**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ANTELOPE VALLEY COLLEGE FEDERATION OF CLASSIFIED EMPLOYEES,<br><br>Charging Party,<br><br>v.<br><br>ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT,<br><br>Respondent. | Case No. LA-CE-5931-E<br><br>PERB Decision No. 2618<br><br>December 28, 2018 |

Appearances: Law Offices of Robert J. Bezemek, by David Conway, Attorney, for Antelope Valley College Federation of Classified Employees; Liebert, Cassidy Whitmore, by Eileen O'Hare-Anderson and Erik M. Cuadros, Attorneys, for Antelope Valley Community College District.

Before Banks, Winslow, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Antelope Valley College Federation of Classified Employees (Federation) and cross-exceptions by the Antelope Valley Community College District (District) to the proposed decision of a PERB administrative law judge (ALJ), dismissing certain allegations in the complaint and the Federation's unfair practice charge. The complaint alleged that the District violated the Educational Employment Relations Act (EERA)[1] by: (1) changing its hours of operation and thereby affecting the hours of work of classified employees represented by the Federation without notice or opportunity to bargain; (2) unilaterally changing its policy for approving alternative work schedules as contained in

[1] EERA is codified at Government Code section 3540 et seq.

section 11.2, article XI of the parties' Collective Bargaining Agreement (CBA) by implementing a modified workday/workweek on or about February 3, 2014, without first obtaining approval from a majority of affected employees; (3) failing and refusing to provide the Federation with certain information, including the identities and departments of classified employees affected by the District's proposed modified schedules; and (4) bypassing, undermining and derogating the Federation's authority as the exclusive representative of classified employees by authorizing or otherwise permitting District supervisors to meet with classified employees to discuss implementation of modified work schedules. Each of these actions was also alleged to have interfered with the representational rights of classified employees and the Federation.

The proposed decision concluded that the District failed to furnish information regarding the affected unit members and that it wrongfully modified the workweeks of a small number of employees over their objections. However, it rejected the allegation that the District made a unilateral change by failing to conduct a vote or poll to ascertain whether a majority of affected employees approved of workweek modifications before their implementation, concluding that this was not required by the contract. Additionally, the ALJ concluded that both the contract and the parties' past practice permitted the District to deal directly with unit members regarding such modifications. Finally, the ALJ found that the District did not fail or refuse to bargain about the effects of its decision to change its hours of operation. The Federation excepts to all findings and conclusions that resulted in the dismissal of any allegation in the complaint, as well as to the remedy for the violations found.

The Federation argues that while either a supervisor or employee may initiate a schedule change, the CBA is clear that to establish a schedule change the District must obtain

employee approval. The Federation argues that the ALJ erred by ignoring the absence in the record of any evidence that the District sought or obtained employee approval for its proposed workday modifications.

For its part, the District excepts to certain aspects of the proposed decision's remedial order. Specifically, it argues that a traditional make-whole order that includes backpay for worked but uncompensated overtime is unwarranted because it would confer a "windfall" on injured employees.

The Board has reviewed the entire record in this matter, including the amended complaint and answer, the transcript of the hearing before the ALJ and exhibits thereto, the parties' post-hearing briefs, the ALJ's proposed decision, the Federation's exceptions to the proposed decision, the District's cross-exceptions,[2] and the parties' responses. Based on this review, we reverse the proposed decision and conclude that the District violated EERA by implementing workweek modifications without the approval of a majority of affected employees, and dealing directly with unit employees, as alleged in the complaint.[3]

## FACTUAL BACKGROUND

The Federation is the exclusive representative of a bargaining unit of roughly 200 classified employees at the District's institution, Antelope Valley College.

[2] On September 20, 2016, the District filed with PERB's Appeals Office a statement of exceptions requesting clarification of the proposed decision and a brief in support of the District's exceptions and request for clarification. The Appeals Office rejected these filings as untimely, and the District did not appeal this determination. However, the District later filed timely cross-exceptions that raised essentially the same issues. (PERB Reg. 32310 [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

[3] In light of our conclusion that the February 2014 implementation of modified workweeks violated article 11 of the parties' CBA, we find it unnecessary to reach the Federation's exception regarding the District's failure to bargain about the effects of its decision to implement new hours of operation.

This dispute centers on the meaning and application of article 11 (Workweek and Compensation) of the parties' 2012-2015 CBA, defining the unit employees' work hours for purposes of determining their eligibility for overtime. According to the parties' agreement, fulltime unit employees are normally scheduled to work 40 hours in a week (a regular workweek), consisting of 5 consecutive workdays of 8 hours each (a regular workday).[4] Consequently, employees are ordinarily eligible for overtime whenever they work more than 8 hours in a day or 40 in a week. In other words, the parties adopted the state's private sector overtime standard of an 8-hour day and 40-hour week. The District may choose to pay this overtime in wages "equal to one and one-half the regular rate of pay" or in compensatory time-off at that rate.

