

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CORNING UNION HIGH SCHOOL)
TEACHERS ASSOCIATION, CTA/NEA,)
)
Charging Party,) Case No. S-CE-206
)
v.) PERB Decision No. 399
)
CORNING UNION HIGH SCHOOL DISTRICT,) August 17, 1984
)
Respondent.)
_____)

Appearances: Kirsten L. Zerger, Attorney for Corning Union High School Teachers Association, CTA/NEA; Harold J. Lucas, Attorney for Corning Union High School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions taken to the proposed decision of an administrative law judge (ALJ) by the Corning Union High School Teachers Association, CTA/NEA (CTA or Association). In the underlying unfair practice charge, CTA alleged that the Corning Union High School District (District) violated certain unfair practice provisions of the Educational Employment Relations Act (EERA or Act)¹ by unilaterally substituting a teaching period for a utility or

¹EERA is codified at Government Code section 3540 et seq. All references herein are to the Government Code unless otherwise specified.

preparation period in the assignment of seven teachers. In his proposed decision, the ALJ determined, inter alia, that the District violated subsections 3543.5(a), (b) and (c) of EERA by failing to negotiate with CTA prior to altering the past practice with respect to the teachers' preparation period. Although the District filed no exceptions to this proposed decision, CTA herein objects to the remedial portion of the ALJ's decision.

FACTUAL SUMMARY

For several years prior to the negotiation sessions undertaken during the 1978-79 school year, the District provided a utility or preparation period for all teachers of core classes.² Each teacher who did not volunteer to teach all six periods was usually permitted to use the 51-minute preparation period as s/he wished.

Not until the 1976-77 school year were teachers of non-core subjects entitled to a preparation period. However, thereafter, non-core subject teachers were permitted the option of electing to have a free period. Some voluntarily continued to teach all six periods; other teachers opted for the preparation period. On certain specific occasions, teachers of both core and non-core classes were required to forfeit their preparation periods in order to fill in for an absent teacher.

²Although this practice was unwritten, there is no dispute as to its existence prior to 1978-79. "Core classes" were understood to include English, mathematics and science.

Prior to the negotiations referenced in the instant case, the Association negotiated a two-page agreement which obliged the District to maintain those benefits established by past practice. A similar agreement was renegotiated for coverage during the 1977-78 school year. Thereafter, the Association developed a comprehensive and detailed proposed contract which it presented to the District in the spring of 1978.

Among the specific proposals, the Association sought that the District provide all teachers with a duty-free preparation period. Certain provisions of the proposed contract sought compensation for teachers who forfeited five preparation periods in the form of sick leave or personal necessity leave credit or substitute teacher's pay. The Association also proposed that teachers who volunteered to teach six class periods receive monetary compensation.

During the course of those negotiations, the District responded to CTA's preparation-period proposals by assuring the Association team that it would maintain the past policy of providing a preparation period to all teachers except those who voluntarily assumed a six-period class schedule.

The bargaining team reached agreement on a nine-page document and attached their signatures thereto on July 24, 1978. No provision regarding preparation periods appeared in that document.

When the 1978-79 school year began and the District declined to fill two teaching positions left vacant by

attrition, it directed that seven non-core subject teachers forfeit their preparation periods and assume the load of six teaching periods.

Although CTA advised the District that the contract had not been ratified by the teachers,³ and that it was reconstructing its bargaining team so as to resume negotiations, the District's response was that it considered the contract to be final and binding. No further negotiations were conducted.

Testimony from several teachers was introduced as to the effects of the eliminated preparation period. Ronald Gleason, a teacher in the business department, testified that, during the school years when he had a preparation period, he used the 51-minute period to prepare and grade tests. In addition, Gleason spent approximately one hour a week after school hours doing preparation work. Gleason testified that, when the District eliminated the preparation period, he spent from one hour to one hour and fifteen minutes each night doing preparation work.

³At issue in the original charge was whether the agreement was finalized and binding when the parties signed off in July, or whether the teachers' subsequent failure to ratify the entire package in the fall necessitated the continuation of the negotiating process. The ALJ found that, assuming that the agreement was binding, the contract provided no basis to support the notion that the Association waived its right to bargain over the unilaterally changed preparation period. Neither party has taken issue with the ratification point.

Doug Oilar, an agricultural teacher, testified that, when given a preparation period in the past, he spent two hours per week on school business either before or after school hours. Without a preparation period, Oilar said he spent double that amount of time, a total of four hours per week, or an additional two hours.

Katherine Ragsdale, a homemaking teacher, testified that she spent approximately 30 minutes after every workday doing preparation in addition to that performed during the preparation period. Without a preparation period, Ragsdale said she spent at least an hour to an hour and a half a day more than when she had a preparation period. She later changed her testimony, stating that, without the preparation period, her after-hours preparation increased from 30 minutes per day to an hour each day.

