STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DISTRICT EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4234-E PERB Decision No. 1525 May 14, 2003

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for District Educators Association, CTA/NEA; Rutan & Tucker by David C. Larsen, Attorney, for Huntington Beach Union High School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Huntington Beach Union High School District (District) to an administrative law judge's (ALJ) proposed decision (attached) which found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally modifying the hours of three new positions in an existing classification.

[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 employees because of their exercise of rights guaranteed by this chapter. For

After reviewing the entire record in this case, including the proposed decision, the District's exceptions[2] and the response of the District Educators Association, CTA/NEA (Association), the Board finds that the ALJ's findings of fact are free from prejudicial error and adopts them as the decision of the Board itself. The Board declines to adopt the ALJ's conclusions of law regarding whether the District's modification of the hours of employment of three new positions in an existing classification was within the scope of representation. The Board will discuss this issue below. As for the ALJ's other conclusions of law, the Board finds that they are free from prejudicial error and adopts them as the decision of the Board itself.

DISCUSSION

The issue before the Board is whether the District violated EERA by unilaterally modifying the hours of employment of three new positions in an existing classification. The Board affirms the ALJ's decision finding a violation of EERA. In doing so, the Board holds that the hours of employment assigned to a position is a matter within the scope of representation regardless of whether the position is occupied or vacant. To the extent that the Board's prior decisions in Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), East Side Union High School District (1999) PERB Decision No. 1353 (East Side),

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> 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.

[2] The District's request for oral argument is denied. The record and briefs in this matter adequately present the issues and positions of the parties.

Antelope Valley Union High School District (2000) PERB Decision No. 1402 (Antelope Valley), hold otherwise, they are overruled.

There is no dispute that the District unilaterally modified the hours of three new librarian positions in order to implement the District's decision to extend the hours of its libraries. The ALJ's decision found that the District failed to provide valid notice to the Association of the changes. The ALJ also found that after the Association was notified by the District of the changes, the Association was not required to demand to negotiate since the changes had already occurred. Because the Board has adopted these findings of the ALJ, the sole issue before the Board is whether the District's modification of hours was within the scope of representation and thus subject to bargaining.

To determine the scope of representation, the Board begins with the language of EERA section 3543.2(a), which states, in pertinent part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment.

Thus, the Legislature has expressly decreed that wages and hours of employment are matters within the scope of representation. As for matters not expressly enumerated in EERA section 3543.2(a), PERB adheres to the test set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim) to determine whether a particular subject is within the scope of representation. Under Anaheim, a subject is within the scope of representation if: (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of the collective negotiations is the appropriate

means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission. (Anaheim, at p. 3.)

Based on the language of EERA section 3543.2(a), PERB has long held that the general subject of hours of employment is within the scope of representation. (Salinas Union High School District (1983) PERB Decision No. 339.) "Hours of employment" includes not only the total number of working hours, but what days of the week and what hours are to be worked. (Saddleback Community College District (1984) PERB Decision No. 433.) It also includes changes in an employee's shift. (Moreno Valley Unified School District (1995) PERB Decision No. 1106.)

Over the years, the principles discussed above have generated little controversy as to occupied positions. The same cannot be said for vacant positions. Indeed, the Board has repeatedly attempted to clarify its jurisprudence regarding the negotiability of an employer's decision to change the hours of a vacant position. (San Jacinto Unified School District (1994) PERB Decision No. 1078 (San Jacinto); Cajon Valley Union School District (1995) PERB Decision No. 1085 (Cajon); Arcata; East Side; Antelope Valley.)

In both San Jacinto and Cajon, the Board found an employer's change in the hours of a vacant position to be within the scope of representation under the facts in those cases.[3] However, in San Jacinto, one Board member, although concurring in the ultimate outcome, dissented from the majority's holding that an employer's decision to change the hours of a vacant position was a matter within the scope of representation. (San Jacinto, at p. 11

[3] However, in Cajon, the Board ultimately dismissed the complaint because the evidence established a past practice allowing the employer to make the changes.

(dissenting opinion of Member Caffrey).) According to the dissent, the Board had "consistently held that a decision concerning the level of service to be provided is a fundamental management prerogative which is not subject to negotiations." (San Jacinto, at p. 10 (dissenting opinion of Member Caffrey).) The dissent argued that an employer's decision to change the hours of a vacant position is the same as changing the level of service. Thus, the dissent concluded that an employer's decision to change the hours of a vacant position should not be a matter within the scope of representation.

