

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



ELSINORE VALLEY EDUCATION )  
ASSOCIATION, CTA/NEA, )  
 )  
Charging Party, ) Case Nos. LA-CE-1827  
 ) LA-CE-2031  
v. )  
 ) PERB Decision No. 646  
LAKE ELSINORE SCHOOL DISTRICT, )  
 ) December 18, 1987  
Respondent. )  
\_\_\_\_\_ )

Appearances; A. Eugene Huguenin, Jr., Attorney for Elsinore Valley Education Association, CTA/NEA; Parham & Associates, Inc., by James C. Whitlock for Lake Elsinore School District.

Before Porter, Craib and Shank, Members.

DECISION AND ORDER

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Lake Elsinore School District (District) to the proposed decision of a PERB administrative law judge (ALJ), attached hereto. The ALJ found that the District violated section 3543.5(c) of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> by:

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

It shall be unlawful for a public school employer to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

unilaterally changing the method of compensating teachers for extra duties performed during the summer of 1983; unilaterally implementing a proposed \$1,500 stipend for teachers assigned to the newly created learning specialist classification; bypassing the exclusive representative by directly negotiating with a unit member to reduce her 1983-84 and 1984-85 work years; failing to give the Elsinore Valley Education Association (EVEA or Association) notice and an opportunity to negotiate over the effects of its decision to reduce School Improvement Project (SIP) instructional aide time; and unilaterally extending the workday of grades 4-6 teachers for four days during the 1983 fall conference week. In addition, the ALJ found that the District derivatively violated section 3543.5(a) and (b) of the EERA by the aforementioned actions:

We find the ALJ's findings of fact to be free of prejudicial error and adopt them as our own.<sup>2</sup> For the

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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.

<sup>2</sup>We note that the District excepted to the ALJ's finding that the change in the minimum day schedule resulted in one hour per day of additional preparation time. The record instead supports a finding that the change in the minimum day schedule resulted in an increase of one-half hour per day of preparation time. This discrepancy, however, in no way affects our analysis of this allegation.

reasons to follow, we affirm in part and reverse in part the ALJ's proposed decision.

Change in Method of Payment for Work Performed in Summer of 1983

The parties' collective bargaining agreement is silent on the subject of the method of payment for summer school work. The record, however, supports the ALJ's finding that teachers were routinely compensated at an hourly rate in past years, and that the District departed from this practice by compensating learning specialists and research-based instruction coaches on a per diem basis in 1983. Furthermore, the manner in which the hourly rate was computed was based upon earlier collective bargaining agreements, and thus raises the inference that the earlier contract provision continues to reflect the mutually agreed upon policy. (Morgan Hill Unified School District (1985) PERB Decision No. 554.) While there was some evidence that District employees were paid per diem wages in the past, a clear preponderance of the evidence showed that teachers' compensation was calculated on an hourly basis, and this, combined with the rule articulated in Morgan Hill, shows the District's policy was to compensate teachers for extra duty summer assignments on an hourly basis.

In order to prove a violation of EERA section 3543.5(c) based upon a unilateral change, a charging party must first make a prima facie showing that the respondent breached a written agreement or altered a past practice. (Grant Joint

Union High School District (1982) PERB Decision No. 196.) In this case, the District changed its policy by its unilateral alteration of its past practice in its method of compensating teachers for extra duty summer assignments. We therefore affirm the ALJ's conclusion that the District violated EERA section 3543.5(c) and, derivatively, section 3543.5(a) and (b) by its change in the method of compensating teachers for summer work.

Unilateral Adoption of Learning Specialist Stipend

The District began considering a new classification of "learning specialist" in the spring of 1982; in April 1983, the District approved a job description and positions for the learning specialist classification. Applications for the newly created positions were limited to the District's existing staff. The District began using learning specialists at the beginning of the 1983-84 school year.

Between June 1983 and the beginning of the 1983-84 school year in September, EVEA and the District were engaged in reopener negotiations. Although the learning specialist classification was not among the reopener subjects, the parties discussed the position. The District, in both its announcement to teachers of the new classification and during negotiations, agreed that parts of the learning specialist program, such as a monetary stipend, were negotiable. The District knew, as a result of earlier exchanges between the parties, that EVEA

desired to discuss negotiable aspects of the new program. The District, nonetheless, implemented the program, including a \$1,500 stipend, without having reached an agreement with EVEA.

While the decision to establish or abolish classifications is a management prerogative and, hence, is nonnegotiable, management remains obligated to negotiate the effects of its decision falling within the scope of representation. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322.) In the instant case, although the learning specialist classification was new, EVEA sought only to bargain the effects of the District's decision to create the new classification. The stipend is an aspect of wages, a subject expressly enumerated in EERA section 3543.2(a).<sup>3</sup> We have specifically held that salaries for newly created positions are negotiable. (Antioch Unified School District (1985) PERB Decision No. 515.) In addition, we note that the facts of this case show that the stipend for the new classification was integrally related to the interests of the current bargaining unit, in that the position was offered only to current employees and the learning specialist stipend constituted compensation for duties which related to and augmented the

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<sup>3</sup>EERA section 3543.2(a) provides that the scope of representation "shall be limited to matters relating to wages, hours of employment and other terms and conditions of employment." Stipends relate to wages and are a mandatory subject of bargaining.

normal teaching responsibilities. We therefore find that the stipend was negotiable.