Clair Peterson, a teacher of auto mechanics, testified that, when he had a preparation period, he spent approximately three hours per week on school business. Ten to twenty percent of the preparation period was spent resting. During the school year when Peterson was without a preparation period, he said he spent another two or three hours per week.

Peter Panek, a woodworking teacher, testified that he spent three to four hours per week doing extra work when he had an assigned preparation period. When no preparation period was scheduled, Panek said he spent 51 minutes outside the school day preparing for his classes.

Although the hearing terminated soon after Panek testified, the parties agreed to accept the ALJ's written summary of evidence received from two other teachers by conference telephone call on January 31, 1980. By letter dated February 1, 1980, the ALJ summarized as follows:

Edward Rosauer was sworn and testified that he teaches agricultural mechanics and ornamental horticulture for the District. He testified that he used 100 percent of his preparation period for school business in the year before he lost the preparation period. He did admit that he took coffee breaks during the preparation period but he stated that this helped him keep going during the day.

Before loss of the preparation period, he said he spent approximately six hours per week on District business, either before or after school site time. After loss of the preparation period, he testified he spent an additional five hours per week of nonschool site time on District business.

He testified that he advises the Future Farmers of America, visits projects, etc., on nonschool site time. He has additional duties of preparing lesson plans, working in the greenhouse, grading papers, maintaining equipment, and reading essay work of his students.

He said he had approximately 20 extra students during the year he lost the preparation period.

John Loyless was sworn and testified that he teaches typing, accounting and offset printing for the District. He said he spent approximately 90 percent of his preparation period on District business before the loss. At that time, he spent approximately 30 minutes to one hour per week of nonschool site time on District business. After loss of the preparation period, he still spent approximately 30 minutes to one hour per

week of nonschool site time on District business. He said he had accomplished this by working a little faster.

When he was without a preparation period, he had approximately 20 additional students.

DISCUSSION

CTA raises three issues in its exceptions, all of which concern the remedial portion of the underlying decision. Most critical of CTA's exceptions is its contention that the ALJ erred in failing to award any financial compensation to the affected teachers. Citing Ex-Cell-0 Corp. (1970) 185 NLRB 107 [74 LRRM 1740] and H. K. Porter Co. v. NLRB (1970) 397 U.S. 99 [73 LRRM 2561], the ALJ declined to compensate the teachers for the unilateral increase because he found that the proper amount of compensation would be that which the parties would have agreed to in negotiations.

Federal precedent does indeed establish that the National Labor Relations Board (NLRB) lacks the authority to require agreement to a specific bargaining proposal. Where there has been bad faith bargaining, the NLRB, as a general rule, is precluded from making the parties' contract for them, a sound labor law principle. The instant case, however, does not involve bad faith bargaining, but rather deals with a unilateral change.

A unilateral change, while involving a refusal to bargain, is typically remedied by restoring the status quo ante, by

ordering the employer to bargain on the matter at issue, and by making particular employees whole for any benefits the employer unilaterally discontinued. See Morris, Developing Labor Law, 2nd Ed., Vol. II, p. 1665, and cases cited infra. In this case, having reached the factual conclusion that the past practice was to grant each teacher a preparation period, the ALJ found that the District violated the Act by unilaterally deviating from that past practice. There is no need to look to the parties' contract negotiations and second-guess what they would have agreed to because the unfair practice relates to the unilaterally altered past practice. Thus, while the ALJ correctly concluded that CTA's concessions during contract negotiations did not establish a waiver of its right to maintenance of the status quo, he erred in finding that the parties' failure to negotiate a fixed formula compensating employees for their lost preparation periods precludes compensation.

The Board is empowered to order an offending party in an unfair practice case "to take such affirmative action . . . as will effectuate the policies" of EERA. Subsection 3541.5(c). In general, PERB cases have typically remedied unilateral changes by ordering the employer to cease and desist from altering negotiable subjects and, in usual situations, by ordering the restoration of the status quo ante. Rio Hondo Community College District (3/8/83) PERB Decision No. 292.

However, the Board has also ordered certain employers to compensate individual employees wronged by the unlawful conduct by issuing a make-whole order.⁴

Most recently in San Mateo City School District (6/20/84) PERB Decision No. 375a, the Board specifically amended its order noting its earlier failure

. . . to require the District to make employees whole for the increase in hours which resulted from the District's unilateral elimination of preparation time

