OVERRULED IN PART by Carlsbad Unified School District (1979) PERB Decision No. 89, and also OVERRULED IN PART by Los Angeles Unified School District (1983) PERB Decision No. 285

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

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| SAN DIEGUITO FACULTY ASSOCIATION,<br>Charging Party | |
| vs | Case No. LA-CE-1 |
| SAN DIEGUITO UNION HIGH SCHOOL DISTRICT,<br>Respondent | EERB DECISION NO. 22 |

Appearances: Charles R. Gustafson, Attorney, for San Dieguito Faculty Association/ California Teachers Association/National Education Association; Lee T. Paterson, Attorney (Paterson & Taggart), for San Dieguito Union High School District.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

With an unfair practice charge filed on July 8, 1976, and amended on October 4, 1976, the San Dieguito Faculty Association (Association) alleges that the San Dieguito Union High School District violated certain sections of the Educational Employment Relations Act (EERA),[1] in that the District's Board of Trustees unilaterally rescinded and revised personnel policies in June and August of 1976. The District filed an answer denying that it had violated the EERA and also filed a motion to dismiss the charge. The case is before this Board on appeal from a hearing officer's recommended decision and order dismissing the unfair practice charge following a hearing. Both the Association and the District filed with the EERB exceptions to the hearing officer's recommended decision and order, and supporting briefs.

[1] Gov. Code Sec. 3540 et seq., sometimes referred to here as the Educational Employment Relations Act or EERA. The Association alleges that the District's conduct, as set out in the charge, violated Gov. Code Secs. 3543, 3543.1(a), 3543.5(a), 3543.5(b), 3543.5(d), and 3544-3544.9, quoted in full or summarized at page 7 infra.

## I

## The Alleged Unlawful Action of June 1976

For at least five years before the events leading to the charge in this case, the District and the Certificated Employees Council (CEC) in the San Dieguito Union High School District met and conferred under procedures established by the Winton Act.[2] The events prompting the filing of this charge began in November of 1975 when the CEC requested a meet and confer session on personnel action by the District which the teachers wanted the School Board to rescind.

On February 9, 1976, the CEC requested a meet and confer session with the District to discuss immediate changes for the 1976-77 school year on the subjects of horizontal movement on the salary schedule, credit for outside experience, extra-work pay, social security coverage for extra-work pay, cost of living increases, and class assignment.

The District replied on March 11, 1976, stating that it had always been willing to discuss personnel matters at meet and confer sessions with the CEC, pursuant to the Winton Act. The District also pointed out that its assignment and transfer policy had been the subject of previous meet and confer sessions and was last amended by the Board on March 14, 1974 after consultation with the CEC. The District's reply also rejected the CEC's request for "an immediate salary increase," in that personnel costs would be considered later in the development of the entire 1976-77 school year budget. The District made no counter proposals in its March 11, 1976 reply to the CEC.

On March 24, 1976, the CEC made a written request for counter proposals from the District. As part of that request, the CEC asked for a meet and confer session on April 1, 1976. The requested agenda for that meeting concerned the six disputed subjects plus any subjects the District wanted to add.

On March 30, 1976, the District replied in writing to the CEC request of March 24, 1976. That response was entitled "Board's Counter Proposal." In that letter, the District said it was in its third year of a "difficult financial situation"; that during the past three years, the budget had been balanced primarily by "reducing reserves and cutting expenditures not related to personnel"; that since the largest expenditure in the District is for employee wages and benefits, the District could not continue to balance the budget without curtailing some personnel costs. The Board's letter then responded specifically to the six items under discussion. Concerning horizontal movement, credit for outside experience and extra pay based on

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[2]Former Ed. Code Sec. 13080 et seq., repealed, stats 1975, Ch. 961, Sec. 1, effective July 1, 1976.

the salary schedule, the District's position was that it would make no changes in respect to these items, a position based on the District's desire to curb some projected long-term personnel costs. On the subject of social security for extra-work pay, the District took the position that it would not add social security benefits for certain employees who receive extra-work pay since that would result in additional costs to the District. The District also said that the CEC's proposal on social security would benefit only "a limited number of employees." The District reiterated its March 11 position on a cost of living increase, stating that it had to deal with all requests for wages and benefits in "one total package." The District also requested that the CEC consider presenting its salary and benefit package for the next year "as soon as possible," and said that its assignment and transfer policy would be reviewed by the administration. Thus, in summary, the District in its March 30, 1976 letter made no counter proposals but did indicate why it was rejecting the CEC's proposals at that time.[3]

In response to the District's March 30 letter, the CEC on April 7, 1976 wrote the District a letter stating in part that "the only 'counter proposal' offered by the Board's representative is 'no'". The letter indicated that the District was not meeting and conferring in good faith. It noted that the preliminary budget presented to the District by the Superintendent contained no provision for any of the six items originally proposed by the CEC. The letter also acknowledged the District's suggestion that the CEC participate in planning a budget for the 1976-77 school year and indicated its willingness to volunteer time and "expertise" in joining with the District in those discussions. The letter concluded by asking the District to direct its representative to include the views of the CEC in the discussion on the proposed 1976-77 budget.

The District's Board of Trustees received the CEC 1976-77 proposals on May 4, 1976 an< placed them on the agenda for its May 16 public meeting. On May 25, 1976, the District delivered its written counter proposals to the CEC and also presented in

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[3] On April 6, 1976, the San Dieguito Faculty Association, the charging party, filed with the District a request for recognition as the exclusive representative of a unit of certificated employees. Subsequently, a timely intervention petition was filed on April 30, 1976 by the American Federation of Teachers, Local 1933, the District notified the EERB that it desired a representation election pursuant to Gov. Code Sec. 3544.5, the parties entered into a consent election agreement which was approved by an EERB agent, and a representation election was conducted by the EERB on March 24, 1977. The EERB Regional Director's tally of ballots shows the following election results:

Votes cast for San Dieguito Federation of Teachers/AFT. . . .105
Votes cast for San Dieguito Faculty Association/CTA/NEA . . .140
Votes cast for no representation . . . . . . . . . . . . . . . 3

The Association was certified as the exclusive representative on April 5, 1977.

writing to the CEC its proposals concerning several other policy changes which the District indicated "must be revised before the collective bargaining provisions of SB 160 go into effect on July 1, 1976." These policies were paid leaves, unpaid leaves, transfer procedures, class size, evaluation procedures, grievance procedures, and safety conditions of employment. In the letter of May 25, 1976, the District offered to "meet and confer on these policies at any time it is mutually convenient to the CEC and the Board's team."

