STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CUPERTINO CHAPTER 13,	)	
Charging Party,	)	Case No. SF-CE-1528
v.	)	PERB Decision No. 987
CUPERTINO UNION SCHOOL DISTRICT,	)	April 1, 1993
Respondent.	)	

Appearances: California School Employees Association by Madalyn J. Frazzini, Attorney, for California School Employees Association and its Cupertino Chapter 13; Breon, O'Donnell, Miller, Brown & Dannis, by Laurie S. Juengert, Attorney, for Cupertino Union School District.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Cupertino Union School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District unilaterally reduced the work hours of employee Stephanie Swensson (Swensson) in violation of section 3543.5(a), (b) and (c) 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 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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

The Board has reviewed the entire record in this case, including the proposed decision, the District's exceptions and the California School Employees Association and its Cupertino Chapter 13's (CSEA) response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

DISTRICT'S EXCEPTIONS

On appeal, the District filed numerous exceptions to the proposed decision including: (1) the ALJ erroneously concluded that the reduction of Swensson's position by one-half time did not fall within the past practice policy of the District; and (2) the party's zipper clause contained in the Collective Bargaining Agreement (CBA) precludes negotiations of matters which are not covered by the agreement, such as reduction in hours.

DISCUSSION

The District argues that it has had a long standing practice of reducing hours of bargaining unit members without negotiating with CSEA. The District presented several instances where it had decreased and increased the hours of unit members without

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> employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

bargaining with CSEA. However, the Board has determined that when an employer changes "the quantity and kind" of its past practice without negotiation, it will violate the duty to negotiate in good faith. (Oakland Unified School District (1983) PERB Decision No. 367.) Although the District may have established a past practice by temporarily increasing and reducing part-time employee hours, the District has failed to demonstrate an instance where a full-time employee whose 8-hour assignment in one classification was permanently reduced by one-half. As the District has failed to demonstrate that it has met the "regular and consistent past patterns of changes in the conditions of employment" as mandated by Pajaro Valley Unified School District (1978) PERB Decision No. 51, this exception is rejected.

Next, the District contends that the parties' CBA contains a zipper clause which precludes negotiations of matters which are not covered by the agreement, such as reduction in hours. The District relies on Sylvan Union Elementary School District (1989) PERB Decision No. 780, in which the Board held that the District was not required to negotiate layoff effects based on the existence of an extensive layoff clause and the zipper clause. However, as the ALJ correctly ruled, the Sylvan case is inapposite to the present case, as in Sylvan, the charging party had not alleged the District's implementation of layoffs as constituting a change in past practice. Additionally, although the parties' zipper clause forecloses further requests to

negotiate regarding matters not covered by the CBA, the District cannot rely on the present zipper clause to make unilateral changes in policy with regard to matters within the scope of representation. (Los Angeles Community College District (1982) PERB Decision No. 252.)

Finally, having reviewed the record, the Board sees no reason to disturb the ALJ's proposed remedy.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, the Board finds that the Cupertino Union School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c). The District violated the EERA by unilaterally reducing the hours of a unit employee in a substantial change from past practice. This action also interfered with the right of the California School Employees Association and its Cupertino Chapter 13 (CSEA) to represent its members, and was thus, also a violation of EERA section 3543.5(b). By this same action it also denied employees the right to participate in employment related activities in violation of section 3543.5(a).

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. Failing and refusing to meet and negotiate in good

faith with the exclusive representative by taking unilateral action with respect to the reduction of hours of unit employees;

2. Interfering with the right of CSEA to represent its members; and

3. Denying bargaining unit employees the right to be represented by CSEA.

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

1. Restore the status quo ante with regard to the reduction of hours to the level which existed prior to the District's unilateral action on Stephanie Swensson's position.

2. Reimburse Stephanie Swensson for the loss of pay from the time of the reduction of hours until the date of her resignation from the District. The amount of the reimbursement shall be augmented by interest at the annual rate of seven (7) percent.

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

4. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director

of the Public Employment Relations Board in accord with the director's instructions.

Chair Blair and Member Caffrey 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. SF-CE-1528, California School Employees Association and its Cupertino Chapter 13 v. Cupertino Union School District, in which all parties had the right to participate, it has been found that the Cupertino Union School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action with respect to the reduction of hours of unit employees;

2. Interfering with the right of CSEA to represent its members; and

3. Denying bargaining unit employees the right to be represented by CSEA.

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

1. Restore the status quo ante with regard to the reduction of hours to the level which existed prior to the District's unilateral action on Stephanie Swensson's position.

