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Legal Issues in Higher Education - Handout: Antelope Valley College Federation of Classified Employees v. Antelope Valley Community College

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41 PERC ¶ 46, 41 Pub. Employee Rep. for California ¶ 46, 2016 WL 4750170

California PERB Administrative Law Judge

Antelope Valley College Federation of Classified Employees, Charging Party, v. Antelope Valley Community College
District, Respondent
No. LA-CE-5931-E
CU
August 5, 2016

Related Index Numbers

[9.651](#) Waiver, Right to Bargain/Waiver by Conduct, Failure to Request Bargaining
[41.7](#) Duty to Supply Information
[43.92](#) Management Rights, Functions and Programs
[43.447](#) Job Content and Scheduling, Hours, Workweek
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[72.55](#) Refusal to Bargain in Good Faith, Direct Communication With Employees
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[74.3211](#) Types of Orders, Specific Affirmative Action, Supply Requested Information

Appearances:

David Conway, Attorney, for Antelope Valley College Federation of Classified Employees, Law Offices of Robert J. Bezemek
Eileen O' Hare-Anderson, Attorney, for Antelope Valley Community College District, Liebert Cassidy Whitmore

Judge / Administrative Officer

CU

Ruling

In a proposed decision, PERB' s ALJ dismissed a portion of a union' s unfair practice charge alleging that the employer-community college district violated several EERA provisions. However, the ALJ also determined that the employer violated EERA Section 3543.5(a), (b) and (c) by significantly delaying in its response to the union' s information request and by possibly failing to provide certain other requested information. The ALJ concluded that the employer unilaterally changed existing policies by modifying certain bargaining unit members' workweeks without their approval.

District errs in modifying employees' workweek, failing to provide information

Meaning

The ALJ explained that, when called upon to construe parties' agreements, PERB uses general principles of contract interpretation. In concluding that the employer made an unlawful unilateral change here, the ALJ explained that a certain bargaining agreement provision required some form of unit member approval before modifying unit members' workday/workweek.

Case Summary

The union brought an unfair practice charge alleging that the employer-community college district committed numerous violations of the duty to bargain in good faith under EERA provisions. The union contended that the employer altered its operational hours without engaging in required effects bargaining. It also contended that the employer bypassed the exclusive

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representative, failed to provide requested information, and unilaterally changed an existing policy about workweek modifications. PERB's ALJ issued a proposed decision regarding the charge. The ALJ rejected the union's effects bargaining claim upon determining that the union's unexplained and unreasonable delay in pursuing effects bargaining constituted a waiver of the right to bargain those effects. Supervisors' communications with employees about modifying their workweeks did not constitute an unlawful bypass, the ALJ found. The ALJ determined that the employer violated EERA Section 3543.5(a), (b) and (c) by significantly delaying in its response to the union's information request and by possibly failing to provide comprehensive facts concerning bargaining unit members whose workweeks changed in the spring 2014 semester. Upon considering the union's unilateral change allegation, the ALJ determined there was no established practice of holding a vote before changing unit members' workweeks. However, the ALJ concluded that the employer unilaterally changed existing policies by modifying certain bargaining unit members' workweeks without their approval, and that the unilateral change impacted employees working in three different areas. The ALJ issued a cease and desist order. The ALJ directed the employer to offer to rescind the spring 2014 workweek modifications for affected employees and to provide the union with a list of unit members who were affected by workweek modifications proposed for the spring 2014 semester.

Full Text

Proposed Decision

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public school employer of multiple violations of the duty to bargain in good faith under Educational Employment Relations Act (EERA),¹ including changing the school's operational hours without engaging in required effects bargaining, bypassing the exclusive representative, failing to provide requested information, and unilaterally changing an existing policy about workweek modifications. The employer denies any violation.

Procedural History

On June 22, 2014, the Antelope Valley College Federation of Classified Employees (Federation) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board), asserting a variety of bargaining claims relating to the Antelope Valley Community College District's (District's) decision to change its operational hours.

On August 24, 2015, the General Counsel's Office issued a complaint alleging that the District changed its operational hours without providing the Federation with the opportunity to negotiate over the effects of that decision; changed its policy for modifying employees' workday/workweek;² failed to properly respond to a December 5, 2013 information request; and, through supervisors Jill Zimmerman, Sherri Padilla, and Diana Keelen, bypassed the Federation to discuss modifying unit members' workweeks. The District filed an answer to the PERB complaint on September 16, 2015, denying the substantive allegations in the complaint and asserting numerous affirmative defenses. An informal settlement conference was held on September 25, 2015, but the matter was not resolved.

The parties participated in a formal hearing on January 25-29, 2016. On the first day, the District stipulated that it was waiving its right to claim that any allegations in the PERB complaint were untimely. During the course of the hearing, the parties learned that a District office maintains an audio recording of a meeting described by multiple witnesses. At the close of the hearing, the parties agreed to leave the evidentiary record open for the limited purpose of accepting the recording and written transcript of that meeting.

On February 23, 2016, the Federation submitted the audio-recording and transcript, along with three declarations describing the chain of custody for the recording as well as the transcription process, including the steps taken to ensure that the District's counsel agreed with the accuracy of the transcript. The District made no objection to either the recording, the declarations, or the transcript.³

The parties files closing briefs on April 12, 2016. At that point, the record was closed and the case was considered submitted

for decision.

Findings of Fact

The Parties

The District is a “public school employer” within the meaning of EERA section 3540.1, subdivision (k). The Federation is an “exclusive representative” within the meaning of EERA section 3540.1, subdivision (e), and represents the District’s classified bargaining unit. In the Fall 2013 semester, there were around 200 employees in the Federation’s bargaining unit.

The Parties’ Collective Bargaining Agreement

The parties have a Collective Bargaining Agreement (CBA) that was in effect by its own terms from July 1, 2012, to June 30, 2015. Article 3 specifies that the CBA represents all of the parties’ understandings and agreements after having had the unlimited right and opportunity to negotiate, absent mutually agreed-upon reopeners. It further states that the terms of the CBA prevail over any past practices not codified in the agreement and that the parties waive the right to request negotiations for the life of the CBA.

Article 4 is entitled “MANAGEMENT RIGHTS,” and states, in relevant part:

The District, on its own behalf and on behalf of the electors of the District, has all the customary and usual powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of California, and of the United States, including, but without limiting the generality of the foregoing, the right:

[...]

To direct the work of its employees, determine the time and hours of operation and determine the kinds and levels of services to be provided and the methods and means of providing those services, including entering into contracts with private vendors for services as authorized by the California Education and Government Codes; as modified by case law[.]

(Emphasis supplied.)

CBA Article 11 is entitled, “WORKWEEK AND COMPENSATION.” Article 11.0 states, in relevant part:

Workweek- The normal workweek for a full-time unit member shall be 40 hours per week. The normal workday shall be eight (8) hours. Other schedules may be adopted, in accordance with Article 11.2.

Article 11.2 states, in its entirety:

Modified Workday/Workweek- Individual departments, with approval of the appropriate vice president or the president, may establish a workday/workweek for all or certain classes of unit members or for individual unit members within a class when by reason of the work location and duties actually performed, their services are not required for a workweek of five (5) consecutive days. The vice president or the president may withdraw approval if it is determined that the services of an individual employee or an employee group are required for a workweek of five consecutive days. *A modified work schedule may be initiated by the employee or the supervisor.* Individual departments can use, but are not limited to one of the modified schedules listed below:

Days	9/80	4/10	49 & 1/2
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Mon	9	10	9
Tue	9	10	9
Wed	9	10	9
Thu	9	10	9
Fri	8		4

Every other Friday off

The establishment of a modified workday/workweek must be approved by a majority of the regular unit members affected.^[4]

(Italics supplied.) Nothing in the CBA explicitly defines the terms “ departments,” “ approved,” or “ affected.” References to the term “ department,” in the CBA were somewhat contradictory and inconclusive. For instance, Article 5.13, refers to “ payroll” as a department. However, in the Classifications and Salary Ranges list, attached as an exhibit to the CBA, “ Payroll Technician,” is listed as being part of the “ Human Resources & Employee Relations” department. According to Vice President of Human Resources (HR), Mark Bryant, “ [t]here isn’ t a clear definition of what a department is and there’ s areas, there’ s offices, people in job descriptions doing their employment duties.” He said that the term department is sometimes used interchangeably with “ area” or “ office.” Bryant also explained that the term “ department” was most commonly used to refer to academic areas. Current Superintendent/President Ed Knudson said that all employees working under a common supervisor constitutes a single department.

The CBA uses the terms “ approved” or “ approval” in multiple contexts including, expressions of agreement or acceptance by an individual supervisor (Article 9.1), a District Vice President (Article 11.5), the Federation leadership (Article 13.3), the District’ s governing board (Article 15.0), or a formal “ Ratification” vote by the bargaining unit (Exhibits to the CBA: Basic Terms of Collective Bargaining). It is unclear from the language of the CBA, which form or forms of approval were intended in Article 11.2.

Antelope Valley College

The Antelope Valley College (College) is the District’ s single college campus.⁵

Prior to the Spring 2014 semester, most offices at the College staffed by Federation unit members opened between 7:30 a.m. and 8:00 a.m., and closed between 4:30 p.m. and 5:00 p.m., Monday through Friday. Certain locations, such as the Library, kept different hours. The College’ s operational hours did not dictate the College’ s academic calendar or its class schedule.

Consistent with CBA Article 11.0, prior to the Spring 2014 semester, the majority of Federation unit members maintained a normal 5/8 workweek. Most also maintained standard working hours of 8:00 a.m. to 4:30 p.m. However, many unit members also worked alternate workweeks. Multiple District supervisors testified that they had employees working alternate workweeks, such as 4/10s, 9/80s and 4/9s and 1/2. Each time, the modification was arranged directly between the employee and his or her supervisor.

The History of Moving to “ Summer Hours”

The College sometimes moves to a Summer hours schedule due to reduced student traffic. The move entails changing both the College’ s operational hours and employees’ workweeks to a 4/10 schedule, with Fridays off. Closing the campus on Fridays typically reduces the College’ s operating expenses. The changes last for the duration of the Summer and revert back in the following Fall semester. Talks to move to Summer hours have been initiated by either the District or the Federation.

Antelope Valley College Federation of Classified Employees, et al., 41 PERC ¶ 46 (2016)

Before moving to Summer hours, the Federation conducts a vote to determine whether unit members approve of the workweek change. All unit members are eligible to vote. The unit is presented with the question of whether they agree with the change and may select “yes or no.” At different times, the Federation has run the vote using paper ballots or e-mail. Once voting is complete, the Federation tallies the ballots. The District is not involved in the voting process and the Federation does not disclose the numerical tally. Rather, the Federation notifies the District which option the majority selected without specific numbers. The unit has approved the move to a Summer 4/10 workweek at least four times dating back to 2008. The most recent occurrence was in Summer 2013. That vote occurred in March 2013.

Employees who had personal conflicts with a 4/10 workweek were allowed to work out alternatives directly with their supervisors. For instance, in 2012, Ford reported to then-Superintendent/President Dr. Jackie Fisher that a majority of employee supported moving to Summer hours, but some employees expressed an interest in a different schedule for child care reasons. Dr. Fisher responded that employees and supervisors were allowed to collaborate on their own specific schedules. At hearing, Ford testified that those accommodations were made directly between the employees and their supervisors. Fisher did not testify.

