STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-736
V.	)	PERB Decision No. 541
MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT,	)	December 12, 1985
Respondent.	)	

Appearances; Ken Burt, Attorney for Modesto Teachers Association; Breon, Galgani, Godino & O'Donnell by Sharon M. Keyworth for Modesto City Schools and High School District.

Before Hesse, Chairperson; Jaeger, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision of a PERB administrative law judge (ALJ) filed by the Modesto Teachers Association (MTA or Association). In his proposed decision, attached hereto, the ALJ concluded that the Modesto City Schools and High School District (District) did not violate the unfair practice provisions of the Educational Employment Relations Act (EERA)[1] when it unilaterally eliminated the second preparation period for the social studies department chairperson at Downey High School. We agree.

[1]EERA is codified at Government Code section 3540 et seq.

FACTUAL SUMMARY

In the main, the factual circumstances surrounding the instant case are undisputed. We find the ALJ's findings of fact to be free from prejudicial error and adopt them as the findings of the Board itself. In summary, the instant dispute arose when, in the spring of 1983, the principal at Downey High School reduced the number of department chairpersons at the school and eliminated the second preparation period for the chairperson of the social studies department. Prior to that time, beginning in 1969, the social studies chairperson at Downey was Ken Lowry. Throughout that period, Lowry enjoyed the second preparation period, using that time to perform departmental duties.

DISCUSSION

In Modesto City Schools and High School District (1984) PERB Decision No. 414, the Board found that, in spite of a relatively consistent past practice establishing the duration of the duty-free lunch period at one high school, the past practice at other schools in the District was a relevant concern. Accordingly, finding evidence of both a great deal of variation among the District schools as well as a great deal of flexibility in scheduling, the Board found that the Association failed to demonstrate a unilateral change in District policy.

The ALJ appropriately applied the rule enunciated in Modesto, supra, to the facts in the instant case. Finding the parties' contract did not address the second preparation period, the ALJ correctly referred to the districtwide past practice to determine whether an unlawful unilateral change occurred.

> When the past practice is considered on a unit-wide basis, it is clear that the Association can point to no consistent pattern. Some chairpersons have had two preparation periods and some have not. Some who once had two preparations lost the second preparation long ago. Few retain the benefit. Although the social studies chairperson at Downey did not lose his second preparation period until the fall of 1983, the record indicates that the social studies chairpersons at Davis and Modesto High Schools lost their second preparation sometime earlier, if indeed they ever had the benefit. There seems to be little relationship between the number of teachers in a department and whether its chairperson has one or two preparation periods. Chairpersons of small departments have had second preparation periods while their counterparts in larger departments did not. The Association can point to no objective criteria which, although previously followed, were ignored at Downey in the fall of 1983. Historically, the decision about whether a chairperson has had one or two preparation periods seems to have been within the exclusive control of the high school principals. (ALJ's Proposed Decision, at pp. 18-19.)

As was the case in Modesto, supra, here the practice of affording department chairpersons a second preparation period has not been uniformly applied to teachers in the District. Moreover, the District's longstanding policy has been to delegate to the principal the authority to change preparation period allotments from time to time as the principal sees fit. In sum, the salient point derived from Modesto is that districtwide policy, not individual school practice, is the appropriate benchmark in unilateral change cases such as this. Thus, since the facts here showed both a variation between schools in the District, as well as a history of changes in individual

chairpersons' preparation period allocations, no change in policy was demonstrated.

In affirming this dismissal, we note that the facts in this case, notably that Lowry enjoyed the second preparation period for more than a decade, test our past practice rule. However, where a diversity among schools as to a particular term or condition of employment is accompanied by a history of discretionary changes in that term, the Board cannot find that a variation in employee working conditions at an individual school, if only it lasts long enough, constitutes an inviolable policy. To do so would freeze into permanence a host of different, perhaps contradictory, disparate and even discriminatory ways of treating employees. Surely the law contemplates no such chaotic and unworkable result. Rather, we remain convinced that, to violate EERA, the change must affect a broad policy of the statutorily-defined employer, the school district.

ORDER

Based on the foregoing Decision and the entire record in this case, it is hereby ORDERED that the unfair practice charge in Case No. S-CE-736 is hereby DISMISSED. MTA's request for oral argument is DENIED.