Less than two years later, the dissenting member in San Jacinto authored the opinion in Arcata, which implicitly adopted his dissenting arguments in San Jacinto. In Arcata, the Board attempted to refine the rulings in San Jacinto and Cajon by setting forth a rule to govern when an employer's decision to change the hours of a vacant position is within the scope of representation. The Arcata rule holds that:

> Such a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is outside the scope of representation. [Fn. omitted.] Conversely, a decision to change the hours of a vacant position which is based on labor cost considerations and does not reflect a change in the nature, direction or level of service, is directly related to issues of employee wages and hours and is within the scope of representation. (Arcata, at p. 8.)

After thoroughly reviewing Arcata and its progeny, the Board concludes that the Arcata rule suffers from fundamental flaws. One flaw is that the rule contains a condition that swallows the rule itself. Specifically, the Arcata rule allows an employer to change the hours of a vacant position where there is a change in the "level of service." However, Arcata and the cases following it can be read to hold that a change in the "level of service" occurs whenever there is a change in the hours. (East Side; San Jacinto, at p. 11 (dissenting opinion of Member Caffrey).) The rule can then be read to allow an employer to change the hours of a position

whenever an employer so chooses, since changing the hours of a position constitutes a change in the level of service. Such a reading allows an employer to change the hours of any vacant position under the guise of changing the "level of service." We do not believe the Board intended such a result.

Indeed, the Board quickly recognized this possible interpretation of Arcata. In East Side, the Board attempted to prevent the Arcata rule from being interpreted in such a way by clarifying that, although any change in the hours of a vacant position could be argued to be a change in service:

> This mere fact does not allow the employer, pursuant to Arcata, unilaterally to change the hours of bargaining unit positions as they become vacant. The Board's intent in Arcata was to permit employers to adjust the hours of vacant positions unilaterally in those circumstances in which legitimate changes in the nature, direction or level of services have occurred, changes which are not based primarily on wage and benefit cost considerations.
>
> The Arcata rule was not intended, and will not be applied, to grant carte blanche authority to employers to change the hours of vacant bargaining unit positions unilaterally. The employer may not unilaterally convert a vacant full-time, full-benefit position to multiple part-time, reduced-benefit positions at substantial labor cost savings, and justify the action simply because the resulting part-time positions will provide a changed level of service. Similarly, the Arcata rule does not permit employers unilaterally to reallocate labor cost resources by changing the hours of multiple bargaining unit positions as they become vacant, based on the assertion that the nature of service delivery is being changed. These employer actions are based primarily on labor cost considerations, relate directly to the terms and conditions of employment of bargaining unit members and are negotiable. (East Side, at p. 9-10.)

In East Side, the Board determined that the change in hours at issue in that case was motivated by labor cost savings. On that basis, the Board held that the changes were within the scope of bargaining.

The Board's latest discussion of Arcata occurred in Antelope Valley. There, the Board found that a decision to replace a full-time position with two part-time positions was driven by a change in the employer's nature and level of service, not by labor cost concerns. The Board emphasized that the Arcata rule, as clarified in East Side, focused on when the changes in hours represent a legitimate change in the nature, direction or level of service or whether the decision is primarily driven by labor cost considerations. (Antelope Valley, at p. 10.) Accordingly, the Arcata rule, as it now states, attempts to balance management's right to dictate the nature, direction and level of service against the obligation to bargain matters that affect wages (i.e., labor costs).

The Board has thoroughly reviewed Arcata and its progeny and reviewed the language of EERA with special consideration to the public policy which it represents. As noted above, the Board concludes that the Arcata rule is fundamentally flawed and must be overturned. First, Arcata incorrectly assumes that an employer's right to dictate its nature, direction, and level of service is contingent upon its ability to determine the hours of work in vacant positions. In other words, Arcata assumes that if an employer were unable to change the hours of vacant positions, the employer would be prevented from dictating its nature, direction, and level of service. This assumption is not valid.

The Board does not dispute that, generally, the District may unilaterally determine to expand the hours of its library. In a similar context, the Board has long held that a school employer may generally set the length of the instructional day. However, the length of the teachers' workday remains negotiable. (Imperial Unified School District (1990) PERB Decision No. 825; Jefferson School District (1980) PERB Decision No. 133.) Similarly, the District's ability to determine the hours of operation of its library must be distinguished from

its ability to determine the hours of work for library employees. The flaw in Arcata is that it does not distinguish between the two, but assumes that the former is contingent upon the latter. As already noted, the Board rejects this assumption.

