STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RAVENSWOOD TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-805
v.	)	PERB Decision No. 469
RAVENSWOOD CITY SCHOOL DISTRICT,	)	December 28, 1984
Respondent.	)	

Appearances: Ramon E. Romero, Attorney for Ravenswood Teachers Association, CTA/NEA; Millner & McGee by Patricia W. Mills for Ravenswood City School District.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: The Ravenswood City School District (District) excepts to the attached proposed decision issued by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board). In the underlying case, the Ravenswood Teachers Association, CTA/NEA (Association), charged that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] when the District threatened to initiate civil action against an employee to recover an alleged salary overpayment if that employee continued to pursue her grievance to arbitration.

[1]EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise indicated.

FACTUAL SUMMARY

The findings of fact as set forth in the ALJ's proposed decision are free from prejudicial error and are adopted by the Board. Insofar as the District's exceptions take issue with the ALJ's factual conclusion, the Board defers to the credibility determinations reached by the ALJ. See Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

Specifically, in accordance with the rule articulated in Santa Clara, we defer to the ALJ's credibility determination and discount Vincent Brown's version of the conversation he witnessed between Dr. Mildred Browne and Sheila Dowds. Because the ALJ had the opportunity to observe Brown's demeanor and to directly question Brown himself, we find that his assessment of Brown's testimony will be credited as the best, first-hand weighing of the evidence available to the Board. We also defer to the ALJ's assessment of the testimonial conflict between Dowds and Dr. Browne. For the reasons articulated in the attached decision, we adopt the ALJ's determinations of credibility.

As a final factual dispute, the District asserts that the ALJ failed to resolve the conflict in testimony regarding the conversation between Association Attorney Ramon Romero and Vincent Brown. The District is dissatisfied with the ALJ's conclusion that:

> Leaving aside the ambiguous and conflicting evidence about the Romero-Brown conversation,

> the other deficiencies relevant to this witness preclude trustworthy use of his testimony. (Proposed Decision, p. 12.)

Having adopted the ALJ's conclusion that Brown's testimony was indeed untrustworthy, we find no basis on which to compel the ALJ to resolve a testimonial conflict which he found unnecessary to his assessment of Brown's credibility. Moreover, even assuming that Brown's version of Romero's comments was accurate, those statements do not go beyond the bounds of an attorney's vigorous advocacy and trial preparation on his/her client's behalf.[2]

DISCUSSION

The District asserts that the ALJ erred in reaching the legal conclusion that Dr. Mildred Browne's statement to Sheila Dowds constituted an unlawful threat. We find no merit to that claim. As is fully explicated in the ALJ's proposed decision, Dr. Browne's statement can reasonably be viewed as an unlawful threat. Relying on the Board's decision in Rio Hondo Community College District (5/19/80) PERB Decision No. 128, Dowds could reasonably have taken Dr. Browne's remarks to be a threatening expression of the District's intentions. Crediting Dowds' version of the facts, Dr. Browne was warning Dowds that, if she persisted in exercising her right to proceed to arbitration of

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[2]According to Brown, Romero told him that Brown's testimony would not help Sheila Dowds, that he (Romero) would be surprised to see him at the hearing, and that he (Romero) would take him apart on the stand and would bring out Brown's relationship with Dr. Mildred Browne.

her dispute, then the District would take legal action to recover money wrongfully tendered.[3]

The District argues, citing Public Service Electric & Gas (1983) 268 NLRB 54 [115 LRRM 1006, 1007] that it is not barred from taking action against an employee on matters that come to light in the course of arbitrating a dispute. The District's legal assertion is correct. Indeed, the ALJ's decision expressly restates that position. The District's argument lacks merit, however, because the factual circumstances in the instant case do not fall within the legal principle articulated above. First, its agent, Dr. Browne,[4] did not take action against Dowds to recover the overpayment. The District never proceeded against Dowds. Neither did Dr. Browne merely advise Dowds that the District was going to initiate the overpayment suit. She said more than that. She conditioned the District's overpayment lawsuit on Dowds' exercise of EERA rights.

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[3]In addition to crediting the ALJ's finding that Dr. Browne made the expressly threatening statement, we also observe that Dr. Browne admitted asking Dowds about a possible overpayment. While such an inquiry directly levels no threat, it may well have been perceived as such by Dowds. Certainly, with the arbitration date quickly approaching and with knowledge of her colleague Lorna Hurd's experience, Dr. Browne's mere inquiry could have carried with it a less-than-concealed threat.

[4]While Dr. Browne was at first a supporter of Dowds' grievance, she withdrew that support when her superiors disapproved and, when she contacted the grievant to discuss the question of a possible overpayment suit that could result from prosecution of the grievance, she did so at the request of District hierarchy. She was without doubt, then, serving as the District's agent.

