STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAK GROVE EDUCATORS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-622
v.	)	PERB Decision No. 582
OAK GROVE SCHOOL DISTRICT,	)	June 30, 1986
Respondent.	)	

Appearances: Priscilla Winslow, Attorney for Oak Grove Educators Association, CTA/NEA; Walters and Shelburne by Diana D. Halpenny for Oak Grove School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

BURT, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondent, Oak Grove School District (District) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a), (b), (c) and (d) of the Educational Employment Relations Act (EERA)[1] by its conduct in establishing a "Teachers Forum"

[1]EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise indicated.

Section 3543.5 (a), (b), (c) and (d) provides:

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

(Teachers Forum or Forum) and by unilaterally changing teacher worktime by increasing the minimum and maximum number of minutes of student instructional time.

Specifically, the District excepts to the ALJ's conclusion that the Forum was an employee organization that had as a primary purpose the representation of employees in their employment relations with the District. It also denies that it in any way interfered with the exercise of employee rights, or that it bypassed the exclusive representative, Oak Grove Educators Association, CTA/NEA (OGEA or Association).

With regard to the change in teacher worktime, the District does not except to the ALJ's conclusion that it unilaterally changed a matter within scope. Instead, it argues that the change was consistent with past practice. Claiming

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

that the changes were not made in response to the change in the District's Administrative Regulation 6310 (AR or AR 6310) and were therefore within the scope of past practice of changes, the District challenges that ALJ's factual conclusions with regard to each individual school. It also excepts to the remedy, arguing in general that a back-pay award is punitive, and reasserting its argument that, in this instance, a back-pay award is not warranted since the matter has since been negotiated.

In accordance with the discussion below, we affirm the ALJ's finding that the District's conduct in establishing the Forum violated section 3543.5(a), (b), (c) and (d) and his finding that the change in teacher worktime was an unlawful unilateral change in violation of 3543.5(a), (b) and (c). As no exceptions were taken to the ALJ's dismissal of charges based on the employee luncheon, we affirm that determination as well.

FACTUAL SUMMARY[2]

When Dr. Robert Lindstrom was hired as superintendent at Oak Grove School District in 1979, one of his primary

[2]The facts regarding the Teachers Forum are not in dispute and are summarized below. The facts regarding the adoption of the new District policy on student instructional time are similarly undisputed, although the parties do not agree about the effect of the adoption of the policy at particular schools.

responsibilities was to improve communications with teachers. In order to do so, Lindstrom first granted one extra leave day a month to the leaders of the various unions in the District, with the condition that at least part of each of these days would be spent discussing District problems with the superintendent. Lindstrom also visited the schools in the District to meet with teachers. During these meetings, it was suggested that the superintendent revive a practice of a previous superintendent called the "superintendent's roundtable." Lindstrom hoped that the roundtable would provide an opportunity for teachers to deal face-to-face with the superintendent. He testified that he never intended that the roundtable take the place of negotiations with the Association.

One of the teachers who suggested the resurrection of the roundtable was Claudelle Bonaccinie, an Association member. Lindstrom testified that he expressed concern to Bonaccinie both as to the amount of time the roundtable would require and whether the Association might be concerned that the roundtable was an attempt to infringe on the Association's authority. Although Bonaccinie did not recall precisely this statement, she did remember Lindstrom wondering what the Association would think. She said she told him she could not speak for the Association, but that she personally thought the roundtable was a good idea.

Lindstrom issued a bulletin on August 27, 1981, outlining his plans for increasing communication, including the reinstitution of the roundtable. The memo read in part:

> I am also establishing a certificated staff roundtable which will consist of a member from each of the schools. This group will meet monthly, and it will be an opportunity to discuss issues and provide some creative solutions to problems facing education. I hope that through this forum we will be able to discuss creative approaches.
>
> Perhaps even the air-conditioning systems can be made well; who knows?

The group became known as the Teachers Forum, composed of one staff representative from each school. Selection of the school representative was left up to each principal; some asked for volunteers, some allowed teachers to select a representative, and some selected their school's representative themselves. OGEA was not invited to send a representative; Lindstrom testified that he wanted to keep the group as "non-political" as possible and wanted to avoid having a "watchdog" in the group. OGEA members were not precluded from attending, however, and several of the Forum's representatives were also OGEA members.

Meetings were held once a month. Representatives with questions or issues to raise would telephone the superintendent's secretary in advance, and she would include those items on the agenda. The superintendent did not choose agenda items except in response to questions raised. Various

representatives would raise the issues of interest to them; there would be general discussion, and some questions and answers. The superintendent's secretary took minutes, and the representatives reported back to their respective schools at the regular mandatory faculty meetings.

On one District committee, the budget study committee, a Forum representative was appointed to participate along with the OGEA representative.

At the hearing, OGEA introduced minutes of the meetings and meeting agendas to show that some of the topics discussed at forum meetings were within the scope of negotiations and/or were actually subjects of negotiations at the time. For example, as well as items of educational concern, the following subjects were discussed: overloaded classrooms and class size, teachers' working five hours without a break or preparation period, differences in lunch prices among schools, shared contracts, whether Martin Luther King Day was a holiday, a staff incentive award program and the status of laid-off teachers now working as substitutes.

The District introduced testimony to show that no actual negotiations took place over the matters which were within the scope of representation; the conversation was repeatedly described as informational. The superintendent often concluded such discussions by remarking that the issue was the subject of

ongoing negotiations and was inappropriate for further discussion.

Both Lindstrom and the subsequent superintendent, Anthony Russo, testified that they did not want the Forum to disrupt the District's relationship with OGEA and went out of their way to avoid discussing negotiable items. No proposals or counterproposals were made, and the ALJ concluded that there was no credible evidence that any complaints were resolved as a result of Forum discussions.

