STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INGLEWOOD TEACHERS ASSOCIATION, CTA/NEA,	
Charging Party,	Case No. LA-CE-2089
v.	PERB Decision No. 593
INGLEWOOD UNIFIED SCHOOL DISTRICT,	October 15, 1936
Respondent.	

Appearances; A. Eugene Huguenin, Jr., Attorney for California Teachers Association, CTA/NEA; Howard M. Knee, Attorney for Inglewood Unified 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 the Inglewood Unified School District (District) to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by failing to implement an agreed-upon bell schedule, by unilaterally imposing a rule of prior approval for use of mailboxes at Inglewood High School, and by disciplining

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

Robert Dillen for refusing to follow that rule. The Inglewood Teachers Association, CTA/NEA (Association, CTA or ITA) does not except to the ALJ's dismissal of charges that the District also violated the EERA by imposing unfavorable class assignments on Dillen, or to the ALJ's dismissal of charges that a District principal threatened the Association president.

We have reviewed the ALJ's decision in light of the District's exceptions, CTA's response thereto and the record as a whole, and affirm it as modified below.

DISCUSSION

The ALJ's findings of fact are free of prejudicial error, and we therefore adopt his findings of fact as set forth in the attached decision as the findings of the Board itself. We also affirm the ALJ's conclusions of law with regard to the District's regulation of mailbox use by the Association, its discipline of Robert Dillen, and its failure to implement a modified bell schedule agreed to by the parties. For the reasons set forth below, however, we modify the ALJ's proposed remedy with regard to the last violation.

On September 14, 1983, the ITA filed unfair practice charge No. LA-CE-1841, alleging that the District unilaterally eliminated a 15-minute student nutrition period that had been duty-free time for teachers. The District abolished the student nutrition period and added five minutes to the lunch period, one minute to each class period, and one minute to each passing period.

Pursuant to settlement talks involving that charge, the parties agreed in February 1984 as follows:

> Effective Fall semester of 1984, the passing period between periods 3 and 4 at the high schools will be increased by six minutes and the lunch period will be reduced by five minutes and the third period by one minute.

The Association then dropped the related charge.

In May 1984, the parties began negotiating on reopeners, including the longer day and extended year encouraged by Senate Bill 813. However, by the beginning of school in September, the parties had not yet reached agreement. Impasse was declared by PERB on August 28, 1984.

When the 1984-85 school year began, the bell schedule did not reflect the parties' agreement of the previous spring. The District explained that, since it expected to reach agreement with the Association soon concerning the extended day, the District wanted to avoid inconveniencing students by changing the bell schedule once at the beginning of the year, and again when the parties reached agreement in negotiations.

The ALJ found and we agree that the District violated the EERA by its refusal to implement the agreed-upon bell schedule in the fall of 1984. In answer to the District's argument that PERB does not have jurisdiction to enforce agreements between the parties, we note, as did the ALJ, that the breach of an agreement may also be a violation of EERA where the breach amounts to a change of policy. See Grant Joint Union

High School District (1982) PERB Decision No. 196. Here, the District's action had a generalized effect and continuing impact upon bargaining unit members and was, therefore, a violation of EERA section 3543.5(a), (b) and (c). We also join the ALJ in rejecting the District's argument that the harm resulting from its failure to abide by the settlement agreement was de minimis. All unit members at the two high schools were affected by the District's conduct and the resulting harm, though small, did affect the teachers' duty-free time.

To remedy the District's unlawful conduct, the ALJ ordered the District to make the affected teachers whole for loss of the seven minutes per day of duty-free time. Pursuant to the Board's decision in Corning Union High School District (1984) PERB Decision No. 399, the ALJ ordered the District to provide either time off or monetary compensation for the additional time worked. The District does not except to the form of the remedy. Nor does it dispute the fact that the elimination of duty-free time and the substitution of instructional time is within scope.[2] The thrust of the District's argument is that, if repudiation of the agreement is found to be a

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[2]In San Mateo City School District (1980) PERB Decision No. 129, the Board discussed this issue at length, and concluded that "to the extent that a change in the length of the teachers instructional day affects the length of the working day or existing duty-free time, the subject is negotiable." Although that decision was vacated by the California Supreme Court, and remanded to the Board for

violation, the Board must find there was an increase of one rather than seven minutes per day.

Information in the record about the actual result of the various changes is inconclusive. In the Association's original charge in Case No. LA-CE-1841, the District was alleged to have unilaterally eliminated a 15-minute duty-free nutrition period. Five minutes were added to the lunch period, one minute to each passing period and one minute to each class period. This description of what happened occurs various places in the record; however, there is no numerical breakdown of the actual amount of duty-free time lost due to the change. There are six class periods. The teachers normally teach during five of them, so presumably the change resulted in five additional minutes of teaching time. However, there is no mention of lunch duty or hall duty during passing periods, and no evidence indicating whether these are considered duty-free time.

The settlement agreement reached in the spring of 1984 provided that the District would increase the passing period between periods three and four by six minutes, and reduce the lunch period by five minutes and the third period by one

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reconsideration, the Board's subsequent Healdsburg Union High School District/Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 took the same position. See also Sutter Union High School District (1981) PERB Decision No 175; Victor Valley Union High School District (1986) PERB Decision No. 565.

minute. The ALJ found that the consequence of the District's failure to implement this agreement was a loss of seven minutes per day of duty-free time. He calculated that six minutes were to be added to the passing period between the third and fourth periods and, in addition, the third period was to be reduced by one minute.

The ALJ's calculations are apparently based upon testimony of Genevieve Neustadter, the ITA president. Neustadter is not a high school teacher. She became aware of problems with the bell schedule through Dillen, who raised the matter at an Association meeting. When asked what action she took when she found out that the agreement had not been implemented, Neustadter replied that she spoke first with the superintendent, and "raised the question as to why the seven minutes had not been put into the high school schedules as the agreement had stated." Neustadter next raised the matter at a school board meeting. She then met again with the superintendent, who said that:

> . . . because we were negotiating at that time, the longer day, longer year schedule, that he would wait until we were settled on the longer day and that the 7 minutes would be incorporated into the schedule at the time.

Notwithstanding Neustadter's repeated references to the "seven minute nutrition period that had been eliminated," other testimony, including the Association's unfair practice charge

in Case No. LA-CE-1841, reveals that it was a 15-minute nutrition period that was originally eliminated.

The Association argues that the only information in the record supports the ALJ's conclusion that seven minutes were lost.[3] It also argues, without any citation to the record, that the District had already reduced the lunch period by five minutes at the time the settlement agreement was signed, and that only the insertion of seven minutes of duty-free time remained to be implemented. It does not clarify what difference that fact would make. The District disputes the seven-minute figure and argues that the failure to implement the agreement resulted in only a one-minute loss of duty-free time, since the five minutes reduced from the lunch period were already duty-free. Therefore, according to the District, the only duty-free time eliminated was the one minute that was not removed from the third period and put into the passing period.

On the face of it, it would seem that the District's position represents a logical way to calculate the amount of

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[3]The Association also makes another argument based on language contained in the District's brief. The District argues that the "net effect . . . was a one-minute reduction in the passing period between periods three and four and a concomitant one-minute increase in the third period." The Association argues that these two one-minute periods result in at least a two-minute loss of duty-free time, by the District's own admission. We disagree. It appears from the settlement agreement that the minute lost from the passing period was the same minute added to the third period. There was a loss of one minute from duty-free time, and that one minute was added to instructional time.

loss. While the teachers originally had a 15-minute duty-free nutrition period, they lost at least five minutes of that time to instructional time pursuant to the District's original unilateral change. However, when the parties signed the settlement agreement, they established a new policy regarding those minutes. It would appear that the Association settled for reorganization of five minutes of duty-free time taken from lunch and the restoration of one minute of duty-free time taken from the third period. When seen in that light, the effect of the District's failure to implement that agreement was only a one-minute loss per day in duty-free time which was added to instructional time.

Because we find the District's argument persuasive, yet contradicted by the only direct testimony available in the record, we reluctantly defer the issue of the exact amount of duty-free time lost to compliance procedures.[4] Absent agreement by the parties, we direct that a compliance hearing shall be held for the purpose of ascertaining the correct amount of loss of duty-free time per day as a result of the District's failure to implement the settlement agreement signed by the parties in the spring of 1984. Neither party has

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[4]Chairperson Hesse finds that Neustadter's testimony was composed of conclusions and was unsupported by the evidence. Because there is sufficient evidence on the record to determine that the net change per day totalled one minute, she would not defer resolution of this issue to a compliance proceeding.

excepted to the ALJ's termination of the award period in February 1985 when the parties reached a successor agreement, and we do not disturb his conclusion on that point.

ORDER

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

A. CEASE AND DESIST FROM:

1. Failing to implement the agreed-upon bell schedule.

2. Denying to the Inglewood Teachers Association, CTA/NEA, rights guaranteed by the Educational Employment Relations Act, including the right to represent its members, by requiring prior approval for use of Inglewood High School teachers' mailboxes.

