

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN DIEGO TEACHERS ASSOCIATION, CTA/NEA,)
Charging Party,)
and) Case No. LA-CE-194
SAN DIEGO UNIFIED SCHOOL DISTRICT,) PERB Decision No. 137
Respondent.) June 19, 1980

Appearances; Charles R. Gustafson, Attorney for San Diego Teachers Association; Ralph D. Stern, Attorney for San Diego Unified School District; Richard J. Currier, Attorney for Association of California School Administrators, amicus curiae.

Before: Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

The San Diego Unified School District (hereafter District) has filed exceptions to the attached hearing officer decision. The hearing officer found that the District violated section 3543.5 (a) of the Educational Employment Relations Act (hereafter EERA)¹ by placing letters of commendation in the personnel files of the approximately 2,500 unit employees who had not participated in a strike. He concluded that such conduct was a discriminatory reprisal against those who had

¹ EERA is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code, unless noted otherwise. EERA is administered by the Public Employment Relations Board, or PERB. (Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.)

participated in the strike. The hearing officer also found a violation of section 3543.5(c) because the District failed to disclose the existence of the letters during the course of negotiations after the strike ended. The exclusive representative, the San Diego Teachers Association (hereafter Association), has not filed any exceptions to the decision. For the reasons set forth below, the Board itself affirms the findings of fact and the conclusions of the hearing officer, as modified herein.

FACTS

In brief, the hearing officer found that a strike called by the Association in the District was halted following a three-two school board vote promising that "no sanctions" other than loss of pay would be taken against strikers if they returned to work and if negotiations were resumed.² These conditions were met. Thereafter, while negotiations continued, the two dissenting members of the school board, without informing the three members who had approved the "no sanctions" resolution, prepared a letter of commendation to be placed in

²The motion approved by the school board at a special meeting on June 9, 1977 stated:

That no sanctions other than loss of pay be imposed on strike participants on the condition that the strike end today and that the union negotiators return to the table tomorrow morning.

the personnel files of school teachers who had not been on strike. The letter was prepared on official stationery, using the board members' titles, and there was a testimonial admission by the District that the letters might be considered as a factor affecting employee promotional opportunities.³

³The commendation letter stated, in full:

August 23, 1977

'The true teacher defends his pupils against his own personal influence. He inspires self-trust. He guides their eyes from himself to the spirit that quickens him. He will have no disciple.¹

Orphic Sayings (1840) Amos Bronson Alcott

Dear Teacher:

Thank you for your dedication to the children of San Diego during the recent teacher's strike. By continuing to fulfill your contract in the face of many pressures exerted upon you to join the ranks of those who had abdicated their responsibilities, you demonstrated clearly and forcefully that you are a truly professional teacher. Yours was a courageous stand.

We want you to know that we shall always be grateful to you and to all your fellow teachers who faced up to their obligations. And the children you served will remember it long after we are gone.

Truly yours,

/s/George W. Smith, President
Board of Education

/s/Dorothea Edmiston, Member
Board of Education

cc: Personnel Division
Employee Personnel File

Representatives of the District did not inform the Association about the letter during negotiations although, as the testimony disclosed, the District's chief negotiator was also the personnel manager and was in charge of receiving the letters of commendation and responsible for placing them in the teacher jackets. Contrary to routine practice, the decision to file the letters was cleared by this individual with the District superintendent because of the large number (about 2,500) and the time it would take to file them. Only after a collective agreement had been reached by the parties in mid-September was the Association notified of the commendation letter by individual employees. The charging party then protested to the three school board members who had voted for the "no sanctions" resolution, but they took no action.

The Association filed an unfair practice charge alleging violation of sections 3543.5(a), (b), (c) and (d);⁴ specifically, that the District's conduct in connection with the commendation letter constituted a discriminatory reprisal against employees who had been on strike, was a breach of the

4 Section 3543.5, in relevant part, provides:

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

"no sanctions" agreement, amounted to a refusal to negotiate in good faith, and interfered with the right of representation and the administration of the employee organization.⁵

DISCUSSION

In the briefs filed with the Board, the District and amicus make three basic contentions. First, they dispute the finding

employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or 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.

⁵In addition to finding the 3543.5(a) and (c) violations mentioned above, the hearing officer dismissed the Association's 3543.5(b) and (d) charges. He concluded that there was no denial of employee organizational rights that was separate from interference arising from the violation of section 3543.5 (c), and therefore the charge under section 3543.5(b) should be dismissed. This conclusion may have been in accord with PERB precedent at the time of the hearing officer's decision (6/2/78), but is inconsistent with subsequent decisions on the scope of section 3543.5(b) in connection with a concurrent violation of section 3543.5(c). See, e.g., San Francisco Community College District (10/12/79) PERB Decision No. 105. For this reason the Board has decided to sustain the section 3543.5(b) charge, even though the charging party took no exception to the hearing officer's dismissal. On the other hand, there is no reason to disturb the hearing officer's dismissal of the charge under section 3543.5 (d) since no evidence was introduced to support the alleged violation. The Association did not take exception to the dismissal of this charge.

that the action of the individual school board members writing the letter of commendation for placement in personnel files was an action of the employer. In support of this position they rely on California statutes prescribing procedures for school board meetings⁶ and conclude that the individual members, acting on their own, did not take official, wrongful action in this case. Second, the District argues that the same statutes preclude a finding that the "no sanctions" agreement was a result of meeting and negotiating, entitled to the protection of EERA, because the three-person majority did not satisfy the meeting requirements set forth in those statutes. Third, the employer maintains that the work stoppage was not protected concerted activity for the purpose of prohibiting the District from commending other employees who did not participate in the work stoppage. In this regard, the District reasons that a letter of commendation as to certain employees does not constitute discrimination against others. For all of these reasons, respondent claims that it did not violate EERA.

Employer Action.

The hearing officer found that the action by the two school board members authorizing the letter of commendation, and placement of the letters in teacher files, was action by the

⁶See, e.g., Education Code section 35145, et seq., as well as Government Code section 54950, et seq.

employer. This conclusion should be affirmed. Unlike the hearing officer, however, a finding of employer action is not based solely on the fact that by failing to act when given notice of the letter of commendation, the three school board members who had originally approved the "no sanctions" agreement effectively condoned the actions of the other members. Additionally, a finding of employer status prior to such condonation is based on the subject matter of the letters (i.e., praise by governing officials for the professionalism of non-striking teachers), the regular District stationery that was used, the titles identifying the authors of the letter as school board members, and the decision of District managerial employees authorizing placement of the letters in personnel folders. Under these circumstances employees in the District had reasonable cause to believe that the District's personnel were acting with the authority of the employer and that the District is liable for their actions. (See Antelope Valley Community College District (7/18/79) PERB Decision No. 97. Also see NLRB v. Donkin's Inn, Inc. (9th Cir. 1976) 532 F2d 138 [91 LRRM 3015]; Naccarato Construction Co. (1977) 233 NLRB 1394 [97 LRRM 1060].)⁷

⁷Comparable provisions of the federal Labor-Management Relations Act (LMRA), 29 U.S.C. 151, et seq., may be used to guide interpretation of EERA. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608. Compare the NLRA definitions of employer (sec. 2(2), 29 U.S.C.,

This determination of employer status is reached notwithstanding several sections of the Education Code relied upon by the District and by amicus to argue that the individual board members' letter could not be construed as official action of the school board itself. (Ante, n.6.) These statutes provide, generally, for public meetings of school boards and other governing institutions, with agendas to be published in advance of the meeting, and time restrictions on actions that may be taken at special sessions. Section 3549.1 of EERA, however, expressly exempts meeting and negotiating discussions from these requirements:

All the proceedings set forth in subdivisions (a) to (d), inclusive, shall be exempt from the provisions of Sections 965 and 966 of the Education Code, the Bagley Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3) and the Ralph M. Brown Act (Chapter 9 commencing with Section 54950) of Part 1 of Division 2 of Title 5, unless the parties mutually agree otherwise:

(a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.