The 2013 Decision to Modify the College’s Operational Hours

In June 2013, the District hired Knudson as Superintendent/President. Upon his arrival, Knudson observed long lines of students waiting for services at College offices early in the morning. Knudson also believed that the College’s existing operational hours did not adequately serve the College’s evening students.

Knudson met with District supervisors and managers on or around November 12, 2013. During the meeting, Knudson proposed extending the College’s operational hours on Monday through Thursday, and shortening the hours on Fridays. Knudson testified that, during the meeting, “I said what I was hoping is that individual managers would work within their units to come up with any obstacles or issues that might arise in the implementation of [the change], and then we could address those issues as they came up.” Knudson also testified that “I also said on several occasions, if there are any collective bargaining issues that arise out of this, we need to identify them so we can address them that way.” Multiple District supervisors corroborated this testimony. Dr. Leslie Uhazy, Dean of Math and Sciences, also said that Knudson told supervisors that employees would not be required to adopt a 4/9 and 1/2 workweek. Knudson instead said that they had flexibility to work with employees. The District planned on keeping a limited number of College buildings open for employees desiring to work on Friday afternoons. Around that time, Knudson also discussed the operational hours change in a “town hall” style meeting open to employees and the community at large. Knudson raised his concerns about evening students as well as his observation about reduced student traffic on Friday afternoons.

On or around November 14, 2013, the College, at Knudson’s direction, e-mailed a “Campus Update” to all employees describing Knudson’s proposal to revise the College’s weekly operational hours to 7:30 a.m. to 6:00 p.m. Monday through Thursday, and 7:30 a.m. to 11:30 a.m. on Friday. In the update, Knudson specified that the operational hours change did not necessarily mean that all employees would need to work until 6:00 p.m., on Monday through Thursday and said that some employees might retain the normal 5/8 workweek. Both Knudson and Bryant testified that the District could have covered the College’s new weekly operational hours even if no employee wanted to modify his or her workweek. They felt that the District could have achieved coverage through a combination of staggering employees’ working hours and consolidating coverage for multiple offices for limited periods of time.⁶

The Federation’s Poll and Vote

Federation President, and CalWorks Coordinator, Pamela Ford testified that unit members approached her with concerns about the operational hours change. In November, 2013, Ford e-mailed dues paying members of the Federation, explaining that the District had not discussed any potential changes to employees’ schedules with the Federation. She asked members to express their opinion over changing from “working Monday - Friday 8 to 430, to working four days a week @ 9 hours and one day @ hours.” According to Ford, most disfavored the change. It is unclear to what extent the respondents to Ford’s

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e-mail actually worked Monday through Friday, 8:00 a.m. to 4:30 p.m. Ford herself acknowledged that she had different working hours.

On November 14-15, 2013, the Federation conducted a vote over the proposed change. All unit members were invited to participate. The ballot had two options:

1. Maintain regular 8 hour work week schedule
2. Change to the District' s modified work schedule of Monday — Thursday 7:30 to 6:00 pm and Friday 7:30 am to 11:30 am.

According to Ford, a majority of the votes were cast against in favor of the first ballot option. It is unclear whether unit members that did not have an eight-hour workday participated in the vote.⁷

Ford e-mailed Knudson on November 21, 2013, stating that Article 11.2 requires a majority of affected unit members to approve any modified workday/workweek, that the Federation conducted a vote, and that:

With hours being a mandatory subject of bargaining, members of the Classified Bargaining Unit cast their votes with a majority voting in favor of remaining with working the regular schedule of an eight hour workday, five day work week[.]

In a second e-mail to Knudson on December 4, 2013, Ford repeated that a majority of the unit voted in favor of retaining an eight-hour workday. Ford also stated that “ the change in work hours is a mandatory subject of bargaining and today the Federation has not been approached with a request to bargain this change.”

Knudson responded to Ford on December 4, 2013, stating, that Article 4 authorizes the District to establish the operational hours of the College without negotiations. Knudson also pointed out that Article 11.2 allows individual supervisors to work with employees in establishing modified workweeks and that “[e]ach individual department or work unit will have different approaches to meeting the change in operational hours, and according to the agreement, we would address those with each department as needed.” He explained that he asked District managers to identify any issues relating to the change and that those issues would be resolved consistent with the CBA.

Regarding a vote, Knudson said that any vote about workweek changes would have to be conducted by the affected employees in each individual unit or department. Knudson requested details about the Federation' s November 14-15 vote, such as what options were presented on the ballot, whether the vote was conducted by department, and the actual numerical tally of the votes. Knudson said in his e-mail that the Federation' s responses would assist him in identifying those issues that required resolution through bargaining. It is not clear whether anyone from the Federation responded.

The December 5, 2013 Town Hall Meeting

Knudson hosted another town hall meeting on December 5, 2013. During the meeting, Knudson stated that the District would comply with the CBA when it came to modifying employees' workweeks. Glenn Collins, Laboratory Technician and Federation Grievance Chair, asked whether Knudson meant that there would be a vote. According to Collins, “ he said, yes. And he said something after that, but I forgot, but he did say yes to that. We were going to have a vote.” No evidence was presented about what else Knudson said about the vote during that meeting.

The December 5, 2013 Information Request

Ford e-mailed Knudson on December 5, 2013, stating that the Federation did not object to voting on workweek changes by department, but only if “ every department and federation unit member within that department [was] identified and agreed upon by the Federation before the vote would occur.” Ford also expressed concern over reports she heard that managers were developing new work schedules with employees without discussing a vote, in compliance with Article 11.2. Ford concluded

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her e-mail with the following request:

1. The Federation requests verification and a list [of] all departments and the number departments and the number of federation unit members in each of those departments.
2. The Federation requests to review all proposed District work modifications schedules for each individual federation unit member before the vote would take place.
3. The Federation requests to know how seniority would factor into schedule selections.
4. The Federation requests a complete list of all classified Bargaining unit employees.
5. The Federation reserves the right to address and request additional information regarding any other issues or questions that may arise before voting process begins.

The December 10, 2013 Meeting

Knudson and Ford met on December 10, 2013, and discussed the operational hours change. Federation Vice President, and Library employee, Maria Valenzuela also attended. Ford expressed an interest in conducting a vote prior to any workweek modifications. She requested that the District delay changing its operational hours to allow time for the vote to be completed. Knudson agreed to delay implementation. Ford also reasserted the Federation's request for a list of employees, separated by department, to facilitate the voting process. Knudson said that he would pass the request along to Bryant, Vice President of HR.

On December 11, 2013, Ford e-mailed Knudson, with a courtesy copy to Bryant, confirming that the Federation was requesting "a list of all departments and all names of employees in each department so that classified employees could move forward with the vote regarding the modification of schedule[s]."

On December 13, 2013, Knudson e-mailed Ford, stating that Bryant would be "providing a new and complete list of all classified employees." Regarding the vote, Knudson offered assistance in conducting the vote electronically. He also said "Mark [Bryant] and I would like to schedule a meeting with you next week to discuss our mutual interest in this issue. This is not a negotiation, a discussion, to achieve an understanding of the nature of the vote, the questions to be posed on the ballot, and receiving a tally of the results." Ford declined both the offer for assistance and the offer to meet. That day, Knudson also e-mailed all District employees about the change in operational hours. In the e-mail, Knudson confirmed that the operational hours of the College would change to 7:30 a.m. to 6:00 p.m., Monday through Thursday and 7:30 a.m. to 11:30 a.m. on Fridays. Regarding employees' workweeks, Knudson said:

I asked each unit manager to address the change within their respective units to allow as much flexibility in scheduling as possible. I understand that those conversations have taken place and the scheduling addressed.

The collective bargaining agreement with the [Federation], Article 11.2 allows for alternate work week schedules to be initiated by either the employee or the supervisor. Many people are already working an alternate schedule. *This Article also requires that once an alternate work schedule is proposed that a vote of the affected members of the department be conducted. The [Federation] will be conducting that vote, by department, in the near future.*

Additionally, at the request of the [Federation], I am delaying the formal implementation and publication of the new work hours until the beginning of spring semester, Monday February 3, 2014.

(Emphasis supplied.)

Later in the day on December 13, 2013, Ford e-mailed Knudson, thanking him for agreeing to the delay and requesting both a list of District departments and the names of all classified bargaining unit members.

Communications Over the December 2013 Information Request

On December 17, 2013, Bryant e-mailed Ford a list of all District classified employees, separated by office/area. He noted that the list included some classified personnel excluded from the Federation's unit, such as confidential employees and classified supervisors. At hearing, Bryant testified that he included those employees because he felt that was what the Federation had requested. Ford responded later in the day on December 17, 2013. She said that the Federation wanted the list to only include unit members. She also requested that the District further separate employees by individual departments, using as an example, the Math and Sciences Division, which includes the academic departments biology, chemistry, physical science, and math, as well as clerical staff.

On December 18, 2013, Bryant provided a new employee list to Ford, including only bargaining unit members. Regarding the categorization of employees by department, Bryant said in the e-mail "[o]ur current system does not allow us to break it down any further." He offered to meet to discuss the issue further. There was no evidence that the Federation responded for the remainder of 2013.

On January 15, 2014, Federation Grievance Chair, Collins, informed Bryant that he was the Federation's primary contact regarding the information request. He asked whether the District was assigning all employees to a 4/9 and 1/2 workweek. Bryant responded the next day stating that "[i]ndividual offices/areas have been given the latitude to work with employees regarding their individual schedules."

Collins e-mailed Bryant on January 21, 2014, requesting that the District provide the Federation with a list of only "affected" unit members, as used in Article 11.2 separated by department. He said that if the District did not provide the requested information, then the Federation would consider the results of its November 14-15, 2013 vote to be its official position on the matter.

On January 30, 2014, Bryant replied, acknowledging the problems with applying the terms of Article 11.2. He again stated that HR's system could not further sub-divide employees' work location from what was already provided. He also stated that the District maintained "no specific data base" for only affected unit members. Bryant said that the "HR office is in the process of collecting the documentation from the different areas regarding the updated schedules for each employee." Bryant also expressed concern over the Federation's November 2013 vote because he did not know how the vote was conducted, what was presented on the ballot, which groups participated in the vote, and what the final tally was. Finally, Bryant repeated the offer to meet and resolve their outstanding issues.

Collins replied to Bryant on January 31, 2014. He said that the Federation offered to conduct a department-by-department vote based on the District's concerns about the prior vote. He said that such a vote was still possible if the District were to identify which unit members were affected by the operational hours change, and their respective departments. Collins described a proposed voting process including a two-day voting period in which affected unit members could select between the following options:

1. Maintain regular 8 hour week work [sic] schedule.
2. Change to the District's modified work schedule of Monday - Thursday 7:30 [am] to 6:00 pm and Friday 7:30 am to 11:30 am.

Under the proposal, the Federation would be responsible for conducting the vote, segregating ballots by department (assuming that information was provided by the District), and reporting whether the majority of voters in each department voted for or against the change. Collins stated that:

It is the Federation's official position that no [F]ederation unit members ['] work schedule should be modified without a majority approval vote from affected unit members in their respective departments. Any work schedule modifications, without majority vote of approval, would constitute a unilateral change to the CBA.