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

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

1. Grant to each of the employees harmed by the refusal to implement the agreed-upon bell schedule the amount of paid time off which corresponds to the amount of time worked

as a result of the reduction of the duty-free period. Should the parties fail to reach a satisfactory accord as to the manner in which such time off shall be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional time worked. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

2. Remove and destroy the October 19 and 26, 1984 Lawrence Freeman memoranda from Robert Dillen's personnel file.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

4. Provide written notification of the actions taken to comply with this Order to the Regional Director of the Public Employment Relations Board, in accordance with his instructions.

5. It is further ORDERED that all other portions of the unfair practice charge and complaint are DISMISSED.

Chairperson Hesse and Member Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-2089, Inglewood Teachers Association. CTA/NEA v. Inglewood Unified School District in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a), (b) and (c) by unilaterally changing the bell schedule of unit employees without affording the exclusive representative notice and the opportunity to negotiate; imposing a prior approval requirement on use of mailboxes; and imposing reprisals.

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

A. CEASE AND DESIST FROM:

1. Failing to implement an agreed-upon bell schedule.

2. Denying to the Inglewood Teachers Association, CTA/NEA, rights guaranteed by the Educational Employment Relations Act, including the right to represent its members by requiring prior approval for use of Inglewood High School teachers' mailboxes.

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

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

Grant to each of the employees harmed by the refusal to implement the agreed-upon bell schedule the amount of time off which corresponds to the amount of time worked as a result of the reduction of the duty-free period. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in

the District's employ, then such employees will be granted monetary compensation commensurate with the additional time worked. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

2. Remove and destroy the October 19 and 26, 1984, Lawrence Freeman memoranda from Robert Dillen's personnel file.

Dated:___________________________ INGLEWOOD UNIFIED SCHOOL DISTRICT

By: _____________________________
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

INGLEWOOD TEACHERS ASSOCIATION. CTA/NEA.	)	
Charging Party.	)	Unfair Practice Case No. LA-CE-2089
v.	)	
INGLEWOOD UNIFIED SCHOOL DISTRICT.	)	PROPOSED DECISION (11/6/85)
Respondent.	)	

Appearances: A. Eugene Huguenin. Esq.. California Teachers Association for Charging Party; Howard M. Knee. Esq.. for Respondent.

Before Gary M. Gallery. Administrative Law Judge.

STATEMENT OF CASE

The District is charged with failing to implement terms of a settlement agreement reached as a result of an earlier unfair practice charge; interfering with the exclusive representative's use of school mailboxes; imposing reprisals on a union representative for use of mailboxes and threatening the exclusive representative president.

PROCEDURAL HISTORY

In an unfair practice charge filed on November 14. 1984. the Inglewood Teachers Association. CTA/NEA (ITA) alleged that the Inglewood Unified School District (District) violated subsections 3543.5(a). (b), and (c) of the Government Code by

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

the following conduct:[1] reneging on a settlement agreement reached in the spring of 1984 that was to be implemented in the fall of that year; discriminatorily assigning a union activist a more onerous class schedule in the fall of 1984; interfering with the union representative's mailbox activity on October 19 and 26, 1984, and suspending him for the October 26 incident, and interfering with the union president's visits to the campus to meet with teachers on union-related matters. The charge was amended on November 29, 1984. A PERB board agent issued a complaint on December 19, 1984, incorporating the allegations of the amended charge. The District filed its answer on January 8, 1985, admitting and denying facts that will be referenced in other portions of this proposed decision. A settlement conference was held without success. The formal

[1]Pursuant to subsections 3543.5(a). (b), and (c) it is unlawful for the public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

This section is a part of the Educational Employment Relations Act (EERA or Act) Government Code section 3540 et seq. All references are to the Government Code unless otherwise noted.

hearing was conducted on June 11, and 12, 1985, in Los Angeles, California. Post-hearing briefs were completed on October 15, 1985, and the matter submitted for decision.

FINDINGS OF FACT

The District is a public school employer within the meaning of the Educational Employment Relations Act. ITA is the exclusive representative of certificated employees of the District. The parties have a collective bargaining agreement covering the period July 1, 1983 through June 30, 1986.

A. The Bell Schedule

On September 14, 1983, ITA filed unfair practice charge LA-CE-1841 against the District alleging a unilateral change in the working conditions of teachers. The charge was amended on October 17, 1983. The thrust of the charge was that the District had unilaterally eliminated a 15-minute student nutrition period during which the teachers had no assigned duties. The District's answer admitted that prior to the 1983-84 school year there was a 15-minute student nutrition break preceding the third teaching period of the school day. The answer stated that at the beginning of the 1983-84 school year the nutrition period was abolished, and the 15 minutes was absorbed into the school day by extending the lunch period by five minutes, the passing period between classes by one minute and adding one minute to each class period.

In conjunction with the unfair practice charge the parties entered into a settlement agreement on or about February 1. 1984. wherein the District agreed that "Effective Fall Semester of 1984, the passing period between periods 3 and 4 at the high schools will be increased by six minutes and the lunch period will be reduced by five minutes and the third period by one minute." In exchange for the fall schedule commitment (and a posting of rights) the ITA withdrew the unfair practice charge.

In May 1984, the parties commenced negotiations on reopeners. Issues on the table, among others, were calendar and hours, including longer work year and extended day encouraged by the financial inducements of SB 813. Negotiations continued through the summer and fall of 1984.

School started in early September of 1984. however, the District did not implement the agreed-upon bell schedule. ITA complained to the superintendent and then to the school board about the failure to implement seven minutes into the schedule. The reason, testified Barbara Cohen,[2] was because the District was in negotiations and it was anticipated, and assumed, she stated, that at any moment settlement with ITA regarding the entire contract would be reached. Because the District was planning on implementing the extended day and longer school year, it would necessitate changing the bell

[2]Cohen is executive assistant to the superintendent, public information officer and a member of the cabinet.

schedule. To be least disruptive to students' class schedule, the superintendent and the cabinet determined to maintain the same bell schedule that existed during the previous school year, and implement a new bell schedule consistent with the negotiated contract.

From PERB files, it is found that the parties were notified on August 28. 1984. of PERB's determination of the existence of impasse between the parties. On October 28, 1984. the CTA requested factfinding between the parties. Tentative agreement was reached on the longer day, longer year in November of 1984. Settlement on the overall issues was reached sometime before February 19. 1985.

B. Inglewood High School

The remainder of the charge pertains to the interaction of Lawrence Freeman, principal at Inglewood High School, with Robert Dillen. a teacher at Inglewood, and Genevieve Neustadter. president of ITA. Inglewood High School is one of two high schools (there is also a continuation school) in the 19 school district. Freeman was assigned principal at Inglewood effective January 4. 1984.

That portion of the charge relating to Dillen pertains to the fall 1984 assignment and two confrontations with Freeman on use of the school mailboxes for teachers. That portion regarding Neustadter relates to meetings Neustadter had with Freeman at the Inglewood campus. These events are described

hereafter, with the prefatory observation that credibility determinations were made difficult by the presentation of the evidence. Dillen's testimony was produced largely by leading questions with short affirmative or negative answers. Neustadter spoke with conviction and yet revealed, as did Dillen. a firm distaste for Freeman's manner of principalship at Inglewood. Freeman, by his own admission, was loud, animated, and spoke authoritatively. His inability to recall some events, and inconsistency in regard to some particulars, leads one to defer to Dillen and Neustadter where there is conflict. This is not to say, however, that I discredit Freeman in all respects. At hearing, his demeanor and candor about his style of administration, and his general presentation of testimony left me with the impression that his inability to recall may have been sincere, and inconsistencies inadvertent.

1. Robert Dillen - Background

Robert Dillen is a 14-year teacher at Inglewood High School. For over half of his fourteen years, Dillen has been a building representative for ITA, including the school years 1982-83 to the time of the hearing. As building representative he was responsible for the dissemination of information to the Inglewood High School faculty, taking feedback to the ITA representative council, conducting elections and meetings for ITA purposes. He and Pam Erbeck were the two functioning building representatives at Inglewood. From January and into

the fall of 1984 he placed ITA materials into the teachers' mailboxes which are located in a room adjacent to but part of the principal's office. This activity would take place no more than once a week, he said.

Prior to Freeman's arrival on January 4, 1984. and when Vice Principal Geraldine Martin was in charge of faculty meetings. Dillen would make announcements regarding ITA matters at the meetings. Since Freeman's arrival. Dillen said, they have not had the opportunity to announce ITA matters at the faculty meetings. Dillen "assumed" that Freeman knew he was the building representative, because it was not "hidden information" and he did his mailbox work in an open manner.

Dillen attended the settlement conference leading to the settlement agreement in LA-CE-1841. He was not on the negotiating team during the summer of 1984 on the reopeners.[3]

2. Dillen's Fall 1984 Class Assignment

Dillen teaches in the Social Sciences department. Normally, teachers have a total of five classes assigned to them, plus a preparation period. Within the Social Science and English departments, students are assigned to either an A or B

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[3]In its post-hearing brief the ITA requests that official notice be taken of two Los Angeles Regional Office unfair practice charges (LA-CE-1938 and LA-CE-2003). Neither file mentions Dillen by name. In the absence of testimony at hearing, I decline to take notice of the pleadings in those cases and draw no inference regarding Freeman's knowledge of Dillen's purported activity with regard to those unfair practice charges.

level class based upon the student's academic and reading ability. A is for higher and B is for lower achievers. The B classes, according to Dillen, cause more stress to the teacher. The teacher cannot relax in the B class and is under pressure to maintain classroom discipline. The students' attention span is more limited and they have less motivation to achieve good grades or to do homework. B level students talk back to the teacher more than the A level students and present a greater challenge to the teacher to get them to do their work. High absenteeism and tardiness, more preparation time, more parent conferences, more phone calls, lead to more teacher stress. Dillen said.

