STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

ORDER

AZUSA FEDERATION OF TEACHERS, AFT LOCAL 3298, Charging Party,	)	Case No. LA-CE-32
vs.	)	EERB Decision No. 38
AZUSA UNIFIED SCHOOL DISTRICT, Respondent.	)	November 23, 1977

The Educational Employment Relations Board directs that:

Upon the findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code Section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Azusa Unified School District, Board of Education, superintendent, and representatives shall:

A. CEASE AND DESIST FROM:

1. Contributing financial or other support to the Azusa Educators Association and encouraging employees to join the Azusa Educators Association in preference to the Azusa Federation of Teachers by rental of a District-owned building at Fourth and Angelo Streets, Azusa, California, at less than its fair rental value;

2. In like manner interfering with employees because of their exercise of rights guaranteed by the Act;

3. In like manner denying to the Azusa Federation of Teachers rights guaranteed by the Act.

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

1. If the Azusa Educators Association remains a tenant of the District-owned building at Fourth and Angelo Streets, satisfy the Los Angeles Regional Director of the EERB, no later than 60 days from the date upon which this order becomes final, that a rental fee in accordance with the fair rental value of said building is being charged to the Azusa Educators Association. In making her determination of fair rental value, the Regional Director shall consult an appropriate expert in the field of real estate appraisal.

2. Prepare and post at its headquarters office and in each school for twenty (20) working days in a conspicuous place at the location where notices to certificated employees are customarily posted, a copy of this order;

3. At the end of the posting period, notify the Los Angeles Regional Director of the action it has taken to comply with this order.

Educational Employment Relations Board

by

STEPHEN BARBER
Executive Assistant to the Board

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

AZUSA FEDERATION OF TEACHERS, AFT LOCAL 3298, Charging Party,	)	Case No. LA-CE-32
and AZUSA UNIFIED SCHOOL DISTRICT, Respondent.	)	EERB Decision No. 38 November 23, 1977

Appearances; Anne Fragasso, for Azusa Federation of Teachers, AFT Local 3298; Robert A. Siegel, Attorney (O'Melveny & Myers), for Azusa Unified School District.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION,

This case is before the Educational Employment Relations Board on Azusa Federation of Teachers' exception to the hearing officer's attached recommended decision concluding that the Azusa Unified School District has violated Sections 3543.5(a), (b) and (d) of the Educational Employment Relations Act (EERA) by renting a school building to the Azusa Educators Association (AEA) for one dollar per year. The Federation's exception does not challenge the hearing officer's finding of a violation of the EERA, but rather his recommended remedy that if the District wishes to maintain AEA as a tenant that it charge AEA a fair rental fee. The Federation argues that the hearing officer's proposed remedy should have provided for the eviction of AEA from the building in question.

The Board has considered the record and the decision in light of the exception and briefs. We affirm the findings and conclusions of the hearing officer and adopt his recommended order, except that the first paragraph in part "B" of the order is modified to read as follows:

> If the Azusa Educators Association remains a tenant of the District-owned building at Fourth and Angelo Streets, satisfy the Los Angeles Regional Director of the EERB, no later than 60 days from the date upon which this order becomes final, that a rental fee in accordance with the fair rental value of said building is being charged to the Azusa Educators Association. In making her determination of fair rental value, the Regional Director shall consult an appropriate expert in the field of real estate appraisal.

By: Reginald Alleyne, Chairman

Raymond Gonzales, Member

Jerilou H. Cossack, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
AZUSA FEDERATION OF TEACHERS, AFT LOCAL 3298,	)	Unfair Practice Case No. LA-CE-32
Charging Party,	)	
	)	
vs	RECOMMENDED	DECISION
AZUSA UNIFIED SCHOOL DISTRICT,	)	June 22, 1977
	)	
Respondent.	)	
	)	

Appearances: Anne Fragasso, for Azusa Federation of Teachers, AFT Local 3298. Robert A. Siegel, Attorney (O'Melveny & Myers)., for Azusa Unified School District.

Before Franklin Silver, Hearing Officer.

