STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS MANTON UNIT OF CHAPTER NO. 406,	)	
Charging Party,	)	Case No. S-CE-1483
v.	)	PERB Decision No. 960
MANTON JOINT UNION ELEMENTARY SCHOOL DISTRICT,	)	November 23, 1992
Respondent.	)	

Appearances: California School Employees Association by Sharon R. Furlong, Senior Field Representative, for California School Employees Association and its Manton Unit of Chapter No. 406; Blandell Swanson by L. Alan Swanson, Attorney, for Manton Joint Union Elementary School District.

Before Hesse, Chairperson, Camilli and Caffrey, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Manton Unit of Chapter No. 406 (CSEA) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ found that the Manton Joint Union Elementary School District (District) violated section 3543.5(a), (b), (c) and (d) of the Educational Employment Relations Act (ERRA or Act)[1] by interfering with a

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

decertification election.

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, CSEA's exceptions and the District's responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

CSEA'S EXCEPTIONS

CSEA contends the ALJ failed to provide effective meaning to EERA section 3541.5(c) when he denied CSEA's request for a one-year cooling off period. CSEA asserts that the taint of the superintendent's letter, praising the decertification effort, remains and the employees would be reluctant to take a position in conflict with the District's position. Such circumstances, they argue, effectively deny the employees the right to freely

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> (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.
>
> (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.

cast their vote.

CSEA additionally asserts that the ALJ failed to invalidate the two decertification petitions[2] filed by the employee group. CSEA relies on decisions of the National Labor Relations Board (NLRB), citing Alexander Linn Hospital Association (1988) 288 NLRB 18 [127 LRRM 1318], which held that petitions for decertification were tainted by the unfair labor practices found against the employer, and therefore, the petitions were dismissed. Further, CSEA contends that under the NLRB's "small shop doctrine," where the number of employees in the work place is small, it may be inferred that the employer knew of the union activities and supported the rival organization. (D & D Distribution v. NLRB (3rd Cir. 1986) 801 F.2d 636 [123 LRRM 2464].) CSEA argues that the District's unlawful conduct so undermines the employees' support for the existing union that CSEA stands no fair chance in the election. They insist only an insulation period and a requirement that a new petition be filed, would provide an equitable remedy.

The District responded to CSEA's statement of exceptions contending the ALJ's remedy is appropriate. The District asserts that there has been "ample time for CSEA to ameliorate any imagined detrimental effects" resulting from the District's March 25, 1992 letter.

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[2]Subsequent to the filing of the unfair practice charge in this case, the employee group filed a second decertification petition on July 1, 1992. This petition has not been processed pending resolution of the unfair practice charge.

DISCUSSION

EERA authorizes the Board to take any such action necessary to give effect to the policies of this Act. Section 3541.5(c) states:

> (c) 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.

In Jefferson School District (1980) PERB Order No. Ad-82 (Jefferson), a decertification petition was filed with PERB after unfair practice charges alleging refusal to meet and negotiate in good faith were filed against each other by the district and the exclusive representative. The regional director imposed a stay of the decertification election pending resolution of the unfair practice charges. Subsequently, the regional director lifted the stay and allowed the decertification election to go forward prior to final resolution of the unfair practice charges. The regional director considered a number of factors in deciding to lift the stay, including the passage of time since the unfair practice charges were filed. The Board upheld the regional director's determination and held that the election should continue to be stayed only if:

> . . . the employees' dissatisfaction with their representative is in all likelihood attributable to the employer's unfair practices rather than to the exclusive representative's failure to respond to and serve the needs of the employees it represents. [Citation.]

The Board further concluded that in order to preserve the employees' free choice in the matter of representation, the Board "may delay a representation election when there is a substantial risk that its outcome will be affected by conduct that is alleged to be an unfair practice when that charge is still pending before the Board." (Jefferson, at p. 18.)

In this case, CSEA argues that a decertification election should not be conducted until there has been a one-year cooling off period to remove the "taint" of the superintendent's letter.

