STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

DIABLO VALLEY FEDERATION OF TEACHERS, AFT LOCAL 1902, Charging Party, vs. MOUNT DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-88	
JAMES P. STEVENS, RHODA LUBNAU, AND FEDERATION OF ASSOCIATED CLASSIFIEDS AND TEACHERS, Charging Party, vs. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-109	EERB Decision No. 44 December 30, 1977
CAPISTRANO UNIFIED FEDERATION OF TEACHERS, LOCAL 2312, Charging Party, vs. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-91	

Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg Se Roger), for Diablo Valley Federation of Teachers, AFT Local 1902; Robert A. Galgani, Attorney (Breon, Galgani & Godino), for Mount Diablo Unified School District; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid Se Sroloff), for James P. Stevens, Rhoda Lubnau, Federation of Associated Classifieds and Teachers and Capistrano Unified Federation of Teachers, Local 2312; John L. Bukey, Attorney (Biddle, Walters & Bukey), for Santa Ana Unified School District and Capistrano Unified School District.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

These three cases present the question whether an employer commits an unfair practice under the Educational Employment Relations Act (EERA)[1] by refusing to take part in a grievance either filed by or presented by an employee organization other than the exclusive representative. The cases were filed at different times by different parties, but the three appeals present a common issue. We therefore consolidate the three appeals and decide each one with this decision.

In all three cases, hearing officers dismissed unfair practice charges. They relied on the general ground that the charges did not allege violations of the Educational Employment Relations Act, since the EERA prohibits an employee organization other than the exclusive representative from presenting grievances for employees in the unit the exclusive representative represents. In each case, we sustain the order of dismissal.[2]

I

In the Santa Ana charge, as amended, the Federation of Associated Classifieds and Teachers (FACT) alleges that the District denied its organization the right to represent one of its members at a grievance conference "and attendant procedures;" that the District published a newsletter to this effect; and that these actions by the District were discriminatory within the meaning of Government Code Section 3543.5(a) and denied rights guaranteed under Government Code Sections 3543, 3542.1(a)

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[1] Gov. Code Sec. 3540 et. seq., and Educational Employment Relations Act or EERA are used synonymously in this opinion.

[2] Solely for purposes of ruling on the validity of the dismissals, we assume that the facts alleged in the charges are true. San Juan Unified School District, EERB Decision No. 12, March 10, 1977.

and 3543.5(d). The hearing officer dismissed the original charge with leave to amend and later partially dismissed an amended charge which added to the original the allegation that grievant had designated a "friend and advisor" to be her representative in the grievance procedure. Rather than dismiss the "friend and advisor" portion of the amended charge, the hearing officer ordered the charging party to particularize it so as to identify the "friend and advisor." The purpose of the order to particularize was to determine whether the "friend and advisor," in representing the grievant, was acting for and in behalf of an employee organization other than the exclusive representative. The charging party appeals both the dismissal and the order to particularize.

In the Mt. Diablo case, the charging party, Diablo Valley Federation of Teachers, alleges that the District unlawfully required "that only the exclusive representative, the Mt. Diablo Education Association, CTA/NEA, could represent teachers in grievances" and that this conduct violated Government Code Sections 3543.5(a) and 35,43.5(b). The hearing officer dismissed the charge with leave to amend. The charging party filed this appeal without attempting to amend the charge.

In the Capistrano case, the charging party, Capistrano Unified Federation of Teachers, charges the District with violations of Government Code Sections 3543.5(a), (b) and (d) in that the District refused to process a grievance on the part of a teacher who, in presenting the grievance, was represented by the Capistrano Unified Federation of Teachers, "a non-bargaining-agent-employee organization." The hearing officer dismissed the charge with leave to amend and the charge was subsequently amended to include the following sentence: "[The grieving teacher] had requested the assistance of Lee Weagley and/or Joe Shofner, certificated employees within the bargaining unit." The hearing officer dismissed the amended charge on the ground that Mr. Lee Weagley "is the

president of the Capistrano Unified Federation of Teachers, Local 2312, and that Mr. Joe Shofner is the [Local 2312] grievance coordinator." Charging party appeals the dismissal of the amended charge.