Secondly, the Public Service case rests on the availability of a reasonable claim. As the ALJ noted, the overpayment claim was stale and based on a claim contrary to a position it had taken earlier. For both of these reasons, the District's contention is without merit.

Finally, relying on the ALJ's instruction that a party seeking a briefing continuance must first contact the other party, the District charges that the ALJ held the District to this rule but permitted the Association's attorney to get a one-day continuance without getting the District's agreement. While the record before us does not fully detail these events, it appears that the District's request for a continuance was sought because its attorney was in a serious car accident. While it is not clear whether the ALJ was so advised, it is asserted that at least one physician advised Patricia Mills, the District's attorney, not to return to work for several months. Under such circumstances, where it is reasonable to assume that a lengthy delay might ensue, the ALJ's requirement that the District get the Association's agreement for the continuance is not illogical. In contrast, although again not specifically asserted, it appears that the continuance requested by the Association's representative was for a one-day extension of time. Given the minimal amount of inconvenience such a delay would bring, it was not unreasonable for the ALJ to grant such a request prior to receiving the District's agreement.

For these reasons and because we find no prejudice alleged or demonstrated as a result of the alleged disparate treatment, we do not disturb the ALJ's rulings but, rather, affirm his factual and legal conclusions.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the Ravenswood City School District and its representatives shall:

1. CEASE AND DESIST FROM:

a. Threatening to take court action, without justification, if an employee grievance is pursued to an arbitration hearing; and

b. Interfering with the right of the Association to represent a grieving employee by threatening, without justification, to take court action if an arbitration hearing is pursued.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and post at its headquarters offices and in conspicuous places at the locations where notices to certificated employees are customarily posted, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of

thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

b. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that all other alleged violations in the complaint are DISMISSED.

Member Jaeger joined in this Decision.

Chairperson Hesse's concurrence begins on page 8.

Hesse, Chairperson, concurring: I concur with the finding that the District violated EERA section 3543.5(a) and (b). I do, however, find that Dr. Browne's interference began prior to her June 13, 1983 statements to Dowds.

Dr. Browne was the Director of Student Services and Dowds' supervisor when Dowds filed her grievance in 1982. As pointed out by the ALJ, Dr. Browne's conduct can be imputed to the employer. Evidence shows that Dr. Browne assisted Dowds in filing and processing the grievance against the District. While her motive was unquestionably to help Dowds, Dr. Browne's actions interfered with Dowds' protected rights.

While it is proper for a supervisor to contact the appropriate officials in an attempt to correct a perceived error, it is contrary to established management procedures to be directly involved in assisting an employee in processing a grievance. The effect of such a deviation is twofold. First, it places management in the position of deciding what issues are important in the grievance, and to the grievant. A question arises as to whose issues or agenda are being pursued in the grievance. This directly interferes with an employee's protected right to define his own grievance, and is a violation of section 3543.5(a).

Second, by assisting Dowds, Dr. Browne was acting as her representative, not her supervisor. The Ravenswood Teachers Association was the exclusive representative of Dowds'

bargaining unit. Such assistance denies the Association its section 3543.1 right to represent that unit in its employment relations with the public school employer by undermining its authority in interpreting and policing the collective bargaining agreement. Such interference violates section 3543.5(b).

Hence, while I agree with the majority's conclusion that Dr. Browne's June 13 discussion was coercive, I would find actual interference began in 1982.

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. SF-CE-805, Ravenswood Teachers Association, CTA/NEA v. Ravenswood City School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a) and (b). (All other alleged violations in the complaint have been dismissed.)

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We will:

CEASE AND DESIST FROM:

a. Threatening to take court action, without justification, if an employee grievance is pursued to an arbitration hearing; and

b. Interfering with the right of the Association to represent a grieving employee by threatening, without justification, to take court action if an arbitration hearing is pursued.

Dated: _____ RAVENSWOOD CITY SCHOOL DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RAVENSWOOD TEACHERS ASSOCIATION CTA/NEA, Charging Party, v. RAVENSWOOD CITY SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-805
	)	PROPOSED DECISION (1/26/84)

Appearances: Ramon E. Romero, attorney for the charging party Ravenswood Teachers Association, CTA/NEA; Patricia W. Mills, attorney (Millner & McGee) for the respondent Ravenswood City School District.

