



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

TEACHERS ASSOCIATION OF)	
CLOVERDALE,)	
)	
Charging Party,)	Case No. SF-CE-1361
)	
v.)	PERB Decision No. 911
)	
CLOVERDALE UNIFIED SCHOOL DISTRICT,)	November 20, 1991
)	
Respondent.)	
)	

Appearances; Ramon E. Romero, Attorney, for Teachers Association of Cloverdale; Henry, Gong, Merchat, Reed & Uchiumi, by Margaret M. Merchat, Attorney, for Cloverdale Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Cloverdale Unified School District (District) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District unilaterally increased the work day for its fourth and fifth grade teachers in violation of section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA or Act).¹

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5(b) and (c) state, in pertinent part:

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

- (b) Deny to employee organizations rights guaranteed to them by this chapter.

The Board has reviewed the entire record in this case, including the proposed decision, the District's exceptions and the Association's response thereto. The Board agrees that the District violated EERA section 3543.5(b) and (c) in accord with the discussion below.

FACTUAL SUMMARY

The Cloverdale Unified School District is a public school employer, and the Teachers Association of Cloverdale (TAC) is an employee organization and an exclusive representative within the meaning of EERA.

The parties' 1986-89 collective bargaining agreement (CBA) contained the following relevant provisions regarding hours of employment for certificated employees in general, and those at Washington Elementary School (Washington),² in particular:

9.1 During the following schedules, employees shall remain on the school premises unless otherwise directed by the Superintendent or Principal.

.....

9.1.5 Washington School - 7:45 a.m. until 3:15 p.m.

.....

9.5 Each teacher in grades 4 to 12 shall be guaranteed a preparation period daily of at least 45 minutes. A teacher may waive his/her preparation period only upon written

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

²All of the District's fourth and fifth grade teachers work at Washington Elementary School.

request by the teacher and approval by the Superintendent. It is the intention of the parties that preparation periods shall not be used as an additional teaching period (excluding band) to reduce a teacher's class load.

.....

9.7 Planning and preparation time where assigned by the principal shall be used for planning, preparation, conference with pupils, parents, or administrators.

9.8 Each teacher shall spend additional time, at the school, that in his/her professional judgement is required to beneficially supplement the regular instructional day. . . .

.....

9.10 During the hours of employment, employees shall perform those duties related to their teaching assignments as designated by the principal. Such duties may include supervision of pupils, conferring with parents, participating in required meetings, etc. The teacher shall be on time for their responsibilities.

.....

9.12 Daily Instruction Schedule:

.....

9.12.3 Grades 4-6 = 320 minutes of instruction per day.

For an extended period of time prior to and through the 1988-89 school year, the fourth and fifth grade teachers at the District's Washington school were assigned the following schedule:

Be at school prior to morning session	7:45 to 8:15 =	30 minutes
Morning session - instruction	8:15 to 10:10 =	115 minutes
Morning Recess	10:10 to 10:30 =	20 minutes
Mid-Morning session - instruction	10:30 to 11:45 =	75 minutes
Noon (Lunch)	11:45 to 12:30 =	45 minutes
Mid-Afternoon session - instruction	12:30 to 1:20 =	50 minutes
Afternoon Recess	1:20 to 1:30 =	10 minutes
Afternoon session - instruction	1:30 to 2:45 =	75 minutes
After school time - non-instruction	2:45 to 3:15 =	30 minutes

Total minutes		450
Total instruction time for students		315
Total instruction time by each individual		
teacher (315 - 45 minute preparation period)		270

During the 1986-87 school year, the District "pulled out" each fourth and fifth grade teacher's students for a total of 45 minutes per day and provided art and physical education instruction. The individual teachers used the time in which their students were absent for their preparation periods.

During the 1987-88 school year, the District eliminated the art teacher's role but maintained that of the physical education teacher. The classroom teacher continued to have a daily 45-minute preparation period during the instructional day.

During the 1988-89 school year, the District maintained the physical education "pull out" procedure and added health. Once again each classroom teacher received a daily 45-minute preparation period.