In response to Bryant's offers to meet, Collins said that he was responsible for reporting his communications back to the

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Federation leadership and that “ email is the best vehicle to accomplish this.” It is unclear whether the District responded to this e-mail directly.

Implementation of the Operational Hours Change

The District implemented the weekly operational hours change on February 3, 2014, the start of the Spring 2014 semester. Accordingly, most College offices were open from 7:30 a.m. to 6:00 p.m. on Monday through Thursday and from 7:30 a.m. to 11:30 a.m. on Friday.

Individual Supervisors’ Scheduling Discussions With Unit Members

Consistent with Knudson’ s directions, District supervisors communicated with their staffs about their schedules under the College’ s new weekly operational hours.

STAR/TRIO⁸

Clerical Assistant III Sara Stanton testified that she heard about the proposed operational hours change from her supervisor, Director Linda Noteboom.⁹ She said that Noteboom met with her sometime in Fall 2013, stating that “since we were the only employees within STAR that [...] 7:30 to six had to be covered, so that would mean our hours were changing from eight hours a day to nine hours a day.” Stanton said she asked Noteboom if she could retain her 5/8 workweek and Noteboom responded “ there was no availability for [Stanton] to work a standard eight-hour day, five-day week because of the Friday hours, the four hours that the campus was open and that [the Student Services] building would be shut down at 11:30 [a.m.]” Stanton said that they discussed the possibility of moving to an alternate work location on Friday afternoons but Noteboom “ strongly suggested” that the option would be counterproductive. According to Stanton, Noteboom later said that “ there would be no way to work another four hours without everything we had in our office.” The two of them agreed that, on Monday through Thursday, Noteboom would work from 7:30 a.m. to 5:00 p.m., and Stanton would work from 8:30 a.m. to 6:00 p.m. Both would work from 7:30 a.m. to 11:30 a.m. on Fridays.

The Instructional Media Center

Dr. Charlotte Forte-Parnell, Dean of Instructional Resources, oversees the College’ s Instructional Media Center (IMC). The IMC employs six unit members. She said that she met with IMC staff in Fall 2013 to discuss the operational hours change. Although she could not recall the specific details of any meeting, she said that she instructed IMC staff to work together and develop schedules under the new operational hours. Parnell said she did not assign anyone to a 4/9 and 1/2 workweek, and told her staff that they could retain their current schedule or develop a new one so long as the new operational hours were covered. Parnell said she told her staff that they could retain a 5/8 workweek, notwithstanding the shortened operational hours on Fridays.

Shirlene Thatch, an IMC Coordinator, testified differently, stating instead that employees were concerned about moving from a 5/8 workweek, but were told that their only option was to work within the new operational hours, particularly on Fridays. Likewise, Cheryl Burleson, another IMC employee, testified that they were told that retaining a 5/8 workweek was not an option for due to the shortened hours on Fridays. Burleson recalled a staff meeting where Parnell informed another unit member that working a full day on Fridays was not possible under the new operational hours. Burleson’ s testimony is buttressed by a recording made of a December 10, 2013 IMC staff meeting admitted into the record. In the recording, IMC employee Vicki Mathias informs Parnell of her eight-hour workday on Fridays. In response, Parnell states that, after the change, “ OK, so, so we can’ t do the 8s on Fridays any more.” In the recording, Parnell does not mention the possibility of retaining a 5/8 workweek.

Before the operational hours change, Shirlene Thatch had a 5/8 workweek. Starting February 3, 2014, Thatch worked a 4/9

and 1/2 workweek. Burleson and other IMC employees had a 5/8 workweek, but had agreed with Parnell to work 30 minutes extra three days of the week and leave early on Fridays. After the operational hours change, Burleson had a 4/9 and 1/2 workweek.

Library

Parnell also oversees the College Library. Similarly to her testimony about the IMC, Parnell testified that she informed Library staff that they had the option to maintain a 5/8 workweek after the operational hours change, but she could not recall the specific details about her meeting with Library staff. She said that staff could have moved to a different location on Friday afternoons if they wanted to work a full day.

According to Library Assistant Dawn Vargas, Parnell described the Library's new operational hours and told the staff to figure out for themselves how the new hours would be covered. According to Vargas, Parnell said that a 5/8 workweek was "not an option." Instead, they "were actually told that the new hours were going to be the four nines and a half," and that employees could only work in an alternate location if making up time. Vargas also said that Parnell told her that she could not have a 5/8 workweek. Library Technician Maria Valenzuela also said that she concluded that having a 5/8 workweek was not an option for Library employees after meeting with Parnell.

On January 24, 2014, Parnell requested that Library staff, submit their new schedules under the new operational hours. In response, Valenzuela e-mailed:

Hi Dr. Parnell,

I would prefer to keep the 5 8's (8:00-4:30). However, since the district is forcing us to do 4/9's and a half, I would like to come in Monday-Thursday, 7:30-5:00 and 7:30-11:30 on Friday.

Vargas sent a similar e-mail and, according to documentary evidence, Library employee Shannon Knab, did so as well.¹⁰ There was no evidence that Parnell replied specifically to any of those e-mails. However, Parnell testified that she explained to any employees making comments of that nature that the District was not forcing a particular workweek onto them and that the District's only interest is covering the new operational hours. Both Valenzuela and Vargas testified that Parnell did not reply to their e-mails and did not otherwise address the issue verbally. Ultimately, both Valenzuela and Vargas moved from a 5/8 workweek to a 4/9 and 1/2 workweek in Spring 2014.

Business Services

Diana Keelen, Executive Director of Business Services, testified that, on or around December 4, 2013, she e-mailed her staff, requesting that they submit work schedules that would ensure adequate coverage under the new operational hours. Keelen said that employees and supervisors have flexibility for different workweeks as long as the new operational hours were covered. Keelen also gave employees the opportunity to identify any "compelling reason" why an area could not be covered at a certain hour. She requested that employees submit their schedules by December 11, 2013, and that if employees did not submit a schedule, then she would "be put in the position of having to assign the hours so that departments are covered during those times." No one else in Business Services testified.

On or around December 10, 2013, Keelen received an e-mail from unit member Christine Garcia. The e-mail states that the Federation requested that employees not submit new schedules until the Federation conducts a vote over the proposed changes. In her e-mail, Garcia sought confirmation about whether she was still required to submit her schedule before the vote occurs. Keelen responded that day, stating "[i]n no way [d]o we wait for a union vote before *planning on covering these hours*, so yes, I expect that if you have agreement with your supervisor that I get the schedule from you." (Emphasis supplied.) Keelen also directed employees to inform her if either they cannot agree on a schedule with their supervisors or if they had other scheduling issues. There was no evidence of any response.

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At hearing, Keelen acknowledged that the segregated nature of duties performed in Business Services presented coverage challenges. A mailroom employee, for example, could not perform Cashier duties. Thus, there would need to be enough employees working in each different Business Services function. Keelen said that, in order to achieve adequate coverage, employees staggered the start and end of their working hours.

On January 10, 2014, Keelen submitted a list of Business Services employee schedules to Knudson and Bryant. She described the list as employees' "planned schedules when we were doing our data gathering." Keelen testified that the list did not necessarily reflect employees' final schedules for the Spring 2014 semester. For instance, Garcia was listed as having a 4/9 and 1/2 workweek, but Keelen testified that she subsequently granted Garcia's request for a 5/8 workweek. Keelen said that the District was able to arrange for employees, including Garcia, to perform work in alternate locations on Friday afternoons.¹¹

Business Services employs two Cashiers, Lisa Diaz, and Sheri LaJoie. Keelen said that both wanted to work a schedule of 8:00 a.m. to 4:30 p.m., Monday through Friday. Keelen said that "if there is not agreement in an area, then I typically look at who's been there longer to be able to determine, especially in the cashier's office, who prefers to open and who prefers to close." Keelen said that because Diaz, who had been employed longer, preferred to open, she said that LaJoie would have to work a shift that included closing hours. Diaz ended up working a 5/8 workweek. Keelen assigned LaJoie a 4/9 and 1/2 workweek.

Keelen said that both before and after the operational hours change, she tried to accommodate employees' requests for their preferred schedules, including alternate workweeks. There was no evidence that any employee reported a problem with their schedule after the operational hours change.

Math and Sciences

Uhazy, Dean of Math and Sciences, has around eight classified employees on his staff. On or around November 14, 2013, he held a staff meeting discussing the operational hours change. Uhazy testified that staff members expressed concern over how the change would affect their schedules. When asked if everyone would be moving to a 4/9 and 1/2 workweek, Uhazy responded "No, not at all" stating instead said that the matter was "open for discussion." The Math and Sciences building was scheduled to remain open on Friday afternoons after the operational hours change. Uhazy said that he recalled Lab Technicians stating that conforming to the new operational hours would not allow them to support Friday lab classes. Uhazy recalled that at least one Lab Technician asked to stay on his current 5/8 workweek. Collins, another Lab Technician, also requested to remain on his current workweek. Another Lab Technician, Jaime Contreras, requested a 4/10 workweek. Uhazy approved all three requests.

The Math and Sciences office has two clerical staff, Wendy Cios and Suzanne Olson. Olson testified that Uhazy said that employees needed to adjust their schedules to accommodate the new hours. It was unclear from her testimony whether she was referring to adjustments in employees working hours, or changes to their workday/work week. Cios testified that Uhazy mentioned the change in operational hours and asked employees to think about what schedule they wanted to work under those new hours. Cios also said that Uhazy expressed no preference for any workweek as long as all the new operational hours were covered. Both said that Uhazy did not mention the option to retain a 5/8 workweek. However, neither requested a 5/8 workweek.

While Uhazy was collecting employees' final scheduling information for the Spring 2014 semester, on February 6, 2014, Olson e-mailed Uhazy stating "I am against the change in work schedule and hours. But, since I am being directed by administration to change to the new schedule, below are the hours I will be working." Olson and Cios both took a 4/9 and 1/2 workweek. Olson started at 7:30 and ended at 5:00. Cios started at 8:00 and ended at 5:30. Uhazy agreed to cover the final 30 minutes, from 5:30 p.m. to 6:00 p.m. Both Olson and Cios worked from 7:30 a.m. to 11:30 a.m. on Fridays.

Business and Computer Studies and Social and Behavioral Sciences

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In Fall 2013, Dr. Louis O' Neil was Dean of Social and Behavioral Sciences, Business and Computer Studies, and Economic Development. O' Neil testified about meeting with his classified staff over the operational hours change that semester. He said something to the effect of " why don' t you all get together and work something out and give it to me, and we' ll see if we can come to an agreement." O' Neil did not direct any employees to work a 4/9 and 1/2 workweek. At hearing, he testified that he had no objection with employees retaining their existing schedules, including a 5/8 workweek. He did not specifically recall informing employees that they could retain a 5/8 workweek, but said that he felt it was " pretty well known" at the time. He said no one asked for a 5/8 workweek. He also said that no employee complained about moving to a 4/9 and 1/2 workweek.

Christi Crosby, an Administrative Assistant working in Business and Computer Services, said that O' Neil met with her and another Administrative Assistant, Cindy Kline, and informed them that they would need to work together to cover the College' s new operational hours. She said it " wasn' t made clear" that employees could retain a 5/8 workweek, but she acknowledges that she never asked. There was no evidence that Kline, who did not testify, asked either.

