STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA CLARA UNIFIED SCHOOL DISTRICT, Respondent, v. SANTA CLARA FEDERATION OF TEACHERS, Local 2393, AFT, AFL-CIO, Charging Party, and, UNITED TEACHERS OF SANTA CLARA, CTA/NEA, Intervenor.	Case No. SF-CE-13 PERB Decision No. 60 August 3, 1978

Appearances: J. Michael Taggart, Attorney (Paterson & Taggart) for Santa Clara Unified School District; Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO; and Joseph G. Schumb, Jr., Attorney (La Croix & Schumb) for United Teachers of Santa Clara, CTA/NEA.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

DECISION

On May 31, 1977 a Public Employment Relations Board (hereafter Board) hearing officer issued a recommended decision in this case dismissing all aspects of the unfair practice charge. On June 7, 1977 charging party Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO (hereafter Federation) filed limited exceptions to the recommended decision. Federation excepted to the hearing officer's failure to find that Laura Garton was discriminated against because she sought assistance from Federation, that William Chapman was harassed because he engaged in protected activities, and that the change in the teaching schedule at Wilson school was made without discussion with Federation.

Federation also excepted to the hearing officer's failure to make certain credibility resolutions between conflicting testimony necessary to resolve the allegation that Laura Garton was discriminated against in violation of section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA).[1]

The Alleged Discrimination Against Laura Garton.

I

Laura Garton was first employed by Santa Clara Unified School District (hereafter District) as a long-term substitute at Cabrillo Junior High School from September 1974 through the first semester of the 1974-75 school year. She was then employed as a long-term substitute at Wilson Junior High School from December 1, 1975 through the end of the school year in 1976. She was employed as a summer school teacher at Washington Elementary School during the summer of 1976.

Garton first learned of the possibility of an opening in the English Department at Wilson at the end of June 1976 from Washington summer school principal Barbara Jeffers. Jeffers asked Garton if she had an English minor; Garton replied that she did not but that she would check into it. About two days later Garton called Wilson principal John Cowden and asked if there was the possibility of a job at Wilson. Cowden told Garton that she had to have an English minor and if she did, there was a good possibility of getting a job. The same week Garton enrolled in a three-unit English class at San Jose State University. On August 13, 1976 she received her grades from San Jose State University. Garton took the grades to the District office and secured an affidavit that she had earned enough credits to have an English minor recorded on her teaching credential. She registered this affidavit with the District office.

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[1]The Educational Employment Relations Act is codified at Gov. Code sec. 3540 et seq. All references are to the Government Code unless otherwise specified.

On August 27, 1976, the Friday before school started, principal Cowden and Garton talked on the phone. According to Garton, Cowden told her during the phone conversation that he thought he had some English and art classes for her. According to Cowden, he suggested that there "was an opening in the English Department, and [asked] whether or not she would feel like this would be something that she could handle since she was not an English major or minor at that time..." Garton and Cowden subsequently met at Wilson the same day and agreed that Garton would teach at Wilson as a long-term substitute. According to Garton, Cowden in effect said that "if things worked out" he did not see anything that would hinder Garton from being hired. According to Cowden, while he neither indicated that the job would be permanent and full-time nor promised Garton that she would get the job if it became permanent, "I told her this would be an opportunity for her and she'd have an inside track on the job."

Garton began teaching at Wilson the following Monday, the day orientation began. According to Garton, at the end of the second week of class she met Cowden accidentally between classes and Cowden asked her if she was ready to have assistant superintendent Gervase come in and observe her. Garton replied that she was ready any time. Cowden recalls that he had a conversation with Garton around the third week of class regarding her observation by Gervase. However, the record is silent regarding Cowden's recollection of the substance of this conversation.

Garton testified that on Tuesday of the following week Cowden called her out of class and into his office. He told her that enrollment had gone down and that the District did not have enough money to hire a full-time teacher. Cowden further said that the position would be part-time, teaching three English classes at about 57 percent of full salary. Cowden told Garton to think about it and let him know if she was interested by Friday. Cowden recalls that he had a discussion with Garton regarding whether or not she would be interested in the job as a part-time position. Cowden testified that he began the conversation by telling Garton that the job would be 57 percent of a full-time job.

Cowden further testified that "...the job that was open to her" was a position paid at 57 percent of the full-time rate and that he asked Garton to consider the position. However, Cowden also testified that he did not remember telling Garton for the first time on September 21, 1976 that the job was only part-time.

Rather, according to Cowden, he decided about six weeks after classes began that he was going to have to fill the position either part-time or full-time. Cowden told assistant superintendent Gervase:

> ...that it looked like we were either going to have to fill a part-time position or a full-time position in English with one art, and that I wasn't really sure yet just exactly what percentage of time, whether it would be a 100 percent or some fraction thereof, and at that time we discussed procedures, and it was his [Gervase's] position and the obvious position that we'd have to advertise.

Garton, however, testified that subsequent to her conversation with Cowden, sometime between Tuesday and Thursday afternoon, she went to the District office and spoke to Mary Mabrey, assistant superintendent Gervase's secretary. Mabrey gave Garton the schedule of insurance benefits prorated on the basis of percentage of time employed. Garton testified that when she introduced herself to Mabrey, Mabrey said, "Oh, you're the one that's going to be over at Wilson." Maybrey did not testify at the hearing.

On Thursday afternoon, after she had been to the District office, Garton called Federation president James Hamm and explained the part-time offer to him. Hamm said he would look into it at the District office and would check on the percentage and the schedule. Hamm testified that Garton contacted him prior to the time the position was posted and told him she had been offered a 57 percent part-time position at Wilson. Garton said that her classes were scattered throughout the day. She wanted to know what her rights were as a part-time employee and whether she was getting a fair shake. Hamm called Gervase and asked how the District had arrived

at the 57 percent figure. Gervase said that he did not understand how the percentage had been determined, that it did not appear correct and that he would look into it. Although Gervase testified at the hearing, he did not testify about the substance of this alleged conversation with Hamm.

Garton testified that Hamm called her on Friday afternoon and told her it would be more beneficial for her to take the part-time position. She tried to see Cowden, but he was not in. Garton further testified that she went to see Cowden on Monday morning, September 27, 1976. She asked Cowden how he had arrived at the 57 percent figure and showed him four different ways in which the percentage could be computed. Cowden agreed that the proper percentage was 66 rather than 57.

Garton testified that she was called into Cowden's office over the loudspeaker later the same day. Cowden appeared to be very angry. The first thing he asked her was what she was doing going to Jim Hamm. Cowden then stated that he had received a call from assistant superintendent Gervase, that Gervase said Hamm had been in his office and it sounded like Garton wanted to grieve the whole thing. Cowden went on to state that he felt like he was being stabbed in the back, that she should watch who her friends were, that they might not really be her friends at all, and that if she had problems she should come and talk to him. Garton replied that she had not just gone to the Federation, that she had actually made her decision before she had even called the Federation, and that she had talked to many people in the District so she could make the best decision. The meeting ended with Cowden telling Garton:

> ...that the job would...be part-time. It would have to be posted with the District in case there were other teachers in the pool... who wanted... it... and then if no one wanted it in the District then it would go elsewhere.

Cowden places this conversation somewhere around October 1, 1976. According to Cowden, the meeting took place because he had received a call from assistant superintendent Gervase in which

Gervase told him Garton was concerned that the schedule of classes was awkward. He called Garton into his office on the same day he received the call from Gervase and asked her what her concerns were regarding the schedule and why she had not talked to him about it first. Cowden testified as follows:

> Q. [by Taggart] Did he [Gervase] indicate to you that Laura Garton had seen anybody else other than Mr. Gervase concerning a part-time assignment? To the best of your recollection.
>
> A. I can't remember if she did or not.
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> *******
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> Q. The meeting you said took place on or about or around October 1st involving Ms. Garton in your office, did you ever mention Jim Hamm in that meeting?
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> *******
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> A. I think that Nick Gervase mentioned that she had talked to--that she had talked to Jim Hamm, and I asked her, I believe she had. She said, yes, she'd talked to several people.
>
> And at that point I asked her why didn't she come to me first.