Although the District argues that EVEA waived its right to bargain a stipend for learning specialists, we agree with the ALJ that the record does not support such a contention. Accordingly, we affirm the ALJ's conclusion that the District's unilateral implementation of the stipend was in violation of section 3543.5(c) and, derivatively, section 3543.5(a) and (b) of EERA..

#### Change in the Work Year of the Bilingual Facilitator

The position of bilingual facilitator is one within the bargaining unit. The collective bargaining agreement provides at article 7 that the length of the work year shall be 179 days for unit members. We agree with the ALJ that the evidence supports the finding that District Superintendent Ronald Flora negotiated directly with Judith Reising, the bilingual facilitator, for a reduction in her 1983-84 work year. The Board of Trustees subsequently approved the reduced school year for Reising. Prior to its approval, EVEA President Denise Thomas inquired of the negotiability of Reising's request, and was told that the subject was nonnegotiable and in compliance with District policy. Believing the subject to be negotiable instead, an EVEA representative filed an amendment to Charge No. LA-CE-1827 to include this allegation:

The following year Reising again requested a reduced school

year. Her request, however, was accompanied by six conditions concerning the amount of her stipend and other terms and conditions of employment. The Board of Trustees approved her request, which it characterized as "child rearing leave" under the contract. The board, however, did not approve Reising's conditions attached to the granting of her leave, and Reising subsequently rejected the leave as approved by the board. When Reising inquired of Flora the status of her leave, she was told to work the same schedule as the year before (1983-84), or the reduced 166-day work year. Although Reising signed a standard contract of employment with the District, there was no change in it to reflect her reduced number of workdays for 1984-85. As in the case of the previous year, there is no evidence that prior to making this decision, Flora provided EVEA with notice or an opportunity to meet and negotiate over the decision. The District's reduction of Reising's work year in 1984-85 resulted in EVEA's filing of an additional unfair practice charge (LA-CE-2031) which was eventually consolidated in the instant case.

We affirm the ALJ's conclusion that the District bypassed the exclusive representative and negotiated individually with the bilingual facilitator for a reduced work year. Although the District maintains that it granted Reising a child rearing leave consistent with the CBA, the evidence does not sustain this contention. Negotiating directly with a bargaining unit

employee to alter existing terms and conditions of employment is a violation of EERA. We, therefore, affirm the ALJ's finding that the Lake Elsinore School District bypassed the exclusive representative in violation of EERA section 3543.5(c) and, derivatively, section 3543.5(a) and (b).

#### Instructional Aide Time

Although we affirm the ALJ's findings of fact on this charge, we supplement them with the following. SIP is a state categorically-funded program designed to provide educational assistance to students in the subject areas of reading, mathematics and language arts. (Ed. Code, sec. 52000.) The Education Code mandates the establishment of a school site council which is responsible for developing plans for the use of SIP funds. It is composed of the principal, teachers and other school personnel, pupils and parents at each school site. (Ed. Code, secs. 52012 et seq.) The school improvement plans for each school site are developed by the site councils consistent with the District's general guidelines for adoption by the District's Board of Trustees upon the recommendations of the site councils. (Ed. Code, sec. 52034.)

The SIP, in operation at all four school sites within the District, operates on a three-year cycle which began in the 1982-83 school year. Although the SIP state funds may be used to assist students in grades K-6, the District concentrated its 1982-83 SIP program in grades K-3, and a large portion of the

grant monies were allotted toward the salaries of instructional aides in order to provide direct educational services to students in grades K-3.

Acting in accordance with the wishes of the school board, the site councils at two of the four school sites (Wildomar and Butterfield schools) reallocated SIP monies for the 1983-84 school year in a manner benefiting the entire student body in grades K-6, rather than merely those students in grades K-3. Specifically, the site council at Wildomar decided to use a portion of the SIP funds to pay the salaries of a library aide, an aide coordinator of volunteers and a computer laboratory aide. Butterfield's site council opted to use a portion of the 1983-84 SIP funds budgeted to pay the salary of a computer aide. Reallocating a portion of SIP funds in such a manner; however, necessitated reducing the amount of SIP funds previously budgeted (in 1982-83) to pay the salaries of the SIP instructional aides for students in the K-3 classrooms; and, accordingly, some teachers at Wildomar and Butterfield had SIP aides in their classrooms for fewer hours, as compared to the previous year.<sup>4</sup>

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<sup>4</sup>In 1982-83, the plan at Wildomar School included three hours of aide time for each class in grades K-3. In the 1983-84 school year, SIP instructional aide time was reduced from three hours to two hours per day in the kindergarten classes, and from three hours to one and one-half hours per day for grade 2 classes. At Butterfield School, in 1982-83, the SIP plan provided for SIP instructional aide time of three

Coinciding with the reduction in SIP instructional aide time in the fall of 1983, one-half the pupils of every class in grades K-6 at both Wildomar and Butterfield were taken in groups to the computer lab and the library for half-hour sessions with the computer lab aide and the library aide (a total of one hour per week). This arrangement reduced the class size for each teacher to one-half the number of pupils for reading and math instruction for half an hour per week for each subject area.

The issue involved in this matter is whether the District should have given EVEA notice and an opportunity to bargain any possible effects on the certificated unit of the District's reduction in the hours of the classified unit's instructional aides, the latter decision made as part of a comprehensive plan to reallocate SIP funds.

