

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EL DORADO UNION HIGH SCHOOL DISTRICT,)
)
Charging Party,) Case No. S-CO-117
)
v.) PERB Decision No. 537
)
EL DORADO UNION HIGH SCHOOL DISTRICT) December 2, 1985
FACULTY ASSOCIATION,)
)
Respondent.)
_____)

Appearances: Girard & Griffin by Thomas M. Griffin for the El Dorado Union High School District; Beeson, Tayer & Bodine by Neil Bodine for the El Dorado Union High School District Faculty Association.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

JAEGER, Member: The El Dorado Union High School District (District) excepts, inter alia, to the finding, attached hereto, of a Public Employment Relations Board administrative law judge (ALJ) that the El Dorado Union High School District Faculty Association (Association) did not violate the Educational Employment Relations Act (EERA or Act)¹ when it picketed the school site during the period from 8:00 to 8:30 a.m.

The ALJ's findings of fact and conclusions of law have been reviewed and, except as modified, are adopted here. For purpose of clarity, certain of these findings and conclusions are summarized here.

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

The parties' agreement provides that the teachers are to report "30 minutes prior to their first scheduled assignment" and are to be "available for student conferences, parent conferences, and other professional responsibilities during duty time . . . [and for] campus supervision" The period involved is from 8:00 to 8:30 a.m.

2. The Association, to put pressure on the District during the latter stages of negotiation, instigated a program which included picketing the school sites during the 30-minute period preceding the beginning of classes. The picketing was conducted on a public street that bisected the school campus.

3. Some teachers on picket duty did confer with students during this time, some in the school hallway and, on one occasion, on the lawn outside the school. There is no credible evidence that any teacher failed to perform the duties specified in the agreement.

4. There were no guidelines as to where the teachers were to be during the 30-minute period. Some spent the time in classrooms, some in the lounge where they discussed sports. A previous effort by one school principal to require the teachers to report to their classrooms during this time failed.

In dismissing this part of the charge, the ALJ analogized the picketing to union organizing conducted in non-work areas prior to the beginning of classes, activity which the Board has found to be protected.²

²See Long Beach Unified School District (1980) PERB Decision No. 130.

The District argues that the ALJ erred in finding that the teachers were on duty while they were picketing. It further claims that the ALJ improperly failed to consider whether the picketing violated regulations of the State Board of Education.³

In another exception, the District argues that the ALJ erred in concluding that administrators who performed certain work boycotted by the teachers are not entitled to reimbursement by the Association.⁴

DISCUSSION

At the outset, the Board does not consider the question before it to be whether the picketing, in itself, violated the Act.⁵ The facts here present a novel question concerning the limits of arguably protected activity where employee-pickers do not report to the employer's work place, but nevertheless continue to provide the services required of them.

The contract provision that teachers "report for duty" and "be available" must surely mean that they be present within the school facility. We think that, absent some clear contractual

³Board of Education Regulation 5570 (5 Cal. Admin. Code No. 5570) requires teachers to report to school 30 minutes prior to the beginning of classes.

⁴The ALJ found the boycott, a teacher action taken as part of the Association strategy but otherwise not connected to the picketing and the subject of a separate allegation, to have violated the Act.

⁵But see Fresno Unified School District (1982) PERB Decision No. 208.

or statutory authority to the contrary, employees may not assert a protected right to determine for themselves where they will perform required duties.

In San Ramon Valley Unified School District (1984) PERB Order No. IR-46, the Board, following federal precedent, held that a partial withholding of services denies the employer the opportunity to "defend itself" against the action, and is therefore unprotected. Here, although the teachers may not have actually withheld the services to be performed during the pre-class period, their insistence upon performing them off school premises has the similar potential of denying the District the opportunity to accommodate itself to the teachers' action.

The evidence shows that although District policy permitted teachers to choose where in the school they spent the 30-minute period, there was a paging system for contacting them when needed, and there was a telephone in the teachers' lounge.⁶ Thus, the District could readily meet its obligations to student and parent needs. It would not be reasonable to impose on the District the obligation to search out teachers who claim that they are available for duties that arise, but who are actually away from the school site itself. Here it appears that the teachers were picketing just outside the school entrance, but the Board must consider the possibility that in any given case picketing may occur at a variety of locations,

⁶Evidence was offered at the hearing that at some time prior to these events, employees who had absented themselves from the school during the pre-class period were disciplined.

and at varying distances from the site, making it impractical to contact them should the need for their services arise.

We also find analogy in Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195. There, the Board concluded that the teachers' refusal to give "discretionary" final examinations as part of its bargaining strategy constituted a partial work stoppage. The Board reasoned that implicit in the teachers' discretionary freedom, was the exercise of an educational judgment. Here, implicit in the teachers' discretionary choice of location in which to perform required pre-class services is the student-oriented requirement that they be available in the school. Because their choice was based solely on their bargaining strategy, we find it to be a partial work stoppage and a violation of section 3543.6(c) of the Act.⁷ For the foregoing reasons, we reject the related findings and conclusions of the ALJ.

Upon review of the District's exception to the finding that school administrators who performed certain boycotted work were not entitled to remuneration by the Association, the Board adopts the ALJ's related findings and conclusions as its own.