Cowden does not remember whether he had one or two conversations with Garton on this day. Cowden denies both that he was angry and that he raised his voice to Garton.

Cowden testified that "it was [Gervase's] position and the obvious position that we'd have to advertise." Cowden also testified that Gervase recommended that the job be advertised. Gervase testified that he made the decision to advertise the position. Gervase also testified that the September 27, 1976 written request for posting a part-time opening in the English Department at Wilson, "initiated with John Cowden." A Notice of Personnel Action requesting that the position be advertised was signed by Cowden on October 11, 1976 and by Gervase on October 14, 1976 and appears to be from Cowden to Gervase. The actual job advertisement is

dated October 12, 1976 and, according to Cowden, was posted in the faculty room at Wilson sometime between September 28 and October 12. Garton testified that the advertisement was posted on either October 8 or 11, 1976, approximately a week after Cowden told her the job would be posted.

According to Gervase, there is both a District policy and a District practice with respect to posting job vacancies. Gervase, as assistant superintendent-personnel, is responsible for implementing all decisions to advertise positions. The District policy requires that vacant jobs be posted to permit teachers who have been involuntarily transferred to bid on them. The District practice is to advertise for "resource" teachers because funding guidelines generally require that a committee interview applicants. Otherwise, according to Gervase, "...many times we do not advertise...a normal teacher's position, because we have many applicants that we can draw from."

At the time the decision was made to advertise the position at Wilson, all persons in the involuntary transfer pool had been assigned. Gervase testified that he "wanted to see some other applicants" because Garton had a minor in English and with the high unemployment rate of teachers he thought there were very many qualified persons who were available.

According to Cowden, he determined that all applicants should be interviewed by a screening committee. Gervase testified that he told Cowden "...that I would expect that he would have a committee that would work with him in screening the applicants." While Gervase stated that there have been other screening committees for non-resource teacher positions in the past two years, he could not recall how many there had been or when they occurred.

There were five candidates for the position, including Garton. Garton testified that she was interviewed twice for the job, first by Gervase and then by the screening committee composed of principal

Cowden and teachers George Champion and Georgia Campbell. During the interview with Gervase:

> ...he wanted me to make sure if I had problems to come to him first instead of going outside, that his office is the place to take care of it.

Gervase also told Garton that Cowden would decide who got the job. Gervase terminated the interview, which lasted about 10 minutes, by telling Garton that:

> ...if I didn't get the job he hoped that I wouldn't be discouraged and would stay in with the District.

On approximately November 1 or 2, 1976, Cowden told Garton that the job had gone to someone else. She asked why and Cowden explained that since none of the other English teachers had an English major, he wanted someone with more of an academic background and an English major to build up the department.

Cowden recalls meeting with Garton in his office right after he had told Gervase that he recommended another applicant, Lillian Jurika, for the position. Cowden told Garton:

> I was sorry, that she did not get the job, and that the one concern we had was the lack of a strong academic background in English...if we had an art opening I would sure, even without possibly even an interview, I would really push to avoid an interview and hire her as an art teacher.

II

The hearing officer concluded that the District, had not violated sections 3543.5(a) or (b) by failing to hire Laura Garton in a regular position. The hearing officer made no conclusions about whether or not the alleged conversations between Garton and principal Cowden and Garton and assistant superintendent Gervase occurred as alleged and, if so, whether or not they constituted independent violations of section 3543.5(a). We believe resolutions of conflicting testimony and evidence is necessary.

In general, the relationship on appeal between an agency and a hearing officer ought to be that of a trial court to an appellate court. Conclusions, interpretations, law and policy should be open to full review. However, those matters about which the hearing officer, who has seen the witnesses and heard the evidence, has a better basis for decision should not be disturbed unless the hearing officer is clearly erroneous[2]. A hearing officer must base findings of fact on direct evidence or reasonable inference. To be reasonable, and thus qualify as a fact found, an inference must be one that springs logically to mind in the context of the known facts.

There was conflicting testimony at every juncture of the events here in question, beginning with the conditions under which Garton was hired as a long-term substitute at Wilson in August of 1976. These conflicts encompass not only conversations between persons but also the chronology of events culminating in the posting of the part-time position in the English department at Wilson. As the record now stands, the hearing officer apparently credited Garton with respect to some of these matters and Cowden or Gervase with respect to others. Furthermore, while the hearing officer concluded that it was assistant superintendent Gervase, not principal Cowden, who made the decision to advertise the job at Wilson, the evidence is unclear as to whether Cowden had any effective role in the decision. In these circumstances, the hearing officer must determine, and state the basis on which the determination rests, the credibility of witnesses and the weight to be given to conflicting items of evidence.

Sound administrative decision-making makes it imperative for us to have the benefit of the hearing officer's opportunity to observe the witnesses he hears and sees but which we do not. We therefore remand the case for a determination of the credibility

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Universal Camera Corp. v. NLRB (1951) 340 U.S. 474, 494 [27 LRRM 2373].

of the witnesses and the weight to be given their testimony and conflicting items of evidence, together with a recital of the bases on which the determinations rest. This will require such amended findings of fact as are necessary to reflect these resolutions.

The Alleged Harassment of William Chapman and The Wilson School Change in Teaching Schedule

The Federation has also excepted to the hearing officer's failure to find that the District unlawfully harassed William Chapman and unlawfully changed the teaching schedule at Wilson School. In view of our decision to remand the prior allegation to the hearing officer for resolution of credibility issues, we make no decision today with respect to these allegations. Rather, we will decide the entire case when the record before us is complete.

ORDER

The Public Employment Relations Board orders that:

(1) The hearing officer shall issue a supplemental recommended decision resolving the conflicting testimony regarding the allegations that Laura Garton was discriminated against in violation of section. 3543.5 (a) and (b).

(2) The parties shall have twenty (20) calendar days after service of the hearing officer's supplemental recommended decision in which to file exceptions to the supplemental recommended decision. Regardless of whether or not exceptions are filed, the case shall be returned to the Board itself for determination in light of the supplemental recommended decision.

By: Jerilou Cossack Twohey, Member Harry Gluck, Chairperson

Raymond J. Gonzales, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the matter of :	)	
	)	
SANTA CLARA FEDERATION OF TEACHERS LOCAL 2393, AFT, AFL-CIO, Charging Party,	)	
	)	
vs.	)	UNFAIR CASE No. SF-CE-13
	)	
SANTA CLARA UNIFIED SCHOOL DISTRICT, Respondent,	)	
	)	
UNITED TEACHERS OF SANTA CLARA CTA/NEA, Intervenor.	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO; J. Michael Taggart, Attorney (Paterson and Taggart), for Santa Clara Unified School District; Joseph G. Schumb, Jr., Attorney (La Croix & Schumb), for United Teachers of Santa Clara/CTA/NEA.

Before Gerald A. Becker, Hearing Officer.

STATEMENT OF THE CASE

On September 15, 1976, the Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO (hereinafter "Federation" or "charging party") filed an unfair practice charge against the Santa Clara Unified School District (hereinafter "district" or "respondent"). The district has an average daily attendance of approximately 20,088 in grades K-12, with 21 elementary schools, 4 intermediate schools, 4 high schools and 1 continuation high school. The certificated staff in the district numbers approximately 904, of which approximately 860 are non-management employees.