Two of the involved teachers described their actions during these preparation periods. They prepared lessons, planned long-term projects and long-term units. It was during this time that they would go to the photocopy room and prepare handouts for students. It was easier to get access to the photocopy machine during the day than during the high-use periods before and after the instructional day. They also used this time to make contact with parents on the phone and to make changes in the internal classroom facilities, i.e., changing the subject of a wall display such as Thanksgiving to Christmas. In addition, they graded papers, wrote lesson plans for future classes and worked on special projects.

The teachers also described their actions during the 30-minute period at the beginning of each school day prior to the start of student instruction. They explained that they checked their individual mailboxes and consulted with the principal, vice-principal and the counselors, when they were available. They also opened up their classrooms and worked with students who were having difficulty with the previous night's homework. In addition, they had to complete rotating 15-minute assignments of playground supervision. Phone calls were made to parents and conversations were held with parents who came, with or without appointments, to the classroom.

The teachers also described their actions during the 30-minute period at the end of the day's student instruction. They routinely cleaned and readied the room for the next day's

instruction and often dealt with disciplinary problems, such as keeping students after school. During this time they also provided individualized instruction to students having difficulties understanding the lesson during the regular classroom period. They also used the time to talk to other instructors, the principal, the vice-principal and counselors. Part of the time was spent making phone calls to and receiving phone calls from parents. In addition, parents would often come to the classroom wanting to talk about their children's progress.

At the beginning of the 1989-90 school year, the District modified the fourth and fifth grade teachers' schedule to eliminate the mid-day preparation period and to add, as more fully described below 45 minutes of daily instruction. It also shifted 30 minutes from various locations throughout the day to the 30-minute post-student school period. The District insisted that this 60-minute period was now the teachers' preparation period.

Two teachers testified regarding the differences between a preparation period during the day, as a result of the "pull out" program, and a preparation period at the end of the day. They both cited, as the primary difference between the two, the number of interruptions. As an example, there would be no parents dropping in unexpectedly during the mid-day preparation period as each teacher was on a different schedule, and the parents were not generally aware of each teacher's schedule. Nor would colleagues drop in to discuss mutual educational concerns as

there would be, at most, only one other teacher with the same preparation period. They cited the elimination of the mid-day preparation period as the reason they were unable, in the 1989-90 school year, to complete their assignments during the work day.

James P. Crump (Crump), a fifth grade teacher at Washington and a member of TAC's negotiating team, described the difference between his actions during his mid-day preparation period and the two non-instructional periods at the beginning and end of the day as follows:

The main distinction between that and the other two periods is that is my personal time where I can sit down and plan and prepare lessons, plan long-term projects and long-term units. The other time I'm involved with interruptions from parents or administration, faculty meetings.

The distinction is like before school and after school is highly involved with the kids. During the prep time I don't have any kids.

(R.T. p. 39.)

Crump testified that as a result of the modified schedule he worked additional time each week. When asked how much time, he stated:

It depended. Some days an hour or two, the other days, especially during heavy grading periods, it could be eight -- eight, nine hours a week.

(R.T. p. 74.)

Brenda Simoneau, a fourth grade teacher at Washington, stated that the combination of the additional 45 daily minutes of instruction plus the elimination of the mid-day preparation

period caused her to work a minimum of five additional hours per week. She believes that Crump and the rest of the fourth and fifth grade teachers at Washington were affected in the same manner and to the same extent.

Notification of 1989-90 Schedule Changes

During the last week in May or the first week in June 1989, Washington's principal, Tim Justus (Justus), told the fourth and fifth grade teachers that the "pull out" program for health and physical education instruction was no longer going to be available. He also said that a new schedule would be implemented and it would have an impact on the teachers' preparation periods. There was nothing in writing given to the teachers and any schedule changes were described as "tentative." Justus was looking for input from the teachers about these changes. Crump told him that they could not give him input - that they would listen and then discuss it among themselves. Crump also told him that if the tentative changes were going to create a change in working conditions they would have to be negotiated. Justus said that he understood.

After the meeting, Crump went back to his classroom and started to analyze the figures given to him by Justus. He realized there was an approximate increase of 25 to 30 daily instructional minutes. He went back to Justus and they discussed Crump's figures. Justus agreed that his original "tentative" **plan** necessitated increasing the number of instructional minutes for each fourth and fifth grade teacher. The two men came to the conclusion that the plan, as originally envisioned, was not going to work - that it had to be redone. Crump told Justus that any

plan incorporating those same concepts would require negotiations between TAC and the District. Justus agreed. Crump discussed the matter with TAC president Tonya Giusso and she called California Teachers Association field representative George Cassell.