⁷Although the California Supreme Court in County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO, et al. (1985) ___ Cal. 3d ___ found certain public employee strikes not to violate State law, it has not addressed the Board's holdings that partial strikes are unprotected and constitute unfair labor practices. See also San Diego Teachers Assn. v. Superior Court (1979) 24 Cal. 3d 1 [154 Cal. Rptr. 893].

findings and conclusions as its own. We add, however, with respect to the District's claim that the picketing violated the Education Code, that PERB is without authority or obligation to administer the regulations of other State agencies. Its duty here is to determine if the Association's activities violated EERA.

Finally, the Board refrains from finding that the Association's actions violated section 3543.6(d) of the Act. Such a finding would carry the unwarranted implication that a partial work stoppage, activity which has been found to be unlawful in and of itself,⁸ would be protected if conducted after the exhaustion of statutory impasse proceedings.

ORDER

Based on the entire record in this case, the Public Employment Relations Board ORDERS that the El Dorado Union High School District Faculty Association shall:

A. CEASE AND DESIST FROM VIOLATING SECTIONS 3543.6(c) OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT BY:

1. refusing to report to the El Dorado Unified High School District premises during the period from 8:00 a.m. to 8:30 a.m. for the purpose of being available for such duties as may be required, thereby engaging in a partial work stoppage;
2. instigating, encouraging, or engaging in an employee boycott of required extra-curricular duties, thereby engaging in an unlawful partial work stoppage.

⁸Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195, supra.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where Association notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the Association. 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.

2. 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 his instructions.

Member Burt joined in this Decision.

Chairperson Hesse's concurrence begins on page 8.

Hesse, Chairperson, concurring: Although I concur in the result reached by the majority, I do so for the reasons set forth below.

The parties do not dispute that, at the time the teachers engaged in picketing, they were still in the process of negotiations for a new contract. There was no evidence that the Association's activities were in response to an unfair practice committed by the District. Indeed, the Association's strategy was seen by both sides as a "pressure tactic," used to try to secure favorable concessions from the District during negotiations.

Given those particular facts, this Board would have little trouble concluding that a full strike would be in violation of EERA.¹ But here, the Association claims that its members were not striking. Rather, it is argued they were engaged in picketing but continued to perform their assigned duties.

I find this distinction without merit. The teachers were to be on campus and available at 8:00 a.m., thirty minutes before classes began. That the teachers were "available" even though they were picketing is immaterial. It is the District that reserves the right to make work assignments during the school day, and the District did not assign the

¹Fresno Unified School District (1982) PERB Decision No. 208; San Mateo City School District (1985) PERB Order No. IR-48.

²See footnote 4 infra.

teachers to picket. Indeed, it most vigorously objected to the employees' picketing. Thus, the teachers were engaged in a partial strike, one unprotected by this Board.³ The Association was certainly not bargaining in good faith or participating in impasse procedures by such action.⁴

The majority opinion reference to a recent decision of the California Supreme Court is unnecessary, as a partial strike under EERA is not comparable to a full strike under a statute that provides neither for oversight by a state agency, nor for impasse resolution procedures. Thus, in reaching this decision, I rely solely upon our own case law, which gives precedent enough to reach the proper result.

³Palos Verde Peninsula Unified School District (1982) PERB Decision No. 195. Instructive in that decision is the phrase that

Employees may not pick and choose the work they wish to do even though their action is in support of legitimate negotiating interest. Accepting full pay for their services implies a willingness to provide full service. (*Id.* p. 10.)

⁴Although we do not have the authority to rule on violations of regulations promulgated by agencies other than PERB, we note that Department of Education Regulation 5570 cited by the majority is incomplete. The relevant part reads:

Unless otherwise provided by rule of the governing board of the school district[^] teachers are required to be present at their respective rooms, and to open them for admission of the pupils, not less than 30 minutes before the time prescribed for commencing school. (Emphasis added.)

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. S-CO-117, El Dorado Union High School District v. El Dorado Union High School District Faculty Association, in which all parties had the opportunity to participate, it has been found that the El Dorado Union High School District Faculty Association violated sections 3543.6(c) of the Educational Employment Relations Act by failing to meet and negotiate in good faith with the El Dorado Union High School District by refusing to report to the El Dorado Union High School premises during the period from 8:00 a.m. to 8:30 a.m. for the purpose of being available for such duties as may be required, thereby engaging in an unlawful partial work stoppage, and by instigating, encouraging, or engaging in a boycott of required extra-curricular duties. As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

CEASE AND DESIST FROM:

A. Failing to meet and negotiate in good faith with the El Dorado Union High School District by refusing to report to school premises during the period from 8:00 a.m. to 8:30 a.m. for the purpose of being available for such duties as may be required;

B. Instigating, encouraging, or engaging in a boycott of required extra-curricular duties.

Dated: _____ EL DORADO UNION HIGH SCHOOL
FACULTY ASSOCIATION

By: _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



EL DORADO UNION HIGH SCHOOL DISTRICT.)
)
 Charging Party.) Unfair Practice
) Case No. S-CO-117
)
 V.) PROPOSED DECISION
) (6/28/85)
 EL DORADO UNION HIGH SCHOOL DISTRICT)
 FACULTY ASSOCIATION.)
)
 Respondent.)
)
)

Appearances: Girard & Griffin by Thomas M. Griffin. Attorney for the El Dorado Union High School District; Beeson, Tayer & Bodine by Neil P. Bodine, Attorney for the El Dorado Union High School District Faculty Association.