Dillen testified that there were a sufficient number of A level classes so that it would not be necessary for any teacher to have all B level classes. Later, however, he testified that he was unaware of the overall number of A level and B level classes.

For the prior seven years, Dillen had, in each year one. two, or three A level classes. In the 1983-84 school year, Dillen had two B level World History classes and three A level classes in Civics. At mid-term because of a need for class size change and for an additional B level class in Civics, Dillen had two A level and two B level classes in Civics and one World History class at B level.

When Dillen came to class the first day of school in fall 1984, he learned that he had five B level classes. He ascertained that there were three other Social Studies teachers who were assigned all B level classes.

Administrators at the high school were Freeman, the principal. Jerry Martin, the assistant vice principal, and Liza Daniels, another administrator. Dillen assumed Martin made the class assignments.

Jerry Martin is assistant principal in charge of Counseling and Curriculum at Inglewood. She prepared the 1984-85 school year class assignments, as she has for six years. Counselors preschedule the students to A or B level classes prior to the end of the previous school year. That preschedule is computerized from which Martin determines how many sections she will need the next term. The teachers also give her preferences for the courses within a department they wish to teach the following school term. Based upon the foregoing information and her understanding of the needs of the school and the expertise of the teachers she arranges a tentative master schedule. She did the scheduling at her home during the month of August. Freeman had no input into the scheduling although he later saw the computer printed schedules showing teachers' A or B level class assignments.

Freeman denied that he had any input into the scheduling of classes. He testified that he had told the teachers when he

first came that he would not be involved in scheduling for some time while he became more familiar with the school and its staff. His testimony in this regard was not refuted by ITA.

Martin later ascertained that seven teachers in the English and Social Science departments had all B level classes. Martin said Dillen's ITA activities were not involved in his assignment. Martin was aware at the time of the assignments that some teachers would be getting all B level classes, but until Dillen called her attention to his assignment and that she might be called to explain it. she did not realize it was an issue.

There are about 20 teachers in each department. While uncertain of what the ratio was Martin said there were more B level than A level classes. Her guess was 60 percent B level and 40 percent A level classes.

Dillen's spring 1984 response to Martin's request for preferences had listed Civics for all periods without designation of level, but for period 6 he requested Civics-World History level (B). Without a designation of preference on the form Martin did not know Dillen preferred one level over another.

From visits to Dillen's classroom. Martin was aware of individualized lesson plans for students determining their achieving levels initiated by Dillen. She felt it was a good program.

I found Martin to be a credible witness. She spoke with confidence, sincerity and knowledge of her responsibilities. Despite ITA's arguments to the contrary. I find no inconsistency in her testimony that Freeman had no input in the makeup of the fall class schedule, but that he did see the schedule after she had developed it. Nor do I find inconsistency in her testimony, again urged by ITA. that she knew at the time of the assignments that some teachers had all B level classes, but did not realize it was an issue, until Dillen informed her of his discontent.

3. The October 19 Incident (Dillen)

As noted, one duty of a building representative is to insert into the teacher's mailboxes various ITA materials distributed by ITA. Typically, ITA materials are prepared in the ITA office. Materials are put into envelopes addressed to the building representatives and delivered to the District central office for distribution to the various school sites. The District has an inter-District mail system by which ITA packages are sent from the centralized office to the various school sites. The building representatives, in turn, place the new materials into the individual teacher's boxes.

Dillen's workday starts at 8:00 a.m. (Classes start at 8:30 a.m.) Consistent with his practice for distributing ITA flyers, he arrived at the principal's outer office at approximately 7:40 and began inserting flyers (the Hotline)

into the 82 mailboxes located there. The process takes about five minutes, he said.

Dillen testified that at the time he was stuffing the Hotline into the mailboxes. Freeman was talking to Tony Washington, a gardener, at the counter.[4] Dillen's back was to Freeman. Freeman said that he wanted Dillen to come over and talk to him. Dillen said he turned to look at Freeman who was talking to Washington. Since Freeman continued his conversation with Washington. Dillen turned and started putting more Hotlines into the boxes. He did not go over, he said, because Freeman was continuing to talk to Washington. Before Dillen had completed the stuffing of the boxes, he said. Freeman came over and grabbed the Hotlines out of his hand, and told Dillen that he wanted to talk to him in his office. Dillen replied something to the effect that he would not do it without a witness. He thought he might have asked Nollan if he would come in with him. Dillen thought Freeman was upset because he was putting things in the boxes. There had been no prior interaction with Freeman that morning. Dillen said Freeman threatened him with suspension if he did not come into the office. Dillen said that he looked at Nollan and Nollan indicated from body language that he thought he had better go in. So Dillen did. but stood in front of the glass door to the

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[4]Mike Nollan and Mrs. Scott, math teachers at the higher school, and a student were in the office as well.

principal's office so that the door would not close, because he did not want to be alone in the office with Freeman.[5]

Freeman then told him to move and Dillen said he was not going to. Freeman said he would move, and Freeman "bodily moved me out of the way of the door." "It was a push with his hands." Freeman then shut the door. Dillen said that Freeman shouted at him "that it was not courteous to put things in the box without his permission and that he cannot hold meetings at the campus at Inglewood High School without his permission." Dillen assumed that he was referring to ITA meetings, because that was the only kind of meeting he conducted at the school.

Dillen said he was sure he told Freeman that he had the right to put things in the boxes and that he did not need Freeman's permission.

Dillen did not recall when, but Freeman gave him the flyers back, and he put them in the mailboxes. He then sat down and waited for further instructions. Shortly thereafter he was given a note to return to his class and was told that a memo would be given to him later.

Freeman testified that on October 19. he saw Dillen putting something in the mailboxes and asked if he could see him for a

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[5]Dillen said this conduct was due to a past experience in May when Freeman shouted at him and ordered him to do something, and blocked his exit from the door. Dillen had to go out a side door.

moment. "Dillen often does not answer when you're talking with him." said Freeman. And then Freeman stated he said.

> "Mr. Dillen did you hear me. I'd like to see you in the office a moment." Dillen kept right on going with his business. So I walked around the counter and placed myself between Dillen and the boxes, and I said, "Mr. Dillen. I've asked you on numerous occasions just to let me know if you're going to put something in the boxes." Dillen kept right on doing it, and I took them out of his hand. And I said, "did you understand, sir, that I'd asked you to let me know when you were going to put something in these boxes." Then I handed them back the papers and let him continue.[6]

Freeman was uncertain if it was that day when Dillen stood in the doorway, because there had been other incidents. He did not recall Nollan being asked to come into the office, although he said Nollan "seems to pop up out of the air anytime." Dillen was walking in front of him. he said, and Dillen stopped immediately right at the door. He said, he placed his hand gently on Dillen and said "Mr. Dillen one way or the other." Dillen went into dramatics, said Freeman, "look everyone he's hitting me." I said, "come on Mr. Dillen just move one way or the other, let's go into the office." Dillen had to move one way or the other because he was blocking the door, and said Freeman, he couldn't get into his own office.

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[6]Freeman initially denied that on that occasion he had summoned Dillen into his office. This is contrary to the later testimony of Freeman just set forth.

Freeman denied that he ever told Dillen that the ITA could not have meetings at the Inglewood High School campus without his permission. He said that with regard to campus ITA's meetings he very seldom knows when they are having a meeting. They might announce it at a faculty meeting, if there is going to be an ITA meeting, or someone might stop and ask if he minded if they held a meeting in the library. There are no restrictions when they meet because they are part of the faculty.

Later that day Dillen got a letter from Freeman. It stated in part:

> Re: Distribution of Materials in Mail Boxes
>
> It is a common practice that whenever materials are placed in boxes that they be shown to the Principal. This procedure is not used as censorship, but rather, as a common courtesy to the school administration.
>
> More importantly, anytime I want to talk personally with you, you feel that you need a witness present. This makes our communication very difficult. When I want a dialogue with you. a witness is unnecessary. This is not to be.[7]
>
> Additionally, when staff persons are requested to follow specific directions of the principal (i.e. to go to class) and they respond with a rebuttal (i.e. I need it in writing), it is time for us to confer.

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[7]Despite this language regarding a witness, the Charging Party stated that it was not their intention to litigate Weingarten rights.

> If actions such as these continue, it will be necessary to give you a severe reprimand for insubordination or consideration for possible termination of your IHS assignment.

Dillen understood the letter as a threat of a transfer. Dillen testified that in all the years of teaching at Inglewood he had never felt that he had to ask the principal to put ITA information in the teachers' boxes. He had never shared a copy of the materials with the administrator prior to putting them in the boxes.

In response to a leading question. Dillen affirmed that Freeman at one of his first faculty meetings announced that as a part of the procedures for distributing materials to faculty members, the administrator, either the principal or the vice-principal, was to see a copy of any material before it was placed in the teachers' boxes.[8] Despite that admonition, Dillen continued to put the materials into the boxes without showing them to the principal first.