In all three cases, an affiliate of the California Teachers Association was the exclusive representative of the employees in the unit which includes the grieving employee.[3]

In the Mt. Diablo case, the grievance procedure stems from an agreement negotiated by the exclusive representative and the District. Among other things, the contractual grievance procedure provides:

> Representation
>
> The grievant may be represented by the Association or any eligible representative of his own choosing, whether or not that representative is a teacher, at any formal step of this procedure.
>
> If the grievant is represented by other than the Association; the Association retains the right to be present at any formal step of the procedure as an observer.

In the Capistrano and Santa Ana cases, the grievance procedures sought to be used were not covered by an existing contract.

II

All three hearing officers relied upon Government Code Sections 3543 and 3543.1(a).

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[3] In the ~~Capistrano~~ case, the hearing officer granted a motion to join the exclusive representative as an indispensable party. No appeal has been taken from that ruling. In the ~~Santa Ana~~ case, the hearing officer dismissed the charge before making a ruling on a request by the District that the exclusive representative be joined as an indispensable party. With this appeal, the District has filed a "renewal of application for joinder," asking that its joinder motion "be ruled upon." Treating the "renewal of application for joinder" as an appeal from a denial of a joinder request, we need not decide whether the exclusive representative should have been joined as an indispensable-party, since we sustain the hearing officer's dismissal of the charge.

After providing that employees are free to engage in or to refrain from engaging in the activities of employee organizations, Government Code Section 3543 provides as follows in its second paragraph:

> 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.

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.

If either of these statutory sections prevents an employee organization other than the exclusive representative from presenting grievances for employees in the representation unit, it follows that no unfair practices were committed by the District. Except for the historical background it lends to a determination of the meaning of Government Code Section 3543.1(a), we do not rely, as did the hearing officers, on Government Code Section 3543 in concluding that these unfair practice charges were properly dismissed. The quoted pertinent portion of Government Code

Section 3543 would be primarily relevant here if the Districts, instead of refusing to process grievances filed by employee organization representatives, had refused to process grievances filed by individual employees. Concerning grievance-representation rights, Government Code Section 3543 separates and treats differently exclusive representative rights on the one hand, and individual employee rights, on the other. Unlike Government Code Section 3543.1(a), Government Code Section 3543 does not bear on the grievance-representation rights of a competing employee organization which is not an exclusive representative. The cases before us do not concern the right of an individual to present a grievance under Government Code Section 3543, but whether an employee organization, other than the exclusive representative, may present a grievance. This case therefore falls under Section 3543.1(a) alone.

Because we conclude, for reasons which follow, that Government Code Section 3543.1(a) prevents employee organizations other than exclusive representatives from filing or presenting grievances for employees in the unit, it follows that no unfair practice sections of the Act were violated by the Districts.[4] We therefore find it unnecessary to set

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[4] EERA unfair practice sections are Gov. Code Secs. 3543.5 and 3543.6.

out at length and analyze the various unfair practice sections alleged to have been violated.

III

The National Labor Relations Board and one Federal Court of Appeals considering the question have held that the National Labor Relations Act precludes a union other than an exclusive bargaining representative from representing employees at grievance proceedings.[5]

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[5]See Federal Telephone and Radio Co., 107 NLRB 649, 33 LRRM 1203 (1953); Meat and Provision Drivers Union, Local 626, 115 NLRB 890, 892, 37 LRRM 1421 (1956); Hughes Tool Co., 56 NLRB 981 (1944), affirmed, Hughes Tool Co. v. NLRB, 147 F. 2d. 69, 15 LRRM 852 (5th Cir. 1945). Douds v. Retail, Wholesale Dept. Store Union, 173 F. 2d. 764, 23 LRRM 2424 (2nd Cir. 1949), which arose in the context of an alleged unlawful strike, is to the contrary and holds that a minority union is not prevented from representing employees in grievance proceedings. But that decision appears to have been impliedly disavowed, and expressly distinguished by the same court in NLRB v. Lundy Manufacturing Corporation, 316 F. 2d. 921, 53 LRRM 2106, 2109 (2nd Cir. 1963). There, that opinion provides in part that the Doud's opinion, "assuming its correctness, does not necessarily mean that it would be an unfair labor practice for the employer to refuse to deal with anyone other than the aggrieved employees on the one hand or their contractually authorized representative on the other."