Before Ronald E. Blubaugh. Administrative Law Judge.

PROCEDURAL HISTORY

The exclusive representative is accused here of instigating unlawful job actions in violation of the duty to negotiate in good faith and prior to the exhaustion of the statutory impasse resolution procedures. Specifically, it is contended that contrary to the negotiated agreement, the union organized a concerted refusal by teachers to participate in required extra assignments and, on two occasions, a concerted refusal to begin their duties 30 minutes before the start of the first teaching period.

The exclusive representative does not deny its role in the concerted activities but rejects the contention that the actions were contrary to the negotiated agreement. The union

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

contends that no required duties were involved in the concerted activity and thus its conduct did not amount to an unfair practice.

The charge which commenced this action was filed on October 19, 1984, by the El Dorado Union High School District (hereafter District) against the El Dorado Union High School District Faculty Association (hereafter Association or union). The charge alleges that the Association instigated a concerted refusal to perform required duties including a 30-minute "strike" at El Dorado High School. In addition to the Association, the charge also named the California Teachers Association as a respondent.

On December 21, 1984, the Sacramento Regional Attorney of the Public Employment Relations Board (hereafter PERB) dismissed the allegations against the California Teachers Association but issued a complaint against the El Dorado Union High School District Faculty Association. The complaint alleges that the Association on October 8 and 10, 1984, authorized and instigated a refusal by the teachers at El Dorado High School to begin their duties 30 minutes prior to their first scheduled assignment as required by the collective bargaining agreement. As a separate count, the complaint also alleges that during the period of September 12 through October 12, 1984, the Association authorized and instigated a concerted refusal by teachers to serve extra assignments as required by

the negotiated agreement. Both actions are alleged to be in violation of Educational Employment Relations Act subsections 3543.6(c) and (d).¹

The Association filed an answer to the complaint on January 25, 1985. The answer was a general denial of the allegations. A hearing was conducted on April 9, 1985. The final brief from the parties was received on June 19, 1985, on which date the matter was submitted for decision.

FINDINGS OF FACT

The El Dorado Union High School District is a public school employer under the EERA. At all times relevant, the El Dorado Union High School District Faculty Association has been the exclusive representative of the District's certificated employee unit.

¹Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, section 3543.6 provides as follows:

It shall be unlawful for an employee organization to:

.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

The parties have had a collective bargaining relationship for some years. The negotiated agreement which preceded the events at issue expired on June 30, 1984. Under the contract, any party wishing to change the terms of the agreement was to notify the other party by March 15, 1984. Such notification was made and the parties commenced negotiation on a successor agreement during the spring of 1984. The negotiations progressed to the point that by mid-September the parties had resolved all but the monetary issues. However, those issues proved to be a substantial obstacle to final agreement.

In early September, Association leaders decided to apply pressure on the District in order to secure what they believed to be a satisfactory contract. Kerry Steed, a past president and member of the negotiating team, described the tactic as including "various activities that we felt were kind of stepping stones, one to another, each one being a little more intense." Part of the strategy, he testified, was to keep the administration off balance about what would happen next. Plans for the campaign were mapped out in a series of six to eight leadership meetings held after school and at 6 a.m. at Ponderosa High School. One tactic the Association leaders decided upon was a boycott of extra duties. The other was picketing at the high schools and during football games. With respect to the picketing, Association guidelines were developed but the teachers at the individual campuses were authorized to

decide when and where the picketing would take place.

In a telephone conversation on September 10, 1985, Association President Dwight Wells told District Assistant Superintendent Arthur Cate that the Association leadership could not go along with some proposals Mr. Cate informally had advanced. The next day, Mr. Wells again called Mr. Cate and told him that the Association was advising its members not to perform the extra curricular duties for which they had signed up at the start of the year.

On September 12, the parties met for a negotiating session. During the meeting, Mr. Cate raised the issue of the Association's plan to encourage members to boycott their extra duty assignments. Mr. Cate asked the union negotiating team if it would be all right for the District to pick a contractual section it would like to ignore now that the Association had chosen to ignore Article XVI. Under Article XVI each District teacher is required to serve three extra duties for a maximum of 12 hours per year. The article also sets out a detailed procedure by which the extra activities are to be assigned.