Before: Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

On August 2, 1983, the charging party Ravenswood Teachers Association, CTA/NEA (hereafter Association or RTA) filed an unfair practice charge against the respondent Ravenswood City School District (hereafter District). The charge alleged that a supervisor threatened that the District would file a court action to recover a salary overpayment if an employee pursued arbitration on a separate salary dispute. The charge also alleged that the District's attorney spoke directly to the employee about the pending case without first informing the grievant's lawyer or securing consent. The Association charged that this conduct violated sections 3543.5(a) and (b) of the

Educational Employment Relations Act (hereafter EERA or Act.)[1]

On August 3, 1983, PERB's general counsel issued a complaint incorporating the allegations of the unfair practice charge. The District filed its answer on August 30, 1983. The answer admitted certain facts, generally denied the allegations of unlawful conduct, and set forth several affirmative defenses. Admissions, denials and defenses will be considered below as relevant to this decision. An informal settlement conference in September 1983 failed to resolve the dispute.

A formal hearing was conducted on October 27, 1983, at the District's office in East Palo Alto, California. After briefing continuances were requested by both parties, and a second settlement conference in December 1983 was unsuccessful, post-hearing briefs were filed, and the case was submitted on January 17, 1984.

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[1]The EERA is codified at section 3540 et seq. of the Government Code and is administered by the Public Employment Relations Board (hereafter PERB or Board). Unless otherwise stated, all statutory references in this decision are to the Government Code. Section 3543.5 provides, in relevant part, that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

FINDINGS OF FACT

A. Background.

Sheila Dowds was hired in fall 1979 as a school psychologist in the District. Initially she was a long-term substitute. The next year she was granted permanent status. Two other school psychologists referred to in this case are Vincent Brown, a District employee for over 20 years, and Lorna Hurd, hired shortly after Dowds.

School psychologists have been supervised since 1980 by Dr. Mildred Browne, the Director of Student Services. For several years before her promotion, Dr. Browne was also a staff psychologist.

In fall 1982 Dowds initiated a grievance claiming that she was misplaced on the salary schedule because she had not been given credit for her prior experience as a school psychologist. In December, the grievance was denied by the superintendent on the ground that past practice did not support Dowds' claim for prior service credit.[2] Around the New Year, binding arbitration was requested.

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[2]In other respects, the superintendent conceded that Dowds was entitled to accrued seniority and other contract benefits based on a date-of-hire retroactive to her beginning work as a substitute. However, coupled with these remarks was the comment that her initial salary placement at "Step 6," rather than "Step 1" for substitutes, was consistent with the District's long-standing interpretation of one section of the contract, despite apparently conflicting language in another

One of Dowds' arguments in her grievance was that fellow-psychologist Hurd had been given credit for her prior experience. The District admitted that this had occurred, but claimed it was an error inconsistent with past policy and that no psychologist hired before Dowds had been given such credit. Soon thereafter, in December 1982, the District wrote a letter to Hurd requesting restitution of the alleged erroneous overpayment. There is no evidence of further District action to recoup the salary differential from Hurd until a small claims action was filed on June 17, 1983.[3]

Dr. Browne supported Dowds' claim throughout the grievance process. In addition to Dr. Browne's belief that past practice justified Dowds' grievance, she also believed, as a matter of moral principle, that prior experience should be rewarded when an employee was hired. Among other things, Dr. Browne wrote a letter in October 1982 in favor of Dowds' position. Dr. Browne also urged Dowds to pursue the grievance to later stages, spoke to the District's superintendent on Dowds' behalf, and gave

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part of the agreement that would have allowed a lesser amount. (See Charging Party Exhibit No. 1-K.)

[3]See Respondent's Exhibit No. 2. Upon the Association's objection, when this exhibit summarizing dates relevant to Dowds and Hurd was offered in evidence, only the second paragraph referring to Dowds was received. However, since the first paragraph of the letter concerns Hurd, whose personnel situation is relevant, and there is no dispute as to authenticity or the official capacity of the assistant superintendent who wrote the letter, the document in its entirety should be received in evidence as an admission.

Dowds the names and phone numbers of other school psychologists who might be helpful witnesses.

In addition to Dr. Browne's grievance assistance in 1982-83, in April 1983 she helped Dowds carry out an assignment for an advanced credential program Dowds was taking. Dowds needed information about collective negotiations procedures in education, and Dr. Browne put her in touch with the District's attorney, Pat Mills. Thereafter, Mills and Dowds had a lengthy conversation about the subject.

Dowds described her experiences with Dr. Browne as a close working relationship but not as a friendship. Dowds conceded that Dr. Browne was definitely supportive of the grievance, but observed that they were not socially involved outside of school. Dr. Browne's testimony was consistent with this description.