Chairperson Hesse and Member Burt joined in this Decision.
Member Jaeger's concurrence begins on p. 5.

Member Jaeger, concurring: I find this case to be a straightforward one. As with all unilateral change cases, the first step is to identify the employer's policy on the subject at issue prior to the alleged unilateral conduct. Oak Grove School District (1985) PERB Decision No. 503. Here, the subject at issue is preparation periods. The employer, of course, is the District, not the individual school. Prior to the complained-of reduction in preparation time, the employer's policy, as the ALJ and the Board both found, was to delegate to the principal at each school the authority to determine the number of periods of preparation time each department chairperson would receive. The evidence, while admittedly weak, fairly shows that the principals exercised their authority from time to time to change preparation time assignments.

Given these findings, the conclusion is clear that the reduction in preparation time which Charging Party here complains of did not evidence a change in employer policy, but was consistent with existing practice.

I find the issue of "diversity" in working conditions among the various school sites of a school district to be something of a red herring. In Modesto City Schools and High School District (1984) PERB Decision No. 414, a decision in which I joined, this Board rejected the proposed decision of an ALJ which found a violation of the EERA based on deviation at a

single school site from the past practice at that site. In doing so, the Board relied heavily on the evidence of diversity among the various schools within the district as to the contested subject, to wit, the length of the duty-free lunch hour. As I understood the decision, the salient point there made was that it is the school district which is the statutorily-defined employer, not the individual school site. Thus, it is district policy which is the focus of the negotiating obligation codifed in the EERA. Charges of unilateral change then, cannot be decided by considering evidence only of the practice at a single school site. Rather, the district as a whole must be examined in order to determine the true policy of the employer. Applying this approach in our Modesto decision, we concluded, based on the evidence of the varied practices among the schools, that the evidence of a change at the single school site was insufficient to prove that a change in employer policy occurred.

The fact that there is diversity in a working condition among the schools of a district, however, does not of itself dictate the answer to a charge of unilateral change. Thus if, in a multi-school district, every chairperson happened to enjoy the same amount of preparation time, but the employer's policy was the same as in the instant case, I would again find no violation were a school principal to exercise the authority to change a preparation time assignment. This would be so despite

the absence of "diversity." By the same token, if a school district assigned preparation time on a fixed basis rather than according to principal discretion, then a change in preparation time for one chairperson at a single school could violate the EERA notwithstanding that every school site in the district may differ from every other in the amount of minutes allotted for preparation time.

As I see it, diversity among schools within a district regarding a particular working condition may be important as evidence suggesting that the employer has delegated the decision-making authority to the local site administrator. Aside from this significance, however, I find that the appropriate analysis of this type of case differs not at all from that appropriate to any other unilateral change dispute.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION. Charging Party. V. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT. Respondent.	Unfair Practice Case No. S-CE-736 PROPOSED DECISION (11/28/84)

Appearances: Ken Burt. Attorney and Executive Director for the Modesto Teachers Association; Sharon Keyworth. Attorney (Breon. Galgani. Godino & O'Donnell) for the Modesto City Schools and High School District.

Before Ronald E. Blubaugh. Hearing Officer.

PROCEDURAL HISTORY

An exclusive representative here challenges the elimination of a non-teaching period which formerly had been granted to the social studies department chairperson at one of the employer's high schools. The union argues that the action was unilateral and that it resulted in a lengthening of the work hours of the affected employee. The employer responds that it acted within its managerial prerogative to make assignments and that its action did not affect any negotiable matter. In any event, the employer argues, its action was consistent with past practice.

The charge which commenced this action was filed on March 5, 1984, by the Modesto Teachers Association (hereafter

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.