Freeman testified he gave the October 19 letter to Dillen because Dillen continued to ignore Freeman's requests to let him know when he was going to place something in the boxes.

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[8]Freeman did not deny the rule attributed to him. He testified that when he got to Inglewood, he let it be known that he "would like very much that if you're going to place stuff in the box you make the principal aware of that so either he could defend what you're doing or not or give some kind of answer." Freeman's further testimony on the rule is outlined below.

He commented in the letter regarding Dillen's insistence on having a witness because he said every time he wanted to talk with him, Dillen would refuse unless he had a witness because "you're going to discipline." Freeman's view was that it was not right to assume every time the principal wanted to talk to an employee there was a disciplinary matter involved.

He further wrote in the letter concerning his request to Dillen. He had asked Dillen to go to the classroom, and they would discuss it later. Since Dillen wanted to go through a lot of rebuttals and did not follow the specific directions. Freeman had to put it in writing.

Freeman testified that there was "no rule per se" regarding the use of school boxes by individuals or organizations but "rather a practice, more or less." Any person who wishes to place something in the school boxes, he testified, "as a matter of courtesy, should tell the principal that they are going to place something in the box." The rule, he said, applied to the PTA. venders, or any organization. He said sometimes he asks to see the materials and other times he does not.

Freeman explained that one of the reasons for the "practice" is that "a lot of people are offended by things that are placed in the box. They might not want to be involved." Freeman was also concerned about students getting hold of something controversial and that parents might be offended

because it is the wrong kind of literature for student consumption. It could be of a religious nature or anything, he said.

Freeman cited, as a further example, someone who placed tax shelter annuity materials in the boxes without approval of the District office. He said that when he got to Inglewood High School he let it be known that he would like to be made aware of materials to be stuffed in the boxes, so that he could either defend them or give some kind of an answer if questioned. By defending, he meant for example to members of the faculty who were not ITA members who did not want to receive information from ITA. "While it didn't make any difference," he said, "they have a right not to receive as well as to receive it." He asked ITA to "inform him when they were going to put something in the box."

Erbeck, the other site representative, does let him know about stuffing the boxes. In each instance, he said, he has allowed her to put material in the boxes. Often she offers to show him the material, but sometimes he does not bother to look at it. He is only interested in knowing that there is going to be material in the boxes. He is not interested in what goes on. And by way of demonstration, once, he said, the Association passed out a very interesting flyer. It was a cartoon of Mr. Freeman "screaming" and "it was a very derogatory flyer." He gave her permission to put the flyer into the boxes.

4. The October 26, 1984 Incident (Dillen)

On October 26, again before 8:00. Dillen was placing materials in the mailboxes. He had not shown the materials to Freeman. Freeman came out of his office and asked if he was putting materials into the mailboxes. Freeman called him into his office and Dillen again announced that he would do so only with a witness present. Wayne Hester was also in the outer office. Freeman suspended Dillen for the day by sending him to the Office of the Director of Personnel. Freeman also gave Dillen a letter, which stated in part:

> Re: Following Requests of the Administration
>
> Once again, you have placed materials in the mailboxes without my prior approval. As I indicated last week, it is a courtesy extended to the school principal to be informed about any materials which are being placed in the teachers' boxes.
>
> I asked you this morning to come into my office so that we could discuss this matter and you refused. Because of the difficulty I observe in your ability to follow the directive of the Principal after being warned and advised to do otherwise, you leave me no choice but to use other measures. I am concerned about your consistent inability to follow reasonable and justifiable directions of the Principal. Therefore, you are hereby notified, that effective immediately, you are being sent to the Personnel Office with pay. You are to report to Mr. Steele.

Dillen spent the entire day at Steele's (District Personnel Officer) office and reported to his classroom on the following Monday pursuant to instructions from Steele.

Freeman did not testify as to the particulars of the October 26 meeting, but did testify that he had asked Dillen to come to the office and Dillen had said he was not coming. On another occasion. Freeman had spoken to Dillen about some machines, and Dillen had told him it was none of his business. "So out of shear desperation," according to Freeman, on October 26. he sent Dillen to the personnel office,

> so that someone could tell Dillen the role of a principal at a school, which is that the principal is the supervisor and he has to be advised of what's going on at the school. And if he advises you to come in, you come in. If you have a grievance after what has been said, and you don't like it, then you go through the grievance process. But just to go out and out refuse to do what you were asked to do is insubordination. And since they did not take this kind of information from Mr. Freeman, I thought perhaps the District personnel officer or someone could explain to these people what it is the principal is responsible to do.

Dillen admitted that he had never been denied placement of materials into mailboxes nor was he aware of any censorship by Freeman.

5. The November 2. 1984 Incident (Dillen)

On Friday, November 2, Dillen was sent to the Personnel Office again. Regarding the underlying incident, Dillen had sent materials to Freeman for duplication. It had to do with homework assignment sheets. He had passed out the homework assignment sheet but had not been able to give students the worksheet, so he sent another copy to be duplicated. It was

not returned. On a Friday he sent a student down to Freeman's office to pick them up. She came back to the classroom crying, he said, because Freeman had jumped on her for not having her nametag. He asked the class if there was anybody else who would like to take the note to Freeman. Ten of the students volunteered to go to Freeman's office to get their copies of the worksheet. Martin came to his classroom and relieved him and told him to report to Freeman's office. He then got the following memorandum.

> Re: Procedures
>
> You continue to persist in following correct school procedures. We have talked about your reluctance in adhering to school procedures in the past, and you have been given written warnings also.
>
> Today you sent several students to my office during the first half of Period 1 to inquire about their materials which needed to be duplicated. The sending of these students is another example of your refusal to follow simple, sensible directives from the Principal. Moreover, your actions continue to be provocative and inappropriate as I try to confer with you.
>
> Once again, I am sending you to District Office with pay for persisting in this action.

He then spent the rest of the day at the Personnel Office. A copy of the November 2 memo went into Dillen's file.

6. Genevieve Neustadter - Background

Genevieve Neustadter, a teacher in the District, is president of the ITA and chairperson of the negotiations team.

In the immediate preceding year she served as the past president.[9]

Neustadter testified that she was unaware of any District policy or procedure under which ITA building representatives are required to provide the school site administrator (the principal) a copy of ITA publications before putting them in the faculty mailboxes. She had on occasion, as president, placed materials in the mailboxes, and she did not give the information to the site administrator. She has never been challenged for putting materials in the mailboxes. However, when she was visiting a school for the purpose of distributing materials in the mailboxes she would announce her arrival at the school office. In those instances where an administrator was present, she never has been challenged for putting the materials in teacher mailboxes.

From ITA monthly meetings attended by building representatives. ITA determined that Inglewood High School was the only school out of the 19 schools where the principal required a copy of flyers for mailbox distribution.

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[9]Neustadter has been active in the ITA for eight years, including two terms as its president and chairperson of the ITA negotiating team. She has served on the negotiating team for several reopeners as well as the 1980-83 collective bargaining agreement between the parties. She is a member of several CTA and NEA committees and has attended numerous training conferences on negotiations and leadership.

7. The October 2 Incident (Neustadter)

Neustadter testified that she had received several calls from teachers at Inglewood High School and had arranged to have a meeting during the lunch periods with the teachers. There were 80 members of the bargaining unit at Inglewood High School.

On October 2. she went to the Inglewood High School for the first time in 1984-85 school year. She had not visited there the previous school year. She arrived at the school site at approximately 11:45. and went to the office and introduced herself to the secretary and ask if she could speak with Mr. Freeman. She met with Freeman and introduced herself as the new president of the Association. Freeman, she said, told her that he was a member of NEA and he had supported the organization. He announced that he had some problems at the school site the previous year. She expressed hope that they could develop a working relationship.

She told Freeman there was some concern from the teachers and that she was going to meet with them during the lunch period. She asked if she could meet with Freeman after her meeting with the teachers.

She testified that he told her that he knew teachers had a lot to complain about and ITA "sort of would like to try to keep up trouble." She said he made reference to the flyers they were sending out and made some "unfriendly remarks" about the Association. She said he also mentioned that he was in

charge of the school, and that he wanted to see anything that teachers wanted to have placed in their mailboxes.

After her meeting with the teachers she went back to Freeman's office to relate the teachers' educational concerns.

The teachers were concerned that school had started and they had not received their textbooks or any school supplies. A typing teacher complained that he had 30 typewriters and 27 of them were not functioning.

When she brought the matter up to Mr. Freeman, she said, he "began screaming and shouting at me and he said that I had no right to come into this building and tell him what to do. He was in charge there and he had instructed his teachers to write goals and objectives, and that was what he wanted them to do."

Neustadter said she responded by asking how many goals and objectives could the teachers write. She stated that they were into the school year and the teachers wanted to begin their educational program, and they did not have their textbooks or supplies. She said he came around from the back of his desk where he had been sitting, and began shouting that "he was in charge, he was the chief," and "he was not going to allow her to come in and tell him how to run his school."

She told him that she was the ITA representative and that teachers had called her in because of their concerns, and that if she and he could not discuss and resolve some of the

problems, she would have to take further steps. She then left, she said. Neustadter later complained to the District superintendent about Freeman's conduct.

