to establish that the District knew or should have known that the 1984 negotiations would be more time consuming than past negotiations.

Thus, it is concluded that neither the District's inflexibility in spring 1984 on its four days only position, nor the particular limit imposed (four days for each of five negotiators) constitutes a refusal to act reasonably with respect to release time for negotiators.

The Association's charge also alleges, and the Association argues in its post hearing brief, that the District acted unlawfully by pre-conditioning the granting of any release time on the Association's agreement to limit release time as the District had proposed. Kilgore, for the District, took this position on April 30, in a meeting with McGill, and on May 4, when the two negotiating teams met.

The question of whether an employer acts unlawfully by pre-conditioning the granting of any release time to a union on the employee organization's agreement to an over all limit is one of first impression for PERB.

I am unwilling to view the District's conduct as a per se violation of its statutory obligations to provide reasonable release time. In the Anaheim case, and later cases, as noted above, PERB has viewed the extent of release time granted as a matter to be decided through the course of negotiations, much as any other subject within the scope of representation. Thus, each party must be given some leeway in taking a position and adhering to it, provided that the position is not inherently unreasonable, and that its adherence does not continue to a point beyond that justified by circumstances.

In this case, the District first adopted the position at issue--no release time until there is agreement on the release time limit--on April 30. It abandoned the position on May 23, when Kilgore signed the ground rules agreement which did not have a specific limitation on the number of release time hours to be granted. The District's adherence to its position did not delay the start of negotiations—it appeared that negotiations would not have started until May 4 even if the District's position had been the reverse: it would grant release time, while continuing to proclaim its intent to limit release time to four days. Further, the Association's position was also inflexible: it took the position at all times that there should be no limit on the amount of release time granted. The Association could have adopted a compromise position—e.g., six meetings on release time, or eight meetings on release time, or release time for alternate meetings after the fourth meeting.

In view of all these circumstances, I conclude that the District's position, pre-conditioning release time on agreement to a limit of release time, was not unlawful within the meaning of EERA section 3543.5(a) ,(b) , or (c) .

In addition, the Association's charge concerning the release time dispute suggests that the District acted illegally by refusing to begin negotiations in a timely fashion so as to allow negotiations to be completed prior to the District's

final budget adoption. The allegation is not spelled out clearly. In any event, the Association introduced no evidence on the point. Insofar as the Association's charge may be read to present that allegation, it will be dismissed.

A separate release time question is raised for the meeting scheduled to take place on October 29. The District refused to grant the WTA negotiators release time. It may be inferred that Davis conveyed to Kilgore in their post-board meeting telephone conversation WTA's expectation and desire for release time for negotiations (although no specific request was made). In any event, Kilgore made it clear that the Board would not allow any additional release time for the Monday meeting. A request by WTA for release time would have been futile. Tarr's explanation of his remark to Casi Wilson represents a clear statement by the District that it intended to grant no additional release time for face-to-face meetings without a mediator, and that this intention was based on the board's belief that its past action had been reasonable.

For this analysis it is of no significance which of the two versions of the October events is credited: the District voted specifically in October to deny additional release time; or, the District had made a general decision several months earlier, and its refusal to grant release time for October 29 was nothing more than a specific application of this decision.

It is undisputed that the District (through Kilgore) informed the Association of its unwillingness to consider any additional release time.

Application of the Magnolia School District standard leads to the conclusion that by this action in October the District acted unreasonably, and thus violated EERA section 3543.5(b).[19] The District's actions were unreasonable given the circumstances. Whatever the District believed in the spring about the likelihood of fairly brief negotiations, it must have been clear to both parties, by late October that final agreement on contract terms, or even a conclusive impasse could not be reached in the immediate future. The predecessor contract between the District and the WTA included provisions on 16 major subject areas. Testimony during the hearing indicated that the parties, up until the time of the hearing,

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[19]The initial charge referring to the release time dispute was filed in May 1984, and obviously did not refer to events in October 1984. However, on the second day of the hearing, counsel for the Association moved to amend the complaint to allege that the denial of release time for the October meeting denied the Association the "reasonable" release time guaranteed by the EERA, and also alleged that the denial of release time was retaliatory. The motion was granted on the third day of the hearing, with no objection by the District (TR: 226). The issue was fully litigated and briefed by the District.

