STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2349
v.	)	PERB Decision No. 715
LAKE ELSINORE SCHOOL DISTRICT,	)	December 29, 1988
Respondent.	)	

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

Before Porter, Craib and Shank, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Lake Elsinore School District (District) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5, subdivision (c) and, derivatively, subdivisions (a) and (b) of the Educational Employment Relations Act (EERA).[1]

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

Section 3543.5 provides, in pertinent part, as follows:

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

FACTUAL SUMMARY

The charge in the instant case was filed by the Elsinore Valley Education Association (EVEA or Charging Party) on March 3, 1986. It alleged that the District violated subdivision (c) of EERA section 3543.5 by failing to give EVEA notice and the opportunity to bargain the negotiable effects of the District's nonnegotiable decision to reduce the hours of instructional aides.

The background of this case is as follows. The District is comprised of five elementary (K-6) schools: Wildomar, Hayman, Machado, Elsinore and Butterfield. Wildomar and Hayman schools are located at the same site.

The School Improvement Project (SIP), a program in existence at all five schools within the District, is a state categorically-funded program designed to provide educational assistance to students in the subject areas of reading, mathematics and language arts. (Ed. Code, sec. 52000.) The Education Code mandates the establishment of school site councils which are responsible for developing plans for the use of SIP funds. It is composed of each school site's principal,

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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.

certificated and classified representatives, as well as students and parents. (Ed. Code, sec. 52012 et seq.) The school improvement plans for each school site are developed by the site councils consistent with the District's general guidelines for adoption by the District's board of trustees upon the recommendations of the site councils. (Ed. Code, sec. 52034.)

The record showed that SIP aides performed a variety of tasks. In addition to monitoring students after a teacher-directed lesson, they provided students with one-on-one help with assignments. On some occasions, while a teacher worked with one reading group, the aide would work with others to reinforce a lesson.

The SIP instructional aides also performed a large number of tasks which were not directly related to instructing students. For example, the aides assembled make-up work for absent students, corrected papers and recorded grades, supervised children during the physical education period and performed preschool yard duty, and administered minor first aid to students. They also telephoned parents and scheduled conferences, maintained classroom bulletin boards, prepared art projects and cleaned up after same, procured educational supplies, and xeroxed materials.

The SIP operates on a three-year cycle which commenced in the 1982-83 school year. During the summer of 1985, there was a surge of growth in the District's student population. Specifically, between the 1984-85 and 1985-86 school years,

enrollment in the District increased by 13 percent, with 65 percent of that increase occurring at the K-3 grade levels. The number of certificated staff was accordingly enlarged in order to accommodate the new students.

During the spring of 1985, the school site councils requested the following increases in the number of instructional aides for school year 1985-86:

Site Council	SIP Aides 1984-85	SIP Aides Requested 1985-86
Elsinore	8	9
Machado	10	14
Butterfield	14	16
Wildomar/Hayman	14	15
Total	46	54

The District's coordinator of projects, LaVerne Carlson, working under the supervision of Director of Personnel Keith McCarthy, reviewed the site councils' requests for additional aides. Carlson projected the estimated cost of the 1985-86 site plans and concluded that the projected funds from the state for the SIP would be insufficient. For purposes of computing the level of SIP funding for each district, the state uses the previous year's student count. The state, therefore, distributed to the District SIP monies for school year 1985-86 based upon the student population count of 1984-85. The state SIP funds for school year 1985-86 were sufficient to fund the increase in the number of SIP instructional aides from 46 to 50. However, due to the substantial growth in student population between school years 1984-85and 1985-86, the state funding was insufficient to hire

enough SIP aides in 1985-86 so that all teachers could receive the same level of aide time they received the previous year. Further, despite the shortfall in the state SIP funds, the District adhered to its practice of not using its general funds to supplement the state SIP funds.

On August 2, 1985, Carlson submitted a report to McCarthy containing her recommendations for the number of SIP aides to be utilized for school year 1985-86. She recommended for Elsinore to have seven three-hour instructional aides, and for Machado to have twelve. For Butterfield and Wildomar/Hayman schools, it was recommended for the number of SIP aides to be increased to the level requested by the site councils (16 and 15 aides respectively). Thus, there was a net increase of four SIP aides in the District for school year 1985-86.

While some of the teachers benefited from the implementation[2] of Carlson's recommendations, most teachers experienced no reduction in aide time in 1985-86. A few teachers at each school, however, had their SIP aide time reduced, which led to the filing of the instant unfair. The record can be summarized as follows: For Elsinore, out of a total of fifteen teachers, two had increased aide time; ten teachers experienced

[2]The site plans for school year 1985-86 were accepted by the board in June 1985. Once accepted, the board still retained the latitude to modify them up until November 1985, based upon the SIP funding available from the state. The record showed that the board delegated its authority to modify the plans to Director of Personnel Keith McCarthy, who, in turn, accepted the recommendations of his subordinate LaVerne Carlson.

no change in aide time compared to 1984-85; and three teachers, Judith Avallone, Jalyne Leonhart and Tracy Scarborough, had their aide time eliminated from the previous year's level of three hours.

At Machado School, out of a total of 21 teachers, 5 teachers filled new positions for school year 1985-86, and, thus, no comparative data regarding the previous year's aide time could be obtained. Of the teachers returning, two had their aide time increased; ten teachers experienced no change in the number of aide hours as between 1984-85 and 1985-86; and four teachers, Frances Easter, Shirley Hunt, Suzanne Moore and Lynn Stuck, had their aide time reduced from three hours in 1984-85 to one hour thirty minutes in 1985-86.

At Butterfield, 12 teachers filled new positions in the District in the 1985-86 school year. Of the returning teachers, six had their aide time increased, and two teachers experienced no change in aide time. Two teachers experienced a decrease in aide time; Beverly Daniel had her aide time reduced from three hours in 1984-85 to one hour in 1985-86, while Nancy Spohn had her aide time eliminated after having received three hours of aide time the previous year.

With respect to Wildomar, six teachers had their aide time increased; two teachers did not experience any change in aide hours; and two teachers experienced decreases. In 1984-85, Sandra Barnes had one hour fifty minutes of SIP aide time. From September 1985 to January 1986, she received forty-five minutes,

and for the rest of the school year, received one hour twenty minutes. Charisse Fitzgerald had her aide time reduced from one hour fifteen minutes to one hour.

At Hayman, five teachers had their aide time increased; four teachers experienced no change; and two teachers had their aide time reduced. Lori Singelyn had her aide time reduced from approximately two hours in 1984-85, to one hour thirty-five minutes in 1985-86. Lisa Maloney had her aide time reduced from three hours to one hour thirty minutes for the latter half of school year 1985-86.