On June 3, 1976 and June 9, 1976, the District and the CEC met and conferred on the District's proposals of May 25. At the June 9 meet and confer session, the meeting opened with an exchange of proposals. The CEC withdrew its request for a cost of living increase of 10%. The CEC conditionally accepted $9.25 per hour for extra-pay work commencing on June 19, 1976, and an increase for driver training to $9.25 per hour. The CEC adhered to its position on credit for outside experience and on extending health benefits to employees' families; it continued to propose a social security program for certificated personnel.

The District indicated that it was prepared to make a final salary proposal contingent on adding the M.A. to the certificated salary schedule. The District's "final figure" for salary adjustments for the 1976-77 school year was $237,000, to be applied in one of two ways: (1) apply the entire amount to the certificated salary schedule, which would increase that schedule by approximately 5.7% or, (2) apply approximately $21,000 to increase the hourly rate for extra pay in all areas except driver training to $9.25 per hour and increase the driver training rate to $8.61 per hour; then apply the remaining $216,000 to the certificated salary schedule, which would increase that schedule by approximately 5.25%. The parties then reached agreement or partial agreement on the following items: personal illness or injury leave, personal necessity leave, bereavement leave, judicial government leave, industrial accident leave, and quarantine leave. The parties reached no agreement on sabbatical leave. The CEC rejected the District's sabbatical leave proposal and requested that the Board re-write it and place it on a future agenda. The District adhered to its earlier position on credit for previous experience, health coverage for employees' families and a social security program for certificated personnel.

On June 11, 1976, the President of the District's Board of Trustees, in a letter to the CEC, stated that the policy changes proposed by the District and presented to the CEC for consideration were within the scope of representation under the EERA that would then take effect on July 1, 1976. The letter states "the Board is of the firm opinion that certain revisions are necessary in these policies prior

to that date", and that the "extra wording of the revised policies is, of course, subject to the Winton Act's meet and confer process." The letter states further the Board's intention to take action on June 30 on all of the policies presented at the May 25 school board meeting. The letter noted that areas of agreement by the District and the CEC would be the subject of Board action before June 30 and that policies on which agreement between the Board and the CEC had not been reached would be considered at meet and confer discussions "prior to Board adoption."

The CEC and the District met on June 14 and 15 for further meet and confer sessions. The minutes for those meetings and the parties' pleadings indicate that the two parties reached agreement on fourteen policies, that two were returned to the District for further consideration and that both the District and the CEC declared persistent disagreement on sabbatical leave, transfer procedures, evaluation procedures, grievance procedures, and assignment procedures. Pursuant to the Winton Act, the CEC on June 15, 1976 requested factfinding on the five topics of disagreement. On June 16 the District issued a memorandum to its personnel staff noting the persistent-disagreement status of the five topics.

On June 24, 1976, the District adopted revised policies on the five subjects of the CEC's factfinding request, and on two other policies, family sick leave and hours of employment. The District refused the CEC's request to defer action until an exclusive representative was selected and certified. The CEC made no further request to meet with the District and the District's "final proposal" then became effective at midnight on June 30, 1976.

At midnight on June 30, 1976, the Winton Act expired.[5]

## The Alleged Unlawful Action of August 1976

At a public meeting on August 5, 1976, the District reviewed a second set of personnel policy proposals it made on May 27, 1976. The Board adopted its proposed changes at an August 26 meeting. The CEC, the Association, and the Federation received copies of the agendas for the August 5 and August 26 Board meetings, but did not request a meeting with the District to discuss the District's proposed policy changes .

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[4]Former Ed. Code Sec. 13087.1, repealed, stats 1975, Ch. 961, Sec. 1,

[5]See note 2 supra.

## The Parties' Contentions

### Charging Party

The argument of the charging party is that by unilaterally rescinding or revising personnel policies on June 24 and August 26, 1976, the District violated both the Winton Act and the EERA in several respects: (1) by failing to fulfill its obligation to consult in good faith with the CEC and the charging party; (2) by failing to consult in good faith, the District intended to impose reprisals on employees and to interfere with and coerce employees because of the exercise of their rights guaranteed by the Winton Act and the EERA; and (3) by taking those actions in respect to the meet and confer process, the District interfered with the charging party's right to represent its members and encouraged employees to reject the selection of an exclusive representative. The Association also contends that the District unlawfully failed to participate in the Winton Act's impasse procedures.

### The District

The District's position is (1) that under the EERA it had no obligation to consult in good faith with a non-exclusive representative; (2) that if it had such a duty, that duty was met since the pattern of meeting and conferring was at all times conducted by the District in good faith; (3) that there was no evidence that the District restrained or coerced employees in violation of the EERA; (4) that to whatever extent the District may have violated the Winton Act, the EERB is without jurisdiction to remedy violations of the Winton Act; and (5) that the EERB lacks jurisdiction to resolve unfair practice allegations based on conduct which took place before July 1, 1976.

## The Applicable Sections of the EERA

The Association alleges that the District's conduct, as described in the Association's charge, violated the following provisions of the EERA.[6]

Government Code Section 3543.5 provides:

> It shall be unlawful for a public school employer to:
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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. * * *
> (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.

Government Code Section 3543.1(a) provides:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

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[6] The Association did not file exceptions to the hearing officer's dismissal of the charge that Gov. Code Sec. 3543.5(c) had been violated by the District. The finding and conclusion of the hearing officer from which no exception was taken dismissed the charge in that respect on the ground that there was no "exclusive representative" within the meaning of Gov. Code Sec. 3543.5(c) during the time of the District's alleged unlawful conduct. Gov. Code Sec. 3543.5(c) provides:

> It shall be unlawful for a public school employer to: * * *
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Charging party also alleges a violation of Gov. Code Secs. 3544-3544.9. Sections 3544, 3544.1, 3544.3, 3544.5, 3544.7 all concern representation procedures. There is neither an allegation nor evidence that the District denied the charging party's right to use the EERA's representation procedures. Gov. Code Sec. 3544.9 provides that a recognized or certified employee organization "shall fairly represent each and every employee in the appropriate unit." That section is not applicable here, since it involves a charge against an employee organization.