The text of the amendment is set out in a separate document which was typed on the last day of the hearing, and received by PERB after the close of the hearing, accompanied by a letter from District counsel, dated December 14, 1984.

had agreed to terms in either three or six areas.[20] Assuming that proposals covered all the subjects covered by the predecessor contract, the parties were far from agreement. This inference is supported by the appointment of a PERB mediator, indicating the parties had reached impasse in their negotiations.

Thus, the circumstances had changed since the District had initially decided in April that it would not allow release time beyond four days for each of five negotiators. More time would be needed to complete negotiations.

There is no requirement in the EERA that an employer provide release time for employee negotiators for every meeting throughout negotiations. However, the PERB has held that the EERA's reference to "reasonable" release time requires an employer to be flexible in its approach to allocating release time.

In this case the District was not flexible. It refused in October to reconsider a position adopted six months earlier, although the assumptions on which the policy was based had proved to be erroneous. At the same time, it refused to grant more than four days' release time despite the knowledge that

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[20]Don Wilson testified agreement had been reached in three areas; Kilgore testified agreement had been reached on six areas. Regardless of which number is correct, the inference which follows remains the same: the parties were far from a complete agreement.

there had already been nine meetings, at least eight of them lengthy, and it was very likely there would be several more before negotiations could be completed. In this context, the District's continued policy limiting release time to four meetings is not reasonable.

It would not have been necessary for the District to agree that all future meetings would be covered by release time. However, the District should have indicated directly that some additional release time would be available for future meetings.

It is concluded, therefore, that the District's refusal to grant any release time for the negotiations meeting scheduled to take place October 29 was a violation of EERA section 3543.5(b).

C. The Allegation of Retaliation in Connection with Release Time for the October Meeting.

The amendment to the complaint which was first proposed on the second day of the hearing, and allowed on the last day of the hearing, alleges that the District's denial of release time for the meeting scheduled for October 29 was a form of retaliation against the Association, for the filing of the initial charge concerning release time. The only evidence in

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[21] It may be noted in this context that the District operates 8 schools, with 360 to 370 teachers. (TR: 10-11.) In a district this size, it cannot be said that granting several additional days of release time to five teachers would represent a significant financial burden to the District. A much smaller district might have a better point to make.

support of this allegation is a remark made by Superintendent Tarr to Casi Wilson and Julie McGill, in or around the hearing room, during a break in the hearing.

The remark itself was ambiguous. Tarr testified, credibly, about what he meant to convey with the remark he made. He specifically denied that the District intended to retaliate against the Association for the filing of the unfair practice charge. Tarr's explanation of the remark is plausible, and I have credited it. Since there is no other evidence of a retaliatory motive by the District, the allegation will be dismissed.[22]

D. The Reduction in the Number of the Pre-Class Preparation Days.

In Palos Verdes Peninsula Unified School District (7/16/79) PERB Decision No. 96, PERB held that the employee calendar, the days on which employees are required to work, is a mandatory subject of bargaining under EERA, as it is included within the reach of the phrase "hours of employment" in EERA section 3543.2.[23] The Board's decision in Palos Verdes did not specifically take up the question presented here—the negotiability of the number of days during the working year which are to be non-instructional days, set aside for teachers

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[22]The Association did not pursue the retaliation allegation in its post-hearing brief.

to do preparation or other instruction-related work (e.g. grading of examinations or other written assignments).