Impact of Reductions on Teachers

Four teachers testified as to the impact on their day caused by a reduction in SIP aide time. Before her aide time was reduced, Jalyne Leonhart described her workweek as constituting approximately 47 hours per week: eight hours fifteen minutes per day, plus about five hours of work at home each week. In 1985-86, Senate Bill (SB) 813 necessitated an increase in the instructional day by thirty minutes, a matter not directly at issue in this case. This, coupled with her elimination of instructional aide time, required that she spend approximately 53 hours[3] per week at school. Leonhart testified that the primary

[3]It should be noted that Leonhart's testimony equivocated concerning the amount of the increase. On one of EVEA's exhibits, she indicated that the 1985-86 decrease in instructional aide hours was the cause of her workweek increasing by at least 15 hours. However, at the hearing she testified, at one point, that her workweek was increased by six hours. At another point in her testimony, she indicated that the increase amounted to ten hours. (See p. 11, infra.)

reason why the elimination of SIP aide time contributed to an increase in her workday was because she no longer had the assistance of a SIP aide in paper correcting, helping the children with seat work, calling parents, and performing first aid. In 1985-86, Leonhart personally had to accomplish such tasks which, in turn, she testified, impinged upon her time available when she was not required to instruct students.

Nancy Spohn, a teacher at Butterfield, also testified to an impact on her instructional day caused by a decrease in SIP aide time. At the beginning of the 1984-85 school year, Spohn had three hours of SIP aide time. This was reduced to two hours ten minutes sometime between January and March 1985. She had no SIP aide time in school year 1985-86. As to impact on her workday caused by the elimination of aide time, Spohn testified that in 1984-85, she took approximately 45 minutes each day for lunch. The contract entitles each teacher to 30 minutes. After the elimination of aide time, Spohn worked through her lunch hour and ate at her desk. Spohn testified further, that she had to use planning time for doing things that her aide normally did, such as cleaning up after art projects and photocopying materials. In addition, Spohn had to assume ten minutes per day instructing physical education when she normally had a break. In all, she estimates that her workweek is approximately five hours longer as a result of not having a SIP aide.

Another witness, Fran Easter, had her aide time reduced from three hours per day in 1984-85, to one hour thirty minutes in

1985-86. As to an impact on her working day, she testified that, by losing the assistance of her instructional aide, Easter now had to prepare additional seat work, correct more papers, and gather and distribute papers to her students for them to take home. This took her approximately five additional hours per week.

Sue Moore, a kindergarten teacher, testified that her aide time was also reduced from three hours in 1984-85, to one hour thirty minutes in 1985-86. After the reduction, she had to assume the duty of supervising recess for ten to fifteen minutes, a task previously performed by her instructional aide. She also had to spend more time correcting papers, putting up bulletin boards, and escorting students to places on campus. It should be noted that the record also showed that Moore was a mentor teacher in 1985-86, and was not one the previous year. In addition, the instructional minutes for kindergarten were increased by fifteen minutes in 1985-86. In all, her workweek was increased by approximately five hours in 1985-86.

ALJ's Proposed Decision

The ALJ ultimately concluded that the District violated subdivision (c) and, derivatively, subdivisions (a) and (b), of EERA section 3543.5, by permitting the reduction of SIP instructional aide hours for some teachers. The ALJ concluded that the District, through its acceptance of Keith McCarthy's recommendations regarding the number of SIP instructional aide hours allocated to teachers for school year 1985-86, reached a

firm decision to reduce aide time, which had the foreseeable impact of lengthening the workday of some teachers. Thus, the District had the obligation, but failed to give the union notice and an opportunity to negotiate the "foreseeable impact" of its decision. Further, the reduction in aide hours resulted in not only potential, but actual effects. In reaching his conclusion, the ALJ credited the testimony of teacher witnesses Leonhart, Spohn, Easter and Moore that their instructional day was increased in 1985-86, and that this increase was caused by each teacher's reduction in aide time. The ALJ found the latter result occurred because tasks previously performed by aides now had to be performed solely by teachers, often requiring them to work extra time during the duty day, lunchtime, after school, at home or on weekends.

DISCUSSION

The utilization of SIP funds for school year 1983-84 has already been the subject of an unfair practice charge, which culminated in Elsinore Valley Education Association, CTA/NEA v. Lake Elsinore School District (1987) PERB Decision No. 646. In Lake Elsinore, No. 646, the SIP site councils at two of the five schools, Wildomar and Butterfield, reallocated SIP monies for the 1983-84 school year in a manner benefiting the entire K-6 student body, rather than merely students in K-3, as had been done since the recent origin (1982-83) of the SIP program. The reallocation of SIP funds necessitated reducing the amount of funds budgeted the previous year to pay the salaries of SIP instructional aides

in some K-3 classrooms. Accordingly, some teachers at Wildomar and Butterfield schools had SIP aides in their classrooms for fewer hours as compared to the previous year.

This Board held that the District did not have the obligation to provide the exclusive representative of the certificated unit notice and an opportunity to negotiate the possible effects of the District's nonnegotiable decision to reduce the hours of members of the classified bargaining unit. The Board relied in part on the fact that the Legislature intended for the SIP aides to be utilized to provide direct "educational assistance to the students in the subject areas of reading, mathematics, and language arts. . . ." (Ed. Code, sec. 52000.) The record in Lake Elsinore, No. 646, showed that, for the most part, teachers were aware of this legislative goal of SIP. Furthermore, the record was not clear on whether it was the reduction in SIP aide time or an entirely different factor which caused the increase in preparation time to which four teachers testified. Other factors which might have contributed included teacher experience, class size, competence of individual aides and learning difficulties of some students. Inasmuch as the reduction in SIP aide time exerted, at best, an indirect and speculative impact on the workday of teachers, the District did not violate EERA by failing to give EVEA notice and an opportunity to negotiate the "effects" of its decision to reallocate SIP funds.

Consistent with Lake Elsinore, No. 646, we reverse the ALJ and dismiss the complaint. The legislation under which SIP was established underscores that the fundamental purpose of it is to maximize direct instructional assistance to students. For example, Education Code section 52000 states, in pertinent part:

> The Legislature declares its intent to encourage improvement of California elementary . . . schools to ensure that all schools can respond in a timely and effective manner to the educational, personal, and career goals of every pupil. The Legislature is committed to the belief that schools should:
>
> . . . . . .
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> (b) Assure that pupils achieve proficiency in mathematics and in the use of the English language, including reading, writing, speaking and listening.
>
> (c) provide pupils opportunities to develop skills, knowledge, awareness, and appreciations in a wide variety of other aspects of the curriculum . . . .
>
> (d) Assist pupils to develop esteem of self and others, personal and social responsibility, critical thinking, and independent judgment.
>
> (e) Provide a range of alternatives in instructional settings and formats to respond adequately to the different ways individual pupils learn.
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> . . . . . .
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> The Legislature, by the provisions of this chapter, intends to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school. (Emphasis added.)