During the summer of 1989, Marc Mager (Mager) replaced Justus as Washington's principal. Near the beginning of August, Crump was at the school site and spoke to Mager. Mager showed Crump the teachers' schedule for the upcoming school year. Crump realized that this schedule had major differences between it and that of the previous year. He believed that these differences impacted the teachers' terms and conditions of employment. He told Mager that he believed the schedule modification required negotiations. He does not recall Mager's response.

On Thursday, August 31, 1989, the fourth and fifth grade teachers were given a new work day schedule when they reported for duty for the 1989-90 school year. That new schedule was as follows:

Be at school prior to morning session	7:45 to 8:05	=	20 minutes
Morning session - instruction	8:05 to 10:05	=	120 minutes
Morning Recess	10:05 to 10:20	=	15 minutes
Mid-Morning session - instruction	10:20 to 12:00	=	100 minutes
Noon (Lunch)	12:00 to 12:40	=	40 minutes
Mid-Afternoon session - instruction	12:40 to 2:15	=	95 minutes
After school time - non-instruction	2:15 to 3:15	=	60 minutes
<hr/>			
Total minutes			450
Total instruction time			315

In addition, Washington's bell schedule for grades 4 and 5 showed two periodic duties: a morning duty period of 15 minutes from 7:50 to 8:05, and a bus duty period of 10 minutes from 2:15 to 2:25.³

The new schedule created the following chronological changes. It (1) reduced the non-instructional time at the start of the day from 30 to 20 minutes; (2) reduced the morning recess from 20 to 15 minutes; (3) reduced the lunch period from 45 to 40 minutes; (4) eliminated the 10-minute afternoon recess; and (5) increased after school non-instructional time from 30 to 60 minutes.

In addition, the teachers were required to prepare for two additional classes, physical education and health, although Principal Mager made it clear that extensive programs in these areas were not expected. They were also assigned a daily ten-minute bus duty once every four to six weeks. However, they were no longer assigned afternoon recess duty as that recess period had been eliminated.

Under the 1988-89 schedule, the teachers had 270 daily instructional minutes. Under the 1989-90 schedule, the same teachers had 315 daily instructional minutes with a corresponding decrease in non-instructional and/or duty free time. The on-site work day, i.e. the mandatory starting and ending duty times did not change.

³Approximately one month after the school term started, the instruction period was modified to start at 8:00 a.m. and end at 2:10 p.m. instead of the original 8:05 a.m. and 2:15 p.m.

Between September 8 and 21, there were four letters of protest concerning the schedule changes. They were sent to both the District's board of education and Principal Mager. These letters came from the fourth and fifth grade teachers of the District. TAC also sent a letter in which it "wishe[d] to formally protest" the District's scheduling changes. Some of the letters demanded the District negotiate the matter and all requested/demanded it rescind its action. One of the arguments made was that all of the sixth through twelfth grade teachers had preparation periods and the kindergarten through third grade teachers had classroom aides. The letters cited the various provisions of their CBA and past practice in support of their position. The letters also demanded that until the schedule was returned to that of the previous year, the teachers be compensated at a rate equal to one-seventh of their daily salary for each day they were required to work without a preparation period. This one-seventh salary was the District's payment for the long-term voluntary relinquishment of a preparation period. Although this rate was not in the CBA, it was a figure the teachers were aware of and, if not bilaterally set, was acquiesced to by all parties. At least two middle school teachers who voluntarily relinquished their preparation periods to teach an additional class received this rate. If a teacher voluntarily gave up his/her preparation period on an occasional

basis, the agreed upon compensation was the contractual extra-duty pay, approximately \$16.00 per hour. This salary figure was in the CBA.

The District declined to either rescind or modify the new schedule or to pay the teachers any additional compensation.