During the Spring 2014 Semester, oversight of the College' s Business and Computer Services functions were transferred from O'Neil to Dr. Karen Cowell.¹² As such, Crosby and Kline reported to both O'Neil and Cowell. Crosby testified that, in or around January 2014, Cowell met with the classified employees she supervised to employees' schedules under the new operational hours. By that time, Crosby and Kline had worked out a schedule that would maintain coverage in the office the two shared. During the meeting, Crosby said that " [w]hen the change in hours was proposed, the classified union asked us for a vote. The majority said they did NOT want to change hours. If I have to change my hours, I am do so in compliance, but not in agreement." (Emphasis in original.) Neither Crosby nor O' Neil could recall whether Crosby made a similar statement to O' Neil. At hearing, Crosby said that she did not ask to retain her schedule and did not seek a 5/8 workweek. In Spring 2014, Crosby worked a 4/9 and 1/2 workweek. Her supervisors subsequently granted her request for a 9/80 workweek.

The Extended Opportunities Programs Office

Gary Roggenstein, Director of Student Services and Extended Opportunities Programs (EOPs), testified that he discussed the operational hours change with his staff during a regular weekly meeting in Fall 2013. In subsequent meetings that semester, he began asking staff for their preferred schedules under the new operational hours. He said that " if they wanted to work after that early closure on Friday, I let them know that they would have to do that in another building because the building our offices were located in, the Student Services building, would be one of the buildings that would be closed after 11:30 a.m. on Fridays." Roggenstein said that because he already had an employee working a 4/10 workweek, he was confident that between himself and that employee, that the office would have coverage at all times. As a result, Roggenstein was not overly concerned with whatever workday/workweek or working hours the employees wanted. He did not direct employees to work a 4/9 and 1/2 workweek. None of Roggenstein' s staff requested or selected that as a workweek.

EOPS Tech II Hilda Thompson confirmed that Roggenstein offered to allow employees to stay on a 5/8 workweek if they moved to an alternate location on Friday afternoons. Another EOPS Tech II, Jenell Paul, testified similarly. At hearing, Thompson expressed reservations about transporting the student files she works with to another location due to concerns over student privacy. It is unclear whether she expressed those concerns to Roggenstein or anyone else at the District. She ended up selecting a 4/10 workweek with Fridays off. Paul selected the same workweek.

Student Programs and Services

Dr. Jill Zimmerman is the Dean of Student Programs and Services.¹³ According to CalWorks Coordinator and Federation President Ford, Zimmerman met with her and stated that the College' s operational hours were changing. She told Ford that most other employees she supervised elected to work a 4/10 workweek, and that if Ford wanted to retain her current 5/8 workweek, she would have to move to another location on Friday afternoons because her office was closing at 11:30 a.m. on Fridays. Ford said that "it wasn' t prudent" to work in another location because she works with student files and needs original documents to do her job. It is unclear whether Ford communicated these concerns to Zimmerman. Ford testified that Zimmerman recommended that Ford work a 4/9 and 1/2 workweek. Ford ultimately moved from a 5/8 workweek to a 4/9 and

1/2 workweek.

Facilities Services

Doug Jensen, Executive Director of Facilities Services, testified that he instructed the supervisors reporting to him to work with employees to ensure that the College's new operational hours would be covered. He said to "try to make it work for the employee and the District, that you know, any schedule was workable." He said that both before and after the operational hours change, different employees worked a variety of different workdays/workweeks. He explained that some employees do not interact directly with the public. As a result some employees preferred working hours where the campus was closed to the public. Jensen said that he did not recall any supervisors reporting problems with developing new schedules. No one else in Facilities Services testified.

Jensen said that he personally coordinated the schedules of the three classified employees in the Facilities office. He said that he presented a variety of options to his staff, including the option to retain a 5/8 workweek. He said that both he and his staff agreed to any workweek changes.

The February 3, 2014 Information Request

On February 3, 2014, Collins made the following information request on the Federation's behalf:

1. The Federation is requesting the work schedules of all classified employees as of today February 3, 2014.
2. The Federation is requesting the work schedules of all classified employees before January 31, 2014.
3. The Federation is requesting the work schedules of all administrative employees as of today February 3, 2014. The work schedules should include the following: The President, all vice presidents, all executive directors, all deans, all directors, all supervisors and managers.

Collins stated that the request was being made to investigate a possible grievance regarding changes to policies contained in the CBA. Collins requested a response by February 10, 2014.

Bryant responded on February 12, 2014, providing a partial list of employees and their schedules as of February 3, 2014. He said that the list represented what the District had "gathered so far," and that he would update the Federation as HR received additional or more accurate information. He also said supervisors were asked to provide employees' schedules from before January 31, 2014. In response to item number three, Bryant said that administrative employees do not have fixed schedules. The District never provided the Federation with unit members' pre-January 31, 2014 schedules. The District eventually provided the Federation with an updated list of schedules in September 2015. It is unclear whether the District ever provided a comprehensive list of employee schedules for the Spring 2014 semester.

The Federation's Grievance

On March 3, 2014, the Federation filed a timely formal grievance alleging a violation of CBA Article 11.2. The parties did not resolve their dispute through the grievance process.

Issues

1. Did the District modify the College's weekly operational hours without giving the Federation notice and the opportunity to request effects bargaining?

2. Did District supervisors' communications with unit members about workweek changes unlawfully bypass the Federation and its negotiators?
3. Did the District fail to adequately and/or timely respond to the Federation's December 5, 2013 information request?
4. Did the District unilaterally change its policy, set forth in Article 11.2, of modifying workweeks only if the majority of affected unit members approved?

Conclusions of Law

1. Effects Bargaining Claim

The PERB complaint alleges that the District modified the College's weekly operational hours without providing the Federation with notice and the opportunity to request bargaining over any negotiable effects of that decision. The parties here agree that the operational hours change itself was a managerial prerogative that is not subject to bargaining. Before implementing a non-negotiable decision, the employer must notify affected bargaining representatives "sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate." (*Victor Valley Union High School District* (1986) PERB Decision No. 565, p. 5.) Where the union receives "actual notice of a decision, the effects of which it believes to be negotiable, the employer's failure to give formal notice is of no legal import[.]" (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919 (Sylvan Union ESD), p. 11, quoting Regents of the **University** of California (1987) PERB Decision No. 640-H, p. 22.)¹⁴ Actual notice is established where the charging party is clearly informed of the employer's action. (See *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778 (*Klamath-Trinity JUSD*), p. 4.)

" ' Once the decision is made the employer must respond to requests to negotiate in a manner consistent with its duty to bargain in good faith.' " (Trustees of the California State **University** (2012) PERB Decision No. 2287-H, p. 11 (*CSU*), quoting *The Regents of the University of California (Lawrence Livermore National Laboratory)* (1997) PERB Decision No. 1221-H.) It falls upon the charging party to demonstrate that it made a valid request to bargain over negotiable effects of the employer's decision. (*CSU*, p. 11, citing *County of Riverside* (2010) PERB Decision No. 2097-M, *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S; *Sylvan Union ESD, supra*, PERB Decision No. 919.) Although the bargaining demand need not take a particular form, the union must clearly signify its interest to engage in effects bargaining. (*Delano Joint Union High School District* (1983) PERB Decision No. 307, p. 6, citing *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, other citations omitted.) It is not sufficient to make a demand to bargain over the non-negotiable decision or to demand that the employer cease and desist from taking action. (*State of California (Department of Developmental Services & Office of Protective Services)* (2009) PERB Decision No. 2062-S, proposed dec., pp. 7-8.) Similarly, merely protesting the decision does not equate to a bargaining demand. (*County of Riverside*, p. 12; *Santee Elementary School District* (2006) PERB Decision No. 1822, p. 6.) Thus, a letter objecting to the closure of an employer's hospital as illegal and not bargained-for was not a sufficient demand to bargain over the effects of the closure. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, pp. 2-3, 8-9.) Testimony that union representatives had "many heated discussions" about a community college district's plan to cancel its winter intercession was not a valid bargaining demand. (*Pasadena Area Community College District* (2011) PERB Decision No. 2218, pd., pp. 3, 5.)

If the union is given reasonable advanced notice of the planned change, its failure to request effects bargaining constitutes a waiver of the right to bargain. (*CSU, supra*, PERB Decision No. 2287-H, pp. 11-12, citing *County of Riverside, supra*, PERB Decision No. 2097-M.) The determination of a reasonable amount of time depends on the circumstances of each case. (*Id.* at p. 11.) The key issue is whether the union, by its silence, has indicated an intentional relinquishment of any right to request negotiations. (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 7-8.)

In the present case, the record shows that the Federation knew of the District's plans to change its operational hours as early

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as November 2013. At that time, Superintendent/President Knudson announced the change via a public meeting and an e-mail to all staff. He specifically mentioned that supervisors will be working with employees about any schedule changes. Shortly afterwards, Federation President Ford e-mailed members acknowledging that schedule changes were possible under the new operational hours. Ford and Knudson e-mailed multiple times about this subject and also met in person. Both discussed the possibility that employees' working hours could be impacted. During one meeting, Knudson agreed to the Federation's request to postpone the operational hours change from January to February 2014. These facts demonstrate that the Federation was aware of the planned operational hours change and that the change could affect employees' hours, a negotiable subject. At no point during the nearly three month period between November 15, 2013, and February 3, 2014, did the Federation articulate an interest in negotiating the effects of the operational hours change. Nor did the Federation identify anything that prevented it from fully considering whether to make demand effects bargaining. The Federation also did not request to further postpone implementation of the operational hours change so it could decide whether to demand effects bargaining. Based on these facts, I find that the District had no reason to believe that the Federation had any interest in negotiating over the effects of the operational hours change.

The Federation contends that Ford's November 21, 2013 e-mail constitutes a valid demand to bargain over the effects of the operational hours change. Both that e-mail and Ford's December 4, 2013 e-mail identify hours and a mandatory subject of bargaining. The December 4 e-mail also states that the District had not negotiated any changes to employees' hours. I do not conclude that these e-mails adequately signified the Federation's interest in negotiating the effects of the planned operational hours change. Neither e-mail included any bargaining demand. At hearing, Ford did not describe either e-mail as a request to bargain. No Federation witness expressed any desire to engage in effects bargaining. In fact, the Federation rejected multiple District offers to meet about the operational hours change. As the above-referenced authority establishes, merely protesting an employer's actions as either illegal or not negotiated does not constitute a bargaining demand. Ford's e-mails accordingly do not qualify.

The Federation also argues that the District failed to notify it of the full extent of its plans, citing as an example its plan to leave certain facilities open on Friday afternoons for employees seeking to work for than four hours on those days. There was no evidence in the record that the District gave formal notice to the Federation about those plans. But, Ford testified that she met with her supervisor, Zimmerman, in Fall 2013 where she was informed that employees could continue working on Friday afternoons in an alternate location. The Board has found that a union has actual notice of a planned change when an officer with authority to bind the organization learns of the change. (Regents of the **University** of California (Davis) (2010) PERB Decision No. 2101-H, p. 18; see also *Klamath-Trinity JUSD, supra*, PERB Decision No. 1778, pp. 4.-5 [Union president's actual knowledge of proposed change was sufficient to establish notice].) In light of Ford's actual awareness of the District's plans to leave facilities open, the lack of formal notice to the Federation is not significant here. (*Sylvan Union ESD, supra*, PERB Decision No. 919, p. 11.)