Further, similar to the record in the previous case, teachers, in the instant case, were aware of how the SIP instructional aide's time was to be expended. For example, Charging Party's chief witness, Jalyne Leonhart, testified that she understood that the District's policy was to use SIP instructional aides to provide "as much direct services to students as possible." Indeed, on January 29, 1986, the parties memorialized their mutual understanding that SIP aides were to be primarily utilized to provide direct instructional services to students, as opposed to performing what the ALJ characterized as "facilitative" tasks which primarily assisted teachers. The parties' Memorandum Of Understanding reads, in pertinent part:

> The most recent research on "effective schools" indicates a high ratio of adults (teachers, instructional aides, and parent volunteers) to students. The research also shows that there is a high percentage of the instructional aides time spent in direct contact with students. It is agreed that the primary responsibility of instructional aides is to provide direct service to students. The majority of instructional aides time should be spent working directly with students. (Emphasis added.)

Consistent with our reasoning in Lake Elsinore, No. 646, we find that any reduction in a teacher's workday resulting from an SIP instructional aide is, at best, a fortuitous side effect of a program intended by the Legislature for the sole benefit of students. Conversely, the extent to which some teachers were required, as a result of a reduction in SIP aides' hours, to adopt a teaching style to accommodate one less adult in the room,

reflects more upon the professional nature of teaching, rather than a District-compelled increase in workload. (Lake Elsinore, No. 646, p. 14.)

Furthermore, the testimonial evidence is far from persuasive regarding the amount of the increase in some teachers' workday, as well as whether or not the 1985-86 reduction in SIP aide hours was the cause of such an increase. For example, the testimony of Charging Party's chief witness, Jalyne Leonhart, equivocated as to the amount her workday was increased. At one point in her testimony, she indicated that she spent ten more hours per week working in 1985-86 as compared to the previous year. She also testified to an increase of six hours. However, when she broke her work schedule down in 1984-85 and 1985-86, the record is not persuasive as to such a large increase. For example, Ms. Leonhart testified that, in 1984-85, she would arrive forty-five minutes before her students arrived, leave two hours after class in the evening, and would then spend approximately one hour a day working at home. In 1985-86, Leonhart testified that she spent a minimum of one hour per day working at home -- the same amount of time as in 1984-85. She also testified that she spent approximately sixty-five minutes at school before her students arrived, and she did not usually leave until two hours after the end of the school day. This amounts to an increase of only approximately two hours per week. The only other increase noted by Ms. Leonhart in the record is three extra hours she claimed to have put in on weekends in 1985-86. This would total only five

hours per week, not the six and ten she claimed elsewhere in her testimony.

Moreover, the testimony of Leonhart, as well as that of other teachers, elucidated certain factors other than reductions in SIP aide time which contributed to an increase in some teachers' workday. For example, SB 813 resulted, for 1985-86, in the negotiated increase of 15 instructional minutes per day for kindergarten teachers, and 30 instructional minutes for all other teachers in the District. This increase in instructional minutes associated with SB 813 additionally resulted in increased preparation time, which also lengthened some teachers' workday. Finally, some teachers had additional duties in 1985-86 unrelated to the loss of aide time which increased their workday, such as mentor teaching and team teaching.[4]

In its exceptions to the proposed decision, the District argues that the record before us demonstrates that the changes in the ratio of aides to teachers were part of a dynamic status quo which fluctuated with enrollment growth, availability of funding, and shifting priorities of the site councils. We agree. EVEA introduced evidence pertaining to the level of aide funding for only one year prior to the reduction--1984-85. Instead of a consistent level of SIP aide time amongst teachers within the

[4]It should also be recognized that certain factors existed which offset 1985-86 workday increases claimed by some teachers. Namely, the record shows that the reduction of SIP aide time commensurately reduced the time teachers were required to prepare for and plan the aides' work.

District, the evidence reveals a fluid and haphazard pattern in which even teachers instructing the same grade level at the same school site did not necessarily share a consistent number of aide hours in 1984-85.[5] The disparities are greater when one compares teachers who instruct different grade levels or who teach at different schools.

In short, the record does not reveal a consistent amount of SIP aide time to which District teachers were entitled by either contract or past practice. Instead, the process by which SIP aide time was allocated amongst teachers is distinguished only by its fortuity. We find it inappropriate for the Board to find a violation of EERA where the claimed impact is on something --SIP aide time--which is so fluid and fluctuating as to defy even the characterization of being a term and condition of employment.

We would further reverse the ALJ in his acceptance of Charging Party's argument that the District violated EERA by failing to bargain the potential impact of a reduction in aide time on teachers' evaluations, tenure and job security. Although the ALJ recognized that the record failed to demonstrate actual

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[5]For example, at Machado, three kindergarten teachers had three hours of SIP aide time in 1984-85, but one teacher had only one hour and thirty minutes and another had no aide time. Concerning Machado's first grade teachers, three of them had three hours of aide time for the entire 1984-85 school year, but one was allotted only one and one-half hours of aide time for the latter half of the school year. Of the four second-grade teachers, all had one and one-half hours of aide time. Of the three third-grade teachers, one was given three hours, while the other two had only one and one-half hours of aide time. The disparities in aide time amongst teachers are just as great at the other school sites.

impact, he found a possible future impact to suffice. In Fremont Union High School District (1987) PERB Decision No. 651, this Board refined the test articulated in Mt. Diablo Unified School District (1983) PERB Decision No. 373 governing when management is obligated to bargain the in-scope effects of a nonnegotiable decision (to lay off employees). Specifically, the Mt. Diablo test required the negotiation of those effects which may reasonably be foreseen to exert an adverse impact on employees' working conditions. In Fremont, this Board interpreted the Mt. Diablo standard to attach a bargaining obligation only "to those immediate or prospective effects which are reasonably certain to occur and causally related to the nonnegotiable decision at issue." (Fremont Union HSD, supra, p. 25.) Quite simply, this record does not meet the requirements of the Fremont test. On the contrary, there was no evidence showing that a negative effect on teachers' evaluations, tenure and job security was reasonably certain to occur.

ORDER

For the foregoing reasons, the unfair practice charge in Case. No. LA-CE-2349 is hereby DISMISSED.

Members Craib and Shank joined in this decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2349
v.	)	
LAKE ELSINORE SCHOOL DISTRICT,	)	PROPOSED DECISION (1/28/87)
Respondent.	)	

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

Before Manuel M. Melgoza, Administrative Law Judge.