However, the parties also agreed to depart from this standard and utilize different workday and workweek schedules when approved by "the appropriate [District] vice president or the president," and a majority of affected "regular unit members." Article 11.2 authorizes the use of modified workdays and workweeks, defined essentially as anything other than a regular workweek of 5 consecutive 8-hour workdays:

> Individual departments, with approval of the appropriate vice president or the president, may establish a workday/workweek for all or certain classes of unit members or for individual unit members within a class when by reason of the work location and duties actually performed, their services are not required for a workweek of five (5) consecutive days. The vice president or president may withdraw approval if it is determined that the services of an individual employee or an employee group are required for a workweek of five consecutive days. A modified work schedule may be initiated by the employee or the supervisor. Individual departments and employees can use, but are not limited to [9/80 (nine hours every day with every other Friday off, equaling 80 hours every two weeks), 4/10 (four ten-

[4] Anyone who works less than this regular 40-hour workweek is considered a part-time employee.

> hour days, one day off each workweek), and 4/9 and 1/2 (four nine-hour days, one four hour day).] The establishment of a modified workday/workweek must be approved by a majority of the regular unit members affected.

At hearing, the parties did not offer any evidence about the relevant bargaining history of this provision but did offer evidence concerning their interpretation and application of article 11.2. This evidence revealed that modified workweeks could be implemented on both an individual employee and group basis, albeit using very different processes.

Historical Reliance on Majority Approval before Instituting Unit-Wide Modified Workweeks

Until February 2014, the majority of classified employees usually worked a regular 5/8 workweek, except during a number of summers. For at least four of the summers between 2008 and 2013, the parties moved to a summer hours schedule due to reduced student traffic. The move entailed changing both the District's operational hours and employees' workweeks to a 4/10 schedule, with Fridays off. Closing the campus on Fridays was said to reduce the District's operating expenses. At the start of the new academic year, the District reverted back to the standard schedule of operational hours and employee workweeks.

In each summer in which the parties moved to a 4/10 schedule, irrespective of whether the District or the Federation raised the issue first, the parties followed a similar procedure. Before moving to summer hours, the Federation always conducted a poll or vote to determine whether unit members approved of the workweek change. The unit was presented with the question of whether they agreed with the change and could select "yes" or "no." At different times, the Federation has run the poll like a vote using paper ballots or e-mail. Once polling was complete, the Federation tallied the responses and notified the District of which option the majority had selected. The District was not involved in the polling process and the Federation did not disclose the numerical tally of responses.

The record evidence contains some of the communications between the parties regarding this application of article 11.2 during the summer term. For instance, prior to end of the 2008-2009 academic year, Pamela Ford (Ford), the Federation's president and a classified employee of the District since 1996, communicated to the District's then-president, Dr. Jackie Fisher (Fisher), that a majority of unit members approved the use of a 4/10 summer workweek. Fisher asked the Federation to conduct this poll to determine whether a majority of the unit approved of the proposed conversion to a 4/10 modified schedule because he wanted to share those results with the District's board members before they voted to change the College's hours of operation. Shortly after Ford communicated the members' support for the change, several classified employees contacted her to share their concerns about the impact of the modified schedule on their childcare responsibilities. Ford communicated these concerns to Fisher, who then authorized his subordinate managers to accommodate the employees' particular scheduling needs.

The parties repeated this pattern in subsequent years. For instance, in May 2012, Ford notified Fisher that a majority of the bargaining unit had again endorsed the proposed 4/10 schedule. When Ford raised the childcare concerns of some employees, Fisher e-mailed Ford to remind her of their past practice to accommodate such individuals:

> Last year, I believe that we allowed employees, who had child care challenges, to collaborate with their supervisors on a schedule to accommodate this issue. ASAP, employees should meet with their supervisors to work out schedule that meets child care challenges, and to ensure that the employee has appropriate supervision.
>
> Thanks for the decision from classified employees to accept the 4/10 work week schedule during summer session. I will conform with V.P.'s on a start of the 4/10 week schedule - June 4 through August 9, 2012.

There was no evidence to suggest that the District ever attempted to modify employees' schedules en masse—whether on a unit, department, or any other group basis—without first seeking their majority approval through the Federation.

Historical Practice of Modifying Workweeks for Individual Employees

Historically, many individual classified employees enjoyed modified workweeks under article 11.2. Multiple District supervisors testified that they had employees working alternate workweeks, such as 4/10, 9/80, or 4/9 and 1/2. In each case, the modification was arranged directly between the employee and his or her supervisor. And as noted above, even during the summer term, several employees arranged with their supervisors exemptions from the District-wide 4/10 schedule in order to meet childcare obligations. However, there is no evidence in the record to suggest that the District moved to modify the work schedules of entire groups or departments on an employee-by-employee basis. Rather, the record demonstrates that individual employees dealt directly with their supervisors only in cases involving individualized scheduling needs.

The District Announces a Change to Operational Hours and the Federation Demands a Vote of Affected Unit Members

On June 10, 2013, the District's new president, Ed Knudson (Knudson), and new vice-president of human resources, Mark Bryant (Bryant), began work.

On or about November 12, 2013, Knudson met with District supervisors and managers and proposed extending the District's operational hours on Monday through Thursday, and shortening the hours on Fridays. Knudson testified that, during the meeting, "I said what I was hoping is that individual managers would work within their units to come up with any obstacles or issues that might arise in the implementation of [the change], and then we could address those issues as they came up." Knudson also testified that "I also said on several occasions, if there are

[any] collective bargaining issues that arise out of this, we need to identify them so we can address them that way." Notes from the meeting indicated that the proposed change was expected to "affect most employees, and each individual department manager will be charged with ensuring appropriate coverage."

