

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



VICTOR VALLEY COMMUNITY COLLEGE,)
CTA/NEA, CHAPTER #375,)
)
Charging Party,) Case No. LA-CE-1925
)
v.) PERB Decision NO. 570
)
VICTOR VALLEY COMMUNITY COLLEGE) May 2, 1986
DISTRICT,)
)
Respondent.)
_____)

Appearances: Charles R. Gustafson, Attorney for Victor Valley Community college, CTA/NEA, Chapter #375; Atkinson, Andelson, Loya, Ruud & Romo by Ronald C. Ruud for Victor Valley Community College 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 Community College District (District), to a proposed decision by a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(c) of the Educational Employment Relations Act (EERA)¹ by unilaterally increasing the threshold for overload (overtime) pay from 30 to 31

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

Section 3543.5 provides, in pertinent part:

annualized teaching hours. The dispute centers on the District's interpretation of the parties' 1981-84 collective bargaining agreement (Agreement), charging Party, Victor Valley Community College, CTA/NEA, Chapter #375 (Association), maintains (and the ALJ agreed) that the District's interpretation is a "hidden" one which was not revealed during negotiations and which is unrelated to the express purpose of the operative provisions. The District maintains that the Agreement clearly provides that the overload threshold is 31 hours. The District also contends that the charge was untimely filed. For the reasons that follow, we reverse the finding of a violation and dismiss the charge.

FACTUAL SUMMARY

Prior to the effective date of the 1981-84 Agreement, overload pay was governed by Policy No. 4141.1(d) of the District's personnel policies. This section states, in pertinent part:

When extra lectures or laboratory classes are assigned over and beyond the recognized full-load assignment as provided for in Policy No. 4115, Full-time Personnel Assignment, the instructor shall be reimbursed at the percentage of overtime applied to his regular ten-month teaching salary. Overtime shall be computed on an annual basis with overtime payment being made during the spring semester.

It shall be unlawful for a public school employer to:

.....

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Policy No. 4115 defined a full-time personnel assignment as 15 lecture hours, 25 laboratory hours or the equivalent per semester.

The testimony reflected that the above policies had not been formally rescinded as of the time of hearing, but Article XI of the 1981-84 Agreement appears to supersede the relevant provisions of these policies. Article XI states, in pertinent part:

ARTICLE XI: HOURS AND WORKING CONDITIONS

A) Faculty Teaching Assignments

1) The full-time faculty assignment shall be for 177 days for a minimum of forty (40) hours per week. The teaching portion of this assignment will be fifteen (15) hours of lectures, twenty (20) hours of individualized instructional laboratory, twenty-five (25) hours of laboratory in 1981-82 and twenty-four (24) hours of laboratory in 1982-83 and 1983-84. An hour of instruction defined in Ed. Code section 84527. In lieu of a full-time teaching load, the instructor may be assigned other duties by the district. The remaining time will be spent in: preparation and evaluation of course work, assisting with student activities, office hours, committee work, attending college-related meetings, or other such duties as may be mutually agreed upon.

.

3) A full-time teaching assignment will be 29-31 equated hours of instruction a year. When the teaching assignment falls below this load, the employee's schedule will be adjusted to equate to a 58-62 hour load over a two-year period. Hours in excess of the equation as set forth in this section shall be an overload.

The Agreement was signed on November 9, 1981. Beginning in the spring of 1982, and again in 1983 and 1984, the District granted overload pay only when a faculty member had worked more

than 31 annualized teaching hours.² The District used 30 hours as the load benchmark, equated to 1.0. While formerly any load greater than 1.0 triggered extra pay, beginning in the spring of 1982, a load greater than 1.033 (31/30) was required. The most complete evidence showing the effect of the new threshold was of the 1983-84 year, in that year, 6 instructors received overload pay, while 15 more would have if 1.0 were used as the threshold amount. Of approximately 61 to 67 certificated employees, only 52 were subject to overload, due to sabbaticals, sick leave or special assignments.

