STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #30 Charging Party, v. COMPTON UNIFIED SCHOOL DISTRICT Respondent.	)	Case No. LA-CE-2817 PERB Decision No. 784 December 29, 1989

Appearances: Janet I. White, Field Representative, for California School Employees Association and its Chapter #30; Jones & Matson, by Martine Magana, Attorney, for Compton Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Compton Community College District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The case arose out of an unfair practice charge filed by the California School Employees Association and its Chapter #30 (CSEA) against the District, alleging that the District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act).[1] The 3543.5(a) allegation was

[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 (a), (b) and (c) states:

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

withdrawn by CSEA and PERB sent the parties a notice of partial withdrawal. A complaint was issued by PERB which alleged that the District violated section 3543.5(b) and (c) of the Act by altering the customary overtime practices for bus and truck drivers transporting regional occupation students to and from employment at Universal Studios, without affording CSEA notice and opportunity to negotiate.

Prior to July 7, 1988, overtime assignments began at the origin of a driving assignment and continued until the students were returned to their initial pick-up point and the bus was cleaned and secured. On or about July 7, 1988, overtime was reduced. Specifically, drivers would only be credited with a maximum of three overtime hours for weekday trips and six overtime hours for trips occurring on weekends and holidays. The assignments on Monday through Friday began at the actual time the students were picked up, and began again at the time the driver had to retrieve the students. On Saturday, Sunday and holidays, overtime began when the bus was picked up and ceased when the

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

students were dropped off and the bus was returned to the District's transportation department. The overtime assignment began again only when it was time to pick up the students. For each assignment, the driver lost approximately four overtime hours on weekday assignments, and lost seven overtime hours on Saturday, Sunday and holiday assignments.

After a hearing on the matter, the ALJ concluded that the District violated EERA section 3543.5(b) and (c) when it changed its overtime policy without negotiating with CSEA.

We have reviewed the entire record in this case, and finding the ALJ's findings of fact and conclusions of law to be free of prejudicial error, we adopt the ALJ's proposed decision as the decision of the Board itself. The District's exceptions will be addressed in the following discussion.[2]

DISCUSSION

The District filed three exceptions to the ALJ's proposed decision. CSEA responded to the District's exceptions but did not file exceptions to the proposed decision.

The District excepted to the ALJ's finding that it is not authorized by the express terms of the collective bargaining agreement between the parties to: (1) determine the period and amount of overtime; and (2) authorize and order overtime assignments for unit members.

[2]The Board notes that the District's exceptions are identical to the arguments raised in its post-hearing brief.

The ALJ correctly determined that, while the broad subject of overtime was addressed in the collective bargaining agreement, the specific overtime compensation practice involved in the instant case was not covered. We find that the contract language regarding overtime is too general and imprecise to grant the District the discretion to authorize and order overtime for bus drivers based on District program needs. Furthermore, the District produced no evidence of bargaining history from which one could reasonably interpret the contractual provisions as a waiver of CSEA's right to notice and bargain over the changes in overtime pay. Therefore, we find no merit in the District's exception.

Secondly, the District excepted on the grounds that PERB has no jurisdiction since the matter is covered by the collective bargaining agreement and CSEA has not exhausted the contractual grievance machinery. (Lake Elsinore Unified School District (1987) PERB Decision No. 646.)

Since we find that the overtime compensation practice is based on longstanding practice and is not covered by the collective bargaining agreement, the ALJ correctly found that CSEA could not exhaust the grievance machinery.

Finally, the District excepted to the ALJ's rejection of its contention that the District was required by operational necessity to reduce overtime to allow students to complete the work/study program at Universal Studios.

An employer may not take unilateral action on negotiable subjects, even if faced with an actual economic collapse of unknown proportions. It must bring its concerns to the bargaining table. (San Francisco Community College District (1979) PERB Decision No. 105.) PERB has held that the diminution of overtime opportunity constitutes a change in wages, an enumerated scope item, and is subject to negotiations. (Calexico Unified School District (1989) PERB Decision No. 754; State of California (Dept, of Transportation) (1983) PERB Decision No. 333-S.) The evidence shows that participation in the Universal Studios work/study program was voluntary, the program did not require mandatory transportation, and lack of participation would not have affected the remainder of the District's program. Further, the District did not prove that it was faced with a genuine financial crisis. Accordingly, we find the ALJ was correct in rejecting the District's operational necessity defense.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, we find that the Compton Community College District violated section 3543.5(b) and (c) of the Educational Employment Relations Act.

It is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Changing, without notice to and negotiations with CSEA, the overtime compensation practices in effect in the transportation department immediately before July 6, 1988.

2. Interfering with CSEA's right to represent unit members in their employment relations with the District.

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

1. Restore the transportation department's overtime compensation procedure in effect immediately before July 6, 1988.

2. Make whole each unit member who suffered economic harm from the change in overtime compensation as to Universal Studio assignments. Drivers who performed Universal Studios assignments after the change will receive the difference between the amount they were actually paid and the amount they would have received under the old procedure. Compensation shall include an additional sum of interest at ten (10) percent per annum. For drivers who declined such assignments after the change, the District shall deduct the number of hours they were credited on the overtime assignment list. Their names will be placed at the top of the list for future overtime until the number of hours worked equals the number they were credited for declining the assignments.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached

hereto as an Appendix. The Notice must be signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Camilli 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-2817, California School Employees Association and its Chapter #30 v. Compton Unified School District, in which all parties had the right to participate, it has been found that the Compton Unified School District violated section 3543.5(b) and (c) of the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Chapter #30 (CSEA) by changing the overtime pay practices for bus drivers without giving CSEA notice and an opportunity to bargain over the subject.