In her findings, the ALJ noted that the impact on the affected teachers' workday varied depending on the grade level involved and the amount of SIP aide time reduced. Some teachers, she found, had to modify their instructional strategy to accommodate the absence of a second adult. Other teachers

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hours per day for grades K-1, and one and one-half hours per day for grades 2 and 3. In the 1983-84 school year, SIP aide time for grades K-1 remained at three hours per day. At the beginning of the fall 1983 semester, grades 2 and 3 had no aide time for the first few weeks of the semester until the teachers in grades K-1 classes volunteered to share one hour of aide time per day with grades 2 and 3.

had to increase the classroom preparation time to prepare additional "seat work" required in absence of a SIP aide. Also, some teachers spent noninstructional time correcting student written work that had previously been corrected by the aide.

The ALJ reasoned that the reduction in instructional aide classroom time would conceivably affect the amount of a teacher's time that was required to prepare for and perform such duties. This was so because, where aide time was reduced or eliminated, teachers who had used SIP aides to correct papers and perform record keeping tasks would have to perform these duties themselves, and this would have the result of increasing the teachers' workday. Also, the change required some teachers to prepare additional "seat work" to accommodate the absence of a SIP aide in the classroom working directly with students, and this would likewise require additional preparation time. The ALJ thereafter concluded that the District's decision which had the effect of reducing the amount of classroom aide time from its level in 1982-83 had a reasonably foreseeable adverse impact on the affected teachers' working conditions, and thus was negotiable pursuant to Mt. Diablo Unified School District (1983) PERB Decision No. 373.

We do not agree that the District had the obligation to provide the exclusive representative of the certificated unit notice and an opportunity to negotiate the possible effects of

the District's nonnegotiable decision which reduced the hours of members of the classified bargaining unit. As was noted by the ALJ, the SIP aides were to be utilized to provide "educational assistance to the students in the subject areas of reading, mathematics, and language arts. . . ." This comports with the intent of the Legislature in enacting SIP legislation as is expressed at section 52000 of the Education Code, which states, in pertinent part:

The Legislature declares its intent to encourage improvement of California elementary . . . schools to ensure that all schools can respond in a timely and effective manner to the educational, personal, and career goals of every pupil. The Legislature is committed to the belief that schools should:

(a) Recognize that each pupil is a unique human being to be encouraged and assisted to learn, grow, and develop in his or her own manner to become a contributing and responsible member of society.

(b) Assure that pupils achieve proficiency in mathematics and in the use of the English language, including reading, writing, speaking and listening.

(c) Provide pupils opportunities to develop skills, knowledge, awareness, and appreciations in a wide variety of other aspects of the curriculum . . . .

(d) Assist pupils to develop esteem of self and others, personal and social responsibility, critical thinking, and independent judgment.

(e) Provide a range of alternatives in instructional settings and formats to respond adequately to the different ways individual pupils learn.

. . . . .  
The Legislature, by the provisions of this chapter, intends to support the efforts of each participating school to improve instruction, auxiliary services, school environment, and school organization to meet the needs of pupils at that school. (Emphasis added.)

As is apparent from the language of the statute, the fundamental purpose of the SIP is to assist pupils in their academic development, and there are numerous options available to the individual school site councils to achieve this goal. Further, there exists evidence in the record demonstrating that teachers were aware that SIP funds were to be used to assist students, and what the role of SIP instructional aides was to be. Although teachers could not recite with verbatim accuracy the Legislative purpose of the SIP legislation, those testifying as to how their workday changed as a result of a reduction in instructional aide time were aware, for the most part, that the SIP aides were there to provide individualized instruction to students, and not to function as personal assistants to teachers.<sup>5</sup> When viewed in light of the

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<sup>5</sup>The Association called teachers Jill Good, Ann Andrews, Lori Singelyn, Susan Johns, and Elizabeth Fowler to testify as to an increase in workload, if any, caused by the reduction in hours of classified SIP aides. Most witnesses displayed at least a rudimentary knowledge of the goals of the SIP legislation. For example, Good testified that one of the main goals of her school's SIP plan was to provide individualized instruction to students by the use of aides. Similarly, Andrews testified that it was her understanding that the

legislative goals of the SIP, any change in or diminishing of the teachers' preparation time in 1982-83 was, at best, a fortuitous side effect of misuse of the program. Conversely, the extent to which some teachers were required, as a result of the reduction in aides' hours, to adopt a teaching style to accommodate one less adult in the room, reflects more upon the professional nature of teaching, which often requires the exercise of discretion and flexibility, rather than it does a District-compelled increase in workload.

Further, the record is not clear on whether it was the reduction in SIP aide time or an entirely different factor which caused the increase in preparation time to which four teachers testified. The teachers' testimony revealed several factors, aside from the SIP aide time, which could have increased the teachers' workday. The relative experience of the teacher was one such factor.<sup>6</sup> Aside from the experience

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purpose of the aide was to give "extra individual attention or individual instruction" to students. Singelyn testified that the aides were "to work with the children, not just sit there and do paperwork." Her testimony was reinforced by that of Walter McCarthy, who, as Assistant Principal at Wildomar in 1982-83, sat in on meetings between the principal and teachers wherein the principal explained that aides were to work directly with the students and strongly discouraged aides being used to grade papers for students. Fowler, however, expressed confusion with respect to the role of the aide in the classroom.