STATEMENT OF THE CASE

On October 12, 1976, the Azusa Federation of Teachers filed an unfair practice charge against the Azusa Unified School District alleging violation of Government Code Sections 3543.5(a), (b), and (d),[1/] based on the District's practice of renting one of its buildings to the Azusa Educators Association for a rental fee of one dollar per year. The District's answer denied that an unfair practice had been committed and raised the affirmative defense that the charge related to events occurring outside the six-month statute of limitations. (Section 3541.5(a)).

1/ Hereafter, all statutory citations are to the Government Code unless otherwise noted.

At the time the charge was filed, a question of representation existed in the District based upon the filing of a request for recognition by the Association and an intervention by the Federation.[2] On December 6, 1976, the Federation filed a request that the Regional Director proceed with the representation matter notwithstanding the filing of the unfair practice charge. This document was signed by the president of the Federation and contained the statement, "It is understood that the Board will not entertain objections to any election in this matter based upon the conduct alleged in the above-referred to Unfair Charge (LA-CE-32)." On January 4 and 5, 1977, the parties to the representation matter signed a consent agreement for an election to be held on February 9. The election was held as scheduled, and the Association was determined to be the winner. On February 22 the Regional Director certified the Association as the exclusive representative.

The hearing on the unfair practice charge was held on January 14, 1977, after the consent agreement had been signed but before the election was held. At the hearing the charging party took the position that the appropriate remedy would be that the Association be evicted from the District building it occupied and that a letter of apology be mailed by the District to each teacher in the District. The Federation took the position further that the same remedy would be appropriate even if an exclusive representative were certified as a result of the pending election.

FINDINGS OF FACT

In 1966 a District-owned building at Fourth and Angeleno Streets on the Slauson School campus was determined to be structurally unsafe for students according to the provisions of the Field Act. Since that time the District has

[2]The hearing officer hereby takes notice of the official documents on file in the representation matter, EERB Case No. LA-R-166.

made the building available to any organization willing to pay the expenses for maintaining the building. The Association has occupied the building since 1966, and it currently pays the District one dollar a year for the use of the building. Maintenance and janitorial expenses paid by the Association for 1976 amounted to approximately $530. It is not clear whether the Association reimbursed the District for those services or arranged on its own for the services to be provided. The local chapter of the California School Employees' Association also uses the building and pays to the Association $150 per year as its share of the expenses.

The above arrangement for the use of the building has a business purpose. The District itself has no other use for the building and would either have to pay maintenance costs or tear the building down if it were vacant. There is no building of a similar nature which could have been provided to the charging party on the same basis.

The building itself was built around 1900. There is one room that is about 27 feet by 15 feet, or about half the size of a classroom, and another room 27 feet by eight or ten feet. There are two other small rooms, one of which is approximately ten feet by ten feet, and a restroom. The rooms are divided by thin partitions. A sign on the front door reads "AEA Building" and the building is referred to in the District by that name.

On February 2, 1975, Shirley Spink, then president of the Federation wrote to Dr. Lewis Beall, District superintendent, protesting the "discriminatory" practice of providing office space for the Association and CSEA but not for the Federation or AFSCME. A few days later a meeting was held in Dr. Beall's office with Ms. Spink and a representative of the Association at which arrangements to share the building were discussed. The possibilities that were considered included dividing up the office space or using the building on alternate days. The necessity for locks on files and telephones was also discussed. Dr. Beall

made it clear that the Federation was welcome to use the building if arrangements for sharing with the Association could be worked out.

A sharing arrangement was never implemented, and a year and a half later, on September 19, 1976, Jack Norick, the new president of the Federation, wrote to Dr. Beall declining the previous offer to share the building- Mr. Norick stated that use of the building by rival organizations in a representation campaign was "out of the question", that granting use of the building to the Association created the impression of quasi-official preference for the Association, and that the rental fee of one dollar a year for office space created an unfair financial advantage for the Association. Norick requested that the Association be notified that they must vacate the premises. Beall responded on September 24, stating that all organizations had been treated equally and that the offer to the Federation to share the building with the Association remained open.