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

A. CEASE AND DESIST FROM:

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2. Interfering with CSEA's right to represent unit members in their employment relations with the District.

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DATED: COMPTON 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 REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #30,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2817
v.	)	
COMPTON UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION (9/14/89)
Respondent.	)	

Appearances: Janet I. White, Field Representative, for California School Employees Association and its Compton Chapter #30; Jones & Matson, by Martine Magana, Attorney for Compton Unified School District.

Before Manuel M. Melgoza, Administrative Law Judge.

PROCEDURAL HISTORY

On December 21, 1988, the California School Employees Association and its Chapter #30 (CSEA, Charging Party or Union), filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board). As amended on January 4, 1989, the charge alleged that the Compton Unified School District (Respondent, District or Employer) violated the Educational Employment Relations Act (EERA or Act) when it altered a settled practice of assigning and paying for overtime bus-driving, thereby reducing the number of compensable overtime hours.[1] Although the amended charge alleged violations of

[1]The EERA is codified at Government Code section 3540 et.seq. The pertinent provisions of section 3543.5 state:

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

subsections (a), (b) and (c) of EERA section 3543.5, the "(a)" allegation was withdrawn by CSEA on February 23, 1989. The PERB sent the parties a notice of the partial withdrawal on February 27, 1989.

The PERB's General Counsel's office also issued a Complaint on February 27, 1989. The Complaint alleged that the District violated EERA sections 3543.5(c) and (b) by altering the customary overtime practices without affording the Union notice and an opportunity to negotiate the change and/or the effects of the change. In its Answer, filed on March 22, 1989, the Respondent denied having violated the Act and asserted various affirmative defenses.

On March 28, 1989, a PERB administrative law judge conducted a settlement conference involving the parties. The parties did not resolve the dispute, however, and the case proceeded to formal hearing.

(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.

The Union and the District presented evidence at a hearing conducted on May 31 and June 1, 1989, before Administrative Law Judge Barbara E. Miller. After the conclusion of the hearing, the case was transferred for further processing to Administrative Law Judge Manuel M. Melgoza on August 4, 1989.

The parties filed opening post-hearing briefs on August 15 and 16, 1989. The parties were given an opportunity to file closing or responsive briefs, but only CSEA exercised this option. When CSEA's closing brief was received, August 25, 1989, the case was submitted for issuance of a proposed decision.

FACTS

A. Background

CSEA exclusively represents a bargaining unit of classified employees of the District. The District has historically assigned bus and truck drivers, who make up a portion of that unit, to transport pupils and staff to a variety of functions, including field trips, athletic events, and various Regional Occupational Programs (ROPs). The District's transportation department, under Director Alfred Gibson, oversees the functions performed by the bus and truck drivers.

B. The Past Practice

According to Gibson, whose testimony agreed with that of senior drivers, the department's overtime pay procedure had been applied consistently for over twenty years until the summer of 1988. Specifically, for all Saturday assignments, whether field trips or ROP trips, the driver would go "on the clock" thirty

minutes before he/she was to pick up the students from their point of departure. During this half-hour, the driver went where the vehicle was stored, performed a safety check on the bus, then proceeded to the pick-up point. If the "pick-up time" happened to be 8:00 a.m., the driver went "on the clock" at 7:30 a.m., for compensation purposes. Upon delivering the students to their destination, the driver ordinarily remained with the bus or would join the students at their event, depending on various circumstances.[2] Whatever the driver chose to do, he/she remained "on the clock" while he/she waited or joined the students.

After the event, the driver transported the students to the point of original departure. He or she was credited with an additional thirty minutes after dropping them off. During this half-hour, the driver returned the bus to its storage area, prepared it for the next day's use, and secured it. At the end of the latter 30-minute period, the driver went "off the clock." Therefore, the driver stayed "on the clock" continuously and earned overtime pay (at one and one-half times the regular rate) beginning with the 30-minute period before the pick-up time and ending 30 minutes after the drop-off time.

For overtime assignments occurring during weekdays (Monday - Friday), the procedure varied slightly. Drivers' regular workdays were from 7:00 a.m. to 4:00 p.m. If, for example, the

[2]The driver could join the students on field trips, for example, or remain in the bus for other reasons. In some cases, he/she was required to transport students back to school for unanticipated reasons. In others, drivers retrieved equipment or lunches inadvertently left behind by the students.

pick-up time for a trip was 1:00 p.m., the driver delivered the students to their destination, then returned to complete his/her regular afternoon school runs. Afterward, he/she would go back to retrieve the students and take them to the point of the overtime trip's origin. If the trip's return time was 5:30 p.m., the driver would not go "off the clock" at the end of his/her regular shift (4:00 p.m.). Rather, he/she would stay "on the clock" and begin earning overtime at 4:01 p.m. The driver would stay "on the clock" for thirty minutes after the drop-off time to store and secure the bus.[3]