After various amendments and a "Particularized Statement of Charge", the charging party essentially alleges that the following unfair practices were committed by the respondent:

a. In violation of Government Code §3543.5 (a) and (b), respondent changed the teaching schedule at Wilson Intermediate School to create more onerous working conditions for employees, so as to harass charging party members because of their membership in, and activities on behalf of, charging party, to discourage membership in charging party and to influence the upcoming representation election;[1]

b. In violation of Government Code §3543.5 (b) and (c), respondent changed the teaching schedule at Wilson Intermediate School without meeting and negotiating with charging party.[2] In violation of Government Code §3543.5 (b), the schedule change was made without meeting and consulting with charging party.[3]

c. In violation of Government Code §3543.5 (a) and (b), respondent threatened, interrogated and harassed William Chapman because of his activities on behalf of charging party;[4]

d. In violation of Government Code §3543.5 (a) and (b), respondent refused to hire a long-term substitute, Laura Garton, as a regular employee because of her activities with respect to charging party, and in order to discourage membership in charging party;[5]

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[1] A summary of paragraphs (1), (2) and (3) of the Third Amended Charge.

[2] Paragraph (4) of the Third Amended Charge.

[3] At the hearing, charging party was permitted to make an oral amendment of its charges to include this allegation.

[4] A summary of paragraphs (5), (6) and (7) of the Third Amended Charge.

[5] Paragraph (8) of the Third Amended Charge, as orally "clarified" at the hearing.

e. In violation of Government Code §3543.5 (b) and (d), respondent dominated and interfered with the formation and administration of the Independent Teachers Association and the Wilson Intermediate School Ad Hoc Committee for Truth in Paper Warfare, employee organizations, and contributed financial and other support to these organizations.[6]

Respondent denies any unfair practice violations. In addition, respondent has made various motions with respect to the unfair practice charges. Prior to the hearing, respondent filed a motion to dismiss the charge alleging a failure to meet and negotiate the teaching schedule change at Wilson Intermediate School on the grounds that charging party did not allege that it was an exclusive representative entitled to meet and negotiate, and that there was no allegation of a request to the district from the charging party to negotiate the schedule change. This motion was renewed at the start of the hearing and at the same time, respondent also orally moved to dismiss the charges pertaining to the schedule change (a. above) on the basis that the unfair practice charge was filed more than 6 months after the acts in question occurred, contrary to Government Code §3541.5 (a) (1). Finally, at the close of the charging party's case in chief, respondent orally moved to dismiss all charges on the ground that insufficient evidence had been presented by charging party to support a decision in its favor. Ruling was reserved on all respondent's motions and they are resolved by this proposed decision.

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[6]Paragraph (9) of the Third Amended Charge.

Prior to the hearing, United Teachers of Santa Clara/ CTA/NEA (hereinafter "Association") filed an application for joinder in the hearing pursuant to EERB Regulation 35016. The Regional Director allowed joinder, leaving the extent of participation to the hearing officer's discretion. The hearing in this matter was held on February 22, 23 and 24, 1977 at the district offices in Santa Clara, California. At the start of the hearing, the hearing officer ruled that the Association could participate in the hearing with respect to paragraphs 1, 2, 3 and 9 of the Third Amended Charge (a. and e. above).

It was stipulated by the parties that the district is an employer, and that the Federation and Association are employee organizations within the meaning of the Educational Employment Relations Act (hereinafter "EERA").[7]

ISSUES PRESENTED

a. Teaching schedule change at Wilson Intermediate School:

(1) Are the unfair practice charges concerning the teaching schedule change at Wilson Intermediate School barred by the six-month limitation period of Government Code Section 3541.5 (a) (1)?

(2) Was charging party required to exhaust the district's grievance procedure prior to filing an unfair practice charge?

(3) Did the respondent change the teaching schedule at Wilson Intermediate School so as to harass Federation members, discourage Federation membership or influence the upcoming representation election,

[7] Government Code §3540 et seq.

in violation of Government Code §3543.5 (a) and (b)?

b. Failure to meet and negotiate or meet and consult:

(1) Did respondent fail to meet and negotiate with charging party concerning the teaching schedule change at Wilson Intermediate School in violation of Government Code §3543.5 (b) and (c)?

(2) Did respondent fail to meet and consult with charging party concerning the above schedule change in violation of Government Code §3543.5 (b)?

c. William Chapman:

(1) Did respondent threaten, interrogate or harass William Chapman because of his Federation activities in violation of Government Code §3543.5 (a) and (b)?

d. Laura Garton:

(1) Is Laura Garton a protected employee under the EERA?

(2) Did respondent refuse to hire Laura Garton as a regular employee because of her activities with respect to the Federation or to discourage Federation membership, in violation of Government Code §3543.5 (a) and (b)?

e. Domination and interference with employee organizations:

(1) Did respondent dominate or interfere with the formation or administration of the Independent Teachers Association, or contribute financial or other support thereto, in violation of Government Code §3543.5 (b) and (d)?

(2) Did respondent dominate or interfere with the formation

or administration of the Wilson Intermediate School Ad Hoc Committee for Truth in Paper Warfare, or contribute financial or other support thereto, in violation of Government Code §3543.5 (b) and (d)?

FINDINGS OF FACT

a. Teaching schedule change at Wilson Intermediate School.

In the summer of 1974, in response to community concern, the school board decided that more emphasis should be placed on basic skills (language arts, reading, math and social science), and that elective subjects should be deemphasized. They also decided that school schedules should be more uniform throughout the district. In the fall of the 1975-76 school year, the district superintendent directed intermediate school principals to prepare school schedules for the 1976-77 school year to implement these goals. The school schedule is the principal's responsibility.

On November 26, 1975, the faculty council[8] at Wilson Intermediate School began discussing alternative schedules for the next school year. The scheduling change was discussed at three faculty council meetings in December, January and February of the 1975-76 school year. The alternatives eventually were narrowed down to two: "Plan 1" by which all teachers would have a constant or "outside" preparation period during the first period of the day, and "Plan 2" by which teachers' preparation periods would rotate throughout the school day. The principal at Wilson Intermediate School, John Cowden, indicated as early as the November 1975

[8] The faculty council at Wilson school implements the district's "participatory management" policy, one of the purposes of which is "to assure equal teacher involvement ... in (p)lanning the instructional program." The council acts in an advisory capacity to the local school administration. There is no evidence in the record that the faculty council ever made a recommendation on the Plan 1-Plan 2 issue.

faculty council meeting that he favored Plan 1. William Chapman, the faculty council president and Federation representative at Wilson School, favored Plan 2. The remainder of the faculty was split.

During the school year, the principal conducted a survey among the faculty to solicit their priorities on educational objectives. The results indicated that the faculty's top priorities were instruction in basic subjects and reduced class size. The principal's concerns were the same. During the 1975-76 school year, class size in basic subjects was approximately 31. Under Plan 2 in the 1976-77 school year, it was estimated that class size would continue to be about the same. Under Plan 1, class size would be reduced to 24.

At a March 3, 1976 faculty meeting, a faculty vote on Plans 1 and 2 was scheduled. Even though nothing specific was told the faculty, based on the fact that the two plans had been developed and debated by the faculty for a number of months and the fact that a vote was to be taken, some faculty members at Wilson School believed that the vote would be decisive. The February 25, 1976 faculty council minutes, signed by William Chapman, indicated there would be a faculty "vote preference". The vote by secret ballot was approximately 21 to 17 in favor of Plan 2. After the vote, Mr. Cowden, the principal, characterized the vote as the faculty's "recommendation" and said he would announce his decision in a few days.