Nevertheless, it is clear from the record that various teachers came to view the Teachers Forum as a more successful route to solving problems than the Association. One OGEA representative testified:

> On going back to our building and discussing this with our building superintendent, it was the feeling that there would be quicker service if the teacher Forum representative were to deal with this problem because he had direct communication with the superintendent and he met with the superintendent every two weeks. Whereas, if the concerns were expressed through the teachers' Association, it would have to go through channels and it would be a long time before anything happened. So, using that as an example, it appeared that the teachers' Forum would provide better, faster services for the health and safety of teachers than would expressing those same concerns through Association channels.

An OGEA building representative at Herman Junior High School, who was also a Forum member, suggested at an OGEA meeting that it would be better to handle the suggested

elimination of a prep period through the Forum rather than OGEA. Thomas Richardson, the OGEA representative at Dickinson School, testified that teachers at his school felt that the Forum was a more effective way to get things done and that attendance at OGEA meetings fell off by about one-half during the term of the Forum meetings. Richardson voiced opposition to faculty participation in the Forum and he believed this position contributed to the fact that he was voted out as building representative.

Instructional Time Changes

There are several types of instructional schedules in the District. Most schools have a five-day week, including four regular days and one minimum, or staff development, day. Many schools also use staggered schedules, where half of the students begin school earlier than the rest, and the other half stay later. Some schools use "team teaching," where students are taught different subjects by different teachers. Others have "functional" schedules where students remain with one teacher all day.

The range of time identified as student instructional time for the previous 10 years was established by AR 6310. That AR, in effect from 1974 to the beginning of the 1981-82 school year, provided the following:

Class Hours

A. The following time parameters should be adhered to unless prior approval for deviation is obtained from the Assistant Superintendent for Educational Services.

Grades	Minimum Day	Maximum Day	Minimum Week	Maximum Week
K	180	180	900	900
1,2,3	240	260	1,200	1,300
4,5,6	285	305	1,425	1,525

B. Schools operating on a single schedule may utilize a minimum day of 230 minutes in grades 1, 2 and 3, and 240 minutes in grades 4, 5, 6, 7 and 8 if desired, for staff development and parent conference periods.

C. Schools operating on split-day schedules shall not utilize minimum days of less time than stated in item A.

D. The principal of each school shall submit a copy of the planned daily/weekly schedules of the school to the Assistant Superintendent for Educational Services no later than three weeks prior to the opening of school each year.

Before the beginning of school in 1981, the District revised AR 6310 to increase the minimum and maximum minutes for student instructional time. The District provided no notice to OGEA prior to the adoption or implementation of the new AR, and the Association did not become aware of the change until school began.

Revised AR 6310 provides the following:

Class Hours

A. The following time standards shall be observed unless prior approval for deviation is obtained from the Assistant Superintendent for Educational Services.

NON-STAGGERED READING SCHEDULE

Grades	Min. Day		Max. Day	Min. Week		Max. Week
K	180	-	240	900	-	1200
1,2,3	265	-	290	1325	-	1450
4,5,6	300	-	320	1500	-	1600
7,8	300	-	325	1500	-	1625

STAGGERED READING SCHEDULE

Grades	Min. Day		Max. Day	Min. Week		Max. Week
K	180	-	240	900	-	1200
1,2,3	250	-	275	1250	-	1375
4,5,6	285	-	305	1425	-	1525
7,8	300	-	325	1500	-	1625

B. The principal of each school shall submit a copy of the planned daily/weekly time schedules of the school to the Assistant Superintendent for Educational Services no later than June 1 of each school year.

Although student instructional time does not correlate precisely to teacher instructional time, the two are closely related and the record indicates that increases in student instructional time generally produces increases in teacher instructional time.

The change in AR 3610 was first discovered by Wanda McKoin, an OGEA officer who teaches at Del Roble School. McKoin received a new schedule reflecting the increase in teacher instructional time at an orientation meeting at the beginning of the school year. She protested the change as violating

AR 6310 and filed a grievance.[3] The principal told McKoin that AR 6310 had been changed and showed her a copy of the new regulation. In late September, the OGEA president officially received a copy of the revised AR.

On October 8, 1981, the Association filed a second grievance demanding a return to the 1980-81 teacher instructional time and protesting the District's failure to discuss the change with the Association. The District responded that any change in the instructional day was within the District's managerial prerogative as long as it did not violate board policy, specific contract language, or state law. It denied the grievance.

The record reveals that, in general, the increase in teacher instructional time was taken from preparation time. Thus, the revision of AR 6310 increased the instructional time for which the teachers were required to prepare while reducing the time in which to do it. The record shows that the increased instructional time required teachers to perform more work during their breaks, preparation periods and time at home.

The District presented evidence that unilateral changes in the instructional schedules had been made in previous years, usually to accommodate problems with bus schedules.

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[3]The agreement between the parties does not provide for binding arbitration.

James Hastings, Assistant Superintendent for Administration Services, testified that, in any given year, approximately six of twelve schools where transportation was provided had their schedules changed for this reason, with one to three schools actually experiencing changes in instructional time. Hastings estimated the changes averaged about 10 minutes, with 15 minutes being the maximum change in instructional time.

Changes in schedules and in student contact time occurred on a school-by-school basis for other reasons as well. Some changes were made to accommodate staggered reading schedules or staff development days. Others were made simply because a new principal wished to alter the schedule. Although sometimes done unilaterally, these changes were frequently made after discussions with the teaching staff or OGEA representative. In general, however, in the past they were done on a school-by-school basis by the principal and, in the end, were within the parameters of the previous AR 6310. OGEA never objected.

While the individual school principals had leeway making minor alterations in schedules, they were required to remain within the guidelines of AR 6310 unless they received approval to deviate from the AR from the superintendent for educational services. None of the previous changes in instructional time resulted from District-wide changes.