⁴See Rialto Unified School District (4/30/82) PERB Decision No. 209, rev. denied (9/13/82) 2 Civ. 27991 (Board ordered district to remedy unlawful transfer of unit work by making whole those employees who lost compensation as a result of the transfer); Delano Union Elementary School District (10/15/82) PERB Decision No. 213a, rev. den. (2/17/83) 5 Civ. 7562) (Board ordered district to remedy its unilateral change of wages, hours and term length of resource teachers by compensating such employees for extra hours worked); Holtville Unified School District (9/30/82) PERB Decision No. 250, rev. den. (11/19/82) 4 Civ. 28419) (Board ordered district to make employees whole for unilaterally implementing standards for compelled retirement by paying them at the rate they would have received as year-to-year teachers rather than ordering their reinstatement in contravention of the Education Code); Rio Hondo Community College District (12/31/82) PERB Decision No. 279 (Board ordered district to compensate those employees whose caseloads were unilaterally increased by paying them overload pay, an extra duty compensation established by past practice); Rio Hondo Community College District (3/8/83) PERB Decision No. 292 (Board ordered district to make employees whole for unilaterally altered leave policy by paying them for leave they would have received but for the changed policy, proper verification being required if district reasonably believed employee abused leave benefit policy); Pittsburg Unified School District (6/10/83) PERB Decision No. 318 (Board ordered district to remedy unilaterally reduced work year by making affected employees whole for any losses suffered as a result); Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322 (Board ordered district to make employees whole for economic losses suffered as a result of a certain unilateral alteration of its classification scheme).

and its requirement that employees perform those preparation time duties outside of the normal workday.

In large part, then, the San Mateo decision resolves the dispute in favor of CTA's contention that the seven individual teachers in this case were entitled to be made whole for their losses. And, in accordance with that decision, one measure of compensating the affected employees is to make them whole for the financial harm each teacher suffered. However, while hours can be properly translated into dollars, the direct and immediate result of the unilateral change was that the teachers were required to work extra hours. In our view, therefore, the most appropriate way to make the affected employees whole would be by ordering the District to afford the teachers a corresponding amount of time off.

The remedy ordered below incorporates two methods of accommodating for the change. We direct the District to grant the seven harmed employees the amount of time off which comports with the number of extra hours each employee actually worked. However, monetary compensation is a valid alternative measure of the harm suffered. Therefore, we direct that, if the District and the Association cannot agree on the manner in which the time off will be granted, the employees concerning whom there is no agreement shall receive monetary compensation commensurate with the extra hours worked. Any harmed employee who no longer is employed by the District would be immediately compensated monetarily.

CTA also takes issue with the ALJ's refusal to permit the introduction of evidence regarding the effects of the unilateral change other than increased hours. Specifically, CTA argues that the affected teachers should also be compensated for the increased number of students and the amount and quality of the work performed. Essentially, CTA claims that it was prevented from proving that the eliminated preparation period required teachers to work harder.

Prior to reconvening the hearing on January 17, 1980, the ALJ advised the parties, by letter dated December 11, 1979, as follows:

[The] only subject upon which evidence will be received is:

Did the substitution of a teaching period for a preparation period require the affected teachers to perform additional work during non-school site time, or were they able to perform their work satisfactorily without increasing the amount of non-school site time they devoted to District business.

When the hearing did reconvene, however, CTA requested that it be permitted to introduce evidence regarding the changes in the quality or type of work required of employees. CTA's counsel stated his case at the hearing as follows:

[W]hen in fact there has been a change in working conditions the issue is not solely limited to whether or not the change results in work that can be accomplished during the regular workday, but rather there is a difference in quality or type of work which has been foisted on the individual employee without the ability to represent himself through the collective bargaining process.
. . . Even if our testimony were to indicate

that individuals could complete all of the additional work during the workday without spending time during nonschool site times, that would not negate our claim to the charge of the unilateral action and our claim to be made whole.

The ALJ denied CTA's request based on the fact that it was untimely because the evidence CTA sought to introduce was available at the time the case was originally heard.

In fact, however, the CTA attorney did address this issue during the first day of hearing, before the ALJ's letter issued limiting the evidence to increased hours only. Superintendent Eldred L. Gott was questioned about increased student load. He testified as to the number of students taught by the teachers whose preparation periods had been eliminated and noted other teachers whose student load was in excess of those with six teaching periods. Gott also testified, however, separate from any such increase in student load, the assignment of an additional teaching period would have increased the teachers' responsibilities.

Based on this testimony, we do not find that the ALJ appropriately rejected CTA's request to introduce evidence because of the Untimeliness of the request. Nonetheless, CTA was not harmed by the ALJ's evidentiary ruling because, having ordered the District to compensate the teachers for the additional hours each worked, we would not also order compensation for the increased number of students or the increased teaching effort which, according to CTA, resulted

from the elimination of the preparation period. On this basis, we reject CTA's exception.

First, as to the increase in number of students, the evidence which does appear in the record pertains to the teachers' total student load. The teachers testified, for example, that the added teaching period increased the total number of students they taught by their average class size. This increase, however, does not represent a separate unilateral change because total teaching load is not "class size" as enumerated by EERA. Grossmont Union High School District (6/6/84) PERB Decision No. 313a. This total student load increase, in effect, is another way of describing the increased work effort. Seen in this light, CTA's singular entitlement is that teachers be awarded for the extra work effort caused by the added teaching period.