Ultimately, the record shows that the Federation knew about the plan to change the College's operational hours. It also knew that the planned change would likely impact unit members' hours. As of December 13, 2013, the Federation also knew that the District planned to implement the change on February 3, 2014, a date set, in part, at the Federation's request. And despite numerous communications, there was no evidence that the Federation expressed any interest in negotiating the effects of the operational hours change until it filed the present unfair practice charge. The Federation's unexplained and unreasonable delay in pursuing effects bargaining constitutes a waiver of the right to bargain those effects. The Federation's effects bargaining claim is therefore dismissed.

2. The Bypass Claim

An employer "bypasses" an exclusive representative when it communicates directly with employees to undermine the union's authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.) PERB generally recognizes two theories of bypass. The first type occurs when an employer engages in direct bargaining with represented employees, such as presenting proposals to bargaining unit members not already exchanged and/or discussed with the bargaining representative. (Trustees of the California State **University** (2006) PERB Decision No. 1871-H, dismissal ltr., p. 3.) The second type is where the employer engages in a "campaign to disparage the exclusive representative's negotiators so as to drive a wedge between union representation and the bargaining unit employees." (Id., citing *Safeway Trails, Inc.* (1977) 233 NLRB 1078, 1081-82.) The PERB complaint in this case alleges that three District representatives, Jill

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Zimmerman, Sherri Padilla, and Diane Keelen, bypassed the Federation under the first theory, by meeting with unit members to discuss modified work schedules.¹⁵

An employer unlawfully negotiates directly with employees when it deals directly with its employees: (1) to create a new policy of general application; or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 6 (*Walnut Valley USD*)). However, once a policy is lawfully established, the employer may contact employees directly to implement that policy. (*Berkeley Unified School District* (2002) PERB Decision No. 1481, warning ltr., p. 2, citing *Walnut Valley USD*.)

Here, it is undisputed that that Knudson directed District supervisors to contact employees directly about modifying their schedules to cover the new operational hours and to report any problems to him. He made that announcement to all staff on or around November 12, 2013. Multiple witnesses, including Jensen, Keelen, Parnell, and Uhazy, testified that they received this directive from Knudson and did in fact contact unit members about modifying their schedules. Ford testified that her supervisor, Zimmerman, engaged in similar discussions about workweek modifications. However, under CBA Article 11.2, “[a] modified work schedule may be initiated by the employee or the supervisor.” In *State of California (Department of Motor Vehicles)* (1999) PERB Decision No. 1347-S (*DMV*), the parties had contract language permitting the employer to establish alternate schedules based on either operational need or at the request of employees. PERB dismissed the claim that the employer bypassed the charging party union by discussing and agreeing to new schedules directly with employees. (*Id.* at partial warning ltr., p. 3.) PERB reasoned that the parties’ contract allowed employees and their supervisors to discuss schedule changes and that once they agreed, no further bargaining with the union was required. (*Id.* at partial dismissal ltr., p. 2.)

Similar to the parties in *DMV*, *supra* PERB Decision No. 1347-S, Article 11.2 in this case specifically allows District supervisors to initiate workweek changes directly with unit members, so long as the unit members affected approve of the modifications. In the past, supervisors and employees engaged in direct discussions about alternate workweeks and actually modified employees’ workweeks if the supervisor and the employee agreed. Under these facts, I do not conclude that the District unlawfully bypassed the Federation when its supervisors discussed workweek modifications directly with unit members.

The Federation contends that these discussions constitute an unlawful bypass because the District sought to waive or modify the existing policy of holding a vote prior to enacting any workweek changes. As will be discussed in greater detail below, I reject this argument because the Federation did not establish the existence of any regular and binding practice concerning voting before the modifications at issue here.

The Federation also argues that the District’s conduct was unlawful because Federation representatives vocally objected to supervisors’ direct communications with unit members. This argument overlooks the language of Article 11.2, which plainly allows workweek modifications to “be initiated by the employee or the supervisor.” Notwithstanding the Federation’s objections, the District was free to rely on the authority granted to it under the CBA. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 10, citing *Rio Hondo Community College District* (1982) PERB Decision No. 279.) In sum, Article 11.2 permitted Jensen, Keelen, Parnell, Uhazy, Zimmerman, and other District supervisors to initiate workweek modifications with unit members. As such, I do not conclude that those supervisors’ communications with employees about modifying their workweeks constitutes an unlawful bypass. Those claims are dismissed.

3. The Information Request Claim

The PERB complaint alleges that the District’s responses to the Federation’s December 5, 2013 information request was inadequate and violated the duty to negotiate in good faith.¹⁶ EERA entitles exclusive representatives to all information “necessary and relevant” to the discharge of their duty of representation. (*Santa Monica Community College District* (2012) PERB Decision No. 2303, proposed dec., p. 6 (*Santa Monica CCD*), citing *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton USD*)). An employer who fails to provide such information upon request may breach of the duty to bargain in good faith. (*Santa Monica CCD*, p. 3; *Compton Community College District* (1990) PERB Decision No. 790, p. 6.)

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PERB applies a liberal standard, similar to a discovery-type standard, to information request claims. (*Santa Monica CCD, supra*, PERB Decision No. 2303, proposed dec., p. 6, citing Trustees of the California State **University** (1987) PERB Decision No. 613-H.) Requests for information relating to issues within the scope of representation are considered presumptively relevant. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, proposed dec., p. 22 (*Saddleback Valley USD*), citing *Ventura County Community College District* (1999) PERB Decision No. 1340.) Once a union makes an information request, the employer must respond in some manner, either by providing the requested information or explaining why it cannot or will not comply. (*Chula Vista City School District* (1990) PERB Decision No. 834, pp. 52 (*Chula Vista CSD*)). Ignoring a union's request altogether is tantamount to a flat refusal to provide the information. (*Saddleback Valley USD*, proposed dec., p. 22, citing *Chula Vista CSD*, p. 53.)

An employer may be excused from producing otherwise relevant requested information where it proves that complying with the request would be "unduly burdensome." (*Stockton USD, supra*, PERB Decision No. 143, pp. 16-17.) It falls upon the employer to prove the burdens on production are unreasonable. Merely asserting that the information is unavailable in the form requested by the union is not a valid excuse. (*Id.* at p. 16.) That said, the employer is not necessarily required to produce the information in the form requested by the union. (*Chula Vista CSD, supra*, PERB Decision No. 834, p. 52.) Thus, the duty to provide requested information does not require the employer to provide information in a format more organized than its own records. (State of California (Department of Corrections) (2000) PERB Decision No. 1388-S, p. 18(*Corrections*)). Nor must the employer provide information that it does not possess. (*Saddleback Valley USD, supra*, PERB Decision No. 2333, proposed dec., p. 25.)

In this case, the Federation contends that the District failed to properly respond to its requests for a list of "affected" unit members, separated by "department," as those terms were used in Article 11.2. On December 18, 2013, the District provided a list of unit members, separated by work area and explaining that existing HR systems were unable to sub-divide employees' work locations further. In response to the Federation's later request for unit members "affected" by the Spring 2014 workweek modifications, the District said that HR did not maintain any database for that specific information.

The District defends Bryant's responses arguing first that it is not required to produce information that it does not possess. According to the District, HR does not maintain more detailed work location information and not did have a database of specific information relating to affected unit members. This argument apparently rests on the presumption that employers are only obligated to produce what is maintained specifically in its HR office. I reject that presumption and the argument that follows it. Just as an employer is not excused from producing requested information simply by stating that it is not available in the format requested (see *Stockton USD, supra*, PERB Decision No. 143, p. 16), the District in this case is not excused from responding to the Federation's request simply because the information was not part of its existing HR system. Rather, the District's obligation extends to producing responsive information wherever it is in its possession, including disaggregated information not part of any database or information maintained by individual District supervisors. And while employers may assert that the burdens of collecting the requested information are too burdensome, the District did not prove that this was the case here.¹⁷

The District also argues that it responded to the Federation's requests in good faith. Regarding the request for department-specific information, it is undisputed that the Federation sought information about "departments" as used in Article 11.2, but the record shows that the parties had no universally understood definition for the word "department." Bryant testified that HR typically describes its sub-divisions as areas, followed by offices, followed by individuals in specific positions. He said he does not consider, for example, the various subdivisions within Student Services, such as EOPS and STAR/TRIO, to be separate departments. Bryant's testimony is consistent with at least some portions of the CBA. The list of classifications and salary ranges, included in the Exhibits to the CBA, describes Student Programs and Services as a single "department." Bryant also explained that the term "department" most commonly referred to academic areas which, provides limited insight into classified employee subdivisions not associated with an academic department. Executive Director of Business Services Keelen testified that she considers Business Services to be an "area," with separate "departments" such as accounting, purchasing, warehouse, duplication/mailroom, cashier's office, and supervision. But, once again, the CBA describes Business Services as a single "department" with no reference to the subdivisions referenced by Keelen. Knudson offered yet another definition, stating that all employees working under a common supervisor constituted a single department. There is insufficient evidence in the record to reconcile these varying definitions of the term "department." In other words, the Federation did not show that the District's December 18, 2013 response was inconsistent with Article 11.2. Nor was it shown that the Federation could not have used the information provided by the District to conduct its planned vote.

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Accordingly, the Federation did not establish that the District failed to properly respond to its request for a list of unit members separated by department.

Although I recognize that the Federation objected to what the District produced and reasserted the need for “department” specific information, it is unclear what additional information the District could have produced absent some clarification from the Federation. In this instance, merely restating its demand for “department” specific information, did not give the District deeper insight into how to comply. The Federation declined the District’s offers to meet over the request. While the Federation was not necessarily required to accede to the District’s requests to meet, the Federation retains the burden of proving that the District’s response violated the duty to negotiate in good faith. Here, the District’s initial response was consistent with some uses in the CBA, the Federation did not clarify its request, and declined offers to meet to resolve their differences. Under these circumstances, I find insufficient information to sustain such a violation. This aspect of the Federation’s information request claim is therefore dismissed.

I reach a different conclusion regarding the Federation’s request for a list of “affected” unit members. Like “department,” the term “affected” is not clearly defined in the CBA. However, I do not find the term so ambiguous that the District was justified in not providing any timely response to the Federation. Even without a comprehensive understanding of how the term is used in Article 11.2, a reasonable person would recognize that, at the very least, the Federation wanted to know which unit members were expected to modify their workweeks in the Spring 2014 semester. Such an understanding is consistent with the Federation’s initial, December 5, 2013 request for all proposed workweek modifications for the Spring 2014 semester.

The present case is similar to *Corrections, supra*, PERB Decision No. 1388-S. There, the employer devised a reorganization plan to redistribute its inmate population among prison facilities and restructure its chain of command. In anticipation of the change, the union representing correctional officers requested information relating to employee reassignments and modifications resulting from the reorganization. (*Id.* at p. 5-6.) The employer initially refused to produce any responsive information, claiming that its staffing plans were not yet finished. Information was finally provided after the reorganization was complete. (*Id.* at pp. 17-18.) The Board found a violation of the duty to provide requested information, reasoning that the employer could not have implemented the reorganization without at least an interim staffing plan and that the employer had an obligation to provide the union what it had. (*Id.* at p. 18.) The Board further found that by responding to the information request only after the reorganization was complete, the employer failed to timely respond. (*Id.* at p. 17.)