2. Reimburse Stephanie Swensson for the loss of pay from the time of the reduction of hours until the date of her resignation from the District. The amount of the reimbursement shall be augmented by interest at the annual rate of seven (7) percent.

Dated: _____ CUPERTINO UNION SCHOOL DISTRICT

By: _____
Authorized Agent

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 CUPERTINO CHAPTER 13,	)	
Charging Party,	)	Unfair Practice Case No. SF-CE-1528
v.	)	
CUPERTINO UNION SCHOOL DISTRICT,	)	PROPOSED DECISION (8/27/92)
Respondent.	)	

Appearances: Diana Hull, Field Representative, for California School Employees Association and its Cupertino Chapter 13; Breon, O'Donnell, Miller, Brown and Dannis, by Laurie S. Juengert for Cupertino Union School District.

Before Gary M. Gallery, Administrative Law Judge.

INTRODUCTION

The district reduced the hours of a unit member after refusing to negotiate with the exclusive representative. The employer's position is that the action was consistent with past practice.

PROCEDURAL HISTORY

The California School Employees Association and its Cupertino Chapter 13 (CSEA) initiated this proceeding by filing an unfair practice charge on February 10, 1992, against the Cupertino Union School District (District). After investigation, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District alleging that prior to January 28, 1992, the District's policy concerning the hours of the Typist Clerk III position was eight hours per day. It was alleged that on that day the policy was changed to

four hours per day without notice to CSEA or affording it the opportunity to negotiate the decision or the effects of the change. This conduct was alleged to have violated section 3543.5(0), (a) and (b) of the Educational Employment Relations Act (EERA or Act).[1]

The District's answer, filed on April 6, 1992, denied any violations of EERA and asserted that it had a long-standing practice of reducing hours without negotiating with CSEA.

By written order issued on May 11, 1992, the caption was amended to include the Cupertino Chapter 13 as charging party.[2]

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[1]EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise specified. Section 3543.5 states in pertinent part:

> 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. . . .
>
> (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.

[2]At hearing, CSEA's request to amend the complaint to include allegations of direct negotiations with an employee was granted. Later, at hearing, the amendment was withdrawn by CSEA.

An informal conference did not result in settlement. Formal hearing was held on June 2 and 3, 1992. Post hearing briefs were filed and the matter submitted on August 10, 1992.[3]

FINDINGS OF FACT

The District is a public school employer within the meaning of section 3540.1(k). CSEA is the exclusive representative of a unit of employees of the District, within the meaning of section 3540.1(e). The unit represented by CSEA includes instructional aides and clerical employees.

Dianna Hull (Hull) has been a CSEA field representative since July of 1988, and has served as chief negotiator for Chapter 13. Terry Nolan (Nolan) served as categorical programs coordinator from 1973 to 1979. Then, after two years as a personnel technician, she became a personnel analyst for three years, and then assumed her current position as supervisor of the office. Pat DeMarlo (DeMarlo) has been director of human resources for the 13 months preceding the formal hearing.

This unfair practice complaint arises from a charge filed by CSEA in regards to Stephanie Swensson (Swensson). Swensson was hired on March 4, 1991, as an eight-hour Typist Clerk III in the Instructional Department. The posting for the position listed it as an eight-hour position. This was in error, according to Nolan, as the position was funded from two different sources.

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[3]Pursuant to PERB Regulation section 32168(b), the parties were notified of substitution of administrative law judge (ALJ) for purposes of writing the proposed decision. No objections were filed.

District documentation indicates that at various times during her employment, Swensson's position was funded from several sources, and then from two sources.

On January 2, 1992, Hull wrote to DeMarlo requesting information on proposed reductions in assigned time of unit members. CSEA learned two weeks later that the District was going to reduce Swensson's hours.

On January 14, 1992, Hull wrote to DeMarlo regarding the proposed reduction of Swensson's hours from eight to four hours per day. Hull demanded to negotiate the decision and the effects of the reduction of Swensson's hours.

According to Hull, the District verbally agreed and scheduled a meeting to negotiate. The meeting did not occur, however. DeMarlo told Hull that Swensson was being laid off the one four-hour position, and they need only to negotiate the effects. DeMarlo testified that the meeting was canceled because CSEA expected to bargain a decision to layoff. The District, said DeMarlo, was prepared to bargain only the impact of the layoff.