Arcata's flaw is easily illustrated using the facts in this case. Here, the District desires to extend its library hours from approximately 3:30 p.m. to 5:00 p.m. or later. The District decided to implement this change by altering the hours of vacant librarian positions to cover the extended hours. Thus, the new positions would generally start later in the day and extend past 3:30 p.m. A fair reading of Arcata would allow the District to make such a change without negotiating with the Association. This is because the change in library hours represents a change in the level of service. The Arcata rule assumes that if the District is not allowed to change the hours of vacant positions, it is prevented from changing the hours of the library. However, in such situations there are normally many options available to the District to implement its decision to expand its library hours. For example, the District can ask the existing librarians to alter their schedules, or ask them to work longer hours and provide them with a salary differential. Even if the District decides to hire new librarians, there are many possible variations in their working hours. When will they start? Will they work until the libraries close or will they work longer? If they worked longer, how much longer? These are precisely the issues that EERA places within the scope of representation. More importantly, requiring the District to negotiate these issues does not impinge upon its management prerogative to set the hours of its libraries.

Second, as just noted, determining the exact hours of employment is precisely what EERA makes negotiable. EERA section 3543.2(a), expressly provides that the "hours of employment" are within the scope of representation. Because the "hours of employment" are

an enumerated subject under EERA, it is neither necessary nor proper to conduct the Anaheim test which balances the potential benefits of negotiating a particular item against the employer's management prerogatives. Indeed, by expressly placing the "hours of employment" within the scope of representation, the Legislature has implicitly conducted the balancing test in Anaheim and concluded that the benefits of negotiation outweigh any infringement on management's prerogatives.

Because the Legislature has determined that the hours of employment are within the scope of representation, this Board must thoroughly evaluate any decision that effectively removes them from negotiations. After careful deliberation, the Board concludes that the negotiability of the hours of employment should not hinge on whether a position happens to be filled at any particular time. Indeed, Arcata and its progeny never articulate why vacant positions should be treated differently from occupied ones. The Board finds no principled distinction between the two.

Third, the Arcata rule is troublesome because its treats the hours of employment differently from wages, even though both are enumerated subjects of representation. It is well settled that changing the wages for a classification must be negotiated. (Cajon Valley Union School District (1989) PERB Decision No. 766; Alum Rock Union Elementary School District (1983) PERB Decision No. 322.) This is true irrespective of whether positions are occupied or vacant. The Board sees no reason why hours of employment should be treated differently.

Finally, the Board believes that its decision to eliminate the Arcata rule represents sound public policy and will effectuate the policies underlying EERA. EERA's central goal is to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California . . ." (EERA sec. 3540.) To this

end, the Board believes that negotiating the hours of employment, regardless of whether a position is occupied or vacant, will serve to reduce conflict and promote better employer-employee relations.

The Board also emphasizes that its decision today does not affect an employer's right to dictate its nature, direction, or level of service. The Board's holding is simply that an employer must negotiate the hours of employment, regardless of whether a position is occupied or vacant.[4] The Board also emphasizes that its holding does not mean that an employer is prohibited from changing the hours of a vacant position. Too often, when changes are found to be within the scope of representation, there is the mistaken belief that the changes are prohibited. This is false. The Board's holding that the District's changes are negotiable does not mean the District cannot enact them. It just means that the District must first negotiate the changes with the Association in good faith.

Accordingly, the Board holds that a change in the hours of employment of vacant positions is a matter within the scope of representation. This remains true even where the change is prompted by an employer's decision to alter its nature, direction, or level of service. To the extent that Arcata, East Side and Antelope Valley, hold differently, they are overruled.

[4] It should be noted that even before today an employer was required to negotiate any change in the hours of an occupied position even where the employer intended to alter its nature, direction, or level of service. (State of California (Employment Development Department) (1998) PERB Decision No. 1284-S at p. 22, Board adopted ALJ's proposed decision.)

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Huntington Beach Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of existing employees to transfer into a newly created position without improper conditions attached thereto.

2. Denying to the District Educators Association, CTA/NEA (Association), rights guaranteed to it by the EERA.

3. Refusing or failing to meet and negotiate in good faith with the Association on the matter of the employment hours of its newly hired librarians.

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

1. Delete all references in its job descriptions or announcements for librarian/library media specialist to any workday other than that traditionally worked by employees in such classification.

2. Immediately modify the working hours of all newly hired librarians to conform with those traditionally worked by librarians.

3. Prior to making any future change in the work hours of librarians, provide notice to the Association and upon request meet and negotiate in good faith about any proposed change(s).

4. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all District sites where notices to certificated employees are customarily placed, copies of the Notice attached hereto as an Appendix, 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 ensure that the Notice is not reduced in size, defaced, altered or covered by any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Members Whitehead and Neima 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-4234-E, District Educators Association, CTA/NEA v. Huntington Beach Union High School District, in which all parties had the right to participate, it has been found that the Huntington Beach Union High 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. Interfering with the rights of existing employees to transfer into a newly created position without improper conditions attached thereto.

2. Denying to the District Educators Association, CTA/NEA (Association), rights guaranteed to it by the EERA.

3. Refusing or failing to meet and negotiate in good faith with the Association on the matter of the employment hours of its newly hired librarians.

