STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

IMPERIAL TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2795
v.	)	PERB Decision No. 825
IMPERIAL UNIFIED SCHOOL DISTRICT,	)	June 29, 1990
Respondent.	)	

Appearances: Charles R. Gustafson, Attorney, for Imperial Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Richard J. Currier, Attorney, for Imperial Unified School District.

Before Hesse, Chairperson; Camilli and Cunningham, Members.

DECISION

CUNNINGHAM, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Imperial Teachers Association, CTA/NEA (Association) and exceptions filed by the Imperial Unified School District (District) to a proposed decision of a PERB administrative law judge (ALJ). The ALJ found the District violated Educational Employment Relations Act (EERA or Act) section 3543.5(b) and (c)[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5(b) and (c) states:

> It shall be unlawful for a public school employer to:
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> . . . . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

by unilaterally increasing the instructional minutes at Frank M. Wright Intermediate School (Frank Wright) in the 1988-89 school year for certificated bargaining unit employees. Specifically, the ALJ determined the unilateral action taken by the District altered a consistent past practice of setting the instructional day at the intermediate school level. This schedule change was found to significantly affect the number of hours worked by unit employees. The ALJ proposed, as a remedy, a return to the instructional schedule in existence before the District's action. However, monetary damages were not included in the ALJ's proposed remedy.

The Board, after review of the entire record, including the exceptions filed by both parties, reverses the ALJ's determination that the District violated EERA section 3543.5(b) and (c) by unilaterally increasing instructional minutes in the 1988-89 school year.

FACTS

Frank Wright and Imperial High School (Imperial) occupy the same site, and the two schools share various facilities and staff. Seven certificated staff members perform services at both schools. Students from the two schools ride the same buses to and from school.

In the 1985-86, 1986-87 and 1987-88 school years, Frank Wright teachers performed a class schedule containing 335

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

instructional minutes divided into six periods, comprised of 60-55-55-55-55-55 minutes. During the 1986-87 and 1987-88 school years, Imperial teachers worked a schedule of 350 instructional minutes, divided into six periods, comprised of 60-58-58-58-58-58 minutes. In the 1988-89 school year, the District changed the instructional day at Frank Wright to contain the same number of minutes as the schedule at Imperial, specifically by adding three minutes to periods two through six, for a total of fifteen additional instructional minutes per day. The workday of seven hours and twenty minutes remained unchanged. The additional instructional minutes were taken from periods before and after classes during which the teachers had previously been required to be present but were not engaged in actual student instruction.

In the hearing on this matter, seven witnesses were called by the Association. Six teacher witnesses testified regarding the effects of the schedule change.

The first witness, Joanne R. Holtz (Holtz), stated that, as a result of the change, she had to make adjustments for the additional three minutes per period to keep students working; that the time for meeting with students during the school day was decreased; and, although the contractual workday remained the same, she had to work before and after the workday more than she had had to in earlier years. Holtz did not keep records of this increased outside work time. Holtz also stated 1988-89 was not a typical year, due to her maternity leave for a portion of the school year, but did not elaborate as to what effect this leave

had on her work.[2]

Carol Keltz (Keltz) testified she frequently stayed until 4 p.m. and sometimes 5 to 6 p.m. in 1988-89, and that she spent more preparation time after the workday in 1988-89, as compared to 1987-88. She explained the cause of this extra work time to be the increased number of language arts courses which she taught in 1988-89, because such courses carry a corresponding increase in paperwork, as well as the elimination of some of her available preparation time before and after class. Keltz also stated the effects of the schedule change included difficulty in keeping students working and less time to meet with students after class, especially those students who ride the school bus. As she uses pre-prepared lesson plans, Keltz was not required to prepare additional materials for the longer periods.

John Deagle's testimony was essentially the same as Keltz's. He mentioned specifically the difficulty of keeping students working, greater disciplinary problems, and less time to meet with students after class, but was vague regarding whether the schedule change required more outside work in 1988-89.

Ruth Ann Baughman (Baughman) stated she was aware that additional effort was necessary to fill the longer periods.

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[2]The District's exception to the ALJ's characterization of Holtz's testimony is well-taken. The ALJ stated Holtz found it necessary to conduct conferences on her own time, beyond the regular workday, as a result of the change. However, the record reflects that Holtz's statement was, "If I wanted to extend my day, and use, basically, my own time to do that, yes, I could meet with students." No actual meetings with students are referenced by this statement.

However, Baughman could not specifically state she devoted more time outside her workday involved in preparation in 1988-89 than she had expended in 1987-88.

Judith Ann Greeno stated she spent more time in preparation outside the workday in 1988-89. She stated this was because, "I had a lot more--a lot more to do, I couldn't keep up."

Thomas Rails (Rails) first stated that, due to the change, he either had to arrive at school earlier or take materials home in order to complete his duties, but subsequently admitted that his amount of preparation varied daily. He further said he gave up his duty-free lunch quite a bit more in 1988-89 to meet individually with students. Rails admitted that, in 1988-89, he gave up his preparation period to teach an extra class for increased pay. He also admitted he kept no records regarding the amount of increased outside time expended in 1988-89.