The employees in this case sought decertification of the exclusive representative prior to any interference by the District. Further, as noted by the ALJ, it was the employees, through the custodian who initiated the decertification effort, who contacted the superintendent seeking certain information. The District did not initiate any effort to direct the employees in their choice of employee representation. Given these facts, it cannot be concluded that the employees' dissatisfaction with their representative was attributable to the employer's unfair practice.

Furthermore, with the passage of approximately seven months since the filing of the unfair practice charge and the resolution of the charge through issuance of this decision, CSEA fails to establish what benefit would accrue to the employees by requiring them to wait a full year to vote in the decertification election. Therefore, this exception is rejected.

CSEA also contends the ALJ erred by failing to invalidate

the two decertification petitions filed by the employee group. CSEA's reliance on the NLRB cases is misplaced. In Alexander Linn Hospital Association, supra, 288 NLRB 18 [127 LRRM 1318], the employer committed several unfair labor practices which had not been remedied at the time the decertification petition was filed. In dismissing the decertification petitions, the NLRB found the nature of the violations and the timing of the decertification effort cast doubt on the effectiveness of the union. Similarly, in Jefferson, the district and the employee organization both filed unfair practice charges prior to the initiation of the decertification petition. Here, the District's unlawful conduct occurred after the initial decertification petition was filed and such conduct cannot be construed as the basis for the employees' dissatisfaction with the exclusive representative.

Further, CSEA seeks to expand the holding in D & D Distribution, supra. 801 F.2d 636 [123 LRRM 2464]. The court held that the small shop doctrine allowed an inference that the employer knew of its employees' union activities, but it did not then conclude that the employer supported a rival employee organization. It does not follow that because the District has knowledge of the employees' decertification effort, it therefore supports the effort.

The employee group in this case properly filed a decertification petition prior to any unlawful acts by the District. There is no evidence the employees' dissatisfaction

with the exclusive representative is derived from the District's unfair practices. Further, the District did not initiate the contact with the group. CSEA fails to provide any compelling reason to overcome the Board's policy to encourage prompt resolution of bargaining unit representation issues, especially since the unfair practice charge has been resolved through issuance of this decision. Accordingly, this exception is rejected and the Board finds that a new decertification election should be conducted in order to permit the employees an opportunity to decide the question of representation.

ORDER

Based upon the findings of fact and conclusions of law and the entire record in this case, the Board finds that the Manton Joint Union Elementary School District (District) violated section 3543.5(c) and (d) of the Educational Employment Relations Act (EERA) when the superintendent bypassed the exclusive representative to negotiate with the representative of a rival group of employees and declared pre-election support for that group. Because the action had the additional effect of interfering with the right of unit members to be represented by the California School Employees Association and its Manton Unit of Chapter No. 406 (CSEA), it was also a violation of EERA section 3543.5(a). Because the action had the further effect of interfering with the right of CSEA to represent its members, it also violated EERA section 3543.5(b).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED

that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Encouraging employees to support any organization in preference to another at a time when a question concerning representation is pending by: (a) negotiating with individual employees or organizations other than the exclusive representative, CSEA; and (b) making statements through the superintendent or other agent which express support for and/or appreciation of rival organization efforts to decertify CSEA as the exclusive representative;

2. Interfering with the right of the classified employees to be represented by CSEA; and

3. By the same conduct, interfering with the right of CSEA to represent its members.

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

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

C. IT IS ALSO ORDERED THAT:

The results of the May 11, 1992 election be set aside and the ballots destroyed. The Sacramento Regional Director is hereby directed to conduct a new election.

Chairperson Hesse and Member Camilli joined in this Decision.

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. S-CE-1483, California School Employees Association and its Manton Unit of Chapter No. 406 v. Manton Joint Union Elementary School District, in which all parties had the right to participate, it has been found that the Manton Joint Union Elementary School District (District) has violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), (c) and (d). The District violated these provisions of the EERA when the superintendent bypassed the exclusive representative to negotiate with a rival group of employees and declared pre-election support for that group.