²Article XVI of the contract between the parties provides as follows:

1. Extra-curricular duties refer to duties that are outside the employee's regular duty hours, such as:
 - a. Athletic Event Supervision
 - b. Class or Club Activities (activities

The Association team went into a caucus to consider Mr. Cate's question. When the Association team returned it asserted that

- open to the entire student body)
 - c. Dances
 - d. Other School Student-sponsored Activities
2. Extra-curricular duties that are discharged outside the employee's regular duty hours will be distributed as equitably as possible (within one duty assignment among all employees at one site unless the employee volunteers for more). The employee may sign up for desired activities when the Master Activities Calendar is presented by the District. The calendar will be presented no later than the first week of school, except in the 1980-81 school year. The Master Activities Calendar with duty assignment will be printed within seven (7) working days after the presentation of the calendar. Employees not signing up for duties during the first two (2) days of the sign-up period will be assigned by the District (some duties will not be open to the general staff - duties requiring special skills, i.e.. timers and scorers at athletic events), but in no case will an employee receive fewer duty hours than the open assignments. Activities added to the calendar after the sign-up period will use volunteer supervision obtained by the sponsor. Saturday and Sunday activities will be on a volunteer basis only.
3. All teachers will serve three (3) duties at a maximum of twelve (12) hours. If additional duties are necessary, those teachers not serving a total of twelve (12) hours will serve one (1) more duty in reverse alphabetical order. Employees assigned to activities that are canceled within one (1) week the

under the past practice it could lawfully refuse to perform the extra-curricular duties. By the conclusion of the September 12 session the parties agreed that they were at impasse. Upon the joint petition of the parties, the PERB determined the existence of an impasse and appointed a mediator on September 17, 1984.

True to Mr. Wells' warning, most District teachers began to boycott their extra-duty assignments effective September 11. The boycott continued until approximately October 11 when the parties reached an oral tentative agreement at 3:30 a.m. Following the tentative agreement, teachers resumed their performance of the extra-curricular activities. The boycott made a substantial impact upon District operations. Particularly in the fall, the extra-curricular assignments involve faculty supervision of student behavior at athletic events and dances. Some of these events normally may be

activity will not be reassigned. Employees missing an assigned activity will be reassigned by the District and may be given a letter of reprimand. Employees may exchange duties with other employees or they may cover for other employees by notifying the District prior to the activity.

4. Professional duties involving all staff members will not be considered as extra-curricular activities; i.e., Open House, Graduation Exercises, etc.
5. Librarians will not be required to render extra-curricular duties as defined in Paragraph 1.

staffed by as many as eight teachers. Following the commencement of the boycott, there were 11 functions at El Dorado High School. 13 at Ponderosa High School and four at Oak Ridge High School that went substantially uncovered by teachers. Salaried administrators were required to fill in for the missing teachers at all of the functions. They received no extra compensation.

The evidence establishes that the past practice on the performance of extra duties substantially coincides with the procedure outlined in contract Article XVI. Teachers may begin to sign-up for the three extra-curricular duties they are required to perform after the first faculty meeting in the fall. Those who fail to volunteer for specific activities are assigned activities one week after the opening of the period for voluntary sign-ups. Occasionally, a few teachers will be required to work four extra-curricular activities but the typical requirement is for three.

When the boycott was lifted on October 11. the sign-up books were reopened at both El Dorado and Ponderosa High Schools. Ultimately, all faculty members at Ponderosa subject to the three-duty requirement were assigned a sufficient number of duties to meet the minimum. Whether every teacher ultimately would be assigned three duties at the other two high schools was unclear. No evidence was presented about Oak Ridge and the testimony about El Dorado was equivocal.

Douglas Brinkley, the assistant principal at El Dorado, testified that he did not believe each teacher would have three extra duties in the 1984-85 school year because of the boycott. However, he was unable to name any teacher who definitely would not have performed three duties by the conclusion of the school year.

Although Article XVI provides for the reprimand of employees who miss an assigned duty, there were no reprimands as a result of the month-long boycott. Mr. Cate testified that although the matter was not closed definitely, the District initially had concluded that it did not want "to stir things further" by reprimanding teachers who participated in the boycott.

Teachers at El Dorado High School developed their plan for picketing in a series of meetings held in a room on campus between 8 and 8:30 a.m. on various days during the previous weeks. Under contract Article V, District facilities may be used for Association business upon prior approval by the building administrator. Association leader Kerry Steed testified that although he did not personally arrange for use of the campus facility where the meetings were held, he believed that it had been cleared with the administration. This testimony was not contradicted by any District witness. All told, the Association held six more meetings between 8 and

8:30 a.m. during the days before the commencement of picketing. At least one of these was announced by the circulation around the school of leaflets. Under the established practice, the Association gives copies to the administration of announcements that are distributed on campus. No witness knew for certain whether the normal practice was followed in this situation.

The picketing at El Dorado began just before 8 a.m. on October 8, 1984. The workday at the school is from 8 a.m. to 3:20 p.m. with the first period of instruction commencing at 8:30 a.m. A warning bell rings at 8:25 a.m. The picketers assembled in front of the school administration building and then spread out along both sides of Canal Street, a thoroughfare which bisects the campus. It is uncontested that some of the picketers went to their classrooms and/or to the administration building to check their mailboxes prior to joining the picket line. Some teachers arrived late at the picket line because they first met with students or administrators. There is no evidence to indicate how many teachers, if any, reported directly to the picket line. At the beginning, only five to ten teachers out of the school's 60 faculty members were present for picketing. The number grew with the Association ultimately counting 55 picketers. The District counted 48.