Negotiations for Successor CBA

Negotiations for a successor CBA began in August of 1989. They continued throughout the school year and, during a mediation session on May 17, 1990, the parties tentatively agreed to a new CBA. The agreement was ratified by both parties on June 12, 1990, and included a provision which stated that the "term of this Agreement shall be effective on July 1, 1989, through June 30, 1990." The District insists, despite this unambiguous language, that only salary and class size were totally retroactive. It also states that there was a partial retroactivity of some fringe benefits.

Neither side proposed an amendment to the CBA to amend the section that sets forth the parameters of the teachers' work day (Sec. 9.1.5) or the section that guaranteed all teachers in grades 4 to 12 a 45-minute preparation period. The subject schedule modification was negotiated at approximately five of the successor agreement negotiation sessions. On February 5, 1990, the TAC submitted a proposal that would have reinstated the "4th and 5th grade teachers' preparation periods as last year."

Gerald N. Huot, chief negotiator of the TAC when it negotiated the 1982-85 CBA, stated that CBA section 9.12⁴ was inserted for the first time in their CBA in response to SB 813.⁵ He insisted that the reference to 320 minutes for grades 4-6 was applicable to a minimum instructional level for those students and not a minimum hands-on instructional level for individual teachers. There was no testimony or other evidence proffered in rebuttal to Huot's testimony other than Mager's general statement that the CBA is an agreement with the teachers and not the students.

The 320-minute student instructional minimum, or at least 315 minutes of it, was maintained by the District in both 1988-89 and 1989-90 school year. Under the former schedule, classroom teachers shared these instructional minutes with the physical education and health teachers. Under the latter, after the District's modification of the daily instructional schedule, the classroom teacher spent the entire time with the students by him/herself.

On March 21, 1990, at a successor negotiations session, the TAC proposed the deletion of CBA section 9.12. It based such

⁴See pages 2-3 for text of relevant sections of the 1986-89 CBA.

⁵SB 813 is more properly known as the Hughes-Hart Educational Reform Act of 1983. It became effective on July 28, 1983 (Ch. 498, Stats. 1983). This Act added Article 8 (commencing with section 46200 et seq.) to Chapter 2, Part 26, Division 4, Title 2 of the Education Code. It offered school districts additional revenues as an incentive to increase both the number of instructional minutes and instructional days. Acceptance of these incentives was not mandatory.

proposal on the premise that the section did not represent the actual minutes the individual teachers spent with the students, but rather reflected a minimum level of student instructional minutes. When the District agreed to the deletion of the section, it made no comment as to why it did so.

"Effects of Layoffs Agreement" in April 1989

On or about April 4, 1989, the parties entered into an agreement that was entitled "Effects of Layoffs on Laid Off Employees." There was little testimony regarding the document or why it was negotiated. Section 2.1 of what appears to be an addendum to this document was cited by the District in its closing brief. That section is as follows:

The Association reserves the right to bargain the impact (effects) of program reductions and/or layoffs of bargaining unit members on the remaining bargaining unit in areas of wages, hours and other terms of (sic) conditions of employment that may not be known until implementation takes effect in the future.

On December 18, 1989, TAC filed the present unfair practice charge. At the formal hearing, TAC filed a motion that the complaint be amended. The complaint, as originally issued, stated that the District's fourth and fifth grade teachers were assigned two new subjects to teach: physical education and art. The two new subjects were actually physical education and health. The District had no objection to the amendment. The motion was granted.

TAC filed a second motion to amend the complaint at the formal hearing. Over the District's objections, the motion was

granted. The complaint was amended to state that the teachers' .45-minute preparation period had been eliminated rather than reduced.

DISTRICT'S EXCEPTIONS

In its exceptions, the District contends the ALJ erred when he determined that the District unilaterally altered the teachers' work schedule. Specifically, the District claims the ALJ erred by: (1) ruling that the CBA did not authorize the District to modify the teachers' schedule as it did; (2) failing to find that the District was relieved of any duty to bargain the schedule change because TAC failed to request negotiations; (3) failing to find that the April 1989 "Effects of Layoff" agreement addressed the elimination of the pull out program; (4) failing to acknowledge the District's business necessity to set up a schedule for the 1989-90 school year in late August 1989; (5) finding that TAC's charge was timely filed; and (6) allowing TAC to amend its complaint at the hearing, thereby allowing a substantive change in the case and denying the District a due process right to notice of the charges against it.