Neustadter was asked, on direct examination, whether anything was said by Freeman before or after her meeting with the teachers, about what action Freeman might take in the event that she persisted in her advocacy on behalf of his faculty. Neustadter answered "no."

Freeman had no recall of this conversation with Neustadter. However, he denied that he ever told Neustadter that she could not have meetings. He further denied that he ever threatened Neustadter or any teacher in the District with any reprisals if Neustadter met with them on the Inglewood High School campus. He also denied that he ever told Neustadter that he did not want her coming to the school.

Freeman's denial of the above assertions were elicited by the District's counsel by referring to portions of the unfair practice charge.[10]

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[10]The amended charge asserted the following:

> 4. On or about October 2. 1984, Union President Genevieve Neustadter went to Inglewood High School to meet with teachers during their lunch period. Before she could meet with teachers. Neustadter was ordered to go to Principal Freeman's office. In his office. Freeman told her she could not put Union flyers and notices in employee mailboxes without his approval and permission. Freeman then interrogated

Freeman's denial of the assertions in the pleadings, coupled with the absence of direct testimony by Neustadter of any suggested reprisal by Freeman for future meetings with employees lead me to conclude that Freeman did not threaten Neustadter with reprisal for meeting with employees at the school. It is further concluded that Freeman did not tell Neustadter that he did not want her to come to the school. By her own testimony. Freeman told her he did not want her to come to the building and tell him how to run the school. This is not a prohibition against coming to the campus, or meeting with teachers at the campus. By Neustadter's own testimony. Freeman said nothing to her about actions against her for continued advocacy on behalf of the faculty.

8. The October 19 Incident (Neustadter)

ITA planned to hold a rally at the District office on October 22. ITA was encouraging teachers to come out and

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> Neustadter as to what she was doing at the school and what she intended to discuss with the employees. Neustadter then left the office and met with the teachers. Following the meeting, at which teachers expressed various concerns about working conditions at Inglewood High School. Neustadter returned to Freeman's office to discuss these concerns with Freeman. Freeman threatened Neustadter and the employees working at Inglewood High School with unspecified reprisals if she persisted in meeting with employees at that school, and told Neustadter that he did not want her coming to his school and that he was the "chief" at his school and would run the school anyway he wanted.

support the negotiations effort and were providing picket signs for teachers. The individual building representatives were responsible for making picket signs for the teachers in their respective buildings.

On October 19, 1985 Neustadter personally delivered poster boards and wooden sticks to many of the school sites, often leaving them at the school office. During this mission she went to the Inglewood High School office and spoke to the office secretary. She identified herself as president of the Inglewood Teachers Association and told the secretary she had some materials she wanted to give to Dillen. The secretary told her she should take the materials down to Dillen's room and gave her directions to Dillen's classroom.

She went to Dillen's classroom and spoke with Dillen for less than a minute. Just as she was about to leave she was told by Mr. Brownley, the dean of students, that Freeman wanted to see her in his office immediately.

She went to Freeman's office and. she said, he immediately began screaming at her saying that she had no right to go to Dillen's classroom and that he had stated previously that whenever she came to the school site she was to let him know she was there. Neustadter said she tried to explain to Freeman that she had come to the office and had stated her purpose after identifying herself to his secretary, but, she said, he continued to scream and intimidate her.

Both the October 2, and October 19, meetings, she said, made her feel threatened. She was very intimidated, his being over six feet tall and she being four feet ten and one-half inches tall. The threat, she said, was due to the proximity and the volume of his voice.

On cross-examination, she admitted she could have left the materials with the secretary, as that is what she had done with the other schools. She denied that Freeman had indicated to her at the October 2 meeting that she should check with him before visiting the teachers. She said it was on October 19 that he told her that was what he wanted her to do.

She was aware of District policies requiring visitors to check in with the office, she said, before going onto a campus. The policy, she says, is to report to the office, it does not say the principal's office. However, she assumes that the policy means the principal's office.

She said October 19 was the first time she had heard the Freeman "scream" scream. Teachers had told her prior to that date that Freeman often raised his voice.

Freeman testified that it was not sufficient that a visitor report to the secretary. They must talk to either the principal or the administrator. The reasons are for security, safety, and non-interruption of the teaching period. They do not even allow subpoenas to be delivered on the campus.

He had directed his dean of students to ask Neustadter to return to his office and make her business known, because she

did not get to the principal or an administrator when she came in.

He recalled that he reminded Mrs. Neustadter that what he would like was "common courtesy." He recalled that at that moment she began to tell him what ITA was and what it did not have to do. He reminded her that "it was a new day, a new issue, a new principal, and new things are done and you'll have to do it this way." This meant that she had to check in with the administrator or the principal. He requires the same of everyone.

Again. Freeman was referred to the amended unfair practice charge on page 5, line 16, where it was stated, "she was then ordered to go to Freeman's office where she was again threatened and told by Freeman that she had no right to visit Inglewood High School and that he was the 'chief.'"

Freeman testified that he never told Mrs. Neustadter that she could not have meetings, or that she did not have the right to visit Inglewood. He thought that he had told her that she had no right to go out on the campus without coming by the principal's office. That was the issue, he said, Neustadter was insisting on her right to go where she pleased because she was an ITA president and he told her she had no right to walk on the campus without letting him know that she was there.

Freeman testified that he is very animated and he talks loud anywhere. In his perception he does not scream at

people. However, he testified that he thought "when a person is on the carpet and when a person knows he or she has done something, a whisper will sound like a thundercloud." It has been his experience at Inglewood High School that anything you say is perceived to be a threat. "A good PR job that they've done and I certainly don't talk with my head in my hand." He denied that he is excitable, but he is "very animated," he said. He denied that he ever screamed at Mrs. Neustadter. saying, "no, I don't scream at that dear person." He denied that he ever screamed at Dillen. But he has talked to them in an "animated, authoritative fashion, absolutely," he said.

ISSUES

The issues in this case are whether the District violated Government Code section 3543.5(a), (b) or (c) by any of the following:

1. Refusing and failing to implement the terms of the January 1984 settlement agreement regarding bell schedules for fall 1984;

2. Assigning level B classes to Dillen for fall 1984;

3. Requiring building representatives to advise the principal at Inglewood High School when Association materials were to be placed into the teachers' mailboxes;

4. Imposing reprimands upon Robert Dillen for placing materials into teachers' mailboxes without prior notice to the principal;

5. Threatening the Association President Neustadter with reprisals for meeting with employees at Inglewood High School or for failing to notify the principal of her visit to the classroom of a teacher building representative.

CONCLUSIONS OF LAW

A. The Bell Schedule

It is undisputed that the District did not implement the terms of the settlement agreement calling for conditions to prevail in September 1984.

The District urges that PERB does not have the jurisdiction to enforce agreements between the parties, relying on University of California (1983) PERB Decision No. 362-H.[11]

The Association argues that under the holding of Grant Joint Union School District (1982) PERB Decision No. 196 that the District's failure to implement the settlement agreement was a violation of its duty to bargain in good faith.

Subsection 3541.5(b) provides:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

In Grant, supra, the Board reversed in part a Board agent's dismissal of an unfair practice charge for failure to state a

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[11] In that case the PERB upheld a Board agent's dismissal of an unfair practice charge for failure to state a prima facie case.

prima facie case where under the Board's analysis of that case, the allegations of the charge suggested conduct amounting to an unfair practice charge in addition to constituting a breach of the negotiated agreement. Noting the express proviso on the Board's statutory limitation on jurisdiction (that would not also constitute an unfair practice) the Board reasoned that conduct constituting an unfair practice was not beyond its authority to remedy, just because the conduct might also constitute a contract breach.

Said PERB:

> The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370], Perry Rubber Co. (1961) 133 NLRB 275 [48 LRRM 1630].
>
> In the words of the National Labor Relations Board:
>
> > . . . [Such] conduct. . . . [amounts] to a rejection of the most basic of collective bargaining principles . . . the acceptance and implementation of the bargaining reached during negotiations. Sea Bay Manor Home (1980) 253 NLRB 68 [106 LRRM 1010. 1012].
>
> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy.

> not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160; C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043]. By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. (Citation omitted.)

Here the parties had negotiated a new policy on bell schedules and passing time between classes. That policy was to take effect commencing with the fall 1984 school term. The District refused to implement the negotiated policy, and the refusal had a generalized effect and continuing impact upon the terms and conditions of employment of bargaining unit members.

The University case, relied upon by the District, is distinguishable from the facts of this case. There the settlement agreement, among other things, called for reclassification of a gardener to a level not given by the University. The breach did not reach the level of having generalized effect or continuing impact upon terms and

conditions of employment of bargaining unit members generally, but upon only one individual.

The District contends that it was free to reduce the passing period by five minutes and to increase the lunch period by five minutes. Those actions are not negotiable, argues the District, because they do not affect the length of the working day or existing duty-free time, relying on San Mateo City School District (1980) PERB Decision No. 129; affirmed in (1984) PERB Decision No. 375a. It distills the effect of the failure to implement the agreement as an "unlawful reduction of the passing period between three and four by one minute and increased the third period by one minute," but contends that the change is de minimis.[12] Because of the pending negotiations and assumed imminent settlement, the District wished to avoid altering the bell schedule mid-term.