Government Code Section 3543 provides:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

The Hearing Officer's Recommended Decision

In his recommended decision, the hearing officer determined that by amending the EERA, the Legislature intended to make the unfair labor practice sections of the EERA retroactive.[7] He therefore concluded that the EERB had jurisdiction to resolve alleged unfair practices occurring on and after April 1, 1976, rather than

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[7]As found by the hearing officer: "As originally enacted on September 22, 1975, chapter 961 of the statutes of 1975 provided three different operative dates for various sections of the EERA. Sections 3541 and 3541.5, which establish the EERB and define the EERB's powers and duties, became operative on January 1, 1976. Sections 3543, 3543.1, 3544, 3544.1, 3544.3, 3544.5, 3544.7 and 3545, which (1) grant to public school employees the right to choose an exclusive bargaining representative; (2) grant to employee organizations certain enumerated rights; and (3) establish procedures for certification of an exclusive representative, became operative on April 1, 1976. All other sections of the EERA, including the unfair practice provisions contained in Sections 3543.5 and 3543.6 became operative on July 1, 1976."

on and after July 1, 1976, as alleged by the District.

The hearing officer found, nonetheless, that the unilateral actions allegedly taken by the District did not constitute an unfair practice. He reasoned as follows: (1) the only right accorded to a non-exclusive employee organization is the right to "meet and consult" and to have its requests considered by the employer; that since the District met and consulted with the CEC on several occasions, the District fulfilled its statutory obligation; (2) the evidence did not establish that the District intended to discourage union membership or that the District's actions otherwise interfered with the employees' rights to select an exclusive representative; (3) the District's conduct did not have the "natural consequence" of discouraging or interfering with the employees' rights to select an exclusive representative; and (4) the charging party's contention that the respondent violated Government Code Section 3543.5(d) because the respondent's actions had the effect of encouraging employees to select "no representation", was without merit since Government Code Section 3543(d) refers "only to actions which encourage employees to join one organization over another."

We sustain the hearing officer's dismissal of the unfair practice charge. But we do not adopt all of the hearing officer's reasoning in support of the dismissal.

## The Retroactivity Issue

An amendment to the EERA, effective July 10, 1976, made certain provisions in the unfair practice section of the Act effective April 1, 1976 rather than July 1, 1976.[8]

Without characterizing it as such, the District, at the hearing and in its exceptions to the Board, in effect challenges the constitutional validity of the EERA's retroactivity amendment. Meeting that argument head on, the hearing officer decided that "remedial statutes can be validly retrospective, and because the respondent has suffered no increased liability, SB 1471 properly grants jurisdiction to the Educational Employment Relations Board to hear and decide this case."

We do not decide the constitutional issue implicitly argued by the District and implicitly resolved by the hearing officer. As a statutory administrative agency with no power to find a statute unconstitutional, we are bound to interpret the EERA as

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[8] Ibid.

we find it and leave to the judiciary questions concerning the constitutional validity of the EERA on its face.[9]

The Duty to Consult

The charging party concedes that the District, in June and August of 1976, was not obligated to meet and negotiate in good faith with any employee organization, since no exclusive representative had been recognized or certified during those times. The Association is thus compelled to argue that the District's alleged unilateral changes in personnel policies was a failure of the employer's obligation to consult.

We agree with the hearing officer's conclusion that the District did not violate the EERA by failing to consult with the Association. Government Code Section 3543.2[10] outlines the breadth of the obligation to meet and negotiate and

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[9] See Hand v. Board of Examiners In Veterinary Medicine, 66 Cal. App. 3d 605, 618-620 (1977); compare Southern Pacific Transportation Co. v. Public Utilities Commission, 18 Cal. 3d 308, 134 Cal. Rptr. 189 (1976), holding that an administrative agency deriving its authority from the State Constitution has the authority to determine the constitutionality of the statute it is called upon to apply.

[10] Gov. Code Sec. 3543.2 provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation. (Continued)

provides in essence that the duty to consult on specified educational-policy matters begins where the duty to meet and negotiate terminates. The EERA does not require consultation with an employee organization that is not an exclusive representative in an appropriate representation unit. Government Code Section 3543.2 provides that "the exclusive representative . . . has the right to consult" on specified matters of educational policy. [Emphasis added.] On matters that are neither within the scope of representation nor within the purview of the "right to consult", a school employer "may" consult but has no duty to consult. In sum, Government Code Section 3543.2 creates two obligatory classes and one optional class of subjects: (1) a mandatory duty to negotiate with an exclusive representative on certain subjects; (2) a mandatory duty to consult with an exclusive representative on certain subjects; and (3) an option to consult or not consult with any employee or employee organization on remaining subjects. Charging party's case is outside of classes (1) and (2), above, because charging party was not the exclusive representative during the period in question. Charging party may not rely upon class (3), above, since a school employer may, but need not, consult on any such matters. The obligation to consult means that a school employer must consider the exclusive representative's proposals, but a school employer is not bound to attempt in good

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Gov. Code Sec. 3540.1(h) defines "meeting and negotiating" as

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

faith to reach a negotiated written agreement.[11] Apart from Government Code Section 3543.2, the EERA contains no other reference to an obligation to consult.

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[11] The EERA does not define the term "consult", as used in Gov. Code Sec. 3543.2. However, the duty to consult appears to be the same as the duty to "meet and confer" as used in the now repealed Winton Act. Former Ed. Code Sec. 13081(d), provided:

> 'Meet and confer' means that a public school employer, or such representatives as it may designate, and representatives of employee organizations shall have the mutual obligation to exchange freely information, opinions, and proposals; and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations.

The Winton Act's meet and confer procedures were intended to apply, among other things, to meeting and conferring in respect to "educational objectives, the determination of the content of courses and curricula, the selection of textbooks and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or governing board under the law • . .." Former Ed. Code Sec.13085. The EERA, in Gov. Code Sec. 3543.2, extends the duty to consult to the same educational-policy matters as those described in the Winton Act, former Ed. Code Sec. 13085. Thus, it appears that the extent of the duty to consult, as that duty arises under the EERA, is a carry-over from the Winton Act.

In San Juan Teachers Association v. San Juan Unified School District, 44 Cal. App. 3d 232, 252 (1974), the Court of Appeal, in noting distinctions between the meet-and-confer obligation and the obligation to negotiate said:

> "There is no statutory requirement that the employer 'negotiate' in the sense of striving to reach a contract, bargain or agreement. Rather, the statutory obligation of the employer is expressed in the words 'meet and confer.'"

The Court also noted with approval the decision of the Court of Appeal in Grasko v. Los Angeles City Board of Education, 31 Cal. App. 3d 290 at 303-304 (1973), 82 LRRM 3098 (1973), interpreting the now-repealed Winton Act, that "the Legislature has determined that binding written contracts or agreements have no place in the field of labor relations between a public school employer and its employees."

During the time of the events leading to the charge in this case, not only was there no exclusive representative but, in addition, no appropriate unit had been established by consent of the parties or by direction of the EERB. If, as argued by the charging party, a duty to consult may arise in advance of certification or recognition of an exclusive representative, and in advance of the identification of an appropriate unit, an employer would be obligated to consult with any employee organization, no matter how many made the request, and in respect to any unit, no matter how inappropriate or how varied in number, with resulting confusion as the employer attempted to resolve possibly conflicting consultation requests made in behalf of possibly overlapping groups of employees. For that reason, we think that Government Code Section 3543.1, which gives employee organizations the "right to represent their members in their employment relations with public school employers" in advance of the selection of an exclusive representative cannot be read to conflict with the plain language in Government Code Section 3543.2, which provides that the duty to consult applies only to an exclusive representative.

In any event, even on the assumption that the District was under a duty to consult, as alleged by the Association, the District fulfilled its obligation by holding several meetings with the CEC, by listening to its proposals, by agreeing to some and disagreeing with others. The District did more than merely listen. True, the District never intended to reach a written accord with the CEC on any of the issues discussed, but it was not under any obligation to make that attempt in the absence of an exclusive representative.[12]

In respect to the charge that the District failed to consult in August of 1976, it is true that consultation did not occur. However, it is undisputed that the Association did not respond to the District's notice that it intended to change the policies that were changed at the Board's meeting of August 26, 1976. As the hearing officer found, the charging party "waived its right to challenge this action by the District." While it may be argued that it would have been futile for the charging party to make a request that the personnel policies not be changed at the August meeting of the District's Board of Trustees, we find that such a request would not have been futile in view of the pattern of meeting and conferring which preceded the August 26 meeting of the Board of Trustees, and concerning which we have previously found that the District fulfilled its obligation to consult.

Our finding that the District did not violate a duty to consult with the charging party necessarily disposes of the charging party's contentions that the

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[12] Note 6 supra.

District violated Government Code Sections 3543.1(a)[13] and 3543.5(b),[14] since the alleged denial of charging party's "rights guaranteed . . . by this chapter", Government Code Section 3543.5(b), refers to rights under Government Code Section 3543.1(a).

The Alleged Interference With The Right
To Select An Exclusive Representative

In arguing that the District's conduct during the meet and confer sessions interfered with the efforts of the employees to exercise their rights to choose an exclusive representative, the Association relies upon Government Code Section 3543.5(a), which makes it unlawful for employers "to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [the EERA]." The charging party thus argues that the same conduct which we find not violative of the employer's statutory obligation to consult, also violates Government Code Section 3543.5(a).

We find no violation of Government Code Section 3543.5(a). In order to find a violation of this section, we would at minimum have to conclude that the District's conduct was carried out with the intent to interfere with the rights of the employees to choose an exclusive representative, or that the District's conduct had the natural and probable consequence of interfering with the employees exercise of their rights to choose an exclusive representative, notwithstanding the employer's intent or motivation. We find neither.

Government Code Section 3543.5(a) combines the language of National Labor Relations Act Sections 8(a)(l)[15] and 8(a)(3).[16] Section 8(a)(l) of the NLRA provides that it shall be an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7."[17]

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[13] See p. 7 supra.

[14] See p. 7 supra.

[15] 29 U.S. Code Sec. 158(a)(l).

[16] 29 U.S. Code Sec. 158(a)(3).

[17] Section 7 of the NLRA, 29 U.S. Code Sec. 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . .." Both parties in this case appropriately rely upon NLRA cases interpreting Sections 8(a)(l) and 8(a)(3) of the NLRA.[18]

The National Labor Relations Board has decided a number of cases on the difficult question of what effect, if any, motive or purpose has in determining whether there is a Section 8(a)(l) NLRA violation. It appears that generally, when the employer grants a wage increase or other economic change during a union organizing campaign, proof of an illegal motive is not required if the employer's actions may reasonably be said to interfere with the union's organizing campaign.[19] But if a valid reason, unrelated to union activity, can be established for a change in benefits, no unlawful interference is found.[20]

The United States Supreme Court has held that the finding of a Section 8(a)(3) violation will normally turn on the employer's motivation.[21] Section 8(a)(l) makes it unlawful simply to interfere with employees in the exercise of Section 7 rights; there is no language on motive or purpose. However, the use of the words "discrimination" and "discouragement" in NLRA Section 8(a)(3) suggests that motivation is a key factor in any Section 8(a)(3) violation.

Unlike Section 8(a)(l) of the NLRA, Government Code Section 3543.5(a) seems to make motive or purpose a requirement for a violation. The pertinent part of Government

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[18] See Los Angeles Unified School District, EERB Decision No. 5, November 24, 1976, n.l.

[19] See Tonkawa Refining Co., 175 NLRB 619, 623, 71 LRRM 1041 (1969), aff'd, 434 F. 2d 1041, 76 LRRM 2127 (10th Cir. 1970); American Freightways Co. Inc., 124 NLRB 146, 44 LRRM 1302 (1959).

[20] See Evansville and Ohio Valley Transportation Co., 223 NLRB 184, 92 LRRM 1157 (1976); Champion Pneumatic Machinery Co., 152 NLRB 300, 306, 59 LRRM 1089 (1965); International Shoe Co., 123 NLRB 682, 43 LRRM 1520 (1959).

[21] See American Ship Building Co. v. NLRB, 380 U.S. 300, 58 LRRM 2672, 2676 (1965).

Code Section 3543.5(a) reads: "It shall be unlawful for a public school employer to: (a) . . . interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter." [Emphasis added.] Interference "because of" is quite different from mere "interference in." "Because of" connotes purposeful or intentional behavior; "interference in" connotes interference with or without an unlawful intent.

The District's Intent

We find, in agreement with the hearing officer, that the District had no unlawful intent; that instead, the District's posture during the meet and confer sessions was motivated by the District's desire to change its personnel policies "before the collective bargaining provisions of [the EERA] go into effect on July 1, 1976."

The District was apparently under the impression that between April 1, 1976 and July 1, 1976, it was only subject to the meet-and-confer standard of the Winton Act, and consequently, that on July 1, 1976 and thereafter, the District would be obligated to negotiate in good faith, within the meaning of Government Code Section 3540.1(h) on all matters within the scope of representation, following the selection of an exclusive representative.

We need not consider the wisdom of the District's tactics in this regard, except to the extent that they may have violated the EERA. We cannot find that the District violated Government Code Section 3543.5(a) and (b)[22] without finding that through unlawful means the District intended to encourage a "no representation" vote at the representation election. In addition to finding no unlawful means, we find no intent, lawful or unlawful, on the part of the District, to encourage a "no representation" vote. The District's intent to gain a superior negotiating position beginning July 1, 1976 is not consistent with an intent to encourage a "no representation vote" in an EERB conducted representation election. Indeed, the District's actions during the period in question were inconsistent with a desire to encourage a "no representation" vote, since its actions were consistent with an intent to negotiate, and an intention to negotiate is inconsistent with a desire to avoid representation altogether.

The Consequences of the District's Action

We find that the District's conduct in question was not such that it had the natural and probable consequence of encouraging a "no representation" vote. The District's meet and confer tactics during the period in question might well have

[22] See p. 7 supra.

had the natural and probable consequence of placing an exclusive representative in a less desirable negotiating position at the outset of negotiations taking place on and after July 1, 1976. But that, alone, did not have the further natural and probable effect of discouraging employees from selecting an employee organization as exclusive representative. The possibility that the District's conduct in question had the opposite effect of encouraging a vote for representation is at least as great, if not greater, than the possibility that the District's conduct had the effect of discouraging employees from voting for representation by an employee organization.

The EERA Section 3543.5(d) Contention

Charging party contends that the District's actions violated Government Code Section 3543.5(d), which provides:

> It shall be unlawful for a public school employer to:
> * ft *
> 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.

In alleging a violation of this section of the EERA, the charging party relies upon the same action of the District that the charging party cites in arguing that the District violated other sections of the EERA. Specifically, it is contended that the District's conduct in question encouraged employees to select "no representation".

We have already found that the District's conduct did not have that effect and that the District did not have that intent. It follows that these actions did not constitute a violation of Government Code Section 3543.5(d). It is not even argued by the charging party that the District's conduct encouraged employees to join an employee organization in preference to another employee organization. Nor is it argued that the District dominated or interfered with the formation or administration of any employee organization or contributed financial or other support to an employee organization. Thus, while it is alleged that the District violated Section 3543.5(d), the charging party's argument boils down to nothing more than the mere allegation, unsupported by evidence in the record, that part of Section 3543.5(d), was violated. We find no violation of Government Code Section 3543.5(d).

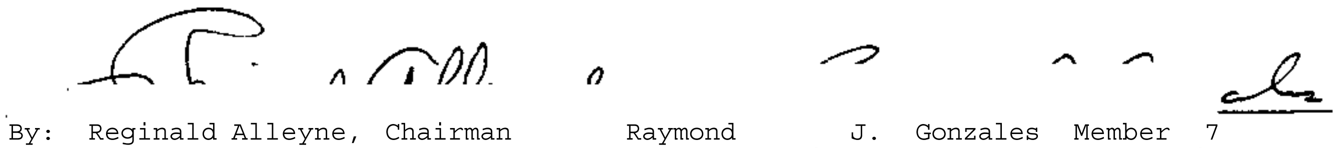
The Alleged Winton Act Violations

Charging party contends that the District's conduct in question, as already described, violated the Winton Act and that the District's failure to participate in the impasse procedures provided by the Winton Act is also a violation of the Winton Act.

The jurisdiction of the EERB is limited to cases arising under the EERA. Thus, while it is possible that the District may have violated the Winton Act, a matter on which we make no finding, the remedy for any such violation would exist in a forum other than the EERB.

ORDER

The hearing officer's dismissal of the unfair practice charge filed by the San Dieguito Faculty Association against the San Dieguito Union High School District, following a hearing, is sustained.



By: Reginald Alleyne, Chairman    Raymond J. Gonzales Member

Dated: September 2, 1977

Jerilou H. Cossack, Member, concurring in part and dissenting in part:

There are several aspects of the majority opinion with which I am in substantial disagreement. First and most important, I disagree with the majority's determination that motive or purpose is a prerequisite to establishing a violation of Section 3543.5(a) and, inferentially, Section 3543.6(a). Second, I disagree with the majority's conclusion that the employer did not violate Section 3543.5(a). Third, I disagree with the majority's conclusion that a requisite element of a Section 3543.5(d) violation is an employer's intention to encourage employees to vote for one organization over another or to encourage a "no representation" vote. Fourth, while I agree with the majority that pursuant to Section 3543.2 an employer is only obligated to "consult" with an exclusive representative, I disagree with the majority's apparent determination that an employer is not obligated pursuant to Section 3543.1(a) to discuss, in some fashion, "employment relations" with a non-exclusive representative, particularly in the absence of an exclusive representative. Finally, I disagree with the reason the majority concluded that the retroactive amendment to the EERA is valid.

I

Since the most devastating and far-reaching decision of the majority is its conclusion that motive or purpose is a prerequisite for establishing a violation of Section 3543.5(a),[1] I will dissent from that aspect of the majority opinion first.

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[1] Presumably, since Sec. 3543.6(a) provides that it shall be unlawful for an employee organization to cause or attempt to cause an employer to violate Sec. 3543.5, the majority also intends to impose the same requirement of motive or purpose in this area as well.

The majority's opinion is, at best, insensitive to the preservation of the rights guaranteed by the Educational Employment Relations Act (EERA). Section 3540 gives employees the right to ". . . join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employer, [and] to select one employee organization as the exclusive representative . . . ." Defeat of these rights does not necessarily depend on the existence of anti-employee organization motivation. Activity protected by the EERA acquires a precarious status indeed if the employer is allowed without substantial financial justification to reduce existing benefits coincidental with the employees' exercise of rights granted them by the EERA.

The majority, in reaching their conclusion, states,

> The United States Supreme Court has held that the finding of a Section 8(a)(3) violation [of the National Labor Relations Act] will normally turn on the employer's motivation. See *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 58 LRRM 2672, 2676 (1965). Section 8(a)(1) [of the National Labor Relations Act] makes it unlawful simply to interfere with employees in the exercise of Section 7 rights; and "discouragement" in NLRA Section 8(a)(3) suggests that motivation is a key factor in any Section 8(a)(3) violation.
>
> Unlike Section 8(a)(1) of the NLRA, Government Code Section 3543.5(a) seems to make motive or purpose a requirement for a violation. The pertinent part of Government Code Section 3543.5(a) reads: "It shall be unlawful for a public school employer to : (a) . . . interfere with, restrain or coerce employees *because of* their exercise of rights guaranteed by this chapter." [Emphasis added.] Interference "because of" is quite different from mere "interference in". "Because of" connotes interference with or without an unlawful intent.

The language of the Educational Employment Relations Act[8] (EERA) and the National Labor Relations Act (NLRA) is similar but not identical. In fact, the language

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[2] Section 3543.5(a) of the EERA states:

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

Section 8(a)(l) and (3) of the NLRA state:

> Sec. 8.(a) It shall be an unfair labor practice for an employer—
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> ******
>
> (3) By discrimination in regard to higher or tenure of employment or any term or condition of employment *to encourage or discourage membership in any labor organization:* . . . .

of Section 3543.5(a) of the EERA is much more sweeping in its prohibition than that of the NLRA. That conduct which is prohibited by Section 8(a)(3) of the NLRA is only discrimination which encourages or discourages membership in a labor organization.[3] Section 3543.5(a) of the EERA prohibits discrimination of any kind against employees because they exercised any rights guaranteed in the EERA.

Even under the more restricted prohibited conduct of the NLRA, however, the National Labor Relations Board (NLRB) and the United States Supreme Court, in interpreting Section 8(a)(3), have determined that when the discriminatory conduct is inherently destructive of important employee rights, no proof of anti-union motive or intent is necessary to establish a violation, even if the employer introduces affirmative evidence of business justifications. See NLRB v. Great Dane Trailers, Inc.,[4] and NLRB v. Fleetwood Trailer Co.[5] Conversely, when the harm to employee rights is comparatively slight and the employer's conduct is lawful on its face and serves a substantial and legitimate business end, an affirmative showing of unlawful motivation must be demonstrated. See NLRB v. Brown[6] and American Ship Building Co. v. NLRB.

American Ship Building Co. v. NLRB, relied upon by the majority, involved an employer lock-out to gain bargaining leverage after impasse had been reached in negotiations for contract renewal. The Court sought to balance the employer's right to manage its enterprise in a relatively unfettered fashion against the rights guaranteed to employees by the NLRA. Concluding that some proof of unlawful motivation was both necessary and absent, the Court found that the lockout is not "one of those acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation."[8] The Court went on to state that while in some cases "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose,"[9] a bargaining

[3] NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963).

[4] 388 U.S. 26, 65 LRRM 2465 (1967).

[5] 389 U.S. 375, 66 LRRM 2737 (1967).

[6] 380 U.S. 278, 289, 58 LRRM 2663 (1965).

[7] 380 U.S. 300, 311-313, 58 LRRM 2672 (1965).

[8] Id. at 310.



[9] Id. at 311-312.

lock-out after impasse is not such a case. The majority, in reliance on American Ship Building Co. has refused to take cognizance of the substantial difference in the relative ability of employees to protect themselves from retaliation prior to and subsequent to the selection of an exclusive representative.

The words "because of" contained in Section 3543.5(a) do not contemplate specific manifestation of a deliberate intent to violate that section. Rather, the only thing these words mean is that the employer did something which it would not have done except that employees exercised the rights guaranteed by the EERA. In other words, the employer did something because the employees exercised rights guaranteed by the EERA. Not all action taken by an employer as a result of the employees' exercise of rights guaranteed by the EERA is unlawful, only that which interferes with, restrains, coerces or discriminates against employees. Interference, restraint, coercion or discrimination may be the result of an employer's conduct, even though that result was not intended. The majority by its decision today has not only robbed the Board of the ability to remedy such conduct, it has given employers a free hand to do whatever they may so long as they do not admit that the action was taken because the employees engaged in activity protected by the EERA.

There is an inherent inequity between an employer and its employees. Both the NLRB and the U.S. Supreme Court have long recognized that this inequity places special obligations and limitations not present in other contexts on employers in dealing with their employees. Compare the Court's discussion of First Amendment rights in NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969), with New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This inequity is particularly susceptible to exploitation during the initial organizational stages and the infancy of the negotiating process. Thus, this Board ought to be jealous of its authority to ensure that the rights established by the EERA are protected. The majority has imposed a more restricted interpretation on the Board's ability to protect these rights than that imposed by the U.S. Supreme Court in interpreting more restrictive language.

II

In the instant case, even under the majority's view that motive is a requisite element to establish a violation of Section 3543.5(a), a violation is established. The employer's repeatedly stated reason for insisting on changing the personnel policies in question prior to July 1, 1976, was that it desired to put itself in a better negotiating position prior to the date it was obligated to meet and

negotiate with an exclusive representative under the terms of the EERA. Trustee Doug Fouquet stated at the May 27, 1976 Board of Trustees meeting that:

> The Board felt that, in view of the change in the law, we had to revise the wording of many of our policies as of July 1st. There will be an opportunity for meet and confer prior to that time and I would certainly assume after that time, but we still got to get our own books in order with the way the new law reads as of July 1st.

The District's chief negotiator reiterated the sentiment at the June 9, 1976 certificated employee counsel (CEC) meeting, that:

> . . . you know we're starting a whole new ball game and that ball game is going to start from—ah—we would like to have one level of policy and you would like to have another and its going to be something in between that, and gradually we're going to put things back into the policy that we will agree on on certain condition.

At the June 14, 1976 CEC meeting with the District, the District's principle negotiator stated the whole matter very succinctly:

> They [the District] are not willing to go along with some of the policies they have right now as the starting point of negotiation. They are not happy with them right now.

Trustee Dave Thompson at the June 24, 1976 meeting of the Board of Trustees, when asked why the policies in dispute had to be changed at that time since they had been in effect since 1974, stated:

> . . . the board has taken the position that they desire the policies to be in effect as of July 1st and, um, or I think they will.

It is clear that the District, anticipating that an exclusive representative would be selected by its certificated employees, decided to change certain of its policies. In most instances, the change was to lower existing benefits described in these policies. Moreover, it is clear from the record as a whole that the District was fixed in its approach and determination to either lower or rescind certain of its policies and that it entered meet and confer sessions with the CEC with this in mind. The sole justification proffered by the District for these reductions in fringe benefit levels was the declining financial prospects of the District. However, no evidence was introduced by the District to support its contention that its financial posture mandated such a reduction in policies _at that time_. It is hard to imagine conduct more fitting the description of a "fist inside the velvet glove" decried by the Supreme Court in _NLRB_ v. _Exchange Parts Co.,_ 375 U.S. 405, 55 LRRM 2098 (1964).

The mere fact that the District did not mount a vigorous no representation cam-

paign in no way nullifies or mitigates against the coercive impact of its reduction in benefits for the avowed purpose of placing itself in a better bargaining position. It is clear that but for the exercise of the rights guaranteed by EERA, specifically "the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, . . . ."[10] the employer would not have changed the policies in question.

While it may be true that the District is in a difficult financial situation, a matter upon which no evidence was introduced or taken, the District did not rely on its financial misfortunes as justification for reducing its benefits. Moreover, if the District is indeed in financial straits, it is well understood that financial necessity is ample justification for negotiating reduced wages and other terms and conditions of employment. Certainly nothing in the concept or traditional interpretation of the policy of collective bargaining or collective negotiations mandates that wages and fringe benefits must be increased with each successive contract. While it is in the nature of things that employees seek more with each contract, more cannot be had, or even the status quo maintained, if the employer does not have the money with which to do it. Even in the private sector, where employers generally do not operate within the same fiscal restraints as the public school system, the U.S. Supreme Court has acknowledged wage decreases as legitimate.[11]

Nor do I agree with the majority that the employee organization, in the circumstances of this case, was obligated to separately challenge the District's personnel changes first stated on May 27, 1976 and promulgated on August 26, 1976..[12]

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[10] Gov. Code Sec. 3540. (Emphasis added.)

[11] In NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1959) the Court stated:

> The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions.

[12] Some of these proposed changes are clearly matters of management prerogative; others are questionable. However, the District itself chose to present them to the employees. Having once done so, I do not think the employee organizations are obligated to refrain from opinion and comment.

Discussion between the District and the employee organizations on both the May 25 and May 27 proposals was not segmented but rather occurred simultaneously. In fact, at least one of the May 27 proposals, that concerning assignment, was certified to factfinding along with the other matters proposed on May 25 about which persistent disagreement was declared.

The District had declared it was going to change the personnel policies. All requests for delay of the June 24 action were rejected. Request for delay of the August action was made. There was no reasonable basis for believing another round of requests would have altered in any way the District's intent to adopt the policy changes. To require the charging party to partake in more futility would be to require them to pump oil from a dry hole.

III

In concluding that the District had not violated Section 3543.5(d), a conclusion with which I am in accord, the hearing officer stated:

> The unfair practice in Section 3543.5(d) is the encouragement of employees to join one organization over another. In this case, "no representation" has not been shown to be an employee organization. Moreover, the EERA does not make it an unfair practice for an employer to urge its employees to vote for "no representation" so long as the employer conducts itself lawfully. Here, the evidence does not indicate that respondent even attempted to mount a "no representation" campaign.
>
> Charging Party's Section 3543.5(d) charge is without merit. No unfair practice was committed under Section 3543.5(d).

The majority also concludes that no violation of this section was committed. It seems to acknowledge that a violation of this section may occur in circumstances other than when an employer is seeking to encourage employees to vote for one organization over another or when an employer has mounted a "no representation" campaign. However, it has not specifically rejected the hearing officer's conclusion that these are requisite elements of a Section 3543.5(d) violation. I wish to do so.

The purpose of a provision such as Section 3543.5(d) is to insure that an organization purporting to act on behalf of employees in the negotiating relationship not be rendered so subject to employer control or dependent upon employer favor as to deprive it of the will and capacity to give its wholehearted devotion to the interest of the employees it represents. An employer may engage in conduct

violative of this section even in the absence of competing employee organizations. See Hotpoint Division, General Electric Company,[13] and Duquesne University of the Holy Ghost.[14]

IV

Both the charging party and the District object to the hearing officer's equation of the right of an employee organization to represent its members in Section 3543.1(a) with the employer's obligation to consult with an exclusive representative described in Section 3543.2. I agree with the apparent opinion of the majority that these two sections of the EERA are not synonymous.[15] I do not think that the right of a non-exclusive employee organization to represent its members encompasses an obligation on the part of the employer to reach agreement with the non-exclusive representative. The employer here solicited the views of the non-exclusive representatives, listened to them, modified some of its proposals and refused to modify others. This pattern of behavior afforded the non-exclusive representatives the opportunity to represent their members as contemplated by Section 3543.1(a). Accordingly, I agree that there is no violation of Section 3543.5(b).