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

A. CEASE AND DESIST FROM:

1. Encouraging employees to support any organization in preference to another at a time when a question concerning representation is pending by: (a) negotiating with individual employees or organizations other than the exclusive representative, CSEA; and (b) making statements through the superintendent or other agent which express support for and/or appreciation of rival organization efforts to decertify CSEA as the exclusive representative;

2. Interfering with the right of the classified employees to be represented by CSEA; and

3. By the same conduct, interfering with the right of CSEA to represent its members.

B. IT IS ALSO ORDERED THAT:

The results of the May 11, 1992 election be set aside and the ballots destroyed. The Sacramento Regional Director is hereby directed to conduct a new election.

Dated: _____

MANTON JOINT UNION
ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its MANTON UNIT Of CHAPTER No. 406,	)	
Charging Party,	)	Unfair Practice Case No. S-CE-1483
v.	)	
MANTON JOINT UNION ELEMENTARY SCHOOL DISTRICT,	)	PROPOSED DECISION (8/5/92)
Respondent.	)	

Appearances: Jan Dole, Field Representative, for the California School Employees Association and its Manton Unit of Chapter No. 406; Blandell Swanson by L. Alan Swanson, Attorney, for the Manton Joint Union Elementary School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing a unit of classified employees contends here that a decertification election should be invalidated because of a school superintendent's pre-election letter. In the letter, which was written in reply to a letter from the employee guiding the decertification, the superintendent made certain commitments and praised the decertification effort. The District defends on the theory that the superintendent's letter had no effect on the election result and urges that the ballots, which have been impounded, be counted.

The California School Employees Association and its Manton Unit of Chapter No. 406 (CSEA or Union) commenced this action on April 13, 1992, by filing an unfair practice charge against the Manton Joint Union Elementary School District (District). The

general counsel of the Public Employment Relations Board (PERB or Board) followed on April 28 with a complaint against the District.

The complaint alleges that District Superintendent R. Barry Morrell, by a letter sent to a group of employees on or about March 25, 1992, bypassed CSEA and interfered with the protected rights of unit members and CSEA. These actions were alleged to be in violation of section 3543.5(a), (b), (c) and (d) of the Educational Employment Relations Act (EERA).[1]

The District answered the complaint on May 5, 1992, denying any wrong-doing. A hearing was conducted in Willows on July 27,

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> 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.
>
> (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.

1992. With the filing of briefs, the matter was submitted for decision on August 3, 1992.[2]

FINDINGS OF FACT

The District is a public school employer under the EERA. CSEA at all times relevant has been the exclusive representative of a comprehensive unit of the District's classified employees.[3] The District operates one school and during February and March of 1992, when the events at issue took place, had nine classified employees.

Suzanne M. Rodrigue, a custodian for the District, testified that the decertification effort was initiated by her. She said when she decided to attempt the removal of CSEA she called, for advice, a former boss who was employed at a school district in Crocket. That boss advised her to contact the PERB. She testified that she then called the Sacramento Regional Office of the PERB where she was given instructions about how to conduct a decertification attempt.

On February 24, 1992, Ms. Rodrigue assembled a group of classified employees to discuss the decertification of CSEA as exclusive representative. Six of the District's nine employees attended the meeting and by the time it ended, all six had signed the proof of support for the decertification. Four of those who

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[2]The parties elected not to request a transcript of the hearing. This proposed decision is written on the basis of notes taken at the hearing and documentary evidence.

[3]CSEA was voluntarily recognized as exclusive representative on April 28, 1978. See PERB representation file, S-D-148 (S-R-688).

signed the petition were instructional aides. One was a cook and one a custodian. On March 5, Ms. Rodrigue filed the decertification petition with the Sacramento Regional Office of the PERB. The decertification petition was found to be timely and backed by a sufficient showing of support. The Regional Director ordered that an election be held on May 11, 1992.

On March 24, Ms. Rodrigue wrote a letter to Superintendent Morrell. She stated in the letter that "experience with this [emphasis in original] union has shown that decertification will benefit the school in general as well as the majority of the classified unit." She noted, however, that an exclusive representative could be reinstated after one year. She then identified a series of working conditions and observed that "[b]efore the election date we need assurance that:"

> 1. The contents of the present contract will be reduced to school policies in accordance with the Education Code with input by the Classified Unit.
>
> 2. Present compensations and benefits will remain in effect.
>
> 3. Salaries will continue at the present schedule with options to negotiate as in the past.
>
> 4. Job classifications and duties remain the same with input by the Classified Unit on changes.
>
> 5. You will agree to meet with a representative committee when issues of concern to the unit or the school arise and need to be resolved.