Another aspect of the transportation department's procedures dealt with the manner of assigning overtime trips to drivers. This process was codified in the parties' 1987-1990 collective bargaining agreement. Section E of Article IX (Work Periods and Overtime) provided:

> E. Equalization of Overtime for Bus and Truck Drivers
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> The purpose of this section is to equalize the number of overtime hours for each driver. This section shall apply to Bus and Truck Driver[s] only:
>
> 1. The District shall establish an overtime list containing the names of all affected drivers and indicating the total number of overtime hours currently accrued by each driver. . . .
> 2. Assignment of overtime shall be as follows:
> (a) Overtime assignments for any given day shall be given to the driver on

[3]The same driver employed to pick-up the students for the overtime trip was used to retrieve and return the students at the conclusion of the function.

the list who has the least number of overtime hours on the list. . . .

(b) Additional overtime assignments shall be given to other drivers in ascending order.

(c) If more than one overtime assignment is available on the day of the trip, the driver with the least number of total overtime hours assigned that day shall be given the trip with the longest duration for that day.

3. Refusal of Overtime Assignment

(a) A driver who refuses an overtime assignment shall have the actual number of hours worked on that trip charged against him/her and have those hours added to his/her total number of overtime hours on the list. . . .

(b) Notwithstanding subsection (a) above, a driver who becomes ill or refuses to implement or complete their overtime assignment will be credited for each overtime trip he/she refuses or can not implement. . . .

Before refusing an overtime assignment, therefore, a driver had to consider this provision's impact in lowering his/her name on the overtime assignment list as if the driver had completed the task.

C. The Regional Occupational Programs

Just before the events giving rise to the unfair practice allegations involved in this case, the District was one of some 22 public school districts involved in a Regional Occupational

Program conducted through the County of Los Angeles. The specific programs within the ROP are designed to equip students to enter the work force rather than to prepare them for an academic career. The County employed a liaison to work with individual Districts. The liaison worked with Riley Johnson, Jr., who, until October of 1988, was the District's director of vocational career and adult education. As of May 1988, the Compton Unified School District participated in about 44 individual ROP programs within the County ROP. Some 2200 District students were enrolled in the programs. Each of the individual programs was funded separately on the basis of the number of students enrolled in the particular program. The source of the funds was average daily attendance ("ADA") monies received from the state.

The District used its transportation department's vehicles and personnel for some ROPs. For example, students participated in a ROP program involving travel to Rockwell Aerospace. Others were involved in a Montgomery Ward ROP, and still others travelled to Johnson's Market, beauty colleges, and neighboring community colleges. The procedure governing drivers' pay was uniform, disregarding whether the assignment was for a ROP or some other trip.

On July 1, 1988, the District withdrew from the County's ROP structure. It assumed direct responsibility for all the ROP programs it had been participating in up until that time. Compton became what Johnson described as "a single-district ROP."

1. The Universal Studios ROP

Before 1988, the County allowed some districts to participate in an individual ROP program involving Universal Studios. Students enlisting in that program worked at different jobs on the Universal Studios grounds. The students received a wage, but neither the County nor the District received compensation from Universal Studios itself. The purpose of the Universal Studios ROP was to provide students with work experience and compensation, although some preliminary orientation classes on job interviewing skills were also given. The students did not receive classroom credit for participating in the program.

The County had not given the Compton Unified School District the chance to participate in the Universal Studios ROP before 1988. However, the County apparently began to suspect that Compton was seeking to pull out of its ROP program.

Allegedly as an inducement for Compton not to withdraw from the County's ROP administration, the County offered the District the opportunity to participate in the Universal Studios ROP sometime in late April of 1988. The County's representatives informed District personnel what the program would entail. There was no requirement that the District provide transportation for students who enrolled in the program. The District was also informed that the program would last from May 21 to September 6, 1988.

Director Johnson asked the transportation department's director, Alfred Gibson, about the cost of transporting the students to Universal Studios for the duration of the program. In addition to discussing with Gibson this cost, Johnson received a list of rates charged by the transportation department. Costs were based on variables including the type of District vehicle used, the mileage involved, and the number of hours the trip would take. Johnson also obtained a bulletin routinely issued by the Department showing the different rates charged for certain services. Johnson testified that he was aware of the Department's overtime pay procedures and that they applied to all ROP trips.

Johnson also knew that, because the Universal Studios ROP involved only one week of "classroom" time - the orientation - the District would receive less than $1900 per student enrolled in the program. The program would not generate any more ADA monies after the orientation week because the "academic" part of the program would be over and the remaining portion was considered by the state to be employment.

Johnson testified that he calculated the transportation costs before the start of the program. He acknowledged that the figure was more than $17,000.00. When asked on cross-examination how he figured he would be able to pay for the program, he

answered, "One possibility was paying for it out of the general funds."[4]

Johnson did not know how many students would eventually enroll in the program and thus how much ADA money would be available for the entire program. Despite not knowing what the program's budget would eventually be, Johnson decided to go forward with the program and to devote the entire budget to transportation expenses. His reasons for implementing the program, despite the uncertainty over funding were "this was a special effort that Compton was trying," and there were "special attributes" that made Compton want to participate in it, whether or not it could afford to.