(b) Any meeting of a mediator with either party or both parties to the meeting and negotiating process.

152(2)) and agency determination (sec. 2(13), 29 U.S.C. 152(13)), with EERA's definitions of management employee (sec. 3540.1(g)) and employer (sec. 3540.1(k)).

(c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.

(d) Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives. [Emphasis added.]

(Sections 965 and 966 of the former Education Code are now sections 35144 and 35145 of the reorganized code.)⁸

Nevertheless, whether the individual board members were acting with proper official notice as the governing board is not the question facing PERB in regard to the issue of employer status. We need only inquire whether their actions, in conjunction with the actions of other agents placing the

⁸The District mistakenly relies on Education Code section 35164 to contest a finding of employer status. That section provides that a five member school board may act upon the majority vote of three members. This requirement is consistent with the finding, below, that the school board adopted the "no sanctions" resolution on a three-two vote; but it is irrelevant to the finding of employer liability for preparation and distribution of the letters of commendation by persons acting with the apparent agency authority of the District. Other statutes referred to by the District add nothing to its argument. Government Code section 54952.6 simply defines the term "action taken" by a legislative body as a majority decision, and section 54959 makes participation in an unlawful meeting a misdemeanor if action is taken. Furthermore, even if the individual board members, for example, acted contrary to provisions of the Education Code, or provisions of the Government Code that are not part of EERA, PERB administers and enforces EERA, and not other statutes.

letters in personnel files, may be viewed, under EERA, as acts of the employer in the eyes of the employees.⁹

Meeting and Negotiating Activity.

A similar analysis controls disposition of the District's argument that the "no sanctions" agreement was not a product of lawful meeting and negotiating procedures, subject to the protection of EERA, because the school board resolution was not adopted pursuant to statutory requirements controlling public meetings, referred to above.

Rejection of the District's position is supported by several facts and by interpretation of relevant provisions of EERA. Negotiations between the parties started in May 1977 and continued up to and after the time of the work stoppage in June 1977. The day before the District adopted its no-reprisals resolution, the parties unsuccessfully attempted to negotiate a similar settlement. Only after those preliminary discussions did the District act at a public meeting, consistent with the

⁹There is also no merit in the employer's argument that upholding its liability in this case will place an unreasonable burden upon the employer to disavow individual letters from the public dealing with employee performance. The facts of this case do not fall within the District's objection. Here, the apparently official involvement of individual board members (using their titles and District stationery) and the involvement of other agents of the District (including the superintendent and the chief personnel and negotiating officer), rebut any suggestion that the letter of commendation was submitted by persons apart from the employment relationship.

obligations of section 3547(d)¹⁰ and the leeway afforded by section 3549.1. (Ante p.8.) The Association's representative was present at the school board meeting when the action was taken, expressed consent with the conditional terms of the proposal, and testified that the Association was satisfied that agreement had been reached on the no-reprisals issue. In the context of this case it was a reasonable and flexible response to the strike situation for both parties to consider means of ending the strike, even if a measure was approved the same day it was put forward in public. The critical nature of an interruption of school services, and the great public interest related to strikes, justifies such a response.

On a negotiations issue related to the employer's argument, it can be concluded that the "no sanctions" proposal complied

¹⁰ Section 3547, EERA's "public notice" provision, provides:

(a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity

with section 3540.1(h) ,11 as it was adopted by the school with the intention of being put in writing, was accepted by the Association representative at the meeting and was ultimately executed by the Association's performance of the District's

to express itself regarding the proposal at a meeting of the public school employer.

(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

(e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives. [Emphasis added.]

¹¹Section 3540.1(h) defines "meeting and negotiating" as:

. . . meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive

proposed conditions. Further, there was never any formal, timely action by the school board disclaiming its original "no sanctions" offer to the striking teachers. Given the Association's justifiable reliance on the apparent authority of the initial public proposal, the District is estopped at this date from arguing that it was not "negotiating." To find otherwise would sanction false pretenses on a matter of utmost public importance.¹²

Violation of Section 3543.5(a)

The hearing officer's conclusion that the letter of commendation violated section 3543.5 (a) should be upheld. In reaching this decision it is not necessary to evaluate the

representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

¹²concurring Member Moore contends that the District's proposal at a public meeting removed the resolution from the bilateral character inherent in the statutory definition of negotiations. First, the school board's conditional resolution here was only one aspect of the process of bargaining, offer and acceptance that took place before, during and after the school board meeting. Second, her approach would impose artificial timing and location requirements on the negotiating parties. For example, if a school board sunshined its initial proposal at a public meeting, and, after public discussion, adopted the proposal at a subsequent public meeting, at which the employee representative announced acceptance, could there be doubt that the parties were engaged in the process of negotiations without having to go elsewhere?

status of the work stoppage by Association members, an issue raised by an unfair practice charge filed by the District, but later withdrawn. The employer's conduct was unlawful whether the strike was legal or illegal.

It is proper to conclude, as did the hearing officer, that a violation of section 3543.5 (a) occurred because the District's action was contrary to the terms of the "no sanctions" resolution approved by the school board. The letter interfered with the protected right of the employee organization and its members to accept in good faith the terms of that resolution by returning to work, resuming negotiations and refraining from continuation of the strike. This right is provided in section 3543, giving employees 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,"¹³ as well as the right "to refuse to join or participate in the activities of employee organizations...."

¹³The potential impact of post-strike sanctions on subjects within the scope of representation is apparent. Employer sanctions could affect hours of employment, compensation, or specific terms and conditions of employment, including, as in this case, "procedures to be used for the evaluation of employees." (Sec. 3543.2.) The employer's failure to negotiate in good faith over its deviation from the "no sanctions" agreement is discussed more fully below as a violation of sec. 3543.5 (c).

The finding of protected employee activity here flows from our understanding of actions that may be taken to improve employer-employee relations by ending disruption of the educational process. The Legislature's recognition of this consideration is reflected in section 3549. That section states that Labor Code section 923, which has been interpreted to include a right to strike (see, e.g., Los Angeles Met. Transit Authority v. Bro. Railroad Trainmen (1960) 54 C.2d 684, 687-688), is not applicable to public school employees. Whether or not inapplicability of Labor Code section 923 is also interpreted to permit public sector strikes, section 3549 further provides that:

Nothing in this section shall cause any court or the board to hold invalid any negotiated agreement between public school employers and the exclusive representative entered into in accordance with the provisions of this chapter.