The dispute over Article XI was precipitated by the filing of a grievance by Richard Powell, a member of the Association's 1981 bargaining team. Powell's grievance, filed on or about March 10, 1983, stated that his overload pay was improperly calculated. From 1980-81 to 1983-84, Powell's loads were as follows:

<u>1980-81</u>	<u>1981-82</u>	<u>1982-83</u>	<u>1983-84</u>
1.014	1.014	1.0333	1.0333

While Powell received overload pay in the spring of 1981, he received none in 1982. in 1983, due to a rounding-off error, he

²Laboratory hours are equated to lecture hours in a 24 to 15 ratio (25 prior to the 1982-83 year). For example, if an instructor had 15 lecture hours in the fall semester and 24 laboratory hours in the spring, the annual total would be 30. Similarly, if an instructor had 8 lecture hours and 11 laboratory hours in the fall, and 7 lecture hours and 13 laboratory hours in the spring, the annual total would again be 30.

received a small amount, which he grieved as too low. In 1984, he received none.

Powell's grievance was accepted and processed, and was unresolved on November 3, 1983 when, at a regular meeting between District and Association representatives, the parties discussed their differing interpretations of Article XI. The Association insists that this was the first time it was aware that Powell's grievance involved conflicting interpretations, and not merely a computation error.³ The underlying unfair practice charge was filed by the Association on February 14, 1984 on behalf of all employees affected by the change in the overload threshold from 30 to 31 hours.

The 1981 Negotiations

The parties began negotiations on the 1981-84 Agreement in late January 1981. In early April, the parties first discussed the issue of overload hours. The District suggested an increase from 15 to 18 lecture hours as the normal load standard, though this appeared to be merely an opening position that was not vigorously advocated. The Association, on the other hand, seriously advocated a decrease in the ratio of laboratory hours to lecture hours from 25-15 to 20-15. Further, the parties agreed to the concept of allowing the District to average loads

³while the extent of the Association's participation in the grievance prior to November 3 is unknown, the parties' Agreement requires that the Association be given a copy of the grievance and of the resolution at each level of the grievance procedure. Employees may, however, present their grievances directly to the District.

over two years. This was designed to avoid the possibility of an instructor working less than a full load one year, at full pay, yet receiving overload pay for working more than a full load the next.⁴⁴

The parties continued to discuss the two-year averaging concept and exchanged counterproposals. On May 14, 1981, the Association agreed to a provision consisting of the first two sentences of what was eventually adopted as paragraph A-3 of Article XI. However, the agreement was contingent upon the District adding a sentence that would guarantee immediate payment for an overload where there had not been an underload the previous year. This would prevent the District from avoiding overload pay altogether by simply reducing an instructor's load the next year to meet the two-year limit. On May 28, the District presented a revised version of paragraph A-3 in order to address the Association's concerns. Generally, the Association was satisfied, and this is the language that appears in the signed agreement. Very late in the negotiations, the parties agreed to reduce the ratio of laboratory hours to lecture hours from 25-15 to 24-15, beginning with the 1982-83 year.

⁴⁴That would result if, for example, an instructor had 27 hours the first year and 33 the second. The inequity becomes apparent when one considers that an instructor teaching 30 hours each of the two years would receive no overload pay.

In essence, the dispute herein is whether paragraph A-1 or paragraph A-3 defines the threshold for overload pay. The Association maintains that paragraph A-3 was designed only to allow the District to average loads over two years in certain circumstances, and that a change in the overload threshold was not discussed. The District maintains that the plain language of A-3 clearly defines the overload threshold as 31 hours, and that the Association was fully aware of the ramifications of the provision.

Janet Bird, a member of the negotiating team, was the only witness presented by the Association who testified concerning the negotiations, AS a librarian, Bird was not eligible for overload payments nor personally affected by the definition of a full-time teaching assignment. Bird testified that she attended all of the 1981 negotiating sessions, but the District's notes⁵⁵ reflect that she was present at only 9 of the 20 sessions. However, she did attend the crucial sessions in May. In response to being confronted with the District's notes, Bird commented that her memory was not as good as she thought it was. Bird could not recall seeing paragraph A-3 in writing prior to

⁵At all of the negotiation sessions, the District had a representative whose role was to take notes. The notes were placed into evidence after the author of most of them, Marguerite Lough, testified about them. The notes are not verbatim, but reflect synopses of the main substantive issues discussed and their resolutions.

reading it in the ratified Agreement.⁶ She also admitted that she did not read the entire Agreement prior to its execution.