Hull attended a January 28, 1992, school board meeting and objected to the District's proposed action on Swensson's hours. Nonetheless, the board adopted a resolution to reduce Swensson's hours. The resolution provided that the elimination of .50 FTE Typist Clerk III position was based upon the lack of funds available for the Title VII - Limited English Proficient Program. The resolution noted the reorganization of services provided and

change in support personnel services as a result of increased personnel costs in the Title VII - Limited English Proficient Program. This necessitated the removal of job functions, duties and funds for the Typist Clerk III position, and thus eliminated the position.

According to Nolan, this was layoff of a half-time position, and even if considered a reduction in time, the District would not have negotiated with CSEA, because it is not the practice to negotiate reduction in hours.

On February 12, 1992, Swensson submitted a letter of resignation from the four-hour position. The letter states she was resigning half-time "to pursue personal interests." The effective date, March 2, 1992, was "to coincide with the already scheduled layoff of 1/2 time due to the lack of Title VII funding." On May 14, 1992, Swensson resigned from any employment with the District.

The dispute about reduction in hours is preceded by two other PERB proceedings.

On June 17, 1991, Hull made a written demand to negotiate the decision to reduce the hours of employment of Instructional Tutor and School Secretary I positions, both, she contended, were six-hour positions. According to Hull, the Secretary I position was posted for four hours, but after the letter from CSEA, it was reinstated to the original assigned time. The tutor position was completely eliminated. Alice Frash (Frash), whose position was being eliminated, wanted to take another tutor position but was

unable to do so. She then sought a "Itinerant tutor" position, believing it to be a six-hour position. CSEA learned, however, the District had reduced the six-hour position by one hour, while the position was vacant. After demand by CSEA, said Hull, the District agreed to give Frash the five-hour position and to add another hour as instructional aide, with the tutor salary.

The District's response, presented by Nolan's testimony and her written response dated July 1, 1991, to Hull's demand (Respondent Exhibit 2) was a firm rejection of any demand to negotiate and firm reliance on past practice. Said Nolan:

> The district is somewhat confused by your demand. For well over a decade, this district has had an established and well-known practice of reducing bargaining unit positions without negotiations. The association is certainly aware of this practice since its utilization has, over the years, personally affected association officers and/or negotiation team members.

Nolan and DeMarlo denied there were any negotiations with CSEA about Frash. Frash was concerned with her placement for the next year and the meeting did not include negotiations, but rather working out personnel matters. Both testified that these discussions were done on a regular basis with CSEA. DeMarlo testified that they have had this discussion annually with Frash.

Nolan and DeMarlo both testified that Frash's hours were reduced in the 1991-92 school year. The District did not agree to bargain with CSEA on that decision. The meeting was to resolve an issue regarding where Frash would be and what she would be doing in the 1992-93 school year. According to Nolan,

Frash's position has been reduced prior to the 1991-92 school year.

CSEA filed an unfair practice charge in July 1991, complaining about the reduction of the tutor position hours from six to five. The unfair practice charge noted the agreement reached with the District with regard to the extra hour for Frash, but complained about the District's stance that the tutor position was only a five-hour position. During an informal conference before a PERB ALJ, the case settled.

On August 8, 1991, Hull demanded to "negotiate the decision and effects of any reduction in assigned time, including reductions in workday, workweek, and work year." According to Hull, the District did not respond.

The District, however, submitted a letter from Nolan to Hull dated August 13, 1991. Hull did not recall receiving the letter. The District declined to bargain, stating:

> . . . the District has a consistent and long standing past practice of reducing the hours of bargaining unit positions without implementation of formal layoff proceedings and without any consultation, or negotiations with C.S.E.A.

Finally, some time before the current events, in October of 1982, CSEA filed an unfair practice charge against the District. Michael Casey (Casey), then field representative for CSEA, wrote to Frank Brunetti (Brunetti), then associate superintendent with the District, explaining the union's intent behind the unfair practice charge. That intent was to see that the District did not bargain with individual employees over reduction in hours,

but would rather approach the "bargaining committee." Casey acknowledged the difference of opinion he and Brunetti had on the negotiability of reduction of hours of position, whether filled or not. Casey explained that CSEA did not challenge the District's contention of past practice of reduction of hours without negotiating with CSEA. Casey further announced that in the event the unfair practice case went to hearing, CSEA would not seek a compensatory award, because " . . . we do not feel it is fair or appropriate to punish the District for action it committed in the past when the law was unclear and this Union did not make demands to negotiate as we did this year."[4]

A PERB conducted settlement conference lead to withdrawal of the charge.