Both also agreed that by the end of the 1982-83 school year Dowds' attitude toward Dr. Browne had changed. Dowds attributed the change to Dr. Browne's rejection in May 1983 of Dowds' request that Dr. Browne testify at the upcoming arbitration. Dr. Browne said she would be out of town and unavailable, and that, in any event, she could only do what the District's counsel permitted. For her part, Dr. Browne did not observe a change in feeling until after Dowds had talked to her attorney, Ramon Romero, in the days following the June 13, 1983, discussion between Dr. Browne and Dowds. It was during this

discussion that Dr. Browne allegedly threatened Dowds with court action. It was also on June 13 that attorney Mills allegedly had unauthorized communications with Dowds.

Nevertheless, even after June 13, there is uncontradicted evidence that Dr. Browne continued providing grievance assistance to Dowds. First, Dr. Browne gave Dowds the phone numbers of potential witnesses. Second, having heard Dowds on June 13 express uncertainty about the degree of Romero's preparation for the upcoming arbitration, Dr. Browne approached a local Association grievance officer, Gene Small, to see if he could intercede to help. Small was present at the hearing but was not called as a witness.

Dowds' grievance arbitration was originally scheduled for June 6 but was continued for about two weeks by agreement between Mills and Romero. It is undisputed that Mills knew Romero was representing Dowds as of June 13, the date of the disputed discussions at issue in this case.

B. The District staff conference on June 13, 1983.

About one hour before Dr. Browne met with Dowds in the morning of June 13, District personnel officials conferred with attorney Mills. The purpose of the staff conference was to review personnel documents in preparation for the arbitration. Although Dr. Browne had not been previously involved in management's case-planning, she attended the meeting under orders from the superintendent. She was hesitant to

participate and, as noted, was hostile to a policy denying credit for prior experience.

At the conference, the records of several previous employees were reviewed. On the basis of this evidence, Dr. Browne was persuaded that she had been mistaken in her belief that prior service credit had been granted to others before Dowds was hired. Dr. Browne described this as a "rude awakening" which made her very upset. She felt she had misled Dowds and had contributed to tension among District staff. On principle, however, she still believed that prior experience credit was deserved, even if past practice evidence did not support her judgment.

Additionally, in the staff meeting, Dr. Browne was told that the District had documentary materials from 1974 negotiations that showed the Association's agreement to reduce the starting salary level of school psychologists, without regard to prior experience.

Also during the meeting, in the course of reviewing records, one official discovered that a question might be raised about Dowds being overpaid when first hired as a substitute. It was observed in a brief discussion that the relevant policy and facts on this collateral issue were uncertain, and that further investigation was needed. According to Dr. Browne, there was no discussion of any court

action in relation to this issue, nor was there any reference to the District's alleged overpayment to Hurd.

After Dr. Browne's lengthy review of the personnel records she believed it might help matters if she spoke with Dowds about the new information. At Mills' suggestion she agreed to talk to Dowds right away, acting as a go-between, to see if the case might be resolved or settled without going to arbitration. Before doing this, Dr. Browne also asked Mills to talk to Dowds, if Dowds was willing to meet once Dr. Browne had relayed the facts she had just learned.

C. Dr. Browne's meeting with Dowds.

Dr. Browne returned to the building that housed the staff psychologists and asked Dowds and Vincent Brown to meet with her. Dr. Browne did not have any specific settlement proposal to present, but wanted to spur a dialogue. She invited Vincent Brown to participate believing that, as a long-time District employee, he might have additional information about the 1974 negotiations that were related to the salary placement dispute. As it turned out, Vincent Brown had only a fuzzy recollection and made few if any comments during the discussion.

The meeting with Dowds lasted about 10 to 15 minutes. Dr. Browne reviewed the disconcerting information she had learned at the earlier personnel conference and admitted her mistaken belief about past practice. She believed that the District had a strong case. Dr. Browne also mentioned that the

District claimed to have documents stemming from the 1974 negotiations that were relevant to the dispute about contract intent. In this regard, she raised a question about whether the Association was being consistent in acting on behalf of Dowds and other psychologists.

At another point, Dr. Browne described the collateral issue that had been raised of a possible overpayment when Dowds was first hired as a substitute. Dr. Browne asked Dowds if she could recall her salary scale at the time. (Dowds was hired as a temporary replacement for Dr. Browne, who was on maternity leave.) A dispute about this part of the conversation is the basis of one of the alleged violations in this case. It will be considered in detail below.

Dr. Browne was emotionally distraught during the discussion, at one point breaking down in tears. At the hearing, Dr. Browne freely admitted her distress about her previous error as well as her anxiety about the potential ramifications of the personnel dispute in causing rancor among the staff. For her part, Dowds was confused by the new information and was concerned that the superintendent had not discussed the case fully and fairly with her in fall 1982. In light of these factors, and given her previous questions about Romero's stage of preparation, Dowds wanted to find out more. She agreed to return to the main administration building with Dr. Browne to meet with the superintendent and Mills.