Bird testified that she recalled the language of what became paragraph A-3 being discussed only in the context of giving the District the flexibility to average loads over two years. she did not recall any discussion of a change in the overload threshold from 30 to 31. She did assert that Richard Powell⁷ expressed concern that overload would continue to be interpreted in the same manner, that is, anything over 30. Bird claimed that James Hvilsted replied by telling Powell that he was overly concerned, and that the District's only intent was to have the flexibility to apply overload over a two-year period. Bird recalled that there were extensive discussions over the definition of a full-time assignment in paragraph A-1.

The District offered the testimony of two of its negotiators, Charles Peterson and James Hvilsted. Peterson and Powell carried the bulk of the discussion for their respective parties concerning the adoption of paragraph A-3. Peterson testified

⁶Documentary evidence reflects that written proposals were exchanged which mirrored the final language of paragraph A-3.

⁷Powell was not called to testify by either party. No explanation was given. The ALJ did not draw any inference from Powell's failure to testify, nor do we. This is consistent with judicial interpretations of California Evidence Code section 412, which hold that no adverse inference should be drawn when a material witness who does not testify could have been called by either party. See, e.g., Patton v. Royal industries, Inc. (1968) 263 Cal.App.2d 760. There was no indication that Powell was unavailable to be called by the District.

that the initial discussions dealt only with the District's desire for the flexibility to average loads over a two-year period. However, Peterson maintained that, once the District had presented its proposal in May calling for 29-31 hours, the subject of overload threshold was discussed.

Peterson initially testified that he expressly mentioned to the Association that, under the District's proposal, the overload threshold would be 31. However, on cross-examination, he backed off from that testimony somewhat, claiming that he could not specifically recall what he said, but that he was certain the issue was discussed. Further, he maintained that the change from 30 to 31 hours was clear from the language of the proposal and that the Association had no objections. He also asserted that he and Hvilsted had discussed privately during the negotiations that the proposed language would raise the threshold to 31.

Peterson confirmed that Powell was concerned about having to wait two years before receiving overload pay and that the third sentence was added to assure immediate payment where there had been no previous underload. He did not recall Powell expressing concern that the threshold remain at 30 and specifically denied that anyone from the District assured Powell the threshold would not be changed. Peterson did admit that he recalled no discussion which specifically addressed the effect on overload pay that would result from the increased threshold, but asserted

that the effect would have been readily apparent to the Association negotiators.

Peterson testified at some length as to the meaning of paragraphs A-1 and A-3. He first drew a distinction between a normal full-time assignment, as referred to in A-1, and the overload threshold, as reflected in A-3. Peterson said that 30 was the normal full-time assignment and is used as the benchmark for calculating loads, i.e., 30 hours equates to 1.0. He then explained that, pursuant to A-3, $31/30$, or 1.0333, reflects the amount necessary to constitute an overload. Essentially, he drew a distinction between the concepts of full load and overload. He asserted that the third sentence was meant to refer to the 29-31 equation. He explained that it does not refer to the 58-62 equation because that provision related only to underload situations.

Hvilsted's testimony was consistent with Peterson's, though much more brief. He, too, asserted that it was made clear to the Association that the overload threshold would be raised to 31 by the proposed language of A-3. As did Peterson, Hvilsted explained the absence of specific mention of the overload threshold discussions in the District's notes by pointing out that the notes are not verbatim and reflect only a summary of major points in the negotiations. Hvilsted categorically denied making any assurances that the threshold would not change or that he told Powell not to be overly concerned. He also claimed to have explained to the Association the fairness in having a

full-load range of 29-31 in that, though overload would not be paid unless hours exceeded 31, full pay would go to those with only 29 hours. The two-year averaging provision would apply only where a load was less than 29. Peterson also testified that the Association did not raise any issue as to overload in reopener negotiations for the 1982-83 and 1983-84 years.