Association) against the Modesto City Schools and High School District (hereafter employer or District). The charge alleged that the employer had reduced from 15 to 9 the number of department chairpersons at Downey High School and had eliminated one of two preparation periods which the social studies and English department chairpersons formerly had enjoyed at Downey. The changes allegedly were taken without prior bargaining and were contrary to past practice. These actions, according to the Association, were in violation of subsections 3543.5(a). (b). (c). (d) and (e) of the Educational Employment Relations Act.[1]

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. Section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it. or in any way encourage

The charge was amended on April 2 and May 4, 1984, to add more factual details to the allegations. On May 14. 1984, the Sacramento Regional Attorney of the Public Employment Relations Board (hereafter PERB) issued a complaint against the employer for the elimination of the second preparation period for the Downey High School social studies chairperson. This conduct is alleged to have been in violation of subsection 3543.5(c) and derivatively, (a) and (b). Also on May 14, the regional attorney dismissed the remainder of the Association's charge on the grounds that a reduction in the number of department chairpersons did not state a prima facie violation of the EERA. The Association on June 5, 1984, filed an appeal of the partial dismissal to the PERB itself where the matter is now pending.

The employer answered the complaint on June 4, 1984, denying that it had made any change in past practice and asserting that the allegations at issue were insufficient to state a prima facie violation of the EERA.

A hearing was conducted on September 17 and 18 in Stockton. Briefs from the parties were received on

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employees to join any organization in preference to another.

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

November 13. 1984. on which date the matter was submitted for decision.

FINDINGS OF FACT

The Modesto City Schools and High School District is a public school employer under the EERA. The District operates four high schools, one of which—Downey--is the location for the events at issue. At all times relevant, the Modesto Teachers Association has been the exclusive representative of the District's certificated employee unit, a unit that includes department chairpersons.

Under the contract between the parties, high school teachers are required daily to teach:

> 330 minutes including a preparation period equivalent to a student instructional period and excluding lunch.

The preparation period is used to prepare for class, to correct tests, to enter grades into record books, to obtain supplies and to work on classroom materials.

Beginning sometime in the mid-1960's, chairpersons of the social studies department at Downey High School were given two daily preparation periods. Their regular workday thus consisted of four teaching periods, a preparation period to be used for their teaching duties, a preparation period to be used for their duties as department chairperson and a duty-free lunch period. Although the enrollment in the high school and the number of teachers in the social studies department varied

widely over the years, it was the consistent practice that the social studies chairperson retained two preparation periods. The second preparation period existed when the department had as many as 15 members and as few as 9. The contract between the parties has never reflected the existence of the second preparation period.

From 1969 through the spring of 1983. the social studies chairperson at Downey was Ken Lowry. Mr. Lowry described the second preparation period as a supervision period and he used it to carry out the duties of the department chair. The duties of the job were varied. As department chairperson. Mr. Lowry was responsible for the departmental budget, the scheduling of teachers and the ordering of supplies and textbooks for teachers and students. He was involved in the selection of textbooks and the revisions of curriculum. He served as the liaison between the school administration and the departmental faculty and it was his role to try to work out the daily complaints which would surface in the department.

In the spring of 1983. Downey High School Principal Jerome Kopp decided to reduce the number of department chairpersons at the school and to eliminate the second preparation period for the chairpersons of the social studies and English departments. With respect to social studies, Mr. Kopp testified that he eliminated the second period in order to better allocate the funds available for the school.

In addition, he concluded that when compared with the responsibilities of other department chairpersons, social studies could not be justified for a second preparation period.

Exactly how Mr. Kopp announced his plans is a matter of some dispute. Mr. Kopp testified that he told Mr. Lowry personally in about April of 1983 that the second preparation would be eliminated the next fall. Mr. Lowry testified that he learned of the change at a meeting of department chairpersons in May of 1983 and that Mr. Kopp never told him personally about the change or asked him to continue in the position. For the purposes of this proposed decision, it makes no difference how the change was announced. It is significant only that Mr. Kopp announced the change in the spring of 1983 and that Mr. Lowry declined to continue as chairperson. Mr. Lowry concluded that there would not be enough time in the day to do the job without a second period. Additional hours would be required outside of school and he did not want the position under these circumstances.

The position of social studies department chairperson was assumed by Albert Simi on September 6, 1983. Mr. Simi, a District teacher for 20 years, accepted the position at the request of the Downey vice principal. He understood when he took the position that it would be without the second preparation period and that he would be expected to teach five classes, the same as other department members. Mr. Simi had

only one preparation period during the 1983-84 school year, a practice which continued into the 1984-85 school year.