Mr. Norick testified at the hearing that no sharing arrangement for the building would be practical during an organizational campaign because of the physical characteristics of the building; i.e., the partitions between the rooms were thin and it would be difficult or impossible to have confidential conversations or meetings while representatives of the other organization were in the building, there was a single door to the building so that anybody with a key would have access to the entire building, there would be a constant problem with security of files and documents, and in general the building was too small for use by competing organizations. It was felt that the same security problems would be present if the building were used by the two organizations on alternating days since the Association would have access to Federation materials when representatives of the Federation were not present.

In addition, an alternating day arrangement would cause inconvenience because the Federation was conducting business on a daily basis during the campaign.

Although the District contends that the building could have been shared, and that the various security problems could have been ameliorated through the use of locked files and telephones and an alternating day arrangement, it is found that the Federation was reasonable in rejecting the District's offer to share the building with the Association since the practical problems and inconveniences of sharing the building during an organizational campaign would have outweighed the building's usefulness as office space.

As stated above, the election was held subsequent to the hearing, no objections were filed, and the Association was certified as the exclusive representative.

CONCLUSIONS OF LAW

A. The Statute of Limitations

Although the practice which gave rise to this dispute originated in 1966, long before EERA came into effect and outside the six-month statute of limitations stated in Section 3541.5(a), the rental arrangement alleged to constitute unlawful support continued throughout the limitations period. In addition, Dr. Beall's unwillingness in September of 1976 to respond to the changed conditions in the District, i.e., the organizational campaign then being conducted under the provisions of the EERA, constitutes an independent basis for the charge. Thus, while evidence of earlier events are properly in evidence to shed light on events within the limitations period, it is not necessary to rely solely on the earlier events to determine if an unfair practice has been committed. For this reason, this action is not

barred by Section 3541.5(a). See, Local Lodge No. 1424, I.A.M., v. NLRB, 362 U.S.411, 45 LRRM 3212 (1960); Coppus Engineering Corp. v. NLRB, 240 F.2d 564, 39 LRRM 2315 (C.A.I, 1957).

B. The Section 3543.5(d) Charge

The main thrust of the charge filed by the Federation is that the District, by its rental of the Fourth and Angelo Street building to the Association, has assisted the Association's organizational effort and discriminated against the Federation in violation of Section 3543.5(d)[3]. That section prohibits the contribution of "financial or other support" to an employee organization and also makes it unlawful for an employer to "in any way encourage employees to join any organization in preference to another."[4/] Under this language, it may be an unfair practice to render assistance to an employee organization even if there is no other organization

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3/ Section 3543.5(d) makes it unlawful for an employer to "dominate or interfere with the formation of administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." The first clause of this section is not involved in this case because there is no allegation that the District was actively involved in the original formation of the Association or at any time has influenced or attempted to influence the manner in which the Association has been managed. Therefore, this decision concentrates on the second and third clauses of Section 3543.5(d).

4/ The prohibition against contributing support to an employee organization is based upon Section 8(a)(2) of the National Labor Relations Act, as amended (29 U.S.C, sec. 158(a)(2)), while the language dealing with encouragement of one organization over another is apparently derived from NLRA Section 8(a)(3). (29 U.S.C, sec. 158(a)(3)). The relevant portions of NLRA Section 8 are as follow:

> (a) It shall be an unfair labor practice for an employer –
> * * *
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it....
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....

in competition with it, but it is clearly unlawful to render assistance in such a way as to discriminate against another employee organization which is competing for membership.

The federal courts and the National Labor Relations Board, in cases not involving employer favoritism of one organization over another, have established that use of company time and property for organizational activity is not per se unlawful. Rather, if an employer extends benefits to a labor organization in a spirit of cooperation which does not constitute in some degree employer control or influence over the organization, no unfair labor practice will be found. Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 35 LRRM 2665 (CA.7, 1955); Duquesne University of the Holy Ghost, 198 NLRB 891, 81 LRRM 1091 (1972); Coamo Knitting Mills, Inc., 150 NLRB 579, 58 LRRM 1116 (1964). On the other hand, when there is more than one labor organization competing for membership, the employer must be strictly neutral in extending organizational opportunities. NLRB v. Waterman S.S. Co., 309 U.S. 206, 5 LRRM 682 (1940); NLRB v. Corning Glass Works, 204 F.2d 422, 32 LRRM 2136, at 2140 (C.A.I, 1953); Wyco Metal Products, 183 NLRB 901, 74 LRRM 1411 (1970).

In the present case, there is no evidence that in renting office space to the Association on favorable terms, the District in any way influenced or attempted to control the manner in which the Association represented its members. Thus, if the District unlawfully supported the Association, it must be because of discrimination against the Federation rather than the simple fact that the District extended a financially beneficial arrangement to the Association.

The District of course contends that it did not discriminate because it consistently took the position that the Federation was welcome to use the

building if it could work out arrangements for sharing with the Association. The District, however, fails to recognize that this attitude placed the Federation in an untenable position. The building was not physically capable of housing two competing organizations during an election campaign. Therefore, the Federation was faced with the choice of moving into the building along with the Association -- sabotaging the building's usefulness for either organization — or declining the District's offer altogether. Under these circumstances, the District's offer to allow the Federation to share office space with the Association was unrealistic, and the fact that office space was provided on a financially beneficial basis to the Association during the organizational campaign constituted a discriminatory contribution of support to the Association. By assisting the Association in its organizational efforts, this support had the natural and probable effect of encouraging membership in the Association in preference to the Federation. Where the natural consequence of an employer's conduct is encouragement or discouragement of membership in a labor organization, it will be presumed that the employer intended this result. Radio Officers' Union v. NLRB, 347 U.S. 17, 33 LRRM 2417, at 2428 (1954).

It must also be noted, however, that there is no evidence that the District was motivated by a hostile attitude towards the Federation. In cases of discriminatory conduct having the effect of encouraging or discouraging membership in a labor organization (NLRA Section 8(a)(3), see n. 4 supra), proof that the employer was motivated by an antiunion purpose is not always necessary.

> First, if it can reasonably be concluded that the employer's conduct was "inherently destructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465, at 2469 (1967). (Emphasis in the original.)

See also, Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620, at 625, 626 (1945).

Applying the analysis of Great Dane Trailers, it would appear that in the present circumstances the effect of the discriminatory conduct on employee rights is "comparatively slight." Although the Association was given an advantage in organizing employees, there was no direct discrimination against Federation members themselves and there is no evidence that employees were substantially inhibited from supporting the Federation due to the District's conduct. Therefore, it must be determined if the District has come forward with evidence of legitimate and substantial business justifications for its conduct. The District did have a legitimate business reason for wanting to have its building occupied by one or more employee organizations: employee organizations appeared to the District to be the logical tenants for the building, and if the building was not occupied the District would either have to provide maintenance or tear the building down. Because the Association

paid for maintenance, the District was relieved of this cost. The District, however, does not suggest why it charged only one dollar per year rather than a fee based on the actual rental value of the building. In other words, the business purpose advanced by the District could have been satisfied by charging a fair rent to the Association, and in this way the discriminatory effect of renting the building to the Association could have been neutralized. The District did not prove a business purpose for renting the building at less than its fair rental value, and therefore it must be concluded that it violated Section 3543.5(d).

C. The Section 3543.5(a) and (b) Charges

The Federation in addition has alleged violations of Sections 3543.5(a) and (b).[5/] These subsections deal generally with discrimination against or interference with employees and employee organizations, and it follows that violation of the more specific provisions of subsection (d) constitutes violations of subsections (a) and (b). Unlawful support of the Association during an organizational campaign has the effect of interfering with employees exercising their Section 3543[6/] rights to form, join, and participate in employee organizations of their own choosing, and of discriminating against those employees who support the Federation. Therefore, it must be concluded

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[5/] Section 3543.5 states:

> It shall be unlawful for a public school employer to: (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. (b) Deny to employee organizations rights guaranteed to them by this chapter....

[6/] Section 3543 states in part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations....

that a violation of subsection (a) is stated. Support of the Association also denies the Federation its right to represent its members as stated in Section 3543.1(a)[7] in violation of subsection (b).