Whatever these attributes might have been, the District hastily took steps to activate the program between late April and May 1988. In the first week in May, the County conducted a one-week orientation designed to prepare the students for job interviews to be handled by Universal Studios personnel. About a week before work actually started, the Universal Studios representatives conducted the job interviews and decided which students to hire.

The first day of work was May 21, 1988, a Saturday.[5] On

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[4]In the 1988-89 school year, the ROP programs at Compton, according to Johnson, were being subsidized by the District's general fund, but the ROP programs would eventually have to reimburse the general fund.

[5]At the beginning of the program, the employment took place only on weekends. At the end of the academic year in the latter part of June 1988, the students were transported to Universal Studios both on weekdays and weekends. District bus and truck

that date, Richard White, a District driver, was assigned to transport 25 of the students to Universal Studios and to return them at the end of the day.[6] Consistent with the transportation department's practice, he went "on the clock" at 6:00 a.m. to pick up the students. He stayed "on the clock" the remainder of the day until 6:30 p.m. when he had stored his bus after returning the Universal Studios ROP students to their initial pick-up point. He did not go "off the clock" in the middle of the day while he waited for his return trip. He was therefore credited with 12 1/2 hours of overtime for this job. Other ROP trips were also paid according to the customary procedure.

On June 7, 1988, the District was informed by the County that its ADA allocation for the Universal Studios ROP was about $7900. Further, the District would only be receiving $7,000 of that allocation. Johnson testified that although he discovered on June 7 the program's meager allocation, and knew that the money would not last until September 6, he did nothing about the looming problems. Rather, he waited until the District's budgeting department informed him a week later that he was "going to run out of money."

Johnson then told the District's superintendent of the financial problems. He did not request additional funds from any other source to complete the program nor did he request general

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drivers ordinarily worked during the summer months.

[6]The students' starting and ending times were not uniform. Therefore, some drivers' pick-up and drop-off times varied.

fund money for the Universal ROP, according to his own testimony. He did tell the superintendent that he felt the "thirteen hour trip wasn't necessary." In testifying, Johnson explained that he saw no sense in sending a driver to Universal Studios to have him/her sitting there all day waiting for the students to return in the evening.

The issue was not completely resolved during that discussion. The superintendent referred the problem to Director of Employer-Employee Relations Dwight Prince. Prince was asked to figure out a way to maintain the Universal Studios ROP, but to "bring it within budget." Otherwise the ROP would have to repay the general fund later for any amount spent over budget.

From discussions with Gibson and Johnson, Prince was convinced that he had to work with the $7,000 budget rather than to try securing additional funding. According to Prince, the District's primary goal was to continue the Universal Studios ROP because it did not want to "disappoint students, parents, that whole thing." The option of charging a transportation fee was discussed, but not considered viable "from a community standpoint." Also, according to Prince, the District did not want to charge students/employees who were earning wages near minimum levels. Prince testified that the District would not levy such a fee "if there was any way in the world to avoid" it.

D. The Change in Overtime

Prince opted, therefore, to change the overtime pay policy for drivers, but only for Universal Studios ROP trips. On about

July 5 or 6, Prince informed CSEA Field Representative Janet White that a decision had been made to change the overtime procedure for drivers who were given assignments in the program. Prince testified that the Union protested that any change in the time credited for the trips would be viewed as a change in past practice and subject to negotiations. However, according to Prince, the District did not offer to negotiate.[7]

On about July 6, 1988, Prince called and attended a meeting for the District's bus drivers to announce the change personally. Transportation Director Gibson accompanied Prince, and Janet White also attended. Prince informed those in attendance that the Universal Studios ROP did not have enough money to continue to pay the drivers what they had been receiving for those trips. Therefore, beginning July 7, the drivers would only be credited with a maximum of three overtime hours for the trips on weekdays and six hours for trips occurring on weekends and holidays.

On Saturdays and holidays, the drivers would be considered "off the clock" between the time they dropped off the students at Universal Studios and the time the driver returned to the studios to take them back to the school. According to one driver, he could choose to remain at Universal Studios with his bus after

[7]Prince explained that a decision had already been made to change the compensation scheme and that, rather than informing the Union what the District was "proposing", he notified White of "what was going to happen." During the PERB proceedings and in its post-hearing brief, the District advanced contractual authority as one reason for not giving CSEA an opportunity to bargain over the change. That reason was not offered when Prince informed White of the change.

the initial drop-off, but he would be on "dead time" and therefore not be paid for that period. The other option was to return to the District garage and store the bus until the late evening - around 9:00 p.m. - when it was time to go back to Universal Studios for the return trip. In either case, instead of earning the normal 12-13 hours of overtime on weekends and holidays, the drivers would be earning only six hours worth of pay for the same task they had performed in the past.

On weekdays, the change would affect the drivers only for the evening return trip because the morning route usually occurred within the normal 7:00 a.m. to 4:00 p.m. shift. In the evening, however, the drivers were deemed "off the clock" at 4:00 p.m. When the time came to retrieve the students from Universal Studios, the driver would go back "on the clock," usually at about 9:00 p.m., and "off the clock" three hours later. They did not automatically stay "on the clock" and begin to earn overtime at 4:01 p.m. as in the past.