I. PROCEDURAL HISTORY

The above-captioned Unfair Practice Charge (Charge) was filed by the Elsinore Valley Education Association, CTA/NEA (Union, Association or Charging Party) on March 3, 1986, alleging that the Lake Elsinore School District (District, Employer or Respondent) violated Educational Employment Relations Act[1] (EERA or Act) sections 3543.5(a), (b), and (c)

[1]The EERA is codified at Government Code sections 3540, et seq. Section 3543.5 states:

> It shall be unlawful for a 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.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

by unilaterally reducing the amount of instructional aide assistance to teachers without notice and an opportunity to bargain over the effects of that action. On March 21, 1986, the Public Employment Relations Board (PERB or Board) issued a Complaint against Respondent incorporating the Charge by reference. Respondent's Answer to the Complaint, filed on April 8, 1986, admitted certain allegations and set forth two affirmative defenses, including that the Charge was untimely filed.

An informal conference held on May 6, 1986 failed to result in a settlement of the underlying issues. A subsequent request by the Charging Party to consolidate this case for hearing with Case No. LA-CE-2282, involving the same parties, was granted on May 15, 1986.

On May 21, 1986, the Respondent requested that Case No. LA-CE-2349 be held in abeyance pending Board resolution of Case No. LA-CE-1827, also involving the same parties. The latter case involved an alleged unilateral reduction of instructional aide services occurring in 1983. The request was denied on May 28, 1986. Respondent's request to conduct a formal hearing at the District's offices was granted on the same date.

(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.

Pursuant to a Notice of Hearing dated May 28, 1986, a formal evidentiary hearing was conducted before the undersigned on July 8 and 9, 1986. On the first day of the hearing, the parties reached a settlement of case number LA-CE-2282. The hearing thereafter proceeded only on case number LA-CE-2349.

At the conclusion of the hearing, the parties agreed to submit simultaneous post-hearing briefs and simultaneous responsive briefs. Pursuant to Charging Party's request, with the concurrence of Respondent, the deadline for filing post-hearing briefs was extended. Opening briefs were filed on October 16, 1986. No responsive briefs were filed. The case was thereafter submitted for proposed decision.

II. FACTS

A. Background

The District is a public school employer within the meaning of EERA section 3540.1(k) and the Union is the exclusive representative of the certificated bargaining unit of District employees within the meaning of EERA section 3540.1(e). The District is comprised of elementary schools with pupils in grades K-6. The District has four school sites, but operates two schools (Wildomar School and Jean Hayman School) at one site.

Each school has a site council made up of certificated employees, classified employees, parents and members of the administration. The school site councils make recommendations to the school board on how to utilize monies provided to the

District by the State of California's School Improvement Program (SIP). The school board may accept the proposed plans of the site councils or may reject and send them back for modification. In practice, the site council's spending plans are scrutinized by, inter alia, the District's coordinator of projects and the director of personnel, who also make recommendations to the school board after reviewing the site council's spending requests.

The State Department of Education will not forward any SIP monies to the District unless the school board accepts the site council's plans. However, after the receipt of those funds, and until November of each year, there is some flexibility allowed whereby the spending plan may be adjusted.[2]

B. Instructional Aides

Although the record is not clear as to how long paid instructional aides have been utilized by the District, they have been employed at least since the beginning of Jalyne Leonhart's five-year tenure as a teacher. Traditionally, the District had been unwilling to use its general fund to employ the aides. Instead, it insisted that aides be funded only with SIP monies.[3] There were exceptions. For example, in some

[2]The site council's planning usually occurs in the spring of each year and the funds are received for use in the following fall.

[3]Bilingual aides, not in issue herein, are funded with LEP (Limited English Proficient) monies.

cases, the District augmented its School Improvement Program by matching SIP moneys with its general fund in order to increase computer aide services and library aide services. Employees hired as "noon-duty aides" or "playground aides," paid for by general fund monies, were sometimes used in the classrooms.

The classroom instructional aides performed a variety of duties incident to, and facilitative of, the direct instructional program. Much of the aides' work involved small group follow-up instruction. They monitored students after a teacher-directed lesson and made sure work was completed. In addition, they provided students one-on-one help with assignments. They performed a variety of tasks to reinforce math, reading, writing, and social studies lessons.

Seat work, including science and art projects for a segment of the class, was monitored by the aides while the teacher instructed another segment. Many times, as in art projects, the seat work required the aide to help the young children cut, staple, paste, and fasten materials. Similarly, while the teacher worked with one reading group, the aide would work with the others to reinforce other current lessons. The aide prepared his/her own materials for this purpose.

Instructional aides also prepared make-up work for children who were absent and, when the student returned, the aide would monitor them to ensure completion. Completed student work would be compiled and prepared by the aide for the children to take home to their parents, along with whatever other notices

the office wanted to send home. The aides would also prepare "reading packets" for reading reinforcement, and help children individually with that reinforcement.

An equally valuable service provided by the aides was in record-keeping. This ranged from tedious correction of daily student work to administering and grading tests and to recording grades in children's cumulative files. They also helped teachers fill in data on standardized testing materials.

In order to free time so that teachers could prepare for upcoming lessons or to tidy the classroom for immediate use, the aides often supervised children during their directed physical education period and performed pre-school yard duty. They also administered minor first aid to students and/or walked the injured children to the school nurse's office.

A variety of other facilitative tasks were perfomed by aides in order to free the teacher to prepare for instruction. These included telephoning parents to schedule conferences or to request that parents bring in materials forgotten at home by students. Also included was the preparation of art work for student projects, putting away the art materials at the end of the art lessons, and cleaning up after the same. In preparation for lessons, they procured educational supplies from the schools' learning specialists. Likewise, the aides obtained needed materials from supply rooms and duplicated materials to be handed out to students. They performed

bulletin board work, including pinning up students' completed work and changing the board in such a way as to maintain a classroom environment conducive to learning.

C. Aide Service Level in 1984-85[4]

The instructional aides in the 1984-85 academic year were concentrated in grades K-3. The number of instructional aide hours per teacher varied depending upon the school and the grade level. For example, at Elsinore School, most of the teachers in the regular program were provided with three hours of aide time five days per week, regardless of grade level. At Machado School, the only regular program teachers who had three-hour aides were at the kindergarten level. First, second and third grade teachers by-and-large were provided with one and one-half hours per day of aide assistance.

Even with the services of the aides at the 1984-85 level, the teachers typically spent time beyond that which was contractually required, on-site and at home, to prepare, plan, and execute their duties as instructors. On isolated occasions, they would go to school on weekends to catch up on some of their duties and/or to work on bulletin boards or special projects.

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[4]The level of aide services provided to teachers previous to that school year, the subject of an unfair practice allegation in Case Number LA-CE-1827, is currently on the PERB docket on appeal from an Administrative Law Judge determination adverse to the District.

1. Events Giving Rise to a Change in Level of Aide Service

During that school year, certain events conspired to cause a change in the level of aide services provided per teacher. Lake Elsinore District was growing at a rapid rate. Between the 1984-85 and 1985-86 school years, its enrollment increased by 13%, with 65% of that increase occurring at the K-3 grade levels. From the beginning to the end of the 1984-85 school year, the number of students grew by about 500. The number of certificated staff was enlarged to provide the required services. For several reasons, including the District's continued unwillingness to use its general fund to employ classroom aides, the number of aides was not increased to keep up with the rapid growth.