District administrators did not know and did not ask whether the teachers would continue picketing or go to their classrooms in time for the start of instruction at 8:30 a.m. Although they hoped to keep the administration off balance by their picketing, the teachers from the beginning had intended to go to their classrooms on time. Kerry Steed testified that it was his responsibility to be sure that the picketers were not late to their classrooms. Toward that end, he passed word among the picketers as the 8:25 bell approached that it was about time to leave. In accord with prior arrangements, the picketers placed their signs in the back of a teacher-owned pickup truck that was parked on Canal Street. They then went to class.

There is some dispute about exactly when the picketing ceased on October 8. Mr. Cate testified that the teachers did not stop picketing until 8:30. The other District witness, Douglas Brinkley, testified that the teachers picketed until "approximately 8:30." Michael Denega, an Association witness, testified that "most people" finished picketing at approximately 8:20 a.m. and Mr. Denega said he was in his classroom before 8:30 a.m. Mr. Steed testified that he got to his classroom at the same time as usual, which is before 8:30 a.m., and he saw no teachers arrive late. Del Wilson, another Association witness, also testified that he was in his classroom before 8:30 a.m.

On a normal school day some teachers open their classroom doors prior to the 8:25 warning bell. Students are able to enter those classrooms early if they choose. Because most of the teachers participated in the picketing on October 8. few if any rooms were open prior to 8:25 a.m. This contributed to a greater than normal sense of confusion in the hallways and might have impeded the progress of both faculty members and students to their classrooms. The commotion doubtless contributed to the differing perceptions of the witnesses about the time the picketing stopped and the teachers returned to their classrooms.

On October 10. 1984, the teachers at El Dorado High School conducted a second round of picketing. The procedure was the same as they followed two days earlier and they returned to their rooms at approximately the same time as on the first day. The District counted some 44 teachers on the picket line.

The contract between the parties provides in Article XV that employees are to report for duty 30 minutes "prior to their first scheduled assignment."³ Because the first

³Article XV of the contract between the parties provides in relevant part as follows:

1. Duty Time

Employees will report thirty (30) minutes prior to their first scheduled assignment. The duty day shall consist of seven (7) hours and twenty (20)

teaching period begins at 8:30 a.m.. El Dorado teachers are required to report at 8 a.m. The reporting requirement is strictly enforced and teachers who do not arrive by 8 a.m. have been reprimanded. At least one teacher also has been reprimanded for arriving on time but then leaving the campus without permission during the 30 minutes between the reporting time and her first class. Despite the effort to enforce the rule strictly, the school maintains neither a timeclock nor a sign-in sheet.

minutes, to be served consecutively.

2. Availability

- a. The employee shall be available for student conferences, parent conferences, and other professional responsibilities during duty time, and after employee's last assignment upon twenty-four (24) hour notification or teacher consent.
- b. The employee will be responsible for campus supervision during the above hours.

An on-site Campus Control Committee will be established at the opening of school by the request of either party. The purpose of said Committee is to recommend solutions to problems arising from student conduct on campus. The Committee shall be composed of on-site administrators appointed by the principal and an equal number of faculty members selected by the on-site faculty. If a majority vote is reached that policy shall be implemented. In the event of a tie vote, the administration shall determine the policy used to control students.

Although the school adheres strictly to the requirement that teachers be present on campus during the 30 minutes before the first teaching period, it fixes no specific duties for them to perform. There is no policy, either written or unwritten, about the subject. The contract specifies only the following:

The employee shall be available for student conferences, parent conferences, and other professional responsibilities during duty time, and after employee's last assignment upon twenty-four (24) hour notification or teacher consent.

The employee will be responsible for campus supervision during the above hours.

Assistant Superintendent Cate testified that the District has deliberately left broad the nature of the requirement. "It isn't the case that we've insisted that you be in your room and have the door open and people can come in there," he testified. "No. we have never set down those rules. We've left it as broad as what the contract says here."

In the absence of District guidelines, teachers spend the 30 minutes in a variety of ways. Some work in their classrooms preparing lectures or setting up laboratory experiments for that day's instruction. Some operate the duplicating machine, copying tests and other materials. Some spend the period in the faculty lounge drinking coffee and talking about sports.

The heavy use of the faculty lounge by certain teachers once led to a confrontation with the principal of El Dorado High School. The principal, Arlene Wilkinson, concluded that

certain teachers were spending too much of the pre-instruction 30 minutes in the lounge. She sent instructions through the vice principal that it was proper only for the teachers to be in their classrooms meeting with students or waiting for them to arrive.

Kerry Steed, the Association president at the time, met with the principal and the two discussed their respective views of how the time should be used. Mr. Steed told her that he believed her view was too narrow and that there were many things a teacher could do during the 30 minute period that did not occur within the walls of a classroom. The principal maintained her position that the employees were wasting time. Ultimately, it was agreed that Mr. Steed would convey the principal's opinion to the teachers hanging out in the lounge but she would drop her insistence that they spend the time in the classroom. Mr. Steed testified without contradiction that after the incident was closed, the teachers continued to use the lounge the same as before without further criticism.

Although there is no specific provision for what teachers are supposed to do during the 30 minutes prior to instruction, there is a well-understood policy that they are to open their classroom doors in time for students to enter the classroom by 8:30 a.m. Teachers have been reprimanded for not opening the classroom doors on time. In order to meet the requirement, most of the teachers who spend the pre-instruction period in

the lounge leave and go to their classrooms when the 8:25 warning bell rings.