Other overtime trips, including trips for other ROPs, were unaffected by the new procedure. They continued to be paid according to traditional practice.

When the change was announced on July 6, the drivers protested that it was unfair and contrary to past practice. Some threatened to refuse to accept those assignments. Others said they would continue to perform them but, essentially, under protest.

Despite the complaints, the change was carried out. One driver refused to accept the assignments to Universal Studios and lost the overtime he would normally have earned under the old procedure. He testified that, in addition, he was denied other overtime assignments because of the operation of contract article IX, section E. Since he was credited with having accepted the assignments, his name was repeatedly pushed down the list of drivers who were due for overtime trips. Other drivers continued to claim (on their time sheets) the number of hours as they had according to prior procedure. But, they were only paid the maximums announced by Prince at the July 6 meeting.

No figures on the final expenses of the Universal Studios ROP were offered as evidence. However, based on Prince's calculations in early July, the amount saved from bus driver pay was projected to reduce the cost overrun to slightly over $1,000 above the original allocation. The projected cost of transportation, including savings from the new compensation procedure, was $8026.02. Prince testified that whatever the overrun was, it was to be paid out of the District's general fund, and the ROP would later have to reimburse that fund.[8]

E. The Collective Bargaining Agreement

In addition to the portions of the parties' contract quoted earlier in this Decision, there are other arguably germane provisions. Article IV (District Rights) states:

[8]There is no evidence as to whether the District would be participating in the Universal Studios ROP for the following summer.

1. It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in, but not limited to, those duties and powers are the exclusive right to: Determine its organization; direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided, and the methods and means of providing them: establish its educational policies, goals and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine the curriculum; build, move or modify facilities; establish budget procedures and determine budgetary allocations; determine the methods of raising revenue; contract out work, and take action on any matter in the event of an emergency.
2. The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with law.
3. The District retains its right to amend, modify or rescind policies and practices referred to in this Agreement in cases of emergency. "Emergency" shall be defined as: A situation calling for prompt action, brought by an act of God; by unusual, unexpected or extraordinary interference from a third party; or by an unusual, unexpected or extraordinary occurrence whose cause is unknown.

The contract also contains provisions under previously-cited Article IX (Work Periods and Overtime) which state:

1. Workday and Workweek

The maximum number of hours of regular employment of unit members is eight (8) hours a day and forty (40) hours a week. However,

the Governing Board may employ persons for lesser periods . . . and authorize unit members to work in excess of eight (8) hours in one day or forty (40) hours in one week. , . .

4. Overtime

A. Overtime is ordered and authorized working time in excess of 8 hours in one day or 40 hours in one week. No one shall order or authorize overtime unless it is compensable as provided below. . . .

. . . . . .

C. No unit member covered by this Agreement shall have his/her hours altered or changed for the sole purpose of circumventing the overtime provisions of this Agreement.

D. Overtime - Distribution by Seniority; Overtime shall be distributed to unit members in the bargaining unit within each department by classification in order of bargaining unit seniority. . . .

5. Compensation for Overtime

A. All overtime must be approved in advance by the appropriate supervisor.

B. The unit member has the option of taking compensating time off or cash payment for accrued overtime, providing the needs of the District do not conflict.

C. Overtime worked must be paid in cash or compensating time off allowed at one and one-half times the actual hours worked. Any compensating time off not used during the calendar month in which earned must be paid in cash, unless the unit member and his/her immediate supervisor mutually agree to an extension of time . . . .

The contract also includes a "zipper clause" (Article XX - Completion of Meeting and Negotiations) binding both parties as follows:

> CSEA and the District knowingly and voluntarily expressly waive and relinquish the right to meet and negotiate during the life of this Agreement over any matter within the scope of representation. No exception shall be granted on the basis that the subject to be addressed in additional negotiations is not covered by this Agreement or was not within the knowledge or contemplation of either party during negotiations for this Agreement.

Neither party offered evidence of bargaining history about the contractual provisions cited in this Decision.

DISCUSSION

PERB has recognized that the opportunity for overtime pay is within the scope of representation. State of California (Department of Transportation) (1983) PERB Decision No. 333-S. In Lincoln Unified School District (1984) PERB Decision No. 465, an employer violated the EERA where, without prior negotiations with an exclusive representative, it caused a reduction in overtime pay during weekend trips for which bus drivers were eligible. The Board also held that it was immaterial that the source of the funds for the weekend trips was not the employer but rather a group of parents and friends of students who raised the money. The Board, in Oakland Unified School District (1983) PERB Decision No. 367, dismissed a unilateral change allegation, but recognized that practices of assigning overtime work are within the scope of representation.

In this case, the District does not argue that the overtime procedure in question is outside the scope of representation. Its own witness, Dwight Prince, acknowledged that the overtime compensation practice at issue was part of the drivers' terms and conditions of employment.

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 and violative of EERA section 3543.5 (c). Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94. A collective bargaining agreement may set forth established terms and conditions of employment. Grant Joint Union High School District (1982) PERB Decision No. 196. Where a contract is silent or ambiguous, established policy may be determined by examining past practice or the parties' bargaining history. Rio Hondo Community College District (1982) PERB Decision No. 279.