Mr. Simi's duties as department chairperson were identical to those of his predecessor. Mr. Lowry. Mr. Simi was responsible for preparation of the department budget which required regular communication with members of the department so they would complete their requests in a timely manner. He also prepared the work schedules for teachers in the department and was responsible for the ordering of textbooks and supplies.

Performance of the department chairperson duties occupied about 40 minutes, on the average, of Mr. Simi's workday. He performed these duties in the morning before class, between classes, during his preparation period, at lunch and after school. He estimated that on the average, half of his daily preparation period was used on departmental business. Use of his daily preparation period for departmental business required Mr. Simi to spend more time at home to prepare for teaching. He estimated that he worked three hours longer each week than would have been required had he received a second preparation period.

At the same time he decided to eliminate the second preparation period for social studies. Mr. Kopp also decided to eliminate it for the English department chairperson. When the school term began in the fall of 1983. neither department chairperson had a second preparation period. However, the

English department chairperson met with Mr. Kopp and convinced him of a need for the extra period. The principal decided to restore the second period because of the size of the English department--13 instructors—and the varied responsibilities which accompanied the chairmanship. Beginning with the fall of 1983. the English department chairperson has been the only-department head to have two preparation periods at Downey.

Historically, two other Downey department chairpersons have had second preparation periods at one time or another. The agriculture department chairperson had two preparation periods during the mid-1970's. The second preparation period was dropped when the number of instructors in the department fell appreciably. When the department chairperson did have two preparation periods, a substantial portion of his time was used supervising students who worked on a District farm as a school assignment. The other department chairperson with a second preparation period during the 1970's was the chairperson of industrial arts. Although the department did not have a large number of teachers, it has had a large budget and the chairperson has been required to order numerous supplies. Budgetary restrictions led to the elimination of the second preparation period for the chairperson of industrial arts.

The District has no uniform practice for deciding which, if any. department chairpersons should receive a second preparation period. The collective bargaining agreement is

silent on the subject and it appears that the decision is left to the individual high school principals. Like the District, the principals have no uniform basis for deciding which chairpersons have two preparation periods. The primary requirement the District places on the principals is that they live within a specific budget. The principals are given considerable discretion in meeting that goal.

The principal at Modesto High School testified that at his school only the English and business department chairpersons receive a second preparation period. He testified that a department chairperson receives a second preparation period only if the members of the department agree to teach a sufficient number of additional students to cover for the department chair.[2] At Davis High School, the English chairperson has a second preparation period but the social studies chairperson does not.

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[2]The Association attempts to discredit the testimony of the Modesto High School principal. Richard Lang, by showing contradictions between his testimony about a job title he held during a teachers' strike and a declaration he made at the time. See Association brief, pp. 13-14. The hearing officer is unpersuaded by this effort. The hearing officer finds it of no significant consequence that Mr. Lang could not recall the strike job title he recited in a four-year-old declaration that likely was written by an attorney and signed by him at a time of great haste. None of this undercuts his testimony that the social studies department chairperson at Modesto High School does not have a second preparation period and that, as principal, he is given great latitude by the District in deciding whether department chairpersons should have second preparation periods.

On or about June 2. 1983. the Association demanded to negotiate with the District over the proposed changes at Downey-High School. While the primary focus of the negotiations appears to have been over the proposed consolidation of the departments, it is clear that the union also sought to negotiate about the proposed elimination of the second preparation period. Association President Frank Vandervort testified that the District's negotiator, Keith Breon, took the position that the subject of the number of department chairpersons was outside of the scope of representation[3] but initially agreed that the reduction in preparation periods was negotiable. Mel Jennings, the director of personnel for the employer, contradicted this, testifying that Mr. Breon offered

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[3]The scope of representation under the EERA is set forth at section 3543.2 which, in relevant part, provides as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to section 3546, procedures for processing grievances pursuant to sections 3548.5, 3548.6, 3548.7. and 3548.8. and the layoff of probationary certificated school district employees, pursuant to section 44959.5 of the Education Code . . . .

to discuss both subjects with the union regardless of whether or not they were within the scope of representation.