At a March 10, 1976 faculty meeting, Mr. Cowden announced that he had selected the Plan 1 instructional schedule, which eventually was implemented at Wilson School at the start of the 1976-77 school year

(September 1, 1976). During the 1976-77 school year under Plan 1, there are 260 instructional minutes per day and the principal requires teachers to arrive at school at 8:10 a.m.[9] and they may leave at 3:05 p.m. The new schedule applies to all teachers at Wilson School. During the 1975-76 school year, the teachers' workday was from 8:00 a.m. - 3:10 p.m. with 253 instructional minutes.

At the other three intermediate schools in the district, the starting and dismissal times and instructional day for the 1976-77 school year are as follows:

Juan Cabrillo Intermediate School: 8:00 a.m.-3:15 p.m., 260 minutes

Patrick Henry Intermediate School: 8:10 a.m.-3:15 p.m., 260 minutes

Curtis Intermediate School: 8:10 a.m. -3:15 p.m, 288 minutes.

At Curtis, a constant, "outside prep" schedule similar to the revised Wilson schedule has been in effect for seven years. At the other two intermediate schools there was discussion during the 1975-76 school year concerning adoption of a similar teaching schedule. It was not adopted by the principal at either school for the 1976-77 school year. At Cabrillo, the faculty voted against the "outside prep" plan. At Patrick Henry, there was no vote taken, but the principal solicited faculty input in making his decision.

Some faculty members at Wilson School who are Federation members do not like the new teaching schedule, generally for the following reasons: the instructional period is too short, there is insufficient time for auxiliary "duties" such as running off copies of materials for

[9]Although the district's "Certificated Handbook" states that "(t)eachers are generally expected to be on duty 20 minutes before the first regular classes begin ...," which the Federation contends would be 7:50 a.m., the principal at Wilson school does not require teachers to arrive until 8:10 when the first period preparation begins.

class, and extra help to students can cut into the morning preparation period-

There are 22 Federation members at Wilson School, at Patrick Henry there are 9, at Cabrillo there are 4, and at Curtis there are 4 or 5. The Federation therefore considers Wilson to be one of its strongholds in the district and when the Plan 1 teaching schedule was imposed at Wilson School contrary to faculty vote, members of the Federation's executive board thought that teachers in the district would think the Federation ineffective in supporting its members at Wilson, and the upcoming election would thereby be influenced. However, no member of the bargaining unit told this to James Hamm, Federation president. There is no evidence in the record that the schedule change at Wilson in fact had such effect.

When William Chapman was first hired in 1971, Mr. Cowden, his principal, mentioned the existence of only the Association, not the Federation. When first hired in 1972, Edward Whitehead, another teacher at Wilson school, specifically asked Mr. Cowden about the Federation . Mr. Cowden laughed and replied that he didn't think he would be interested in the Federation because it was small and the Association was the majority organization in the district. Mr. Cowden's statement concerning the relative sizes of the Association and the Federation was factually correct.

The district has a grievance policy, which culminates in advisory arbitration subject to final decision by the school board. A grievance is defined in pertinent part as a "violation of district rules and regulations, or of administrative regulations and procedures... ."

Federation inquired about filing a grievance concerning the teaching schedule change at Wilson School but was told by Mr. Gervase, administrator of personnel services, and another district administrator, that there was no violation of any district policy to grieve. However, the district superintendent testified that he felt it would have been a proper subject for grievance if a violation of the district's "participatory management" policy had been alleged.

b. Failure to meet and negotiate or meet and consult.

The Plan 1 teaching schedule change adopted at Wilson School for the 1976-77 school year reduced class size. It also changed the length of the teachers' workday. James Hamm, Federation president, knew of the proposed schedule change in October or November of 1975, and William Chapman, the representative at Wilson, kept the Federation informed throughout. The Federation never requested to negotiate the schedule change. There is no evidence that the Federation ever requested to meet and consult concerning the proposed schedule change.

The parties stipulated that neither the Federation nor the Association is an exclusive representative.

c. Threats, interrogation and harassment of William Chapman.

William Chapman has been the Federation representative at Wilson School for the past four years. He has represented teachers in grievances at Wilson as well as at other schools in the district. He also is the Federation's "labor counselor" and in that capacity represents the Federation at Central Labor Council meetings. He teaches in the math department at Wilson School.

After Mr. Cowden decided on March 10, 1976 to adopt the Plan 1 teaching schedule, Mr. Chapman told him he was going to file a grievance on the issue. In addition, on August 30, 1976, when Mr. Chapman reported back to Wilson School after summer vacation, he told Mr. Cowden that he could not honor the new teaching schedule and he did not see why he had to be at school by 8:10 a.m.. Mr. Chapman told Mr. Cowden that he was speaking on behalf of an unspecified group of teachers as well.

Mr. Cowden became upset and told Mr. Chapman that if he could not support the program at Wilson any better than that, he would have him punch a time clock, dock him 10 % of his pay and have to take action on his insubordination.

In the three or four weeks after August 30, 1976, Mr. Cowden conducted 11 informal observations of Mr. Chapman's classes, each of a few minutes duration. Mr. Cowden also conducted a formal, "sit-down" observation of Mr. Chapman, of approximately 15-20 minutes duration, during "Spirit Week" in late November, 1976. During "Spirit Week" students and teachers were dressed in costume and a paper drive was conducted. The students in Mr. Chapman's class were "fired up" during Mr. Cowden's observation. Previously, Mr. Chapman had extended an open invitation to Mr. Cowden to come into his classroom at any time.

Mr. Cowden never told Mr. Chapman that he was dissatisfied with the Spirit Week observation of his class. Mr. Cowden testified at the hearing that he thought there was "good atmosphere" in the class. There is no evidence that Mr. Cowden ever said that he was

dissatisfied with Mr. Cowden's teaching this school year. Previously, he has told Mr. Chapman that he considers him an excellent teacher, and in the past always has evaluated him as satisfactory or excellent. Mr. Cowden has not yet evaluated Mr. Chapman this year.

Mr. Cowden informally observed all other math department members this year, including during Spirit Week, although only Mr. Chapman had a formal, "sit-down" observation during that time.

In prior years, Mr. Cowden observed Mr. Chapman about four or five times before evaluating him.

d. Refusal to hire Laura Garton as a regular teacher.

From September, 1974 through January 1975, Laura Garton taught music, typing and art as a long-term substitute teacher at Cabrillo Intermediate School. From December 1, 1975 through June, 1976 she taught seven art classes per day as a long-term substitute at Wilson School. In the summer of 1976, she taught sports, recreation, art and drama in summer school at Washington Elementary School in the district.

During the summer school session, Barbara Jeffers, the summer school principal, told Ms. Garton that there was an opening in the English department at Wilson. Ms. Garton called Mr. Cowden who said that if she obtained a minor in English there would be a good chance she would get the job. Ms. Garton took courses over the summer, obtained an English minor and filed it with the district. She already had a fine arts major.

On August 27, 1976, Mr. Cowden offered her a long-term substitute position at Wilson teaching 5 English classes and one art class.

The position was not advertised. It is not district policy to advertise substitute jobs. The position was classified as substitute because Mr. Cowden was not sure that enrollment at Wilson would be sufficient to support a permanent position and in order to give both Ms. Garton and himself an opportunity to see how things worked out. Mr. Cowden said that Ms. Garton would have an "inside track" on the job if it became permanent.

About six weeks into the semester Mr. Cowden determined that the job would become permanent, but because enrollment had not yet stabilized he was not sure whether it would be full-time or part-time. Mr. Cowden informed Ms. Garton that the position would become a 57 % part-time, permanent position. Ms. Garton checked with the district office concerning the relative benefits of part-time versus substitute status. She also talked to James Hamm, Federation president, who said he would check with the district office for her.