During the spring of 1985, each of the school site councils requested an increase in the number of instructional aides to be provided for school year 1985-86. Although the record does not specify the precise date during the 1984-85 school year, one or more of the site councils (Butterfield School and Elsinore Elementary School) also recommended that the utilization of aides be re-prioritized. According to Principal Gordon Keifer, Elsinore wanted the aides placed at the lowest level (with a cap of three hours) with their use at higher levels as funding permitted. Accordingly, aide staffing would start at kindergarten at three hours per class, continue to

first grade, and if the District ran out of money before it got to second grade "they'd be out of luck."

Jalyne Leonhart, who is a member of the site council at Elsinore School, testified that the council did discuss the issue of placing emphasis on aide utilization in grades K-2. However, she assumed that the actual determination of allocation of aides was made by the administration. As will be noted below, the administration subsequently chose to put these site council recommendations into force, subject to adjustments it saw as necessary during the 1985-86 school year.

The District's coordinator of projects, LaVerne Carlson, working under the supervision of Director of Personnel Keith McCarthy, reviewed the requests for additional aides of the site councils. She projected the estimated cost of the requested plan and concluded that the available money from the SIP would be insufficient to fund the increase. The conclusion was based in part on the discretionary allocation of over $38,000 to District overhead for program implementation, rather than to the purchase of classroom aide time.[5] This amount equaled the maximum percentage of SIP funds that the state allowed districts to allocate to overhead.

On August 2, 1985, Carlson submitted her report with the above conclusions to McCarthy. Considering her projections on

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[5]McCarthy testified that a three-hour aide cost an estimated $4,200 per year.

the availability of SIP money and the District's election not to use its general fund for this purpose, she recommended a reduction in the number of aides hired for Elsinore School from both the requested number (9) and the 1984-85 level (8), to seven three-hour aides. For Butterfield, Wildomar and Hayman Schools, it was recommended that the number of aides be increased to the level requested by the site councils. With respect to Machado School, 12 three-hour aides were recommended, an increase of 2 from the previous year, and a decrease of 2 from the site council's request. Despite the modest overall increase in the total number of three-hour aides, the growth in enrollment and the increase in the number of classrooms more than offset it, causing the number of three-hour aides per teacher to decrease.

The school board members were apparently aware of the teachers' desire to maintain the current level of aide services, for they discussed the issue during the summer meetings. According to Sue Moore, a teacher at Machado School, the board members stated that they felt that the amount of money the schools were receiving for aides was adequate for what they considered "aiding" to be, and one board member consistently took the position that aides were a "passe" thing and not in "vogue."

During the time that the site councils were engaged in devising and submitting their plans and during the time

McCarthy's office was making its analysis and recommendations, the Union was left out of the process. Although it was foreseeable that the reallocation of aides and the failure to maintain the level of aide service at an even pace with the enrollment growth would have an effect on teachers' jobs, there is a lack of evidence that any notice to the Union was given.

D. The 1985-86 School Year

Although some teachers were told by their principals that their level of aide service might be reduced or eliminated during the spring of 1985, they did not learn exactly what would happen until the beginning of the next school year, September 1985. At a pre-school meeting that month, for example, Sue Moore and her colleagues were informed by their principal, Carol Holmes, how the aides would be allocated at Machado School. She told Moore that instead of having the assistance of an aide for three hours daily as she had enjoyed in 1984-85, an aide would be assigned to her class for only one and one-half hours per day. She explained that this was because of the amount of funds that had been committed and because general funds would not be used to "beef up" the program.

Fran Easter, another teacher at Machado, was also given a reduction of aide services from three hours per day in 1984-85 to one and one-half hours in 1985-86. Both Easter and Moore were kindergarten teachers. Although not readily apparent from

the record, when viewed with testimony that Machado School added classes for kindergarten and first grades, and with other evidence, it appears that a determination was made that aide time should be redistributed so that the new teachers would have some aide services.[6]

Many teachers who previously enjoyed the services of instructional aides lost aide time completely or had aide services reduced. For example, Jalyne Leonhart, who had a three-hour aide during 1984-85 at Elsinore School, lost all aide assistance for 1985-86. Other teachers at the various schools who had a three-hour aide in 1984-85 and who lost all instructional aide services the following year included Sherri Smith (Butterfield), Tracy Scarborough (Elsinore), and Nancy Spohn (Butterfield). Others who had a three-hour aide the previous year, but had their services reduced to one and one-half hours per day included Lynn Stuck, Sue Moore and Fran Easter, all at Machado School.

In Leonhart's case, the principal of Elsinore School withdrew her aide services some three weeks after the beginning of the 1985-86 school year. His explanation for doing so was that the school's growth forced the opening of a new kindergarten class. When the new class was opened, Leonhart's

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[6]Respondent's Exhibit D shows that at least three teachers who were not there during 1984-85 - Karen Fisher (kindergarten), Lisa Graf (kindergarten), and Theresa Kent (3rd grade) - were each allocated one and one-half hours of aide time in 1985-86.

aide was sent to help the teacher who had been brought in to instruct those pupils.

A few teachers benefited from the District's enforcement of reallocation recommendations of the site councils. In the case of Butterfield School, where third grade teachers had no aide service in 1984-85, each received one hour of aide time the following year. Second grade teachers went from one and one-half hours of aide time to two hours. Other teachers experienced an increase in aide service, but the increase was due to an assignment change rather than a reallocation of aide resources by the District and its site councils.

1. Impact on Teachers

Because of the many services traditionally provided by instructional aides, the teachers who faced elimination or reduction of that service were adversely affected. The loss of the service typically meant that tasks previously provided by the aides now had to be performed solely by the teacher. A great proportion of those were indispensable and incapable of being performed during the regular workday. They now had to be done before the teacher's duty day, during the lunch hour, after school, at home, or on weekends.

An example of the additional work required due to the loss of aide services is the teachers' preparation of "seat work" for the students. In situations where the teachers were working with a group or segment of the class, other children

had to be assigned tasks such as reading reinforcement, science or art projects. Previously, the aides not only monitored the seat work while the teacher was busy, but also did much of its preparation. With the loss of aide time, the teacher had to prepare more seat work for the children. Typically, according to the teachers' testimony, the preparation of seat work had to be performed outside of the regular instructional day. This caused some teachers, who had already been arriving to work earlier than required in 1984-85, to come in yet earlier in the day, leave later than they had before, and/or to take the work home.

The time available during the work day to perform preparation and other necessary functions was further impinged upon by the fact that teachers now had to assume additional physical eduction and yard-duty supervision (pre-school and mid-day), in the absence of the aides.