There is a District personnel committee of which CSEA representatives are members. According to Patricia McCrery (McCrery), coordinator for human services since 1984, the committee meetings are "meet and confer" sessions. The committee meets once a month, and reduction in hours have been discussed. In the spring they discuss reduction of hours for secretaries in the fall. The reduction, however, was the result of a temporary add-on of one hour to the secretary's work time. CSEA field

[4]Official notice is given to the PERB file, SF-CE-701. The complaint, incorporating the allegations of the underlying unfair practice charge, filed on September 23, 1982, alleges that the District reduced the hours of 45 aides, after securing "voluntary" requests for such reduction from each employee. CSEA was not notified nor given an opportunity to negotiate the reduction in hours. When CSEA did demand to negotiate the reduction in hours, it was alleged, the District refused, claiming the employees had volunteered to reduce their hours.

representatives attended committee meetings. CSEA, to her recall, has never demanded to negotiate reduction in hours.

Nolan testified extensively about past practice with regard to reduction in hours of instructional aides, clerks and secretaries. School site council's determine how funds will be spent. The decisions on hours of employment are functions of, among other things, money, pupil enrollment, and movement of special programs. While she was the District's categorical program coordinator, instructional aide and clerk position hours were reduced.

The District offered documentary evidence of reductions in hours. Nolan described these as examples and that there were other reductions in hours without negotiations with CSEA.

Arlyne Craighead was employed with the District as a school clerk from 1976 to 1978. She would work an additional half hour on early childhood education projects and would be paid from that program account for the work on the project. Record evidence demonstrates that at various times she was given short-term assignments and then her hours were reduced by one-half hour.

Doris Irwin, an Instructional Aide II, had her hours increased and decreased several times from 1983 to 1991. These changes consisted of movement of hours from .188 to .125 (1983), to .375 (1986), reduced to .188 (1987), then reduced from .375 to .188 (1988), increased to .250 (1990), then reduced to .188 (June 1990). In June of 1991, the hours were reduced from .250 to .188 hours.

Roberta Zentner is an Instructional Aide I. The record evidence shows that yearly, from 1987 to as late as school year 1990-91, her hours were increased at the commencement of the school year, and then decreased in June by .125. In the 1990-91 school year the increase and decrease was .063 hours. The documentation often indicated that the elimination was related to completion of temporary assignment.

Dorothy Batie, a school secretary from 1988 to 1991, generally had her hours increased at the beginning of the school year by .062 and decreased by that amount at the end of the school year. Documentation initiating the reduction indicated that the temporary assignment had been completed.

Margaret Urquhart, a Typist Clerk III or Secretary I, had her hours increased by .500 in August of 1989, and reduced by that amount in June of 1990. The documentation notes that the reduction was because the typist clerk assignment had been completed.

Some of these exhibits referred to "temporary hours." Nolan explained that this was so because of the unstable funding source. The school site councils who make the decision of how many hours go to instructional assistant time, want people to know that funding may not be available.

Nolan further testified that positions vacant by retirement or by resignation have also been reduced or split into two fewer-hour positions.

CSEA received board reports mailed to the field representative. These reports would include the personnel action report, reflecting changes in any employee's personnel history. In some instances, the reporting documents went to the board for action after the effective date of the change. While CSEA was to get notice of these transactions, it may be that the notice came after the effective date of the change.

Nolan has been in the personnel office since 1979 and, according to her, the District has never agreed to negotiate reduction in hours of CSEA positions. The District has never given CSEA advance notice of reduction in hours of bargaining unit positions. Even if the Swensson change had been a reduction in hours, the District would not have negotiated because it was not the practice to bargain the decision to reduce hours.

The parties have included in the collective bargaining agreement a so-called zipper clause that has been in the contract, unchanged, since 1979.[5] Article 20, called "Entirety of Agreement" provides in relevant part:

> 20.1 Extent of Negotiation. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right to make demands and proposals with respect to all matters subject to collective negotiations. They, therefore, voluntarily and without qualifications waive the right for the life of the Agreement to negotiate collectively with respect to any subject or matter not specifically referred to or covered by this Agreement.

[5]CSEA has been the exclusive representative since 1977.

> 20.2 Entirety of Agreement. This contract represents the entire Agreement between the parties and no other agreement or practices are binding upon either party hereto with respect to wages, hours, or working conditions of the employees covered.