On Monday morning, September 27, 1976, Mr. Cowden agreed with Ms. Garton that the correct part-time percentage should be higher (it eventually was advertised as 64 %) . After school that same day, Mr. Cowden called her into the office. He appeared angry and told her that Mr. Gervase, administrator of personnel services, had called and said that Ms. Garton had been to see him and others in the district about the job, that James Hamm also had come to see him about the job and it appeared that Ms. Garton was ready to grieve the whole matter. Mr. Cowden said that she should have come to him first if she had any problems, that he felt she was stabbing him in

the back by going to other people, and that she should watch out who her friends were because they might not really be. At the same time, Mr. Cowden also informed her that the job would have to be advertised throughout the district. Mr. Cowden was unaware of any Federation activities on her part and in fact Ms. Garton is not a Federation or Association member.

In their September 27, 1976 telephone conversation, Mr. Gervase determined that Mr. Cowden would have to request that the position be advertised. It is district policy to advertise teaching positions if there is an "involuntary transfer pool" of teachers resulting from discontinuance of classes and to advertise for resource teacher positions because of Education Code requirements. It is not usual to advertise teaching positions otherwise. In the case of the position at issue, the involuntary transfer pool already had been exhausted and it was not a resource teacher position. Mr. Gervase testified that he decided to advertise the position because there were many qualified applicants that he wanted to have an opportunity for the job. Mr. Cowden testified that he wanted to strengthen the English department.

Among English department members this year at Wilson, Edward Whitehead and George Chanpion have English minors only. Mr. Cowden had asked Mr. Whitehead to be English department chairman. Charles Shell has no English major or minor, but only a general credential. He considers English to be his poorest subject and was reassigned over protest this year to the English department from a physical education assignment.

Mr. Gervase also told Mr. Cowden that he should set up a screening committee for the applicants, a procedure not often used in the past. Ms. Garton was one of five applicants to appear before the screening committee which, in her case, consisted of Mr. Cowden, the reading department chairperson, and George Champion, an English and music teacher who was substituted at the last moment by Mr. Cowden to replace the English department chairperson who was ill. Mr. Champion is a Federation member. Before the interview, Mr. Gervase told Ms. Garton that he hoped she wouldn't be discouraged if she didn't get the job, and that she should stay with the district. Previously, when she saw him concerning the part-time job, he told her to come to him first with any problems. After interviewing the five applicants, the unanimous selection of the screening committee was Lillian Jurika because she had a masters degree in English and seven years' teaching experience

In early November 1976, Mr. Cowden told Ms. Garton that she did not get the job because they wanted someone with an English major and more academic background, and that she might have had a better chance if she had taken English rather than art classes during that semester. Shortly thereafter, Ms. Garton left her substitute job at Wilson and Ms. Jurika filled the position, which became a full-time permanent position.

Since then, Ms. Garton has substituted throughout the district and specifically at Wilson 10 to 12 times. These short-term substitute assignments are made through the "substitute desk" at district offices, usually without the school principal's knowledge.

In the past, however, Mr. Cowden has requested that particular substitutes not be sent to his school and his requests have been honored by the district. He did not make such a request in Ms. Garton's case.

On February 9, 1977, prior to testifying at the hearing, Ms. Garton requested a meeting with Mr. Gervase, who assured her there would be no "black marks" against her for testifying.

e. Domination and interference with the Independent Teachers' Association and Wilson School Ad Hoc Committee for Truth in Paper Warfare.

It was stipulated by the parties that the Independent Teachers Association (hereinafter "ITA") is an employee organization within the meaning of Government Code §3540.l(d). ITA is an unaffiliated, local certificated employee organization formed in the district in December, 1976. An article noting its formation, goals and pro tempore officers appeared in the December 13, 1976 issue of the district's staff bulletin placed in faculty mailboxes. According to the district superintendent, any employee organization can request to have such informational notices placed in the staff bulletin and on occasion such organization notices have appeared in past staff bulletins.

On February 1, 1977, ITA sent a letter to the school board expressing, among other things, 100% support for the school board. The letter was signed by Barbara Jeffers on behalf of ITA. Barbara Jeffers is the treasurer pro tempore of ITA.

In the spring of 1974, Barbara Jeffers was elected a second vice-president of the Federation. She was named as such in an October 15, 1975 letter from James Hamm, Federation president, to the district superintendent, in which the Federation filed for recognition as an employee organization in the district for the 1975-76 schoolyear. Sometime in the, fall of 1975 Barbara Jeffers told William Chapman that

she had other commitments and did not want to continue as Federation vice-president.

In the winter of 1975, when she was selected as summer school principal for the 1976 summer session, Mr. Hamm remarked to her that a Federation member was selected for the position. On February 25, 1976, she signed a "petition card" authorizing the Federation to represent her in collective negotiations, and around the same time, she also distributed Federation petition cards to other teachers at Wilson school. She resigned the vice-presidency post on October 31 or November 1, 1976.

In the summer of 1975, Barbara Jeffers acted as an assistant to John Cowden, who was a summer school principal. In the summer of 1976, she was a summer school principal herself. In the spring, she spent about 20-25 hours working on the summer school program, schedule and curriculum. She interviewed about 20 teachers and recommended hiring six, who were in fact hired. Within the District's priority system for selecting summer school teachers, she recommended the hiring by priority of all applicants with elementary teaching credentials. During the summer session, she evaluated the six teachers. Summer school teachers are not in the certificated bargaining unit. Summer school is a half-day, five week session. Barbara Jeffers again will be a summer school principal this coming summer.

The District has not designated Barbara Jeffers, nor summer school principals, as management or supervisory.

From about November, 1976 until February, 1977, Barbara Jeffers was assigned to the District office to research and write grant applications for federal projects. She did not sign the applications. She

received her regular teaching salary during this period and was assigned back to Wilson school shortly before this hearing.

In 1973, Barbara Jeffers was assigned to a counseling position at Wilson school for four or five weeks as a temporary replacement for an ill counselor. There was one other qualified candidate, and Barbara Jeffers was recommended by the vice-principal and the two other counselors.

In the first quarter of the 1976-77 school year, Barbara Jeffers was given an extra preparation period to prepare for the Career Education class she had been given as a new assignment. Some other teachers at Wilson school also have an extra preparation period this year, including some Federation members.

Barbara Jeffers is the certificated employee representative on the district's Affirmative Action Committee. She was urged to take the position by the Federation's executive board.

Barbara Jeffers has applied to the district and been rejected for the positions of principal, dean of girls and resource specialist.

The only evidence in the record concerning the Wilson Intermediate School Ad Hoc Committee for Truth in Paper Warfare is that it is run by one person, Bob Sherrard, and that Barbara Jeffers attended one meeting in which a letter was drafted to all certificated employees in the district asking them to attend a meeting at Wilson school concerning the rivalry between the Federation and the Association.

DISCUSSION

a. Teaching schedule change at Wilson School.

(1) The unfair charges are not barred by the six-month limitations period.

The initial decision to adopt the Plan 1 teaching schedule at Wilson school was made by the principal on March 10, 1976. The unfair charge was filed on September 15, 1976, more than six months thereafter. Respondent contends that the charges related to the teaching schedule change are therefore barred by Government Code §3541.5 (a) (1) which provides that the board shall not:

> "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge... ."

The language of section 3541.5 (a) (1) is almost exactly the same as section 10(b) of the Labor Management Relations Act (LMRA). Interpretation of the federal law by the NLRB and the courts therefore serves as guidance in interpreting the language of section 3541.5 (a) (1). Fire Fighters Union v. City of Vallejo (1974) 12 C. 3d 608, 615-17, 116 Cal. Rptr. 507.