Dr. Browne urged this course even though, only minutes before, Mills had momentarily interrupted the conference to tell Dr. Browne that, on second thought, Mills was rejecting Dr. Browne's earlier idea and could not confer directly with Dowds.[4]

D. The alleged court action threat.

The key dispute about the June 13 meeting involves Dowds' claim that Dr. Browne threatened that the District would file a court action on the alleged substitute overpayment if Dowds pursued her case to arbitration. Dowds testified as follows:

> Q. Okay. What else did she [Dr. Browne] say?
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> A. Well, the gist was that they had a very strong case and that I didn't have very much of a chance fighting the District and that if, and then she said that if I decided to go through with it, the District would take me to court to recover overpayment of salary which they were claiming occurred the first year that I worked as a long-term substitute where I supposedly was paid too much, so they were going to try to get that money back from me.
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> Q. Had you ever heard of any alleged overpayment of salary to you prior to this meeting?
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> A. No, I hadn't. No.
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> Q. Okay. Did she explain the overpayment? What else did she say about the overpayment?

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[4]Dowds did not remember this interruption, as recalled by Mills and Dr. Browne, but it makes sense as a transition explaining Mills' later conduct declining to talk to Dowds about the substance of the case. (See pp. 13-15, below.)

A. Just that, that's all, that they'd gone over the salary and that I wasn't entitled to as much as I was paid that year and if I decided to go through with the arbitration hearing, they would try to recover some of that money from me by taking a court action.

Q. Okay. What did you say in response to that?

A. I said that I didn't believe they could do that because I was familiar with what was going on with Lorna Herd (phonetic), that they were recovering, trying to recover money from her for alleged overpayment and just from what I knew about her case, I didn't believe that that would happen either to her or to myself. So I said that, but Mildred insisted that it could and it would.

Q. What did she say?

A. She said, oh, yes, it will happen, that will happen. (Reporter's Transcript, pp. 26-27.)

Dr. Browne admitted asking Dowds about a possible overpayment when Dowds was hired as a substitute. However, Dr. Browne unequivocally denied that she made any reference to possible court action or to Hurd's situation. Indeed, Dr. Browne testified that although she knew Hurd had a grievance pending (not involving Dr. Browne), and that the District had claimed an overpayment, she was unaware of any court action against Hurd when these events occurred on June 13.

Vincent Brown, the third person at the meeting, also denied that any court action was mentioned. However, his testimony should be disregarded as unreliable (although not intentionally false). His overall demeanor was that of an unwilling,

hesitant witness who was nervous about saying the wrong thing. Additionally, his recollection was vague and uncertain, even about such an important uncontested point as Dr. Browne's assessment that the just-disclosed evidence supported the District's case. He also was a potentially biased witness who, although friendly to Dowds, was, in regard to Dr. Browne, a closer friend as well as a member of the same church and godfather to one of her children.

Respondent argued at the hearing and in its brief that Vincent Brown's credibility was enhanced because he testified following an antagonistic phone coversation with Romero just before the hearing in this case, and because his recollection as stated to Romero was in accord with his later testimony denying a court threat. Leaving aside the ambiguous and conflicting evidence about the Romero-Brown conversation, the other deficiencies relevant to this witness preclude trustworthy use of his testimony.

After reviewing the testimony of Dowds and Dr. Browne, and the context of events, it is found that Dr. Browne <u>did</u> refer to possible court action by the District if the arbitration went forward. First, although Dr. Browne's testimony was earnest and careful, showing that she was trying to tell the truth, she was very upset on June 13 and, in that agitated state of mind, easily might not recall at a hearing months later a brief comment about a potential court action. Certainly, Dr. Browne

mentioning an additional troubling facet that would strengthen her argument in favor of resolving the dispute, was consistent with her distress about the new grievance evidence and the need for settlement. Second, given the close proximity to the District's court action against Hurd, filed on June 17, it is probable that a reference was made to comparable overpayment litigation during the previous meeting with Mills and personnel staff. Even if the District's administrators needed to investigate further, and Dr. Browne overstated the employer's intent, it strains belief that an eventual court option was not mentioned at all. Finally, Dowds' testimony had the ring of truth. In particular her clarity about the threat and her doubt about the likelihood of successful court action jibed with the District's earlier but unpursued attempt in December 1982, which Dowds knew about, to recover an alleged overpayment from Hurd.[5] Regardless of the factual finding above, the legal effect of Dr. Browne's statement remains to be determined.