Calls to parents now had to be made during time the teachers used to consider breaks. Some remained in their classrooms to eat while simultaneously preparing for the next lesson. Duplication of instructional materials and procurement of materials from the learning specialist now had to be done during these previously-considered break times as well.

The burdensome task of correcting papers, grading them, posting grades, and maintaining current individual student files was now the sole responsibility of the teacher. Such

work was required to be accomplished immediately inasmuch as the children could not advance to another lesson until one was completed. Since this required more of the teacher's time than when the aides were assisting, whatever could not be accomplished during the regular work day had to be done before or after hours or at home.

Although it was not uncommon for teachers to take work home with them in 1984-85, those who lost aide service experienced a marked increase in the amount of work they had to perform there. Sue Moore's testimony on cross-examination regarding this issue, is typical of the impact many teachers felt:

> Q - Was it your practice in 84-85 to take work home after school?
>
> A - Yes.
>
> Q - And did you continue to do that in 85-86?
>
> A - Yes, only I went from one bag to two bags.

Not having the same level of aide service in 1985-86 created more work for teachers in situations where substitute teachers had to take a class over during regular teachers' absence. Since the aide was no longer there to provide a smooth transition and to make sure that lessons followed sequentially, the regular teacher had to prepare very detailed lesson plans and instructions for the substitutes in advance. Needless to say, that extra preparation impinged upon other non-instructional time.

Similarly, clean-up was now largely done by the teachers. If things such as art projects came at the end of the instructional day, it usually meant that the teacher would be cleaning after school, further impinging on other time. Compounding this inconvenience were situations wherein a child was injured when the teacher was busy cleaning up, causing him or her to attend to the child and leave the cleaning for a later time.

Since the District required that a suitable room environment be maintained, the tasks of upkeep and regular changing of the bulletin boards was now entirely in the hands of the teachers. That work now had to be performed, usually on the teachers' own time, including on weekends. Principal Kiefer acknowledged that he personally observed some increase in the number of teachers who were coming in to work on weekends.

Jalyne Leonhart testified that she spent at least 10 more hours per week of her own time doing work that was brought on as a direct result of her loss of aide services. This increase was over and above the time she had voluntarily given the District in 1984-85 in pursuit of her duties. Similarly, with respect to Nancy Spohn's kindergarten assignment, her loss of aide services in 1985-86 caused an increase of about one and one-half hours of work per week at home, 30 minutes per day during her lunch time, and 15 minutes per day after school.

Fran Easter's reduction of aide services caused her to spend approximately one hour per day (of her own time) more than in 1984-85. Sue Moore conservatively estimated that the reduction of aide services caused her to spend at least one more hour per day than in the previous year. The record reflects that other teachers who lost aide services experienced similar increased intrusions into their off-duty time. (See, e.g., Exhibits 1-10.)

Although the District administration urged and encouraged teachers to recruit and utilize parent volunteers, and despite teachers' efforts to carry this out, the parent volunteer program did not offset the impact of the reduction of aides per teacher. The teachers were able to recruit and obtain the cooperation of many parents to help with duties incident to the instructional program. But, they were not available in sufficient quantities, the turnover was high, their attendance was sporadic, and their own personal schedules made it inconvenient to rely upon them on an ongoing basis.

The testimony indicated that most were available for about two days out of the week and for only a small fraction of the instructional day when they did attend. Some volunteers' personal schedules enabled them to attend only at a time when teachers were in the middle of a lesson, causing the teacher to interrupt her instruction in order to brief the parent on what was being instructed and to give the parent directions.

Likewise, some parents had to depart in the middle of a lesson, such as art, leaving the teacher with the responsibility of finishing what the volunteer had started and cleaning up afterward. These factors prevented the teachers from planning the instructional day around the volunteers.

Of equal importance was the parents' lack of training and experience in comparison to the aides. They could not work as independently of the teacher as the aides could and required more orientation and instruction on how to facilitate the instructional program. Partly as a result of this lack of training, and also due to parent volunteers' unwillingness or inability to discipline children of other parents, the teachers found themselves having to do increased work in the areas of reinforcement, monitoring students for completion of work, and follow-up for those students who refused to heed the volunteers' instructions.

The parents' role in record-keeping and grading student work was severely limited. For reasons of confidentiality, the teachers were unable to assign them the duties of grading papers and entering grades in cards that went into each child's cumulative folder. For the most part, the parents' function was limited to attempting to work one-on-one with children and attempting to have them complete follow-up assignments. Because of the difficulty involved, parents were not utilized to perform such functions as retrieving instructional materials from the learning specialists and were not asked to call other

parents for purposes such as scheduling conferences and bringing in materials students forgot at home. Only in one or two isolated instances were parents able to help teachers maintain and update bulletin boards. In actuality, the teachers' time and effort in recruiting, training, and coordinating volunteers' activities consumed as much or more time than that which was saved by having the volunteer service. The benefit to students of more one-to-one contact and the benefit to parents in understanding of their children's formal education process, however, was sufficient to maintain the District's desire to continue utilizing parent volunteers.

There is evidence to indicate that the loss of aide time was accompanied by another potential impact on teachers - on evaluations - even though no actual impact was shown. Specifically, the District has its-own set of criteria or "benchmarks" which it uses to gauge students' progress. Teachers are evaluated in part on the degree to which their students have achieved those benchmarks. McCarthy, also a former teacher who had experience working with a three-hour aide and without a three-hour aide, acknowledged that, based on his experience, having an aide would have a tendency to assist in the achievement of the District's benchmarks as compared with not having an aide.[7]

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[7]The parties' pertinent collective bargaining agreement does not contain language governing the specific matters at issue herein.

III. DISCUSSION

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate pursuant to the mandate enunciated in EERA sections 3543.3 and 3543.5. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94. Charging Party correctly cites in its brief Oakland Unified School District (1985) PERB Decision No. 540, et al., for the proposition that an employer has an obligation to give an exclusive representative notice and an opportunity to bargain over the negotiable effects of an otherwise non-negotiable decision.

Normally, it is within management's sole prerogative to determine the minimum number of employees to be hired at each job site. Mt. Diablo Unified School District (1983) PERB Decision No. 373. However, when the subject does not merely involve setting the minimum number of employees, but is related to other terms and conditions of employment, such as workload, hours, or wages, it is within the scope of representation and cannot be altered without notice to the exclusive representative and an opportunity to bargain. Ibid., and State of California (Department of Transportation) (1983) PERB Decision No. 361-S. Staffing ratio of nurses per school and/or per student is such a subject. Mt. Diablo, supra. The method

of staffing may also be subject to negotiations prior to a change if it affects other terms and conditions of employment. State of California, supra. Staffing policies that are aimed, at least in part, at regulating "employees' workloads" - the amount of labor for which employees will be contractually obligated - are also subject to negotiation prior to a change. Davis Joint Unified School District (1984) PERB Decision No. 393.