<sup>6</sup>It is noteworthy in this respect that of the four teachers testifying as to an increase in their workday, three, having taught five years or less, were relatively inexperienced teachers and one was in her first year of teaching with the

factor, other factors which could have contributed to an increased workday included: class size, special learning difficulties of some students; competence of the aides and, perhaps the most significant of all, individual variation among teachers themselves. With respect to the latter, some teachers, especially new teachers, habitually worked longer than the contractually mandated minimum 7 1/2 hours, while other teachers did not.

Furthermore, the record shows that in 1983-84, students were taken from the classrooms in groups each week for a half-hour session with the computer lab aide and a half-hour session with the library aide. One may infer that this would be a factor offsetting any increases in the length of some teachers' workday allegedly caused by the reduction in SIP instructional aide time.

In short, the reductions in SIP instructional aide time in certain K-3 classes at two schools occurred within the context

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District as of the time of the hearing. Conversely, the teacher testifying with the most experience with the District, Lucinda Brouwer, noticed no impact on the length of time it took for her to prepare for class subsequent to the reduction in aide time. In her testimony, Brouwer stated:

I think because I have taught a little bit longer than some of the witnesses who have spoken earlier, I've made it a habit of doing my work in the seven and a half hours. And I don't take work home and I don't do work on the weekends. And I did that regardless of if I had an aide or not.

of a categorically funded program – the fundamental purpose of which was to assist students. Mt. Diablo's requirements of notice and an opportunity to negotiate "reasonably foreseeable effects" of a nonnegotiable decision do not contemplate the bargaining of those effects contravening the intent of the Legislature in enacting the SIP legislation. Instead, the reduction in SIP aides' hours reasonably would have been expected to exert, at best, an indirect and speculative impact on the workday of teachers. In this regard, we note that the (1982-83) levels of aide time from which the reduction occurred had been in existence for only one school year. Accordingly, we reverse the ALJ on this allegation and find that the District was not required to provide the Association notice and an opportunity to negotiate such speculative effects on the teachers of its decision which reduced instructional aide services in the classified unit.

#### Change in the Length of the Instructional Day

The complaint in this case alleges, and the ALJ found, that the District committed an unfair practice by changing the length of the instructional day during the 1983 fall conference week. As to this unfair practice charge, the record before us presents a jurisdictional question which was neither raised by the parties nor addressed by the ALJ: Does this Board have jurisdiction to issue a complaint and resolve an unfair practice charge where the conduct charged is also prohibited by

the provisions of the parties' collective bargaining agreement, which contains grievance machinery covering the matter at issue and culminating in binding arbitration?

A secondary issue presented by the record before us is the effect, if any, on this jurisdictional question of charging party's failure to invoke the grievance machinery and the respondent's concomitant failure to assert as a "defense" to the complaint that the matter was subject to binding arbitration.<sup>7</sup>

Preliminarily it is appropriate to review this Board's jurisdictional terrain.

First, this Board has only such jurisdiction and powers as have been conferred upon it by statute. (Association For Retarded Citizens v. Dept. of Developmental Services (1985) 38 Cal.3d 384, 391-392; Fertig v. State Personnel Board (1969) 71 Cal.2d 96, 103; B.W. v. Board of Medical Quality Assurance (1985) 169 Cal.App.3d 219, 233-234; B.M.W. of North America, Inc. v. New Motor Vehicle Board (1984) 162 Cal.App.3d 980, 994, hg. den.; Graves v. Commission on Professional Competence (1976) 63 Cal.App.3d 970, 976, hg. den.)

Second, this Board acts in excess of its jurisdiction if

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<sup>7</sup>Board Regulation 32646 provides that if the respondent believes that the dispute is subject to binding arbitration, it shall assert such as a defense in its answer to the complaint and move to dismiss the complaint. (Cal. Admin. Code, tit. 8, sec. 32646.)

it acts in violation of the statutes conferring and/or limiting its jurisdiction and powers. (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288-291; Kennaley v. Superior Court (1954) 43 Cal.2d 512, 514; Graves v. Commission on Professional Competence, supra, 63 Cal.App.3d 970, 976, hg. den.) Indeed, all actions taken, or determinations made, in excess of this Board's jurisdiction and powers are void. (City Se County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 400, hg. den.; Fertig v. State Personnel Board, supra, 71 Cal.2d 96, 103-104; Association For Retarded Citizens v. Dept, of Developmental Services, supra, 38 Cal.3d 384, 391; B.W. v. Board of Medical Quality Assurance, supra, 169 Cal.App.3d 219, 234; Graves v. Commission on Professional Competence; supra; 63 Cal.App.3d 970; 976; hg. den.)

Third, where this Board is without jurisdiction with respect to a matter before it, it must dismiss the matter on its own motion, regardless of whether the jurisdictional issue has been raised by the parties. (Goodwine v. Superior Court (1965) 63 Cal.2d 481, 482; Abelleira v. District Court of Appeal, supra, 17 Cal.2d 280, 302-303; Linnick v. Sedelmeier (1968) 262 Cal.App.2d 12, fn. 1; Olmstead v. West (1960) 177 Cal.App.2d 652, 655; Warner v. Pacific Tel. & Tel. Co. (1953) 121 Cal.App.2d 497, 502, hg. den.; Estate of Zavadil (1962) 200 Cal.App.2d 32, 36; Costa v. Banta (1950) 98 Cal.App.2d 181, 182, hg. den.; and see Bender v.