On or about November 15, 2013, Knudson sent an e-mail regarding "Operational Hours for the College" to all employees describing his proposal to revise the weekly operational hours to 7:30 a.m. to 6:00 p.m. Monday through Thursday, and 7:30 a.m. to 11 :30 a.m. on Friday. Knudson specified that the operational hours change did not necessarily mean that all employees would need to work until 6:00 p.m. from Monday through Thursday, and said that some employees might retain the normal 5/8 workweek. Knudson "asked the campus managers to work within their units to determine how they could achieve meeting [the new] college operational schedule of hours." Both Knudson and Bryant testified that the District could have covered the District's new weekly operational hours even if no employee wanted to modify his or her workweek. They believed the District could have achieved coverage through a combination of staggering employees' working hours and consolidating coverage for multiple offices for limited periods of time; presumably, the District was also able to authorize overtime if necessary to cover critical work needs. In any event, in his e-mail, Knudson stated that "[a]s the managers speak with everyone and issues are identified, [the District] will work to resolve those issues where they exist through appropriate protocols consistent with collective bargaining agreements."

Despite this stated commitment to the process of collective bargaining, the District did not formally notify the Federation of its proposal to modify the operational hours before announcing it to the bargaining unit. Nevertheless, Ford had begun to hear rumors of potential

changes in early November 2013. In response, beginning November 7, Ford conducted a poll of Federation members to gauge their support for the kind of modified workweeks that the new operational hours might require, specifically the 4/9 and 1/2 workweek. She found few supporters. On November 14, Ford conducted a vote among all unit employees. The ballots had two options: "1. Maintain regular 8-hour work week schedule"; or "2. Change to the District[']s modified work schedule Monday - Thursday 7:30 [am] to 6:00 pm and Friday 7:30 am to 11:30 am." Although there was some dispute about the manner and results of the vote, according to Ford, a majority of the bargaining unit did not approve of the changes proposed on the ballot.

On December 4, 2013, after receiving the results of the Federation's poll of the bargaining unit, Knudson sent an e-mail to Ford stating the District's position that article 11.2 of the CBA required a classified employee vote by department for "establishing alternate work schedules." However, in the same message, Knudson appeared to question the purpose of a vote, "[i]nasmuch as I specifically directed the managers to work with each of their areas to determine how they would meet this operational change, I am not certain what a collective vote of the classified service, member and non-member, would reveal." He then asked to meet with the Federation to discuss this matter.

The following day, December 5, 2013, Knudson held a "town hall" meeting to discuss the proposed change in operational hours with employees. According to the uncontradicted testimony of the Federation's grievance chairperson, Glenn Collins (Collins), Knudson told employees that the District would comply with the contract and that there would be a vote before the implementation of workweek modifications. That same day, Ford made a request for information the Federation needed to conduct its vote by department, as urged by Knudson. Over the course of several discussions, more fully described below, the Federation refined its

request to include, as relevant here, a list of all bargaining unit members affected by the proposed change in operational hours.

The parties met on December 10, 2013, and agreed that the District would delay its proposed changes to the hours of operation until February 4, 2014, to permit a vote of the affected classified employees by department. Indeed, Knudson testified he understood the purpose of the delay was to allow the Federation the time necessary to conduct the departmental votes. Consistent with the understanding reached at that meeting, Knudson sent an e-mail to all employees on December 13, 2013, which stated in part:

> [Article 11.2] also requires that once an alternate work schedule is proposed that [*sic*] a vote of the affected members of the department be conducted. The Classified bargaining unit will be conducting that vote, by department, in the near future.
>
> Additionally, at the request of the Classified Bargaining Unit, I am delaying the formal implementation and publication of the new work hours until the beginning of spring semester, Monday, February 3, 2014 . . . .
>
> Thank you for all the conversations you have had within your units and areas, and your ongoing commitment to service of the students and the community.

In explaining his intentions and motivations for sending this e-mail, Knudson testified that he understood by the date of his e-mail that article 11.2 required a vote by "department," which he believed to mean that a majority of all classified employees under a common supervisor must first indicate their approval of a modified workweek before it could be implemented.

District Supervisors Discuss Modified Workweeks Directly with Unit Members

Meanwhile, and despite these statements from Knudson, District supervisors proceeded to meet directly with unit employees, solicited their opinions about modifying their workweeks to staff the new operational hours, discussed workweek modifications directly with their

employees, and implemented those modifications (or left the existing schedule unchanged) based on those discussions.[5]

Communications Over the December 2013 Information Request

On December 17, 2013, Bryant e-mailed Ford a list of all District classified employees, separated by office/area. He noted that the list included some classified personnel excluded from the Federation's unit, such as confidential employees and classified supervisors. At hearing, Bryant testified that he included those employees because he believed that was what the Federation had requested. Ford responded later in the day on December 17, 2013, stating that the Federation wanted the list to include only unit members. She also requested that the District further separate employees by individual departments, using as an example, the Math and Sciences Division, which includes the academic departments biology, chemistry, physical science, and math, as well as clerical staff.

On December 18, 2013, Bryant provided a new employee list to Ford, including only bargaining unit members. Regarding the categorization of employees by department, Bryant said in the e-mail "[o]ur current system does not allow us to break it down any further." He offered to meet to discuss the issue further.