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

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2. Immediately modify the working hours of all newly hired librarians to conform with those traditionally worked by librarians.

3. Prior to making any future change in the work hours of librarians, provide notice to the Association and upon request meet and negotiate in good faith about any proposed change(s).

Dated: _____

HUNTINGTON BEACH UNION HIGH 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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DISTRICT EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4234-E PROPOSED DECISION (12/19/01)

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for District Educators Association, CTA/NEA; Rutan & Tucker, by David C. Larsen, Attorney, for Huntington Beach Union High School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On October 25, 2000, the District Educators Association, CTA/NEA (Association), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Huntington Beach Union High School District (District). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).[1]

On January 5, 2001, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a), (b), and (c) of section 3543.5.[2]

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

[2] Subdivisions (a), (b), and (c) of section 3543.5 state:

On January 23, 2001, the District answered the complaint denying all material allegations and propounding various affirmative defenses. On February 22 an informal conference was held in an unsuccessful attempt to arrive at a mutually agreeable settlement.

Complaint Amendments

The Association proposed, and respondent had no objection to, the amending of the complaint as follows:

1. In paragraph 3, delete: "8:30 a.m. to 2:30 p.m.," and insert, "7:30 a.m. to 3:30 p.m., but within a seven and one-half hour workday."

2. In paragraph 4, delete: "from 9:30 a.m. to 5:00 p.m.," and insert, "later than 3:30 p.m., but within a seven and one-half hour workday."

One day of formal hearing was held before the undersigned on June 12, 2001. With the filing of the briefs the matter was submitted for decision on November 13, 2001.

INTRODUCTION

The District, after extensive discussions with various constituencies, decided to extend its library hours past the instructional day into the late afternoon and early evening. The daily

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> It shall be unlawful for a public school employer to do any of the following:
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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.
>
> (b) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

work schedule for each of the three existing media specialists/librarians[3] consists of seven and one-half hours, worked between 7:30 a.m. and 3:30 p.m. The District hired three new librarians, but required them to work extended hours. The Association objected, but the new hours were implemented over such objections. The Association alleged that such implementation constitutes a unilateral modification of employee working conditions.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that the Association is both an employee organization and an exclusive representative, and the District is a public school employer within the meaning of the EERA.

Background

The District consists of six regular high schools and one continuation high school, each of which has a library (media center). Prior to 1992, the District employed one full-time librarian at each of the regular high schools. In 1992, three librarian positions were eliminated. From 1992 to September 2000, the District employed three librarians, who each worked a split assignment at two school sites. When the District reduced the number of librarians, it negotiated a pay differential to compensate the remaining librarians for both their travel and inconvenience connected with these split assignments. Thus, from 1992 to September 2000,

[3] The terms "library media specialist" and "librarian" are used interchangeably by the parties. In this decision the term "librarian" will be used, not to ignore the historically increased responsibilities of the employees in this classification, but to clearly differentiate them from the employee classification of "senior media clerks" or "library clerks." In this decision the term, "library clerk" will be used.

In addition, the technology aides, classified employees assigned to the libraries for nineteen hours per week, will be referred to as library aides.

each regular high school library had a half-time librarian. The District also employed six library clerks, each of whom worked an eight-hour day at the library at each of the regular high schools.

Applicable Collective Bargaining Agreement (CBA) Provisions

The District and the Association are parties to a CBA effective through June 30, 2001.

CBA Article VI, District Rights, in pertinent part, states:

> 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 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 . . . educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; . . . In addition, the Board retains the right to . . . assign, . . . employees.
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> The exercise of the foregoing powers, rights and authority, duties and responsibilities by the District, and 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 specific and express terms of this Agreement, or any other written agreement reached between the Association and the Board, and then only to the extent such specific and express terms are in conformance with law. [Emphasis added.]

CBA Article VIII, Maintenance of Benefits, in pertinent part, states:

> Except as provided for in this Agreement, the Board shall not reduce or eliminate any benefits provided to teachers by adopted policies or written staff rules . . . dealing with . . . hours, . . . that are in existence at the time this Agreement was signed. . . .

CBA Article X, Work Day, states the contractual workday for bargaining unit members consists of a seven and one-half hour day, which is spread over six consecutive periods.[4]

[4] However, Jim Pacelli (Pacelli), the Association's chief negotiator, when asked if a principal's unilateral change of school hours from 7:30 a.m. to 3:30 p.m. to 9:00 a.m. to

While high school bell schedules vary somewhat, Period 1 begins no earlier than 7:20 a.m. and Period 6 concludes no later than 3:01 p.m.[5]

CBA Article XXIV, Completion of Meet and Negotiation, in its entirety, states:

> During the term of this Agreement, except as provided elsewhere in this Agreement, the Association expressly waives and relinquishes the right to meet and negotiate and agrees that the District shall not be obligated to meet and negotiate with respect to any subject or matter whether referred to or covered in this Agreement or not.