San Mateo, supra, however, does not empower the employer to reduce the passing periods or to increase lunch periods unilaterally. It does stand for the principle that educational issues, central to the maintenance of the mission of the school, are beyond the scope of representation. Those matters affecting the hours of employees, including preparation time, duty-free time and lunch periods, are subject to negotiations.

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[12]The District does not argue that the effect of the changes in time between periods or duty-free time is not negotiable or that ITA failed to show any impact on working conditions by the change in the bell schedule.

Here, the District was free to adjust the students passing time, but was obligated to negotiate with ITA on the decision to the extent it affected teachers' duty-free time. As the facts show, the District abolished a 15-minute student nutrition period preceding the third class period. While five minutes was added to the lunch period and one minute to each passing period, there was also added one minute to each class period. That addition resulted in less duty-free time teachers previously enjoyed as part of the nutrition period. The settlement agreement, which the District failed to implement, and which is the basis of this charge, was to revive at least six minutes of duty-free time by the addition of that amount of time to the passing time between the third and fourth periods. In addition, the third period was to be reduced by one minute. According to Neustadter, the agreement went to reinstating seven-minutes.

The District's de minimis argument is likewise rejected. In Moreno Valley Unified School District (1982) PERB Decision No. 206. the Board held that the reduction of five minutes preparation time was not so negligible as to be insignificant, because cumulative effects of changes made on a minuscule basis would ultimately alter hours of employment. Similarly, here the seven minutes of duty-free time denied teachers in the fall of 1984, while small, could, if authorized, be undertaken again and thus drastically affect working hours.

Here all bargaining unit members of the two high schools were affected for the fall term of 1984. This was due to the failure to implement the agreed-upon policy of the bell schedule and passing time and was the alteration of an established policy mutually agreed upon by the parties during the negotiation process. As a result teachers had seven fewer minutes duty-free time. The District's failure to implement the agreed-upon bell schedule was a violation of its duty to bargain in good faith, mandated by subsection 3543.5(c). There are also concurrent violation of subsections 3543.5(b) and (a). San Francisco Community College District (1979) PERB Decision No. 105.

B. Inglewood High School

1. Assignment of Level B Classes to Dillen

The ITA charges that Dillen's fall 1984 class assignment to all B level classes was made by the District in reprisal for his protected activities.

Under subsection 3543.5(a) it is unlawful for the employer to:

> 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.

In Novato Unified School District (1982) PERB Decision No. 210. the Board held that a party alleging discrimination or reprisal has the burden of making a showing sufficient to

demonstrate that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains.[13] Unlawful motive is the specific nexus required in the establishment of a prima facie case. In recognition of the fact that direct evidence of motivation is seldom available, unlawful motivation may be demonstrated circumstantially and from the record as a whole. Carlsbad Unified School District, supra; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party is able, by direct or circumstantial evidence, to raise the inference that the employer was motivated to take adverse personnel action by its knowledge of the employee's protected activity, the burden shifts to the employer to demonstrate that it would have acted as it did regardless of the employee's participation in protected activity. Novato, supra; Wright Line. A Division of Wright Line. Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]; NLRB v. Transportation Management Corp. (1983) ___ U.S.____ [113 LRRM 2857]; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721.[14] [14]

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[13]In order to prevail, the charging party must prove the charge by a preponderance of the evidence. PERB regulation 32178.

[14]The construction of similar or identical provisions of the NLRA, as amended. 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g. San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1. 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608. 616.

To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity, Novato Unified School District, supra; Moreland Elementary School District (7/27/82) PERB Decision No. 224. Such knowledge, plus other factors cited by PERB in Novato, may support the inference of unlawful motive. Said PERB:

> The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive.

The mere fact that an employee is participating in union activities does not insulate him or her from discharge for misconduct or give the employee immunity from routine employment decisions. Martori Brothers Distributors v. Agricultural Relations Board, supra. 29 Cal.3d 721. Rather, once employee misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities.

Applying these standards to the instant case, it must be concluded that ITA failed to raise an inference of unlawful motive in the District's assignment of Dillen's fall 1984 class schedule.

The record shows that Martin made the assignments of schedules in August 1984. resulting in Dillen's assignment of five level B classes. The record also shows that she was aware of Dillen's active participation in ITA activities, as she chaired the faculty meetings prior to January 1984. at which Dillen made ITA announcements. The record is less clear, however, contrary to ITA's arguments, of Freeman's knowledge of Dillen's ITA activity. Dillen only testified that he "assumed" Freeman was aware that Dillen was building representative because "it wasn't hidden information" and he did his mailbox work in an open manner. However, Freeman's knowledge of Dillen's protected activity is not material to a resolution of the instant issue as the findings have established that Freeman had no input into giving Dillen the five level B classes as Martin was the one who made the assignments.

As to timing. Martin's decision to give Dillen five level B classes appears remote from his activity of outlining ITA activities at faculty meetings which she chaired. Furthermore. Dillen had been site representative for over one-half of his fourteen years at the District and four of the last three years (1982-85) during which Martin was scheduling classes and for which he had no complaints, even for the years during which he had been assigned only one level A class. There is simply nothing in the record to suggest that some interim event would

trigger Martin's adverse reaction to Dillen and cause her to give him all level B classes.

Other indicia for finding an inference of unlawful motive are lacking here altogether. According to the undisputed testimony of Martin, six other teachers had all level B classes. (By his own determination Dillen had found two other teachers in his department who had all level B classes.) There is no showing that the other teachers were given such classes for protected EERA activity. Thus, there is no disparagement of treatment to Dillen.

Likewise absent is any showing of departure from procedures and standards in Dillen's assignment. Dillen only testified that he had never had all level B classes, not that no teacher had ever been so assigned. The procedures by which Martin considered the needs of the classes and preferences of teachers were standard factors employed in making the assignment. Dillen's own spring 1984 preference re-guested one level B class and did not specify the rest were to be level A by preference. Finally, the District's explanation of the assignment brings no inference of unlawful motive. The fact of the matter is that there were more level B classes than level A classes and more teachers were required to teach level B classes.

In sum, an inference cannot be drawn from the foregoing observations that Martin was motivated unlawfully in making the assignments for Dillen in the fall of 1984.

Even if an inference is to be raised, it is found that the District has met its burden to show that the assignment would have taken place notwithstanding Dillen's protected activity. As the testimony of Martin reveals, the District had more level B than level A classes and thus needed more teachers for the level B assignments. Six other teachers were given level B class assignments also. For the foregoing reasons, it is found that Dillen's fall 1984 class assignment of all level B classes was not a violation of the EERA. This portion of the charge must be dismissed.

2. The Prior Notice Requirement Regarding Use of Mailboxes

Shortly after his arrival at Inglewood High School. Principal Freeman told the teachers that he was to be notified if anyone was going to place materials into the teachers' mailboxes. This rule was imposed only by him. at Inglewood, and not at any of the other schools operated by the District.

Section 3543.l(b) provides:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

The express right to use institutional mailboxes is subject to reasonable regulation. If Freeman's rule of prior notification

is reasonable, then no violation could follow for his imposition of the rule.

In Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99, the Board examined the employer's regulation on use of school mail systems for reasonableness. After concluding that the use of mail systems was a guaranteed right under the EERA, the Board held that the employer regulation under section 3543.1(b) should be narrowly drawn to cover the time, place, and manner of the activity, without impinging on the content unless it presents a substantial threat to peaceful school operations.

The District argues that Freeman's re-guest for prior notice regarding placement of material in the mailboxes does not regulate or impinge on the content of the materials, but enables him to prevent unauthorized use of the boxes. Freeman, urges the District, does not review the materials for content and has never censored materials or prevented teachers from using the boxes. This simple rule, applied to all users of the mailboxes, and not just ITA, urges the District, is a reasonable rule.

The burden of demonstrating reasonableness rests with the employer. Richmond, supra. On its face, a simple requirement of notice of intent to use the mailboxes arguably would stand as a rule within the meaning of time, place and manner of an activity authorized by Richmond. The facts of this case do not

support the conclusion that prior notice for use was the basis for the rule.

At the onset, it is noteworthy that prior notice was not required for use of the Inglewood Unified School District mail system but only at Inglewood High School. This is just the converse of the situation in Richmond, supra, where the Board found, as a basis for holding a regulation unreasonable, that materials precluded from the mail systems could be placed directly into the teacher mailboxes. Such inconsistency mitigated against any special interest on the part of the employer for justification of the rule. Here, neither the District itself nor the principals in the 18 other schools within the District, required such prior notice.

Turning to the reasons for the rule, or "practice," as Freeman styled the requirement, it is likewise concluded that no basis in fact serves the District's interest in preventing a substantial threat to peaceful school operations.

Freeman required the prior notice as a matter of "courtesy" to the principal as custodian of the mailboxes. He required the prior notice of anyone who was going to use the mailboxes. Sometimes he would look at the material but, if he knew the person, he did not always ask to see the material. The purpose of the rule was. in his words:

> Some persons might be offended by some things that are placed in the box. They might not want to be involved with it.

> Students might get hold of materials that would be offensive to parents, because of the nature of the material, i.e., religious nature.

Freeman cited an instance where someone placed materials on tax sheltered annuities into the mailboxes and he had to admonish the person regarding their failure to get District approval for placement of the material into the mailboxes.