In San Jose Community College District (9/30/82), PERB Decision No. 240, the Board dismissed an allegation of unlawful conduct by a school district which had adopted a school calendar without agreement with the teachers' bargaining agent. However, the Board's decision turned on the absence of evidence that the increase in the number of class days (itself a matter of educational policy and therefore outside the scope of representation) had a direct effect on any matter within the scope of representation under EERA. The PERB wrote:

> We find that the Association failed to prove that the substitution of teaching days for inservice days affected a matter within the scope of representation. There is no evidence in the record to indicate that the District's actions required certificated personnel to work more days, nor did it lengthen the working day, increase the number of working days per year, or affect the distribution of workdays. Moreover, the evidence fails to indicate that discontinuation of the program increased preparation time or caused employees to use any duty-free or off-duty time to meet professional development requirements. (Citations omitted.) . . . Therefore, there was no evidence presented to prove that the District's actions impacted a subject within the scope of representation. (San Jose Community College District, Id., at page 10).

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[23]Section 3543.2 reads, in pertinent part:

> The scope of representation shall be limited to matters relating to wages, hours of employment and other terms and conditions of employment.

The clear implication of this passage is that an employer may not take unilateral action which would require certificated employees to work additional days, to lengthen the working day, increase the number of working days per year, or cause employees to use any off-duty time to meet "professional development requirements."

In this case, it has been found that the District's conduct did increase the number of working days per year. Laney and Don Wilson testified to that effect, explicitly. More importantly, I have taken judicial notice, and the District concedes, that every teacher within the District with a full work load needs at least three or four days of preparation, prior to the first day of classes in the fall, to prepare for the school year.

If the District expects and assumes that teachers will spend at least three or four days preparing to teach, before the first day of classes, and assigns three or four days to such preparation before the first day of classes, all or most of that work will be done during those scheduled workdays. If, on the other hand, the District assigns only one official workday to preparation, and expects the teachers to prepare just as thoroughly, carefully, and thoughtfully, then teachers who fulfill that expectation will be working an additional two or three days (at least) on "their own time." The District's action thus resulted in a material increase in the teachers' hours of employment.

Looked at another way: if it is assumed that the District's teachers work on each day on which there are scheduled classes during the 1984-1985 school year, they will be working at least 184 days during this school year: 181 class days, one official pre-class preparation day, and at least two unscheduled preparation days before the first day of classes. The total of 184 working days is two days more than teachers were required to work in the 1983-84 school year.[24] The same conclusion is reached: the District unilaterally increased the number of days on which teachers were required to work.

One of the two Board opinions in the Palos Verdes case refers to the possibility that in some circumstances a school district may be required to act unilaterally with regard to beginning classes to meet a legal or financial obligation. (Palos Verdes, supra, at pp. 32-33). However, that is not the case here. There is no dispute about the date on which classes were to begin; the dispute is about the date on which teachers' paid, official pre-class preparation was to begin.

The District's unilateral act removing two preparation days from the official working calendar, while not reducing (to any

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[24]This calculation does not take into account the possibility that there will be extra workdays between semesters, in late January, or at the end of the school year, in mid-June. If there are such days scheduled, the teachers' work year will be extended even more.

measurable degree) the work required of teachers prior to the commencement of classes, constitutes a violation of EERA sections 3543.5(b) and (c).

The District argues, correctly, that the student calendar is not a subject within the scope of representation, and by unilaterally adopting the student calendar, the Board did not act in violation of the EERA. That is accurate, but not relevant. What was at issue here was not the date for the commencement of classes but the date on which the teachers' work year would officially begin: the date on which the District would recognize the teachers' pre-class preparation as paid work time, to be included in eventual calculations of the number of teacher working days. The District chose to designate only one day, September 7, prior to the start of classes as a teacher workday. In the previous school year, there were three such days prior to the start of classes. By altering this practice, the District acted unilaterally.

The District argues that its conduct in this respect was consistent with past practice, and consistent with the collective bargaining agreement, since the agreement says only that the work year will begin no earlier than September 1. Without quite saying so, the District argues that the Association, by agreeing to the contract language quoted above, waived its right to negotiate about the subject at issue here. As noted above, PERB, like the NLRB, recognizes an employee

organization's waiver of a right to negotiate about the subject only when the waiver is clear and unmistakable. There is no such waiver here. There is no mention at all in the contract of the question of preparation days, or teacher working days on which there are no classes. There can be no finding of waiver made in this case.