Traditional Librarian Hours

Traditionally the District librarians have worked either 7:00 a.m. to 3:00 p.m. or 7:30 a.m. to 3:30 p.m. Work outside the normal workday, whether it is the zero period before the regular school day or the seventh period after the school day, is voluntary.

District Committee Recommendations Regarding Library Hours

Beginning in June 1999, the District determined that both the operating hours and staffing of the libraries was inadequate. A District Curriculum Committee, consisting of teachers, librarians, governing board members, parents and students met, deliberated and eventually presented to the governing board a report entitled "Library/Media Center Recommendations." The committee recommended, inter alia, that libraries have "flexible, extended operating hours so that students . . . have access," and that a minimum of one full-time librarian should be provided at each comprehensive high school. It also warned that

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5:00 p.m. would violate the CBA, answered, "It probably wouldn't, because I -- it probably wouldn't." When asked to respond to the District counsel's query regarding a possible CBA violation in the event that, "Marina [High School]wants to start 20 minutes later [than 7:30]." Pacelli responded. "There's nothing in the contract [that prohibits that.]."

[5] The parties have an October 18, 2000, side letter of agreement on bell schedules, effective through June 30, 2001. This side letter only pertains to those schools on a block schedule.

"[a]dditional classified personnel may be necessary in order to provide extended media center hours." Shirley Bowen (Bowen), a District librarian since November 1996 and a curriculum committee member, said that the committee's primary staffing concern was that there be one librarian per school instead of librarians working split assignments. She explained that the extended hours would be of service to the "slow [sic] socioeconomic" and at-risk students. The committee did not recommend that librarians work extended hours, only that the libraries stay open for extended hours. There was no agreement among the committee members as to how these extended hours were to be staffed.

Governing Board's Actions Regarding Committee's Recommendations

On July 11, 2000, the District's Strategic Planning Committee presented its annual plan to the governing board. This plan recommended, "Continue the implementation of the Media Center Plan with priority on personnel and extended hours." Earl Ziemann (Ziemann), outgoing Association president and a member of the District's Strategic Planning Committee, testified regarding the committee's discussion about extending library hours:

> [I]t was attached also to the idea of bringing back the full positions at each school and so we wouldn't have to rotate, because we had to deal with that before we could even think about extending hours. So the idea was we'd have the librarian at each school, and when we discussed the extended hours, the idea that I remember discussing was that we would bring on a different person. In other words, that the possibility existed that we would need to possibly find a classified person, which we already have working in the libraries, and that would be the person that would extend the hours of the library.

Apparently based on these recommendations, the District decided to increase the number of its librarian positions and add six 19-hour technology aides, one at each school. The job description for "Instructional Aide-Technology" contains a "Special Requirement" that provides, "Some positions may work evenings, weekends or split shifts."

District/Association Dialogue Regarding Modification in Librarian Hours

In June 2000, Superintendent Dr. Susan J. Roper (Roper) met with Ziemann and incoming Association President Mary Jon McAvoy (McAvoy) to tell them that she would be recommending that the District's governing board hire three librarians to work extended hours. Roper admitted that this would be a "later shift," "a different start time and a different ending time" than any other bargaining unit member worked. She said she believed that the district had no obligation to negotiate the extended hours. Roper showed them two potential librarian schedules. Ziemann objected, stating that either schedule would be a contractual violation. Roper replied that the District had not yet made a firm decision, they were "still in the kind of planning phases." A short time after this discussion, the District posted the new librarian positions.

Implementation of Library Hours Modification

On or about July 14, 2000, the District issued and posted a job announcement for three additional librarian positions. This announcement included the following sentences: "Tentative work day will begin mid to late morning through early evening. Specific times will be determined at the time of selection." In the subsequent interview, applicants were informed that the new positions would have extended hours. The previous (pre-2000) job announcements contained no such reference to extended hours.

On or about August 17, 2000, Nelson Elsner (Elsner), assistant superintendent of personnel, met with Kathy Sullivan (Sullivan), who had applied for one of the opening librarian positions. He told her that the new librarians would staff these extended hours. He also stated that the matter of the positions' working hours was non-negotiable.

On or about August 24, 2000, Sullivan was interviewed for a position as a librarian. She has been a District employee for 29 years, two years of which (1990-1992) she held a position as a librarian. Throughout this entire service period, she has worked 7:30 a.m. to 3:30 p.m. She is presently assigned to Marina and Edison High Schools, where she works a schedule that extends after 3:00 p.m. She has concerns about security related to the extended hours, which she discussed with both the interview panel and her principals, who share her concerns.

Since February 2001, the District has hired two additional librarians for split assignments to work beyond 3:30 p.m. All librarians, new and old, perform the same duties, as described in their job description and work the same number of hours each day.

In May 2001, the District conducted a survey, which indicated that the students would "prefer to have the library open until 5:00 p.m."

On September 28, 2000, Elsner sent a memorandum to the Association's bargaining team chair, Pacelli, citing legal counsel's advice changing work schedule times for the three new librarians was not subject to negotiation. On October 5, 2000, the Association demanded that the District cease the implementation of the new librarian schedules, stating that it was a violation of the CBA.

On October 9, 2000, the District responded to this demand with an offer to meet and discuss the issue, setting out available meeting dates. The Association did not respond to the offer, believing that the matter should be negotiated. On October 25, 2000, the Association filed the instant unfair practice charge.

ISSUE

When the District hired three new librarians with hours different than those of the existing librarians, did it violate subdivisions (a), (b), or (c) of section 3543.5?

CONCLUSIONS OF LAW

Controlling Case Law

A unilateral modification of terms and conditions of employment within the scope of negotiations that has a generalized effect or continuing impact is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) PERB has long recognized this principle. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; and Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under subdivision (c) of section 3543.5, the public school employer is obligated to met and negotiate in good faith with an exclusive representative about matters within the scope of representation. This section precludes an employer from making a unilateral change in the status quo, whether it is evidenced by a CBA or past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

Scope of representation is addressed in EERA's subdivision (a) of section 3543.2, which states, in pertinent part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment.

In the past few years, PERB has issued a number of decisions that examined the subject of the unilateral diminution of hours of vacant positions and the practice of replacing vacant

positions with ones calling for a lesser number of hours. (See San Jacinto Unified School District (1994) PERB Decision No. 1078 (San Jacinto); Cajon Valley Union School District (1995) PERB Decision No. 1085 (Cajon); Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata); East Side Union High School District (1999) PERB Decision No. 1353 (East Side); and Antelope Valley Union High School District (2000) PERB Decision No. 1402 (Antelope Valley).)

In San Jacinto and Cajon, the Board found an employer's change in the hours of a vacant position to be negotiable.

However, in San Jacinto, adopting proposed decision of administrative law judge (ALJ) at pp. 25-26, the Board also stated:

> . . . If, as the District asserts, it merely created new positions in an existing classification and allotted hours different from those allotted to the existing positions, then the District's action was within the scope of management prerogative and, therefore, not negotiable. However, the effects of its action may have been negotiable if it impacted matters within the scope of representations. [Citation.]
>
> In a number of decisions, PERB has held that the level of services that an employer decides to provide is not a negotiable subject to bargaining. [Citations.] Thus, if the District (1) left the existing library technician and health clerk positions vacant, (2) created new positions bearing the same classification titles, and (3) determined that the number of hours per day allotted to these positions where to be different from the hours of the vacant positions, its actions would have been an exercise of managerial prerogative. [Emphasis added.]

In Arcata, the Board balanced the employer's exercise of management prerogative and the rights of employees to be represented in matters relating to terms and conditions of employment. It excluded from the scope of negotiations those management decisions "which lie at the core of entrepreneurial control." It based its decision as to what action lies at such

"core," on whether or not the modifications of hours of a vacant position reflected a "change in the nature, direction or level of service." If such a change was the reason for the modification, the matter was within management's prerogative and outside the scope of representation. Conversely, if the modification was based on labor cost considerations, it was directly related to terms and conditions of employment, and was within the scope of representation.

However, in East Side, the Board attempted to clarify the Arcata decision, when it stated:

> It is axiomatic that any change in the hours of any vacant position changes the level of service to be provided by that position. This mere fact does not allow the employer, pursuant to Arcata, unilaterally to change the hours of bargaining unit positions as they become vacant. The Board's intent in Arcata was to permit employers to adjust the hours of vacant positions unilaterally in those circumstances in which legitimate changes in the nature, direction or level of services have occurred, changes which are not based primarily on wage and benefit cost considerations.
>
> The Arcata rule was not intended, and will not be applied, to grant carte blanche authority to employers to change the hours of vacant bargaining unit positions unilaterally. The employer may not unilaterally convert a vacant full-time, full-benefit position to multiple part-time, reduced-benefit positions at substantial labor cost savings, and justify the action simply because the resulting part-time positions will provide a changed level of service. Similarly, the Arcata rule does not permit employers unilaterally to reallocate labor cost resources by changing the hours of multiple bargaining unit positions as they become vacant, based on the assertion that the nature of service delivery is being changed. These employer actions are based primarily on labor cost considerations, relate directly to the terms and conditions of employment of bargaining unit members and are negotiable. [Emphasis added.]