Merely because a change in a negotiable subject results favorably as to some employees does not change its unlawful nature. Indeed, unilateral increases in such things as wages and benefits have historically been found to be unlawful. See Morris, The Developing Labor Law, Second edition, Bureau of National Affairs, Inc. (1983), pp. 563-564; NLRB v. Fitzgerald Mills (2nd Cir. 1963) 313 F.2d 260 [52 LRRM 2174]; Colson Equipment. Inc. (1981) 257 NLRB No. 15.[8]

In the case at hand, the District, through its acceptance of Keith McCarthy's recommendations delineated in LaVerne Carlson's memorandum of August 2, 1985, reached a firm decision on the allocation of instructional aide services to the teachers. Such a decision had the foreseeable impact of

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[8]The construction of provisions of the National Labor Relations Act as amended, 29 U.S.C. 151, et seq., is useful guidance in interpreting parallel provisions of the EERA. See San Diego Teachers Association v. Superior Court (1979) 12 Cal.3d 1, 12-13; Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

lengthening the workday of those teachers who faced a partial or total loss of aide services. One could not seriously deny the fact that during the 1984-85 school year, teachers typically worked on their own time to complete their duties, even with the previous ratio of aides per teacher. Principal Kiefer's testimony adds support to this conclusion.

Furthermore, once the District decided to carry out the aide reallocation plan, it had a duty to give notice and an opportunity to bargain to the Union regarding those foreseeable effects. Mt. Diablo Unified School District (1983) PERB Decision No. 373; Newark Unified School District (1982) PERB Decision No. 225; citing San Mateo County Community College District, supra, at pp. 14-17. The District failed to meet this obligation even after the foreseeable effects became reality at the beginning of the 1985-86 school year.

The Charging Party established that the aide reallocation resulted in a substantial change in enumerated items within the scope of representation, namely, hours of work. It also resulted, in some cases, in the practical elimination of break or rest periods and the duty-free lunch period. In addition, the workload which was expected to be done by the teachers during the instructional day was increased due to the shifting of responsibilities to the teachers when the aides were removed. Finally, the reallocation had at least a potential affect on the teachers' tenure or job security, inasmuch as it

made it more difficult for many employees to have their students achieve District performance expectations or benchmarks. By the above conduct, the Respondent violated EERA section 3543.5(c) and, derivatively, 3543.5(a) and (b). See Oakland Unified School District (1983) PERB Decision No. 367, at pp. 22 and San Francisco Community College District (1979) PERB Decision No. 105.

During the unfair practice hearing and in its post-hearing brief, Respondent raised several contentions as its defense. It posits that, because the site councils were responsible for recommending the prioritization of aide usage, leading to adverse effects on some employees, the District never made any decision to reduce aide services per teacher, and cannot be held accountable therefor. It has also asserted that there was never a change in policy because there was no showing of a stable status quo from which a change in terms and conditions of employment could be measured. It offered the related argument that there was no change in 1985-86 because the total number of instructional aides in the District stayed the same or grew slightly. Respondent produced some testimony in support of contentions that appear to relate to a waiver (by contract and/or inaction) of the Union's right to bargain. Finally, although it failed to present evidence at the hearing on its affirmative defense, the District included, in its Answer to the Complaint, an allegation that the Charge was not timely filed (EERA section 3541.5(a)).

The District's first contention is rejected because the site councils acted as its agents. It is settled law that an employer may be held responsible for acts of even a rank-and-file employee, acting as its agent where: the employer instigated, encouraged, ratified, or condoned such activity; where the employee had actual or apparent authority to act for his/her principal; where the employer held him/her out to other employees as being "clothed with supervisory authority," and where other employees could reasonably believe that he/she was speaking and acting on behalf of management. Moreland Elementary School District (1982) PERB Decision No. 227 citing Rexart Color Chemical Co. (1979) 246 NLRB No. 40 and NLRB v. American Thread Co. (1953) 204 F.2d 161 [32 LRRM 2044]; Los Angeles Community College District (1982) PERB Decision No. 252; and Amerace Corporation. Esna Division (1976) 225 NLRB No. 159, at pp. 1096.

The site councils, composed of administrators, rank-and-file employees, and segments of the community, recommended plans for school improvement and spending of SIP moneys. The District's school board is not bound to accept those plans and recommendations and may send them back to the councils for modification. Without school board approval, the site council's recommendations are meaningless and cannot be implemented. No SIP funds can be expended without board approval. Although not bound to accept the site council's

recommendations, Principal Kiefer testified that the District's policy is to leave the decision on how to prioritize aide resources entirely to school site councils. McCarthy testified that, with respect to the reduction in the ratio of aides to teachers, the site councils recommended realignment and the District "put the recommendation into force." By these acts, the District authorized the councils to act on its behalf. To this degree the District cannot disclaim responsibility for its decision to defer entirely to the councils.

Notwithstanding whether the site councils are legally "agents" of the District, evidence abounds from which to conclude that the change in teachers' hours resulting from the reduction of aide services was directly connected to District action and, in a sense, its failure to act. In addition to the fact that the District is not bound by site council recommendations, it is also not required to fund aides exclusively with SIP money. Indeed, in the 1986-87 school year, the District has undertaken to fund its aides with only 30% from SIP funds, 10% from its general funds, and the remainder from state lottery revenues.

Secondly, McCarthy's testimony indicated that the administration has a great deal of discretion in shifting SIP budget figures before and after their submission to the state. It is within its discretion, for example, to determine what amount to allocate to overhead. Additionally, once SIP funds

are received, the administrators allocate the amounts as they see fit, attempting to approximate the recommendations of the site councils, but not strictly bound by them. Even within the school sites, the principals have discretion over aide allocation, as exemplified by the case of Elsinore School, wherein Principal Kiefer decided to take away aide services from one teacher weeks after the beginning of the school year in order to provide some aide service to newly-hired teachers covering additional classes opened because of enrollment increases.

The District's related assertion that changes in teachers' hours (in 1985-86) did not result from any "District" decision does not support a conclusion that it did not violate the EERA. An employer's decision not to act can result in adverse consequences to its employees' hours or working conditions just as surely as can a decision to act affirmatively. See, e.g., San Joaquin County Employees Ass'n. v. City of Stockton (1984) 161 Cal.App.3d 813; 207 Cal.Rptr. 876 (employer is required under Meyer-Milias-Brown Act (Govt. Code sec. 3500, et seq.) to maintain the status quo in terms of an expired labor agreement by paying any increased insurance premiums required to provide the previous level of insurance coverage to employees). While the District could have chosen to hire any number of aides as it saw fit, it had the reciprocal duty, and ability, to ensure that an action in that regard did not impact negotiable terms

of employment - in this case, working hours - and/or to give the employee's Union the opportunity to negotiate in order to offset any adverse impact.