Similarly in this case, the District knew that at least some unit members’ workweeks would change in the Spring 2014 semester. Furthermore, some District supervisors had already submitted scheduling information to HR. For example, on January 10, 2014, Keelen emailed both Bryant and Knudson a list of planned Business Services employees’ schedules under the new operational hours. This list, in HR’s possession at the time of the Federation’s request, was unquestionably responsive to the Federation’s request. Even if the District did not possess all the requested information, it was nevertheless obligated to provide what it already had in a timely manner. Parnell also said that she had collected her own staff’s scheduling information in mid-January 2014. And yet, the District did not produce even an incomplete list of unit members’ schedules until February 13, 2014, after the Federation repeated its demand for the information. No justification was offered for this delay. At the time, Bryant stated that he would provide additional information as the District received it, but there was no evidence of any further response until September 2015. The District did not establish why it could not have responded sooner. The District was obligated to provide what it had in a timely fashion. The significant delays in this case do not satisfy its duty to respond to the Federation’s information request. Moreover, it is still unclear whether the District ever provided a comprehensive response of unit members whose workweeks changed in the Spring 2014 semester. Under these circumstances, the District failed to timely and adequately respond to the Federation’s request for “affected” unit members. This failure constitutes a violation of EERA section 3543.5, subdivisions (a), (b), and (c). (*Santa Monica CCD, supra*, PERB Decision No. 2303, p. 3.)

4. Unilateral Change Claim

The PERB complaint alleges that the District unilaterally changed the procedure for modifying unit members’ workday/workweek. Unilateral changes violate the duty to bargain in good faith where: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken

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without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley USD, supra*, PERB Decision No. 160, p. 5.)

Of these elements, the main dispute here is whether the District changed its existing policy of conducting a vote before modifying unit members' workdays and/or workweeks. The District does not contest that employees' hours are within the scope of representation under EERA section 3543.2. Policies or proposals relating to employees' shifts (*Los Angeles Community College District* (1982) PERB Decision No. 252, p. 8), the length of the workweek (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S, p. 10), or the hours in the workday (*Imperial Unified School District* (1990) PERB Decision No. 825, p. 7) are all mandatory subjects of bargaining. The Board has also found that changing employees' schedules on an ongoing basis has a continuing impact and a generalized effect on the terms and conditions of employment. (*Moreno Valley Unified School District* (1995) PERB Decision No. 1106, p. 9, citing *Jamestown Elementary School District* (1990) PERB Decision No. 795.) Finally, the record shows that the District did not inform the Federation that it planned on moving forward with modifying employees' workweeks without a vote, as the Federation contends was required. Thus, this proposed decision will focus on whether the District changed or deviated from existing policy.

The parties agree that the policy at issue arises out of CBA Article 11.2, which states that "[a] modified work schedule may be initiated by the employee or supervisor." Article 11.2 also specifies some of the modified workweeks available, including a 4/10, a 9/80, and a 4/9 and 1/2. Article 11.2 concludes by stating that "[t]he establishment of a modified workday/workweek must be approved by a majority of the regular unit members affected." When called upon to construe parties' agreements, PERB uses general principles of contract interpretation. (*County of Riverside* (2013) PERB Decision No. 2307-M, p. 18, citing *County of Ventura (Office of Agricultural Commissioner)* (2011) PERB Decision No. 2227-M.) Those principles include looking first to the plain language of the contract to understand its meaning and to read the entire contract as a whole together such that each clause helps interpret the other. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16, citing *Civ. Code, § 1641*.) If there are areas where the contract is silent or ambiguous, then PERB may look to other places, such as bargaining history or past practice to determine its meaning. (*County of Riverside*, p. 20, citing *Compton Community College District, supra*, PERB Decision No. 790; *Rio Hondo Community College District, supra*, PERB Decision No. 279.)

In this case, both parties recognize that Article 11.2 requires some form of unit member approval before modifying unit members' workday/workweek. The CBA is silent on how unit members register their approval or disapproval. Elsewhere in the CBA, the terms "approved" or "approval" is used in multiple different contexts ranging from individual agreements between supervisors and employees and a formal "ratification" vote. The CBA does not specify which form of the term "approved" was intended in Article 11.2. The Federation does not explain why, if the parties' intended 11.2 to require a "ratification" vote, the article did not use that terminology. Under these facts, I do not conclude that the plain language of the CBA requires a formal vote before modifying unit members' workweeks.

Regarding evidence extrinsic to the CBA, neither party presented any evidence of their negotiating history or the development of the language in Article 11.2. The Federation instead maintains that the parties have a binding practice of determining unit member approval by voting before any workweek modifications. The Board found that the parties' may be bound to their past practices where the practice is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186, proposed dec., p. 13, citing *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 5, 10 (*Pajaro Valley USD*)). The general rule is that the practice must be: (1) unequivocal; (2) clearly enunciated and acted upon, (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Id.* see also *County of Riverside, supra*, PERB Decision No. 2307-M, p. 20.) The crucial issue is that there is evidence of consistent course of conduct over an extended period of time. (*Cajon Valley Union School District* (1995) PERB Decision No. 1085, p. 4, citing *Pajaro Valley USD*.)

The Federation has not met its burden of proving that the parties had a consistent past practice of holding a Federation-run vote before modifying unit members' workday/workweek. The Federation argues that the voting practice is established through the parties' history of voting before moving to Summer hours, i.e., changing both the District's operational hours and virtually all employees' workweeks to a 4/10 schedule for the Summer. There were at least four examples of such a vote,

dating back to 2008. When one party initiated discussions about moving to a Summer 4/10 workweek, the entire unit voted and had the option of selecting “yes or no” to the proposed change. However, those changes are not sufficiently analogous to the present situation. To start with, unlike with the moves to Summer hours, the planned change in operational hours here did not mirror the proposed changes to unit members’ workweeks. As a result, unit members were not asked to adopt identical modified workweeks. In many cases, employees were free to select their preferred workweek or could select no workweek change at all. There was no evidence that the Federation ever held a vote under these circumstances before. There was also no evidence that the parties ever held a department-specific vote, as contemplated by the Federation.

The lack of a binding practice is, perhaps, best exemplified by the fact that the parties never had a clear, much less a common, understanding over the mechanics of the vote. No one could articulate how the ballot could accurately capture the different options available to unit members under the proposed operational hours change.¹⁸ Similarly, no one could explain how the Federation would have conducted a vote by “department,” or even what a “department” is in District parlance. It was also clear from the correspondence between Bryant and Collins that the parties did not have an accepted understanding of who would be eligible to vote. These facts tend to show that the parties had never held this type of vote before.

In addition, there is significant and unrefuted evidence that the District modified unit members’ workweeks without holding a formal vote. As stated above, Article 11.2 expressly allows either a supervisor or an individual employee to initiate workweek modifications. Executive Director of Business Services, Keelen testified that, before February 3, 2014, she was “very flexible” with employees’ schedules and agreed to employees working 9/80 workweek or 4/10 workweek. Similarly, Executive Director of Facilities, Jensen, also said that he agreed to different types of modified workdays/workweeks with individual employees. Clerical Assistant III, Burlson said that she and her supervisor agreed upon a modified 5/8 workweek. The Federation did not hold a vote for any of these modifications. The Federation acknowledges that even after voting to move to a Summer 4/10 workweek, individual employees worked with their supervisors about further modifications. In correspondence dating back to 2012, the Federation sought assurances that this practice would continue. For these reasons, I do not conclude that the parties had a readily ascertainable and unequivocal practice of voting before changing unit members’ workday/workweek.

a. The Effect of Knudson’s Statements

The Federation argues that a vote was required before modifying unit members’ workweeks here because of Superintendent/President Knudson’s December 2013 public statements about holding a vote. Various permutations of this argument will be addressed below.

i. Evidence of a Past Practice

The Federation argues that Knudson admitted to the existence of a binding practice when he made statements to both the Federation and to the public that Article 11.2 required a vote, conducted by the Federation. Although I recognize that Knudson is the chief executive of the District, he is simply not in a position to provide first-hand evidence about either the parties’ intent when negotiating Article 11.2, or the parties’ history of applying that contract language. Knudson was hired by the District in June 2013, after the parties ratified the CBA in its current form and after the last time the parties decided to move to Summer hours.¹⁹ Nor was there evidence that Knudson plays an active role in labor relations, negotiations, or administering/interpreting agreements with District bargaining units. Thus, I do not conclude that Knudson’s statements about Article 11.2 overcome the lack of evidence about a binding practice about voting to approve modified workweeks. Overall, I find insufficient evidence of any past practice.

ii. Evidence of an Agreement to Hold a Vote

Even in the absence of a binding past practice, Knudson’s comments may have indicated that the parties agreed to conduct a vote as a specific means to satisfy the general requirements of Article 11.2. However, the record shows that the parties never

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reached any agreement. A critical component of any agreement is that the parties have a mutual understanding over material and substantive terms. (See *Anaheim Union High School District* (2015) PERB Decision No. 2434, proposed dec., p. 68, citing *Transit Service Corp.* (1993) 312 NLRB 477, 481.) Although the parties may have both supported the idea behind holding a vote, they never saw eye-to-eye on even basic voting procedures such as who is eligible to vote, i.e., who is an “affected” unit member under Article 11.2, or how unit members’ votes would be grouped, i.e., what “departments,” are under Article 11.2. In an e-mail from December 17, 2013, Knudson was still asking the Federation for its understanding of the main details of the proposed vote, including asking how a unit-by-unit vote could occur.²⁰ There was also no evidence that Knudson agreed that that District would be bound by the results of any Federation-run vote.

In later correspondence between Collins and Bryant from January 23, 2014, Collins stated that the Federation would only agree to conduct a vote, *if* the District clarified who was being “affected” and provided more information about unit members’ work locations, i.e., “departments,” as those terms are used in Article 11.2. The record shows that no clarity was ever achieved between the parties. By January 30, 2014, Bryant offered to meet to address these issues, but Collins declined, instead reasserting the Federation’s demands for information relating to affected unit members and District departments. The problem with taking this position, is that the terms “department” and “affected” are not clearly defined. The Federation’s repeated demands for ambiguous information, while refusing to discuss the issue did not bring the parties closer to understanding or agreement over the voting process. Accordingly, I cannot conclude that the parties ever agreed to hold a vote before changing unit members’ workweek.

