STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LA CANADA TEACHERS ASSOCIATION, CTA/NEA, Charging Party,	Case No. LA-CE-1637
v.	PERB Decision No. 461
LA CANADA UNIFIED SCHOOL DISTRICT, Respondent.	December 13, 1984

Appearances: Michael R. White, Attorney for La Canada Teachers Association, CTA/NEA; O'Melveny & Myers by Diane L. Whiting, Attorney for La Canada Unified School District.

Before Tovar, Jaeger and Burt, Members.

DECISION

JAEGER, Member: The La Canada Teachers Association, CTA/NEA excepts to the dismissal of its unfair practice charge filed against the La Canada Unified School District. The Association contends that the charge included an allegation that the District violated section 3543.5 (a), (b) and (c) of the Educational Employment Relations Act[1] by unilaterally reducing preparation time for 6th grade teachers.[2] The administrative law judge determined that the alleged violation had neither been included in the charge nor fully litigated at the subsequent hearing.

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[1]Codified at Government Code section 3540 et. seq.

[2]No exceptions were filed to the dismissal of the other allegations contained in the charge.

ORDER

The Public Employment Relations Board has reviewed the entire record, including the exceptions filed by the charging party and, finding no prejudicial error of fact or law, adopts the attached proposed decision as its own and ORDERS that the charge is DISMISSED.

Members Tovar and Burt joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LA CANADA TEACHERS ASSOCIATION, Charging Party, v. LA CANADA UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1637 PROPOSED DECISION (8/10/83)

Appearances: Michael R. White, California Teachers Association, Attorney for La Canada Teachers Association; Diane L. Whiting, O'Melveny & Myers, Attorney for La Canada Unified School District.

Before: Marian Kennedy, Administrative Law Judge.

STATEMENT OF THE CASE

On September 16, 1982, the La Canada Teachers Association (hereinafter Association) filed the above-captioned unfair practice charge against the La Canada Unified School District (hereinafter District) alleging that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereinafter EERA or the Act)[1] by unilaterally increasing the work hours of teachers in the District without first meeting and negotiating with the Association. The Association is the exclusive representative of the certificated employees of the District.

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[1]The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

A complaint was issued on the above-stated charge on November 9, 1982. The District filed an Answer on December 3, 1982, and a particularized Answer on March 7, 1983, admitting the alleged changes but alleging as an affirmative defense that the District had been explicitly granted the authority to make such changes by the terms of the parties' collective bargaining agreement.

An informal conference was held on December 15, 1982, but the matter was not resolved. A formal hearing was conducted by the undersigned Administrative Law Judge on April 4, 1982. The parties filed post-hearing briefs and the matter was submitted for decision on June 8, 1983.

FINDINGS OF FACT

The District's Unilateral Action

On July 20, 1982, the District's Governing Board adopted increases in the instructional day in all schools for the 1982-83 school year, as follows:

kindergarten	---	20 minutes
grades 1 - 6	---	40 minutes
grades 7 - 8	---	5 minutes
grades 9 - 12	---	15 minutes

The District did not give advance notice nor did it agree to negotiate regarding these changes upon demand by the Association.

Other aspects of the teachers' working hours remained unchanged, including a fixed one-half hour non-instructional time at the beginning and end of the workday, one-half hour duty-free lunch, fixed amounts of preparation time (except with respect to sixth grade teachers, discussed below), and a maximum workday of eight hours, all of which are set by the terms of Article XII, section 2 of the parties' contract, infra.

The increase in instructional time for sixth grade teachers is not accurately reflected by the above figures since the District also instituted other changes affecting them. Specifically, in March 1982 the District decided to transfer the sixth grades from the intermediate school (6th - 8th) level to the elementary school level commencing in the 1982-83 school year. The change involved alteration of the sixth grade teaching program to some extent and an increase in instructional hours from 270 minutes per day (in 1981-82) in the intermediate school to 342 minutes (in 1982-83) in the elementary school.[2] Thus the instructional hours for 6th grade teachers were effectively increased by 72 minutes per day.