E. The Dowds-Mills encounters.

Dowds and Dr. Browne returned to the main administration building and, since the superintendent was out, found Mills. Mills told Dowds, either directly or through Dr. Browne, that

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[5]Examined carefully, Dowds did not testify that Hurd had already been sued as of June 13, an event that took place on June 17, but only that the District was "trying to recover money from her for alleged overpayment."

she couldn't talk about the case and that Dowds' questions, prompted by Dr. Browne's disclosures, should be directed to Romero as her lawyer. Dowds admitted in her testimony that Mills would not discuss the case.

According to Dowds, Mills believed that Romero's phone number was in her briefcase back in Dr. Browne's office in the psychology section, and the group went over to call him.[6] When they arrived at Dr. Browne's office, Dowds testified that a call was placed but Romero was out. (According to Mills and Dr. Browne, the phone number couldn't be located and no call was made.) Again, as Dowds admitted, during this last phase Mills told Dowds that Mills couldn't talk directly to her--at

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[6]One major testimonial conflict involved Dowds' claim that, as the trio returned to the psychology offices, they observed an RTA officer in the parking lot, which caused Mills to tell Dowds that if anyone asked what they were doing together, Dowds should say they were discussing negotiations. Dowds understood this to refer to their earlier discussions about her coursework and not to local negotiations with the District. Both Mills and Dr. Browne denied that any conversation took place in the parking lot. For the following reasons, it is found that Mills did make the comment about negotiations. First, the RTA officer persuasively testified that although she could not overhear the group, their body movement, slow walking pace and Dr. Browne's expressiveness, led her to believe they were conversing. Second, in Mills' pre-testimony notes she indicated merely that she could not recall the alleged remark. Mills testified that only after her recollection was refreshed by conversation with others about the case did she determine that the remark was not made at all. Third, the remark would have been consistent with Mills' obvious self-consciousness about talking to Dowds directly rather than through her attorney. In any event, resolving this conflict against Mills and Dr. Browne does not disturb the principal finding, conceded by Dowds, that Mills did not discuss the substance of Dowds' case at any time on June 13.

least not until the case was over--and that Dowds should get in touch with Romero.

At some point in the encounter, Mills may have stated that she didn't want to see the Association take advantage of Dowds. If this remark was made (which Mills denied), it was understandable in the context of events. Thus, it was responsive to Dowds' obvious desire to reach Romero to clear up the questions that had been raised about the District's past salary practices and the 1974 negotiations, as well as Dowds' own concerns about Romero's readiness. Finally, the discussion ended and Dowds departed, perhaps with Mills urging the desirability of a settlement because of the District's hard-pressed finances.

CONCLUSIONS OF LAW

In Rio Hondo Community College District (5/19/80) PERB Decision No. 128, the Board adopted precedent under the National Labor Relations Act (NLRA) holding that it would evaluate allegedly unlawful employer speech to determine whether it "contains a threat of reprisal or force or promise of benefit." (Id., at p. 20).[7]

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[7]Section 8(c) of the NLRA (29 U.S.C. 158(c)) states:

> The expression of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under

Hence, if the statement challenged by the Association contained a threat of reprisal tending to or interfering with employee rights under the EERA, a violation will be found unless the employer demonstrates an operational justification for the statement. See Novato Unified School District (4/30/82) PERB Decision No. 210; Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

In assessing Dr. Browne's comments, Sheila Dowds' subjective impression of a threat is not determinative. In Rio Hondo, the Board held that the legality of employer speech would be gauged,

> . . . in light of the impact that such communication had or was likely to have on the . . . employee [who] may be more susceptible to intimidation or receptive to the coercive import of the employer's message. (Id., PERB Decision No. 128, at p. 20.)

A violation is therefore to be based on how the statement could be "reasonably viewed." (Id., at p. 23.) This approach is

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> any provision of this Act, if such expression contains no threat or reprisal or force or promise or benefit.

The EERA lacks expres language comparable to 8(c), but the Board's decision in Rio Hondo is clearly in accord with this standard and specifically relies upon NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, the leading federal case interpreting 8(c).

The construction given to comparable application of the NLRA may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

consistent with the objective analysis standard under the NLRA. Regents of the University of California (12/16/83) PERB Decision No. 366-H, citing B.M.C. Manufacturing Corp. (1955) 113 NLRB 823 [36 LRRM 1397]; Gorman, Labor Law (1976) at p. 132.

As a threshold matter, it is plain that the discussion between Dr. Browne and Dowds involved a pending grievance, an activity protected under the EERA. North Sacramento School District (12/20/82) PERB Decision No. 264.