On January 15, 2014, Federation Grievance Chair Collins informed Bryant that he was the Federation's primary contact regarding the information request. He asked whether the

[5] The greatest portion of the evidence at hearing concerned these interactions between supervisors and unit members, and the proposed decision focused considerable attention addressing this evidence. The ALJ concluded that these direct discussions between supervisors and unit members violated article 11.2 *only* in cases where the Federation proved that individual employees were forced to accept a modified workweek without their approval or consent. In light of our conclusion that these discussions were a unilateral change to the contractual requirement of majority approval by the affected unit members, it is unnecessary to recount at length the facts regarding specific interactions between employees and supervisors, or to address the Federation's exceptions concerning the ALJ's allocation of the burden of proof on this issue.

District was assigning all employees to a 4/9 and 1/2 workweek. Bryant responded the next day that "[i]ndividual offices/areas have been given the latitude to work with employees regarding their individual schedules."

Collins e-mailed Bryant on January 21, 2014, requesting that the District provide the Federation with a list of only "affected" unit members, as used in article 11.2, separated by department. He said that if the District did not provide the requested information, the Federation would consider the results of its November 14-15, 2013 vote to be its official position on the matter.

On January 30, 2014, Bryant replied, acknowledging the problems with applying the terms of article 11.2. He again stated that the District's system could not further sub-divide employees' work location from what was already provided. He also stated that the District maintained "no specific data base" for only affected unit members. Bryant said that the "HR office is in the process of collecting the documentation from the different areas regarding the updated schedules for each employee." Bryant also expressed concern over the Federation's November 2013 vote because he did not know how the vote was conducted, what was presented on the ballot, which groups participated in the vote, and what the final tally was. Finally, Bryant repeated the offer to meet and resolve their outstanding issues.

Collins replied to Bryant on January 31, 2014. He said that the Federation had offered to conduct a department-by-department vote based on the District's concerns about the prior vote. Collins claimed said that such a vote was still possible if the District were to identify which unit members were affected by the operational hours change, and their respective departments. Collins described a proposed voting process including a two-day voting period in which affected unit members could select between the following options:

> 1. Maintain regular 8 hour week work [sic] schedule.
>
> 2. Change to the District's modified work schedule of Monday – Thursday 7:30 [am] to 6:00 pm and Friday 7:30 am to 11:30 am.

Under the proposal, the Federation would be responsible for conducting the vote, segregating ballots by department (assuming that information was provided by the District), and reporting whether the majority of voters in each department voted for or against the change. Collins stated that:

> It is the Federation's official position that no [F]ederation unit members[']work schedule should be modified without a majority approval vote from affected unit members in their respective departments. Any work schedule modifications, without majority vote of approval, would constitute a unilateral change to the CBA.

In response to Bryant's offers to meet, Collins said that he was responsible for reporting his communications back to the Federation leadership and that "email is the best vehicle to accomplish this." It is unclear whether the District responded to this e-mail.

Implementation of the Operational Hours Change

The District implemented the weekly operational hours change on February 3, 2014, the start of the Spring 2014 semester. Accordingly, most College offices were open from 7:30 a.m. to 6:00 p.m. on Monday through Thursday and from 7:30 a.m. to 11:30 a.m. on Friday. Whereas the majority of the bargaining unit previously worked a regular 5/8 workweek, only 53 of 210 classified employees in the District maintained the regular 5/8 workweek after the District implemented the new operational hours. In other words, the District abandoned the notion that a vote was necessary and proceeded to modify employees' workweeks based on whatever discussions they had with supervisors.

In response to these changes, the Federation filed both a grievance and the instant unfair practice charge protesting the unilateral implementation of workweek modifications.

## THE PROPOSED DECISION

The proposed decision found that article 11.2 was ambiguous because it did not define the manner or method through which unit members were supposed to register their approval of a proposed workweek modification. Turning to the parties' past practice, the ALJ concluded that there was no firm historical support for a vote or poll, and thus no contractual requirement to conduct such a vote or poll before establishing modified workweeks. Instead, the ALJ found that the past practice permitted supervisors to deal directly with employees, who retained an individual power to approve or refuse a proposed workweek modification. On this basis, he found that the District violated the parties' agreement only with respect to those employees who affirmatively opposed the implemented workweek modification. Additionally, as noted, the ALJ found that the District failed to furnish information concerning the identity of the members affected by the proposed workweek modifications. The ALJ dismissed all other allegations.

## DISCUSSION

### The District's Decision to Implement Modified Workweeks Without the Approval of a Majority of the Affected Employees Constituted an Unlawful Unilateral Change

In order to prevail in a case of alleged unilateral change, a charging party must prove by a preponderance of the evidence that: (1) the employer took action to change existing policy or implement a new policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9; PERB Reg. 32178.)

A change in policy generally falls into one of three categories: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies or application or enforcement of an existing policy in a new way. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 12; *City of Davis* (2016) PERB Decision No. 2494-M, pp. 30-31.) Although any one of these categories is sufficient to constitute a unilateral change, in this case the District's conduct meets all three of the above standards.