Secondly, since we have herein ordered the District to remedy the unilateral change by ordering time off or payment for the additional hours, we find the teachers are made whole for the change. In this case, our award based on extra hours reflects the manner in which the teachers reacted to the increased workload. The added student load and teaching effort is another way of defining the change from a preparation period to a classroom teaching period. The increased work effort is directly compensated by an award of a corresponding period of time off when no work effort will be demanded. The harm of having to teach twenty extra students for one teaching period

is remedied by awarding the teacher a time-off period when s/he will have no students to instruct. To award separate, additional compensation for the workload increase would be to award the teachers twice for one unilateral change.

CTA's remaining exception pertains to the ALJ's factual conclusion that the elimination of the preparation period resulted in an average increase of 2.86 hours per week per teacher. While it does appear that some arithmetic error may have been committed, we find the instant dispute seems more appropriately resolved through compliance proceedings.

Therefore, to the extent that the ALJ's proposed decision failed to order any make-whole remedy and thus reached no conclusion as to the specific formula to be utilized, the exact method of computing the compensation due to the affected employees is most suitable to resolution during a compliance hearing, should such a proceeding become necessary.

REMEDY

In accordance with the above discussion, we have concluded that the District unlawfully eliminated the preparation period of certain individual teachers. And, finding merit in the Association's argument, we have reversed that portion of the ALJ's proposed decision which failed to order make-whole relief. Consistent with past Board precedent and subsection 3541.5(c) of EERA, we find it appropriate to order that the District remedy those employees who suffered harm as a result of the District's unfair practice. In this case, we have

outlined a specific method of compensation which permits direct, in kind compensation for extra hours worked or, alternatively, monetary compensation, should no such agreement be reached or should any harmed employee be no longer employed by the District. Having so ordered, we reject CTA's claim that it was prejudiced by the ALJ's ruling to exclude evidence of the unilateral change other than increased hours. The instant order affords full compensation for the harm that resulted from the unilateral change and, thus, the excluded evidence would have resulted in no additional relief.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Board finds that the Corning Union High School District violated subsections 3543.5(a), (b) and (c) of EERA by unilaterally eliminating the preparation period previously maintained by past practice. Pursuant to subsection 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Corning Union High School Teachers Association, CTA/NEA, concerning the teachers' preparation periods;

2. Denying the Corning Union High School Teachers Association, CTA/NEA, the right to represent the employees by failing and refusing to meet and negotiate in good faith concerning the teachers' preparation periods; and

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Corning Union High School Teachers Association, CTA/NEA, concerning the teachers' preparation periods.

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

1. Upon request, meet and negotiate with the exclusive representative concerning the teachers' preparation time.

2. Reinstate the teachers' preparation periods in effect prior to the 1978-79 school year until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the preparation periods.

3. Grant to each of the seven employees harmed by the unilateral change the amount of time off which corresponds to the number of extra hours worked as a result of the elimination of the preparation period. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked.

However, if subsequent to the District's unlawful action, the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning preparation periods, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of seven (7) percent per annum.

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

5. Written notification of the actions taken to comply with this Order shall be made to the Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Burt joined in this Decision.

APPENDIX

NOTICE TO ALL 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. S-CE-206, Corning Union High School Teachers Association, CTA/NEA v. Corning Union High School District, in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Corning Union High School District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act.

As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Corning Union High School Teachers Association, CTA/NEA, concerning the teachers' preparation periods;

2. Denying the Corning Union High School Teachers Association, CTA/NEA, the right to represent the employees by failing and refusing to meet and negotiate in good faith concerning the teachers' preparation periods; and

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act by failing and refusing to meet and negotiate with the Corning Union High School Teachers Association, CTA/NEA, concerning the teachers' preparation periods.

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

1. Upon request, meet and negotiate with the exclusive representative concerning the teachers' preparation time.

2. Reinstate the teachers' preparation periods in effect prior to the 1978-79 school year until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the preparation periods.

3. Grant to each of the seven employees harmed by the unilateral change the amount of time off which corresponds to the number of extra hours worked as a result of the elimination of the preparation period. Should the parties fail to reach a satisfactory accord as to the manner in which such time off will be granted or if an individual is no longer in the District's employ, then such employees will be granted monetary compensation commensurate with the additional hours worked. However, if subsequent to the District's unlawful action, the parties have, on their own initiative, reached agreement or negotiated through the completion of the statutory impasse procedure concerning preparation periods, then liability for compensatory time off or back pay shall terminate at that point. Any monetary payment shall include interest at the rate of seven (7) percent per annum.

Dated: _____ CORNING UNION HIGH SCHOOL DISTRICT

By _____
Authorized Representative

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