DISCUSSION

In its exceptions, the District argues generally that the ALJ improperly found a violation of EERA based on the unilateral schedule change. The District also contends the ALJ made numerous inaccurate factual findings, as well as incorrect legal conclusions. These exceptions are discussed below.

Because the Act is designed to foster the negotiation process, PERB has determined that an unfair practice, in the form of a unilateral change in established policy, occurs when a change is affected in the understanding between the parties, whether such understanding is evidenced by a collective

bargaining agreement or past practice. (Grant Joint Union High School District (1982) PERB Decision No. 196, p. 8.) Such a change in established policy, by definition, must have a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members.[3] (Id. at p. 9.)

In Modesto City Schools and High School District (1985) PERB Decision No. 541, the Board determined that, for purposes of an unfair practice charge, a consistent past practice on a district-wide basis is of relevant concern. Here, the District argues there was no districtwide past practice regarding instructional minutes and, on this basis, this case must be dismissed. The Association in turn points to the schedule which had been in place for the three previous school years at Frank Wright. In his analysis, the ALJ correctly noted that any comparison under the Modesto rule must be made with other schools at the same level within a district, due to the unique educational requirements of the intermediate grade levels.

Here, Frank Wright is the only intermediate level school in the District. Thus, in analyzing "districtwide" practice, the Association's argument that the District had a past practice

[3]The District argues that this schedule change had no effect on unit employees generally, as only Frank Wright teachers were affected and, thus, under NLRB precedent, the change in schedules did not violate the duty to bargain in good faith. However, as stated, PERB precedent requires a finding of violation of this duty when a change in policy has a generalized effect or continuing impact upon the terms and conditions of employment. (Grant Joint Union High School District, supra, PERB Decision No. 196.)

of setting instructional minutes at the intermediate level (that is, at Frank Wright alone) is consistent with Modesto. The District argues that Frank Wright and Imperial are, in effect, one school and, thus, a past practice of treating both schools as one existed, so that no violation of the Act resulted from the schedule change. Although these schools share the same campus and many of the same facilities, they have different names, almost totally different certificated staffs and different bell schedules, all of which demonstrate that the District, in fact, treated these schools as separate entities. The ALJ correctly concluded that an established practice regarding instructional minutes was changed by the District, without notice to the Association, in the 1988-89 school year. Notwithstanding this initial determination, further analysis of the District's actions is required to determine if a violation of the Act occurred.

PERB law generally views the length of the instructional day as a management prerogative which is outside the scope of representation. (Jefferson School District (1980) PERB Decision No. 133.) Thus, employers are generally free to alter the instructional schedule without prior negotiation with employee organizations. However, when changes in the instructional day in turn affect the length of the working day or existing duty-free time, the subject is negotiable. Similarly, to the extent changes in preparation time affect the length of the employees' workday or existing duty-free time, that subject is negotiable.

(San Mateo City School District (1980) PERB Decision No. 129.[4])

Several PERB cases address the issue of what level of effect on the workday or duty-free time must be shown to establish a violation of the Act.

The Board, in Fountain Valley Elementary School District, supra, PERB Decision No. 625, addressed a unilateral thirty-minute increase in the instructional day at the first- and second-grade levels. One teacher testified she spent one and one-half to two hours more per day working outside the regular school day than she had before the change. Another teacher stated she worked forty minutes to one hour more outside the workday after the change. The District's witnesses admitted that thirty additional instructional minutes would necessitate additional preparation time. The Board found the evidence demonstrated an impact on employees' after-school duty-free time and, thus, the unilateral schedule change violated the Act.

In Corning Union High School District (1984) PERB Decision No. 399, the Board was faced with a situation in which the District unilaterally increased the instructional day by substituting a teaching period for a preparation period. A business teacher testified that, before elimination of the

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[4]Although San Mateo was annulled by the Supreme Court on remand in June 1984, PERB came to the same conclusion it reached originally regarding the district's obligation to negotiate about instructional time and preparation time. (Healdsburg Union High School District (1984) PERB Decision No. 375; see also Fountain Valley Elementary School District (1987) PERB Decision No. 625 and Victor Valley Union High School District (1986) PERB Decision No. 565.)

preparation period, he spent approximately one hour per week after school hours engaged in preparation. After the change, he stated he spent approximately one hour each night doing preparation work. Six other witnesses presented similar specific testimony regarding the effect of this schedule change on their workday. The Board concluded the District unlawfully altered its past practice through this increase in instructional minutes.

The District takes exception to the ALJ's finding that Moreno Valley Unified School District (1982) PERB Decision No. 206 is analogous to the present case. In Moreno, the district eliminated five minutes from the 50-minute preparation period at the beginning of the day previously available to teachers of grades four through six. The Board found an impact on teachers' workday to be apparent based on the evidence that the district continued to require the same level of preparation as before the change.