Here, the applicable policy is the practice of allowing drivers to stay "on the clock" - and thereby earn overtime pay - between the time they started their assignment (on trips extending beyond regular hours and/or workdays) and the time they stored the bus after returning the students to the point of origin. This policy is not set forth in the parties' collective bargaining agreement. However, it was clearly established through over twenty years of consistent and well-known practice.

There is also no dispute that the established policy was

changed, and changed unilaterally. Prince admitted this fact during his testimony. His announcement of the change to the Union - a day or two before it was to take effect - was a firm decision already made, not a proposal. He also conceded that the District did not offer to negotiate on the subject despite protests that such change was negotiable.

Considering the above, the District must establish an affirmative defense to avoid a finding that it violated the EERA.

The Respondent asserts two main arguments in defense of the alleged conduct - waiver by contract and operational necessity. Specifically, the District argues that the collective bargaining agreement grants it the sole power to determine the amount of overtime and to authorize overtime assignments for unit members. From this, Respondent concludes that the contract therefore allows it to reduce overtime as it did herein. Additionally, the District claims that it was required to reduce overtime so its students could complete the Universal Studios program.

Waiver is an affirmative defense which the PERB will not find unless the Respondent can show that the exclusive representative "intentionally relinquished in clear and unmistakable terms" its rights under the Act. See, e.g., Davis Unified School District, et al. (1980) PERB Decision No. 116. The subject involved must have been "fully discussed" or "consciously explored" and thereafter "consciously yielded" by the charging party. Los Angeles Community College District (1982) PERB Decision No. 252. In Placentia Unified School

District (1986) PERB Decision No. 595, the Board held that simply including a broad subject in a collective bargaining agreement does not amount to a waiver of particular aspects of that subject that were neither discussed nor covered by the eventually agreed upon language.

Here, the District's waiver defense hinges on extrapolation from general and imprecise contractual language. Yet, Article III (Effect of Agreement) of the contract states clearly that "rules, policies and practices not specifically written into this **Agreement are not part of this Agreement."** Hence, although the broad subject of overtime was addressed in the contract, the specific overtime compensation practice involved here was not covered. Therefore, the claim that the specific subject of staying "on the clock" was consciously yielded is suspect.

The District also cites contract Articles IV and IX for the proposition that, absent a specific contractual prohibition, it has complete discretion to make changes in overtime. And, since the overtime practice at issue was not delineated in the contract, the District declares it was free to act as it did here. Only a strained reading of the contractual provisions can yield such a conclusion.

The District Rights Article (IV) gives the Employer the broad rights to "direct the work of its employees, determine the times and hours of operation, and determine the kinds and levels of services to be provided." Nowhere does the language state that the District may change the pay scheme of those employees or

alter a compensation practice the District itself has established by unwritten policy. Furthermore, the article provides that the Respondent "retains" its managerial authority "to the full extent of the law." One can fairly conclude "the law," as referenced in the provision, includes the duties of notice and opportunity to bargain under the EERA. Hence, although the compensation procedure here was not expressed in the contract, the District was bound by the limitations of the Act. It did not have unbridled discretion to alter terms not expressly mentioned in the agreement.

Even if the contract were not read to incorporate the EERA by implication, the agreement's unspecific management rights language does not clearly give the District the authority to make changes in the settled overtime procedure. A waiver of bargaining rights by a union will not be lightly inferred, particularly where, as here, the language of the agreement fails to define the policy in question. Compton Community College District (1989) PERB Decision No. 720, at p. 19. Not only must a waiver be "clear and unmistakable" but waiver is also an affirmative defense, and the party asserting it (here the District) bears the burden of proof. Placentia Unified School District (1986) PERB Decision No. 595, at p. 7. The District did not produce evidence of bargaining history from which one could reasonably interpret the contractual provisions as a waiver of the Union's right to notice and bargaining over the changes in overtime pay.

The agreement's zipper clause (Article XX) supports the conclusion that the District was not free to alter the transportation department's overtime compensation practice without the participation of the bus drivers' exclusive representative. The clause's plain language gives both parties the right to refuse to bargain changes in all matters covered by the terms of the clause for the duration of the agreement. This includes "any matter within the scope of representation" and those "not covered by this Agreement or . . . not within the knowledge or contemplation of either party during negotiations for this Agreement."

In Los Rios Community College District (1988) PERB Decision No. 684, the Board analyzed the effects of a zipper clause essentially the same as the one involved herein.[9] The Board concluded that, in practical terms, the clause fixed for the life of the agreement (absent mutual agreement to negotiate changes)

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[9]The zipper clause in that case read:
The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Board and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively unless mutually agreed upon with respect to any subject or matter, even though such subjects or matter may not have been within the knowledge or contemplation of either or both parties at the time they negotiated or signed this Agreement, [emphasis added]

those terms and conditions of employment established by past practice, as well as those established by the express terms of the contract. Thus, unspecified terms and conditions of employment covering negotiable subjects became the status quo for the life of that agreement.

Here, the practice of drivers remaining "on the clock" during overtime assignments became the status quo for the term of the contract. As in the Los Rios case, it is found here that the Compton Unified School District was not free to alter the overtime compensation practice unilaterally, even though it was not detailed in the agreement.