Our analysis in this regard follows the mandate of the Supreme Court in San Diego Teachers Association v. Superior Court (1979) 24 C.3d 1,¹⁴ that PERB is charged with responsibility for furthering "the public interest in

¹⁴In San Diego, involving the same parties and work stoppage before PERB in this case, the Supreme Court vacated contempt findings imposed by a court against the striking teachers, holding that PERB, not the court, has exclusive initial jurisdiction to determine whether a strike is a probable unfair practice under EERA, and to seek injunctive relief, if warranted.

maintaining the continuity and quality of educational services." (San Diego, supra, 24 C.3d at 11.) This conclusion is also consistent with judicial enforcement of strike settlement agreements, even if the preceding work stoppage was arguably unlawful. See, e.g., City and County of San Francisco v. Cooper (1975) 13 C.3d 898, citing with approval East Bay Municipal Employees Union v. County of Alameda (1970) 3 Cal.App.3d 578.¹⁵

¹⁵ Durkin v. Board of Commissioners (Wise. Cir. Ct. 1969) [73 LRRM 2213] the court disapproved discriminatory action following the settlement of a strike by a no-reprisals agreement. The argument in favor of protecting strike settlements was succinctly stated:

As a concession to achieve an end to the dispute, the Council made a policy decision that it would not be in the public interest to take disciplinary action of any kind against the men who engaged in the strike. . . . Such clauses are universally recognized as part of such settlements and part of the collective bargaining process. Many bitter and abrasive labor disputes with alleged improprieties and illegal acts against both parties have been terminated by forgiveness clauses, and such provisions may be as advantageous to the employer as the employees. In our increasingly complex society, the law should recognize and encourage the peaceful solution of any strife, whether it is in the arena of labor relations or elsewhere. We are witnessing a time of escalating disputation and we must seek and lend support to the newest techniques of settlement. (73 LRRM at 2214-2215.)

Indeed, it is also established labor policy in the private sector that a strike settlement agreement constitutes a condonation of prior unprotected concerted strike activity, thereby prohibiting an employer's reliance on the previous conduct for the purpose of justifying future punishment. In Confectionary Drivers v. NLRB (2nd Cir. 1963) 312 F.2d 108 [52 LRRM 2163], for example, the court found that a strike settlement:

condoned the prior unlawful actions of the striking employees. Condonation requires a demonstrated willingness to forgive the improper aspect of a concerted action, to "wipe the slate clean." After a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise discriminate against, them. (Citations omitted.)
(52 LRRM at 2166.)

(Also see Richardson Paint Co. 226 NLRB 673 [93 LRRM 1351] and cases cited therein, enf. (5th cir. 1978) 574 F..2d 1195 [98 LRRM 2951].)

Hence, whether the strike settlement agreement was itself protected activity in the form of negotiating an end to the strike and employees returning to work, or whether the strike settlement condoned allegedly unlawful activity, the subsequent action of the employer constituted a discriminatory reprisal against those employees who had been on strike by favoring, without justification, those employees who did not strike. See, e.g., Rubatex Corp. (1978) 235 NLRB No. 113 [97 LRRM 1534]

(cash bonus to non-strikers); Swedish Hospital Medical Center (1977) 232 NLRB 16 [97 LRRM 1173] aff. 238 NLRB No. 154 [98 LRRM 1467] (extra day off to non-strikers); Aero-Motive Mfg. Co. (1972) 195 NLRB 790 [79 LRRM 1496] (cash bonus to non-strikers).

This finding is not based, as was the hearing officer's, on San Dieguito Unified School District (9/2/77) EERB Decision No. 22, but is premised on the superseding test set forth in Carlsbad Unified School District (1/30/79) PERB Decision No. 89, and applicable to charges of discriminatory employer action. Under the Carlsbad test the charging party need not necessarily demonstrate actual discriminatory intent or actual harmful impact in connection with the employer's conduct; for example, a purposeful restriction upon a specific promotion possibility in the District. Rather, the mere threat of discrimination or reprisal is sufficient under the terms of our statute. (See n.4, ante.) It is apparent, as well, that the employer's letter may have a chilling coercive effect on employees, causing them to refrain from any protected organizational activity because of a fear that such involvement would result in their being denied benefits available to other employees. Finally, even if the harm to employees in this case was slight, there was no evidence presented in the employer's defense that its action was supported by legitimate business justification.

Violation of Section 3543.5 (c).

The hearing officer's finding and conclusion that the District violated section 3543.5 (c) of EERA should also be affirmed. The District's bad faith bargaining was evident in its failure to disclose the existence of the commendation letter during the course of negotiations, despite the fact that managerial agents of the District were aware of the existence of the letter at that time. As the hearing officer noted, the District had a duty to inform the Association negotiators even if, as the employer contends, the negotiators did not first ask about the existence of the letter. How could the Association demand to negotiate a management action which it was not informed of until long after the action was taken?¹⁶ The subject matter in dispute between the parties, as the testimony indicates, had presumably been settled, eliminating any need for further discussion unless, as in this case, one of the parties attempted to alter a previous understanding. For this reason, too, the District's action amounted to a unilateral change of a subject already agreed to by the parties, potentially affecting a wide range of employee working conditions without notice to or negotiations with the exclusive representative, in violation of section 3543.5(c).

¹⁶Still, once the Association knew about the letters of commendation, it protested without success to the three board members who adopted the original "no sanctions" resolution.

See San Mateo County Community College District (6/8/79) PERB
Decision No. 94.¹⁷

Other Issues.

The preceding analyses of section 3543.5(a) and (c) violations, contrary to the District's claim, is not precluded by section 3541.5(b) of EERA, which provides:

(b) The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based of alleged violation of such agreement that would not also constitute an unfair practice under this chapter.

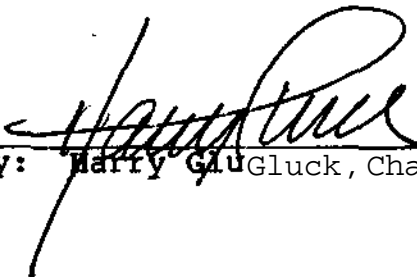
Thus, under EERA, where conduct which constitutes an unfair practice would also be a violation of an agreement, the latter fact does not prohibit PERB from deciding the unfair practice charge. Absent a finding that the contractual issue should be

¹⁷A conclusion that an employer's unilateral and undisclosed post-strike discriminatory reprisal may also constitute a refusal to bargain in good faith is consistent with NLRB precedent. See, e.g., Rubatex Corp., supra; Swedish Hospital Medical Center, supra; Aero-Motive Mfg. Corp., supra. (See p.17-18, ante.)

Moreover, these cases support the further observation, in response to an issue raised by the District, that it is not necessary to find that the "no sanctions" agreement complied with the notice and meeting rules of the negotiating process in order to support a conclusion that a violation of section 3543.5(c) occurred. The District's failure to inform the Association of the massive letter writing evaluation and the employer's unilateral action demonstrated a failure to meet and negotiate in good faith, independent of the contractual status of the "no sanctions" understanding as an interim agreement between the parties.

deferred to an arbitrator, pursuant to section 3541.5(a), the Board is free to make its inquiry, as it has in this proceeding.,

A final employer argument that failure to include the "no sanctions" provision in the subsequent collective negotiating agreement constituted a waiver of the issue by the Association should also be rejected. The testimony from both parties showed that they believed the issue had already been disposed of before they faced each other in later negotiations, and that there was no need for the collective agreement to expressly incorporate the prior school board statement. A waiver of rights here should not be found absent a clear and express waiver by the Association of a matter that had been previously resolved by the parties. See Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.


By: Harry Gluck, Chairperson

Member Moore's concurrence begins on page 22.

The Remedy and Order in this decision begin on Page 28,

Barbara D. Moore, Member, concurring:

I agree with the Chairperson that the District violated subsections (a) and (c) of section 3543.5 by placing letters of commendation in the personnel files of teachers who did not participate in an Association-sponsored work stoppage. I disagree, however, with portions of the Chairperson's analysis of the bases for finding these violations.