He wanted prior notice from the ITA so he could defend the action. This meant, he said, that "there are members of the faculty who are not ITA members and who don't want to receive information from ITA." This meant that they have a right not to receive the ITA material and he wanted everyone to have their rights taken care of. Despite these reasons for wanting prior notice. Freeman then testified that he really only wanted to know that materials were being placed into the boxes, and was not really interested in what was in the materials. The reasons are inherently inconsistent, and standing separately have no basis for justification of the rule. They are inherently inconsistent because, in the first place. Freeman refused to call it a rule, but rather, in his words, "a practice, more or less." This suggests less than strict observance in application and renders the practice suspect, as it appears to serve to apply at his whim or pleasure.

In the second place. Freeman could not tell if the materials were offensive to teachers or to children, unless he were to look at each document. By his own testimony, he often

did not look at the materials. How could he determine its potential for offensiveness unless he looked at and read the materials?

In addition. Freeman's concern about access to "offensive material" by children could be more appropriately addressed in regulations concerning the time, place, manner, and content of the materials that would provide advance notice to anyone using the mails. Once again, the absence of a District-wide concern (by the absence of a District-wide rule on the issue) mitigates against Freeman's concern and/or practice.

PERB has already addressed the role of the employer in juxtaposition of employees who might choose to refrain from engaging in employee organization activities. In Long Beach Unified School District (1980) PERB Decision No. 130 PERB stated:

> While the district may legitimately promulgate rules to prohibit disruptive conduct, the EERA does not establish the public school employer as the guardian of the employees' undisputed right to refrain from participating in the activities of employee organization . . . . In balancing the right of access of organizations and the right of individual employees to participate or refrain from participating in organizational activities, the Board finds the latter right is adequately protected in that disinterested employees are not a captive audience and may simply leave the nonworking areas or otherwise ignore the organizational activities.

See also San Ramon Valley Unified School District (1982) PERB Decision No. 230. The Long Beach case dealt with employee

organizations' rights to meet with employees in nonworking areas during nonwork time. This case deals with the statutory right to use mailboxes and parallels the right of access of employee organizations. Employees desirous of refraining from the activities of employee organizations are no more captive audiences in receiving materials in their mailboxes, which upon receipt they can immediately discard, than a disinterested employee in a nonwork area, who is free to leave when confronted with hearing information he or she is disinterested in. It is simply not Freeman's job to monitor mail on behalf of disinterested employees.

The record is barren of any evidence of a District rule regarding prior approval of the District for certain kinds of materials prior to insertion in mailboxes. The record does show that no other school within the District, nor the District itself, had a policy of prior notice to the principal regarding placement of materials into mailboxes. The absence of a district-wide rule is contrary to Freeman's contention that his practice of prior notice is reasonable.

The District argues that Freeman required no more than notice of the fact that material was going to be placed into the mailboxes. The facts do not support the argument. Freeman explained the rule to protect children from offensive materials and non-union unit members from union materials. Neither purpose could be served without review of the materials to be

placed in the boxes. In addition. Freeman sanctioned Dillen twice for failing to meet his practice. The first letter, dated October 19. criticized Dillen for failing to show materials to the principal. On October 26 he was given a letter for placing material into the mailboxes without Freeman's "prior approval." Clearly, Freeman wanted to see material when he wanted to see it. and at his determination would grant permission to place materials into the boxes without such review.

The foregoing reasons offered by the principal, and the inconsistency of application of those reasons, leaves one with the feeling that there were no clear standards and procedures, leaving the practice to the unfettered discretion of the principal, a basis itself for holding the practice unreasonable. See Richmond, supra.

The rule being unreasonable, its imposition is a violation of the employee organization's rights under section 3543.5(b), San Ramon, supra.[15] Imposition of the rule may also constitute interference within the meaning of section

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[15]ITA also urged that the prior notice rule was unilaterally adopted in violation of the employer's obligation to bargain in good faith. The District filed a motion to file a supplemental brief on the issue contending that ITA had first raised the unilateral adoption issue in its reply brief and that such charge was barred by the statute of limitations as the rule was announced by Freeman in January of 1984. Because of the disposition of the rule itself herein, however, it is unnecessary to address either contention.

3543.5(a). Richmond, supra, applying the test of Carlsbad Unified School District (1979) PERB Decision No. 89. Here, however, no harm to the Association occurred as a result of the imposition of the rule. As Dillen testified, there was never a refusal to allow the placement of material into the mailboxes. Yet, as discussed below. Dillen was reprimanded for failing to notify Freeman of the placement of materials into the mailboxes. Clearly, reprimanding an employee organization representative for undertaking Association rights is harmful within the meaning of section 3543.5(a). As found above, there is no operational necessity for the rule and thus there is interference under section 3543.5(a).

3. Dillen's Letters and Suspensions with Pay

It has been found that the imposition of the prior approval practice by Freeman was an unlawful violation of the employee organization's right of access to the mailboxes, and in addition, interference with employees' rights to participate in the activities of employee organizations. On October 19 Dillen was given a written warning admonishing him for stuffing the mailboxes without first having shown them to Freeman. On October 26, 1984. Dillen was suspended, with pay. for failing to notify Freeman, in advance, of placement of materials into the mailboxes. As the imposition of the rule has been found to be a violation, sanctioning an employee for noncompliance must also be a violation. If placement of the materials into the

mailboxes without the approval of the principal was a right of the employee organization, then an employee engaged in that activity must also have a similarly protected right. Hence, sanctioning Dillen for his protected activity is a violation of section 3543.5(a).[16]

The District contends that even if the prior notice requirement were not a reasonable rule, the letters should stand because they were given because of Dillen's insubordination. On both October 19 and October 26. Dillen was ordered to meet with Freeman and he refused without the presence of a witness. Thus, argues the District. Dillen's insubordination was just ground for the letters.

ITA argues that while it does not raise the Weingarten rights[17] as a direct issue in the case, the District took action against Dillen because he asked for a witness and that under the authority of Marin Community College District, such

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[16]ITA makes no argument, nor requests any remedy, for the November 2, 1984 suspension of Dillen. Accordingly, no legal conclusions are drawn from that incident.

[17]The Weingarten rights refer to the principal of NLRB v. J. Weingarten. Inc. (1975) 420 U.S. 251, 88 LRRM 2689, wherein the Supreme Court upheld NLRB's conclusion that employees have a right to a union representative at investigatory meetings where there is a reasonable expectation of disciplinary action. PERB has adopted this principle. Marin Community College District (1980) PERB Decision No. 145. See also Redwoods Community College District (1983) PERB Decision No. 293.

action is a reprisal in violation of section 3543.5(a).[18]

The District's argument does not have support in the record. There is no showing that Freeman would have called Dillen into his office but for the stuffing of the box incidents. To prevail in its argument, the District would have to show that it would have sanctioned Dillen despite the absence of the mailbox incidents. In both cases (the October 19 and 26 events) it was Dillen's failure to notify (or seek approval from) Freeman before stuffing the boxes that precipitated the call for the meeting. In both cases the letters were issued because of the failure to give notice to Freeman prior to inserting materials into the mailboxes and because Dillen refused to meet with Freeman, without a witness, to discuss that failure. It is simply not possible to separate the two events. In addition, even if it were to be assumed that Dillen's refusal to meet with Freeman without a witness was not protected activity, thus giving rise to reprimand for "mixed conduct," some of which is protected and some of which is not. there is no showing that the District would have issued the letters on the failure to meet alone issue. Such "mixed conduct" cases must be resolved, in the absence of such

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[18] The District does not argue that Dillen's re-guest for a "witness" was not adequate notice to the employer triggering Weingarten rights. Failure to place the employer on notice of the desire for representational rights can constitute waiver thereof. See Fremont Union High School District (1983) PERB Decision No. 301 and NLRB cases cited therein.

showing, in favor of the charging party. See San Ysidro School District (1980) PERB Decision No. 134; Belridge School District (1980) PERB Decision No. 157.

4. The Neustadter Incidents

ITA contends the employer's conduct is unlawful interference with Neustadter's exercise of her protected rights in that Freeman required Neustadter to show him all union materials and that Freeman physically intimidated her when he screamed at her for distributing union materials.

In Rio Hondo Community College District (1980) PERB Decision No. 128, PERB fashioned a standard for employer's expressions of views on employment related matters. Employers' views that must be allowed are not without limits, said PERB, "it must necessarily include both favorable and critical speech regarding a union's position provided the communication is not used as a means of violating the Act." (Citation omitted.) The standard to be applied, said PERB, is that "an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA."

The District argues that on October 2 Freeman simply told Neustadter that he was in charge of the school, which is true, and that he did not want her telling him how to run the

school. Neither statement is unlawful argues the District. The District finds that the fact that Neustadter stood up to Freeman and told him that if they could not resolve the problems that she would take other steps simply negates any conclusion that she was intimidated.

Regarding the October 19 event, the District urges that Freeman was simply advising Neustadter of the requirement that she notify the principal or the administrator that she was on campus and that it was not sufficient for her to report to clerical personnel. The fact that Freeman may have been yelling at her. argues the District, does not transform lawful statements into unlawful threats. In addition, argues the District. Neustadter. a "hardened and experienced" union representative who was aware of Freeman's often raised voice, could not have been deterred by his conduct.