The District next claims it was forced by operational necessity to carry out the change. In Compton Community College District (1989) PERB Decision No. 720, the Board restated the principle that, to establish a business necessity defense based on budgetary considerations, an employer must show that the financial crisis

> . . . is an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action. (Calexico Unified School District (1983) PERB Decision No. 357, at p. 20.)

Even when an employer is faced with an actual economic collapse of unknown proportions, it may not take unilateral action on negotiable subjects, but must bring its concerns about these matters to the negotiating table. San Francisco Community College District (1979) PERB Decision No. 105, at pp. 10-11. The

existence of a genuine emergency, by itself, does not extinguish the duty to give notice and an opportunity to bargain.

The District's threshold argument that there existed a genuine financial crisis is unpersuasive. The evidence clearly shows that the Universal Studios ROP was voluntary. Further, participation in the program did not mandate that the District provide free transportation for the student/workers.[10] Although the Respondent viewed District transportation as valuable to the program's success, the evidence does not show that the District had no alternative but to furnish it to the extent it did here. PERB does not sanction unilateral changes where statutes give the employer discretion. Fountain Valley Elementary School District (1987) PERB Decision No. 625, at p. 27.

The "financial crisis" was not unanticipated. Almost from the start, District administrators decided to participate regardless of whether or not the District could afford the entire costs of the Universal Studios program. Yet, when the District chose to participate in the face of information that the program's transportation costs alone would exceed $17,000.00, and that the income from ADA monies would be limited, administrators moved onward despite foreseeable financial obstacles. Johnson even entertained, at that time, the possibility that the District's general fund could be used to help pay for the program. Even when Johnson was informed of the actual fund

[10]One District witness testified that some of the students supplied their own transportation, although the District administrators felt this was not "supposed" to happen.

allocation for the Universal Studios ROP on June 7, he apparently did not feel it was sufficiently serious to warrant immediate action until he was prodded to do so by the District's budget department.

Prince's testimony shows that some thought was given to the prospect of requesting additional funds in order to meet the transportation costs for the remainder of the program. However, the overall record demonstrates only a superficial effort was made in this regard. Prince testified that he simply accepted the two directors' (Gibson and Johnson) conclusions that the $7,000 was all there was with which to work. He also testified that the directive he had been given by the superintendent was not to seek funds to supplement the ADA monies, but rather to "bring the program within budget."

Given these facts, one must doubt the assertion that the "financial emergency" was one which "left no real alternative to the action taken" by the District. Indeed, Prince surmised that the amount eventually overspent by the Universal Studios ROP would be paid from the District's general fund, to be reimbursed at an unspecified later date. He acknowledged there was no restriction, other than the "concept of efficiency and management," preventing the District from advancing more than the amount actually overspent. Interestingly, the District's general fund was being used to subsidize the ROP programs in the following academic year. The lack of genuine efforts to find

options to the funding shortage belies any assertion that the situation left no real alternatives.

Arguably, several alternatives, apart from those discussed above, were available. The District could have continued to participate in the Universal Studios program, but cease providing transportation. Or, it could have limited its transportation to the weekdays, thereby eliminating the weekend overtime expenditures. It might have subsidized students' public transportation bus fares. It could have negotiated (with CSEA) a way to avoid the financial impact on drivers - e.g., creating an exception for Universal Studios assignments whereby a driver declining such would not be penalized or precluded from the next overtime assignment which came up.

The Respondent never considered the alternatives of informing the Union of the options it was entertaining or of seeking alternative solutions via the negotiations table. Although the status of the funding was unclear at the time the District calculated expenses during planning stages of the program, Respondent was aware, from the disparity of costs to possible revenue, of likely financial problems. Nothing precluded contingency negotiations on the issue. When the District received the budget allocation statement on June 7, it could have, but did not, alert the Union of the chance that drivers' hours and pay might be affected. A week or so later, Johnson was advocating to the superintendent a possible solution to the fund shortage - there was no reason to pay the drivers for

sitting at Universal studios all day (collecting overtime) waiting for the return trip. Yet the Union was not informed that the District was entertaining this possibility. The alternative selected was one intended to accommodate students, parents, the community, and the administration, at the expense of the drivers.

Prince reached a firm decision to implement the overtime change at most two days before the date of implementation. Even then, he made no offer to CSEA to negotiate over the matter. No reason was given as to why the implementation date could not be moved even for a few days to give the Union an opportunity to assert its bargaining rights on behalf of the drivers. No effort was made to negotiate a compromise after the fact. The District made what was a final decision, not a proposal capable of being negotiated. Under all these circumstances, the Respondent's operational necessity defense must be rejected.

Respondent finally contends that the Complaint should be dismissed because PERB lacks jurisdiction since the matter is covered by the collective bargaining agreement and the Charging Party has not exhausted the contractual grievance machinery. This argument lacks merit for various reasons.