Williamsport Area School District (1986) 475 U.S. \_\_\_\_  
[89 L.Ed.2d 501, 511, 514-514, reh'g. den. 90 L.Ed.2d 682];  
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxiles  
de Guinee (1982) 456 U.S. 694, 701-702 [72 L.Ed.2d 492,  
500-501.]

Fourth, where this Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel. (Schlyen v. Schlyen (1954) 43 Cal.2d 361, 375; Keithley v. Civil Service Board of City of Oakland (1970) 11 Cal.App.3d 443, 448, hg. den.; Summers v. Superior Court (1959) 53 Cal.2d 295, 298; Sampsell v. Superior Court (1948) 32 Cal.2d 763, 773, 776; Fong Chuck v. Chin Po Foon (1947) 29 Cal.2d 552, 554; Estate of Lee (1981) 124 Cal.App.3d 687, 692-693, hg. den.; People v. Coit Ranch, Inc. (1962) 204 Cal.App.2d 52, 57, hg. den.)

Lastly, lack of jurisdiction cannot be overcome by the established practices or customs of this Board, nor by Board regulation. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29; Morris v. Williams (1967) 67 Cal.2d 733, 737, 748; Calif. State Restaurant Assoc, v. Whitlow, Chief, Div, of Industrial Welfare (1976) 58 Cal.App.3d 340, 347, hg. den.; Harris v. ABC Appeals Board (1964) 228 Cal.App.2d 1, 6, hg. den.; Graves v. Commission on Professional Competence, supra, 63 Cal.App.3d 970, 976, hg. den.; Adamek & Dessert, Inc. v. Agricultural Labor Relations

Board (1986) 178 Cal.App.3d 970, 978, hg. den.; Brown v. State Personnel Board (1941) 43 Cal.App.2d 70, 75, hg. den.; Davidson v. Burns (1940) 38 Cal.App.2d 188, 192, hg. den.)

The record before us shows that the parties' collective bargaining agreement includes a grievance and arbitration provision culminating in binding arbitration. The contract further provides at article 15 that a grievance may be brought by the Association or any member of the bargaining unit covered by the terms of the agreement, and that:

[a] "grievance" occurs when a unit member has been adversely affected by an alleged violation, misinterpretation or misapplication of [the] Agreement...

Article 7, section 7.7 of the parties' collective bargaining agreement prescribes:

The instructional minutes for the intermediate grades may be increased by the District not more than fifteen (15) minutes during the 1982-83 school year. (Emphasis added.)<sup>8</sup>

In this case, EVEA alleged that the District unilaterally increased the number of instructional minutes during Conference Week in the fall of 1983 by approximately 45 minutes per day. Therefore, to the extent that the District increased the number

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<sup>8</sup>As noted by the ALJ, although under the terms of the collective bargaining agreement the 15-minute increase in instructional minutes was to be implemented during the 1982-83 school year, the agreement was not ratified until April 15, 1983. The parties, accordingly, agreed that the 15-minute increase would be implemented during the 1983-84 school year, beginning in the fall of 1983.

of instructional minutes in an amount greater than 15 minutes, it allegedly has engaged in conduct violative of the provisions of the agreement.

Turning now to the language of EERA., section 3541.5 (a) provides, in pertinent part:

Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery. (Emphasis added.)

In construing a statute, we begin with the fundamental rule that a court "should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230.) Further, it is a

fundamental maxim of statutory construction that, where no ambiguity exists, the intent of the Legislature in enacting a law is to be gleaned from the words of the statute itself, according to the usual and ordinary import of the language employed. In other words, where the language of a statute is clear and unambiguous, case law holds that the construction intended by the Legislature is obvious from the language used. (Noroian v. Department of Administration, Public Employees' Retirement System (1970) 11 Cal.App.3d 651, 654, hg. den.; McQuillan v. Southern Pacific Co. (1974) 40 Cal.App.3d 802, 805-806; Hoyme v. Board of Education (1980) 107 Cal.App.3d 449; Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal.3d 152, 155; People v. Boyd (1979) 24 Cal.3d 285, 294.)

The Legislature's limitation on this Board's jurisdiction to act prior to the exhaustion of the parties' grievance machinery culminating in binding arbitration is clearly evinced by its choice of words in section 3541.5(a), ". . . the Board shall not issue a complaint. . . ." In dealing with the provisions of EERA, it is important to note that Government Code sections 5 and 14 prescribe that the word "shall" is mandatory. Likewise, California case law customarily construes the word "shall" as being mandatory, while "may" is generally interpreted to describe permissive action on the part of a governmental entity. (Gov. Code, secs. 5 and 14; Fair v. Hernandez (1981) 116 Cal.App.3d 868, 878, hg. den.; Hogya v.

Superior Court, San Diego County (1977) 75 Cal.App.3d 122, 133, hg. den.; REA Enterprises v. California Coastal Zone Commission (1975) 52 Cal.App.3d 596, 606, hg. den.) Furthermore, even without the Government Code's prescriptions that "shall" is mandatory, "(t)he word 'shall' in ordinary usage means 'must' and is inconsistent with the concept of discretion." (People v. Municipal Court (1983) 149 Cal.App.3d 951, 954, hg. den.)

The word "shall" appearing in a statute has additionally been interpreted by courts as being "mandatory" in the sense that a governmental entity's failure to comply with a particular procedural step will have the effect of invalidating a governmental action to which the procedural requirement relates. In this instance, courts have held, the procedural requirement is considered jurisdictional. (Garcia v. County Board of Education (1981) 123 Cal.App.3d 807, 811-813; People v. McGee (1977) 19 Cal.3d 948, 959; Edwards v. Steele (1979) 25 Cal.3d 406, 410.) For example, in the case of Ursino v. Superior Court (1974) 39 Cal.App.3d 611, at issue was the application of a municipal ordinance providing that, "On the filing of any appeal, the Board [of Permit Appeals] . . . shall act thereon not later than forty (40) days after such filing . . . ." (P. 618.) In interpreting this ordinance, the court declared that "[t]he use of the word 'shall' in conjunction with the phrase 'not later than' is clearly

indicative of a mandatory intention." (P. 619.) The court went on to hold that any purported determination made by the Board of Permit Appeals after the 40-day period would be in excess of the Board's jurisdiction and void. (P. 619.)

By these authorities, it would be entirely anomalous to argue that, while "shall" is interpreted by the courts to impose an affirmative duty to act, the words, "shall not" may nonetheless be construed to confer discretion to act. The conclusion is unavoidable that the prohibitory language of EERA section 3541.5 is mandatory. Not only did the Legislature use the word "shall" to express its mandatory intent, it further proscribed certain conduct of the Board by the use of the negative, "not," thereby rendering the statute even more plainly mandatory. (Tarquin v. Commission on Professional Competence (1978) 84 Cal.App.3d 251, 257-258, hg. den.; McKee v. Commission on Professional Competence (1981) 114 Cal.App.3d 718, 721-722, hg. den.; Pollack v. Department of Motor Vehicles (1985) 38 Cal.3d 367, 377-378.)<sup>9</sup>

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<sup>9</sup>Tarquin v. Commission on Professional Competence, McKee v. Commission on Professional Competence and Pollack v. Department of Motor Vehicles all present decisions in which the words "shall not," appearing in a statute, have been interpreted to operate as a jurisdictional limitation on the authority of the governing board to which such statutory language is directed. For example, in Tarquin, supra, at issue was the application of section 13407 of the Education Code which provides, in pertinent part:

The governing board of any school district shall not act upon any charges

Furthermore, the second proviso of section 3541.5(a) is further evidence of the Legislature's intent to limit the Board's jurisdiction. It provides, in pertinent part:<sup>10</sup>

The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge . . . .  
(Emphasis added.)

In reading section 3541.5 as a whole, while the first proviso is intended to operate as a jurisdictional limitation on the Board's authority to issue a complaint where the matter

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of unprofessional conduct or incompetency unless during the preceding term . . . prior to the date of filing the charge and at least 90 days prior to the date of the filing, the board . . . has given the employee . . . written notice of the unprofessional conduct or incompetency, specifying the nature thereof . . . with such particularity as to furnish the employee an opportunity to correct his faults . . . .

In Tarquin, a school district sought to discharge a teacher for incompetence. The district, accordingly, served upon the teacher a notice of unsatisfactory performance. The district also relieved the teacher of his classroom duties. The court found that the notice to the teacher did not comply with the statute inasmuch as it did not give him an adequate opportunity to correct shortcomings. Thus, significantly, the court held that the school district was without jurisdiction to proceed against the teacher on charges of incompetency. (Pp. 258-259.)

<sup>10</sup>EERA section 3541.5(a) is quoted at page 21.

is covered by the parties' grievance procedures and binding arbitration, the statute goes on to vest the Board with discretionary jurisdiction to (1) review such arbitration and settlement awards for repugnancy and (2), if the Board finds repugnancy, to issue a complaint. The Legislature clearly delineated the Board's discretionary jurisdiction to review for repugnancy.

In reaching this conclusion, this Board recognizes the strong policy in California in favor of arbitration and that provisions of EERA embody such a policy. EERA provides a procedure for a party to seek a court order compelling arbitration, and specifies that this action is to be brought under Code of Civil Procedure section 1280 et seq.<sup>11</sup>**11**

Language of those statutory provisions and cases decided thereunder contain forceful expressions of this state's legislative and public policies in favor of arbitration. More than one court has declared:

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<sup>11</sup>Section 3548.7 states in pertinent part:

Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefore in the agreement . . . , the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefore in such agreement . . . .

General rules relative to arbitration and arbitration agreements and proceedings are provided in section 1280 et seq, Code of Civil Procedure. They reflect the strong legislative policy favoring arbitration

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(American Ins. Co. v. Gernand (1968) 262 Cal.App.2d 300, 304; Jordan v. Pacific Auto Ins. Co. (1965) 232 Cal.App.2d 127, 132; Morris v. Zuckerman (1967) 257 Cal.App.2d 91, 95, hg. den.)

In Delta Lines, Inc. v. International Brotherhood of

Teamsters (1977) 66 Cal.App.3d 960, 965-966, the court stated:

It has long been the policy of this state to recognize and give utmost effect to arbitration agreements. . . . "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing. . . . 'Therefore every reasonable intendment will be indulged to give effect to such proceedings.'" (Utah Const. Co. v. Western Pac. Ry. Co. (1916) 174 Cal. 156.) "This policy is especially applicable to collective bargaining agreements since arbitration under such agreements has been a potent factor in establishing and maintaining peaceful relations between labor and industry." (Meyers v. Richfield Oil Corp. (1950) 98 Cal.App.2d 667, 671.)

For other decisions in which there have been strong enunciations by California courts of the public policy in favor of arbitration, see also Lehto v. Underground Constr. Co. (1977) 69 Cal.App.3d 933; 939; hg. den.; Vernon v. Drexel Burnham & Co. (1975) 52 Cal.App.3d 706; 715-716, hg. den.; Pacific Inv. Co. v. Townsend (1976) 58 Cal.App.3d 1, 9-10; Posner v. Grumwald-Marx (1961) 56 Cal.2d 169, 176.

Accordingly, EERA proscribes this Board's issuance of a complaint against conduct prohibited by the parties' agreement prior to the exhaustion of the contract's grievance-arbitration machinery. Hence, PERB was and is without jurisdiction to issue a complaint on this allegation.

Turning to our prior precedent, one finds that this Board has traditionally followed the private sector's discretionary deferral doctrine as was articulated by the National Labor Relations Board (NLRB) in the case of Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. The genesis of this Board's adherence to the prearbitration guidelines set forth in Collyer occurred in the decision of Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a. In Dry Creek the Board explained:

While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.

A comparison, however, of the statutory framework of the National Labor Relations Act (NLRA) with that of EERA reveals the fallacy in the Board's conclusion in Dry Creek that EERA "essentially codified" the NLRB prearbitral policy. In sharp contrast to EERA, there is no statutory proscription or

deferral provision under the NLRA. Indeed, unlike EERA, the NLRA explicitly provides that:

The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. (29 U.S.C, sec. 160(a), emphasis added.)

Thus, section 10(a) constitutes an expression of Congress' intention for the NLRB's jurisdiction to be paramount over any system which might be devised by the parties to settle their disputes, including binding arbitration pursuant to a provision under the collective bargaining agreement. (See Morris, *The Developing Labor Law* (2d ed. 1983) p. 918; Johannesen & Smith, Collyer, Open Sesame to Deferral (1972) 23 Lab. L.J. 723.) Therefore; quite unlike the jurisdiction of PERB; that of the NLRB is not displaced by the presence of an arbitration provision within the parties' agreement covering the matter at issue. On the contrary, even though a breach of contract remediable through arbitration occurs, the NLRB may still, if it so chooses, exercise its jurisdiction under the NLRA to prosecute conduct which also constitutes an unfair labor practice. (NLRB v. Strong Roofing and Insulating Co. (1969) 393 U.S. 357, 361 [70 LRRM 2100, 2101]; International Harvester Company (1962) 138 NLRB 923 [51 LRRM 1155]; C & C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 2065]; NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069].)

Although Congress has not statutorily limited the NLRB's jurisdiction to adjudicate unfair practices where the conduct at issue also constitutes a breach of contract cognizable under the parties' grievance machinery, Congress has nonetheless declared, at section 203(d) of the Labor Management Relations Act, that "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement" should be the parties' agreed-upon method of dispute resolution. (29 U.S.C. sec. 173(d), emphasis added.) The NLRB has accordingly developed a comprehensive, if not always consistent,<sup>12</sup> doctrine of prearbitral deferral. (See Dubo Manufacturing Corporation (1963) 142 NLRB 431 [53 LRRM 1070]; Collyer Insulated Wire, supra, 192 NLRB 837.)

More specifically, in Collyer Insulated Wire the NLRB articulated standards under which deferral would be deemed appropriate. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to

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<sup>12</sup>For example, the NLRB has reversed itself on the issue of the propriety of deferring to arbitration alleged discrimination violations. The current position of the NLRB is that such violations are properly deferrable. (See General American Transportation Corp. (1977) 228 NLRB 808 [94 LRRM 1483] overruled by NLRB in United Technologies Corp. (1984) 268 NLRB 557 [115 LRRM 1049], thereby returning to doctrine articulated in National Radio Co., Inc. (1972) 198 NLRB 527 [80 LRRM 1718].)

arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute. (Collyer Insulated Wire, supra, 192 NLRB 837, 842.)

While the NLRB standards set forth in Collyer Insulated Wire apply in the the private sector, such NLRB guidelines are not controlling nor even instructive in administering EERA. Unlike the NLRA, under EERA, where a contract provides for binding grievance arbitration, it is elevated to a basic, fundamental and required component of the collective bargaining process. Quite simply, the Legislature did not "essentially codify" the Collyer requirements. In fact, there is absent even the suggestion in the language of section 3541.5, any other provision in EERA; or in its legislative history of an intent of the Legislature to codify Collyer. On the contrary, by its choice of prohibitory language, the Legislature plainly expressed that the parties' contractual procedures for binding arbitration, if covering the matter at issue, precludes this Board's exercise of jurisdiction. Accordingly, we overrule Dry Creek and its progeny<sup>13</sup> to the extent that they would

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<sup>13</sup>We also overrule the following PERB decisions to the extent that they rely on the Collyer standards for prearbitration deferral: Lancaster Elementary School District (1983) PERB Decision No. 358; Conejo Valley Unified School District (1984) PERB Decision No. 376; State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S; Los Angeles Unified School District (1986) PERB

condition the proscription of section 3541.5 on an application of the Collyer prearbitration deferral factors.

Finally, in finding today that section 3541.5(a) precludes this Board's exercise of jurisdiction where the disputed issue is covered by the parties' contractual grievance-arbitration procedures, we observe that our regulations are not to be interpreted or applied in such a manner so as to override this express jurisdictional barrier. In this regard, the Board's application of PERB Regulation 32646 is at issue. PERB Regulation 34246 provides, in pertinent part:

If the respondent believes that issuance of the complaint is inappropriate . . . because the dispute is subject to final and binding arbitration . . . the respondent shall assert such a defense in its answer and shall move to dismiss the complaint, . . . .

In Charter Oak Unified School District (1982) PERB Order No. Ad-125, this Board held that the district's failure to demonstrate that the association's charge was cognizable under a contractual grievance machinery to which PERB must defer was sufficient grounds to affirm the hearing officer's decision to refuse to dismiss a complaint. While the Board in Charter Oak did not expressly hold that section 3541.5(a) should be considered an affirmative defense under EERA, subject to a party's "waiver," it did place upon the District, the defending

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Decision No. 587; State of California (Department of Personnel Administration) (1986) PERB Decision No. 600-S; San Juan Unified School District (1982) PERB Decision No. 204.

party, the burden of showing that "deferral" was warranted and that a complaint, therefore, should not have been issued. While Procedurally it is appropriate to have the respondent call to the Board's attention that the charge is properly deferrable, its failure to do so cannot be used as a basis for expanding this Board's jurisdiction. Accordingly, we disapprove of any implication in Charter Oak that prearbitration deferral is an affirmative defense under EERA subject to a party's waiver.

### Conclusion

In summation, we affirm the ALJ's proposed decision to the extent that it was found that the District violated section 3543.5(c) of the EERA, and derivatively, section 3543.5(a) and (b) by unilaterally changing the method of compensating teachers for extra duties performed during the summer of 1983, by unilaterally implementing a proposed \$1,500 stipend for teachers assigned to the learning specialist classification, and by bypassing the exclusive representative in the direct negotiation of a reduction in the work year of one unit member for the 1983-84 and 1984-85 school years. Accordingly, we adopt the ALJ's proposed decision and remedy pertaining to these charges. Furthermore, consistent with the discussion herein, we dismiss those charges alleging that the District violated EERA by failing to give EVEA notice and an opportunity to negotiate over the effects of its decision to reduce SIP

instructional aide time, and by unilaterally extending the workday of grades 4-6 teachers for four days during the 1983 fall conference week.

ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Lake Elsinore School District, its Board of Trustees, Superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning: (a) changes in the rate of pay to unit members for summer work performed; (b) implementation of the learning specialist program, including the amount of annual stipend paid; and (c) changes in the certificated work year and other terms and conditions of employment within the scope of representation.

2. Interfering with the right of the employees to be represented in their employment relations with the District by the employee organization of their choice.

3. Interfering with the right of the exclusive representative to represent members of the bargaining unit in their employment relations with their employer.

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

1. Restore the District's past practice of compensating bargaining unit members at hourly rates of pay for summer work and compensate any affected employees for monetary losses suffered as a result of the unilateral change in the summer of 1983. All payments shall include 10 percent per annum interest. Upon request, negotiate in good faith with the Association on the matter. However, the status quo ante shall not be restored if, subsequent to the District's actions the parties have, on their own, reached agreement or negotiated through completion of the impasse procedure concerning the rate of summer pay.

2. Upon request, meet and negotiate with the Association concerning the negotiable aspects of the learning specialists program, including the amount of annual stipend to be paid.

3. Upon request of the Association, reinstate the work year and other terms and conditions of employment of the bilingual facilitator to those of unit members at the time of unlawful changes in either 1983 or 1984; and negotiate in good faith with the Association before changing any aspect of the employee's work year or other terms and conditions of employment.

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

5. Provide written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

It is furthered ORDERED that all other portions of the unfair practice charge and complaint are DISMISSED.

Members Craib and Shank joined in this Decision.

APPENDIX

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



After a hearing in Unfair Practice Cases Nos. LA-CE-1827 and LA-CE-2031, Elsinore Valley Education Association, CTA/NEA v. Lake Elsinore School District in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a), (b) and (c) by unilaterally making changes concerning matters within the scope of representation affecting certain unit members without first meeting and negotiating with the exclusive representative of such employees.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning: (a) changes in the rate of pay to unit members for summer work performed; (b) implementation of the learning specialist program, including the amount of annual stipend paid; and (c) changes in the certificated work year and other terms and conditions of employment within the scope of representation.

2. Interfering with the right of employees to be represented in their employment relations with the District by the employee organization of their choice.

3. Interfering with the right of the exclusive representative to represent the members of the bargaining unit in their employment relations with their employer.

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

1. Restore the District's past practice of compensating bargaining unit members at hourly rates of pay for summer work and compensate any affected employees for monetary losses suffered as a result of the unilateral change in the summer of 1983. All payments shall include 10 percent per annum interest. Upon request, negotiate in good faith with the Association on the matter. However, the status quo ante shall not be restored if, subsequent to the District's actions the parties have, on their own, reached agreement or negotiated through completion of the impasse procedure concerning the rate of summer pay.

2. Upon request, meet and negotiate with the Association concerning the negotiable aspects of the learning specialists program, including the amount of annual stipend to be paid.

3. Upon request of the Association, reinstate the work year and other terms and conditions of employment of the bilingual facilitator to those of unit members at the time of unlawful changes in either 1983 or 1984; and negotiate in good faith with the Association before changing any aspect of the employee's work year or other terms and conditions of employment.

DATED: \_\_\_\_\_

LAKE ELSINORE SCHOOL DISTRICT

By: \_\_\_\_\_  
Authorized Representative

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