In the present case, the principal's March 10 decision was an informal one. No official action was taken beyond the announcement of his decision to the Wilson school faculty. The principal could

have changed his mind any time prior to actual implementation of the schedule change on September 1, 1976. If he had done so, any previously-filed unfair practice charges could have been mooted. It was implementation of the schedule change, and not the initial informal decision, which created the allegedly onerous working conditions for Wilson School faculty, and from which stemmed the alleged effects on the Federation and the election. Thus, this is not a case in which an apparently lawful action within the six-month limitation period is charged to be an unfair practice only through reliance on actions occurring prior to the six-month period as in Local Lodge 1424 v. NLRB (1960) 362 U.S. 411, 45 LRRM 3212. Rather, although the analogy is by no means perfect, the instant case is closer to the facts in NLRB v. Plumbers, Local 214 (7th Cir. 1962) 298 F. 2d 427, 49 LRRM 2519. In that case, more than six months prior to filing of the charge a union unlawfully demanded the discharge of a non-union employee, but the discharge itself was within the limitation period. The court held the charge to be timely filed.

Therefore, it is found that in this case the date of implementation of the schedule change, September 1, 1976, is an appropriate time from which the six-month limitation period should run. Accordingly, the unfair practice charges were timely filed.

(2) The charging party was not required to exhaust the district's grievance procedure prior to filing the unfair practice charge.

In its brief, respondent contends that administrative remedies must be exhausted prior to resorting to extra-judicial relief. In support of this proposition, respondent cites Cone v. Union Oil Co. (1954) 129 CA. 2d 558, 277 P. 2d 464 and Abelleira v. Court of Appeal (1941) 17 C. 2d 280, 109 P. 2d 942. Respondent is incorrect; these two cases stand only for the well-established proposition that administrative remedies must be exhausted before resort to judicial relief. No authority has been found extending this proposition to include a requirement that local administrative remedies must be exhausted before requesting relief from a state agency such as EERB which itself conducts administrative proceedings.

Therefore, charging party was not required to exhaust the district's grievance machinery prior to filing its unfair practice charge for the reasons advanced by respondent.[11] In view of this conclusion, it is unnecessary to determine whether the teaching schedule change at Wilson School was a grievable matter under the district's policy.

(3) Respondent did not commit an unfair practice by changing the teaching schedule at Wilson School.

The theory upon which the Federation predicates its charges concerning the teaching schedule change at Wilson School is that since Wilson School is a Federation stronghold, the schedule change was intended to discriminate against Federation members at the school, and in addition, members of the bargaining unit would think the Federation ineffective in representing its members so that

[11] Respondent does not argue that this case involves contract grievance machinery under Gov. C. §3541.5 (a) (2).

Federation membership would be discouraged and the upcoming representation election would be influenced.

As to the contentions that Federation membership would be discouraged and the representation election influenced, there is no evidence that any member of the negotiating unit thought the Federation ineffective because the schedule change at Wilson School was put into effect over the faculty's vote. In fact, the only evidence on this point is contrary; no member of the negotiating unit told James Hamm, Federation president, that he or she felt that way. Nor is there any basis for finding that this would be the natural and probable consequence of the schedule change. Other than the fact that William Chapman, the Federation representative at Wilson School, was faculty council president and opposed the schedule which eventually was adopted, there is no evidence that the Federation ever intervened or took up the issue on behalf of its members. There similarly is no evidence that negotiating unit members saw it as a Federation issue. Indeed, the testimony establishes that the dispute over the Plan 1 - Plan 2 issue at Wilson School was centered on academic, not organizational concerns.

In essence, charging party asks us to draw an inference that Federation membership was discouraged and that the election would be influenced solely from the fact that Wilson School is a Federation stronghold. Assuming for the sake of argument that members of the negotiating unit do in fact view Wilson as a Federation stronghold, on this record this inference alone is insufficient to sustain the charging party's burden of proving an unfair practice

was committed. (EERB Regulation 35027).

With respect to the charge that the Wilson School schedule change was adopted for the purpose of harassing Federation members, the evidence shows that the schedule change proposal was initiated in the fall of 1975 in response to academic concerns on the part of the school board. From the start of discussions at Wilson School, well before he could have known how the faculty would vote, John Cowden, the principal, indicated he favored the schedule which he eventually adopted. Plan 1 results in smaller class size than Plan 2, a high priority of both the principal and faculty. The new teaching schedule does not result in a longer school day or instructional day for Wilson teachers as compared to teachers at the district's other intermediate schools. In fact, the teachers at Wilson have a shorter day than teachers at all the other intermediate schools and their instructional day (teaching time) is the same as at two of the schools and shorter than the third.

It is true that some Wilson faculty members who are Federation members do not like the new schedule. But the faculty vote was close, 21 to 17, and it must be assumed that many faculty members are in favor of the new schedule The schedule of course affects all teachers equally without regard to organizational affiliation.

Therefore, it cannot be said that the schedule change at Wilson School was intended to harass Federation members. While a few years ago Mr. Cowden did indicate a preference for the Association over the Federation, it appears that his remarks were prompted by

the Federation's lack of strength at that time. With respect to the schedule change, there is no evidence that Mr, Cowden was motivated by other than academic concerns,

b. Respondent did not commit an unfair practice by failing to meet and negotiate or meet and consult with. Federation on the Wilson School schedule change.

For purposes of this decision, it is assumed without deciding that the teaching schedule change at Wilson School is within the scope of representation (Government Code §3543.2) and subject to negotiation. However, only an exclusive representative has the right to meet and negotiate (Government Code §3543.5 (c)) and conversely, the district only is required to negotiate with an exclusive representative (Government Code §3543.3). It was stipulated that the Federation is not an exclusive representative. Moreover, an employer is obligated under Government Code §3543.3 to negotiate only "upon request" and the Federation never made such a request. Therefore, it was not an unfair practice to adopt the schedule change without negotiating with the Federation.

By its oral amendment, Federation contends that prior to selection of an exclusive representative, its right to represent its members in their employment relations with the district under Government Code §3543.1 (a) includes the right to "meet and consult" on items within the scope of representation. It is unnecessary to decide whether the right to meet and consult is included within the scope of representation because there is no evidence that the Federation

ever requested to meet and consult on the schedule change at Wilson School, even though it had ample notice and opportunity, and therefore it must be deemed to have waived whatever right it had in that regard,

c. Respondent did not threaten, interrogate or harass William Chapman because of his Federation activities.

The evidence of threats by Mr. Cowden against Mr. Chapman is that at the start of the current school year, Mr. Cowden threatened to have Mr. Chapman punch a time clock, dock him 10% of his pay and take action for insubordination if Mr. Chapman would not honor the new teaching schedule as he said he would not. Although Mr. Chapman indicated he was speaking on behalf of other teachers as well, he did not say that he was acting in his capacity as a Federation representative or that he was specifically representing Federation members. Rather, the evidence indicates that Mr. Cowden's angry response resulted from what he considered to be proposed insubordination by Mr. Chapman.

The Federation charges that in the 3 or A weeks immediately after this confrontation, Mr. Cowden harassed Mr. Chapman by observing his class 11 times. Mr. Cowden also conducted a "sit-down" observation of Mr. Cowden during ''Spirit Week" when the class was "fired up". While it appears that Mr. Cowden observed Mr. Chapman's classes somewhat more than is usual, the observations were only of a few minutes duration and Mr. Cowden has not made any negative comments this year concerning Mr. Chapman's teaching and previously always has rated him well.