In responding to the District's arguments, the Chairperson rejects its position that the "no sanctions" resolution was not the product of lawful meeting and negotiating. He finds that the resolution complied with section 3540.1(h), which defines meeting and negotiating, and that the District is estopped from arguing that it was not negotiating. (Ante, pp. 11-13.)

Unlike the Chairperson, I do not find that the school board's "no sanctions" resolution was the product of meeting and negotiating. Meeting and negotiating is a bilateral process. (sec. 3540.1(h).) I do not view the school board's passage of what is essentially a take it or leave it "no sanctions" resolution as the functional equivalent of meeting and negotiating simply because an Association representative was

1 I do not base my view on the District's argument that this is so because the resolution was not adopted pursuant to Education Code requirements controlling public meetings. I join the Chairperson in rejecting this argument.

present at the school board's special meeting and because of the parties' unwitting compliance with the public notice provisions of the Act.² (See 3547.) The inherent reasonability of a package proposal does not relieve either party from its duty to engage in the healthy give and take of negotiating. (See NLRB v. General Electric Co. (2nd Dist. 1969) 418 F.2d 736 [72 LRRM 2530], cert. den., 397 U.S. 965 [73 LRRM 2660].) Although the "no sanctions" resolution may have been a reasonable means of attempting to settle the strike, I do not see its unilateral adoption as reflecting the mutual give and take which is the hallmark of the negotiating process.

While the employees' and the Association's performance of the conditions specified in the "no sanctions" resolution may well have converted the District's promise into an agreement other than a negotiated agreement, cementing the District's obligation to abide by its resolution, the finding of such an agreement, or of a negotiated agreement, is not necessary to

²The Chairperson indicates that the Association representative expressed consent with the terms of the resolution. (Ante, pp.11 and 12.) To the extent this implies an affirmative statement of acceptance, I disagree with this finding. Even if affirmative consent had been expressed, I would not view that as transmuting the course of conduct into meeting and negotiating. Denominating the course of conduct in this case as meeting and negotiating raises substantial questions as to when parties may make proposals away from the negotiating table, what are the other side's obligations to respond to such proposals and to what extent such conduct satisfies the obligation to meet and negotiate in good faith or evidences bad faith negotiating.

resolving the issue. In my view, the keen public interest in the peaceful resolution of strikes, specifically embodied in section 3549, requires a district to keep even its unilateral "no sanctions" promises.

Section 35493 of the Act authorizes parties to negotiate strike settlement agreements, including amnesty provisions for strikers. While that section specifically protects a "negotiated agreement," it does not preclude the validity of other agreements, including those that strictly speaking are not a product of the meeting and negotiating process. Nor does the plain language of section 3549 preclude the enforceability of a district's unilateral promise to refrain from taking reprisals against strikers. Therefore I conclude that the section does not draw only negotiated agreements within the zone of statutory protection. The clear purpose of

3Section 3549 provides:

The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Section 3543.2. Nothing in this section shall cause any court or the board to hold invalid any negotiated agreement between public school employers and the exclusive representative entered into in accordance with the provisions of this chapter.

section 3549 is to enable parties to end disputes that have led to strikes, without continuing bitterness, and to put their differences behind them in furtherance of the statutory goals of EERA to promote the improvement of employer-employee relations. (sec. 3540.)⁴

The District is bound by its "no sanctions" resolution not because it was a negotiated agreement, but because of the Association's reliance thereon on behalf of its members, as evidenced by the employees' return to work and the Association's return to the negotiating table. To now allow the District, which chose the method of settling the strike, to avoid responsibility for its action and to renege on its promise on the basis that the resolution was not the product of meeting and negotiating and therefore not protected by 3549 would laud form over substance and would completely undermine the purposes of section 3549 and the general purposes of EERA "to improve employer-employee relations" (sec. 3540).

In a case involving these same parties, the California Supreme Court declined to determine whether public school employee strikes are legal. (San Diego Teachers Association v.

⁴Section 3540, in pertinent part, provides:

It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California. . . .

Superior Court (1979) 24 C.3d 1) In the instant case, the parties withdrew mutual unfair practice charges that would have required this Board to scrutinize the status of the organization's strike. By withdrawing its charge, the District in effect evidenced some intention to let the matter drop rather than to subject itself, its employees, and the Association to protracted unfair practice proceedings. Having abandoned a course of conduct which would have enabled the appropriate administrative body to determine whether the Association work stoppage was lawful under EERA, the District did not obtain any right to determine on its own the status of the strike, nor any authority to remedy the strike, if it was an unfair practice, by commending nonstrikers.

I agree with the Chairperson that whether the strike was legal or illegal the District's actions violated section 3543.5(a) and essentially agree with his discussion on this issue. The letters constituted discriminatory reprisals against employees who had been on strike in violation of the "no sanctions" resolution. EERA provides that employees have the right to participate or refrain from participating in organizational activity. (Sec. 3543) Strike settlements are authorized by section 3549. The employees, through their exclusive representative, had a right to accept the District's "no sanctions" resolution. The District reneged and treated employees discriminatorily thus interfering with the exercise

of their right to accept the terms of the resolution, return to the negotiating table and refrain from continuing the strike.

Further, the effect of the District's conduct is to signal employees that if they engage in organizational activity they run the risk of reprisals from their employer even when the employer has promised there will be no reprisals. The clear message is that participation in organizational activity exposes the employee to potential reprisals and discriminatory treatment. Thus the letters have a coercive chilling effect on employees because employees may be intimidated from engaging in any organizational activity for fear of being treated disadvantageously compared to employees who do not engage in such activity.⁵ Accordingly, I find that the District violated section 3543.5(a) of the Act.

Section 3543.5(c)

I agree with the Chairperson that the District's conduct amounted to a unilateral change in violation of section 3543.5 (c). The District had a duty to meet and negotiate with the Association regarding any change in the "no sanction" resolution and did not fulfill this duty.

I join in the Chairperson's opinion to the extent consistent with my foregoing discussion.



Barbara D. Moore, Member

Dr. Raymond J. Gonzales' dissent begins on page 33.

⁵ I note in this regard that the employees' participation in the strike has not been determined to be legal or illegal under EERA. The Supreme Court specifically declined to address this issue. (See San Diego Teachers Association v. Superior Court, supra.)

REMEDY

For the reasons set forth above the Board affirms the remedy and order found by the hearing officer, and adopts his order, as modified herein, as the order of the Board itself.¹

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is found that the San Diego Unified School District violated Government Code section 3543.5(a), (b), and (c). The violation occurred when the District, without notice to or negotiations with the exclusive representative, placed letters of commendation in the personnel files of teachers who did not strike in June, 1977, to the potential disadvantage of teachers who had been on strike, thereby contradicting the District's previous pledge that no sanctions would be taken against members of the San Diego Teachers Association after the strike ended and negotiations resumed. The Public Employment Relations Board ORDERS that the San Diego Unified School District and its representatives shall:

¹ There is no evidence to support the District's argument that the remedy requiring rescission, nullification and removal of the commendation letters, and posting of the Board's order, will revive bitter feelings in the District. To the contrary, failure to take such action will alter the terms of an agreed upon, peaceful resolution of the work stoppage, potentially re-opening old divisions and hostility. The order effectively restores the status quo ante.

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals against teachers who participated in a work stoppage during the **week of June 6, 1977**, or in any manner interfering with, restraining, or coercing employees of the San Diego Unified School District because of their exercise of rights guaranteed by the Educational Employment Relations Act:

(b) Denying the San Diego Teachers Association rights guaranteed by the Educational Employment Relations Act.

(c) Failing or refusing to meet and negotiate in good faith with the San Diego Teachers Association.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Rescind, nullify and remove the letters of commendation written by members of the Board of Education and dated August 23, 1977, from the personnel files of all teachers **who** received them;

(b) Immediately upon receipt of this decision, prepare and post copies of this order at each of its school sites for twenty (20) workdays in conspicuous places, including all locations where notices to employees are customarily placed;

(c) Within twenty (20) calendar days of the date of service of this decision, notify the Los Angeles Regional Director of the Public Employment Relations Board of the actions it has taken to comply with this order.

3. IT IS FURTHER ORDERED that the charge is dismissed with respect to Government Code section 3543.5(d).

PUBLIC EMPLOYMENT RELATIONS BOARD

A handwritten signature in cursive script, reading "J. Stephen Barber", is written over a solid horizontal line.

By J. Stephen Barber
Executive Assistant to the Board

APPENDIX

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

After a hearing in unfair Practice Case No. LA-CE-194, in which all parties had the right to participate, it has been found that the San Diego Unified School District violated Government Code section 3543.5(a), (b), and (c). The violation occurred when the District, without notice to or negotiations with the exclusive representative, placed letters of commendation in the personnel files of teachers who did not strike in June 1977, to the potential disadvantage of teachers who had been on strike, thereby contradicting the District's previous pledge that no sanctions would be taken against members of the San Diego Teachers Association after the strike ended and negotiations resumed. As a result of this conduct, we have been ORDERED to abide by the following:

1. WE WILL NOT:

(a) Impose or threaten to impose reprisals against teachers who participated in a work stoppage during the week of June 6, 1977, or in any manner interfere with, restrain, or coerce employees of the San Diego Unified School District because of their exercise of rights guaranteed by the Educational Employment Relations Act.

(b) Deny the San Diego Teachers Association rights guaranteed by the Educational Employment Relations Act.

(c) Fail or refuse to meet and negotiate in good faith with the San Diego Teachers Association.

2. WE WILL:

Rescind, nullify and remove the letters of commendations written by members of the Board of Education and dated August 23, 1977, from the personnel files of all teachers who received them.

SAN DIEGO UNIFIED SCHOOL DISTRICT

By: Superintendent
Dated:

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED, OR COVERED BY ANY MATERIAL.

Raymond J. Gonzales, Member, dissenting:

I do not agree that the authorship and placement of commendation letters in the personnel files of non-striking teachers constituted District action in violation of subsections (a) and (c) of section 3543.5.

The threshold question in this case is whether the action of the two school board members who authored the letters was action by the employer. I believe it was not. The definition of employer in section 3540.1(k) includes "governing board of the district." An examination of the acts alleged, in the overall context of this case, leads me to the conclusion that a majority of the school board clearly did not author nor authorize the letter in question. The only official board action taken was the adoption of the "no sanctions" resolution at a public meeting.¹ The vote was three to two, and the two board members who rejected the resolution were the very two who

¹ Irrespective of the fact that PERB does not administer statutes governing the public meetings and action of school boards, I cannot ignore the notice, majority vote and other requirements imposed on such boards. (See Educ. Code, sec. 35145 et seq.; see also Gov. Code, sec. 54950 et seq.) Converting the act of two individual board members into official action by the whole board, taken in violation of the public meetings laws, would subject the board members to misdemeanor charges. I presume that school board members in San Diego and elsewhere are well advised of the serious consequences of ignoring the above cited statutes. While I make no judgment as to whether the District in this case did or did not comply with every requirement of the public meeting statutes, it is clear that the board at no time actually authorized the letters.

independently decided to send the commendatory letter to non-striking teachers. This act directly contravened the officially adopted resolution. In fact, the majority knew nothing of the letter distribution until it was accomplished. That the disgruntled school board minority intended their action to circumvent the authority of the full board is evidenced by their furtiveness in preparing and sending the letter. Given the publicly stated position of the majority, the minority undoubtedly recognized that the majority would oppose the use of District stationery and board titles in an act that wholly contradicted the spirit and intent of the "no sanctions" resolution.

Under the circumstances, I do not find that the employees had reasonable cause to believe that the two board members were acting on behalf of the entire board. As Chairman Gluck stated in his opinion in Antelope Valley, Community College District (7/18/79) PERB Decision No. 97:

Apparent authority results from conduct of the principal upon which third persons rely in dealing with agents. The liability of the principal attaches where such reliance was reasonable and results in a change in position by the third party. (at p. 11.)

Here, the school board's manifestations to employees unequivocally expressed the board's opposition to sanctions of any kind, other than loss of pay. Further, the board had no opportunity to prevent the sending of the letter; it is difficult to understand how the majority could have

prevented an act of which they were not aware until it was a fait accompli. After being informed that the letters had been sent, the majority expressed their displeasure to the Association's Executive Director and also expressed concern about reopening old wounds.² In addition, at least one member of the majority conveyed his feelings to the minority.

With regard to the action of the District personnel who placed the letters in personnel files, I am not persuaded that this act was other than the fulfillment of a routine duty. There is no evidence that District personnel could choose not to accept commendation letters for filing. Since these letters were clearly initiated by independent board members, and I have concluded that the employer did not commit an unlawful practice, I cannot find that District personnel acted unlawfully as agents of the employer.

²The facts in the present case contrast sharply with those in Antelope, where the District designated managerial employees, cooperated in their activities, accepted and acted favorably on proposals presented by them, and created the impression that the designees acted with District approval. Under those facts, this board found that "the designees both in fact and from the point of view of the employees did act as agents of the District"

It also appears that the standard for finding "apparent authority" discussed in NLRB v. Donkin's Inn, Inc. (9th Cir. 1976) 532 F.2d 138 (97 LRRM 1060), calls for substantial evidence that the principal permitted his agent to act for him and that the agent's actions arose from and were in accordance with the principal's manifestations to third parties. I do not find that the facts in this case can support such a finding.

Notwithstanding my determination that there was no District action here, I am compelled to assume so for purposes of discussing the analysis employed by my colleagues in finding the District guilty of committing unfair practices. I do so because the majority's decision is yet another effort to pave the way for an absolute ruling that strikes by public employees are legal.

First, I agree with Member Moore that the no sanctions resolution was not the product of meeting and negotiating. Association representatives did not submit the no reprisals resolution in the negotiating process but sought the signatures of Board members individually. The Board did not respond to this proposal but adopted its own resolution at a public board meeting. Furthermore, no written document of the resolution was executed by the parties nor was the provision included in the final contract between them. (See sec. 3540.1(h).)³

3 Section 3540.1(h) provides:

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of

This is not to say that the District's adoption of the resolution was meaningless, nor that I would condone District action taken in violation of protected employee rights. Clearly, under the authority of City and County of San Francisco v. Cooper, supra, a public employer may determine the appropriate legislative response to a strike. The employer's action may not be invalidated, albeit the action was motivated by a desire to end an illegal strike, where there are no constitutional, legislative or charter proscriptions against such strikes. (Cooper, supra, at 912-913.) Nevertheless, some critical distinctions exist between the facts in Cooper and those of the present case. First of all, the action taken in Cooper conferred direct salary benefits on striking employees. The challenge to that action was by a taxpayer who protested that the "illegal" strike coerced the employer into an improper response to the strike, that is, a resolution to increase employees' pay. Secondly, the court in Cooper emphasized that its analysis rested on the fact that "the resolution at issue . . . [was] clearly legislative in nature." Cooper, supra, at 911.) (Emphasis added.) Thus, the significance of Cooper is the protection it affords public employers who

Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

negotiate strike settlements.⁴ While it is obvious that negotiating requires two parties, I find nothing in Cooper which guards the right of employees to have strike settlements enforced per se. Thus, that case is of limited value to support the majority's holding that employees are entitled to judicial enforcement of strike settlement agreements.