Other relevant provisions of the contract are:

> 7.2 Workday. The hours of the workday shall be designated by the District for each classified assignment, in accordance with the provisions set forth in this Agreement. Each employee shall be assigned a fixed, regular, and ascertainable number of hours of work.
>
> 7.3.1 The District and its employees shall comply with all legal requirements and guidelines relating to reduction in hours.

Article 23 addresses layoff. Section 23.1 provides, among other things, that classified employees shall be subject to layoff for lack of work or lack of funds. Section 23.2.1 provides for 30 days notice when the termination date of a specially funded program is other than June 30.

In August 1989, during negotiations for the agreement covering the period 1989 through 1992, the District submitted a proposal to redefine layoff as ". . .a separation from service or any reduction in assigned time, including work day, work week, or work year."

Nolan testified that the District's proposal was to memorialize what had been the practice.

According to Hull, CSEA interpreted the proposal to eliminate the District's obligation to negotiate reduction of hours, and objected on that ground. The proposal was dropped by the District.

ISSUE

The issue in this case is whether the District violated EERA by its refusal to negotiate either the layoff or reduction of hours of Stephanie Swensson in January 1992?

CONCLUSION

An employer violates EERA if it refuses or fails to meet and negotiate in good faith about a matter within the scope of representation. (Section 3543.5(c).) PERB has determined that an employer retains the right to unilaterally determine when layoff is appropriate. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) It must, however, bargain the effects of the decision to layoff. (Oakland Unified School District (1983) PERB Decision No. 326.) The employer has an obligation to negotiate both the decision and the effects of a reduction in hours. (North Sacramento School District (1981) PERB Decision No. 193.)

The employer does not violate EERA, however, where the action in question does not altar the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

Established practice may be expressed in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining

history (Colusa Unified School District (1983) PERB Decision Nos. 296 and 296(a)) or the past practice (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District, supra, PERB Decision No. 51).

CSEA argues that past practice is not relevant. It argues that, under the authority of Lake Elsinore School District (1986) PERB Decision No. 563, the employer may not rest on past practice where the contract terms are unambiguous. Here, contends CSEA, the contract is unambiguous. Under section 7.3.1 of the agreement, "The District and its employees shall comply with all legal requirements and guidelines relating to reduction in hours." This section, coupled with section 7.2 on workday[6] contends CSEA, is manifestation of CSEA's right to bargain reduction in hours. In this regard, CSEA does not find the contract "silent or ambiguous."

Contrary to CSEA's views on the contract provisions, the mandate that the District comply with "legal requirements and guidelines" is not free of ambiguity. Uncertain are what legal requirements or guidelines are referred to: PERB case law, mandating negotiations on reduction in hours; Education Code provisions on reduction in hours? What guidelines are intended to play a role in reduction in hours? No evidence was offered by

[6]Section 7.2 provides: "The hours of the workday shall be designated by the District for each classified assignment, in accordance with the provisions set forth in this agreement. Each employee shall be assigned a fixed, regular, and ascertainable number of hours of work."

CSEA as to the proper reference such language was intended to incorporate.

Nor is this ambiguity clarified by looking at section 7.2. The section does not, by mandating fixed regular hours, shore up an otherwise ambiguous reference to "legal requirements and guidelines." Clearly section 7.3.1 does anticipate a reduction in hours, but the language does not ascertain within what framework.

CSEA further argues that the District has negotiated an agreement that past practice is not binding on either party. Pursuant to section 20.2, the "Entirety of Agreement" provision, the parties have agreed that practices are not binding on either party.

The District counters that CSEA offered no evidence regarding the intent of this language, and Nolan testified that the District never intended to waive its past practices by agreeing to this language. The District then cites a number of arbitrator decisions that suggest only strong language evidencing intent to eliminate existing practices will have that effect. While I am not persuaded by the arbitrator decisions, the meaning of the elimination of practices is troublesome. Its consequence is to eliminate status quo. If the contract does not cover the issue in question, what is to govern the resolution of a dispute in issue?

Even if the exclusion of past practices were not found to be within the purview of this section, the result would be the same.

The District's primary defense to the complaint is that the past practice of the District has been to reduce hours without negotiations with CSEA. It also asserts that the zipper clause in its agreement with CSEA precludes negotiations of matters not covered by the agreement and includes an express waiver by both sides.

The District contends that the record evidences that it has, for the last 20 years, undertaken reduction in hours without negotiating with CSEA, and that CSEA has failed to show any unilateral change in the District's practices with respect to reduction in hours.