Furthermore, there is no evidence linking the alleged harassment to Mr. Chapman's Federation activities save for the

Federation's contention that the confrontations between Mr. Chapman and Mr. Cowden over the schedule change issue were so motivated. Having found in both instances that Mr. Cowden's motivations were otherwise, there is no basis for charging that the alleged harassment of Mr. Chapman was because of his Federation activities.

There is no evidence in the record that Mr. Chapman ever was interrogated concerning his Federation activities,

d. Refusal to hire Laura Garton.

(1) Laura Garton is a protected employee under the EERA.

Respondent argues that because Laura Garton was a substitute teacher, she is not entitled to the protection of the EERA's unfair practice provisions. In support of this contention, respondent cites the board's decisions in Belmont Elementary School District (EERB Decision No. 7, December 30, 1976) and Petaluma City Elementary and High School Districts (EERB Decision No. 9, February 22, 1977) in which long-term and day-to day substitutes were not included in the same negotiating unit as "regular" teachers. As respondent notes, the board did not decide in these cases whether these substitutes were "employees" under the EERA.

Respondent also cites Bernard T. King, Esq. (1973) 6 PERB 3132 in which the New York Public Employment Relations Board held that per diem substitutes, the majority of whom worked less than one quarter of the school year and whose return rate was under 40%, are not "public employees" under New York's Taylor Law. Like Government Code §3540.1 (j), the definition of "public employee" under the Taylor Law is broad.

However, in at least two other states with similarly broad definitions of "employee", opposite results have been reached. In Pennsylvania, per diem substitutes who work more than 22 days were held to be "employees." Philadelphia School District (1975) 5 PPER 113. In Oregon, any substitute teacher who worked at all during the previous year was held to be an "employee." Eugene Substitute Teacher Organization v. Eugene School District 4-J (1976) 1 PECBR 716, 725-6. See also, Town of Lincoln (1975) 1 MLC 1422, in which the Massachusetts Labor Relations Commission held that "call-fire-fighters", even though casual employees and excluded from the bargaining unit, were "employees" under the Act. Under the National Labor Relations Board (NLRA), cf. Soss Manufacturing Co. (1944) 56 NLRB 348, 14 LRRM 109 in which supervisors excluded from the bargaining unit nevertheless were entitled to protection of the NLRA's unfair labor practice provisions.

Moreover, the above decisions concern per diem or day-to-day substitutes. Ms. Garton was classified as a "long-term" substitute.[13] During the last two school years, she taught 50% or more of the school term. Her employment relationship with the district therefore was more continuing and substantial than that of day-to-day substitutes.

Not only was Ms. Garton a "long-term substitute" but under the allegations of the unfair charge, she also was an applicant for a

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[13] The Education Code does not distinguish between day-to-day and long-term substitutes, but on the record it is unclear that Ms. Garton was properly classified as a substitute, rather than temporary employee , since apparently she was not filling the position of a "regularly employed person absent from service." Ed. C. §44917; see also, §44919, 44920, and 44852. The Board has included temporary employees in classroom teachers' negotiating units. (Belmont, supra, and Grossmont Union High School District, EERB Decision No. 11, March 9, 1977) and therefore temporary employees must be protected employees under the unfair practice provisions of the EERA.

regular teaching position. Under §8(a)(3) pf the NLRA, job applicants are protected against discrimination in hiring. Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177, 8 LRRM 439. In the Phelps Dodge case, the Supreme Court held that the phrase "discrimination in regard to hire" in §8(a)(3) protects job applicants as well as those already employed.

The EERA contains no language analogous to §8(a)(3) of the NLRA, and §8(a)(3) by its terms is not limited to discrimination against "employees". But a violation of §8(a)(3) constitutes a derivative violation of §8(a)(l) (3 NLRB Annual Report 52 (1939)), which section is analogous to Government Code §3543.5(a) and like §3543.5(a), is limited to interference with, restraint or coercion of "employees".[14]

Therefore, it is found that Laura Garton is a protected employee for purposes of an unfair practice charge brought under Government Code §3543.5(a).[15]

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[14] We do not discuss here the implications of the fact that as defined in §2(3) of the NLRA, "employee" is not "limited to the employees of a particular employer."

[15] A possibly troublesome question arises as to the Federation's standing to represent Ms. Garton as a party to the proceedings on the §3543.5(a) charge since she is not a Federation member and the Federation, a non-exclusive representative, is expressly given the right under Gov. C §3543.1(a) only to represent its members. Only the Federation and not Ms. Garton is named as a charging party, so it cannot be said that the Federation is acting only as Ms. Garton's agent in presenting a case on her behalf. Nevertheless, since none of the parties have objected to the Federation's standing, nor has Ms. Garton, this issue is merely noted but will not be pursued. In the hearing officer's opinion, any possible defect could have been remedied by naming Ms. Garton, with her consent of course, as a charging party.

The Federation also charges that the refusal to hire Laura Garton denied the Federation rights guaranteed to it under the EERA in violation of Government Code §3543.5(b). Insofar as the alleged discrimination against Ms. Garton resulted in prejudice to the Federation's rights under the EERA, her employee status is irrelevant. To hold otherwise might permit an employer to give preference in hiring to members of one organization over another, and the organization discriminated against would have no remedy under the EERA. As the Supreme Court stated in the Phelps Dodge case:

> "Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply." 313 U.S. 177, at 185.

(2) Respondent's failure to hire Laura Garton as a regular employee was not because of her Federation-related activities or to discourage Federation membership.

It would appear that through the morning of September 27, 1976, barring unforseen circumstances, Mr. Cowden intended to give the regular position to Ms. Garton. However, after school that same day, he informed her that the job opening would have to be posted. The intervening circumstance was the phone call to Mr. Cowden from Mr. Gervase, personnel administrator. Mr. Gervase said that Ms. Garton had been in to see him and others about her job, that Mr. Hamm also had come to see him on her behalf, and that it looked like Ms. Garton was ready to grieve the whole matter. Coupled with the fact that posting a job of this kind was unusual, this circumstantial evidence creates some suspicion.

But as charging party intimates in its closing brief, the

alleged unfair practice was that Ms. Garton was required to compete for the job, and not that she was not eventually selected. In any event, it appears that the screening committee procedure itself was fairly conducted. Since the decision to advertise the job was made by Mr. Gervase, and not Mr. Cowden, we must focus on the former's behavior and motivation. Mr. Cowden's actions after the telephone conversation are irrelevant.

Whether or not Ms. Garton actually was discriminated against, the only evidence that any such discrimination resulted because of protected activities under the EERA is that Mr. Gervase decided to advertise the job (1) after Mr. Hamm had come to see him, and (2) after he mentioned to Mr. Cowden that he thought that Ms. Garton was ready to file a grievance.

On the other hand, Mr. Gervase testified that he wanted to give other qualified applicants an opportunity. He urged Ms. Garton not to be discouraged and to stay with the district if she were not selected by the screening committee. He also urged Ms. Garton to come to him with any problems. There is no basis for finding that Mr. Gervase was insincere. Since November,1976, Ms. Garton has continued to work fairly regularly in the district as a substitute. Before testifying at the hearing, Mr. Gervase assured Ms. Garton that she would not be penalized for testifying. Ms. Garton is not a Federation member.

Based on the evidence in the record, it is found that charging party has not sustained its burden of proving that the district

committed an unfair practice under Government Code §3543.5(a) or (b) by failing to hire Ms. Garton in a regular position,

e. Respondent did not dominate or interfere with the formation or administration of either the Independent Teachers Association or the Wilson Intermediate School Ad Hoc Committee for Truth in Paper Warfare, nor did it contribute financial or other support.