Schedule changes occurred at 14 schools in the fall of 1981. The specifics of the changes at some of these schools will be discussed below in light of the District's exceptions.

DISCUSSION

Teachers Forum

Section 3543.5(d) of EERA provides that it shall be unlawful for a public school employer to:

> (d) dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Initially, the District argues that it was not in violation of section 3543.5(d) by its formation of the Teachers Forum since the Forum is not an "employee organization."

In section 3540.1(d), EERA provides the following definition:

> (d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

Here, there is no question that the Teachers Forum includes employees of the employer. The central question is whether it has as one of its primary purposes[4] representing employees in their relationship with the employer.

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[4]It need not be the primary purpose, only one of the primary purposes.

In seeking to define "employee organization," the Board has previously determined that an organization need not have formal structure, seek exclusivity, or be concerned with all aspects of the employment relationship in order to constitute a statutory labor organization. The Board adopted the National Labor Relations Board's (NLRB) approach in inquiring whether the group has as a central focus the representation of employees on employment related matters. State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S.

The language in the comparable section 2(5) of the National Labor Relations Act (NLRA) is somewhat different, defining an employee organization as,

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employee participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The NLRB has interpreted the "dealing with" language very broadly, to find a variety of employee committees to be labor organizations. For example, in Cabot Carbon Co., (1957) 117 NLRB 1633 [40 LRRM 1058], enforced by the Supreme Court in NLRB v. Cabot Carbon Co. (1959) 360 U.S. 203 [44 LRRM 2204], the board found an employee committee system, where employees met with management to discuss mutual problems, was a labor

organization within the meaning of section 2(5) since it dealt with grievances and working conditions. In upholding the board's order, the court rejected two of the arguments made here by the employer. The court found that "dealing with" was not synonymous with bargaining and that employee committees could be found to be statutory labor organizations regardless of whether they actually negotiated with the employer.

The court also rejected the employer's argument and found that NLRA section 9(a), which permits any individual employee to present grievances to the employer, and which is analogous to section 3543 of EERA, does not permit an employer to set up an organization to deal with the employer on matters appropriate to collective bargaining.[5] Although the NLRB has

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[5]See also Thompson Ramo Woolridge (1961) 132 NLRB 993 [48 LRRM 1470] (in determining whether an organization is a statutory labor organization, the sole question is whether one of its purposes is to deal with employers concerning grievances, wages, hours or conditions of work, etc., and the expressing of views is sufficient to constitute "dealing with"); NLRB v. Ampex Corp. (7th Cir. 1971) 442 F.2d 82, [77 LRRM 2072], enforcing 168 NLRB 742 (1968) [67 LRRM 1134] (a communications committee was an employee organization; the statutory definition of labor organization is very broad); M-W Education Corp. (1976) 223 NLRB 495 [92 LRRM 1274] (an Employee Council, where employee representatives met with management to discuss grievances and conditions of employment is a labor organization); Alta Bates Hospital (1976) 226 NLRB 485 [93 LRRM 1288] (an advisory committee to facilitate discussion of employee complaints to promote better relations and new ideas is a labor organization; that it has no authority to negotiate is immaterial, as is the fact that the employer had no intent to violate the law—motive is irrelevant). With regard to educational institutions, see Stephens Institute (1979) 241 NLRB 454 [100 LRRM 1603] (a faculty senate found to be an unlawfully dominated labor organization).

somewhat narrowed its interpretation of "dealing with,"[6] it continues to define "labor organization" broadly.

In the past, PERB has given similarly broad construction to the representation rights of employee organizations. In State of California (Department of Developmental Services), supra, at p.6, where we found that an employee-tenant group constituted an "employee organization," PERB stated:

> We need not decide. . . whether the housing concerns herein are within scope under SEERA [footnote omitted]. Rather, we need only determine that they were within the much broader ambit of "employer-employee" relations. [Emphasis added.]

The Board has found employers guilty of domination and interference charges in Antelope Valley Community College District (1979) PERB Decision No. 97, where the district sponsored the establishment of an alternative organization during a California School Employees Association organizing drive and in Sacramento City Unified School District (1982) PERB Decision No. 214, where the district met and negotiated with an employee council in the face of a pending question concerning representation. In Clovis Unified School District (1984) PERB Decision No. 389, it was found that the district

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[6]See Sparks Nugget, Inc. (1977) 230 NLRB 275 [95 LRRM 1298] (grievance review panel not an employee organization); Mercy-Memorial Hospital Corp. (1977) 231 NLRB 1108 [96 LRRM 1239] (an employer-employee grievance committee found not to be "dealing with" the employer).

violated section 3543.5(a), (b) and (d) by favoring the faculty senate over the association during the period immediately preceding an election. The senate met with the administration concerning salaries, the calendar, health benefits, the grievance policy, curriculum and textbooks. None of the parties ever contended that the senate was not a labor organization.

Here the record shows that the Forum was established and used to improve communications and solve problems. It functioned as a representative body, with one teacher representing each school and raising at the meetings problems suggested by teachers from that school. Many of those problems touched on matters of employment relations and working conditions—the air conditioner, prep periods, etc. Thus, although no actual negotiations took place, negotiable items were indeed discussed.

The record also shows that, although various teachers suggested topics to be discussed at the Forum meetings, the agenda was finalized at the superintendent's office. Although the record indicates the superintendent would end discussions of certain topics by saying they concerned negotiable items and were therefore not appropriate for discussion at the Forum, he apparently did not take steps to prevent such items from being raised and addressed in the first place. Moreover, it is clear that, whatever the original intent, the Forum came to be

perceived by employees as a better way to solve problems involving working conditions than through OGEA.