On July 26. 1983. the District declared that the parties were at impasse and requested the appointment of a mediator. The Association opposed the declaration of impasse and the PERB concluded that the parties were not at impasse and declined to appoint a mediator. The Association made a proposal on August 17. 1983. which dealt primarily with the proposed consolidation of department chairmanships. Regarding the proposed elimination of the second preparation periods, the Association proposed maintenance of the past practice. The parties had scheduled a negotiating session for August 26 but the District decided not to continue with the negotiations. On August 30. 1984. Mr. Breon wrote the Association a letter declaring that from the District's point of view the negotiations were over. With respect to the reduction in the number of preparation periods. Mr. Breon asserted that the subject was outside the EERA scope of representation.

Following Mr. Breon's letter, no more negotiating sessions were held between the parties. As of the start of the school year, when the change was implemented, the parties had not exhausted the statutory impasse procedures.

Department chairpersons received a stipend. The amount of the stipend is set under a formula in the contract between the parties. Chairpersons of larger departments receive larger

stipends. Mr. Simi, the current social studies chairperson at Downey, expects to receive $895 for the 1984-85 school year.

LEGAL ISSUES

1) Was the District's decision to eliminate the second preparation period for the Downey High School social studies chairperson a matter within the scope of representation?

2) If so. did the District make an unlawful unilateral change by eliminating that second preparation period?

Scope of Representation.

The Association argues that the elimination of the second preparation period for the Downey social studies chairperson had an uncontroverted impact upon hours. The Association cites the testimony of Mr. Simi that the duties of the position require at least 40 minutes per day and that the elimination of the preparation period effectively increased Mr. Simi's daily working hours by 40 minutes. Thus, the action affected a matter within the scope of representation.

Under the EERA, a public school employer is obligated to negotiate about matters relating to wages, hours of employment and nine specifically enumerated terms and conditions of employment. Several times, the PERB itself has considered the question of whether the subject of preparation periods falls within the scope of representation. See in particular, San Mateo City School District (5/20/80) PERB Decision No. 129. Sutter Union High School District (10/7/81) PERB Decision

No. 175. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, and Modesto City Schools (3/8/83) PERB Decision No. 291. These cases hold that preparation periods are within the scope of representation "to the extent that changes in available preparation time affect the length of the employees[1] workday or duty-free time." San Mateo City School District, supra. Thus, the unilateral elimination of preparation periods is a violation only where the evidence introduced by the charging party "demonstrates an actual increase in workload, i.e.. that the teachers did in fact extend their working hours for class preparation." Modesto City Schools, supra. PERB Decision No. 291.

Because the identity of the Downey High School social studies chairperson changed following the elimination of the second preparation period, it is not possible to compare the pre-change and post-change working hours of the same employee. Nevertheless, the evidence reasonably establishes that the working hours for the job increased because of the elimination of the second preparation period.

Ken Lowry. who held the department chair before elimination of the second preparation period, testified that he used the period to perform departmental duties. He resigned from the position when the second period was eliminated because he concluded those duties would have to be performed during his regular preparation period reguiring other work to be performed at home.

What Mr. Lowry expected is what actually happened to his successor. Albert Simi. Mr. Simi testified that departmental duties required about 40 minutes per day. He performed the duties at various times, including his one preparation period. Use of his preparation period for departmental business required him to work additional hours at home to prepare for teaching. He estimated that he worked three hours longer each week than would have been required had he received a second preparation period.

The Association, therefore, has met its burden of showing that the elimination of the second preparation period led to an actual increase in workload and lengthened the working hours of the department chairperson. Accordingly, it is concluded that the District's decision was within the scope of representation under the EERA.

Unilateral Change.

The Association finds the underlying dispute to be one of stark simplicity. For more than 20 years, the Association argues, the social studies department chairperson at Downey High School has without exception had a second preparation period. The practice was changed unilaterally, prior to the completion of negotiations, resulting in an increase in the working hours of the affected employee. Such a clear change in past practice, the Association reasons, is a violation of the obligation to negotiate in good faith.