V

Finally, I do not believe that the validity of the retroactive amendments to the EERA[16] may be summarily assumed without comment. True, as the majority implies, legislative enactments assume a strong presumption of validity. However, as the California Supreme Court has stated in Southern Pacific Transportation Co. v. Public Utilities Commission,[17]

> An administrative agency's obligation to adhere to the Constitution is not limited to mere promulgation of rules, but extends to the agency's application of legislation to the facts presented. [Citations omitted.] Obviously, administrative agencies, like police officers [citations omitted] must obey the Constitution and may not deprive persons of constitutional rights.

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[13] 128 NLRB 788, 46 LRRM 1421 (1960).

[14] 198 NLRB 891, 81 LRRM 1091 (1972).

[15] I do not agree that the obligation to "consult" established by Section 3543.2 is the same as the obligation to "meet and confer" enunciated in the now repealed Winton Act. However, I find it unnecessary to reach any definition of consultation here inasmuch as the obligation is only imposed on an employer in dealing with an exclusive representative and there was no exclusive representative at any material time.

[16] 3B 1471, Stats. 1976, ch. 421.

[17] 18 Cal. 3d 308, at footnote 2, 311 (1976).

> In a few cases involving the question whether a litigant may raise constitutional issues in court when he has not exhausted administrative remedies, it has been indicated that administrative agencies may not determine the validity of statutes, invalidating the legislative will. [Citations omitted.] The exhaustion question, of course, involves a number of considerations other than whether a statute excuses an administrator from his constitutional duties.
>
> Taken literally, the two lines of authority are difficult to reconcile. When the United States Supreme Court, for example, repudiates the separate but equal doctrine established by the statutes of one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid; should the boards, recognizing the potential denial of constitutional rights, enforce the Constitution on a case-by-case basis without considering whether the statutes may be enforced in some other case; or should the boards recognize the invalidity of the statutes? The first position will result in denial of constitutional rights; the second, although protecting constitutional rights, is wasteful, ignores reality and compels intellectual dishonesty insofar as the administrator must close his eyes to the fact that deprivation of constitutional rights will occur in all cases to which the statute may be applied. Only the third complies with the board's duty to determine and follow the law.

In Hand v. Board of Examiners in Veterinary Medicine,[18] a case relied upon by the majority, the appellate court determined that only administrative agencies of constitutional origin may determine whether statutes enacted by the legislature were constitutional. The court relied upon the constitutional separation of powers between the legislative, executive and judicial branches. The instant case, however, unlike Hand but like Public Utilities Commission, is one in which a party before the agency contests the agency's basic jurisdiction to pass on the merits of the case before it. While it is one thing to say that a litigant need not raise questions concerning the validity of the enabling legislation before the administrative agency, it is quite another to say that the administrative agency must not rule on the challenge to its enabling legislation once raised. In the instant case a litigant contends that we lack authority to hear the merits of the case. An initial decision by this agency on the validity of SB 1471 in no way usurps the authority of the courts to determine the ultimate issue. Nor does it in any way infringe on the authority of the legislature to enact legislation. It is merely ensuring that we attempt to exercise the authority of the Board in a fashion consistent with the Constitution of the State of California.

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[18] 66 Cal. App. 3d 605, 618-620 (1977).

The EERA as originally enacted, i.e., SB 160, gave school district employees the right to organize and join employee organizations for the purpose of meeting and negotiating with the school districts, effective April 1, 1976. However, it provided no remedy if the rights guaranteed to employees were infringed upon between April 1, 1976 and July 1, 1976. While it was not filed with the Secretary of State until July 10, 1976, SB 1471 was introduced into the Senate on January 23, 1976. SB 1471, in essence, provided a remedy otherwise lacking in SB 160 in the event that the rights granted by SB 160 were abridged.

In the general course of things, in determining the validity of retroactive legislation, the social benefits of the rights gained must be balanced against the harm a retroactive application may cause.[19]

In the instant case the legislature established the public policy of, among other things, " . . . providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, [and] to select one employee organization as the exclusive representative of the employees in an appropriate unit, . . . ." As the hearing officer in this case stated, "[a] right without a remedy is no right at all." By enacting SB 1471 the legislature obviously intended to prohibit conduct which abrogated the rights it had granted public school employees coincidental with the date that public school employees received those rights. The question then becomes whether the district's right to manage its employer-employee relations without consideration of the rights granted to employees in their employment relationship with the school district must give way at all, or to what extent, to a consideration of the rights granted to employees by SB 160. It is a well-established principle that the courts will not recognize an even arguably vested right if they find that the "right" is the power to do wrong. Cohen v. Wright, 22 Cal. 293, 327 (1863). The validity of a retroactive statute is questionable when some vested right has been harmed. Kenney v. Wolff, 102 Cal.App.2d 132 (1951). Since the general policy articulated by the legislature as the purpose of the passage

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[19] See "The Supreme Court and the Constitutionality for Retroactive Legislation," 73 Harv.L.Rev. 692 (1960); "Constitutional and Legislative Considerations in Retroactive Law Making," 48 Cal.L.Rev. 216 (1960) and "Retroactivity of the 1975 California Community Property Reforms," 48 So.Cal.L.Rev. 977 (1975).

of SB 160 is to ". . . promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California . . ." we must determine whether SB 1471 promoted that policy and general object. It is axiomatic that sound personnel management and employer-employee relations would be seriously undermined if employees sought to exercise rights granted them by the legislature, were wronged as a result of that exercise and the wrong was unable to be redressed.[20]

*By* Jerilou H. Cossack, Member

[20] Since Section 3543.5(c) relates to rights which were not fully granted by either SB 160 in its original form or by SB 1471, I do not consider here whether the legislature intended to make this section of the act retroactive to April 1, 1976.