Next, the District argues that the District's past practice was to use non-teaching days before the beginning of classes for the convenience of the District: for District-wide meetings, in-service training, faculty meetings, department meetings and the like. In September 1984 the District lawfully exercised its managerial authority to direct its work force, and cannot be found to have acted illegally, the District argues.

All of the activities listed by the District did take place, on occasion, during other school years, in the days immediately preceding the beginning of classes, alongside teacher preparation. However, the evidence is far from sufficient to establish a consistent past practice. For example, a District-wide meeting occurred once, in 1974. In-service meetings to train teachers to teach "special education" students who were placed in regular classes were provided in certain years, but not in later years. There was no detailed evidence of how the District used its pre-class teacher workdays in the 1983-84 school year.

In the absence of satisfactory evidence on this point, the proffered defense cannot be accepted.

Finally, the District argues that it fulfilled its obligations by negotiating the teacher calendar with the Association, during the contract negotiations which began before the hearing, and continued after the hearing. The evidence showed that the District and the Association had discussed the working calendar during negotiations, but had not yet reached agreement on the subject. In the absence of agreement, it was the District's obligation to maintain the status quo, that is, three working days before the beginning of classes. By changing the status quo, the District acted unlawfully. The District would be free to act unilaterally on this issue only after it had reached impasse with the Association, and had undertaken and completed in good faith the statutory impasse procedures. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, aff'd, Moreno Valley Unified School District v. PERB (1983) [142 Cal.App. 3d 191].

CONCLUSIONS

The District violated EERA section 3543.5(c) by its unilateral decision in December 1983 as implemented in January 1984 to add ten minutes per day to teachers' instructional time, and by subtracting the same amount from teachers' daily preparation time. Concurrently, the District also violated sections 3543.5(a) and (b).

The District violated EERA section 3543.5(b) by its unreasonable conduct with respect to release time in October 1984. Concurrently, this conduct violated EERA sections 3543.5(a) and (c). Its other conduct with regard to release time did not violate any provision of EERA, and allegations pertaining to this conduct shall be dismissed.

The District violated EERA section 3543.5(c) by its unilateral elimination of two of the three pre-class teacher preparation days in September 1984. Concurrently, the District also violated EERA sections 3543.5(a) and (b).

All other allegations of unlawful conduct shall be dismissed.

REMEDY

The usual remedy for an unlawful unilateral change is an order restoring the status quo ante, requiring the employer to negotiate with the employee organization about the matter(s) at issue, and requiring the employer to make particular employees whole for monetary losses incurred by the employees as a result of the employer's unlawful conduct. In Corning Union High School District (8/17/84) PERB Decision No. 399, a case in which PERB found that a school district had unlawfully eliminated certain teachers' preparation period, PERB issued a remedial order which had two alternative methods of compensating those employees who were required to work longer

hours than had been agreed to. The Board ordered the district to compensate the affected employees by giving them paid time off work "which comports with the number of extra hours each employee actually worked." In the alternative, the Board ordered that if the district and the employee organization were unable to agree on the manner in which the time off would be granted, "the employees concerning whom there is no agreement shall receive monetary compensation commensurate with the extra hours worked."

That precedent will be followed here, with respect to the District's unilateral reduction of preparation time in January 1984 and the District's unilateral elimination of two preparation days in September 1984.

The District argues that an order requiring the District to pay for additional minutes which the teachers were required to teach is inappropriate, because the Association presented no evidence that the additional teaching minutes required each teacher to work additional time outside of the workday. Further, the Association notes,

> (T)he record reflects that any amount of extra time which employees may have worked because of increased instructional minutes varied depending on the subject matter taught, their particular work habits and their professional decisions of how to fill teaching time.

The Association notes, correctly, that only two teachers testified about the consequences (to each of them,

respectively) of the District's unilateral lengthening of the instructional minutes per day. There is no evidence that other teachers were compelled, as a result of the unilateral change, to spend additional time beyond the contractual workday preparing for classes, or, if they did so, how much extra time was needed.