- Under the circumstances here, we find the Teachers Forum to be an employee organization within the meaning of 3543.5(d). Having so found, there is no question that the organization was dominated by the District in violation of section 3543.5(d). It was established by the superintendent, who directed the principal of each school to provide a representative, appointing one if necessary. Meetings were scheduled during working hours for which employees were paid, and a report was made of these meetings at mandatory faculty meetings of the individual schools. None of these privileges was accorded to the Association. At some schools, the Forum meetings were noticed in the principal's letter, while Association meetings were not.

This is not to say that all faculty councils or groups are per se unlawful, or that individual employees cannot speak to their employers about working conditions, including those within the scope of representation. But when the District sets up an organized group of teachers to meet at regular intervals on school time to discuss topics of mutual interest, it permits discussion of negotiable subjects at its own risk.

We also hold that the District violated section 3543.5(a) by the same conduct. As noted in Sacramento City, supra, PERB will find a violation of section 3543.5(a) where an employer's

actions tend to or actually do harm to employee rights, and the employer is unable to justify those acts by operational necessity. Here, there was evidence that the establishment of the Teacher Forum in fact undermined the Association in the eyes of its members who believed that the Forum would provide quicker action. It is exactly that harm that section 3543.5(a), (b) and (d) are intended to prevent by making it unlawful for employers to establish organizations which they control to compete with the exclusive representative.

The record shows no operational necessity that justified the District's action. While it may well have wished to improve communications, it might have done so in a variety of ways not proscribed by the law, including improving communications with OGEA.

The Association also claims that the District failed or refused to negotiate with the Association in violation of section 3543.5(c) by bypassing the exclusive representative in its dealings with the Forum. Such a charge usually involves the communications of the employer with the employees about negotiations. See Muroc Unified School District (1978) PERB Decision No. 80; Modesto City Schools (1983) PERB Decision No. 291.

In determining the propriety of an employer's effort to communicate directly with employees, the effect upon the authority of the exclusive representative is critical. Muroc Unified School District (1978) PERB Decision No. 80; Goodyear

Aerospace Co. (6th Cir. 1974) 497 F2d 747 [86 LRRM 2763] enforcing, in part, (1973) 203 NLRB 831 [83 LRRM 1461]. Here it is clear that the operation of the Forum, including the discussion of negotiable items, did indeed undermine the exclusive representative. Thus, we hold that the District also violated section 3543.5(c).

Changes in Instructional Time

The District does not argue that the increases in teacher work time resulting from its unilateral decision to increase student instructional time are nonnegotiable. Instead, it advances three main defenses to finding that unilateral action unlawful: first, that there was a past practice of changes in instructional time; second, that there were actually no changes in teacher instructional time at the various schools as a direct result of the change in the regulation; and third, that the parties subsequently signed an agreement that settled the question of instructional time.

Past Practice

It is settled law that if the District is simply proceeding according to past practice, there is no unlawful unilateral change. Pajaro Valley Unified School District (1978) PERB Decision No. 51. The record supports the District's argument that every year there have been changes in instructional schedules at certain individual schools that were instituted in response to problems in bus scheduling or other scheduling

problems. Although principals had some flexibility in developing individual school schedules, they were expected to keep their schedules within the AR 6310 guidelines unless prior approval to deviate therefrom was obtained. The District had never previously unilaterally changed its District-wide policy on student instructional time, affecting all the schools in the District. Thus, the change in the policy establishing the permissible range for all students' instructional time was not in line with past practice in the District and its effects on teacher instructional time were negotiable. Therefore, this defense fails.

Changes in Teacher Instructional Time at Individual Schools

The factual questions surrounding the changes in teacher instructional time at the individual schools are complex. The ALJ found no changes in teacher instructional time at Dickinson, Glider, Hayes, Sakamoto, or Santa Teresa. He also found that the changes in teacher instructional time at Anderson, Edenvale, Oakridge, Parkview and Taylor were unrelated to the new AR. Since no exceptions were taken to these findings, they are affirmed without discussion.

The ALJ found that some changes in teacher instructional time at Baldwin, Christopher, San Anselmo and Samuel Stipe were related to the change in AR 6310. He found that all changes at Blossom Valley, Calero, Del Roble, Earl Frost and Miner were related to the new AR. The District excepts to the findings

regarding Baldwin, Christopher, San Anselmo, Stipe, Del Roble and Miner and each will be discussed below. As no exceptions were taken to the ALJ's findings as to Blossom Valley, Calero and Earl Frost schools, they are affirmed.

Baldwin School

At Baldwin, the teacher instructional time was increased for grades 1-3 on both regular and minimum days. It was increased for grades 4-6 on minimum days only. Principal Burgei testified that he was aware of AR 6310 and its revision in 1981-82. He denied that the change in the teacher instructional schedule was in any way a result of the new AR; he said the decision was based on the bus schedule. Contrary testimony was received from Ellen Jackson, a teacher and OGEA member. Jackson said she and another OGEA member asked Burgei about the change at the time. She testified that Burgei indicated to her that the increase was due to both the new AR minimums and bus schedule changes.

The ALJ concluded that the changes in teacher instructional time in grades 4-6 at Baldwin were in response to the revised AR, but that the changes in grades 1-3 were not, since the third grade minimum day already met the revised standards.

We agree with the District that it is illogical to view the increase in the minimum day of grades 4-6 as a response to the revised AR when, even after the five-minute increase, the minimum day was still 10 minutes below that required by the new

AR. Thus, we reverse the ALJ and find that none of the changes in teacher instructional time at Baldwin were related to the new change in student instructional time.

Christopher School

The change made at this school involved eliminating the staggered schedule on the minimum day, and eliminating a recess. Thus, while the student instructional time increased on that day, the teacher instructional time actually decreased. The school still remained under the specified minimum for the day, but not for the week, and Principal Alfred Villa requested and received a waiver of the daily minimum in light of the weekly totals and the difficulty of further rearranging bus schedules.