The NLRB and federal court decisions were based on an interpretation of NLRA. Section 9(a)'s proviso,[6] which has an almost exact parallel in Government Code Section 3543. Those decisions required a labored examination of the proviso's legislative history. They were difficult cases to decide. One United States Court of Appeals reached a decision in conflict with another United States Court of Appeals[7] and in conflict with those of earlier and subsequent decisions of the NLRB. The difficulties experienced by the NLRB and the federal courts had their basis in the Section 9(a) proviso's lack of a direct bearing on the matter of an exclusive representative in grievance-representation competition with another union, as distinguished from an exclusive representative in grievance-representation competition with an. individual employee. The California Legislature has avoided these problems of interpretation by including Section 3543.1(a) in the EERA. Government

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[6] 29 U.S.C. Sec. 159(a), which provides in pertinent part:

> • • • Provided, That any individual employer or a group of employees shall have the right at any time" to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

[7] See Note 6 supra.

Code Section 3543.1(a) has no counterpart in the National Labor Relations Act. Accordingly, we need not rely upon the cases interpreting the proviso to NLRA Section 9(a), except to note, as we have, their bearing on the history of Government Code Section 3543.1(a).[5] By giving employee organization members in their employment relations with public school employers," with the exception made, Section 3543.1(a) confers on an employee organization the right to represent its members in a grievance proceeding even if that employee organization is not the exclusive representative, but only so long as there is no exclusive representative of the grieving employees. The Legislature no doubt used the word "members" rather than unit, because it anticipated that some employee organizations might attempt to represent their members in grievance proceedings, even though the employee organization was not the exclusive representative.

Also, in our decision in San Dieguito Union High School District,[9] we held that an employer's obligation to negotiate or consult extends only to an exclusive representative. This holding was based on a plain-meaning reading of Government Code Sections 3543.5(c)[10] and 3543.2.[11]

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[8] Note 5 ~~supra~~.

[9] EERB Decision No. 22, September 2, 1977.

[10] Gov. Code Sec. 3543.5(c) provides:

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

[11] *Gov.* Code Sec. 3543.2 provides in part:

> [T]he exclusive representative of certificated personnel has the right to consult . . . .

Since the Legislature did not extend to a nonexclusive representative the privilege of consulting or negotiating with an unwilling employer, the reference in Government Code Section 3543.1(a) to an employee organization's right to represent its members until an exclusive representative is selected, must necessarily relate to grievances.

Although the grievance procedures in the Capistrano and Santa Ana cases were not contractual grievances, we do not read Government Code Section 3543.1(a) as making a distinction between a contractual and a noncontractual grievance. The term "employment relations," as used in that section, is broad enough to encompass both a contractual and a noncontractual grievance. The policy consideration Government Code Section 3543.1(a) addresses is applicable to both contractual and non-contractual grievances: the high potential for disruption of the relationship between an employer and an exclusive representative if a rival employee organization could raise its stature in the eyes of its members and other employees in the representation unit by presenting a grievance the exclusive representative in good faith regarded as lacking in merit. The California Legislature has made it possible for the exclusive representative to be free from those concerns.[12]

The Waiver Issue

In the Mt. Diablo case, the effect of the "representation" section of the grievance procedure noted earlier must be considered. We must

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12 At the same time, the Legislature has provided that an exclusive representative has the duty to "fairly represent each and every employee in the appropriate unit." Gov. Code Sec. 3543.9. No charge in these cases involves that section of the EERA.

decide whether the representation section of the contractual grievance procedure in the agreement between the District and the exclusive representative, Mt. Diablo Education Association, operates as a waiver of the employer's and the exclusive representative's right to bar a nonexclusive representative from presenting grievances. We need not interpret the "representation clause" in the grievance procedure.[13] We view the position taken by the District and the exclusive representative in the Mt. Diablo case as an indication that both the exclusive representative and the District view the "representation" clause in a manner consistent with our interpretation of Government Code Section 3543.1(a).[14] They are also the parties to the agreement and its grievance procedure.