I also find unacceptable and untenable the Chairman's reliance on NLRB precedent which provides that strike settlements constitute condonation of prior unlawful strike activity, "thereby prohibiting an employer's reliance on the previous conduct for the purpose of justifying future punishment." (Maj. opn., at p. 17) A wholesale transfer of that policy to the public sector amounts to a blatant usurpation of legislative and judicial powers which are not properly exercised by an administrative agency such as PERB and is simply a backdoor route to the majority's desired conclusion that public sector strikes may be adjudged legal by this Board.

In any event, I would not find that the employer in this case punished striking employees. Nor would I conclude, as does the majority, that the letters discriminated against striking employees. I find a substantial distinction between the

⁴Moreover, Cooper acknowledges that striking employees may be subject to a variety of administrative sanctions. (At p. 912.)

tangible, measurable benefits conferred on non-striking employees in the cases cited by Chairman Gluck (see p. 17-18) and the merest possibility that the letters will be factors in promotional consideration at some remote time in the future.⁵

Further, there is no causal connection between the letters and the exercise of employee rights. I have already stated that I do not find that the parties negotiated a no reprisals agreement; but I also cannot agree with Member Moore's interpretation of section 3549. I believe that section 3549 was enacted to further enhance the sanctity of agreements reached between parties through the collective negotiations process. When read in conjunction with section 3541.5(a), which prohibits enforcement of contract provisions unless the violation of the contract is also an unfair practice, the logical conclusion is that the Legislature intended PERB to have a limited rather than expansive role in enforcing agreements between the parties. Thus, I see no protected right to have the resolution enforced.

I also dissent from the majority's finding that the District failed to negotiate in good faith. I find no grounds whatsoever for a (c) violation. As I stated earlier, I am in

⁵In fact, testimony indicates that some striking teachers have received promotions since the letters were distributed, reinforcing my belief that the allegations of potential harm are so speculative as to barely rise to the level of possibility, let alone "threat."

PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

| | | |
|---|---|--------------------------|
| SAN DIEGO TEACHERS ASSOCIATION/CTA/NEA,) |) | Unfair Practice |
| Charging Party,) |) | Case No. LA-CE-194 |
| v.) |) | |
| SAN DIEGO UNIFIED SCHOOL DISTRICT,) |) | <u>PROPOSED DECISION</u> |
| Respondent.) |) | (6/2/78) |

Appearances: Charles R. Gustafson, Attorney for San Diego Teachers Association; Ralph Stern, Attorney for San Diego Unified School District.

Before Jeff Paule, Hearing Officer.

STATEMENT OF THE CASE

On October 18, 1977, the San Diego Teachers Association/CTA/NEA (hereafter "Association" or "charging party") filed an unfair practice charge with the Public Employment Relations Board (PERB). The Association alleged that the San Diego Unified School District (hereafter "District" or "respondent") violated Government Code sections 3543, 3543.1(a), 3543.5(a), (b), (c), and (d)¹ of the Educational Employment Relations Act (EERA) by placing letters of commendation in the personnel files of negotiating unit members who did not participate in a strike,

¹All section references are to the Government Code unless otherwise noted. Text of sections alleged to have been violated are printed in full infra.

as a reprisal against those who did. On November 22, 1977, the District filed an answer denying the illegality of its action.

On January 23, 1978, a hearing was held in San Diego, California.

FINDINGS OF FACT

The San Diego Teachers Association/CTA/NEA is the exclusive representative of the certificated employees in the San Diego Unified School District. On or about May 10, 1977, the Association and the District commenced meeting and negotiating. After several negotiating sessions the parties terminated negotiations on Sunday, June 5, 1977. There was no official declaration of impasse by either party. See section 3548.²

On Monday, June 6, 1977, about 55 percent of the District's approximately 5,700 teachers withheld their employment services from the District. Prior to the commencement of the work stoppage the District obtained a temporary restraining order from the San Diego Superior Court prohibiting the strike. The Association and the teachers continued the strike. On Wednesday, June 8, 1977, a preliminary injunction was issued by the court against the San Diego Teachers Association and its officers.

2

Section 3548 of the EERA provides, in part, that: "Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board [PERB] to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable, . . ."

Notwithstanding this legal action by the District to end the work stoppage the strike continued through Thursday, June 9, 1977.³

On the third day of the strike, June 8, 1977, Association representatives sought the signatures of individual Board of Education members on a no-reprisal agreement in exchange for the teachers' return to work. Only one member of the school board signed the proffered agreement.⁴

³Court proceedings did not end with the preliminary injunction. On August 8, 1977, the court found the Association and its officers in contempt of court for violating the preliminary injunction. The matter is currently pending before the District Court of Appeal.

⁴The no-reprisal agreement submitted by the Association states that:

"There shall be no reprisals taken against any employee or student who participated in, supported, or in any way aided the strike called by the Board of Directors of the San Diego Teachers Association and which commenced on June 6, 1977.

Said employees shall have equal opportunity for transfers, summer school employment, promotion or any other right of employees in the San Diego Unified School District. Furthermore, there shall be no letters of reprimand on any other disciplinary action taken against the aforementioned employees and/or students.

The Board of Education authorizes and directs its negotiators and administrative agents to return to the bargaining table and negotiate in good faith with the San Diego Teachers Association. This authorization carries with it full authority to negotiate and make proposals and counter proposals on all issues which are currently on the bargaining table. This includes all issues both monetary and non-monetary.

To facilitate the bargaining process, the Board of Education agrees to utilize the services of the California Conciliation Service."

At approximately 2:00 p.m. on the fourth day of the strike, June 9, 1977, the Board of Education held a special school board meeting. During this meeting the following motion was made by board member Philip Halfaker:

That no sanctions other than loss of pay be imposed on strike participants on the condition that the strike end today and that the union negotiators return to the table tomorrow morning.

The motion passed on a 3 to 2 vote, with school board president George Smith and member Dorothea Edmiston casting the "no" votes.

The negotiating unit members returned to work the next day, June 10, 1977, and meet and negotiate sessions reconvened that day. A collective agreement was finally agreed to and signed by the negotiators on September 9, 1977. The collective agreement was ratified by the Association on September 15, 1977, and by the District's Board of Education on September 20, 1977. The collective agreement does not contain a no-reprisal clause. The executive director of the Association, Louis Boitano, testified that a no-reprisal clause was not discussed during negotiations because "it was assumed that the agreement of June 9 was a good faith agreement. . . . " The assistant superintendent for the District, George Ellis, testified that there was no necessity for including a no-reprisal clause in the agreement because "the reprisal issue was related to the [school board's] adopted statement. . . . "

While negotiations were in progress, on August 23, 1977, the two school board members who voted against the June 9, 1977,

no-reprisal motion prepared and mailed a letter using the District's official stationery. The letter was mailed to those negotiating unit members who did not participate in the work stoppage. The names and addresses of those teachers were obtained by the board members by their having access to the school district payroll records. The letter is reprinted, in full, as follows:

August 23, 1977

"The true teacher defends his pupils against his own personal influence. He inspires self-trust. He guides their eyes from himself to the spirit that quickens him. He will have no disciple."