Ample evidence also supports the conclusion that there was a nexus between this protected activity and Dr. Browne's action on behalf of the District. There is no dispute over Dr. Browne's apparent authority to have acted as the employer's agent on June 13, nor, indeed, could that authority be disclaimed at this late date. See Antelope Valley Community College District (7/18/79) PERB Decision No. 97 (at pp. 9-10), quoting International Assn. of Machinists v. NLRB (1940) 311 U.S. 72; Vista Verde Farms v. The Agricultural Labor Relations Bd. (1981) 29 Cal.3d 307, 318-321. In fact, in its answer to the complaint (as demonstrated by the evidence at the hearing), the District admits Dr. Browne's supervisory status and concedes that,

> . . . at the direction of Attorney Mills Dr. Mildred Browne met with school psychologist Sheila Dowds and Vincent Brown in an attempt to resolve and/or settle the grievance. (Answer, at p. 2; emphasis added.)

On the ultimate issue of unlawful conduct, under the circumstances, Dowds could reasonably view as a threat Dr. Browne's remarks about a potential lawsuit by the District if Dowds pursued her case to arbitration. Although Dr. Browne had been Dowds' ally on the grievance, rendering assistance and interceding on Dowds' behalf, the fact remains that on June 13 Dr. Browne was acting as a go-between on management's behalf. Even if Dr. Browne bore no ill will toward Dowds, sincerely wanted a settlement, and would not have initiated court action on her own, Dowds could properly take Dr. Browne's remarks as expressing the employer's point of view since this was related to Dr. Browne's report about the administrative conference that had just taken place.

Moreover, Dr. Browne's remarks can be imputed to the employer, regardless of Dr. Browne's supervisory status, since the District expected Dr. Browne to be acting as a messenger conveying information to Dowds. Whether Dr. Browne accurately reported the tentative status of the overpayment issue as raised in the previous conference is beside the point. The risk that Dr. Browne inadvertently misstated what had transpired, perhaps to strengthen her appeal that Dowds resolve the grievance, shall be borne by the District which had commissioned her to act as an intermediary. Unfortunately, with the benefit of hindsight, it is apparent that the better practice would have been for Mills to communicate the state of

the evidence to Romero, rather than to have relied on Dr. Browne's intercession.8

Nor can the District defend against a violation on the ground that an overpayment salary claim against Dowds was justified. An employer is not barred from warning or taking action against an employee on matters that are disclosed in the process of arbitrating a contract claim, for to do so "would give automatic immunity." Public Svc. Elec. & Gas Co. (1983) 268 NLRB 54 [115 LRRM 1006, 1007]. Assuming a reasonable counterclaim was discovered while preparing for Dowds' arbitration, the District would have been free to trade its claim in exchange for dismissal of the grievance. In this connection, however, there was no evidence introduced that Dowds had been overpaid when first hired as a long-term substitute. Further, the suggested claim was stale, having arisen, if at all, nearly four years before, and the subject was certainly within the knowledge of District agents acting at

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8Federal precedent is consistent with this analysis. Among the numerous cases on the subject of employer liability for the acts of apparent agents, compare Community Cash Stores (1978) 238 NLRB 265, 266 [99 LRRM 1256] (liability for anti-union acts of older employee emissary), Adams Iron Works, Inc. (1975) 221 NLRB 71 [90 LRRM 1643], enf. (2nd Cir. 1976) 556 F.2d 557 [96 LRRM 2106] (ostensible authority of management friend to offer settlement), and, Teledyne Dental Products Corp. (1974) 210 NLRB 435, 441 [86 LRRM 1134] (liability for messages transmitted by non-supervisory employee), with University Townhouse Cooperative (1982) 260 NLRB 1381 [109 LRRM 1321] (no evidence showing that shop coordinator liaison gave impression of speaking on management's behalf).

that time. Last, in the course of denying Dowds' grievance, the District had referred to the initial salary placement as correct, expressly disclaiming reliance on contract language that could have been interpreted to authorize a lower salary.

In sum, to have raised the prospect of court action on the eve of the arbitration, coupled with representations about damaging evidence on the merits of Dowds' grievance, could reasonably have been viewed by Dowds as an unjustified threat to coerce her to drop the case. Indeed, it is arguable that this conclusion would apply even if no court action had been explicitly threatened, but only had been implied by reference to an unsound overpayment issue.

B. The Mills-Dowds communications.

The charging party contends that Mills improperly communicated with Dowds on June 13, bypassing Romero, who was Dowds' designated representative on the pending grievance. To support this claim, the Association refers to Rule 7-103 of the Rules of Professional Conduct, which states:

> A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

Assuming that PERB may refer to professional standards to gauge the conduct of parties in regard to grievance activity

protected under the EERA,[9] no interference with protected rights is found in this case.