DISCUSSION

A. Timeliness of the Charge

The District first contends that the six-month statute of limitations began to run on November 9, 1981, when the Agreement was signed. This contention is based on the assumption that the language of the Agreement itself put the Association on notice of the threshold change. This is an abstractly interesting but fallacious argument. The statute of limitations does not begin to run until the charging party has actual or constructive notice of the act alleged to be unlawful. Fairfield-Suisun Unified School District (1985) PERB Decision No. 547. The charge in this case does not allege that the contract language was itself illegal, but that the District implemented an interpretation of the language not agreed to and understood by both parties. Thus, the limitations period began from the time the Association is deemed to have had knowledge of the District's intent to implement an overload threshold of 31 hours. By definition, such time would have to be after the execution of the Agreement, for the Agreement established the policy from which the District is alleged to have unlawfully deviated.

Next, the District asserts that the application of the new threshold in 1982 and 1983 put the Association on notice. In 1984, about 40 percent of the faculty was affected by the change from 30 to 31, either by receiving no or less overload pay. The ALJ assumed that roughly the same number were affected in 1982 and 1983. The ALJ stated that the Association would be deemed to have had notice if it knew or should have known of the District's implementation of the threshold increase. Noting that there was no evidence that any of the affected employees were actually aware of the change, nor evidence of their relationship to the Association, the ALJ found no proof of actual knowledge. Nevertheless, the fact that a substantial number of employees were affected was a factor considered by the ALJ to determine whether to impute knowledge to the Association. He concluded it was insufficient in itself and found no other factor present which would favor imputing knowledge. We agree.

The District also contends that Powell's failure to receive an overload payment in the spring of 1982, after receiving one for the same number of hours the previous year, put the Association on notice. The ALJ properly concluded that Powell's failure to receive any overload payment in the spring of 1982 was insufficient to put the Association on notice of the District's view of the overload threshold. There was no evidence that Powell continued to have any official role in the Association after the conclusion of the 1981 negotiations. Nor was there evidence that Powell communicated with any Association official

concerning his failure to receive an overload payment in 1982. Additionally, there was no evidence demonstrating that the use of a 31-hour threshold would have been apparent to the Association even in the absence of employee complaints. Without such evidence, we are unable to impute knowledge to the Association in 1982.

The ALJ found that Powell's March 10, 1983 grievance put the Association on notice of the District's interpretation of the overload threshold.⁸ Though the unfair practice charge was not filed until February 14, 1984, the ALJ concluded that the six-month statute of limitations provided by EERA section 3541.5(a) was tolled during Powell's attempted resolution of the dispute through the grievance procedure. Since the record reflects that the grievance was pending until its final denial on December 7, 1983, the filing of the charge in February 1984 would place it within the six-month limitation period. We find the ALJ's analysis to be correct.

The District's objection to the finding that Powell's grievance tolled the statute of limitations is without merit. The District misreads two prior Board decisions⁹ for the

⁸AS noted above, the Agreement provides that the Association receive copies of all grievances filed. AS the ALJ noted, a reasonably diligent inquiry would have revealed the nature of the grievance if it was not readily apparent on its face.

⁹Poway Unified School District (1983) PERB Decision No. 350; San Dieguito union High School District (1982) PERB Decision NO. 194.

proposition that a grievance does not toll the statute of limitations unless the contractual grievance procedure culminates in binding arbitration. While Poway and San Dieguito limit the application of statutory tolling, pursuant to EERA section 3541.5(a), to grievance procedures providing for binding arbitration, both cases expressly stated that equitable tolling principles may be applied, regardless of any provision for binding arbitration. It is equitable tolling that is involved herein.

The doctrine of equitable tolling requires the satisfaction of two basic conditions: (1) The charging party must have reasonably and in good faith pursued an alternate method of relief; and (2) the tolling must not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. Poway, supra; Elkins v. Derby (1974) 12 Cal.3d 410; Meyers v. County of Orange (1970) 6 Cal.App.3d 626.

The dispute herein could have been resolved through the negotiated grievance procedure. The District admitted that Powell's grievance was pursued through various levels of the procedure and denied on March 17, April 7 and December 7, 1983. The only apparent delay was between the second and third levels. There is no evidence that the delay was the result of a failure by Powell to pursue the grievance in good faith and in a diligent manner. Had the deadlines provided by the grievance procedure been adhered to, the denial at level three would have issued within two months of the denial at level two. The record

contains no explanation of why it in fact took approximately eight months. Nevertheless, we find it instructive that, even assuming the delay was the fault of Powell, the District apparently did not see fit to enforce the contractual time limit for a level III filing.

The second condition for applying equitable tolling is clearly present, AS the ALJ observed, the grievance and the unfair practice charge arose from exactly the same circumstances. Both deal primarily with the determination of the proper overload pay threshold. The evidence requirements for the defense of the unfair practice charge and of the grievance would not differ. Since the District was put on notice of the dispute herein at the time of Powell's grievance in March 1983, it was not prejudiced by the time lag between the grievance and the unfair practice charge.

Finally, we reject the District's claim that the limitations period should not be tolled because the grievance was filed by Powell, not by the Association. The Board considered and rejected this argument in Victor Valley Joint union High school District (1982) PERB Decision NO. 273. The Board noted that the exclusive representative is also an aggrieved party in relation to an alleged refusal to bargain, and is thus an appropriate party to raise the unfair practice charge.

B. The Alleged unilateral change

The ALJ characterized the District's interpretation of the Agreement as a "hidden" one which did not reflect the parties'

mutual understanding at the bargaining table. The District excepts to this characterization, and insists that the ALJ ignored credible testimony that the threshold change was communicated expressly and impliedly to the Association during negotiations. While the District's argument is somewhat overstated, we agree that the ALJ erred in finding a violation. The plain language of the parties' agreement is most susceptible to the District's proffered interpretation, while the Agreement can be viewed as somewhat ambiguous, our review of the record nonetheless compels us to conclude that the Association failed to establish through evidence of negotiation history that its interpretation was the one the parties intended.¹⁰

The District's interpretation is both internally consistent and easily reconciled with the plain language of Article XI. The first sentence of paragraph A-3 provides a range of 29 to 31 hours. Any amount within this range would be considered a normal full-time assignment. Pursuant to the second sentence, if a teacher's load fell below 29, the District could assign an amount in excess of 31 the next year, as long as the two-year total did not exceed 62.

¹⁰Regulation 32178 provides that, in unfair practice cases, the charging party bears the burden of proof by a preponderance of the evidence.

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

Assuming that "in this section" refers to paragraph A-3, the third sentence provides that, when limits referred to above are exceeded, it would constitute an "overload" for which extra pay would be due. The parties maintain that this sentence was added to insure an immediate overload payment in situations where two-year averaging was not applicable (i.e., where there was no previous underload), undoubtedly, the language could have been drafted to more clearly provide that hours in excess of 31 would constitute an overload, except where two-year averaging is permitted, in which case overload would be anything exceeding a two-year total of 62. Nevertheless, the third sentence is most reasonably read to confer that meaning. "Equation" refers to 29-31 and its two-year counterpart (58-62), or it refers solely to 29-31, but is impliedly qualified by the two-year provision in the second sentence.

The District's explanation of the interaction of paragraphs A-1 and A-3 is also plausible. "Full-time assignment" as used in A-1 can be viewed as defining merely the normative full-time load that is used for comparative purposes. For example, the parties agreed to retain 15 hours per semester as the benchmark to which laboratory hours are equated. Additionally, the evidence revealed that the District continued to use the 30-hour figure (equated to 1.0) as the benchmark against which individual loads are compared. Though A-1 defines the normal load as 30, A-3 provides that only loads over 31 trigger overload pay, and only loads under 29 trigger two-year averaging.

Viewing paragraphs A-1 and A-3 as serving different but consistent purposes serves the principle that contract provisions should be read together and harmonized if possible to give meaning to each provision. This principle is codified in California Civil Code section 1641, which states:

The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

While the District's interpretation is easily harmonized with the plain language of Article XI, the operative provisions arguably contain some ambiguities. Therefore, it is proper to consider extrinsic evidence in interpreting those provisions. Nevertheless, while extrinsic evidence is properly considered when the contract language is ambiguous, it may be received only to establish a meaning to which the language of the contract is reasonably susceptible. Murphy Estate (1978) 82 Cal.App.3d 304 [147 Cal.Rptr. 258]; Murphy Slough Assn, v. Avila (1972) 27 Cal.App.3d 649 [104 Cal.Rptr. 136].