An established policy may be embodied in the terms of the parties' CBA. (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 8; *Pasadena Area Community College District, supra*, PERB Decision No. 2444, p. 12.) With respect to such policies, an employer may not unilaterally impose a contractual interpretation that represents a conscious or apparent reversal of a previous understanding. (*City of Davis, supra*, PERB Decision No. 2494-M, p. 20, citing *Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 31 [employer imposed its own interpretation on side letter intended to distinguish criteria for designating instructors as lecturers or adjunct professors]; *Regents of the University of California* (1991) PERB Decision No. 907-H [unilateral creation of a hiring ratio not based on agreed-upon criteria constituted an unlawful alteration of terms of agreement]; *Regents of the University of California* (Davis) (2010) PERB Decision No. 2101-H [employer's interpretation of contract provision regarding transfer of unit work that was overly narrow and contrary to the intended meaning of the contract was unlawful contract repudiation]; *County of Kern* (2018) PERB Decision No. 2615-M, pp. 6-7 [employer may not make unilateral discretionary changes that are inconsistent with the settled dynamic status quo without giving notice and opportunity to bargain].)

The central dispute in this case concerns the meaning and application of article 11.2. While the language of this section is not clear and unambiguous, we conclude that the District unilaterally adopted a new interpretation that is inconsistent not only with the parties' historical interpretation, but also with any practical construction of their agreement based upon fundamental principles of contract interpretation. In short, the contract required that a majority of the affected employees approve of the District's proposed modifications to the workweek before implementing them.[6] This requirement of majority approval necessitates group decision-making, such as a vote or poll; the contract does not permit the District, if it wishes to change the workweek for more than one employee, to deal directly with those affected as individuals in order to circumvent the majority approval requirement. Since the District's actions altered the status quo, its conduct constitutes an unlawful unilateral change.

The Parties' Past Construction of Article 11.2 Establishes Their Intent to Conduct a Vote or Poll to Determine Majority Approval for Proposed Workweek Modifications

Although PERB lacks authority to enforce contracts, it may interpret contracts when necessary to resolve an alleged unfair practice. (*County of Sonoma* (2011) PERB Decision No. 2173-M, p. 16.) In doing so, the Board applies traditional principles of contract interpretation. (*City of Davis*, *supra*, Decision No. 2494-M, p. 18; *County of Tulare* (2015) PERB Decision No. 2414-M, p. 17, affd. in relevant part as noted in *County of Tulare* (2016) PERB Decision No. 2414a-M.) Those principles include looking first to the language of the contract to understand its meaning and to read the entire contract as a whole such that each

[6] The establishment of modified workweeks is different from a change in the hours of operation. The former involves employees' hours of work, which is a negotiable subject under EERA section 3543.2. The latter involves the hours when the District is open to provide services to the public, i.e., a decision concerning the "level of service" to be provided, which is a managerial prerogative under our precedent. (*Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 7-8.)

clause helps interpret the other. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing Civ. Code, § 1641.) Evidence of bargaining history or past practice, if available, may help us to determine the meaning of a contract that is ambiguous or silent on certain topics. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 20, citing *Compton Community College District* (1990) PERB Decision No. 790; *Rio Hondo Community College District* (1982) PERB Decision No. 279, p. 17.)[7]

Here, we apply these principles to harmonize all parts of article 11.2. The provision permits the District's supervisors to propose modified work schedules and to do so for "all or certain classes of unit members or for individual employees within a class," but requires that "[t]he establishment of a modified workday/workweek *must* be approved by a majority of the regular unit members affected." (Emphasis added.) We must give meaning to both of these aspects of the parties' language. To do so, we must honor the plain limitation on unilateral management action: Article 11.2 does not permit management to adopt a modified workweek absent approval by a majority of those asked to forfeit their right to the standard 8-hour day and 40-hour week. At the same time, the contract is ambiguous as to the exact method by which the parties should ascertain the will of the majority. We therefore consider not only the best construction of the overall language, but the parties' past application of the language. Ultimately, for the reasons discussed below, we find that the District unilaterally altered article

[7] PERB precedent is in accord with fundamental canons for determining the intent of the parties under California law. (Civ. Code, § 1636.) When the language used in an instrument is ambiguous, extrinsic evidence may be introduced to clarify the ambiguity. (Code Civ. Proc., § 1856.) Relevant extrinsic evidence includes the circumstances which existed at the time the written instrument was made (Civ. Code, § 1647), and the construction given to it by the acts and conduct of the parties with knowledge of its terms before any controversy has arisen as to its meaning. (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, 931-32, citing *Universal Sales Corp. v. Cal. Press Mfg. Co.* (1942) 20 Cal.2d 751, 761.)

11.2 when it took the position that no form of majority approval is required and that it could instead authorize its supervisors to discuss schedules individually with each employee, without involving the Federation.

The District rests its argument largely on past instances in which an individual employee approached his or her supervisor to seek a schedule modification to accommodate child care needs or other responsibilities outside of work. But in those instances in which management has proposed to alter the workweek for more than one employee, the parties' past practice has been consistent with the contemporaneous statements by management in this case in reflecting an understanding and expectation that gives meaning to the CBA's majority approval language: the Federation would first conduct a poll or vote to determine majority approval. The parties repeatedly and consistently followed this practice in adopting 4/10 schedules for several summer terms. In each of those instances, the District took no action to implement modified summer schedules until and unless the Federation reported that a majority of the unit approved them. Thereafter, individual employees negatively impacted by the majority's decision could approach their supervisors to reach an individualized accommodation.