ITA argues, in response to the District's contention that Neustadter was not intimidated, that under the holding of Clovis Unified School District (1984) PERB Decision No. 389. it was not required to prove that Neustadter was in fact intimidated. In Clovis, the Board cited and relied on NLRB v. Triangle Publications (3d Cir. 1974) 500 F.2d 597. 598. where the court stated:

> That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may

> reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

In the present case, Neustadter testified that Freeman made some "unfriendly remarks" about the union. The Board has ruled that a negative attitude toward a union may not. without more, support a conclusion of unlawful motive. Said the Board ". . .we note that an employer may harbor adverse feelings toward an employee organization so long as it refrains from taking action against any employee because of the exercise of rights guaranteed by the Educational Employment Relations Act." Los Angeles Unified School District (1985) PERB Decision No. 514. I find no substance to Neustadter's testimony upon which a conclusion of threat of reprisal or force or promise of benefit can be drawn. Coupled with Freeman's statement of the rule regarding prior notice for mailbox materials presents no additional ground for finding a violation. Contrary to ITA's arguments, there was no required showing of materials to Freeman. Neustadter testified only that he stated the rule, not that he required her to show materials. Nor was there any testimony on her part about what consequences, if any. there would be if she failed to show him materials. Hence there was no threat of reprisal.

Freeman did not threaten Neustadter for having met with the teachers nor did he tell her he did not want her to meet with employees. Freeman may have made some unfriendly remarks about

ITA. and he spoke with a loud and authoritative voice to Neustadter. This is not to condone what may have been an uncomfortable situation for Neustadter. By Neustadter's own testimony, he told her. albeit in a loud voice, that he did not want her telling him how to run the school; however, he did not suggest any form of reprisal for her exercise of rights as president of the ITA. Also by her own testimony, the intimidation was from the proximity and the volume of Freeman's voice and not a threat of reprisal. In fact, she stood up to him and told him that if they could not work things out. she would seek recourse elsewhere. She did go to the District superintendent to complain about Freeman's conduct.

With regard to the October 19 incident, again Neustadter's own testimony reveals that Freeman's admonition to her related to her failure to notify him or the other administrator of her intended visit onto the campus. While Neustadter had told the secretary and from her unrefuted testimony she was simply directed to Dillen's classroom for the delivery of the materials to him, which mitigates against Neustadter's action of going to the classroom. It does not seem unlawful for Freeman to call her in and recite the rule as it was enforced.[19]

What is left is the confrontation between Neustadter and Freeman where the latter, substantially taller than the other.

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[19]ITA makes no argument concerning the rule itself.

spoke in a loud if not screaming manner at the October 19 meeting regarding her visiting the campus without seeing him first and his role as the chief of the school.

Nothing in Neustadter's testimony describing the October 19, 1984. event suggests a threat of force or reprisal for her organizational activities. Again, not to condone Freeman's character of screaming at employees, the volume of his voice cannot produce unlawful conduct. Neustadter has been an active member of ITA for eight years, including two terms as president, and a member of the negotiating team as well as its chairperson. She is a member of several CTA and NEA committees and has attended numerous training conferences on negotiations. As of October 19. 1984. she had had one prior confrontation with Freeman and was aware of his authoritative and loud style. She was an experienced negotiator and had training in negotiation sessions. Freeman was loud, if not screaming, in telling Neustadter of the rule regarding prior notice before visiting the campus. The ITA does not contest the rule. Neustadter, an experienced negotiator and two-term president was aware of Freeman's loud and authoritative style. She had met with him before. Under these circumstances, I do not find Freeman's conduct tending to coerce or intimidate employees generally, on Neustadter in particular, in the exercise of rights protected by the EERA. Accordingly, the charge, insofar as it relates to Neustadter, must be dismissed.

SUMMARY

In sum. it has been found that the District violated its obligation to bargain in good faith in violation of section 3543.5(c) with concurrent violations of 3543.5(a) and (b) by unilaterally failing to implement the agreed-upon bell schedule for the fall of 1984. Further it has been found that the District denied the employee organization's right to access to teachers' mailboxes by Freeman's imposition of the prior approval requirement in violation of section 3543.5(b). This is also a violation of section 3543.5(a) by interference in employees' right to participate in employee organization activities. Finally, it has been found that the District violated section 3543.5(a) by imposing reprisals upon Dillen for his exercise of protected activity, to wit, placing the ITA materials into the mailboxes without prior approval from Freeman.

REMEDY

Under section 3541.5(c) PERB has the power.

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

It has been found that the District violated subsections 3543.5(a). (b) and (c) by unilaterally failing to implement the agreed upon bell schedule in the fall of 1984. It has been

found that the District violated subsections 3543.5(a) and (b) by imposing a prior approval for mailbox insertion at the Inglewood High School. It has been further found that the District violated subsection 3543.5(a) when it issued memoranda to and imposed a suspension with pay on Robert Dillen. on October 26. 1985. It is appropriate that the District be ordered to cease and desist from such conduct.

Where an employer has made an unlawful unilateral change, a remedy requiring the restoration of the status quo is appropriate to effectuate the policies of EERA because it restores, to the extent possible, the positions the parties occupied prior to the unilateral change. Rio Hondo Community College District (1983) PERB Decision No. 292. Corning Union High School District (1984) PERB Decision No. 399, fn. 4. p. 10. A return to the status quo will not be ordered, however, where after the unilateral action, the parties have reached agreement on the issue. See Delano Union Elementary School District (1982) PERB Decision No. 213a. Here, the evidence shows that agreement on the reopener provisions, including hours and calendars, were reached in February of 1985. Hence a return to the status quo ante will not be ordered. It is appropriate, however, to make the employees whole for the unilateral reduction of their duty-free time. San Mateo City School District (1984) PERB Decision No. 375a. Under the authority of Corning, supra, the appropriate remedy

may either be to give the employees so affected corresponding time off or simply monetary compensation for the extra time worked. Here the District eliminated seven minutes of duty-free time per day. This change was effective from the opening day of school in September of 1984 until the terms of the new agreement was reached in February of 1985. The District will be ordered to offer employees whose duty-free time was reduced by seven minutes per day a corresponding amount of time off and if the parties cannot reach agreement as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation for the additional time worked. Interest at 10 percent will also be ordered. Antioch Unified School District (1985) PERB Decision No. 515. (Department of Transportation (1984) PERB Decision No. 459-S.)

It is further appropriate to order the District to remove and destroy the October 19 and 26 memoranda from Robert Dillen's personnel file. Marin Community College District (1980) PERB Decision No. 145.

The ITA seeks attorneys' fees and cost of litigation for the unfair practice charge. Relying on Fresno Unified School District (1982) PERB Decision No. 208. ITA argues that the District's unilateral action leading to the first unfair practice (LA-CE-1841) and its subsequent failure to implement

the settlement agreement constitutes "repeated and flagrant violations" of the Act. The PERB has held that attorneys fees should be awarded upon a showing that the defense to an unfair practice charge is "without arguable merit." Cumero v. King City High School District Association. CTA/NEA, et al. (1982) PERB Decision No. 197. 167 Cal.App.3d 131 (1985). or if there was a showing of "frivolous or dilatory litigation" but should be denied ". . .if the issues are debatable and brought in good faith." Unit Determination for the State of California (1980) PERB Decision No. 110c-S. Here the District did not implement a revised bell schedule pursuant to an agreement in settlement of an earlier unfair practice charge. The refusal to implement the bell schedule was predicated upon the District's supposition of settlement of reopener negotiations which included longer year and workday issues. While the supposition did not alleviate against a finding of unilateral action in violation of the EERA, it does mitigate against the absence of arguable merit. The parties were in negotiations in the summer and fall of 1984 and there is no evidence to show that the District's belief of imminent settlement was without foundation. The District's conduct does not constitute frivolous or dilatory tactics and presented debatable issues and was ostensibly brought in good faith. Accordingly, the request for attorneys fees is denied.

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

PROPOSED ORDER

Upon the foregoing Findings of Fact and Conclusions of Law and the entire record in the matter, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Inglewood Unified School District, its Board of Trustees, Superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Unilaterally altering the high school teachers' duty-free time without providing notice and a reasonable

opportunity to negotiate to the Inglewood Teachers Association. CTA/NEA.

2. Denying to the Inglewood Teachers Association, CTA/NEA rights guaranteed by the Educational Employment Relations Act, including the right to represent its members by requiring prior approval for use of Inglewood High School teachers' mailboxes.

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

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

1. Grant to each of the employees harmed by the refusal to implement the agreed-upon bell schedule the amount of paid time off which corresponds to the amount of time worked as a result of the reduction of the duty-free period. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional time worked. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

2. Remove and destroy the October 19 and 26, 1984, Freeman memoranda from Robert Dillen's personnel file.

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

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

IT IS FURTHER ORDERED all other portions of the unfair practice charge and complaint are DISMISSED.

Pursuant to California Administrative Code, title 8. part III. section 32305, this Proposed Decision and Order shall become final on November 26. 1985. unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8. part III. section 32300. Such statement of exceptions and supporting brief must be actually received by the Public

Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 26, 1985. or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8. part III. section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8. part III. section 32300 and 32305.

Dated: November 6, 1985

Administrative Law Judge
Gary M. Gallery