The Motion to Particularize

We partially sustain the order of the hearing officer to particularize the charge in the Santa Ana case. We agree that the grievant's "friend and advisor" must be identified in a particularized charge; otherwise, it will not be possible to determine whether the grievant is being represented by an employee organization other than the exclusive representative. However, we do not sustain the portion of the

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[13]Gov, Code Sec. 3541.5 provides in pertinent part;

> The board shall not have the authority to enforce agreements between the parties . . .

[14]See NLRB v. C & C Plywood Corp., 385 U.S. 421. 64 LRRM 2065, 2067 (1967).

particularization order requiring that the charge itself state "whether this individual is in any way associated or connected, either directly or indirectly, with any employee organization other than the [exclusive representative]." We view the relationship between the "friend and advisor" and the nonexclusive representative, if any, as a matter requiring proof at a hearing, after the "friend and advisor" is identified in the charge. Government Code Section 3543 protects the right of an individual to present a grievance either alone or through a representative other than an employee organization that is not the exclusive representative. However, the "representative" may not be an agent of an employee organization other than the exclusive representative. In making this determination, common law principles of agency shall govern. The burden of proving that a disqualifying relationship exists shall be upon the party seeking the disqualification.

On the agency issue, this case and future cases must be decided on a case-by-case basis. However, we decide now that in resolving the agency issue, mere incidental membership in a rival employee organization, without proof that the representative of the grievant is acting for and in behalf of a rival employee organization, is insufficient to disqualify a grievant's representative from presenting a grievance.[15]

IV

In the Santa Ana case, the charging party appeals from the hearing officer's dismissal of an allegation that the District violated Government

[15] On appeal, charging party argues that its constitutional right to freedom of association was violated by the order to particularize. The order to particularize is authorized by our rules and consistent with our interpretation of the EERA.. We leave to a judicial determination questions concerning the constitutional validity of the motion to particularize.

Code Section 3543.5(d)[16] of the Act by distributing a newsletter stating, among other things, that only the exclusive representative is entitled to represent employees in grievance proceedings'. The theory most favorable to charging party is that the newsletter stated a misrepresentation of the law by failing to indicate that an individual may represent himself or herself individually or through a representative that is not acting for and in behalf of an employee organization that is not the exclusive representative.

We sustain the dismissal of this aspect of the charge. We note that this is the only unfair practice allegation in the three cases that is not necessarily disposed of by our interpretation of Government Code Section 3543.1(a). Misrepresentations, alone, have sometimes been held to be grounds for setting aside an election. But they are generally not held to constitute unfair practices.[17] In any event. Government Code Section 3543.5(d) does not cover the conduct described in this aspect of the charge.

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[16]Gov. Code Sec. 3543.5(d) provides:

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

[17]In a recent case, the NLRB has held that misrepresentations, alone, are not grounds for setting aside an election. See Shopping Kart Food Market, 228 NLRB No. 190, 94 LRRM 1705 (1977), overruling Hollywood Ceramics Company, Inc., 140 NLRB 221, 51 LRRM 1600 (1962).

ORDER

(1) The hearing officer's partial dismissal of the charge, as amended, by Federation of Associated Classifieds and Teachers against the Santa Ana Unified School District, is sustained.

(2) The hearing officer's order of particularization of the amended charge by Federation of Associated Classifieds and Teachers against the Santa Ana Unified School District, is sustained only to the extent of requiring the identity, by name only, of grievant's "friend and advisor."

(3) The dismissal of the charge by Diablo Valley Federation of Teachers against the Mt. Diablo Unified School District, is sustained.

(4) The dismissal of the charge by Capistrano Unified Federation of Teachers against the Capistrano Unified School District, is sustained.

By: Reginald Alleyne, Chairman Raymond J. Gonzales Member

Jerilou Cossack Twohey, Member, concurring:

I agree that these charges should be dismissed, essentially for the reasons set out by the hearing officer in his Notice of Dismissal With Leave to Amend in the Santa Ana case.

I do not subscribe to the majority's view that "The cases before us do not concern the right of an individual to present a grievance under Government Code Section 3543...." While not explicitly so stated by any of the charging parties, probably because it's so obvious, the

employees in each of these cases sought to have an employee organization other than the duly selected exclusive representative represent them in processing their grievances. Nothing on the record indicates, and no one contends, that the charging parties in each of these cases--minority non-exclusive employee organizations--thrust or forced their representation on any of the grieving employees. Certainly the employees knew that they could have sought representation in processing their grievances by their exclusive representative but chose not to do so. The majority has ignored the obvious reality that the grievances were filed by individual employees who chose someone other than the exclusive representative to aid and assist them in processing the grievances.

Section 3543.1(a) clearly states that individual employees may present grievances independent of the exclusive representative. Presentation of grievances necessarily contemplates effective presentation. Thus, individual employees may also seek assistance in this presentation. The question is, may that assistance come from a minority, rival, employee organization?[1] I think not. To permit representation by a minority, rival, organization would tend almost necessarily to subvert the grievance procedure from an orderly process whereby disputes are resolved into an organizing battleground strewn with frivolous charges and countercharges. The individual's right to present grievances and have assistance in doing so must be balanced

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[1]Nothing contained in this decision precludes an employee from maintaining membership in a minority employee organization if the employee so chooses.

against the stated purpose of the EERA of fostering harmonious employer-employee relations by permitting a majority of the employees to select an exclusive negotiating representative. This balance would be seriously disturbed if rival employee organizations were permitted to represent employees in a negotiating unit which had selected another organization as the exclusive representative in their handling of grievances.

Nor do I subscribe to the majority's broad conclusion that Section 3543.1(a) does not either permit or require a distinction between contractual and noncontractual grievances. An employee organization which had not been party to the contract negotiations should not be able, through a grievance, to subvert the intent of the exclusive representative in reaching agreement with the employer on specific language in any given contract clause. This consideration is obviously not present where the employee's complaint does not concern a matter covered by a contract between the employer and the exclusive representative. I agree, however, that the fact that in both Capistrano and Santa Ana no contract existed between the employer and the exclusive representative does not require a different result here.

The exclusive representative in both instances had only recently been selected. The charging parties in both instances had competed in the election, seeking to be selected as the exclusive representative, and had lost. There had not been an opportunity for the employer and the exclusive representative to negotiate their first contract. The nascent negotiations between the parties in their initial efforts at drawing up a contract could in no way be enhanced by the concurrent processing of a grievance by a recently defeated organization.

I agree that in Santa Ana the hearing officer's motion to particularize regarding the grievant's "friend and advisor" was unduly broad. While a determination as to whether interrogation about an employee's preference for or membership in one employee organization or another interferes with, restrains or coerces employees must be made in the context of all the surrounding circumstances,[2] this Board should not encourage conduct which may constitute an unfair practice. Furthermore, mere membership in an employee organization is not sufficient to find that an individual is an agent of that organization; conversely, lack of membership does not guarantee that an individual is not an agent. Since membership is not determinative of an agency relationship, and since it is inadvisable to invite conduct which might be unlawful, questions with respect to membership should be inadmissable as a factor in determining whether or not an agency relationship exists.

Finally, I agree with the dismissal of the unfair practice allegation against the Santa Ana employer charging misrepresentation of the right to representation of grievance proceedings. While the facts in this case support the dismissal, I do not agree with any broad principle that misrepresentations generally may not be unfair practices under the EERA.