Villa's testimony about the changes is confusing and contradictory, but he initially testified that the change in instructional time for the intermediate grades was in response to AR 6310, and that the change in the primary grades was to conform to the change in intermediate grades so that the students could be bused at the same time.

The District argues that all of the changes were in response to changes in bus schedules. The ALJ found that the changes in grades 4-6 were in response to the new AR, but the changes in grades 1-3 were not. In so finding, the ALJ apparently relies erroneously on some of Villa's testimony that appears to refer to changes made in 1982-83 over 1981-82, instead of 1981-82 over 1980-81.

After review of the record, we find that all changes at Christopher School were in response to the new AR, as the principal so clearly testified. Although the increase in student instructional time was accomplished in such a way that the teacher instructional day decreased, the increase was still an unlawful unilateral change. Gulf State Mfg. v. NLRB (5th Cir. 1978) 579 F.2d 1298 [97 LRRM 2547]; see also Palo Verde Unified School District (1983) PERB Decision No. 321. However, no back pay is available to these teachers whose hours were decreased.

San Anselmo School

At San Anselmo, all grades were divided into either team or functional schedules. In team grades 1 and 2, the minimum schedule increased 20[7] minutes in 1981-82. There was no increase in the regular day schedule, so the weekly increase was 20 minutes. In team grade 3, the regular day schedule decreased 25 minutes, and the minimum day schedule decreased 20 minutes. Therefore, the weekly decrease was 120 minutes. In team grade 4, the minimum day schedule was decreased 20 minutes.

Principal Marlene Smeed at San Anselmo School testified that she was unaware of AR 6310 or of any change in that policy in 1981-82. She said she attended a meeting in the spring of 1981 where student instructional time was discussed. She understood from that meeting that she would probably have to

[7]Joint Exhibit 21 reflects a change of 25 minutes, but the Charging Party's post-hearing brief acknowledges that 20 minutes is the correct number, and that is the figure used by the ALJ.

increase instructional time for grades 1 and 2, since the school was five minutes below the District-required minimum. She met with her staff to discuss the problem and decided to adopt a new schedule for these grades and to conform the rest of the school schedule to the change. Principal Smeed, however, left at the end of June 1981 and was unable to provide much information about the 1981-82 schedule that was finally adopted. The principal who took over in the fall of 1981 testified that the new schedule had been adopted before she came. She thought the new schedule was intended to bring the functional and team strands into closer alliance.

The ALJ found that the change in team grades 1-2 were a result of potential changes in AR 6310, and that the revisions in team grades 3-4 were to conform to those changes. He found that none of the changes in the functional schedules were related to AR 6310.

We find that the change in team grade 3 was related to the loss of a teacher and that there was no evidence regarding the changes in grades 4-6. Thus, the Association has not carried its burden of proof related to these changes. However, it is clear the the principal instigated a 20-minute increase in the minimum day in grades 1-2 as a result of some District directive, and we find this change to be related to the provisions of the revised AR.

Stipe School

The evidence as to the changes in instructional time at Stipe is ambiguous at best. Principal Marie Troiano testified

as to changes made between the 1980-81 and 1981-82 school years, but her recollection conflicted with the information contained in Joint Exhibit 21 and may have been affected by the fact that she became principal only in the fall of 1981. Charging Party's post-hearing brief also indicated that Joint Exhibit 21 understated the figures for the minimum day for grade 2 by 10 minutes and, thus, the figures for the increase by the amount.[8]

We need not rely on the disputed figures for our finding, however, as we find that there was insufficient evidence presented to link any of the changes in teacher instructional time to the revised AR.

Del Roble School

The regular day instructional minutes at Del Roble School increased from 250 to 275 for grades 1-3. The minimum day increased from 250 to 255 minutes. Thus, the total weekly increase was 105 minutes. In grades 4-6, the regular day increased 10 minutes and the minimum day decreased 10 minutes, resulting in a total weekly increase of 30 minutes. Charles Cook, the principal at Del Roble, testified that there was an increase in instructional time at Del Roble in 1981-82 that

[8]Joint Exhibit 21 was the parties' compilation of schedule changes throughout the District. Although the parties originally stipulated to its accuracy, it became apparent during the hearing that not all the figures are valid and occasionally corrected figures were agreed to.

totaled 30 minutes for the week. Cook testified that when he first came to Del Roble in 1979-80, he found that the school had the least instructional minutes in the District and he was determined to change that. He testified that he met with the staff who opposed any changes in his first year, so none were made for 1980-81. However, in 1981-82 he increased the minutes. He testified:

> And I really didn't have any goal in mind other than to just put us in keeping with the majority of the other schools in the District in terms of time.

Cook also testified that he knew of the change in AR 6310. He stated that when the proposed AR was first discussed, he felt in would ultimately be the District policy, but that it wouldn't affect his school because the new schedule he wanted to implement already conformed to its requirements. The revised schedule contemplated by Cook in 1980-81 and implemented in 1981-82 exceeded the maximums of the old AR 6310, but was consistent with the revised AR. Cook testified that although he did not specifically recall it, he "must have" looked at both AR's when he set up his new schedule.

Wanda McKoin, a teacher at Del Roble, testified that a grievance had been filed based on the increase in instructional time at Del Roble. She said that when she asked about the increase, Cook said the District had instructed him to make it. When she then said the increase was not permitted by the current AR, he showed her the revised AR. Although Cook

testified that he would have made the changes even if the new AR had not been issued, it is clear that he could not have done so, since the increases would have violated the old AR. That Cook made the changes relying on the fact that they were now permitted by the new AR is supported by McKoin's testimony.

For these reasons, we find that the increases in teacher instructional time at Del Roble were related to the new AR.