Orphic Sayings (1840) Amos Bronson Alcott

Dear Teacher:

Thank you for your dedication to the children of San Diego during the recent teachers' strike. By continuing to fulfill your contract in the face of many pressures exerted upon you to join the ranks of those who had abdicated their responsibilities, you demonstrated clearly and forcefully that you are a truly professional teacher. Yours was a courageous stand.

We want you to know that we shall always be grateful to you and to all your fellow teachers who faced up to their obligations. And the children you served will remember it long after we are gone.

Truly yours,

/s/ George W. Smith, President
Board of Education

/s/ Dorothea Edmiston, Member
Board of Education

DE:dk

cc: Personnel Division
Employee Personnel File

Copies of the signed letter were placed in the personnel files of approximately 2,500 teachers. District administrators, including the superintendent, were fully aware of the action taken by the two school board members. According to George Ellis, assistant superintendent (personnel division), the District considered the placing of the letters in personnel files "a routine matter." Mr. Ellis also testified that the letter sent by the dissenting school board members would be treated just the same as other letters of commendation, which are reviewed when the District considers the employee for advancement to higher positions.

The president of the Association testified that the Association only received notification of the board members' letter when individual employees called the Association's office. This did not occur until late September or early October, 1977. The Association apprised the other three school board members of the letter and informed them that the Association felt the action by Mr. Smith and Ms. Edmiston violated the no-reprisals agreement of June 9, 1977. The Association asked the three board members if they were going to do anything about the letters. The Board of Education took no action to have the letters removed.

ISSUE

The issue to be decided is whether the District violated the HRA when two Board of Education members placed letters of commendation in the personnel files of non-striking teachers.

CONCLUSIONS OF LAW

The Action by the Two School Board Members Constituted Conduct by the San Diego Unified School District.

Section 3543.5 states that it shall be unlawful for a public school employer to engage in certain unfair practices. Section 3540.1(k) defines public school employer as a "governing board of a school district, a school district, a county board of education, or a county superintendent of schools."

In the instant case the respondent argues that regardless of the substance of the unfair practice charge, "the sending of the letters constituted action by two members of the Board of Education acting in their individual capacities." The respondent's contention is that the full school board did not take any action regarding the letters and that the letters are similar to letters of commendation received from community groups such as the Kiwanis Club.

The respondent's argument is rejected. Mr. Smith and Ms. Edmiston wrote their letter on school district stationery and signed their names not as individuals, but as members of the school board. When the other three members of the school board were apprised of Mr. Smith's and Ms. Edmiston's action they took no action to retract the letters. Additionally, the superintendent and other District administrators had full knowledge of the actions of Mr. Smith and Ms. Edmiston and they, too, did nothing to reverse the decision to send the letters or to place them in the teachers' personnel files. The lack of any affirmative action by the three board members and the superintendent

to remove the letters from the teachers' personnel files is a clear indication that these individuals acquiesced in the action by Mr. Smith and Ms. Edmiston.

Accordingly, the placing of the letters in question in the personnel files of those teachers who did not participate in the strike during the week of June 6, 1977, is found to be conduct by "a public school employer" within the meaning of sections 3543.5 and 3540.1(k).

Alleged Violation of Section 3543.5(a).

Government Code section 3543.5(a) states that:

It shall be unlawful for a public school employer to:

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 [EERA].

The PERB has examined and interpreted this section in two cases, San Dieguito Union High School District (9/2/77) PERB Decision No. 22 and Pittsburg Unified School District (2/10/78) PERB Decision No. 47. In San Dieguito, the PERB concluded that for a violation to be found it must be shown "at minimum" that an employer acted either with "the intent to interfere with the rights of employees" or that the employer's conduct "had the natural and probable consequence of interfering with the employees exercise of their rights. . . , notwithstanding the employer's intent or motivation."

In the instant case, the inquiry is whether the action by the District in placing the letters of commendation in the personnel files of non-striking teachers was an action affecting the teachers who did strike and if so, whether this action was a reprisal against those teachers.

It is manifestly clear that the writing and placing of the letters of commendation in the personnel files of non-striking teachers was an action which affected those teachers who did participate in the strike. Further, such action by the District constituted a reprisal against those teachers who did participate in the strike. Written under the pretext of a "typical letter of commendation", the letter of August 23, 1977, can only be construed as a veiled attempt to take reprisals of retaliatory action against those teachers who chose to participate in the strike. This conclusion is fortified on the fact that the "letters of commendation" are to be considered when promotional opportunities arise in the District.

This finding, that the letter of commendation in fact constituted a reprisal against those teachers who participated in the strike, is not determinative of a violation of section 3543.5(a), however. The remaining issue is whether there exists the requisite nexus between the action by the District and the exercise of rights protected by the EERA for the employees. See San Dieguito Union High School District, supra.

The "protected activity" by the teachers was not their participation in the strike, but their collective decision to accept the terms and conditions of the District's resolution of

no reprisal and to agree to end the strike and resume meeting and negotiating. If a strike occurs as a result of a breakdown in communications between the parties, then clearly the teachers have a right, protected by the EERA., to enter into an agreement with their employer to end the strike.⁵ One of the primary purposes of the EERA is to promote the improvement of employer-employee relations in the public school systems. One way of improving employer-employee relations is to permit teachers to enter into agreements to end strikes free from reprisals or retaliatory action for any prior illegal conduct.⁶

The requisite nexus in this case is clear. On June 9, 1977, the fourth day of the strike, the District school board passed a motion in which no uncertain language stated that no sanctions would be imposed on striking teachers if the strike ended on that day and the Association's negotiators returned to the negotiating table on June 10, 1977. The Association accepted the terms and conditions of the resolution in good faith; the strike ended and the Association resumed meeting and negotiating. On August 23,

⁵This conclusion is buttressed by the recent holding in City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898. There the California Supreme Court held that an agreement entered into between a public employer and its employees to end an illegal strike was not tainted by the illegality of the strike.

⁶The District, of course, does not have to agree to such an arrangement. It can pursue its legal remedies in court to end the strike, or it can file an unfair practice charge against the employee organization when a strike allegedly has resulted in a termination of negotiations. Cf. Fremont Unified School District, SF-CO-19, 20 (4/14/78). Here the district did not pursue its judicial remedies (although the San Diego Superior Court did on its own initiative). Also, the District filed an unfair practice charge on May 26, 1977, against the Association alleging a violation of the EERA in that the Association was "threatening to call a strike." As part of a settlement agreed to during the informal conference on this charge, the District withdrew the unfair practice charge.

1977, during subsequent meeting and negotiating sessions, reprisals were taken against employees who participated in the strike in the form of a letter of commendation to those teachers who did not strike. The District's action clearly had the natural and probable consequence of interfering not only with the teachers' "protected right" to agree to end the strike, but also with their good faith expectation that the exercise of that right would not be subject to later reprisals.⁷

For the foregoing reasons the District is found to have violated section 3543.5(a) by placing in personnel files of those teachers who did not participate in the strike during the week of June 6, 1977, letters commending them for not participating in the strike.

Alleged Violation of Section 3543.5(c).

Government Code section 3543.5(c) states that:

It shall be unlawful for a public school employer to:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The charging party contends that the breach of the no-reprisals agreement by the District constituted "bad faith negotiating" in that the violation of the agreement occurred during negotiations and without the Association's knowledge.