Granted, the Board has determined that in grievance proceedings an employee has the right to grieve through a particular individual representative. California State University (Sacramento) (4/30/82) PERB Decision No. 211 (at pp. 14-15). And, applying NLRA precedent, an employer is required to deal with a grievant's attorney absent contract language limiting that right. United States Postal Service (1973) 202 NLRB 823 [82 LRRM 1641]. The general rule that prohibits bypassing and refusals to deal is justified by important policy considerations favoring contract stability and protecting against internal union divisions, and the PERB has adopted this approach. See, e.g., San Ramon Unified School District (8/9/82) PERB Decision No. 230 (at pp. 16-17). Rio Hondo Community College District (12/28/82) PERB Decision No. 272 (at pp. 6-11); Bethlehem Steel Co. (1950) 89 NLRB 341 [25 LRRM 1564].

The rationale supporting this labor relations prohibition is similar to the policy underlying Rule 7-103. That rule is

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[9]Cf. Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal.App.3d 597, 603-608 (affirming trial court disqualification of attorney for improper contact with opposing party). Also compare Code of Civil Procedure, section 128 (enumerating court powers) with Board Rule 32170 (8 Cal. Admin. Code, sec. 32170) (enumerating hearing officer powers).

intended to protect the sanctity of the attorney-client relationship as well as the administration of legal disputes.

> It shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well-intended but misguided.
>
> The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing party from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication by calling attention to counteracting elements which may exist. (Mitton v. State Bar (1969) 71 Cal.2d 525, 534.)

However, in this case the Association has not charged that, aside from threatened court action, there was impermissible contact ab initio between Dr. Browne and Dowds that undermined the labor relations and professional standards described above. Rather, the Association only claims that the communications between Mills and Dowds violated the Act.10

10Had the Association offered to amend its charge to conform to proof after the trial, it is questionable whether a violation would be found for the Dr. Browne-Dowds contact. Dowds as the original grievant had previously represented herself in the dispute and there was no showing that Romero, once he entered the case, had notified the District that he was the sole and exclusive agent on her behalf. Also, Dowds made no objection when she was approached by Dr. Browne to talk about the case, willingly engaged in conversation, heard information about the District's evidence, and actively cooperated with Dr. Browne in seeking further contact with the superintendent and/or Mills on June 13.

When examined in light of these labor relations and professional principles, there is insufficient evidence to support the contention that Mills' comments to Dowds, in Romero's absence and without his consent, violated the EERA. In short, Mills stated without any ambiguity that Dowds should contact Romero to seek answers to her questions about the case, and that Mills could not discuss the substance of the grievance. Mills' refusal to discuss the case occurred not only when she was first confronted by Dr. Browne and Dowds, who were anxious to continue discussion following the morning disclosures, but continued when the group moved to another building. According to Dowds, Mills even assisted in an unsuccessful attempt to telephone Romero. Any other criticisms or doubts about the case that Dowds may have subjectively inferred from Mills' remarks were purely responsive to the situation and were harmless. As Mills argued during the hearing, there was no communication upon any "subject of controversy" in the words of Rule 7-103. This aspect of the complaint shall be dismissed.

C. Violation.

Separate violations of section 3543.5(a) and 3543.5(b) are found in Dr. Browne's comment conveying a threatened court action reprisal if Dowds pursued her case to arbitration. Under section 3543.5(a), this unprotected speech interfered with the right of an employee to process a grievance by linking

continuation of the pending proceeding to prospective harm at a later date. Under section 3543.5(b), organizational readiness to proceed on behalf of an employee it represents would certainly be diminished by such a chilling threat, which included the implication of potential strain on organizational resources that would result from additional litigation.

REMEDY

Section 3541.5(c) of the Act states:

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

A cease and desist order is the traditional remedy for cases of unlawful employer speech threatening a reprisal tied to the exercise of protected rights under the Act. See, e.g., John Swett Unified School District (6/8/82) PERB Decision No. 188 (employer derogation of faculty poll had no place in legitimate problem-solving conversation).

It also is appropriate that the District post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from

this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Ravenswood City School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Threatening to take court action, without justification, if an employee grievance is pursued to an arbitration hearing; and,

(b) Interfering with the right of the Association to represent a grieving employee by threatening, without justification, to take court action if an arbitration hearing is pursued.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty

(30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(b) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

IT IS FURTHER ORDERED that all other alleged violations in the complaint shall be DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 15, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on

February 15, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: January 26, 1984

BARRY WINOGRAD
Administrative Law Judge