The facts of this case directly contravene that practice. A majority of Federation-represented employees did not approve the District's proposed new workweek and as a result the District adopted a new contract interpretation in which District supervisors could circumvent a group vote by dealing with employees individually. Prior to that reversal, there is no evidence that the District ever attempted to modify the workweek for more than one employee without the Federation first determining majority support.

Our analysis thus turns in significant part on the fact that both parties understood the need for a Federation-led vote or poll prior to modifying workweeks, and they manifested that mutual understanding over a significant period of time, even after Knudson arrived at the District in June 2013. Indeed, Knudson clearly articulated that article 11.2 necessitated a vote or poll when he first announced the proposed changes to operational hours: "[Article 11.2] also requires that once an alternate work schedule is proposed that [*sic*] a vote of the affected members of the department be conducted. The Classified bargaining unit will be conducting that vote, by department, in the near future." The District's later self-serving change in interpretation reveals mainly that management had come to realize the significant likelihood that the District's proposal might very well never achieve majority support.

The parties' practical construction of a contract, as shown by their actions, is important evidence of their intent, and helps us to resolve ambiguities in the contract. (See *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753 (*Crestview Cemetery Assn.*); *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1814.) Moreover, even aside from the parties' pre-dispute application of their contract, we could not interpret the relevant contractual language to match what occurred here; where the contract requires that a new workweek "be approved by a majority of the regular unit members affected," that cannot mean that a majority votes against the change and then management nevertheless implements it by talking to employees individually. An interpretation of article 11.2 that eschews a vote or poll of affected employees would essentially nullify the requirement of majority approval. Indeed, there would be no point in requiring the approval of a majority of affected employees if the District may simply choose to deal with each employee individually. While we should never endorse an interpretation that treats any part of the contract as mere surplusage (*National*

*City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279), the need to give full effect to article 11.2's requirement of majority approval is all the more compelling because it is the only sentence in the section that employs mandatory language: "the establishment of a mandatory workday/workweek *must* be approved by a majority of the regular unit members affected."

The Proposed Decision Did Not Give Sufficient Weight to the Parties' Past Practical Construction of Article 11.2

In the proposed decision, the ALJ concluded that a vote was unnecessary because the evidence did not establish a "past practice" of conducting votes before implementing the type of workweek changes present in this case. The ALJ relied on *Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro*) and subsequent cases for the proposition that parties are bound only by past practices that are "regular and consistent" or "historic and accepted." (*Ibid.*, p. 10.) Analyzing the evidence under this standard, the ALJ first found that the parties' multi-year practice of conducting votes before transitioning to a modified summer workweek was insufficiently analogous to the present situation to constitute a binding past practice. In his view, the summer transition involved a wholesale conversion of both the operations and unit employees to a uniform 4/10 modified schedule, whereas here, the District intended to implement multiple, non-uniform modified schedules to staff its new hours of operations. Thus, the ALJ concluded that the evidence did not reveal a discernable promise to rely on a vote or poll of affected unit members before implementing modified workweeks (and thus altering employees' eligibility for overtime.) We do not adopt these conclusions, in part because they are grounded on a misunderstanding of the applicability of *Pajaro* to a case such as this, viz., one involving the interpretation of the parties' agreement.

The proposed decision errs, first, because it conflates a past practice that establishes an enforceable policy in the absence of contract language, on the one hand, and a past practice that illuminates the meaning of ambiguous contract language, on the other. *Pajaro* and its progeny deal primarily with the former and are concerned with identifying the non-contractual terms and conditions that form the status quo an employer cannot alter unilaterally. Thus, before giving a particular disputed past practice the force of a contractual promise, it is first necessary to determine that it is historically unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 25, citing *Riverside Sheriff's Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) The purpose of this inquiry is to ensure that, in the absence of controlling contractual terms, the parties are bound only to those promises that are evident from their unequivocal conduct.

While the parties' past practice in this case may have been sufficient to meet the *Pajaro* standard, we need not reach that question, because the inquiry is fundamentally different when the parties' past practices are considered to help define the meaning of contract language. In such situations, we scrutinize the parties' application of their own agreement in order to discern its meaning:

> This rule of practical construction is predicated on the common sense concept that "actions speak louder than words." Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts [and the Board] should enforce that intent.

(*Crestview Cemetery Assn, supra*, 54 Cal.2d at p. 753.) In these circumstances, the past practice is but one tool for interpreting the contract, and therefore need not be as definitive as when it is defining the status quo in the absence of a contract term.

Here, as described above, the parties behaved as if article 11.2 did not permit a unit-wide departure from the standard 8-hour workday and 40-hour workweek unless approved by a majority of the affected employees as reflected in a vote or poll. Since the District disregarded the outcome of the only vote in this case, and then implemented its new workweek without allowing a revote, its conduct constituted a departure from the contract and an unlawful unilateral change to the existing terms and conditions of employment.