The change from intermediate to elementary school programs also effected the amount of preparation time for sixth grade teachers. Preparation time was reduced from one period (55 minutes) per day to 90 minutes per week, reflecting the

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[2]These figures do not include preparation time.

difference in preparation time agreed upon in the 1980-82 contract for intermediate versus elementary school teachers.

The District did not give the Association notice nor offer to bargain regarding the effects of the transfer[3] on the instructional time and preparation time of the sixth grade teachers. Nor did the Association demand negotiations regarding either aspect of these effects. With respect to the preparation time change, the Association points out that the contract specifically requires certain preparation time for sixth grade teachers. It was the obligation of the District, therefore, to propose changes in the preparation time provision, if any such changes were necessary.

All of the above changes went into effect on September 13, 1982.

Applicable Contract Provisions

The parties have had a series of collective bargaining contracts, the initial one being for the period of March 1977 through June 1978. The contract covering the events alleged herein was for the period of July 1, 1980, through June 30, 1982. The parties commenced negotiations for a successor to this contract in May of 1982 but did not reach

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[3]There is no dispute that the decision to transfer the sixth grade was not a mandatory subject of bargaining.

agreement until March 9, 1983. There is no dispute that the parties treated the 1980-82 contract as remaining in effect after its expiration date until a successor agreement was reached.[4]

The contract provisions which are relevant to the instant case are the following:

ARTICLE IV

> 1. It is understood and agreed that the Governing Board retains all of its powers and authority to direct and control the District to the full extent of the law. All matters not specifically enumerated in this Agreement and which are outside the scope of negotiation in accordance with Government Code Section 3543.2, are reserved to the District.
>
> 2. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify or discontinue, in whole or in part, temporarily or permanently, any of the following:
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> . . . . . .

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[4]The agreement to extend the contract is evidenced by the fact that the Association filed a grievance under the 1980-82 contract regarding the events in dispute herein, which arose out of a decision of the District first taken after the expiration date of that contract. Both parties processed the grievance under the terms of the 1980-82 contract and in all respects treated that contract as controlling. Neither party attempts to deny the applicability of the 1980-82 contract to this dispute.

I. The dates, times and hours of operation of District facilities, functions, and activities, and work schedules limited only by the express terms of Article XII, Professional Employee Duties/Hours of Employment.

ARTICLE IX, Section 2

The District agrees not to adopt policies or procedures that affect professional employees without providing the Association an opportunity to review such policies or procedures and indicate possible concerns. The District further agrees to provide opportunities for conferring on such concerns.

ARTICLE XII, Section 2

The length of the regular school day including starting and ending time shall be fixed by the Governing Board, upon recommendation of the Superintendent. The working day of professional employees shall be from one-half (1/2) hour before the start of the regular school day to one-half (1/2) hour after the end of the regular school day. Each professional employee will be provided a duty-free lunch of one-half (1/2) hour between the hours of 11:00 a.m. and 1:30 p.m. Each professional employee shall be provided minimum preparation time within the regular school day as follows: Elementary, 90 minutes per week. Grades 6-12, one period preparation for each 5 periods taught by the professional employee (teaching and preparation period, 55 minutes), no teacher will be responsible for more than 5 teaching periods per day unless mutually agreed upon, teaching and preparation time may be accumulated over a 2 day period. The professional employee shall not be accountable for more than eight (8) hours per day except as hereinafter described.[5]

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[5]The Association also cites Article I, section 5 which includes a waiver of further negotiations on any subject during

Bargaining History

Evidence was introduced regarding the negotiations with respect to the quoted Articles for the 1977-78 contract.[6] The District called as witnesses not only its own negotiator, Donald Davidson, but also Voytek Dolinski, the Association's chief negotiator during the 1977 bargaining. Dolinski is currently a vice principal of the District high school and acted as the District's chief negotiator in the 1982-85 negotiations. Both men testified that during the 1977 negotiations the District strove to preserve as much of its

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the term of the Agreement. The Association correctly argues that such a waiver does not authorize unilateral action by the District. The District does not rely upon this section as part of its waiver defense; therefore, no further discussion of it is necessary.