In the final analysis, Arcata and East Side state that the mere assertion of a change in the nature, direction or level of service is insufficient to extract the matter from within the parameters of the scope of representation. Conversely, legitimate changes in the nature,

direction or level of service, the proof of which is supported by persuasive evidence, are sufficient to support a conclusion that the decision to modify a vacant position's hours, was one lying at the "core of entrepreneurial control."

In Antelope Valley, the Board was faced with circumstances similar to those of the instant case. The district replaced a retiring eight-hour cafeteria worker with three employees with three-and-one-half hour assignments. The full-time position was left vacant. The Board, when determining whether such replacements constituted a change in the nature, direction or level of service, analyzed the objective evidence.

First, it determined that the subject cafeteria was the only one in the district that had two full-time workers, and there was no evidence that the district had any intention of replacing the retiring employee with another full-time employee. The Board also noted that there was a pattern in the district not to replace retiring full-time employees with new full-time employees. Second, the district's decision to insert a labor-intensive machine, a pizza maker, in its kitchen, predated the resignation of the full-time employee. Third, the pizza-making machine required one person to attend it whenever it was being operated. Therefore, the Board determined that the decision to replace the full-time employee with three part-time employees was based on the district's "non-negotiable decision to provide a different type of service to patrons by opening a pizza parlor."

The respondent also points to the reasoning in a recent ALJ proposed decision in support of its contentions. That decision, CSEA v. Clovis Unified School District (Clovis),[6] was issued March 23, 2001. In it the ALJ found that the district credibly asserted that there was a marked diminution in the level of service required at two sites and that there was insufficient

[6] Clovis (2001) PERB Decision No. HO-U-779.

evidence to support a conclusion that the subject personnel decisions were motivated by an attempt to save labor costs. Therefore, the proposed decision held that management's decision to leave two six-hour positions vacant and create two positions with fewer hours to respond to this reduced customer level was a legitimate change in the level of service, and within its "core of entrepreneurial control."

Analysis

The Board has determined that a modification to the hours of a newly created position in an existing classification is within the scope of negotiations, unless such decision is within its "core of entrepreneurial control." (See Arcata.) The respondent's attempt to cite language contained in San Jacinto to create an exception to this determination is not persuasive. San Jacinto was decided long before Arcata and East Side. It is clear that the Board, through the series of cited cases, supra, was attempting to develop a comprehensive standard for employers to follow when it wished to change the hours of vacant positions. A brief statement of dicta in the first of the series of these cases does not survive the more comprehensive later decisions.

In this case, the District made a decision to change the hours of positions in an existing classification, i.e., librarians. This change of hours was not a change in the nature or direction of services as there was no corresponding modification in the types of services provided by the existing librarians. In other words, the extended hours are not due to the addition of a new service or a major modification of an existing one.

The issue of level of service is a closer question. However, an analysis of the reasoning in Arcata and East Side supports a conclusion that the Board's intent was to permit managerial decisions based on substantial modifications of educational services. At the same time the

Board was attempting to prohibit unilateral decisions that did little more than affect hours of employment, an enumerated item in the statutory scope of representation. Unlike Antelope Valley, there was no objective evidence in this case that the District's decision was dictated by a new machine that required a modification in the existing staffing patterns. Unlike Clovis, there was no objective evidence that this decision was dictated by a drastic change in the demand for services at a particular service location. There was also no evidence that the decision was based on anything other than the District's desire to modify the hours of library services.

In this case, there was no change in the level of service, but merely an employer's decision that this same level of service should be provided at a different time of the day. This time-related decision has, admittedly, some trappings of entrepreneurial discretion, but it is well settled that the time of day employees are required to work is as negotiable as the number of hours of employment. (See Moreno Valley Unified School District (1995) PERB Decision No. 1106, p. 8 of adopted decision of the ALJ; Hardin, Developing Labor Law (1992) at pp. 882-883; Los Angeles Community College District (1982) PERB Decision No. 252.)

As there was no change in the nature, direction or level of service, the District's change in the librarians' working hours without first negotiating the matter with the Association constitutes a violation of subdivision (c) of section 3543.5.

District Contention Regarding Association's Alleged Waiver of Right to Negotiate

The District contends that the management rights and zipper clause in the CBA are sufficiently specific so as to constitute a waiver of the Association's right to negotiate the subject matter. PERB has long held that a waiver of the right to bargain must be "clear and unmistakable." (See Amador Valley Joint Union High School District (1987) PERB Decision

No. 74.) To justify a unilateral change, the CBA must contain specific language that clearly and unmistakably waives the right to bargain over the matter at issue. Even a cursory examination of the parties' management rights (CBA Article VI, p. 3) and zipper (CBA Article XXIV, p. 4) clauses fails to support the District's position.