The District Unlawfully Adopted a New Policy

Even if the ALJ had been correct to grant so little weight to the parties' practices with respect to summer schedules, such a finding would not excuse the District's decision to proceed as it did here. It has long been understood that "a unilateral change may occur if the employer has adopted a new policy where previously there was none, or has adopted a stricter enforcement of an existing policy." (*County of Monterey, supra*, PERB Decision No. 2579-M, p. 21, and cases cited therein.) To the extent the transition to summer schedules differs from the present situation, at most the District could argue that the parties had no reliable past practice on which to base their conduct. That is, while the record evidence demonstrated that individual employees, including Federation officers, routinely "approved" modified workweeks for themselves—typically to accommodate their own requests due to child care or other outside responsibilities—there was absolutely no evidence that the District ever attempted to modify swathes of schedules throughout the unit on an individual basis. In such circumstances, the District's proposal to modify unit members' schedules could, at most, be

viewed as entirely novel, and its policy of approaching everyone on an individual basis must therefore be regarded as a new policy for purposes of the unilateral change analysis.[8]

The District's Conduct Constituted Direct Dealing

The legislative purpose of exclusive representation, as set forth in EERA section 3540, is "to promote the improvement of personnel management and employer-employee relations . . . in the State of California by providing a uniform basis for recognizing the right of public school employees to . . . select one employee organization as the exclusive representative of the employees in an appropriate unit." The bargaining obligation under EERA includes an affirmative duty to meet and negotiate upon request over matters within the scope of representation. This obligation of dealing with the exclusive representative also "exacts the negative duty to treat with no other." (*Hanford Joint Union High School District Board of Trustees* (1978) PERB Decision No. 58, p. 7, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684; see also *Redwoods Community College District* (1987) PERB Decision No. 650, adopting proposed decision at pp. 50-51.)

Under PERB law, an employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 19.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (*Id*. at p. 6.) To establish that an employer

[8] And, as we conclude below, approaching each employee individually was unlawful direct dealing.

has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Ibid.*)

Here, the ALJ cited *State of California (Department of Motor Vehicles)* (1999) PERB Dec. No. 1347-S (*DMV*) to support his conclusion that article 11.2 authorized the District to deal directly with unit employees regarding workweek modifications. However, the plain language of the contract in *DMV* unambiguously waived the union's right to bargain. Specifically, it allowed the employer to "*establish*, pursuant to an operational need or a request by either a [union] representative or an employee, flexible work hours." (*Id.*, adopting partial dismissal letter, p. 2, emphasis added.) In other words, changes to work hours did not require any employee or union approval, and certainly did not require approval by the majority of affected employees. This is not the case here.

In these circumstances, the District's decision to discuss workweek modifications with every employee individually had the effect of nullifying its contractual duty to obtain majority approval. The District sought to obtain a waiver or modification of its contractual promise not to impose modified workweeks without first obtaining the approval of the majority of affected employees. Under our law, this conduct constitutes a paradigmatic example of direct dealing.

REMEDY

EERA gives the Board broad remedial powers, including the authority to issue cease and desist orders and to require such affirmative action as the Board deems necessary to effectuate the policies and purposes of the Act. (EERA, § 3541.3, subd. (i); *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189.) PERB's customary remedy for an employer's unfair practices includes restoration of the prior status quo,

including back pay and benefits, and interest thereon for employees who have suffered loss as a result of the unlawful conduct. (*State of California (Employment Development Department)* (1999) PERB Decision No. 1318-S, p. 12; *Corning Union High School District* (1984) PERB Decision No. 399, pp. 7-8; *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 19-22.)

Because he found that the District unilaterally changed the procedure established in the contract only as to those employees proven to have objected to the schedule change, the ALJ limited the proposed remedy to only those employees who, either through their own testimony or that of their supervisors, established that they opposed the change in schedule. The Federation argues that the ALJ's proposed remedy is too narrow in that it relies on an unrealistic standard of proof. In its cross-exceptions, the District contends that "the Board should not impose financial obligations upon the District to pay overtime for hours worked in excess of eight hours four days per week without accounting for the corresponding four hours of leave every fifth day in computing the total amount that the District owes." In other words, the District argues its daily overtime liability should be offset by whatever value the employees might have derived from the District's unlawful decision to schedule them to work only four hours on Fridays.

Although back pay calculations are a matter for compliance, the parties' exceptions indicate that our remedy requires clarification in order to provide guidance for the compliance process. We first address the District's primary argument in its cross-exceptions, which relates to the measure of make whole relief, and we conclude as follows, using an example of an employee working four nine-hour days and one four-hour day. But for the District's unilateral change, the employee's ninth hour of work on the first four days of the week would earn either

wages or compensatory time off at a premium time-and-a-half rate, per the contract; the District would have a choice between those two options, also per the contract.[9] Thus, such an employee should earn either 42 hours of pay for the week, or should receive 40 hours of pay plus two hours of compensatory time off, at the District's option. The District is wrong to the extent it suggests that it may choose the compensatory time off option and then offset the employee's half day off on Friday afternoon against the two hours of compensatory time it owes the employee. That is an analytical error, as an employee who works 40 hours in a week has not used any compensatory time off that week.