[6]The language negotiated for those Articles in 1977 remains unchanged in the 1980-82 contract except that the following language (quoted above) was included for the first time in the 1980-82 contract:

Article IV:	the words: "and which are outside the scope of negotiations in accordance with Government Code Section 3543.2"
Article XII:	(1) the provision limiting the duty free lunch to between 11:00 and 1:30;
	(2) the provision specifying minimum preparation times at the various grade levels, as well as the length of teaching periods and the maximum of 5 teaching periods per day in grades 6-12.

unilateral control over matters within the scope of bargaining as it could and the Association sought to limit the District's unilateral power to the extent possible.

According to Dolinski, Article IV, District Rights, represented a compromise of those positions. Article IV, section 2(I) provides that the District has the authority to set the "dates, times and hours of operation of District facilities . . . and work schedules limited only by the express terms of Article XII." Article XII, section 2 reiterates the point: "The length of the regular school day including starting and ending time shall be fixed by the Governing Board" but then imposes certain specific limitations with respect to teachers' workdays. Dolinski testified that the language just quoted in Article XII, section 2 was proposed by the District and that the remainder of that section, as well as other limiting provisions in Article XII, reflected the Association's concern that the quoted language would give the District the authority to impose unreasonable working hours. Thus, the Association sought to limit that authority by various provisions such as an eight-hour day limitation, a one-half hour duty-free lunch, a provision limiting the teachers' workday to the period from one-half hour before to one-half hour after the regular school day, all of which appear in section 2, and limitations on extra-duty assignments, which appear in other sections of Article XII.

The District's negotiator testified that the parties understood Article IV, section 2(I) to give the District full authority to set dates, times, hours and work schedules limited only by the provisions of Article XII. He testified, however, that there had been no specific discussion of the District's authority to establish the length of the school day.

With respect to Article IX, Consulting and Conferring, Dolinski testified that the purpose of the Article was to accommodate the limited scope of bargaining under EERA. The Article required the District to consult or confer regarding matters which affect teachers but which fall outside EERA's scope of negotiation.

Association negotiators Stinson and Harlan testified regarding the bargaining history of the changes in Article XII added to the 1980-82 contract. Both testified that the changes in the working hours provisions of Article XII, section 2 were intended by both sides to codify existing practice and that the District and Association had agreed that the status quo would be preserved regarding teachers' working hours generally during the 1980-82 contract. According to Harlan, the District had refused to detail all elements of the status quo on teachers' hours in the contract but the District had stated that it had no intention of making any changes in hours. District negotiator Facer testified that the District specifically

refused to include a provision requiring maintenance of the status quo on this issue and instead agreed only to the specific additional limitations on the District's power to change teachers' working hours which were requested by the Association and were added to Article XII.[7]

ISSUES PRESENTED

1. Did the Association waive its right to bargain regarding changes in instructional hours of teachers by agreeing to the contract provisions quoted above?

2. Did the District violate EERA by reducing the preparation time of sixth grade teachers in violation of Article XII, section 2 of the parties' contract?

CONCLUSIONS OF LAW

I. Waiver of Bargaining Regarding Work Hours

The parties do not dispute that the change in teachers' working hours, adopted by the District on July 20, 1982, is a matter within the scope of negotiation under EERA. The District argues that it was justified in making the changes in

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[7]Stinson also testified regarding an alleged District agreement to maintain preparation periods at 94 minutes each two days, although the contract provides for 55 minutes per day, and to negotiate with the Association before making any changes in the preparation time. Neither party relies upon this testimony in its argument and it is not considered further herein since it does not add to or detract from either parties' position.

this case, however, because the parties' collective bargaining agreement, specifically Articles IV and XII, explicitly grant the District the authority to do so. Therefore, the Association waived its right to further bargaining regarding any changes made pursuant to that authority.

The standard for determining whether an employee organization has waived its right to bargain on a mandatory subject is a strict one. As the PERB stated in Solano County Community College District (1982) PERB Decision No. 219:

> In order for a waiver of a statutory right to be found, the District must prove the waiver by either clear and unmistakable language or demonstrable behaviour amounting to a waiver of the right to meet and negotiate. (Id. at 11.)

Similarly, in Los Angeles Community College District (1982) PERB Decision No. 252, where a waiver was alleged based upon contract language, the PERB stated:

> Contract terms will not justify a unilateral management act on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such right. New York Mirror (1965) 151 NLRB 834 [58 LRRM 1465, 1467]. (Id. at 10.)

I conclude that Articles IV and XII do constitute such clear and unmistakable express waiver of the Association's right to bargain regarding changes in the instructional hours of teachers. Article IV, section 2(I) provides that the rights reserved to the District shall include the right to "determine" or "change" the "dates, times and hours of operation of

District facilities, functions and activities, and work schedules limited only by the express terms of Article XII." That language permits the District to set the numbers and lengths of classes, as well as the specific scheduling of classes. Moreover, it gives the District the authority to determine the work schedules of all professional employees. Setting the schedules of student classes and the work schedules of teachers necessarily determines the working hours as well as the instructional hours of teachers.

Nothing in Article XII undermines that general authority; instead it sets specific limits within which the authority may be exercised (e.g., eight-hour maximum day, one-half hour duty-free lunch, one-half hour non-instructional time at the beginning and end of the school day, etc.). If anything, Article XII reinforces the authority granted in Article IV, at least with respect to setting working hours. Article XII, section 2 states that "the length of the regular school day including starting and ending times shall be fixed by the Governing Board," and then defines the working day of teachers by reference to the "regular school day," the working day of teachers being from one-half hour before until one-half hour after the regular school day.

Thus, on their face, Articles IV and XII clearly and expressly reserve to the District the authority to determine the working hours and instructional hours of teachers.

The Association makes several arguments to show that this conclusion is incorrect. First, it argues that that such a finding is contradicted by Article IV, section 1 which provides: "All matters not specifically enumerated in this Agreement and which are outside the scope of negotiation . . . are reserved to the District." The Association asserts that the effect of this provision is to reserve to the District only those rights which are outside the scope of negotiation. It reaches that conclusion by the following reasoning:

(1) Article IV, section 1 reserves to the District only those matters which are <u>both</u> <u>not</u> specifically enumerated in the agreement and <u>outside</u> the scope of negotiation.

(2) Article IV, section 2 provides that "such reserved rights," include a long list of matters, among them being 2(I), the dates, times and hours of operation and work schedules, limited only by Article XII.

(3) Since section 2 refers to "such reserved rights," that phrase necessarily refers back to the reserved rights defined in section 1 of that Article, which include only rights outside the scope of negotiations. Section 2 does not add any District rights but only enumerates examples of reserved rights.

That argument attempts to read more into the words "such reserved rights" than is reasonable in light of the contract language. A reasonable reading of Article IV is that it reserves to the District those rights and powers specifically

negotiated and enumerated in the contract, as well as any other rights or powers not specifically enumerated, provided that those non-enumerated rights and powers are ones outside the scope of negotiations. Thus the reference in Article IV, section 1 to "only" those matters which are outside the scope of negotiation is a limitation on the District's authority over matters not enumerated in the contract.

The Association's argument, by contrast, is essentially that it cannot be held to any explicit contractual concessions which it made on any matter within the scope of negotiation. Under that interpretation, any attempt by the District to negotiate concessions from the Association in the form of reserved powers would have been pointless since any concessions which the District won would not be effective unless the subject matter of the concession were outside the scope of negotiation. Needless to say, if the matter conceded were outside the scope of negotiation, the Association had no power to prevent the District from acting unilaterally on that matter and no concession from the Association was necessary to preserve the District's power to act. While the interpretation of "such reserved rights" advanced by the Association may be grammatically correct, it must be rejected because of the irrational and obviously unanticipated effects which it would have of nullifying numerous other provisions of the contract.

Secondly, the Association turns its attention to Article XII and argues that the first sentence of section 28 of that Article merely recognizes the authority of the District, under the Education Code, to determine the regular school day for students. The Association quotes San Mateo School District (1980) PERB Decision No. 129, to the effect that the school day for students is not the same as either the workday for teachers or that part of the teachers' workday which is instructional time. San Mateo held that while the District has the authority to set unilaterally the school day for students, that authority does not extend to setting unilaterally the teachers' workday or instructional day.

That argument might be persuasive were it not for two other provisions. With respect to the teachers' workday, the second sentence of the same section explicitly defines the teachers' workday by reference to the regular school day. Thus, in this case, the District and the Association have explicitly bargained regarding the length of the teachers' workday separate from the school day for students and have agreed upon a definition of the teachers' workday inextricably tied to the

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[8]"The length of the regular school day including starting and ending time shall be fixed by the Governing Board, upon recommendation of the Superintendent."

length of the school day. Thus, the District has clear authority to change the teachers' working day by changing the length of the regular school day.

With respect to changes in the teachers' instructional day, the District's authority is clear from its Article IV, section 2(I) rights to set class schedules and work schedules. Moreover, since the same section provides that the District's authority in that regard is limited only by the express terms of Article XII, the limits set out in Article XII cannot be expanded by judicial interpretation. If the Association wished to prevent the District from exercising its Article IV, section 2(I) authority to change the instructional time of teachers (by changing student classes and teacher work schedules), given the terms of Article IV, section 2, it had to write an explicit limitation to that effect into Article XII. That it did not do.

The Association argues that the fact that Article XII contains certain specific limitations does not indicate that the Association has "clearly and unmistakably" waived its right to negotiate over other matters affecting teachers' instructional time. The fact that the contract is silent on instructional time, it asserts, does not operate as a waiver of further limitations on the District's setting of instructional time, beyond those stated in Article XII. "Surely, silence does not constitute clear and unmistakable waiver," the

Association argues quoting Amador Valley Joint Union High School District (1978) PERB Decision No. 74.

Indeed, silence normally does not constitute a waiver, but in this case the contract is not silent. It provides that the only limitations on the District's right to set hours of operation of District functions and activities, and work schedules are those set out in Article XII. Once the Association has agreed, as it did here, that a list of limitations on District authority over a matter shall be considered an exhaustive list, it cannot argue later that the mere absence of additional limitations from that list should not constitute a waiver of those limitations. By every rule of fairness and logic, as well as according to the clear contractual language, the absence of limiting provisions in this context does constitute a waiver.

Thirdly, the Association argues that the presence of Article IX - Consulting and Conferring negates any conclusion that the contract otherwise permits the District to make unilateral changes on matters affecting working conditions of teachers. Article IX, section 2 requires the District to consult before adopting any policies or procedures affecting professional employees. The Association asserts that this obligation is incompatible with a waiver of bargaining rights on matters affecting teachers.

The apparent purpose of Article IX read as a whole is to insure that the Association has the opportunity to consult or confer on matters over which it has no right to negotiate, that is, matters outside the scope of negotiation. Section 1 of that Article codifies the EERA section 3543.2 right of an employee organization to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks, all of which are matters outside the scope of negotiation.[9] Section 2 follows and more generally provides for consultation on any policies or procedures that affect professional employees.

While this latter section does not specifically relate only to matters outside the scope of negotiation, only that interpretation is consistent with the statutory scheme. The District has an obligation to bargaining regarding some

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[9]Section 1 reads:

> The District proposes to utilize the Instructional Planning Group, curriculum writing committees and textbook selection committees as currently organized to deal with the definition of educational objectives, determination of course content, curriculum and textbook selection. The District agrees to make reasonable effort to provide the Association with information regarding the activities of these groups or committees. The District further agrees to provide opportunities for consulting on these matters.

subjects and an obligation to confer or consult regarding others. It would be unreasonable to read Article IX to require the District to confer or consult on matters on which it was also obligated to bargain. The lesser obligation to confer or consult is certainly encompassed in the greater obligation to bargain.[10]

Moreover, the District did bargain as required with respect to working hours and instructional hours of teachers, and won the concession from the Association that it could unilaterally institute changes in those subjects during the term of the contract, subject to certain restrictions appearing in Article XII. That fact that the Association bargained and made limited concessions on a matter within the scope of bargaining is not incompatible with its asserting a right to consult regarding other matters outside the scope of bargaining. I therefore find no basis upon which to conclude that the presence of Article IX precludes a finding that the Association waived its right to negotiate on changes in teachers' working and instructional hours.

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[10]To the extent that Article IX is at all ambiguous on this point, its meaning was clarified by the uncontradicted testimony of Dolinski that the purpose of the Article was to deal with the limited scope of bargaining under EERA and to give the Association the right to consult or confer on matters outside the scope of negotiation.

The Association argues, fourth, that no waiver of its right to negotiate regarding changes in instructional hours for teachers can be found in the bargaining history because the evidence presented related only to the 1977-78 bargaining, ignoring differences between the 1977-78 and 1980-82 contracts, and because the history presented does not show any clear and conscious waiver on that subject.

The 1977-78 bargaining history may be relevant to explain certain provisions of the 1980-82 contract to the extent that those provisions are unchanged from the 1977-78 contract. In this case, however, it is unnecessary to rely upon bargaining history to establish a waiver of bargaining. Bargaining history must be examined where a waiver is sought to be shown by inference from general or ambiguous contract terms, or from discussions at the bargaining table. See Los Angeles Community College District, supra at 12-16. Where a waiver is explicitly embodied in the contract and is as unambiguous as here - permitting the District to make changes in work schedules and hours limited only by the restrictions expressed in Article XII, the finding of waiver is based upon the contract language rather than bargaining history.

Moreover, the bargaining history for the 1977-78 negotiations which was presented does not detract in any way from the finding of waiver based upon the express language of

the contract. Although the specific question of whether the District had the authority to increase the working time or instructional time of teachers was never explicitly discussed in those negotiations, the record is clear that the parties understood Article IV, section 2(I) to give the District authority over teachers' hours and that the Association attempted, and the District agreed, to limit that authority to the extent expressly stated in Article XII. If the Association felt that other limits on the authority over teachers' hours granted to the District were necessary, or if it wanted to preserve its right to bargain over matters affecting hours not specifically discussed, it should have declined to agree to the language in Article IV making the limitations stated in Article XII the only limitations on the District's authority on this subject.

Finally, the Association argues that, despite the contract language, the intention of the parties as evidenced by the 1980-82 bargaining history, was that Article XII and the additions thereto in 1980 were intended to preserve the status quo regarding duties and hours of employment as it existed in 1979-80. Two Association negotiators testified that the changes made to Article XII were intended to codify the existing practice on those matters and, further, that the parties agreed generally to preserve the status quo regarding

teachers' working hours in the 1980-82 contract. The District negotiator, by contrast, testified that the District refused to agree to the Association demand for a provision maintaining the status quo regarding teachers' working hours. Instead the District agreed to add the further specific limitations on teachers' hours, for example, requiring a minimum amount of preparation time, which appear in Article XII.

The express terms of the contract can only be varied by a showing of mutual agreement to such variance. The Association's evidence on this point certainly demonstrates that it sought to preserve the status quo but does not establish that the District agreed to do so with respect to any terms except minimum preparation time and the timing of the duty-free lunch, both of which were expressly incorporated in the 1980-82 agreement. The provisions of the contract therefore stand as written.

For all the reasons stated, I conclude that the Association waived its right to bargain regarding changes in teachers' instructional hours, within the limits of Article XII. Therefore, the District did not violate sections 3543.5(a), (b) and (c) by unilaterally increasing instructional hours.

II. Reduction in Preparation Time of Sixth Grade Teachers

Article XII, section 2 of the 1980-82 contract provides that teachers in grades 6 - 12 shall have one period (55 minutes) of preparation time for each five periods taught,

which is effectively 55 minutes per day preparation time. When the District moved the sixth grade from the intermediate school level to the elementary level, the amount of preparation time available to sixth grade teachers was reduced to 90 minutes per week, the amount specified in the contract for elementary school teachers. Although preparation time is indisputably a matter within the scope of negotiation and the contract embodied agreed-upon amounts of preparation time, the District did not seek the Association's agreement to the change in preparation time.[11]

The District advances several arguments for finding no violation despite its unilateral action on this matter. Only the first need be addressed since it by itself requires dismissal of this allegation.[12]

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[11]Since the parties had agreed that the 1980-82 contract would be treated as continuing in effect until a new agreement was reached, the District was bound by the preparation times specified in the contract. It had an obligation not merely to negotiate with the Association before implementing changes in preparation time but also to obtain the consent of the Association before making changes. C & S Industries Inc. (1966) 158 NLRB 454 [62 LRRM 1043]; Oak Cliff-Golman Baking Co. (1974) 207 NLRB 1063 [85 LRRM 1035]; Gorman, Basic Text on Labor Law (1976) at pp. 463-64.

[12]The District's other alleged defenses are: (1) the contract was not breached because sixth grade teachers became elementary school teachers upon transfer and thereafter received the amount of preparation time contractually required for elementary school teachers; (2) if there was a contract violation, it did not constitute a change in policy and therefore did not rise to the level of an unfair practice; and (3) the sixth grade teachers participated in and some supported the transfer to elementary school level and its accompanying effects.

The District argues that no finding of an unfair practice can be made regarding the change in sixth grade preparation time since the underlying charge and complaint do not include any allegation of a violation on that ground. According to the District, the preparation time issue is not "related to the specifically alleged violation" (Belridge School District (12/31/80) PERB Decision No. 157) or "intimately related to the subject matter of the complaint" (Santa Clara Unified School District (9/26/79) PERB Decision No. 104), as required by PERB precedent.

In the Belridge case, the Board permitted an unfair practice finding on a fully-litigated but unalleged violation where the evidence of the unalleged violation was admitted to show the District's unlawful motivation for the alleged violation of discriminatory discipline. The unalleged incident occurred three days after the alleged incident. The Board found that the unalleged violation was sufficiently related to the allegations in the charge to permit a separate unfair practice finding on it given that it had been fully litigated at hearing.

In Santa Clara the unalleged violations consisted of discriminatory statements made to an employee in the course of denying her a part-time teaching position because of her protected union activity. Again, the statements were admissible to establish unlawful motivation for the District's

acts on the alleged violation and were "intimately" connected with the alleged violation.

By contrast, the Board has refused to permit unfair practice findings on unalleged violations where the lack of close relation between the alleged and unalleged violations resulted in the Respondent not having had adequate notice that it would be called upon to defend the unalleged violation, particularly where an independent charge on the unalleged matter was time-barred by the time of the hearing. Regents of the University of California (UCLA) (12/21/82) PERB Decision No. 267. Similarly, in San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230, the Board reversed an administrative law judge's finding of a violation based upon unalleged coercive statements which arose out of events separate from those constituting the alleged violations. The alleged statements were introduced as evidence of illegal motive for the alleged violations, but there was no indication at the hearing that a separate finding of an unfair practice was sought based upon those statements. The Board concluded that finding an unfair practice on that basis denied the District "its right to be fully informed of charges brought against it and to have a full and fair opportunity to defend such charges." (Id. at 10.)

In the instant case, the charge makes no mention of the decrease in preparation time for sixth grade teachers or of the District's March decision to transfer the sixth grade to the elementary school. The charge is directed solely to the increase in instructional time decided upon by the District in July 1982. It does not even address the additional increases in instructional time to which sixth grade teachers were subject due to the transfer.

Moreover, there was absolutely no mention of the increase in preparation time during the Association's prima facie case. The only specific reference to sixth grade teachers was brief testimony on redirect examination of an Association witness that sixth grade teachers had been subject to substantial increases in instructional time because of their transfer from intermediate to elementary level schools.

During the District's case, witness Facer did discuss the nature of the sixth grade change generally, and testified that it had not been the subject of collective bargaining and that it constituted a return to an elementary school structure which included the sixth grade, as it had existed prior to 1978-79. He also testified that because of the change, sixth grade teachers were considered to be elementary school teachers in 1982-83. The only time the Association specifically confronted the issue of the decrease in preparation time for sixth grade teachers was in a brief exchange during cross-examination of

Facer in which he was asked how much preparation time sixth grade teachers got in 1982-83. He was then shown Article XII, section 2 and was asked whether sixth grade teachers got the amount of preparation time required by the contract. He replied that they did not.

The Association argues that the preparation time change is intimately related to the increase in instructional hours because both changes were implemented at the same time at the start of the 1982-83 school year and because the sixth grade teachers in effect suffered a double loss from decrease in preparation time and increase in instructional time, both of which affect teachers' hours.

I conclude that neither the simultaneous implementation of the two changes nor the fact that they both relate to hours of teachers leads to the conclusion that the two are so intimately related that the District was on fair notice of the unalleged violation by the filing of the alleged violation. The decision to make the sixth grade change was made several months before the decision to increase instructional time, and only the latter decision was the subject of the underlying charge. The change in preparation time was not referred to in any way in the charge, nor was it raised in the Association's prima facie case. Nor did the District's opening statement indicate that it had been able to anticipate during the hearing that the preparation time change was at issue.

Although there was some limited testimony on the preparation time change, the matter was by no means fully litigated. No evidence was introduced by either party regarding the reasons for the differences in preparation time of elementary versus grades 6-12 teachers and which measure of preparation time should control when the two groups overlap. Nor was there any evidence regarding the feasibility of requiring one period per day preparation time for the sixth grade at the elementary school level. In fact, the only evidence on the point is the bare fact that sixth grade teachers got less preparation time in 1982-83.

Finally, the Association did not indicate at any time during the hearing that it would seek an unfair practice finding on the preparation time change. It made that argument for the first time in its post-hearing brief. Moreover, a charge raised initially at the time of the hearing would have been barred by the section 3541.5(a) six-month statute of limitations since the hearing was held more than six months after both the decision to transfer the sixth grade and the implementation of that decision in September. Although the District did anticipate the Association's allegation on this point in its brief, no inference can be drawn therefrom that the matter was fully litigated or that the District had adequate notice to defend on the issue at hearing.

I conclude, therefore, consistent with the UCLA and San Ramon cases cited above, that no finding of an unfair practice can be made based upon the unalleged reduction in preparation time of sixth grade teachers. To do so would deny the District "its right to be fully informed of the charges brought against it and to have a full and fair opportunity to defend such charges." (Id. at p. 10.)

I therefore dismiss the allegation, raised in the Association's brief, that the change in preparation time constituted a violation of section 3543.5(a), (b) and (c).

PROPOSED ORDER

Based upon the finding of fact, conclusions of law, and the entire record, the unfair practice charge filed by the La Canada Teachers Association, CTA/NEA against the La Canada Unified School District and subsequent complaint are hereby DISMISSED in their entirety.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 30, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and

supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 30, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: August 10, 1983

Marian Kennedy
Administrative Law Judge