As the findings have established, the District did increase and correspondingly decreased hours of secretaries and instructional aides. These actions, typified by Nolan's examples and testimony was that hours were increased and decreased, without bargaining with CSEA. Some changes were discussed in "meet and confer" sessions, described by McCrery, and which were attended by CSEA representatives. At these sessions there was discussion of temporary add on or reduction of one hour of secretary time. Thus the record shows some practice of unilaterally increasing and reducing hours of unit employees. Yet, it is noteworthy that in only one instance was there a change in the magnitude of Swensson's reduction of one-half of her full days work. Typist-clerk Margaret Urquhart had the hours of her workday increased by one-half, and then at the end of the year, decreased by that amount. In all the other examples, hours

were increased, and then decreased, sometimes upon action simply following the initial determination. None of the examples sets a precedent for reduction of a full-time employee's hours by one-half.

In Oakland Unified School District (1983) PERB Decision No. 367, PERB addressed a contention of past practice in regard to subcontracting by the employer. PERB held that an increase of almost tenfold to be an increase in such "magnitude evidences a change in the quantity and kind of subcontracting as to constitute a unilateral change in established policy."

Here, record evidence shows that several unit members hours were routinely increased or reduced during the school year, without negotiations between the parties. Those changes, in addition to being unlike a straight reduction of hours, exemplified temporary increases and corresponding decrease in hours, and only once met the magnitude of the Swensson action. Even then, the evidence shows the reduction followed an increase in the employee's hours. This evidence does not meet the "regular and consistent past patterns of changes in the conditions of employment" mandated by Pajaro Valley, supra. It is concluded that the District did not show a regular and consistent past practice of unilaterally reducing full-time positions by one-half, without giving notice to and affording CSEA an opportunity to negotiate the reduction in hours.

The District further argues that the "zipper clause" precludes negotiations of matters not covered by the agreement

and therefore CSEA is precluded from negotiating the decision to reduce hours since it is not covered by the contract, citing Sylvan Union Elementary School District (1989) PERB Decision No. 780. I reject this argument. Sylvan is inapposite, as PERB expressly noted that the charging party had not alleged the employer's action constituted a change in past practice. Moreover, while a "zipper clause" does bar negotiations on matters subject to the clause, it does not enable the employer to take unilateral action on matters within the scope of representation. (Los Angeles Community College District (1982) PERB Decision No. 252.)

It is concluded that the District's action in reducing Swensson's hours by one-half represents an increase in magnitude evidencing a change in the quantity of reduction of hours and constitutes a unilateral change in terms of employment. The District's action was inconsistent with established past practice, and constitutes a violation of it's duty to bargain in good faith. This same action has denied CSEA and its Chapter 13 rights guaranteed to it by EERA. Thus, the District's action violated section 3543.5(b). This same action also denied employees their rights to be represented by the exclusive representative, thus a violation of section 3543.5(a).

REMEDY

PERB is empowered to direct ". . . an offending party to cease and desist from the unfair practice and to take such

affirmative action . . . as will effectuate the polices of this chapter."[7]

It is appropriate to order the District to cease and desist its violation of the obligation to bargain reduction in hours to the extent such reduction represents a change from its prior practice. It is customary to order return to the status quo ante. Thus, Swensson's hours should be restored to 8 hours per day, and she should be awarded back pay for the time lost as a result of the unlawful reduction. The award should be limited to the time from reduction to her ultimate resignation from the District. Interest at seven (7) percent per annum shall also be included.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purpose of EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the forgoing findings of fact and conclusions of law and the entire record in the case, it is found that the Cupertino

[7]Section 3541.5(c).

Union School District (District) violated Government Code section 3543.5(c) of the Educational Employment Relations Act (Act). The District violated the Act by unilaterally reducing the hours of a unit employee in a substantial change from past practice. This action also interfered with the right of the California School Employees Association and its Cupertino Chapter 13 (CSEA) to represent its members, and was thus, also a violation of section 3543.5(b). This same action also denied employees the right to participate in employment related activities, a violation of section 3543.5(a).

Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action with respect to reduction of hours of unit employees.

2. By this same conduct, interfering with the right of CSEA to represent its members.

3. By this same conduct, denying bargaining unit employees the right to be represented by CSEA.

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

1. Restore the status quo ante with regard to the reduction of hours to the level which existed prior to the District's unilateral action on Stephanie Swensson's position.

2. Reimburse Stephanie Swensson for loss of pay from the time of the reduction of hours until the date of her resignation from the District. The amount of the reimbursement shall be augmented by interest at the annual rate of seven (7) percent.

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

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

GARY M. GALLERY
Administrative Law Judge