Moreover, while parties are free to engage in discussions modifying the terms of their agreement, both parties ultimately have the right to refuse to modify their existing contract. The fact that the parties engaged in negotiations about modifying contract terms does not mean that they have relinquished their right to later stand on the contract. (Professional Engineers in California Government (Lopez) (1989) PERB Decision No. 760-S, proposed dec., p. 19, citing Connecticut Light and Power Company (1984) 271 NLRB 776 and *Inland Cities, Inc.* (1979) 241 NLRB 374.) Thus, once the District realized that the parties did not have a common understanding about the voting process, the District was free to disengage its discussions and rely upon the authority it had under the existing terms of Article 11.2.

iii. Equitable Estoppel

The Federation also suggests that, because of Knudson’s comments that Article 11.2 required a vote, the District should be precluded from arguing that no vote is needed under the CBA. In *Santa Ana Unified School District* (2013) PERB Decision No. 2332, the Board recognized the doctrine of equitable estoppel. (*Id.* at pp. 21-22.) The equitable estoppel doctrine may prevent a party from taking a position in litigation where it previously made a contrary assertion to the opposing party to that other party’s detrimental reliance. The Board considers the following elements: (1) the party to be estopped must be apprised of the facts; (2) the party being estopped must either intend its word or conduct to be acted upon or cause the other party to believe that such was the intent; (3) the other party must be ignorant of the facts; and (4) the other party must rely on the first party’s conduct to its detriment. (*Id.* at p. 22, citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, p. 493.) The doctrine does not apply when application would be against the benefit of the public. (*Id.*, citing *County of San Diego v. California Water and Telephone. Co.* (1947) 30 Cal.2d 817, pp. 829-830)

These elements are not met here. As discussed above, it is unclear whether, at the time of his comments, Knudson was in a position to speak with authority about the interpretation of Article 11.2. Even assuming that was the case, the Federation was not ignorant of the facts relating to Article 11.2 and the parties’ past application of that language. Given his relative newness at the District at the time of his comments, Federation leaders arguably had better access to information relating to Article 11.2 than Knudson did.

It is also unclear to what extent the Federation detrimentally relied on Knudson’s statements. Shortly after Knudson commented about holding a vote, Bryant informed the Federation that individual supervisors were working with employees about their schedules. Collins stated that the Federation would only agree to hold the vote if the District could satisfy the Federation’s request for more-detailed department information. In other words, the Federation was still entertaining the possibility that no vote would ever take place. Under the circumstances, I decline to apply the doctrine of equitable estoppel to preclude the District from arguing that the parties did not have a practice of voting before workweeks changes here.

In conclusion, I do not find that Knudson's statements about holding a vote demonstrated the existence of a past voting practice, established a binding voting agreement, or satisfied the requirements of the equitable estoppel doctrine.

b. Supervisors' Individual Discussions With Unit Members

Even after concluding that there was no established practice of holding a vote before changing unit members' workweeks, the District's actions in this case may nevertheless deviate from existing policy if it modified workweeks without complying with the express terms of Article 11.2. The Federation claims that the District modified unit members' workweeks in violation of those terms.

i. STAR/TRIO

STAR/TRIO employee Stanton testified that her schedule had to conform to the new operational hours because she and her supervisor, Noteboom, were the only employees working in the STAR/TRIO office. According to Stanton, Noteboom mentioned the possibility of working in an alternate location on Friday afternoons, but "strongly suggested" that moving locations would be counterproductive. According to Stanton, Noteboom later said that "there would be no way" that she could perform her job in an alternate location.²¹ Article 11.2 allows supervisors or employees to initiate workweek modifications, but requires that any modification be "approved by a majority of the regular unit members affected." While I recognize that the term "approved" as used in Article 11.2 was not clearly defined in the record, I also find that unit members could not have "approved" of workweek modifications in any meaningful way where they were instructed that they could not retain their existing workweek and that some kind of modification was mandatory. Because Noteboom told Stanton that she could not retain her existing workweek, I cannot conclude that Stanton ever "approved" of being moved to a modified workweek. Changing Stanton's schedule under these circumstances deviated from the policy set forth in Article 11.2.

ii. IMC and the Library

The weight of the evidence also shows that Parnell made similar statements to her staff in both the IMC and the Library. IMC employees Thatch and Burleson both testified that Parnell informed employees that they did could not maintain a normal 5/8 workweek. Parnell denied this during her testimony, but I credit Thatch's and Burleson's testimony over Parnell's on this issue. Parnell admitted to not having a clear recollection of her meetings with IMC employees. In addition, Thatch's and Burleson's testimony is supported by a recording of an IMC meeting over the new operational hours.²² During the meeting, Parnell said "OK, so we can't do the 8s on Fridays anymore." Employees reasonably interpreted this statement as meaning they could no longer maintain an eight-hour workday on Fridays. As with Stanton in STAR/TRIO, the IMC employees could not have "approved" any modification where they were expressly instructed that some form of a change was required. Under the circumstances, moving IMC employees to a modified workweek deviated from existing policy as set forth in Article 11.2.

Library employees Vargas and Valenzuela also testified that Parnell instructed Library staff that they could not work a 5/8 workweek. Parnell denied this as well, but I once again credit the unit members' testimony. Parnell's statements to IMC staff about not being allowed to maintain a standard 5/8 workweek increase the likelihood that Parnell made similar statements to Library staff.²³ In addition, both Vargas and Valenzuela e-mailed Parnell stating their preferences for a 5/8 workweek as well as their belief that they were being forced to change to a modified workweek. Parnell never replied to those e-mails. According to Parnell, she told those employees verbally that no workweek changes were being forced upon them. Both Vargas and Valenzuela deny those conversations took place. Here, I credit Vargas and Valenzuela. I find it unusual that Parnell would not either reply to these e-mails or report the employees' statements to either Bryant or Knudson, as she had been directed to do. Under these facts, I find it more likely than not that Parnell instructed Library staff in the same manner that she did IMC staff, including the comment that Library employees could not keep working under a 5/8 workweek and that some modification was required.

iii. Business Services

The Federation also argues that Business Services unit members were forced to adopt modified workweeks. It contends that Keelen, the Executive Director of Business Services, requested that her staff submit schedules under the new operational hours and that, if they did not reply, then she would assign their schedules without their input. However, there was only evidence of one instance where Keelen involuntarily modified a unit member's workweek. Keelen testified that both Cashiers, Diaz and LaJoie, wanted to have a 5/8 workweek with working hours of 8:00 a.m. - 4:30 p.m., Monday through Friday. Keelen said that for coverage reasons, she allowed Diaz to retain that schedule, but involuntarily assigned LaJoie to a 4/9 and 1/2 workweek. Under these circumstances, assigning the workweek to LaJoie without her approval deviated from the policy set forth in Article 11.2. With regard to other Business Services employees, the evidence shows that Keelen was flexible and accommodating in allowing employees to have their preferred schedules, including maintaining a 5/8 workweek. There was no evidence that any employee, aside from LaJoie, disagreed with his or her workweek in the Spring 2014 semester.

The Federation argues that Keelen demonstrated that she was not seeking unit members' approval when, in January 2014, she instructed her staff to supply her with their proposed schedules after the operational hours change immediately and without waiting for the Federation's vote. I find this argument unpersuasive for at least two reasons. First, as discussed above, the Federation failed to meet its burden of proving that any vote was required before modifying unit members' workweeks. The record shows a history of employees working with their supervisors directly to achieve such modifications. Second, the Federation has not established why it was problematic for Keelen to gather data about proposed workweek modifications. As Keelen testified, the information she gathered from her employees in January did not always represent employees' final workweeks. She continued to work with employees to give them their preferred schedules, including a 5/8 workweek. Under the circumstances, the only policy deviation that occurred in Business Services was when Keelen assigned LaJoie to a 4/9 and 1/2 workweek without her approval.

iv. Math and Sciences

The Federation also argues that Math and Sciences Dean Uhazy changed unit members' workweeks without their approval. Uhazy testified that he allowed employees to develop their own schedules so long as the new operational hours were covered. Uhazy ultimately approved a variety of schedules proposed by employees including at least two employees who sought to maintain their current schedules. There was no evidence that Uhazy directed any employee to select a modified workweek or rejected an employee's proposed schedule.

Math and Sciences employees Cios and Olson both testified that they were not given the option to maintain their existing 5/8 workweeks. However, neither employee requested to maintain their existing workweek so it is unclear whether Uhazy would have agreed to those requests. As stated above, Uhazy did allow employees to retain their existing schedules, including at least one who was working a 5/8 workweek. Moreover, because Article 11.2 allows a supervisor to initiate discussions about workweek modifications, the Federation does not establish that it was a violation for Uhazy to suggest changes so long as those changes were not imposed on unit members without their approval. I find insufficient evidence that Uhazy violated this policy.

The Federation also points out that Olson e-mailed Uhazy on February 6, 2014, stating that she was "against the change in work schedule and hours." As with the Vargas's and Valenzuela's e-mails to Parnell, this suggests that Olson was not in agreement with her Spring 2014 schedule. However, unlike with those other e-mails, it is unclear in Olson's case, whether she was complaining about a change in her workday/workweek (i.e., the number of hours worked per day or per week) or her working hours (i.e., the time of day she is to report to work and the end of her shift). Article 11.2 only requires approval for changes to the workweek/workday. The PERB complaint, likewise, only alleges a violation of the policy set forth in Article 11.2. It does not allege any changes to the District's policy concerning employees' working hours. Nor did the Federation establish the District's policy for assigning or changing employees' working hours. Under these circumstances, I find Olson's e-mail to be insufficient evidence that Uhazy deviated from the policy set forth in Article 11.2. I also find that the Federation failed to adequately plead or demonstrate a unilateral change to any policy concerning changes to working hours.

v. Social and Behavioral Sciences and Business and Computer Studies

The Federation makes similar arguments regarding unit members working in Social and Behavioral Sciences and Business and Computer Studies. In Fall 2013, O' Neil was Dean over both areas. In Spring 2014, Cowell became the Dean of Business Studies. As with Uhazy, O' Neil allowed his staff propose a variety of workweeks and he did not direct any employee to work a particular workweek. There was no evidence that he rejected any employees' proposed workweek. There was also no evidence that any employee complained to him about his or her workweek.

Administrative Assistant Crosby testified that she informed Cowell that the Federation held a vote and that a majority of the unit voted against changing their hours. She said to Cowell that "if I have to change my hours, I am doing so in compliance, but not in agreement." Crosby also testified that it was not made clear to her that she could retain a 5/8 workweek. The Federation maintains that this evidence establishes that Crosby did not agree to modify her workweek after the operational hours change. As with Olson, it is unclear from Crosby's statement whether she was objecting to a change in workweek, or a change in working hours. As stated above, the PERB complaint does not allege any policy change concerning working hours and the Federation did not establish that the District deviated from or created a new policy concerning working hours. In addition, it is unclear from Crosby's statement whether she was objecting to changing her hours solely because of the outcome of the Federation's November 2013 vote. The Federation did not establish that Article 11.2, or any other policy or practice, required a vote before modifying unit members' workweek. For these reasons, I find insufficient evidence that Crosby was forced to modify her workweek without her approval.

vi. EOPS and Student Programs and Services

The Federation also argues that EOPS Director Roggenstein and Dean of Student Programs and Services Zimmerman modified unit members' workweeks without their approval. At EOPS, Roggenstein asked employees for their preferred schedules under the College's new operational hours. He specifically offered employees the ability to retain a normal 5/8 workweek if they moved to an alternate work location on Friday afternoons. Although EOPS Tech II Thompson had reservations about making such a move, there was no evidence she communicated those concerns to Roggenstein or if Roggenstein shared those concerns. Nor was there evidence that any employee objected to his or her workweek after the operational hours change.

Similarly, the evidence shows that Zimmerman offered to allow Ford to retain her normal 5/8 workweek. Ford said that Zimmerman recommended that Ford adopt a 4/9 and 1/2 workweek, but Article 11.2 specifically allows a supervisor to initiate discussions for workweek modifications. There was no evidence that Ford communicated her disagreement with modifying her workweek.