The letter was signed, "Suzanne M. Rodrigue Representing A Group of Classified Employees."

Superintendent Morrell replied by letter of March 25. In his response he listed by number each item from Ms. Rodrigue's letter and stated that each was "acceptable." In addition to those items, he listed a sixth working condition which the District would honor.[4] His letter concluded with the following comment:

> Personally, I can never express to the individuals responsible for this decertification, my admiration of their courage, commitment to the school, the community, and the certificated staff, for the position they have taken. A position that demonstrates an attitude that puts the children first, one that truly [sic] desires harmony, rather [th]an and [sic] adversarial [sic] relationship; An attitude that fosters team work and the betterment of the school is to be applauded.
>
> Thank you all for your concerns for the children, staff and community. It is an honor to work with people that use their position for the betterment of children and the school rather than for self fulfilling motives.

The superintendent's letter was distributed by Ms. Rodrigue among the employees who had signed the proof of support for the decertification attempt.

Not long after the superintendent sent his letter, CSEA filed the present unfair practice case. On May 1, the Sacramento

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[4]Item no. 6 as listed on Mr. Morrell's reply reads as follows:

> 6. Betty Heitmans [sic] rent and living conditions will remain as listed in the contract. The district reserves the right to revert to free rent in the event that it will benefit all concerned.

Regional Director of the PERB issued an order which determined that the unfair practice constituted a blocking charge. By the same letter, the Regional Director ordered that the ballots from the May 11 on-site election be impounded pending investigation and resolution of the unfair practice charge. Subsequently, the election was conducted and the ballots remain impounded.

At the unfair practice hearing, the District called five of the six employees who signed the showing of support for the decertification and asked each whether the superintendent's letter had affected their votes in the election. Each of the employees testified that she had not been affected by the letter and had decided to vote for decertification prior to the date the letter was written.

The District also introduced a copy of a July 1, 1992, decertification petition filed against the CSEA chapter at Manton. The petition bears the signatures of the same six employees as signed the original petition plus the signature of an employee hired since then.

LEGAL ISSUE

Did the District through the superintendent's letter of March 25, 1992:

A) Interfere with the protected right of employees to be represented by CSEA in violation of Government Code section 3543.5(a)?

B) Interfere with the right of CSEA to represent its members in violation of Government Code section 3543.5(b)?

C) Bypass, undermine and derogate the authority of CSEA in violation of Government Code section 3543.5 (c)?

D) Encourage employees to vote in preference of decertification in violation of Government Code section 3543.5(d)?

CONCLUSIONS OF LAW

The rules of law in pre-election cases involving interference with employee choice and unlawful employer preference are well established in PERB decisions. There is considerable overlap among them and the evidence which will establish interference often will also establish unlawful employer support. Typically, where an employer has unlawfully supported one organization in preference to another, that conduct will constitute interference with various protected rights.

Public school employees have the protected 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.[5]

It is an unfair practice under section 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by

[5]Section 3543.

proving operational necessity. (Carlsbad Unified School District (1979) PERB Decision No. 89.)[6] In an interference case, it is not necessary for the charging party to show that the respondent acted with an unlawful motivation. (Regents of the University of California (1983) PERB Decision No. 305-H.)

Like individual employees, organizations also have protected rights under the EERA. Among these is the right of an employee organization to represent its members.[7] It is an unfair practice under section 3543.5(b) for a public school employer to "deny to employee organizations rights" protected by the EERA. An alleged

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[6]The Carlsbad test for interference provides, in relevant part, as follows:

> (2) Where the Charging Party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> (3) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> (4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> (5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained conduct but for an unlawful motivation, purpose or intent.

[7]Section 3543.1(a).

interference with organizational rights is analyzed in the same manner as an alleged interference with individual rights.