The District first argues that it acted in accord with the contract which provides for "a preparation period equivalent to a student instructional period" (emphasis supplied) but makes no mention of multiple preparation periods for department chairpersons. Rather, the District continues, the contract provides for stipends to department chairpersons, with the largest stipends to the chairpersons with the largest number of teachers to supervise. Because the contract does not require a second preparation period for department chairpersons and. indeed, provides the alternative compensation of a stipend, the District concludes that it took no improper action when it removed the second preparation period.[4]

The District next argues that the past practice affords District principals with the discretion to decide whether or not to give department chairpersons two preparation periods. The District notes the lack of consistency among the various high schools and within Downey High School itself. Citing Modesto City Schools and High School District (10/12/84) PERB Decision No. 414, the District argues that the practice at an individual school cannot be viewed in isolation. What is

[4]The Association rejects this waiver argument on the ground that it was not timely raised by the District and is therefore lost. For the purposes of this proposed decision it is unnecessary to consider the waiver argument. As will be seen, infra, even if the Association were sustained in its rejection of the waiver defense, it nevertheless must lose the case on the merits.

significant is the practice throughout the unit. Because the Association failed to establish a consistent, unit-wide practice, the District concludes, it has failed to meet its burden of proof and its charge must be dismissed.

It is well settled that an employer that makes a pre-impasse unilateral change affecting an established policy within the scope of representation violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See generally, Davis Unified School District (2/22/80) PERB Decision No. 116. San Francisco Community College District (6/8/79) PERB Decision No. 94.

Established policy may be reflected in a collective agreement. Grant Joint Union High School District (2/26/82) PERB Decision No. 196. or where the agreement is vague or ambiguous, it may be determined by an examination of the past practice or bargaining history. Rio Hondo Community College District (12/31/82) PERB Decision No. 279; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.

Here, the collective agreement provides that all teachers shall receive "a preparation period" but is silent about a second preparation period for department chairpersons. There is no evidence the subject ever was discussed in negotiations.

Established policy, therefore, may be found only by an examination of the past practice of the parties.

The evidence is uncontested that from sometime in the mid-1960's to the fall of 1983 the social studies department chairperson at Downey High School had two preparation periods. This practice continued in years when the department had a varied number of members. It is uncontested also that the second period was eliminated prior to the exhaustion of the statutory impasse procedures and without the consent of the Association.

The Association argues that the activities at Downey High School constitute the only relevant past practice and that PERB may not look to the practice at other District schools. In support of its position, the Association relies upon an arbitrator's decision involving the Modesto Schools in which the arbitrator concluded that the only relevant past practice was that at the individual school. Because the arbitrator's award was issued under the contract, the Association reasons, it is controlling as a statement of intent by the parties.

The Association thus ignores the PERB decision cited by the District which apparently grew out of the same events as the arbitrator's award. In Modesto City Schools, supra. PERB Decision No. 414. the PERB concluded that, "absent any evidence of contrary intention, past practice throughout the unit is relevant in determining whether or not a unilateral change in

policy has occurred." The Association offers no justification for why the PERB should reject its own interpretation of relevant past practice in favor of that made by the arbitrator. The legal analysis of the arbitrator is not binding upon the PERB. Under Modesto City Schools, supra, it is relevant to consider the past practice in all departments in all high schools contained within the unit.

When the past practice is considered on a unit-wide basis, it is clear that the Association can point to no consistent pattern. Some chairpersons have had two preparation periods and some have not. Some who once had two preparations lost the second preparation long ago. Few retain the benefit. Although the social studies chairperson at Downey did not lose his second preparation period until the fall of 1983, the record indicates that the social studies chairpersons at Davis and Modesto High Schools lost their second preparation sometime earlier, if indeed they ever had the benefit. There seems to be little relationship between the number of teachers in a department and whether its chairperson has one or two preparation periods. Chairpersons of small departments have had second preparation periods while their counterparts in larger departments did not. The Association can point to no objective criteria which, although previously followed, were ignored at Downey in the fall of 1983. Historically, the decision about whether a chairperson has had one or two

preparation periods seems to have been within the exclusive control of the high school principals.

Such evidence of an inconsistent past practice requires dismissal of the complaint for failure of the charging party to demonstrate that the employer's action was a unilateral change. Modesto City Schools, supra. PERB Decision No. 414.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CE-736. Modesto Teachers Association v. Modesto City Schools and High School District, and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8. part III. section 32305. this Proposed Decision and Order shall become final on December 18. 1984, 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 December 18. 1984. 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

title 8. part III. section 32300 and 32305.

Dated: November 28. 1984

Ronald E. Blubaugh
Hearing Officer