Notwithstanding any similarities Moreno shares with the present case, Moreno appears to presume an effect on length of workday or existing duty-free time by a schedule change of this nature. This presumption is contrary to Board precedent in this area and, in effect, it lifts any burden of proof from the charging party. (See Modesto City Schools (1983) PERB Decision No. 291, p. 13.) Accordingly, we overrule Moreno insofar as it fails to correctly apply this burden of proof.

The Association argues that this case is similar to Victor Valley Union High School District, supra, PERB Decision No. 565.

Victor Valley involved an increase of ten minutes per day in instructional time. Two teachers testified regarding impact of the schedule change. One teacher stated she was required to expend extra effort in the form of revising lesson plans. Another teacher testified he was required to prepare progress reports, grade papers and perform similar chores outside the workday as a result of the change. Also, a District witness admitted that the 6-hour and 25-minute workday required some work be completed during off-duty hours. In addition, in Victor Valley the Board found that a generalized, continuing impact on all teachers could be inferred from the testimony of the two witnesses. In this case, however, unlike Victor Valley, there were inconclusive statements from several witnesses which do not support a determination of impact on nonwork time.

The ALJ concluded that the increase in instructional time had, at most, a minimal impact on preparation time, which impact could not be quantified with certainty. In apparent contradistinction to such finding, however, the ALJ concluded the number of hours worked by the teachers was significantly affected by the change. In support of this latter conclusion, he stated the instructors found it necessary to schedule conferences with parents and students before and after their workday and that one instructor was forced to give up his duty-free lunch period.[5]

[5]The ALJ appeared to specifically discredit the testimony of Rails which indicated that Rails gave up his lunch period quite a bit more in 1988-89 than in 1987-88 to counsel students. However, the ALJ later relies on this testimony in support of his conclusion that the schedule change impacted the workday. Because

In further support of the above conclusion, the ALJ found the increase in instructional minutes affected the instructors' discretionary or duty-free time before and after classes and during lunch periods. It was undisputed, according to the ALJ, that, after the schedule change, the teachers were required to engage in more instructional activities, with increased disciplinary problems, during time they otherwise would have used for rest, student meetings or other discretionary activities. Implicit in this statement is the assumption that the periods before and after the instructional day were duty-free in nature, and that, by their reduction, a finding of impact on existing duty-free time is necessitated.

The evidence does not support the ALJ's characterization of these periods as duty-free. The District correctly argues that only the lunch period was shown to be duty-free. Accordingly, the Association must show the schedule change had an impact on the length of the workday or on the existing duty-free period--specifically, the lunch period.

We find the ALJ's ruling that the number of hours worked by the employees was significantly affected by the schedule change to also be unsupported by the record. As noted above, the ALJ erred in finding that, because of the change, Holtz was forced to conduct student conferences before and after work hours. Furthermore, only three witnesses who testified regarding

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this testimony was discredited, it should not have been relied upon as a basis for a finding, and we refrain from doing so herein.

impact indicated the change had some effect on the workday; the testimony of one of those was Holtz, and the other testimony was discredited by the ALJ. Indeed, no witness was able to estimate the extra amount of off-duty time expended, and one witness refused to state under oath that she felt she spent more time outside the workday in preparation as a result of the change. Lastly, the ALJ specifically discredited the testimony of two witnesses,[6] Judith Greeno and Rails, that indicated the increase in instructional minutes substantially increased their off-duty preparation time.

All of these factors lead to the conclusion that the Association failed in its burden, as a part of its prima facie case, to show the schedule change impacted the length of the teachers' workday or their existing duty-free time. The ALJ, in refusing to award damages in this action, found that none of the Association's witnesses could give even a rough estimate as to additional time expended, and that monetary damages in such a case would be too speculative. The failure of evidence upon which the ALJ relies in denying restitution damages, likewise also causes the prima facie case to fail because there is simply insufficient evidence of impact on nonwork time. In Modesto City Schools, supra, PERB Decision No. 291, at page 13, the Board reversed the decision of an ALJ who found a violation based on a unilateral elimination of a preparation period, but who refused to award lost compensation based on the violation. The Board

[6]See ante, footnote 5, page 11.

determined the charging party failed to demonstrate that the schedule change in fact extended the workday and, thus, did not meet its burden of proof. Here, the Association has similarly failed in this regard. Consequently, we reverse the ALJ's proposed decision as it holds the District violated EERA section 3543.5(b) and (c) by unilaterally increasing instructional minutes in the 1988-89 school year for certificated employees at Frank Wright.[7]

ORDER

Based on the foregoing, the Association's complaint in Case No. LA-CE-2795 is hereby DISMISSED.

Chairperson Hesse and Member Camilli joined in this Decision.

[7]Because we find that no violation of the Act occurred, we specifically do not address the appropriateness of the remedy in the proposed decision and the Association's exceptions relating to it.