The Federation argues that a subsection (b) violation is stated because it was denied equal access to District facilities required by Section 3543.5(b)[2] That section does not require, however, that employee organizations be provided with access to office space, and so it does not apply on its face to a situation where an employer chooses to make office space available. It is sufficient in this case that there has been a denial of the Federation's organizational rights without reliance on Section 3543.5(b).

D. The Remedy

The Federation proposes as a remedy that the Association be evicted from the Fourth and Angelo Street building and that the District mail a letter of apology to each teacher in the District. This proposed remedy, however, is not suited to the facts of this case. The District has a legitimate business purpose in retaining the Association as a tenant, and

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[7] Section 3543.1(a) states in part:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer.

[8] Section 3543.5(b) states:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

especially now that the Association has been certified as the exclusive bargaining representative no purpose could be served by disrupting a cooperative arrangement for rental of the District building[9]. As indicated previously, the District's business purpose can be satisfied without the taint of unlawful support simply by charging the Association a rental fee reflecting the fair rental value of the building. No doubt the rent will still be reasonable, since an old building on school property is probably not in great demand. Nevertheless, in view of the expense of renting comparable commercial property, the Association will undoubtedly be willing to pay a higher rent than one dollar per year. For this reason it is recommended that the District be ordered to satisfy the Los Angeles Regional Director that it has entered into a new rental agreement with the Association reflecting the fair rental value of the Fourth and Angelo Street building. This requirement will be satisfied by presenting the Regional Director

[9]Arguably, the certification of the Association renders the necessity for any remedy moot since the unlawful support occurred solely in the context of the pre-election campaign, and, having waived the filing of objections to the election, the Federation cannot now claim to have a right to equal treatment. Four federal courts of appeal have considered the question of whether an NLRB remedy of pre-election unfair labor practices is rendered moot by certification of an exclusive representative. Three of these courts have held that the purpose of the Remedy is in part to prevent a repetition of the unlawful conduct in the future if the defeated organization attempts to become the bargaining agent, and that on this basis enforcement of the remedy is proper. NLRB v. Metelab Equipment Co., 367 F.2d 471, 63 LRRM 2321 (CA.4, 1966); NLRB v. Marsh Supermarkets, Inc., 327 F.2d 109, 55 LRRM 2017 (CA.7, 1963); NLRB v. Clark Bros. Co., 163 F.2d 373, 20 LRRM 2436 (CA.2, 1947). But see General Engineering, Inc. v. NLRB, 311 F.2d 570, 52 LRRM 2277 (C.A.9, 1962).

with figures reflecting the rent charged for commercial property of comparable age, condition, and floor area in the general neighborhood of the building, and by discounting these figures by a reasonable amount, to be approved by the Regional Director, to reflect the fact that the building is located on school district property and is unsuitable for most commercial uses. The Regional Director may also wish to consider other appropriate evidence of the fair rental value.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code Section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Azusa Unified School District, Board of Education, superintendent, and representatives shall:

A. CEASE AND DESIST FROM:

1. Contributing financial or other support to the Azusa Educators Association and encouraging employees to join the Azusa Educators Association in preference to the Azusa Federation of Teachers by rental of a District-owned building at Fourth and Angelo Streets, Azusa, California, at less than its fair rental value;
2. In like manner interfering with employees because of their exercise of rights guaranteed by the Act;
3. In like manner denying to the Azusa Federation of Teachers rights guaranteed by the Act.

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

1. Satisfy the Los Angeles Regional Director of the EERB, no later than 60 days from the date upon which this order becomes final if the Azusa Educators Association remains a tenant of the District-owned building at Fourth and Angelo Streets, that a rental fee in accordance with the fair rental value of said building is being charged to the Azusa Educators Association;

2. Prepare and post at its headquarters office and in each school for twenty (20) working days in a conspicuous place at the location where notices to certificated employees are customarily posted, a copy of this order;

3. At the end of the posting period, notify the Los Angeles Regional Director of the action it has taken to comply with this order.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become final on July 5, 1977, unless a party files a timely statement of exceptions. See Title 8, California Administrative Code Section 35030.

Dated: June 22, 1977

Franklin Silver
Hearing Officer