Jerilou Cossack Twohey, Member

[2]See Blue Flash Express, Inc., 109 NLRB 591, 594, 34 LRRM 1384 (1954); see also Struksnes Construction Co., Inc., 165 NLRB 1062, 65 LRRM 1385 (1967).

STATE OF CALIFORNIA

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

In the matter of:	
DIABLO VALLEY FEDERATION OF TEACHERS, AFT LOCAL 1902, Charging Party,	
vs.	Case No. SF-CE-88
MOUNT DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	

NOTICE OF DISMISSAL WITH LEAVE TO AMEND

NOTICE IS HEREBY GIVEN that the above-captioned Charge is dismissed with leave to amend within ten calendar days. This action is taken pursuant to Section 35007(a) of Title 8 of the California Administrative Code.

Said dismissal is based on the following grounds:

Once an employee organization has been recognized or certified as the exclusive representative of an appropriate unit of employees, Government Code Section 3543.1(a) prohibits the representation of members of that unit in grievance proceedings by an employee organization other than such exclusive representative. The rationale for this interpretation of Section 3543.1(a) is delineated in the enclosed Notice of Dismissal with Leave to Amend in FACT vs. SANTA ANA UNIFIED SCHOOL DISTRICT, Case No. LA-CE-109, which rationale is incorporated herein by reference.

The above action is taken pursuant to EERB Regulation 35007(a). If the Charging Party chooses not to amend the Charge, it may obtain review of the dismissal by filing an appeal to the Board itself within ten calendar days after service of the Notice of Dismissal. Such appeal must be in writing

signed by the party or its agents, and contain the facts and arguments upon which the appeal is based. EERB Regulation 35007(b).

WILLIAM P. SMITH
General Counsel

Dated: JUN 27 1977

By: _____
ANGELA PICKETT-EVANS
Hearing Officer

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EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of	)	
JAMES P. STEVENS, RHODA LUBNAU, and FEDERATION OF ASSOCIATED CLASSIFIEDS AND TEACHERS,	)	Case No. LA-CE-109
Charging Parties,	)	
vs.	)	~~NOTICE OF DISMISSAL~~ WITH LEAVE ~~TO AMEND~~
SANTA ANA UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

NOTICE IS HEREBY GIVEN that the above-captioned charge is dismissed with leave to amend within ten calendar days. This action is taken pursuant to Section 35007(a) of Title 8 of the California Administrative Code.

This charge is dismissed with leave to amend on the advice of the General Counsel on the following grounds:

BACKGROUND

The charging parties, in their unfair practice charge, allege as follows:

The Santa Ana Educators Association is the exclusive representative of certificated employees of the respondent.[1/]

[1/] The Educational Employment Relations Board files, of which the Hearing Officer takes official notice, show that the Santa Ana Educators Association/ CTA/NEA was certified as the exclusive representative on November 5, 1976. The charging parties also state, and the Educational Employment Relations Board files appear to confirm, that no contract has been negotiated between the exclusive representative and the school district as of the date of this charge.

On February 2, 1977, the respondent denied the Federation of Associated Classifieds and Teachers (FACT) the right to represent one of its members in a grievance proceeding.

On March 11, 1977, the respondent issued a newsletter (Staff Bulletin No. 5) which, according to the charging parties, states that only the exclusive representative may represent or act as counsel to employees in grievance proceedings.

DISCUSSION

Government Code Section 3543.1(a) states that 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, only that employee organization may represent that unit in their employment relations with the public school employer[2] Government Code Section 3543, however, allows individual employees at any time to present grievances to the employer without the intervention of the exclusive representative[3]. The troublesome issue is whether an individual employee can select a non-exclusive employee organization as his/her representative in a grievance proceeding, or

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[2]In Fremont Unified School District, EERB Decision No. 6 (December 16, 1976), the Board held that "employer-employee relations include, at the least...the processing of grievances."

[3]Section 3543 states that "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."

whether an employee is forced either to represent him/herself or have the exclusive representative act as the employee's representative.