District Contention Regarding Association's Alleged Failure to Demand Negotiations

The District contends that the Association, by its failure to demand to negotiate this matter, waived its right to do so. The record shows that:

1. In June, Roper discussed with the Association the possibility of extended hours for librarians. When confronted with opposing viewpoints, she said that the District had not made a firm decision and that they were still in the "planning phases."

2. In July 2000, there were recommendations to the governing board that libraries receive extended hours. Such recommendations did not include a modified workday for librarians.

3. In mid-July 2000, a job announcement was issued stating that the new positions would work extended hours.

4. In mid-August, Assistant Superintendent of Personnel Elsner told Sullivan, an applicant for one of the new positions, that the issue of the work hours was not negotiable.

5. In late September, Elsner sent a memorandum to the Association's bargaining chair, citing legal counsel's advice that the librarian's extended hours was not subject to negotiations.

Rumors, potential modifications, matters in the planning phase, and comments to position applicants do not constitute valid notice to the Association of potential modifications of working conditions. (See Los Angeles Community College District, supra, PERB Decision

No. 252.) In late September, Elsner notified the bargaining chair of the extended hours and, at the same time, stated that the matter was not negotiable. Seven days later the Association demanded that the District cease and desist its unilateral modification of the librarians' hours. Four days later, the District declined to do so, asking, in the alternative, to meet and discuss the matter. The Association chose, fifteen days later, to file the instant charge.

PERB has long held that a demand to negotiate is not necessary when such action would be futile. (See San Francisco Community College District (1979) PERB Decision No. 105.) Nor is there an obligation to demand to negotiate after the unilateral modification had been implemented. (See Archoe Union School District (1983) PERB Decision No. 360.) The record is quite clear that by the time Elsner wrote the Association in late September, the modification had already occurred and any demand to negotiate would have been futile. Therefore, the District's contention that the Association is barred by its failure to demand to negotiate is rejected.

Association's Rights Were Violated

When the District unilaterally modified the hours of three new positions in an existing classification without negotiating the decision, it interfered with the Association's ability to properly represent its members in their labor relations with the District, a violation of subdivision (b) of section 3543.5.

Individual Employees' Right Were Violated

The evidence shows that the unilateral reduction occurred prior to the eventual incumbents being hired by the District. As the District made such modified hours a condition of employment, the eventual incumbents were required to work under conditions the District had no right to impose. However onerous this may seem, it does not constitute interference or

discrimination against the newly hired employees. However, this employer action did interfere with the right of existing employees to transfer into the newly created positions without the improper condition(s). Therefore, the employer's action constitutes a violation of subdivision (a) of section 3543.5.

SUMMARY

Based on all of the foregoing, it has been concluded that the District has violated subdivisions (a), (b), and (c) of section 3543.5 when it unilaterally modified the hours of three new positions in an existing classification, thereby (1) interfering with the rights of existing employees to transfer into newly created positions without improper conditions attached thereto, (2) denying the Association the right to properly represent its members in their labor relations with the District, and (3) refusing to meet and negotiate in good faith with its employees' exclusive representative.

REMEDY

The PERB, in section 3541.5(c) is given:

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

In order to remedy the unfair practice of the District and prevent it from benefiting from its unfair labor practices, and to effectuate the purposes of the Act, it is appropriate to order it to cease and desist from (1) interfering with the rights of existing employees to transfer into newly created positions without improper conditions attached thereto, (2) denying the Association rights guaranteed to it by the Act, and (3) refusing to meet and negotiate in good faith with its employees' exclusive representative.

It is also appropriate that the District be required to post a notice incorporating the terms of this Order at all sites where notices are customarily placed for certificated employees. This notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. 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 the District 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 District'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 Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Huntington Beach Union High School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a), (b) and (c). Therefore, it is hereby ORDERED that the District, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of existing employees to transfer into newly created position without improper conditions attached thereto.

2. Denying to the (Huntington Beach) District Educators Association, CTA/NEA (Association), rights guaranteed to it by the Act.

3. Refusing or failing to meet and negotiate in good faith with the Association on the matter of the employment hours of its newly hired librarians.

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

1. Delete all references in its job descriptions or announcements for librarian/library media specialist to any workday other than that traditionally worked by employees in such classification.

2. Immediately modify the working hours of all newly hired librarians to conform with those traditionally worked by librarians.

3. Prior to making any future change in the work hours of librarians, provide notice to the Association and upon request meet and negotiate in good faith about any proposed change(s).

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

5. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board (PERB or Board) in accordance with her instructions. Continue

to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

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 within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required

number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen R. Link
Administrative Law Judge