Altogether, the evidence shows that the District modified the workweeks of Stanton, LaJoie, and the unit members in the IMC and the Library without their approval, as required under Article 11.2. Because these employees had their workweeks changed on an ongoing basis and without giving the Federation notice and the opportunity to request bargaining, the District committed a unilateral policy change in violation of EERA section 3543.5, subdivisions (a), (b), and (c). (*Centinela Valley UHSD, supra*, PERB Decision No. 2378, p. 10.)

Remedy

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), states:

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

1. Remedies for the Unilateral Change Violations

It has been found that the District unilaterally changed existing policies by modifying certain unit members' workweeks without their approval. The record shows that the District's unilateral action impacted those employees who worked in the IMC (including but not limited to Burluson and Thatch), Library staff (including but not limited to Valenzuela and Vargas), STAR/TRIO employee Stanton, and Cashier LaJoie. Appropriate remedies in such cases include an order to cease and desist from violating EERA and to return the parties and affected individuals to the status quo that existed before the unlawful acts (*Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 30-35.) All of these remedies are appropriate here as well. Therefore, the District is ordered to cease and desist from unilaterally changing its policy for modifying unit members' workweeks and to offer to return Stanton, LaJoie, and unit members in the IMC and the Library to the workweeks they had in Fall 2013. The District is further ordered to compensate those employees for financial losses, including lost overtime, arising directly from the District's unilateral actions. Any financial losses due shall be augmented by interest at a rate of 7 percent per annum. (*Id.* at p. 34.)

2. Remedy for the Information Request Violation

In *Santa Monica CCD, supra*, PERB Decision No. 2303, PERB held that an appropriate remedy in cases involving the failure to provide requested information include an order to cease and desist from violating EERA and to provide the requested information. (*Id.* at p. 3.) Those remedies are warranted here as well. Accordingly, the District is ordered to cease and desist from failing to properly and timely respond to the Federation's information requests and to provide the Federation with a complete list of employees that were affected by the Spring 2014 workweek modifications, including but not limited to those employees whose workweeks changed.

The District is further ordered to post a notice specifying that it violated EERA. The notice posting shall include both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit." (*Centinela Valley UHSD, supra*, PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

Proposed Order

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, *Antelope Valley College Federation of Classified Employees v. Antelope Valley Community College District*, it is found that the Antelope Valley Community College District (District) violated the Educational Employment Relations Act (EERA), [Government Code section 3543.5, subdivisions \(a\), \(b\), and \(c\)](#). The District violated the EERA by: (1) unilaterally modifying Antelope Valley College Federation of Classified Employees (Federation) unit members' workweeks without their approval; and (2) failing to properly respond to the Federation's request for unit members "affected" by workweek modifications proposed for the Spring 2014 semester. All other allegations have been dismissed.

Pursuant to EERA section 3541.5, subdivision (c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. Cease and Desist From:

1. Unilaterally changing policies within the scope of representation.
2. Failing to properly respond to the Federation's requests for information necessary and relevant to its representation of

members.

3. Interfering with the Federation's right to represent its members.
4. Interfering with employees' right to be represented by the Federation.

B. Take the Following Affirmative Actions Designed to Effectuate the Policies of the Act:

1. Offer to rescind the Spring 2014 workweek modifications for Sara Stanton, Sherri LaJoie, and Federation unit members in the Instructional Media Center and the Library. Compensate those employees for financial losses incurred as a result of the unilaterally implemented workweek modifications, augmented by interest at a rate of 7 percent per annum.
2. Provide the Federation with a list of unit members "affected" by workweek modifications proposed for the Spring 2014 semester.
3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Federation's bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the Federation's unit.
4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Federation.

Right to Appeal

Pursuant to [California Code of Regulations, title 8, section 32305](#), this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board

Attention: Appeals Assistant

1031 18th Street

Sacramento, CA 95811-4124

(916) 322-8231

FAX: (916) 327-7960

E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. ([Cal. Code Regs., tit. 8, § 32300.](#))

Antelope Valley College Federation of Classified Employees, et al., 41 PERC ¶ 46 (2016)

A document is considered “ filed” when actually received during a regular PERB business day. ([Cal. Code Regs., tit. 8, § § 32135, subd. \(a\) and 32130](#); see also [Gov. Code, § 11020, subd. \(a\).](#)) A document is also considered “ filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. ([Cal. Code Regs., tit. 8, § 32135, subds. \(b\), \(c\) and \(d\)](#); see also [Cal. Code Regs., tit. 8, § § 32090, 32091 and 32130.](#))

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See [Cal. Code Regs., tit. 8, § § 32300, 32305, 32140, and 32135, subd. \(c\).](#))

Footnotes

- ¹ EERA is codified at [Government Code section 3540 et seq.](#) PERB Regulations are codified at [California Code of Regulations, title 8, section 31001 et seq.](#)
- ² Consistent with the parties’ Collective Bargaining Agreement, use of the term “workweek” shall describe the number of hours employees work every week and use of the term “workday” shall describe the number of hours employees work on a given day. The term “working hours” will describe the times of day of an employee’ s shift, including the start and end times.
- ³ For ease of reference, the recording shall be marked and admitted as Charging Party Exhibit #132. The declarations and transcript shall be marked and admitted as Charging Party Exhibit #133.
- ⁴ This proposed decision will refer to a variety of different workweek configurations. A “5/8 workweek” will refer to a five-day workweek consisting of eight-hour workdays. A “ 4/10 workweek” will refer to a four-day workweek consisting of 10-hour workdays. A “ 9/80 workweek” will refer to a schedule consisting of nine workdays with a combined total of 80 hours, split between two workweeks. A “ 4/9s and 1/2 workweek” will refer to a five-day workweek consisting of four 9-hour workdays and one 4-hour workday.
- ⁵ The District also operates an alternative site, the Palmdale Center, with fewer services and personnel.
- ⁶ The record did not establish the District’s policy for setting or changing employees’ working hours.
- ⁷ The actual ballots were included as exhibits in the record, but the content of those ballots, for the most part, is uncorroborated hearsay.
- ⁸ STAR/TRIO was not further defined for the record. The office was generally understood to oversee special programs for low income students, first generation college students and students with disabilities.
- ⁹ Noteboom did not testify.
- ¹⁰ Knab did not testify.
- ¹¹ Keelen said that Garcia later requested to discontinue her 5/8 workweek in favor of a 4/9 and 1/2 workweek speculating that Garcia did so because of concerns over her mobility. As stated above, Garcia did not testify. Keelen granted the request.
- ¹² Cowell did not testify.
- ¹³ Zimmerman did not testify.
- ¹⁴ When interpreting EERA, PERB may rely on authority construing analogous federal and State authority. ([San Diego Teachers Assn. v. Superior Court \(1979\) 24 Cal.3d 1, pp. 12-13](#); [Fire Fighters Union v. City of Vallejo \(1974\) 12 Cal.3d 608, p. 616](#); [Centinela Valley Union High School District \(2014\) PERB Decision No. 2378, proposed dec., p. 13, fn. 8 \(Centinela Valley UHSD\).](#))
- ¹⁵ The parties presented no evidence about an individual named “Padilla.” Any claim that a District representative with that name bypassed the Federation in his or her contact with unit members is dismissed for lack of proof.

Antelope Valley College Federation of Classified Employees,...., 41 PERC ¶ 46 (2016)

In addition, the Federation alleges that additional District supervisors, i.e., Jensen, Parnell, and Uhazy, also engaged in unlawful direct dealing. Although those people were not named in the PERB complaint, PERB has authority to review “unalleged violations” where the respondent has adequate notice of and the opportunity to defend against the claim, the claim is sufficiently related to those in the complaint, the matter is fully litigated by the parties, including an equal and full opportunity to examine any witnesses and other evidence relating to the new claim. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8.) I find it appropriate to consider the Federation’s claims under the unalleged violations doctrine. The bypass claims concerning Jensen, Parnell, and Uhazy are closely related and practically identical to those concerning Keelen and Zimmerman. Both sides presented a significant amount of evidence concerning supervisors’ contact with unit members, including calling Jensen, Parnell, and Uhazy as witnesses. The District does not dispute that all of its supervisors contacted employees about workweek modifications and defends against all the bypass claims with a common defense. Under the circumstances, consideration of these unalleged violations is appropriate.

¹⁶ In addition, the Federation argues, for the first time in its closing brief, that the District also violated EERA by failing to properly respond to its February 3, 2014 information request. That allegation was not included in the PERB complaint. The standards for considering an unalleged violation are not met here. When the Federation attempted to introduce evidence about the February 3, 2014 information request on the first day of hearing, counsel for the District objected on the grounds the request was not relevant to the claims in the complaint. In reply, counsel for the Federation stated that the Federation would not be seeking to amend the complaint and that “[t]his simply goes again, goes to aspects of the complaint.” Based on the Federation’s counsel’s representation, I conclude that the District had insufficient notice that the Federation would pursue the February 3, 2014 information request as a separate violation. I similarly conclude that the District also lacked the full opportunity to mount a proper defense to this claim. Accordingly, the Federation’s attempt to pursue this as an unalleged violation is rejected. (See *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668, pp. 6-9.) Evidence of the parties’ conduct regarding this request may be relevant to the claims in the PERB complaint.

¹⁷ In fact, in subsequent information requests by the Federation, such as its February 3, 2014 request, the District was willing to reach out to its individual supervisors for responsive information.

¹⁸ There is evidence that the Federation believed that unit members should be voting to either retain a 5/8 workweek or move to a 4/9 and 1/2 workweek. This is problematic because the record shows that not all unit members had a 5/8 workweek at the time of the contemplated vote. Nor were all unit members directed to adopt a 4/9 and 1/2 workweek after the operational hours change. It is unclear how accurately this suggested vote would have reflected employee sentiment.

¹⁹ The parties did move to Summer hours in the Summer of 2013, but the vote occurred in March 2013, before Knudson arrived.

²⁰ Another e-mail from Knudson around that time raises questions about whether the District even considered the parties to negotiating over a voting procedure. He offered to meet with Ford about the vote, but specifically stated that the meeting was “not a negotiation, [but] a discussion to achieve an understanding of the nature of the vote[.]”

²¹ Stanton’s testimony about what Noteboom said, when used for the truth of the matters asserted, is hearsay. (*Evid. Code, § 1200.*) Other Federation witnesses also testified about conversations with their supervisors about workweek modifications. These accounts of District supervisors’ statements are admissible under the party admission exception to the hearsay rule. (See *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 10 (*Bellflower USD*), citing *Evid. Code, §1220.*) The record shows that District supervisors are authorized to set and modify the workweeks of their respective staffs. As such, I conclude that supervisors were speaking on behalf of the District, when discussing scheduling with their staffs. Employee testimony about such statements accordingly may be used to establish a factual finding under PERB Regulation 32176. (*Bellflower USD*, p. 10.)

²² The recording is hearsay. But the recording is not being used as the sole basis for making a factual finding. (See PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 19-20.) Rather, it is being used to support Burseson’s testimony of what Parnell said at the meeting. As with Noteboom, Parnell’s comments about scheduling are admissible as party admissions.

²³ Parnell herself admitted to confusing the statements made to IMC staff with statements she made to Library staff.