There are two possible ambiguities in the provisions at issue: (1) Paragraph A-1 can be read to define a "full-time assignment" as 15 semester hours (30 annual hours), while paragraph A-3 states a "full-time assignment" is 29-31 equated hours; and (2) it is not certain whether the words "in this section" in the third sentence of A-3 refer to A-3 only or to the entire subdivision A of Article XI. Both ambiguities touch

upon the ultimate issue in this case, the threshold for overload pay.¹¹

The Association contends that paragraphs A-1 and A-3 are inconsistent, but that A-1 should control because it is the more specific provision. The reference to "section" in the third sentence of A-3 is said to relate to all of "section" A, not "paragraph" A-3. Therefore, the overload threshold would be controlled by A-1 because it is more specific. The Association asserts that the District's distinction between normal load and overload is a dubious one.

The Association does attempt to offer an interpretation that harmonizes the two paragraphs. This interpretation views the 29-31 and 58-62 ranges in paragraph A-3 as relating solely to two-year averaging, without impact on the overload threshold. Where an annual teaching load is less than 29, the following year the District may assign, without additional compensation, up to 31 hours. Overload pay must be paid annually for any assignment in excess of 30 hours unless, in the preceding year, the unit member had been assigned less than 29 hours. In that case, overload pay would be due if the second-year assignment exceeded 31. In essence, the Association asserts that paragraph A-3 provides simply that, when a load falls below 29, the

¹¹The Association urges that, pursuant to California civil Code section 1654, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist (i.e., the District). However, as the Association acknowledges, this principle is applied only where other rules of construction fail to resolve the uncertainty.

District may assign up to 31 hours the following year without incurring liability for overload pay.

There are numerous problems with the Association's interpretation. Foremost among them is that the 58-62 range in the second sentence of A-3 cannot be reconciled with this interpretation, under the Association's interpretation, the District could assign only two-year totals approaching 60 without triggering overload pay.¹² The Association's contention that the 58-62 range represents an average of 60 or merely an expression of twice the 29-31 range is unconvincing. Further, it would take a strained construction at best to find from the language of A-3 that, in the year following an underload, only 31 hours may be assigned without triggering overload pay.¹³

¹²Two-Years averaging is triggered by a load less than 29, and the second-year assignment cannot exceed 31. Therefore, 28.99 plus 31, or 59.99, would be the maximum possible two-year total not requiring overload pay. Further, if the first-year assignment is less than 27, then the two-year total would not even fall within the 58-62 range.

¹³It is instructive to note that the Association, in its response to the District's exceptions, cites approvingly the following passage from the proposed Decision:

The District, in seeking flexibility, was trying to prevent an instructor who, for example, had worked only 27 lecture hours in one academic year from collecting overload pay for working 33 lecture hours in the next academic year.

The above finding by the ALJ is inconsistent with the Association's interpretation of paragraph A-3, as described above, for the Association claims that only a maximum of 31 hours can be assigned the second year without triggering overload pay. The ALJ's finding is, however, consistent with the District's interpretation of A-3.

We also note that the Association's interpretation is inferior to the District's in serving the mutually agreed upon purpose of the provision, which was to make load distribution more equitable by allowing two-year averaging where there had been a previous underload. For example, those assigned a normal full-time load of 30 hours each year would continue to receive less pay than many others whose two-year total of 60 would entitle them to overload pay. By limiting the second-year adjustment to a maximum of 31, only those whose first-year load was very close to the underload trigger of 29 would end up working approximately the same 60 hours without overload pay. The following chart illustrates this point:

		Overload Pay (Yes or NO)			
		Pre-agreement		Post-agreement Policy	
First Year -	Second Year	Total	Policy	Association Interpretation	District interpretation
30	- 30	60	NO	No	No
29	- 31	60	Yes	Yes	No
28.99	- 31	59.99	Yes	No	No
28.50	- 31	59.50	Yes	No	No
28	- 31	59	Yes	NO	No
28	- 32	60	Yes	Yes*	No
27	- 31	58	Yes	NO	NO
27	- 33	60	Yes	Yes*	No
26	- 34	60	Yes	Yes*	No
25	- 35	60	Yes	Yes*	NO
24	- 36**	60	Yes	Yes*	NO

*Where overload pay is due, it would be for one-hour less than under the pre-agreement policy.