DISCUSSION

The central issue in this case is whether the District's revision of the 1989-90 work schedule for its fourth and fifth grade teachers at the District's Washington Elementary School constituted a unilateral change in the terms and conditions of employment within the scope of representation in violation of EERA section 3543.5(c).

A unilateral change in terms and conditions of employment within the scope of negotiations is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

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

In Imperial Unified School District (1990) PERB Decision No. 825, the Board determined that the charging party failed to show that the District's unilateral schedule change had an impact on the employees' work day, and thus found no violation of the EERA. However, the Board set forth standards to measure the effects of such changes:

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. . . . (San Mateo City School

District (1980) PERB Decision No. 129.) (Fn. omitted.)

(Imperial Unified School District (1990) PERB Decision No. 825, pp. 7-8.)

In two similar cases, Fountain Valley Elementary School District (1987) PERB Decision No. 625 and Corning Union High School District (1984) PERB Decision No. 399, the Board concluded that the school districts' unilateral action had impacted either the employees' work day or their duty free time. Therefore, the Board found violations of the Act based on such unilateral action.

In this case, the District's unilateral change in the schedule not only increased each teacher's instructional day by 45 minutes but also added two new subjects to the basic teaching assignment. Evidence was provided that the employer's action caused an approximate increase of between five and nine hours per week of additional work time for each teacher. Relying on Imperial, Fountain Valley and Corning, the Board finds that, absent a valid defense, the employer violated section 3543.5(c) when it implemented the subject modifications in the fourth and fifth grade teachers' daily work schedule.

On appeal, the District argues that the CBA specifically authorized the District to alter the teachers' work day schedule as it did. The District points to several provisions of the CBA to demonstrate the District's control over the teachers' time during the work day. The District argues section 9.5 provided for 45 minutes of preparation but did not require it to be during

the instructional day. Section 9.10 specified the types of duties non-instructional time was to be used for. And section 9.7 authorized the principal to make assignments regarding the teachers' work day. The District specifically asserts that section 9.12 required the teachers to teach up to 320 daily minutes of instruction. Prior to the schedule change, the teachers taught 270 instructional minutes daily.

In support of its claim, the District relies on Marysville Joint Unified School District (1983) PERB Decision No. 314. In Marysville, the District reduced the teacher's lunch break from 50 minutes to 30 minutes. The Board held that while the District was free to grant teachers a lunch break in excess of 30 minutes, the decision to reduce the lunch break to no more than 30 minutes was consistent with its contractual rights. The District contends that it modified the schedule to require 315 instructional minutes for the 1989-90 school year as permitted by the CBA. The District argues that it was not precluded from moving closer to the actual terms of the contract.

Section 9.12 of the CBA establishes the daily instructional requirement for the students. The evidence provides that this provision was enacted in response to SB 813 which required that specified levels of student instruction time be maintained. As this provision was not intended to establish a minimal level of instructional time for individual teachers, the District's argument must fail.

The District next argues that assuming the schedule change ~~was~~ a negotiable item, the District was relieved of any duty to bargain the matter because TAC failed to request negotiations. The District points to the absence of a demand to negotiate by TAC after Principal Justus' meeting with the fourth and fifth grade teachers in May 1989. At that meeting Justus provided a proposed schedule and informed the teachers that the pull out program would be eliminated and the resulting schedule changes would have an impact on their preparation periods. Teacher James Crump reviewed the proposed schedule and indicated to Justus that the schedule change was a negotiable item.

The District agrees that while TAC did not receive formal notice of the proposed change in the teachers' schedule, TAC did acquire actual notice from Justus. The District, citing Victor Valley Union High School District (1986) PERB Decision No. 565, noted that, "Even in the absence of formal notice, proof that such an official had actual notice of the proposed change will suffice."

An exclusive representative can be found to have waived the right to bargain where the employer shows that the exclusive representative failed to request bargaining, despite receiving sufficient notice of the intended charge. (Id. at pp. 4-6.) In The Regents of the University of California (1990) PERB Decision No. 826-H, p. 8, the Board held that, in a unilateral implementation case, a charging party must file an unfair practice charge when it has actual or constructive notice of a

clear Intent to implement the change, and may not rest on its rights until actual implementation occurs.