Miner School

Robert Keenan testified that the increase in the instructional day for the primary grades in 1981-82 over 1980-81 was due to the change in the District-wide minimums, and that the change in grades 4-6 was so that:

> . . . all the grades would get out at the same time, children would be able to go home with their older brothers and sisters and that sort of thing.

While not directly related, we view the changes in instructional time for grades 4-6, like those in grades 1-3, as being attributable to the revised policy.

REMEDY

Pursuant to EERA section 3541.5(c)[9], PERB has broad authority to shape remedies for unfair practices. As we have

[9]EERA section 3541.5(c):

> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair

found that the District violated EERA section 3543.5(a), (b), (c) and (d) by its establishment of the Teachers Forum, it is appropriate to order the District to cease dominating the Teachers Forum, to cease interfering in OGEA's exercise of its statutory right to represent certificated employees by allowing discussion of subjects related to employer-employee relations at the Teachers Forum, and to cease undermining and bypassing the exclusive representative by its dealings with the Forum.

We have also found that the District's action in revising its student instructional time policy without negotiating the effects of that change on the teachers' workday violates section 3543.5 (c) and, concurrently, 3543.5(a) and (b). Therefore, it is appropriate to order the District to cease and desist taking action affecting matters within the scope of representation without first giving the exclusive representative an opportunity to bargain over the effects of such action. Further, we order the District to negotiate over the impact of its decision to revise AR 6310.

Ordinarily, the remedy for an unlawful unilateral change is designed to restore the status quo ante to the extent possible. Santa Clara Unified School District (1979) PERB

> practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Decision No. 104. However, although the impact on the teachers' workday was negotiable, the decision to change the student instructional time policy was itself within the District's managerial prerogative. Moreno Valley Unified School District (1982) PERB Decision No. 206, aff'd (1983) 142 Cal.App.3d 191. Thus, it would be inappropriate to order rescission of the revised AR 6310. Moreover, to roll back teacher schedules to those in effect during the 1980-81 school year would disrupt the educational process. As the degree of unlawful impact varied with school and grade, any attempt to do so would necessarily be piecemeal and would not effectively restore the situation to what would have existed had the District not changed the student instructional time policy. Solano County Community College District (1982) PERB Decision No. 219; Los Angeles Community College District (1982) PERB Decision No. 252. Thus, a literal return to the status quo ante shall not be ordered.

However, it is appropriate to order the employees compensated for any additional time worked as a result of the District's unlawful action. When employees' worktime is increased without a proportionate increase in pay, the employees are being paid less per unit of time worked than bargained for. See, for example, Delano Union Elementary School (1982) PERB Decision No. 213a; Corning Union High School

District (1984) PERB Decision No. 399. Thus, this remedy is not punitive, but compensatory.[10]

The District claims that because it had a duty to negotiate only the impact of its decision to increase student instructional time, a more limited back pay award is appropriate; i.e., one that begins to accrue when our decision issues instead of when the unfair conduct occurred. We disagree. While such a limited remedy may be appropriate in cases involving layoffs, it is not appropriate here. If a layoff is proper, then the laid-off employee has no right to continued pay after the date of layoff. Here, while the District was entitled to make the decision to increase student instructional time, the impact of that decision on teachers' worktime began when the decision was implemented and continued. Full back pay is, therefore, appropriate.

The District also claims that its liability for any back pay ordered should end as of the effective date of the next contract that addressed the issue of teacher worktime. It states that the contract executed June 1982, effective July 1, 1981, should cut off its liability in that way. In that contract, Article XIV, "Hours of Employment," addresses at some

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[10]Such back pay is awarded to individual teachers as compensation for the extra time they worked because of the unlawful conduct of the District. Whether or not the total worktime for the entire faculty in the District has been increased is irrelevant. It would be manifestly unfair, and unprecedented, to deny full compensation to those teachers whose hours were unlawfully increased simply because the hours of other teachers were, equally unlawfully, decreased.

length the hours of employment, including maximum instruction time for classroom teachers. It provides that school schedules which exceed those maximums in 1981-82 may be continued under certain circumstances, but that adjustments in the instructional day beyond those noted must have the consent of the Association. Adjustments of the maximums were limited to 10 minutes per year, and the base year was to be 1981-82.

The Board has consistently held that merely signing a contract after hearing is insufficient to waive the right to negotiate over the subject of an unlawful unilateral change or to establish that the case is moot. Oakland Unified School District (1980) PERB Decision No. 126. On the contrary, a clear unmistakable waiver on the part of charging party is necessary to establish that the case is settled or moot. Oakland, supra. However, the Board has refused to restore status quo and has limited the liability for back pay once a District has fulfilled its obligation to negotiate and the parties have reached agreement. San Mateo City School District (1984) PERB Decision No. 375a. This has generally been considered to be a question for compliance, since it usually concerns a post-hearing agreement. Here, however, the parties' contract had been signed by the time the hearing was held in October 1982 and testimony about the meaning and effect of that agreement was received at that hearing. Therefore, we will address the effect of that agreement.

Originally Article XIV of that contract contained a sentence: "The base year for purposes of this adjustment is the minutes actually taught during 1981-82." OGEA negotiators Cynthia Joehnck and Claudelle Bonaccinie testified consistently that they had demanded and obtained the deletion of the word "actually" from that statement so that there would be nothing in the contract that would affect the pending unfair practice and nothing to prevent the base year from being rolled back. They understood that the language they finally agreed to would allow the base year of the schools affected to be adjusted depending on the outcome of the unfair. The meaning of the revised language, as they understood it, would "not be minutes actually taught, it would be minutes that the District had a right to assign to the teachers."

The testimony from Gary Clarke, Program Director for Public Relations, who was present when the language was negotiated, was not inconsistent with that position. He stated that the original language reflected a District proposal and, when he had inquired whether the Association would drop the unfair, they refused. He testified that he met with Joehnck and Bonaccinie and they had asked to have the word "actually" removed because they were concerned about the unfair. He continued:

> I responded that PERB, the unfair, if the Association should prevail the PERB could do whatever it wanted to do. They have the authority to make decisions and if they

> thought they could roll back the base year that would be a decision for them to make. Although the language here, by removing the word ["actually"] from that language, from the District's point of view, did not alter the base year, did not alter the fact that it should be established for 81-82 as the base year. And we have no control over what PERB would decide.

We find that the District has not met its duty to negotiate on instructional time so that its back-pay liability is cut off by the July 1, 1981 contract. At the time of the negotiation of that contract, the Association was presented with a status quo that had been unlawfully altered by the District. The base year was to be 1981-82, a year in which the instructional minutes had already been unlawfully increased by the District. The parties were both clearly aware of the pending unfair and both felt that the outcome of that unfair could alter their agreement.

Since the Board generally declines to restore the status quo where the decision is within the prerogative of management and it is only the effects which must be negotiated (Moreno Valley Unified School District, supra), the status quo remedy expected by the Association at the time of negotiations will not be forthcoming. If back pay is cut off at the time the contract is signed, however, the teachers have no real remedy for the fact that their workday was unilaterally increased and the effect of that increase has been ongoing. As argued by the

Association, to decide otherwise would put charging parties in the position of refusing to sign contracts indefinitely while awaiting PERB action, or waiving their right to full back pay. For that reason, we do not order the restoration of the status quo but, instead, order the parties to negotiate upon request and award back pay for increased worktime from the time of the change until agreement or impasse is reached. As no exception was taken to the ALJ's calculation of back pay on a weekly basis, that shall be the appropriate basis.

ORDER

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

A. CEASE AND DESIST FROM:

(1) Dominating or interfering with the formation or administration of the Teachers Forum or any successor thereto and from contributing financial aid or any other support to it;

(2) Undermining the status of the exclusive representative or interfering with its exercise of statutory rights by permitting the Teachers Forum or any successor thereto to function as an employee organization having as a primary purpose the representation of the employees in their relations with the Oak Grove School District;

(3) Failing and refusing to meet and negotiate in good faith with the Oak Grove Educators Association, CTA/NEA;

(4) Denying the Oak Grove Educators Association, CTA/NEA its right to represent teachers by failing and refusing to meet and negotiate about matters within the scope of representation;

(5) In any manner interfering with the rights of employees by unilaterally initiating changes without meeting and negotiating with the Oak Grove Educators Association, CTA/NEA over the impact of such changes on matters within the scope of representation.

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

(1) Bargain upon request with the Oak Grove Educators Association, CTA/NEA over the effects of the revision to Administrative Regulation 6310;

(2) Pay the affected employees at their normal rate of pay with interest of ten (10) percent per annum for the increased teacher worktime, calculated on a weekly basis, from September 1981 until the occurrence of the earliest of one of the following conditions:

(a) The date the parties reach agreement over the effects of revisions to Administrative Regulation 6310;

(b) The date the statutory impasse procedure is exhausted;

(c) The failure of the Oak Grove Educators Association, CTA/NEA to request bargaining within thirty (30) days of the date this Decision is no longer subject to reconsideration or within seven (7) days of the District's notice of its desire to negotiate within the Oak Grove Educators Association, CTA/NEA; or

(d) The subsequent failure of the Oak Grove Educators Association, CTA/NEA to negotiate in good faith.

(3) 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.

(4) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and 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.

(5) Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

At the compliance proceeding, the compliance officer shall attempt to accommodate any reasonable proposal regarding the method of payment of the monetary award ordered by the Board.

Member Morgenstern joined in this Decision.

Chairperson Hesse's Dissent begins on page 39.

Hesse, Chairperson, dissenting: I cannot concur with my colleagues in their conclusion that the Superintendent's Forum constituted an employee organization under the EERA, nor that the District in any way sought to bypass the exclusive representative.

As I read the statutory requirements,[1] the Forum would constitute an employee organization if the following elements were present: (1) it was an organization, (2) having as a primary purpose (3) the representation of employees (4) in their relations with the employer on matters within the scope of representation. All of these elements must be shown, not merely some of them. In this case, the proof falls far short of showing that these elements were present.

As noted by the majority, the easiest element to prove is the existence of "an organization." Long-settled case law points to as few as two employees constituting an organization, even if the employees themselves were unaware of their collective status and did not intend to act as an organization. Here, there was a group of a continuing nature, made up of employees. Thus, I can agree that the Forum was "an organization."

Further, given that the purpose of the Forum was to disseminate and receive information from representatives of rank and file teachers, I can also concur that the panel members were to represent the employees at their various

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[1]Government Code section 3540.1(d).

schools. Although the meetings were in theory open to anyone, and the panel members themselves were given their jobs by a number of different methods (election, appointment, volunteering), the purpose behind the structure reasonably is seen to be to have the members of the Forum report back to their own schools with information, and to bring discussion items from their faculties to the Forum. Thus, two of the four elements of the statutory requirements were met in this case. In truth, the same two elements are met every time a school holds a faculty or department head meeting, or a district sponsors a district-wide staff meeting. But the two remaining elements were not proven on this record.

The EERA requires that the employee organization must have as a "primary purpose" the representation of employees on matters within scope. Certainly it can have other purposes: providing professional group support, making available low cost supplemental insurance plans, giving opportunities for training and professional growth, etc. But in order to fit the definition of section 3540.1(d), the purpose of representation on matters within scope must be the primary goal. Here, the purpose of the Forum is less than that. Rather, its primary purpose was to give the rank and file employees access to the new superintendent, as a morale booster,. The instigation for the Forum came from the teachers, not vice versa. The teachers' feeling, evidently shared by the board of education, was that the lines of communication between the staff and the

superintendent were in need of repair. To that end, the teachers suggested reinstituting the Forum. The District agreed, noting that morale was low due to the perception that the teachers had no voice that was listened to. Formation of the Forum served a twofold purpose: it provided a vehicle for the superintendent and the teachers to exchange information, and by doing so it raised employees' morale.

There is no indication that the primary purpose of the Forum was to represent employees on matters within scope.

Entwined with the question of the group's primary purpose is the question of whether matters within scope were discussed, and whether those discussions led to impermissible action by the District. The record is devoid of any instance when subjects within scope were discussed. Indeed, the record is replete with examples of subjects that teachers wanted to discuss, but where the District instead referred the Forum representatives to the Association as the appropriate place to raise those issues. In another instance, the teachers were curious as to the District's plan for Martin Luther King Day. The District did not bargain over the holiday. Instead, it gave the teachers an update on the legislation authorizing the holiday, and noted how various districts were implementing the holiday. I find it difficult to believe that EERA was intended to preclude an employer from informing the employees on the status of a legal holiday. There may have been other instances when items discussed encroached on a subject within scope. But

that is inevitable and, as long as no negotiations occurred, then I cannot find an exchange of information between employer and employee harmful. To so limit exchanges is not the purpose of the Act, and is based on a naive understanding of employer/employee communication.

Furthermore, not only is there no evidence of either negotiation or of a unilateral change made in response to any of the discussions, there is no evidence that the superintendent made any changes as a result of the Forum discussions. Thus, I find it impossible to believe that the Association was bypassed in any way, or that its authority as the exclusive representative was undermined in the least.

As to the alleged unilateral changes in instructional time pursuant to AR 6310, here too I find the record less than clear.

To be proven to be a unilateral change in response to the new AR, the school schedule would need to reflect (1) that the school's schedule complied with the new AR; (2) that it had changed the instructional minutes from 1980-81 to 1981-82; and (3) that the change in the instructional day resulted in a change in the teacher's overall workday.

Examining Joint Exhibit 1, I note very few situations where the above conditions are met. The vast majority of the schools in 1981-82 did not comply with the new AR 6310, or, if they were in compliance with the new AR 6310, the schools had no change from the previous year. I find the only situations where an increase occurred, and the schedule conformed to the

new AR, to be:

Blossom Valley School
grades 4-6 only (+15 min/week)

Del Roble School
grades 1-3 only (+105 min/week)

Edenvale School
grades 4-6 only (+125 min/week)

Frost School
grades 1-3 (+150 min/week)
grades 4-6 (+10 min/week)

Given the large number of schools in the District, this hardly reflects a district-wide pattern and practice. Furthermore, even if the schools where the change due to AR 6310 resulted in a decrease in instructional time are included, only two more schools are added:

Parkview School
grades 4-6 only [20] minute decrease/week

San Anselmo School

grade 4 only [15] minute decrease/week

Furthermore, whether the total work time for the faculty was increased is not clear from the record. I thus feel it inappropriate to award damages to those teachers affected by the AR changes. Even if damages were appropriate, any order must, of necessity, examine the economic gain experienced by those teachers whose work decreased in response to the AR.

I particularly take issue with the majority's failure to limit back pay liability up to the time the parties negotiated teacher work time. Whether the parties "intended" the negotiations to cut-off liability is not as important as the

fact that they did negotiate teacher work time. To continue back pay liability past the 1981-82 school year would act as a warning to all parties "Caution: negotiate at your own risk." PERB should craft remedies that encourage and reward parties who negotiate over subjects in scope, not punish parties who see their duty, even belatedly, and fulfill it.

Therefore, I believe the only appropriate remedy is an order to bargain the impact of the new AR on those schools listed above, provided that it is shown that the teachers' workday was affected.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-622, Oak Grove Educators Association, CTA/NEA v. Oak Grove School District, in which all parties had the right to participate, it is found that the Oak Grove School District violated the Educational Employment Relations Act, Government Code section 3543.5(a), (b), (c) and (d).

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

A. CEASE AND DESIST FROM:

(1) Dominating or interfering with the formation or administration of the Teachers Forum or any successor thereto and from contributing financial aid or any other support to it;

(2) Undermining the status of the exclusive representative or interfering with its exercise of statutory rights by permitting the Teachers Forum or any successor thereto to function as an employee organization having as a primary purpose the representation of the employees in their relations with the Oak Grove School District;

(3) Failing and refusing to meet and negotiate in good faith with the Oak Grove Educators Association, CTA/NEA;

(4) Denying the Oak Grove Educators Association, CTA/NEA, its right to represent teachers by failing and refusing to meet and negotiate about matters within the scope of representation;

(5) In any manner interfering with the rights of employees by unilaterally initiating changes without meeting and negotiating with the Oak Grove Educators Association, CTA/NEA, over the impact of such changes on matters within the scope of representation.

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

(1) Bargain upon request with the Oak Grove Educators Association, CTA/NEA, over the effects of the revision to Administrative Regulation 6310;

(2) Pay the affected employees at their normal rate of pay with interest of ten (10) percent per annum for the increased teacher worktime, calculated on a weekly basis, from September 1981 until the occurrence of the earliest of one of the following conditions:

(a) The date the parties reach agreement over the effects of revisions to Administrative Regulation 6310;

(b) The date the statutory impasse procedure is exhausted;

(c) The failure of the Oak Grove Educators Association, CTA/NEA, to request bargaining within thirty (30) days of the date this Decision is no longer subject to reconsideration or within seven (7) days of the District's notice of its desire to negotiate with the Oak Grove Educators Association, CTA/NEA; or

(d) The subsequent failure of the Oak Grove Educators Association, CTA/NEA, to negotiate in good faith.

Dated: OAK GROVE SCHOOL DISTRICT

By _____
Authorized Representative

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