Various options were available to the District. It could have used the SIP moneys it allocated for "overhead" to hire at least an additional nine aides to offset the impact of enrollment growth. It could have used its general fund, as it did in 1986-87, to allocate aides in grades which the site councils decided were not priorities. Alternatively, it could have negotiated with the Union for offsets - e.g., added vacation or leave credits, time off, increased wages, etc. - to alleviate the impact of an extended day on those teachers who were faced with a reduction in aide services. It is not necessary to outline herein all the possibilities available to the District.

Yet, as McCarthy testified, "the only District decision" that was made was "to live within the funding provided by the State's SIP" Program. In so doing, the District chose to allow its teachers to bear the brunt of increased enrollment and of by-products of the actions, however well-meaning, of the site councils and school principals. The District had it within its power to maintain the teachers' hours at least at the 1984-85 level, yet failed to do so.

For these same reasons, the Employer's contention that it should not be held responsible for the change because there was

no decrease in the total number of instructional aides, must be rejected. The central issue herein is not merely a change in the number of aides, but the change in the number of working hours resulting from management's actions (and failures to act) in the face of increased enrollment and aide reallocation.

For similar considerations, the District's argument that there was no showing of a change in the "status quo" lacks merit. In essence, the District's contention is that the changes in the ratio of aides to teachers were part of a "dynamic status quo" fluctuating with enrollment growth, availability of funding, and shifting priorities of the site councils. The "dynamic status quo" defense excuses alleged unilateral changes only where the changes are automatic and where the employer has no discretion in the matter. NLRB v. Ralph Printing & Lithographing Co. (8th Cir. 1970) 433 F.2d 1058 [75 LRRM 2267]; NLRB v. Southern Coach & Body Co. (5th. Cir. 1964) 336 F.2d 214 [57 LRRM 2102]; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; and Davis Unified School District, et al. (1980) PERB Decision No. 116. Thus, automatic wage increases that have been firmly set as to regularity and amount, and by announced employer policy, have been held not to violate the duty to bargain. Id.

None of these prerequisites are present herein. As already noted, the District had considerable discretion over the level and distribution of aide services, over their funding, over

whether to accept recommended plans of the site councils, over the method of implementation of school improvement plans, and over the length of the teachers' workday. To claim that the changes in teachers' hours in 1985-86 were caused by external forces beyond the District's discretion and control is to ignore the weight of the evidence to the contrary.

The Respondent also failed to carry its burden of establishing waiver. PERB has held that a waiver of an exclusive representative's EERA rights to notice and an opportunity to bargain must be "intentionally relinquished in clear and unmistakable terms" in order to be upheld. Davis Unified School District, et al., supra at p. 17.

The only evidence adduced by the Respondent is about a "possible grievance," ultimately settled in February 1986, that did not revolve around the level or amount of aide services per teacher, but on what kinds of services the aides could perform - e.g., correction of student work, assistance in classroom preparation, etc. Similarly, the parties' 1985-86 collective bargaining agreement contains neither language indicative of a waiver, nor a zipper clause. That instrument was executed sometime after the teachers' workday was affected by the changes in aide allocations.[1]

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[9]The contract contains provisions regarding the teachers' reporting times which have not varied significantly over previous requirements. There is also language reflecting an increase in instructional minutes (15 mins.) due to Senate Bill

Neither has the employer sufficiently supported with convincing evidence its contention of a "waiver by inaction." McCarthy's unspecific testimony that he is aware of previously-filed grievances regarding the lack of aide services for some teachers and that prior redistributions of aide services have been "observed" by the Association without filing a demand to bargain, cannot support a conclusion that the Union clearly and unmistakably waived its rights. This vague and unspecific (as to dates, individuals and circumstances) testimony is especially inadequate given the Union's previous Unfair Practice Charge over a nearly identical issue in 1983 (LA-CE-1827).

Finally, the District presented no evidence to support the Untimeliness pleading in its Answer. The only evidence relating to that issue, elicited for unrelated reasons by both parties, was that the teachers first found out about the aide service reductions at the beginning of the 1985-86 school year (September 1985) at a preschool meeting. There is no evidence that the District ever gave formal notice to any official Union representative. Indeed, McCarthy testified that it is "not the

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813 and a 1% salary raise in exchange for that increase. Finally, there is contingency language indicating a general increase in the salaries of all teachers tied to the level of District growth. None of these provisions were shown to have been connected in any way with the changes in hours at issue herein. No evidence of bargaining history in support of a waiver theory was presented by the Respondent.

practice of the District to notice the union when redistribution of aide services is going to occur." It cannot therefore be determined when the Union received actual or constructive notice of the change in teachers' hours occasioned by the redistribution of aide resources.[10]

IV. CONCLUSION

For all of the foregoing reasons, it is determined that, through its actions in enforcing the plan regarding reallocation of instructional aide services during the 1985-86 school year, without giving notice and an opportunity to bargain over its effects to the Union, the District violated EERA sections 3543.5(c), (b), and (a).

V. REMEDY

The PERB is empowered to issue a decision and order directing an offending party to take such affirmative action as will effectuate the policies of the EERA. Government Code section 3541.5(c). Accordingly, the Respondent will be ordered to cease and desist from failing or refusing to give notice and an opportunity to negotiate to the Union over the impact of its decisions on teachers' terms of employment. In addition, because the employer's conduct lengthened the workday of unit members without compensation, it is appropriate to order the

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[10]Even if the Union were deemed to have had constructive notice as of the date of the preschool meeting (September 3 or 4, 1985), the Charge was filed within six months of that event (March 3, 1986).

District to make whole each teacher whose workday was increased as a result of the reduced level of aide services in 1985-86 and the increased workload resulting therefrom. Such relief shall include back pay together with interest thereon at 10 percent per annum.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the Employer indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced, altered or covered by any material. Posting such a notice will provide employees with information that the employer has acted in an unlawful manner and is being required to cease and desist from this activity. The notice effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the Employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeals approved a similar posting requirement. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

VI. PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case and pursuant to EERA section

3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives/agents shall:

A. CEASE AND DESIST FROM:

Unilaterally changing the hours of employment, including the length of the teachers' workday, without first negotiating with the Elsinore Valley Education Association, CTA/NEA.

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

(1) Make whole each teacher whose workday was increased as a result of the reduced level of instructional aide services in academic year 1985-86 and for the increased workload resulting therefrom. Such relief shall include back pay together with interest thereon at 10 percent per annum.

(2) Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its headquarters office and at each of its school sites and all other work locations for thirty (30) consecutive workdays. Copies of this Notice, after being duly signed by the authorized agent of the District, shall be posted within ten (10) workdays from service of the final decision in this matter. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other materials.

(3) Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to

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

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: January 28, 1987

MANUEL M. MELGOZA
Administrative Law Judge