Evidence that an employer has negotiated with a rival group of employees may show both a bypassing of the exclusive representative and unlawful preference between organizations. Upon the certification of an exclusive representative, the employer is obligated to refrain from negotiating directly with employees in the bargaining unit. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) Once an exclusive representative has been chosen, "only that employee organization may represent that unit in their employment relations with the public school employer."[8] When an employer bypasses the exclusive representative and negotiates directly with employees, an employer fails to negotiate in good faith in violation of section 3543.5(c).

Finally, under section 3543.5(d) it is an unfair practice for a public school employer to "contribute financial or other support" to an employee organization or to "in any way encourage employees to join any organization in preference to another." The PERB has interpreted this language as imposing "an unqualified requirement of strict neutrality." (Clovis Unified School District (1984) PERB Decision No. 389.) There is no requirement that the aggrieved employee organization show that the employer intended its actions to impact on employee free choice. "The simple threshold test . . . is whether the

[8]Section 3543.1(a).

employer's conduct tends to influence that choice or provide stimulus in one direction or the other." (Santa Monica Community College District (1979) PERB Decision No. 103.) It is unnecessary that the organization for which the employer expressed preference be listed on the ballot or be a formally constituted organization. (Clovis Unified School District, supra, PERB Decision No. 389; Sacramento City Unified School District (1982) PERB Decision No. 214.)

The central factual allegations of this case are undisputed. During the time immediately prior to a decertification election, the leader of the decertification effort, Suzanne Rodrigue, requested the District superintendent to make certain commitments. Although the letter was signed only by Ms. Rodrigue, it is clear from the text of the letter that Ms. Rodrigue was representing a group of employees. She requested commitments about the retention of wages and other benefits. More telling, she also asked for a commitment that the superintendent would agree to future meetings with "a representative committee when issues of concern to the unit" need to be resolved.

The superintendent promptly acceded to every request set out in the letter. He also offered assurance of the continuance of another employee benefit which was not even requested in the employee letter. Then, the superintendent went on to profusely praise the employees involved in the decertification for their "courage" and "commitment to the school."

The exchange of letters between Ms. Rodrigue and the superintendent clearly concerned wages and other matters within the scope of representation. Ms. Rodrigue asked for and was given assurances that the decertification of CSEA would result in no change of those matters. At the time this exchange occurred, CSEA remained the exclusive representative. By dealing directly with Ms. Rodrigue, the superintendent bypassed CSEA. In bypassing the exclusive representative and dealing directly with a group of employees, the District failed to negotiate in good faith in violation of section 3543.5(c).

It is clear from Ms. Rodrigue's letter, moreover, that she envisioned more than the simple decertification of CSEA. She plainly anticipated a continuing organization to meet with the District and discuss working conditions. She requested and was given the superintendent's assurance that he would hold future meetings with a classified employees committee to discuss working conditions.

It is of no moment that the organization had no official name other than Ms. Rodrigue's description of it as "A Group of Classified Employees." It is similarly insignificant that Ms. Rodrigue's group did not appear as a rival organization on the decertification election ballot. The "Group of Classified Employees" was a de facto employee organization and by his March 25 letter the superintendent expressed a clear preference in favor of it. He also made a commitment to deal with the group in the future. The superintendent thus failed to satisfy the

unqualified requirement of strict neutrality which the Board has required in representation elections. By this conduct, the District violated section 3543.5(d).

The superintendent's bypassing of CSEA and favoritism toward the "Group of Classified Employees" were acts which would have the natural effect of interfering with the protected rights of CSEA supporters to be represented by CSEA. Similarly, the bypassing and favoritism toward the rival group would interfere with CSEA's ability to represent its members. So long as CSEA continued to be the exclusive representative, the District was not permitted to engage in such conduct. The District offered no operational necessity to justify its actions. These actions, therefore, also violated section 3543.5(a) and (b).

REMEDY

The PERB in section 3541.5(c) is given:

> . . . 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.

CSEA here requests that the election of May 11, 1992, be set aside and that no new election be held for a period of one year following the issuance of this proposed decision. The District argues that since there is no showing that the superintendent's letter had any effect on the election result, the ballots from the May 11 election should be opened and counted.