In this case, the testimony of Justus and Crump clearly indicates that the scheduling changes discussed at the May 1989 meeting did not amount to actual or constructive notice of the District's clear intent to implement a unilateral change in the teachers' schedule. At the hearing, Justus characterized the content of the May 1989 meeting with the effected teachers as ". . . a proposal of some options that could be used." Justus also testified that he had not yet made a final decision as to the schedule for the 1989-90 school year as of the date of that meeting. Similarly, Crump characterized the meeting as a discussion involving a "tentative" or "potential" schedule for the following year. Crump also testified that he and Justus agreed, after further discussion, that the options presented by Justus at the meeting would result in a change in working conditions, which would require negotiation. This evidence does not support a finding that in May 1989, the District expressed a clear intent to implement a change in policy.

The District further contends that the April 1989 "Effects of Layoff" agreement addressed the elimination of the pull out program. The District argues that the language of section 2.1⁶ permits them to implement changes in the teachers' schedule as a result of the elimination of the pull out program. Once

⁶See page 14 for text of Effects of Layoff agreement section 2.1.

implementation had occurred, TAC could raise the issue at the bargaining table.

The language of the April 1989 agreement supports a conclusion that TAC was attempting to reserve a right to itself, rather than grant a broad sweeping waiver of the employer's duty to negotiate on future unknown District actions. The language relied upon does not support the District's contention that TAC, when it signed the April 1989 document, waived its right to negotiate the August 1989 unilateral schedule modification for its fourth and fifth grade teachers.

On appeal, the District alleges the ALJ failed to acknowledge the District's business necessity in late August to set up a schedule for the 1989-90 school year. When a public school employer is faced with a true emergency, the employer may successfully defend a unilateral change in the status quo on the basis of business necessity. (Fountain Valley Elementary School District (1987) PERB Decision No. 625; San Francisco Community College District (1979) PERB Decision No. 105.) The evidence in this case fails to establish that an emergency existed which was sufficient to necessitate the revision of the teachers' schedule. Further, the District did not provide any argument in support of its bare assertion of this defense. Accordingly, this exception is without merit.

The District also excepts to the ALJ's finding that TAC's charge was timely filed. The ALJ found that TAC did not have sufficient notice of the schedule modification until the teachers

arrived at school for the start of the 1989-90 school year on August 31, 1989, and therefore, the December 18, 1989, filing of the unfair practice charge occurred within the six-month period. The District asserts the evidence supports its claim that TAC had sufficient notice of the change in the latter part of May 1989, and thus, the unfair labor practice charge was not timely filed.

The six month time period in which a charge may be filed begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent. Regents of the University of California (UC-AFT) (1990) PERB Decision No. 826-H. For the reasons discussed above, the Board finds that TAC did not receive actual or constructive notice at the May 1989 meeting. Accordingly, the time period for filing a charge did not begin to run as a result of information related at the May meeting.

At the hearing in this case, there was also testimony concerning communications on this issue between the parties during the first week of August 1989, and then again on approximately August 31, 1989, when the teachers reported to school and received a copy of the 1989-90 school year schedule. Notice was certainly adequate as of August 31, 1989, when the new schedule was distributed to the teachers.⁷

⁷The Board need not determine whether the communication in the first week of August constituted adequate notice to start the six-month time period running, as adequate notice at any time in

Finally, the District contends the ALJ erroneously allowed TAC to amend its complaint at the hearing, thereby allowing a substantive change in TAC's charge from a claim that the preparation period had been decreased to one that the preparation period had been eliminated. As such, the District contends it did not have adequate notice of the charges against it.

PERB Regulation 32648⁸ provides:

During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

At the hearing in this case, the ALJ allowed the amendment noting TAC was merely amending the complaint to reflect the evidence produced at the hearing. The District contends only that the late amendment "allowed a substantive change in the entire case -- from a claim that the preparation period had been decreased to one that the preparation time had been eliminated." The theory of law upon which the violation was based was not affected by the amendment of the factual basis for the charge. As such, it is difficult to determine what, if any, prejudice

August would result in a determination that the charge was timely filed.

⁸PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

resulted from this amendment. Therefore, this exception has no merit.