**Thirty-six (36) is the maximum permissible one-year assignment, for the parties' Agreement does not allow semester assignments in excess of 18 without the instructor's consent in writing.

California Code of civil Procedure section 1859 provides, in essence, that specific provisions control over general provisions. The Association's assertion that "15" is more specific than "29-31" is attractively simple but misleading. If the 29-31-hour range in paragraph A-3 is viewed in context (i.e., two-year averaging), it is reasonable to conclude that it is more specific than the reference to "15" in paragraph A-1. The definition of "full-time faculty assignment" in paragraph A-1 is part of a broad provision of general application which describes the normative duties of the faculty. The definition of "full-time teaching assignment" in paragraph A-3 is part of a very specific provision dealing with a particular application of that definition.

The Association is correct in its assertion that the reference to "this section" in the last sentence of paragraph A-3 does not necessarily relate only to that paragraph, rather than to the whole of subdivision A. However, it does not necessarily refer solely to paragraph A-1 either, while the first two sentences of paragraph A-1 do express an equation, so does the first sentence of paragraph A-3. We note that the overload threshold applies to yearly teaching assignments. While paragraph A-3 speaks in terms of yearly figures, the critical portion of paragraph A-1 refers to semester totals. This observation, along with the placement of the overload provision in paragraph A-3 and the integral relationship between overload and two-year averaging, lead us to the conclusion that the

critical third sentence of paragraph A-3 refers to the first sentence of that paragraph and not to paragraph A-1.¹⁴**14**

Irrespective of the possible interpretations of paragraph A-3, the Association insists that it was added only to allow for two-year averaging, and that there was no discussion of increasing the overload threshold. However, the Association failed to provide convincing evidence that the parties intended that paragraph A-3 have no affect on the overload threshold. Janet Bird's testimony was weak and confused, In fact, she could not recall seeing the language of A-3 in writing until after the agreement was executed. Bird did recall Richard Powell expressing concern about overload and being told by the District not to worry. However, when viewed in the context of the evidence as a whole, this is clearly insufficient to carry the Association's burden of proof.

14¹⁴The District's bargaining notes are consistent with this conclusion. The notes for May 14, 1981, in reference to A-3, state:

CTA accepted this item with the addition of a statement of assurance that any time beyond the 29-31 equated hours of instruction will be considered overload.

The notes for May 28, 1981 state:

A-1) included definition of overload. Terry asked when the 2-year equation begins. chuck said when the contract is signed and ratified.

While this entry is labeled "A-1," the reference to two-year averaging reflects that this is most likely due to a typographical error. Paragraph A-1 contains no reference to two-year averaging.

While we draw no adverse inference from Powell's failure to testify, the fact is he did not, so the Association must rely solely upon Bird's testimony. The District's witnesses, who were found to be credible by the ALJ, both denied making any assurances that the overload threshold would remain at 30, and instead insisted that the overload increase was discussed. We believe the ALJ put too much emphasis on the failure to discuss the actual impact upon unit members' pay and on the inability of Hvilsted and Peterson to recall specifically what they told the Association at the bargaining table. What they did consistently maintain was that the issue was discussed and that the Association apparently understood the ramifications of paragraph A-3.

In sum, the Association's proffered interpretation is less plausible than that offered by the District. There is no internal consistency giving meaning to all provisions of the two paragraphs. Though there is arguably some inconsistency between paragraphs A-1 and A-3, the Association's suggested resolution requires a construction of A-3 which is much more strained than the construction of A-1 suggested by the District to resolve the inconsistency. While neither party's testimony on the content of negotiations is entirely convincing, it is the Association which bears the burden of proof. The evidence was insufficient to carry that burden.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, Case No. LA-CE-1925 is hereby DISMISSED.

Members Burt and Craib joined in this Decision.