The basic question in determining whether to set aside an election is whether the various unlawful activities establish a "probable impact on the employees' vote." (Jefferson Elementary School District) (1981) PERB Decision No. 164.)[9] When measuring whether unlawful employer conduct had a "probable impact" on employee choice, an objective standard is followed. The question is whether the employer's conduct would reasonably tend to coerce or interfere with employee choice.

> That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. (NLRB v. Triangle Publications (3d Cir. 1974) 500 F.2d 597, 598 [86 LRRM 2939].)

The superintendent's letter of support for the "Group of Classified Employees" and his pre-election commitments to it was conduct of the type which would have a probable impact on the employee vote. Assurances that benefits would remain unchanged and that the superintendent would hold future meetings with an employee committee would naturally minimize voter concerns about the future. Voters could cast their ballots confident that they would retain their existing benefits without CSEA. Some voters might also be influenced by the superintendent's high praise of their decision to remove CSEA as exclusive representative.

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[9]It is unnecessary that actual impact be proven. (San Ramon Valley Unified School District (1979) PERB Decision No. 111; Clovis Unified School District, supra, PERB Decision No. 389.)

The District argues that the superintendent's letter is no basis for setting aside the election because six of the nine employees decided in February to vote against CSEA. They made up their minds when they signed the petition, the District argues, and this occurred long before the superintendent wrote the disputed letter. Moreover, the District argues, the employees testified they were unaffected by the letter.

The District's argument assumes, however, that employee signatures on a proof of support equate automatically with employee votes in an election. Indeed, common experience shows this is not the case. Election results demonstrate that employees often vote differently than their signatures or non-signatures on showing of support petitions would predict. The same holds true for the testimony of five employees that they were unaffected. It is common knowledge that what people say about an election and how they actually cast their secret ballots are often quite different. Peer pressure might cause an employee's public statements to differ from what that employee actually believed. This is one reason that an objective rather than a subjective test is employed to determine impact.

I find it appropriate, therefore, that the May 11 election be set aside and the ballots destroyed without being counted.

I find no justification, however, for CSEA's request that a one-year cooling off period be imposed prior to any new election. Although the superintendent improperly negotiated with the "Group of Classified Employees" and made commitments to it, there is no

evidence he initiated this conduct. The unchallenged evidence is that Ms. Rodrigue initiated the decertification election without support or assistance from the District. It was also she who initiated the negotiations with the superintendent.

It is not clear, under these circumstances, what purpose a one-year cooling off period would achieve. The harm to be remedied was in a very real sense instigated by the very employees who supposedly would benefit from the cooling off period. The Union has made no persuasive argument about what benefit would be achieved in compelling these employees to wait a year to vote in a new election.

The District will be ordered to cease-and-desist from its unlawful conduct. After the District has admitted that it acted unlawfully through the posting of the attached notice, there will be no further delay ordered before the Regional Director may conduct a new election as the director finds appropriate.

It is appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Manton Joint Union Elementary School District (District) violated section 3543.5(c) and (d) of the Educational Employment Relations Act (Act). The District violated the Act when the superintendent bypassed the exclusive representative to negotiate with the representative of a rival group of employees and declared pre-election support for that group. Because the action had the additional effect of interfering with the right of unit members to be represented by the California School Employees Association and its Manton Unit of Chapter No. 406 (CSEA), the refusal to negotiate also was a violation of section 3543.5(a). Because the action had the further effect of interfering with the right of CSEA to represent its members, the refusal to negotiate also was a violation of section 3543.5(b).

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

A. CEASE AND DESIST FROM:

1. Encouraging employees to support any organization in preference to another at a time when a question concerning representation is pending by:

(a) Negotiating with individual employees or organizations other than the exclusive representative, California School Employees Association;

(b) Making statements through the superintendent or other agent which express support for and/or appreciation of rival organization efforts to decertify the CSEA as exclusive representative;

2. By the same conduct, interfering with the right of the classified employees to be represented by CSEA;

3. By the same conduct, interfering with the right of CSEA to represent its members.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

C. IT ALSO IS ORDERED THAT:

The results of the May 11, 1992, election be set aside and the ballots destroyed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge