STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

IMPERIAL TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. IMPERIAL UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-2795 Administrative Appeal PERB Order No. Ad-189 July 12, 1989

Appearances: Littler, Mendelson, Fastiff & Tichy, by Richard J. Currier and C. Anne Hudson, Attorneys, for Imperial Unified School District.

Before Porter, Craib and Camilli, Members.

DECISION

CAMILLI, Member: This matter is before the Public Employment Relations Board (PERB or Board) pursuant to an appeal filed by the Imperial Unified School District (District). On April 6, 1989, a PERB administrative law judge (ALJ) denied the District's motion to dismiss the complaint.

PROCEDURAL BACKGROUND

The Imperial Teachers Association, CTA/NEA (Association) filed an unfair practice charge against the District alleging that in the 1988-89 school year the District unilaterally increased the number of instructional minutes at Frank Wright

Intermediate School in violation of sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

The District requested that the charge be dismissed because the dispute was covered by provisions of the contract, and therefore must be deferred to binding arbitration pursuant to EERA section 3541.5(a)(2).[2] The regional attorney refused to dismiss the charge, and a complaint was issued alleging a violation of EERA section 3543.5(c), and derivatively, section 3543.5(b).

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[1]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 states, in pertinent part:

> 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.

[2]Section 3541.5(a)(2) states, in pertinent part, that PERB:

> Shall not . . . issue a complaint against conduct also prohibited by the provisions of the . . . [collective bargaining agreement in effect] 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.

The District thereafter filed a Motion to Dismiss Complaint, based on the deferral claim. The motion was denied by the ALJ. The hearing on the merits of the complaint was scheduled for June 15, 1989; however, the Board issued a stay pending this appeal. (See Imperial Unified School District (1989) PERB Order No. Ad-185.)

The Board affirms the ALJ's ruling denying the motion to dismiss in accordance with the discussion below.

DISCUSSION

The District's main contention is that the Board agent should have deferred this case to binding arbitration under Lake Elsinore School District (1987) PERB Decision No. 646.

In Lake Elsinore, the Board held that section 3541.5(a)(2) established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties; and (2) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration.

In the instant case, the District claims that deferral is mandatory because an increase in instructional minutes at Frank Wright Intermediate School was arguably permitted by provisions found in the 1987-89 Master Contract (Contract) between the District and the Association. Article XII of the Contract which defines "workday" states, in pertinent part:

> The Imperial Unified School District has established the workday for teachers as being

> seven hours and twenty minutes after the beginning time. It is understood that the normal starting time (except at Westside School) is at 8:00 a.m., except under unusual circumstances.

Article II of the Contract, entitled "District Rights," provides that the District retains all rights to efficiently manage the District "except as limited by this Agreement."

Both the ALJ and the regional attorney determined that the subject of instructional time is not covered by the Contract, and that the District's unilateral increase in the instructional minutes of teachers is therefore not arguably prohibited by the two provisions taken together, or viewed separately. As section 3541.5(a)(2) requires deferral only where the conduct complained of in the charge is arguably prohibited by the parties' agreement, both the regional attorney and the ALJ concluded that deferral would not be proper in this case.

We agree. The parties' Contract does not contain a provision regarding instructional minutes; however, the District would have the Board read Articles XII and II as arguably incorporating the subject of instructional minutes. We decline to take that view. As the ALJ correctly pointed out, the Board has held in previous decisions that instructional time is a term and condition of employment separate from the length of the workday. (San Mateo City School District (1980) PERB Decision No. 129; Sutter Union High School District (1981) PERB Decision No. 175.) Consequently, we find that neither Article XII nor Article II concern the subject of instructional minutes and,

therefore, the provisions do not arguably prohibit the conduct at issue in this matter.

The District also alleges that both the ALJ and the regional attorney incorrectly applied a waiver test. The District argues that it is not its contention that the Association clearly and unmistakably waived its right to bargain instructional minutes. Instead, the District argues that it was not required to prove a clear and unmistakable waiver by express contract language, or that the pertinent contract provisions "clearly and unmistakably cover the matter in dispute." The District cited Conejo Valley Unified School District (1984) PERB Decision No. 376 and Roy Robinson Chevrolet (1977) 228 NLRB 103 [94 LRRM 1474] for the proposition that neither PERB nor the National Labor Relations Board require express contract language in order to hold that deferral is required. However, the facts in the present case are quite different. Here, the agreement lacks a provision that even mentions instructional time. The District attempts to show that the Article XII "workday" provision implies instructional time as well. However, as we noted earlier, the Board has previously ruled that instructional time is a bargaining subject that is separate from workday time. Accordingly, we conclude that the unilateral increase of instructional time is not arguably prohibited by the Contract and that the underlying charge is therefore not subject to mandatory deferral.

ORDER

The Board hereby DISSOLVES the order of a stay (PERB Order No. Ad-185), DENIES the appeal of the ALJ dismissal, and ORDERS the ALJ to schedule a hearing on the merits of the complaint in Case No. LA-CE-2795.

Members Porter and Craib joined in this Decision.