The question of whether an employer is acting in good faith during meeting and negotiating "must be determined in the light of all relevant facts in the case." Joy Silk Mills v. NLRB

⁷This conclusion is not to be construed as asserting that the strike itself was protected activity under the EERA.

(D.C. Cir. 1950) 185 F.2d 732, [27 LRRM 2012]. In the instant case, the agreement between the parties provided that if the teachers ended their strike the District would not impose any sanctions or reprisals against them. Both parties presented testimony that because of this agreement they felt that it was not necessary to raise the "no reprisals" issue at the negotiating table. Therefore, the collective agreement, which was concluded on September 9, 1977, does not contain a no-reprisals clause. It seems clear that since the letter in issue was mailed to certain teachers on August 23, 1977, and shortly thereafter was placed in those teachers' personnel files, the District was aware of the letter while negotiations were still in progress.

The duty to furnish relevant information to the exclusive representative to be used in negotiations usually arises only after there has been a demand or request for such information. In the instant matter, however, it was reasonable for the Association to assume that the District would honor its commitment in accordance with the school board's resolution of June 9, 1977. Therefore, under the facts of this case, the District had a duty to inform the Association of its action with respect to a possible violation of the agreement. It is not known, of course, whether the letter and a "no-reprisals clause" would have been raised as subjects of negotiations had the Association been informed of the District's action. It is clear, however, that the failure of the District to inform the Association of

its action of August 23, 1977, while the parties were still negotiating, undermined the integrity of the meeting and negotiating process and constituted bad faith negotiating.

For the foregoing reasons, it is found that the District has violated section 3543.5(c).

Alleged Violation of Section 3543.5(b) and (d).

Government Code section 3543.5(b) and (d) state that:

It shall be unlawful for a public school employer to:

(b) Deny to employee organizations rights guaranteed to them by this chapter [EERA].

(d) Dominate or interfere with the formation or 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 Association argues that there is also a violation of section 3543(b) and (d) .

Sections 3543 and 3543.1 guarantee definite rights to employee organizations and to exclusive representatives such as the right to use school bulletin boards and to released time for meeting and negotiating. It is concluded that the legislative purpose in including section 3543.5(b) was to provide a mechanism for enforcement of those rights, rather than to simply add another statutory basis to any unfair practice found under section 3543.5(c). Therefore, the Association's contention that section 3543.5(b) has been violated is rejected since there was no evidence that the District interfered with any rights guaranteed by sections 3543 and 3543.1.

Also, the Association presented no evidence that the District dominated or interfered with the foundation or administration of the Association. Therefore, no violation is found under section 3543.5(d).

District's Defenses.

The District argues that even assuming that there is a no-reprisal agreement between the District and the Association, "the PERB is prohibited by law from enforcing it." The District relies on section 3541.5(b), which states that:

The board [PERB] shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based of alleged violation of such a agreement that would not also constitute an unfair practice under this chapter [EERA].

The PERB has not interpreted this section of the EERA. While it may be argued that this section applies only to the enforcement of a collective negotiations agreement it is not necessary to rely on this interpretation herein. Section 3541.5(b) itself contains a proviso that if a violation of an agreement is also an unfair practice, then the PERB has jurisdiction to hear and decide the case. If an unfair practice is found, as in the instant case, the PERB would not be enforcing an agreement between the parties, as the District argues, but would be remedying an unfair practice. See section 3541.5.⁸

⁸ Section 3541.5 provides, in part, that: [T]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of [the EERA], shall be a matter within the exclusive jurisdiction of the [PERB]. . . .

The District also contends that the relief sought by the Association, removal of the letters, is contrary to public policy. The respondent states in its brief that, "[t]o order the removal of the letters of commendation . . . would place the Public Employment Relations Board in the position of supporting, aiding and abetting an illegal strike."

The District is patently incorrect. The strike which occurred during the week of June 6, 1977, was an extremely unfortunate event which will not easily be forgotten. It was the District, however, which revived the bitter feelings between the District and its employees when it wrote the letters of commendation. Removing any physical remnants of the strike, such as the letters in question, not only better serves the public interest, but also facilitates the parties to achieve a more harmonious employer-employee relationship. This certainly cannot be construed as supporting or aiding an alleged strike.

REMEDY

Section 3541.5(c) provides that:

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

The charging party urges that the proper remedy in this case should be an order to remove the letters of commendation from the personnel files of those teachers who received them.

As previously mentioned, the District contends that such an order "would place the PERB in the position of supporting, aiding and abetting an illegal strike."

One of the primary purposes of the EERA is "to promote the improvement of personnel management and employer-employee relations within the public school systems. . . ." Clearly, the strike called by the Association against the San Diego Unified School District did nothing to further this objective. However, the strike is now history. Although the strike will not be forgotten by those who were involved therein, it will "effectuate the policies of the EERA" if the District is required, as a remedy for its unfair practice, to take action consonant with the understanding of the Association regarding the no-reprisals resolution of June 9, 1977. To achieve such a status, the District will be required to remove the letters of commendation from the personnel files. Removal of the letters will be, in effect, a retraction of the reprisals taken against the strike participants, and this action by the District will help to achieve the primary purpose of the EERA.

Accordingly, the District will be required to cease and desist from imposing or threatening to impose reprisals on those teachers who participated in the strike during the week of June 6, 1977, and to remove the letters of commendation it placed in the personnel files of those teachers who did not participate in the strike.

Also, the District will be required to post copies of the order. Posting copies of the order is appropriate in that it will provide employees with notice that the District is being required to cease and desist from the activity found to be unlawful. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy. A posting requirement has been upheld by the U.S. Supreme Court interpreting section 10(c) of the NLRA, which is nearly identical to section 3541.5(c), in NLRB v. Empress Publishing Co. (1941) 312 U.S. 426, [8 LRRM 415]. A posting requirement has also been sanctioned in California in interpreting the Agricultural Labor Relations Act. See Pandol and Sons v. ALRB (1978) 77 Cal.App.3d 822. Also in New York, that state's highest court upheld a posting requirement ordered by the New York PERB against a public agency. City of Albany v. Helsby (1972) 327 N.Y.S.2d 658, [79 LRRM 2457].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record of this case, it is found that the San Diego Unified School District violated Government Code section 3543.5(a) and (c). Pursuant to Government Code section 3541.5(c), it is hereby ordered that the San Diego Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals against teachers who participated in a work stoppage during the week of June 6, 1977, or in any manner interfering with, restraining, or

coercing employees of the San Diego Unified School District because of their exercise of rights guaranteed by the Educational Employment Relations Act;

(b) Failing or refusing to meet and negotiate in good faith with the San Diego Teachers Association.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Rescind, nullify and remove the letters of commendation written by members of the Board of Education and dated August 23, 1977, from the personnel files of all teachers who received same;

(b) Prepare and post copies of this order at each of its school sites for twenty (20) workdays in conspicuous places, including all locations where notices to employees are customarily placed;

(c) Notify the Los Angeles Regional Director of the Public Employment Relations Board of the actions it has taken to comply with this order.

3. IT IS FURTHER ORDERED that the charge is dismissed with respect to Government Code section 3543.5(b) and to any other section included in the charge but not found to be a violation of the EERA.

Pursuant to California Administrative Code 32305, title 8 this Proposed Decision and Order shall become final on June 30, 1978, unless a party files a timely statement of exceptions. California Administrative Code 32300, title 8.

Dated: June 2, 1978

Jeff Paule
Hearing Officer