Despite this shortage of evidence, the make-whole remedy is appropriate. The unilateral change implemented by the District substituted, each day, ten minutes of class time for ten minutes of non-class time, which was available for use as preparation time. Each teacher who did exactly the same amount of preparation following the unilateral change as she or he did before the unilateral change, must have worked ten minutes longer each day. Only teachers who reduced their preparation effort after the unilateral change could have avoided the lengthening of their workday; there is no evidence that any teachers chose this path.

It is possible that specific teachers reduced their preparation time after the January 3 unilateral change, and as a result, did not have a longer working day or week. The question of each teacher's entitlement to a specific amount of money is left to a compliance proceeding, if the parties cannot, by their own efforts, agree on amounts due. The order in this case establishes that teachers who did work longer days

as a result of the unilateral change are entitled to additional compensation.[25]

The District also argues that a make whole order for the additional instructional days for the 1984-85 school year is inappropriate. The District would view work done by teachers to prepare for classes before the first day of instruction as "voluntary" on the part of those teachers. The District's final brief noted that teachers who did not report for work prior to September 7 were not penalized or reprimanded in any way. Also, the District contends that "the record is clear that in the past non-student working days before the beginning of school have been filled with District's mandated preparation activities."

The District's contentions are unpersuasive. First, the record, as I noted above, is far from clear on the point; in fact the most likely inference that might be drawn from the sketchy record is that "District-mandated" activities prior to the first day of classes were a minor element of teachers' activities during those three or four days each September designated as workdays.

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[25]PERB has issued similar orders in other unilateral change cases, in which the entitlement of various individuals to monetary compensation was uncertain. Oakland Unified School District (4/23/80) PERB Decision No. 126, aff'd, Oakland Unified School District v. PERB, 120 Cal.App.3d 1007 (1981) and Lincoln Unified School District (12/18/84), PERB Decision No. 465.

Second, the argument that teachers' efforts prior to the first day of classes are "voluntary" is disingenuous. I took notice that with few exceptions, teachers use three or four days prior to classes to prepare for the impending semester of lectures, assignments, examinations, papers, and grading. In past years, the District recognized the necessity of such preparation, by including such days among the enumerated workdays for which teachers were compensated. The order in this case would require only that the District adhere to its previous practice. It does not require the District to compensate each teacher for as many preparation days as each teacher decides is necessary in his or her case, without limit.

No monetary compensation will be ordered for the District's refusal to provide reasonable release time for the October 29, 1984 negotiating meeting. There is not a clear inference to be drawn that members of the negotiating team worked extra hours, or suffered a financial loss in any other way, as a consequence of the District's unlawful conduct. In any event, if the District had indicated to the WTA its willingness to negotiate about release time provisions for October 29 (and other meetings which might follow) there is no certainty that those negotiations would have led to release time for October 29.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District

indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Victor Valley Teachers Association concerning the teachers' preparation periods, non-student working days, and release time for negotiations;

(2) Denying the Victor Valley Teachers Association the right to represent the employees by failing and refusing to meet and negotiate in good faith concerning the teachers' preparation periods, instructional time, non-student working days, and release time for negotiations.

(3) Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Victor Valley Teachers Association concerning these subjects.

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

(1) Upon request, meet and negotiate with the exclusive representative concerning the teachers' preparation time, non-student working days, and release time for negotiations.

(2) Reinstate the teachers' preparation periods in effect prior to January 3, 1984, until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the preparation periods.

(3) Grant to each of the employees harmed by the unilateral change the amount of time off which corresponds to the number of extra hours worked as a result of the increase in class time following January 2, 1984, and as a result of the elimination of two non-student working days prior to the commencement of classes in September 1984. Should the parties

fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked. However, if subsequent to the District's unlawful action, the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning these subjects, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

(4) 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 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 the notice is not reduced in size, altered, defaced or covered by any other material.

(5) Upon issuance of a final decision make written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

IT IS FURTHER ORDERED all other allegations in the charge and complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 3 2305, this Proposed Decision and Order shall become final on February 19, 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 February 19, 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 3 2300 and 32305.

Dated: January 28, 1985

MARTIN FASSLER
Administrative Law Judge