Section 3541.5 (a) of the Act prevents PERB from issuing a Complaint against conduct prohibited by a collective bargaining agreement unless the grievance machinery of the contract has been exhausted either by settlement or binding arbitration. As already concluded, supra, the matter involved in this case is not covered by the applicable contract but, rather, is based on

longstanding practice. Because the contract does not specify the practice, CSEA could not allege that a specific contractual provision was violated and, therefore could not exhaust the grievance machinery, particularly in light of the following language from Article VI (Grievance Procedure):

> 1. Definitions
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> A. A "grievance" is a written complaint by a unit member . . . that he/she has been adversely affected by an alleged violation, misinterpretation, or misapplication of a specific provision of this Agreement. Actions to challenge or change rules or regulations of the District which are not specifically incorporated into this Agreement or to contest matters for which a specific method of review is provided by law are not grievances and are not within the scope of the grievance procedures set forth in this Article . . . . (Emphasis added.)

Also as noted further above, Article III excludes from the contract "rules, policies and practices not specifically written into" the agreement. The Board noted, in State of California, Department of the Youth Authority (1989) PERB Decision No. 749-S, that where allegations in the unfair practice charge are specifically excluded from the grievance machinery, no deferral can be ordered. It follows that in such instances, as in the one at hand, PERB's jurisdiction is preserved.

CONCLUSION

Based on the entire record and the preceding reasons, it is concluded that the District violated EERA section 3543.5 (c) when, without negotiating with CSEA, it changed the practice of allowing bus drivers to remain "on the clock" for a continuous

period starting with the origin of a driving assignment and concluding at the end of the assignment when the bus was secured after the students were returned from their trips. The unilateral action was taken in disregard of CSEA's admonitions and with indifference to the Union's right and duty to represent the rights of affected unit members. Therefore, the District's action also violated EERA section 3543.5 (b). Although there is evidence that the Respondent's conduct may have also violated EERA section 3543.5 (a), a finding on that section cannot be reached here. Such allegation had been withdrawn with prejudice by the Charging Party at the time the Complaint was issued.

ORDER AND REMEDY

The PERB is empowered to issue a decision and order directing an offending party to take such action as will effectuate the policies of the EERA. In a unilateral change case, the respondent is typically ordered to cease and desist from such action in the future and to restore the status quo ante. Accordingly, the District will be ordered to cease and desist from unilaterally changing the overtime policies which were in effect before it engaged in the conduct which is the subject of this case. Although it may appear that the change only affected the Universal Studios ROP, which either ended or was in a hiatus after September 6, 1988, the evidence suggests that the District erroneously believed it retained the discretion to change the overtime practice as needed in the future. It is also unclear whether the District will participate in the

Universal Studios ROP in the future. To avoid any ambiguity, the Respondent will be directed to restore the overtime procedures in effect before the unilateral change occurred.

Unit members were financially affected by the change in two different ways. One was the reduction in the number of overtime hours credited on Universal Studios trips. The other was a loss of non-Universal Studios overtime assignments, due to the penalty in the contract (Article IX, section E), for drivers who refused these assignments. Drivers had only two options - accept the assignments at the reduced level, or lose their turn on the rotation schedule for overtime assignments, thereby also missing the chance for overtime pay. Under these circumstances, it is appropriate to order the District to make unit members whole for any economic losses they suffered stemming from the unlawful changes.

Drivers who accepted and performed Universal Studios ROP assignments when the changes went into effect shall receive the difference between what they were paid and the amount they would have received under the old system of crediting hours. The exact amounts of compensation, unless agreed to by the parties, can be determined in compliance proceedings before the PERB. To these compensatory amounts, the District shall add interest at ten (10) percent per annum.

For those drivers who declined Universal Studios ROP assignments after the change in practice, the District must deduct the hours with which they were credited from the overtime

assignment list. Their names are to be placed at the top of the list for future overtime assignments until the overtime hours performed equals the number they were credited with pursuant to contract Article IX, section E3.

The Respondent shall also be required to post a notice incorporating the terms of this Order. The Notice should be subscribed by an authorized agent of the Employer, indicating that it will follow the terms thereof. The Notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a Notice will provide employees with notice that the Employer has acted in an unlawful manner and is being required to cease and desist from this activity. It 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 Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar posting requirement.

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

A. CEASE AND DESIST FROM:

(1) Changing, without notice to and negotiations with CSEA, the overtime compensation practices in effect in the transportation department immediately before July 6, 1988.

(2) Interfering with CSEA's right to represent unit members in their employment relations with the District.

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

(1) Restore the transportation department's overtime compensation procedure in effect immediately before July 6, 1988.

(2) Make whole each unit member who suffered economic harm from the change in overtime compensation as to Universal Studios ROP assignments. Drivers who continued to perform Universal Studios ROP assignments after the change will receive the difference between the amount they were actually paid and the amount they would have received under the old procedure. The amounts of compensation shall include an additional sum as interest calculated at ten (10) percent per annum. For drivers who declined Universal Studios ROP assignments after the unlawful change, the District shall deduct the number of hours they were charged with on the overtime assignment list for future assignments. The names of these drivers will be placed at the top of the overtime assignment list for future overtime until the number of hours worked equals the number they were charged with for having declined the assignments.

(3) Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are

usually placed at its headquarters office and at each of its campuses and all other work locations for thirty (30) consecutive workdays. Copies of this Notice, after being duly signed by an authorized agent of the Respondent, 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.

(4) 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 her instructions.

Pursuant to California Administrative Code, title 8, 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, 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, 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, sections 32300, 32305 and 32140.

Dated: September 14, 1989

Manuel M. Melgoza
Administrative Law Judge