While the contract requires teachers to be available for student and parent conferences during the teaching day, few of these are held at El Dorado during the 30 minutes before the first teaching period. A large percentage of the El Dorado student body travels to school by bus and the buses do not arrive until shortly before the warning bell. Typically, the students who travel by bus seek to meet with their teachers during the lunch period or immediately after school. When a teacher is sought during the 30-minute period for a telephone call with a parent or student, the school intercom is used. The lounge also has a telephone.

The Association presented evidence to show that even during the picketing, teachers who had obligations to students kept those obligations. Among these was Michael Denega, a science instructor, who testified that he was twice stopped by students who needed help in school work. He met with and helped students in the hallway when he was on his way to the picket line. Later, students came up to him while he was on the picket line and asked for help. He sat on the lawn with them and answered their questions. There is a loudspeaker on the front of the school which is used to call maintenance employees. The evidence establishes that if the speaker had

been used to call any teacher it would have been heard by those on the picket line.

In addition to the picketing at El Dorado, District teachers picketed on two occasions after classes at Ponderosa High School and at two football games.

The tentative agreement reached by the parties on October 11 was ratified in a vote taken by the teachers on October 22 and by the school board on November 6.

LEGAL ISSUES

1. Did the Association by its instigation of the teacher boycott of required extra duties violate its duty to negotiate in good faith and/or its duty to participate in the impasse procedures in good faith?

2. Did the Association by its instigation of the picketing at El Dorado High School violate its duty to negotiate in good faith and/or its duty to participate in the impasse procedures in good faith?

CONCLUSIONS OF LAW

The obligation to negotiate in good faith is bilateral under the EERA. If either party breaks the obligation it commits an unfair practice. While violations by employers tend to involve unilateral changes⁴ or surface bargaining.⁵

⁴See example, Davis Unified School District (1980) PERB Decision No. 116.

⁵See, for example, Stockton Unified School District (1980) PERB Decision No. 143.

violations by unions often involve illegal pressure tactics. Depending on the circumstances, a strike may be the most obvious example of a union's failure to negotiate in good faith. There is a rebuttable presumption that an unprovoked strike "prior to [the] exhaustion of impasse proceedings constitutes an illegal pressure tactic" and is a violation of subsection 3543.6(c). Fresno Unified School District (1982) PERB Decision No. 208.⁶

The PERB also had found that slow-down strikes⁷ and surprise strikes⁸ are not protected and has cited with approval federal precedent prohibiting certain wildcat strikes, partial strikes and intermittent strikes. These strikes are held to be unlawful because the means they employ to carry out the concerted action are themselves seen as unfair, regardless of the nature of the underlying objectives.

In the present case the Association sought to work to the

⁶PERB precedent in this area is unaffected by the Supreme Court's recent decision in County Sanitation District No. 2 v. Los Angeles County Employees Association, Local 660, SEIU (1985) 38 Cal.3d 564. It is clear from the various opinions which compose that decision that a majority of the Court finds no constitutional obstacles to the type of impasse procedures written into the EERA as a method of heading off strikes.

⁷See Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195 and Modesto City Schools (1983) PERB Decision No. 291.

⁸See San Ramon Valley Unified School District (1984) PERB Order No. IR-46.

⁹Id.

rule, that is, encourage teachers to perform exactly those duties which were required but no more.¹⁰ In a work-to-the-rule case, the inquiry focuses on whether or not the activities which were not performed were required or voluntary. "The refusal to do voluntary activities is protected conduct, while the refusal to do normally required assigned and assigned adjunct duties is not." Modesto City School (1983) PERB Decision No. 291. citing Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195. Thus, if the duties which the teachers refused to perform were required then the concerted refusal to perform them was an illegal pressure tactic. If, however, the duties were not required then the Association-inspired refusal to perform them was lawful and the teachers were merely exercising their protected right to participate in the activities of an employee organization.¹¹

The first of the Association's pressure tactics was the

¹⁰It is uncontested that the actions at issue were instigated by the Association. Former Association President Kerry Steed testified that the actions were originated by the Association leadership and were designed to put pressure on the District. It was the unchallenged testimony of Assistant Superintendent Arthur Cate that he was told by Association President Dwight Wells that the Association had recommended to teachers that they not perform the extra duties.

¹¹Under section 3543. public school employees have "the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

extra duties boycott which commenced on September 11, 1984. The District argues that teachers are required under contract Article XVI to supervise three extra-curricular activities up to a maximum of 12 hours per school year. It is uncontested, the District continues, that teachers refused to perform extra duties for a month and that their concerted refusal was at the instigation of the Association. Thus, the District reasons, the violation is apparent.

The Association defends on the theory that ultimately the teachers did perform the contractually required 12 hours of extra duties. The Association notes that after the contract was settled, teachers performed "make-up" assignments and thus were in compliance with the contract before the end of the school year. This was in keeping, the Association contends, with the past practice of permitting employees to choose which extra-curricular assignments they would perform. Now, the Association argues, the District attempts to depart from its former casual attitude toward the allocation of extra assignments. But under the past practice, the Association concludes, employees had the right of selection and their one-month boycott was consistent with this former policy.