The basis upon which Federation contends that the district dominated and interfered with the formation and administration of the Independent Teachers Association (ITA) is that Barbara Jeffers was a founding member. Federation contends that Barbara Jeffers is a management or supervisory employee and an agent of management.

Government Code §3543.5(d) prohibiting employer domination, interference or support of an employee organization is similar to §8(a)(2) of the NLRA. There is no evidence, as required to show unlawful domination, that ITA was formed and structured by the district or that the district dominated the administration of ITA to the extent that employees' freedom of choice was influenced. Hertzka and Knowles v. NLRB (9th Cir. 1974) 503 F. 2d 625, 87 LRRM 2503, 2507, cert. denied. However, participation in the affairs of an employer organization by supervisory personnel, even though unauthorized and unratified by the employer, can be illegal interference.[16] Plumbers Local 636 v. NLRB (DC Cir. 1961) 287 F. 2d 354, 47 LRRM 2457; NLRB v. Park Edge Sheridan Meats, Inc. (2d Cir. 1963) 323 F. 2d 956, 54 LRRM 2411.

[16]It should be kept in mind that supervisors are entirely excluded from coverage under the NLRA (§14(a)), whereas under the EERA, the only restrictions are that supervisory employees must belong to a separate unit and be represented by a different employee organization (Gov. Code §3545 (b)(2)).

The Federation contends that special treatment has been accorded Ms. Jeffers including her recent district assignment, extra preparation period, Affirmative Action Committee membership, and temporary counseling assignment. See Findings of Fact, pp. 17-18, ante. But it is apparent that none of the above involved any duties indicative of management or supervisory status as set forth in Government Code §3540.l(m), nor do the facts demonstrate that these assignments made her an agent of management. Accordingly this opinion focuses on her employment as a summer school principal.

The Federation's contention that Ms. Jeffers is a management or supervisory employee primarily rests on the fact that she serves as a summer school principal. Ms. Jeffers functions as a regular employee during the regular school year. As a summer school principal, Ms. Jeffers effectively recommended hiring of summer school teachers. However, she had no discretion to choose one applicant over another. Under the district's priority system, she had to choose by priority number all applicants with the necessary elementary credential. Therefore, her authority to recommend hiring was "... of a merely routine... nature, ... (not) requir(ing) the use of independent judgment." Government Code §3540.l(m).

Ms. Jeffers also evaluates summer school teachers, but there is no evidence as to how these evaluations are used. Unless an evaluation forms the basis for affecting an employee's status the authority to evaluate, by itself, does not indicate supervisory status. Summer school teaching service does not count towards attainment of tenure in the district. Education Code §44913.

Therefore, Ms. Jeffer's summer school duties are insufficient to qualify her as a supervisor.

The evidence of management status is that Ms. Jeffers developed the summer school schedule and curriculum. These duties concern nonunit personnel and are outside the scope of her regular district assignment. She testified that she spent only 20-25 hours, prior to the summer school session in such preparation. There was no evidence as to the degree of autonomy she exercised in performing these duties. There also was no evidence as to the manner in which she actually administered the program during the five week summer session.

Therefore, there is a lack of evidence as to the nature of her summer school duties and moreover, the total time spent performing these duties (5 week summer session plus 20-25 hours of preparation) represents a minor portion of Ms. Jeffers' work time. Even if Ms. Jeffers performed some management functions, such functions are de minimus when compared to her full-time duties as a regular employee in the district's regular program.

Accordingly on these facts it is found that Federation has not sustained its burden of proof that Ms. Jeffers' summer school duties give her "significant responsibilities for formulating district policies or administering district programs" (emphasis added) within the meaning of Government Code Section 3540.l(g) defining "management employee."

It is ironic to note that in the summer of 1976 when she served as a summer school principal, Ms. Jeffers was a Federation member and officer. ITA had not yet been formed. As respondent notes, if Ms. Jeffers in fact were management or supervisory, Federation's own organizational efforts could be jeopardized. Ms. Jeffers has yet to serve or perform duties as a summer school principal since becoming affiliated with ITA.

With respect to Federation's charge that the district contributed financial or other support to ITA, the only evidence is the announcement of its formation in the district's staff bulletin and the use of district facilities for meetings. On occasion, other employee organizations' notices have appeared in the staff bulletin. In addition, other employee organizations also have been permitted to use district facilities for activities such as meetings.[15]

Under the NLRA, support to an employee organization, consisting of use of the employer's time and property, is not a per se violation

[15]Government Code Section 3543.1(b) gives employee organizations the "right to use institutional facilities at reasonable times for the purpose of meetings... ."

of Section 8(a)(2) but subject to a de minimus rule. Coamo Knitting Mills Inc. (1964) 150 NLRB 579, 582, 58 LRRM 1116; Duquesne University (1972) 198 NLRB 891, 81 LRRM 1091.

Accordingly, although the staff bulletin may have gone a little overboard in its emphasis on ITA's goals and its dissatisfaction with the Federation and Association, any support rendered ITA by the bulletin is de minimus and does not constitute illegal support under Government Code Section 3543.5(d).

Furthermore, it appears that ITA was given no special advantages not also extended to other employee organizations. Such even-handed treatment does not constitute unlawful support under Government Code Section 3543.5(d). Ballston-Stillwater Knitting Co. (2d Cir. 1938) 98 F. 2d 758, 2LRRM 655, 657-8.

There is insufficient evidence to make even the preliminary determination as to whether the Wilson School Ad Hoc Committee for Truth in Paper Warfare is an employee organization within the meaning of Government Code Section 3540.l(d). Therefore, no domination, interference or support is found.

CONCLUSIONS OF LAW

a. Teaching schedule change at Wilson Intermediate School:

(1) The unfair practice charges concerning the teaching schedule change at Wilson Intermediate School are not barred by the six-month limitation period of Government Code §3541.5(a)(1).

(2) Charging party was not required to exhaust the district's grievance procedure prior to filing the unfair practice charges.

(3) Respondent did not violate Government Code §§3543.5(a) or (b) by changing the teaching schedule at Wilson Intermediate School.

b. Failure to meet and negotiate or meet and consult:

(1) Respondent did not violate Government Code §§3543.5(b) or (c) by failing to meet and negotiate with charging party over the teaching schedule change at Wilson Intermediate School because charging party was not an exclusive representative with the right to meet and negotiate.

(2) Respondent did not violate Government Code §3543.5(b) by failing to meet and consult with charging party because charging party did not request to meet and consult and therefore waived whatever rights it had in that regard.

c. William Chapman:

(1) Respondent did not threaten, interrogate or harass William Chapman because of his Federation activities in violation of Government Code §§3543.5(a) or (b).

d. Laura Garton:

(1) Laura Garton is a protected employee under the unfair practice provisions of the EERA.

(2) Respondent did not refuse to hire Laura Garton as a regular employee because of her Federation-related activities, or to discourage Federation membership, in violation of Government Code §§3543.5(a) or (b).

e. Domination and interference with employee organizations:

(1) Respondent did not dominate or interfere with the formation or administration of the ITA, or contribute financial or other support thereto, in violation of Government Code §§3543.5(b) and (d).

(2) Respondent did not dominate or interfere with the formation or administration of the Wilson Intermediate School Ad Hoc Committee for Truth in Paper Warfare in violation of Government Code §§3543.5(b) and (d).

ORDER

The unfair practice charges filed by the Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO are hereby dismissed.

Pursuant to Title 8, Cal. Admin. Code §35029, this recommended decision and order shall become the final decision and order of the Board itself on June 13, 1977 unless a party files a timely statement of exceptions. See 8 Cal. Admin. Code §35030.

GERALD A. BECKER
Hearing Officer

Dated: May 31, 1977.