Next, we turn to the Federation's contention that all affected unit employees are entitled to the above-described remedy regardless of whether the Federation proved that each one opposed the District's workweek change. We concur with the Federation's view for two principal reasons. First, we must adopt that approach in order to effectuate the purposes of EERA. We cannot give effect to undocumented and unproven employee "approvals," especially since the District claims to have obtained these approvals when it refused to honor a contractually-required majority vote and unilaterally adopted a new policy allowing for one-on-one discussions in which supervisors could extract "approvals" from individual employees. Second, the Federation's approach is more consistent with precedent. As noted, PERB orders make whole relief to compensate employees for the difference between what they actually earned and what they would have earned, but for the employer's illegal conduct. (*Santa Monica Community College District* (1979) PERB Decision No. 103; *Santa Clara Unified School District* (1979) PERB Decision No. 104; *Los Gatos Joint Union High School District*

[9] Article 11.5.1 of the parties' contract provides that overtime is calculated on a daily basis, after 8 hours a day, and that the District may choose to pay this overtime in wages "equal to one and one-half the regular rate of pay" or in compensatory time-off at that rate.

(1980) PERB Decision No. 120; *San Diego Community College District* (1983) PERB Decision No. 368.) A back pay award also provides a financial disincentive and deterrent against future unlawful conduct. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13, and authorities cited therein.)

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Antelope Valley Community College District (District) is found to have violated the Educational Employment Relations Act (EERA), Government Code section 3540, et seq., by unilaterally establishing modified workweeks without the approval of a majority of affected bargaining unit members, by dealing directly with unit employees regarding the modification of their workweeks and thus bypassing their certified exclusive representative, the Antelope Valley College Federation of Classified Employees (Federation), and by failing and/or refusing to furnish to the Federation the names of unit employees affected by the unilateral establishment of modified workweeks. This conduct also interfered with the representational rights of employees and the Federation, as their exclusive representative.

Pursuant to Government Code section 3541.3, subdivisions (i) and (n), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing workdays or workweeks for all or certain classes of unit employees without complying with the terms of the parties' written agreement.

2. Bypassing the Federation and dealing directly with unit employees regarding the establishment of modified workweeks for all or certain classes of unit employees.

3. Refusing or failing to furnish a list of names of the unit members affected by the District's unilateral establishment of modified workweeks in or around February 2014.

4. Interfering with employees' right to be represented by the employee organization recognized or certified as their exclusive representative.

5. Interfering with the right of the Federation, as the exclusive representative, to represent employees.

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

1. Within 45 days after this decision is no longer subject to appeal, meet and negotiate upon demand from the Federation regarding whether to rescind in whole or in part the modified workweeks established unilaterally on or around February 2014, as well as the process for conducting new votes or polls of affected members. Once negotiations begin, the parties will have 90 days to conclude an agreement. If no agreement is reached in that time, or if the Federation does not request to meet and negotiate, then the District shall rescind the modified workweeks in their entirety and restore the work schedules in effect before February 2014.

2. Furnish a list of the names of bargaining unit members affected by the modified workweeks established on or around February 2014.

3. Make whole for any financial losses suffered, including overtime wages or overtime leave in a manner consistent with the decision in this matter, all unit employees affected by the establishment of modified workweeks on or around February 2014. The backpay period shall run from the date of the implementation of the modified workweeks through the earliest of the following: the date the Federation declines to negotiate over the

rescission of the modified workweeks, the date of any agreement reached by the parties pursuant to paragraph B.1, or, if no agreement is reached within 90 days of the start of negotiations, the date on which the District fully rescinds the unilateral changes to employee work schedules. All monetary amounts owed shall be augmented by interest at a rate of 7 percent per annum.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees represented by the Federation 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 it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the Federation's bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Federation.

Members Winslow and Krantz 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-5931-E, *Antelope Valley College Federation of Classified Employees v. Antelope Valley Community College District*, in which all parties had the right to participate, it has been found that the Antelope Valley Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing workdays or workweeks for all or certain classes of unit employees without complying with the terms of the collective bargaining agreement between us and the Antelope Valley College Federation of Classified Employees (Federation).

2. Bypassing the Federation and dealing directly with unit employees regarding the establishment of modified workweeks for all or certain classes of unit employees.

3. Refusing or failing to furnish a list of names of the unit members affected by the District's unilateral establishment of modified workweeks in or around February 2014.

4. Interfering with employees' right to be represented by the employee organization recognized or certified as their exclusive representative.

5. Interfering with the right of the Federation, as the exclusive representative, to represent employees.

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

1. Within 45 days after this decision is no longer subject to appeal, meet and negotiate upon demand from the Federation regarding whether to rescind in whole or part the modified workweeks established unilaterally on or around February 2014, as well as the process for conducting new votes or polls of affected members. Once negotiations begin, the parties will have 90 days to conclude an agreement. If no agreement is reached in that time, or if the Federation does not request to meet and negotiate, then the District shall rescind the modified workweeks in their entirety and restore the work schedules in effect before February 2014.

2. Furnish a list of the names of bargaining unit members affected by the modified workweeks established on or around February 2014.

3. Make whole for any financial losses suffered, including premium overtime wages or compensatory time off, all unit employees affected by the establishment of modified workweeks on or around February 2014. The backpay period shall run from the date of the implementation of the modified workweeks through the earliest of the following: the date the Federation declines to negotiate over the rescission of the modified workweeks, the date of any agreement reached by the parties pursuant to paragraph B.1, or, if no agreement is reached within 90 days of the start of negotiations, the date on which the District fully rescinds the unilateral changes to employee work schedules. All monetary amounts owed shall be augmented by interest at a rate of 7 percent per annum.

Dated: _____ Antelope Valley Community College 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.