CONCLUSION

The Board finds that the District unilaterally increased the fourth and fifth grade teachers' work day without first meeting and negotiating in good faith in violation of EERA section 3543.5(c). Further, when the employer refuses or fails to meet and negotiate in good faith with an exclusive representative it concurrently denies to that entity its right to represent its members, a violation of section 3543.5(b). As there were no facts supporting an independent violation of subdivision (a), no such violation is found.

REMEDY

In order to remedy the unfair practice found in this case, it is appropriate to issue a cease and desist order and a make whole remedy. There is evidence that the accepted rate for the voluntary relinquishment by a teacher of his or her preparation period on a long term basis was one-seventh of the teacher's salary. In Corning Union High School District, supra, PERB Decision No. 399, the Board imposed a remedy for unlawfully converting a preparation period to an instructional period, "ordering the District to afford the teachers a corresponding amount of time off." The Board also provided an alternative monetary compensation remedy, should the parties fail to reach agreement concerning time off.

In accord with the above, the District is directed to grant to each affected fourth and fifth grade teacher an amount of time off which comports with one-seventh of his or her daily instructional time for each day the teacher was unlawfully required to work the modified daily work schedule implemented by the District at the start of the 1989-90 school year. However, monetary compensation is a valid alternative measure of the harm suffered. Therefore, if the District and TAC cannot agree on the manner in which the time off will be granted, monetary compensation commensurate with the extra hours worked will be granted to the employees for which agreement is not reached. Any affected employee who is no longer employed by the District should be immediately compensated monetarily. Any monetary award shall include interest at the rate of ten (10) percent per annum.

The District is also required to post a notice incorporating the terms of this Order.

ORDER

Based upon the foregoing and the entire record of this case it is found that the Cloverdale Unified School District violated section 3543.5(b) and (c) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c) it is hereby ORDERED that the Cloverdale Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally modifying the daily work schedule for its fourth and fifth grade teachers in such a manner as to cause an increase in the teachers' work day.

2. Refusing or failing to meet and negotiate in good faith with the Teachers Association of Cloverdale, the exclusive representative of the certificated employees of the District.

3. Denying to the Teachers Association of Cloverdale rights guaranteed to it by the Educational Employment Relations Act.

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

1. Grant to each affected fourth and fifth grade teacher an amount of time off which comports with one-seventh of his or her daily instructional time for each day the teacher was unlawfully required to work the modified daily work schedule implemented by the District at the start of the 1989-90 school year or, if agreement cannot be reached as to the manner in which to grant such time off or if an individual is no longer in the District's employ, monetary compensation commensurate with the one-seventh formula set forth above. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

2. Restore the work schedule for the fourth and fifth grade teachers to the pre-1989-90 school year status or to a status that does not improperly extend the work day beyond that of the 1988-89 school year.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all Cloverdale Unified School District sites and all other work locations where notices are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Cloverdale Unified School District, indicating that it shall comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

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

Chairperson Hesse and Member Camilli joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California



After a hearing in Unfair Practice Case No. SF-CE-1361, Teachers Association of Cloverdale v. Cloverdale Unified School District, in which all parties had the right to participate, it has been found that the Cloverdale Unified School District violated the Educational Employment Relations Act, Government Code section 3543.5(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. Unilaterally modifying the daily work schedule for its fourth and fifth grade teachers in such a manner as to cause an increase in the teachers' work day.

2. Refusing or failing to meet and negotiate in good faith with the Teachers Association of Cloverdale, the exclusive representative of the certificated employees of the District.

3. Denying to the Teachers Association of Cloverdale rights guaranteed to it by the Educational Employment Relations Act.

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

1. Grant to each affected fourth and fifth grade teacher an amount of time off which comports with one-seventh of his or her daily instructional time for each day the teacher was unlawfully required to work the modified daily work schedule implemented by the District at the start of the 1989-90 school year or, if agreement cannot be reached as to the manner in which to grant such time off or if an individual is no longer in the District's employ, monetary compensation commensurate with the one-seventh formula set forth above. Any monetary payment shall include interest at the rate of ten (10) percent per annum.

2. Restore the work schedule for the fourth and fifth grade teachers to the pre-1989-90 school year status or to a status that does not improperly extend the work day beyond that of the 1988-89 school year.

Dated: _____ CLOVERDALE UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.