The National Labor Relations Board and the federal courts have faced this issue in interpreting similar language in the National Labor Relations Act with varied results. (See 9 ALR 2d 696, Anno., Rival Union's Right to Act.) The pertinent provisions of Section 9(a)[4] of the National Labor Relations Act, as amended, reads as follows:

> Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

Prior to 1947, instead of the above two clauses, the NLRA contained a single proviso, as follows:

> Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer.

Legislative history of the original proviso indicates that it was not intended to permit the defeated or a minority union any rights to represent employees. The proposed bills in Congress originally contained, at the end of the proviso, the words, "through representatives of their own choosing."[5]

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[4] 29 USCA Section 159(a).

[5] Hearings before the Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 4. Hearings before the House Committee on Labor, on H.R. 6288,. 74th Cong., 1st Sess., p. 4..

The NLRB in Federal Telephone and Radio Co., 107 NLRB 649, 33 LRRM 1203 (1953) stated that "these words were eliminated in order to avoid the implication that the 'individual' or 'group' might select any representative it wished." The NLRB also is of the opinion that the amended version of Section 9(a) of the NLRA does not accord an employee the right to present his grievance through a rival union, but that "these changes were directed only toward assuring the individual grievant the right to confer with his employer without participation of the certified bargaining agent." Federal Telephone and Radio Co., 107 NLRB at 653.

Thus, the National Labor Relations Board has been consistent through the years in holding that "individual employees are permitted to present grievances to their employer by appearing in behalf of themselves, although not through any labor organization other than the exclusive representaitve." Hughes Tool Co., 56 NLRB 981 (1944). See also Meat and Provision Drivers Union, Local 626, 115 NLRB 890, 892, 37 LRRM 1421 (1956).

The leading federal appeals court decision in support of the NLRB is Hughes Tool Co. v. NLRB, 147 F 2d. 69, 15 LRRM 852 (5th cir. 1945). The court, in enforcing in part the NLRB's order in Hughes Tool, supra, stated that "we think an inexperienced or ignorant griever can ask a more experienced friend to assist him, but he cannot present his grievance through any union except the [exclusive] representative."

The Court of Appeals for the Second Circuit, however, in Douds v. Retail, Wholesale Dept. Store Union, 173 F 2d. 764, 23 LRRM 2424 (1949), held that an individual employee could select a representative to present his grievance and this representative may even be a minority union at the company*

This holding has not been followed by the National Labor Relations Board (see Federal Telephone and Radio Co., 107 NLRB at 653, note 9, and Meat and Provision Drivers Union, 115 NLRB at 892) and was sharply criticized in Sherman, The Individual and His Grievance - Whose Grievance Is It? 11 Pitt. L. Rev. 35, 54-55 (1949).[6/]

Construing the pertinent provisions of Section 3543 of the EERA in a manner similar to the National Labor Relations Board in Federal Telephone and the Fifth Circuit Court of Appeals in Hughes Tool v. NLRB better effectuates the policy and intent of the EERA. That intent is, should the employees so choose, to provide exclusivity to one employee organization in the area of employer-employee relations. This conclusion is not only consonant with the language of the statute, but it also provides stability in the area of grievance procedures.

As stated by the court in Hughes Tool v. NLRB, supra, "it was not thought good to allow grievance hearings to become clashes between rival unions." To allow a rival employee organization to represent an employee in a grievance proceeding opens to the rival employee organization the opportunity of exploiting grievances apart from their merits to show its superiority as a bargaining agent in the hope of ultimately displacing the exclusive representative. In self-defense, the exclusive representative would then be forced to support what may be ill-founded grievances in order to prevent impairment of its prestige. The grievance proceeding would become a campaign forum or organizing

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[6/] The Second Circuit appears to retreat somewhat from its its view as expressed in Douds in National Labor Relations Board v. Lundy, 316 F 2d. 921, 53 LRRM 2106 (1963), but the court expressly refused to determine the continuing validity of the Douds case.

device and the process of grievance adjustment would lose its character as a responsible means of settling differences.

It is noted that the prohibition of representation through an employee organization other than the exclusive representative does not preclude representation through others, however. This was expressly so stated in Hughes Tool v. NLRB, supra, where the court suggested that a grievant might enlist the aid of "a more experienced friend" which would include, presumably, retaining private counsel. It is unclear from the unfair practice charge in the instant case whether the employer is allegedly denying to employees their right to present their own grievances through representatives not associated or in any way connected with FACT or any other rival employee organization. The charging parties are given leave to amend in this regard.

If the charging parties choose not to amend the charge, they may obtain a review of the dismissal by filing an appeal to the Board itself within ten (10) calendar days after service of this notice of dismissal. Such appeal must be in writing, signed by the parties or their agent, and contain facts and argument upon which the appeal is based. EERB Regulation 35007(b).

Dated: May 25, 1977

WILLIAM P. SMITH
General Counsel

By _____
Jeff Paule
Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the matter of: CAPISTRANO UNIFIED FEDERATION OF TEACHERS, LOCAL 2312, Charging Party, vs. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-91 NOTICE OF DISMISSAL

NOTICE IS HEREBY GIVEN that the above-captioned charge is dismissed. This action is taken pursuant to Section 35007(a) of Title 8 of the California Administrative Code.

This charge is dismissed on the advice of the General Counsel on the following grounds:

On June 20, 1977 the above-captioned charge was dismissed with leave to amend. A copy of this dismissal is attached hereto and made a part hereof.

On **June 29,** *1977* the charging party filed an amendment in which the allegations contained in the original charge were repeated with the addition of the following sentence: "Mr. Quirk had requested the assistance of Lee Weagley and/or Joe Shofner, certificated employees within the bargaining unit".

The dismissal with leave to amend stated, in part, that "a grievant

might enlist the aid of 'a more experienced friend' which would include, presumably, retaining private counsel, but would exclude anyone associated or connected, either directly or indirectly, with an employee organization other than the exclusive representative."

It appears from the face of the charge that Mr. Lee Weagley is the President of the Capistrano Federation of Teachers, Local 2312 and that Mr. Joe Shofner is the Local's Grievance Coordinator. Both individuals are designated as agents of the charging party.

Accordingly, it is found that the charge remains defective and is therefore DISMISSED.

The charging party may obtain a review of the dismissal by filing an appeal to the Board itself within ten (10) calendar days after service of this notice of dismissal. Such appeal must be in writing, signed by the party or its agent, and contain facts and argument upon which the appeal is based. EERB Reg. 35007(b).

Dated: June 30, 1977

WILLIAM P. SMITH, JR.
GENERAL COUNSEL

By: _____
Jeff Paule
Hearing Officer

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

ORDER

DIABLO VALLEY FEDERATION OF TEACHERS, AFT LOCAL 1902, Charging Party, vs. MOUNT DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-88
JAMES P. STEVENS, RHODA LUBNAU, AND FEDERATION OF ASSOCIATED CLASSIFIEDS AND TEACHERS, Charging Party, vs. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	)	EERB Decision No. 44 Case No. LA-CE-109 December 30, 1977
CAPISTRANO UNIFIED FEDERATION OF TEACHERS, LOCAL 2312, Charging Party, vs. CAPISTRANO UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-91

The Educational Employment Relations Board directs that:

(1) The hearing officer's partial dismissal of the charge, as amended, by Federation of Associated Classifieds and Teachers against the Santa Ana Unified School District, is sustained.

(2) The hearing officer's order of particularization of the amended charge by Federation of Associated Classifieds and Teachers against the Santa Ana Unified School District, is sustained only to the extent of requiring the identity, by name only, of grievant's "friend and advisor."

(3) The dismissal of the charge by Diablo Valley Federation of Teachers against the Mt. Diablo Unified School District, is sustained.

(4) The dismissal of the charge by Capistrano Unified Federation of Teachers against the Capistrano Unified School District, is sustained.

Educational Employment Relations Board
Stephen Barber, Executive Assistant

by
William P. Smith, General Counsel