It is clear from contract Article XVI that extra-curricular duties are mandatory. All teachers are required to serve three extra-curricular duties for a maximum of 12 hours. The only voluntary aspect of the program is the right of choice that

teachers have when the assignments first are made for a school year. Teachers may select which activities they prefer to perform. But teachers who do not select three activities will be assigned three by the District. There is no choice about performance. Under contract Article XVI, employees who miss an assignment "will be reassigned by the District and may be given a letter of reprimand."

Thus, once the extra curricular assignments were made in the fall of 1984, individual teachers had no right to boycott them. There was no longer a right to choose. The assignments became as much of a required duty as teaching. It is of no consequence that the District later reassigned other duties to those who missed the fall assignments. That the teachers later worked some other extra duty does not compensate for their absence from earlier activities they were committed to attend.

Because of its role as the instigator of this unlawful boycott of assigned duties, the Association must be found in violation of the EERA. The boycott was in effect a partial strike. It was designed to have employees work, continue to be paid and at the same time select what part of their required duties they cared to perform. Such strikes long have been condemned in the private sector, NLRB v. Montgomery Ward & Co. (8th Cir. 1946) 157 F.2d 486 [19 LRRM 2008], and have been declared a prima facie violation of the EERA by the PERB. San Ramon Valley USD, supra. PERB Order No. IR-46. Accordingly, it

is concluded here that by instigating and encouraging the boycott of assigned duties, the Association engaged in an unlawful pressure tactic in violation of subsection 3543.6(c). Because a substantial portion of the boycott occurred after the PERB appointment of a mediator but prior to the exhaustion of the statutory impasse procedures, it also constituted an independent violation of subsection 3543.6(d). Westminster School District (1982) PERB Decision No. 277.

The District next argues that the Association violated the EERA by instigating and encouraging "a refusal by the teachers at El Dorado High School to begin duties 30 minutes prior to their first scheduled assignment." The "refusal to begin duties" occurred on October 8 and 10, 1984, when the teachers at the school picketed in front of administrative offices. The District points to contract Article XV in support of its contention that the teachers are required to begin their school day at 8 a.m. During the time they were picketing, the District continues, the teachers were not performing classroom-related work as is customary for most of them. Nor were they available for conferences with parents and students, as required by the contract. Finally, the District argues, many of the picketers failed to have their classroom doors open by 8:25 a.m. as required in District policy. Thus, the District concludes, the picketing conflicted with required work and was therefore a violation of the EERA.

The Association rejects this argument, noting that neither the contract nor any written or unwritten policy defines how teachers are to occupy the 30 minutes prior to the first class period. Indeed, the Association continues, teachers have used the time in a variety of ways. These have included drinking coffee in the employee lounge and attending District authorized on campus Association meetings. There was no evidence of a single incident during the two periods of picketing, the Association argues, where a teacher was not "available" for student or parent conferences as required by the contract. The evidence proves exactly the opposite, the Association contends. Teachers took time off from picketing to meet with students and many arrived late to picketing because they chose to complete their school-related duties first. The burden of proving that the Association encouraged employees not to perform required duties lies with the charging party and, the Association concludes, the District has failed to establish that the picketing resulted in the failure of any teacher to perform required duties.

The Association's role in the El Dorado picketing presents a considerably closer question than the boycott of extra duties. Contrary to the District's argument, it is not at all clear that the teachers who joined the picket line failed to perform any required duties. There are no specific District guidelines about how teachers are to spend the 30 minutes

between the time they report for duty at 8:00 a.m. and the commencement of instruction at 8:30 a.m. The only requirement is the broad provision in contract Article XV that during duty time teachers "shall be available for student conferences, parent conferences, and other professional responsibilities" and "responsible for campus supervision." The record does not reflect a single instance of a missed meeting with a student or parent during the two 25-minute picketing sessions at El Dorado High School. Indeed, the evidence shows that several teachers did meet with students and administrators during the picketing periods. One teacher left the picket line to sit down on the grass and discuss school work with a student who approached him during the picketing. Other teachers arrived at the picket line late because they had school-related duties that they wished to complete first. The record likewise fails to reflect any evidence of a failure of campus supervision during the picketing.

How teachers spend the 25 minutes before the first teaching period has traditionally been left to the teachers. There is no District rule that they are to be in their classrooms and no rule that they are to be working. Indeed, a large number of teachers occupy the time in the teachers' lounge, drinking coffee and talking about sports. There has been no District prohibition against such a use of the time. On the one occasion a District administrator sought to ban teachers from

spending the period in the lounge, the Association successfully challenged the attempted change.

It is well-settled that public school employees have a protected right to engage in organizing in non-work areas during non-work periods. San Ramon Valley Unified School District (1982) PERB Decision No. 230; Marin Community College District (1980) PERB Decision No. 145. Indeed, organizing may not be banned from non-duty areas during the time prior to the first teaching period where the employer requires teachers to be on campus but then prescribes no specific duties to occupy the time. Long Beach Unified School District (1980) PERB Decision No. 130.

In the past, the District appears not to have been concerned about employee participation in organizational activities during the time prior to the first instructional period. The Association held a series of 8:00 a.m. to 8:30 a.m. meetings on campus during the weeks prior to the two mornings of picketing. There is uncontested testimony that these meetings were cleared in advance with the administration.

At a minimum, the District argues, the teachers violated District rules by not leaving the picket line in sufficient time to admit students into the classrooms by 8:30 a.m. Two District witnesses testified that the teachers did not even leave the picket line until 8:30 a.m. and that students were therefore late to class. Three teacher witnesses testified

that they were in their classrooms before 8:30 a.m. and that they did not see any other teachers open their classroom doors late.

This credibility dispute is resolved in favor of the Association. All witnesses who testified impressed the hearing officer as being sincere and desirous of telling the truth. However, it is concluded that the District witnesses, both administrators, were so surprised and upset at seeing picketers the morning of October 8 that their recollections of the precise details of that occasion are not reliable.

Mr. Brinkley, for example, could not remember whether the picketers walked down a single side of the street or both sides on October 8. "I was a little more anxious about whether we were going to have teachers in class than I was about which side of the street they were on." he testified. Nor could he recall what time the picketers arrived at the picket line. "I don't have that information." he testified. "I just know that they were there." Mr. Cate could not recall which campus administrator called to tell him of the picketing nor could he remember what happened to the picket signs at the completion of the picketing.

It is clear, moreover, that late arrival by the teachers at their classrooms would have run counter to the Association's entire strategy. The Association was engaged in a psychological pressure campaign, designed to unnerve the

administration but not break any rules. It is undisputed that by long-standing District practice teachers are supposed to have their classroom doors open in time for students to be in the rooms by 8:30 a.m. Association leaders knew they would be in violation of this requirements if they allowed the picketing to drag past 8:25 a.m. For that reason, Mr. Steed was appointed to monitor the time and notify teachers of the approaching 8:25 a.m. bell so they could get to their classes on time. He credibly testified that he warned them just prior to 8:25 a.m. and that the picketers left the line at the bell.

The evidence establishes that the teachers did not arrive at their rooms until just before the 8:30 a.m. bell. Their last-minute return doubtlessly generated a considerable amount of confusion. However, the burden of proof in an unfair practice charge is on the charging party. Here, the District has failed to establish by a preponderance of the evidence that during the two mornings of picketing El Dorado High School teachers failed to perform any required duties, including the opening of their classroom doors prior to 8:30 a.m.

For these reasons, it is concluded that the Association committed no unfair practice by instigating the picketing which occurred on October 8 and 10, 1984, at El Dorado High School.

REMEDY

The District seeks an order that the Association be required to cease and desist from its illegal work stoppage.

The District also asks that the Association be required to compensate the administrators who worked at extra-curricular activities in place of the boycotting teachers. The PERB in subsection 3541.5(c) is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

A cease and desist order is an appropriate remedy for Association's unlawful boycott of required duties. Fresno Unified School District, supra. PERB Decision No. 208. It also is appropriate that the Association be directed to cease and desist from its unfair practice and to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the Association, will provide employees with notice that the Association has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the Association's readiness to comply with the ordered remedy. Davis Unified School District et al. (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.

The District cites no case law in support of its request that the Association be required to compensate administrators

for the extra hours they worked in place of the boycotting teachers. The purpose of a financial remedy is to make a party whole for the losses it suffered as a result of the respondent's unfair practice. Here, as the Association points out, the District suffered no financial loss as a result of the boycott of extra-curricular duties. The administrators were salaried employees, required to work without additional pay and the District incurred no out-of-pocket costs by calling them in for extra duty. Nor is there any showing that the administrators themselves are entitled to additional wages or compensatory time off. There is no evidence that the performance of an additional duty in the place of an absent teacher is an unexpected requirement for a salaried administrator. Nothing in the record, for example, indicates that an administrator called to chaperon a dance in place of an ill teacher would expect or be entitled to additional compensation. The obligation to work additional hours without compensation is a normal facet of the acceptance of a salaried position. That the additional work was due to the Association's unfair practice does not entitle the administrators to reimbursement which would have been denied them had the extra duties been the product of other causes.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the

El Dorado Union High School District Faculty Association violated subsections 3543.6(c) and (d) of the Educational Employment Relations Act. Pursuant to subsection 3541.5(d) of the Government Code, it is hereby ORDERED that the Association, its officers and its representatives shall:

1. CEASE AND DESIST FROM:

A. Failing to meet and negotiate in good faith with the El Dorado Union High school District by instigating and encouraging an employee boycott of required extra-curricular duties and thereby engaging in the illegal pressure tactic of a partial strike.

B. Failing to participate in the impasse procedures in good faith by instigating and encouraging an employee boycott of required extra-curricular duties at a time after the parties had jointly declared themselves to be at impasse but prior to the exhaustion of the statutory impasse procedures.

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

A. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this order. Such posting shall be maintained for

a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

B. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

IT IS FURTHER ORDERED that all other allegations of the charge and complaint are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 18, 1985, 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 July 18, 1985, 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: June 28. 1985

Ronald E. Blubaugh
Administrative Law Judge