STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of: CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, PITTSBURG CHAPTER #44, Charging Party, vs. PITTSBURG UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-52 PERB Decision No.47 February 10, 1978

Appearances: Robert L. Blake, Attorney, for California School Employees Association, Pittsburg Chapter #44; Margaret O'Donnell, Attorney (Breon, Galgani and Godino), for Pittsburg Unified School District.

Before Gonzales and Cossack Twohey, Members.

OPINION

On September 8, 1977, Hearing Officer Ronald E. Blubaugh issued the attached Recommended Decision. Thereafter, California School Employees Association, Pittsburg Chapter #44 (CSEA) filed exceptions.

We have considered the record as a whole and the attached Recommended Decision in light of the exceptions filed and decide

to affirm the rulings, findings[1] and conclusions of the Hearing Officer and to adopt his Recommended Order.

By: Jerilou Cossack Twohey, Member Raymond J. Gonzales, Member

[1]We do not here conclude whether any of the statements contained in the leaflet might qualify as "a deliberate intention to falsify" or "a malevolent desire to injure" within the meaning of Linn v. Plant Guard Workers, 383 U.S. 53, 61 LRRM 2345 (1966).

We do agree with the Hearing Officer's conclusion that the District rules pursuant to which the employees were disciplined were promulgated for reasons unrelated to organizational activity.

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of	)	
	)	
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION PITTSBURG CHAPTER NUMBER 44,	)	Unfair Practice) Case No.SF-CE-52
Charging Party,	)	
vs.	)	
	)	
PITTSBURG UNIFIED SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

Appearances: Robert L. Blake, Attorney, for California School Employees Association, Pittsburg Chapter No. 44; Margaret O'Donnell, Attorney (Breon, Galgani and Godino), for Pittsburg Unified School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This case involves the disciplining of three employees by a public school district for their role in the preparation and distribution of a leaflet.

The leaflet at issue is a single sheet with a drawing in the upper left front corner and text on both the front and back sides. The text is written in a gossipy style with teasing questions, some of which appear to imply sexual activities involving various employees of the Pittsburg Unified School District.[1]

On January 27, 1977, following the District's initiation of discipline against the employees, the California School Employees Association, Pittsburg

[1] Hereafter, the Pittsburg Unified School District will be referred to as the "District."

Chapter No. 44 2/, filed an unfair practice charge against the District. The charge alleges that the District violated Government Code Sections 3543.5(a) and (d). According to CSEA, the District had (1) "threatened to impose reprisals" against certain employees and had "otherwise interfered with, restrained and coerced" them because of their exercise of rights under the law[3] and had (2) "dominated and interfered with" CSEA's administration of its own activities.

In its answer, the District admitted that disciplinary action had been initiated against the employees but denied that it had violated or was anticipating a violation of the Educational Employment Relations Act.[5]

2/ Hereafter, the California School Employees Association, Pittsburg Chapter No. 44, will be referred to as the "CSEA."

3/ Government Code Section 3543.5 reads as follows:

> It shall be unlawful for a public school employer to:
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

4/ The charge was filed prior to the time the disciplinary action was taken against the employees.

5/ Government Code Section 3540 et seq.

In an effort to settle the dispute, an informal conference with the parties was held on April 8, 1977, By an attorney from the Educational Employment Relations Board. However, no settlement was reached and a formal hearing was conducted by an EERB hearing officer on May 11, 1977, at the EERB's San Francisco Regional Office.

LEGAL ISSUES

This case presents these legal issues:

1. Did the District impose reprisals, discriminate, restrain or coerce employees because of their exercise of rights guaranteed by the EERA, thereby violating Government Code Section 3543.5(a)?

2. Did the District dominate or interfere with the administration of the CSEA, thereby violating Government Code Section 3543.5(d)?

FINDINGS OF FACT

On or about October 6, 1976, the membership of CSEA's Pittsburg chapter approved the preparation of a negotiations bulletin. On December 3, 1976, three members of the CSEA executive committee and a CSEA field representative met to write the bulletin. Those present were John E. McGrath, then incumbent president of the chapter; Ellen Ruth Collins, a chapter officer and member of the negotiating committee; Anthony Costanza, a member of the executive committee; and David R. Young, a CSEA employee who is assigned generally to central and eastern Contra Costa County. He was the only one of the four authors of the leaflet who was not an employee of the District.

The four testified that their purpose in writing the leaflet was to provide a morale booster for members who were dispirited at the length of negotiations. Mr. Costanza said he had hoped the members would "read this and laugh about it" and understand that negotiations were difficult. No other negotiations bulletin was produced for the membership even though in past years there had been a practice of the negotiators making written reports to the membership.

The four authors worked about three hours on their leaflet. Mr. Young testified that document they ultimately produced was an official publication of the CSEA because the membership had authorized a bulletin, because he had approved it and because the executive committee had approved it. From the evidence, it would appear that the only involvement by the executive committee was that three local officers participated in writing the document. At least two chapter officers -- Ratzi Aiello and Eva McDowell -- were not present when the leaflet was written.

Following the group's writing session, Ms. Collins took the handwritten notes they had compiled to a typist who made a finished copy. She gave the copy to Mr. McGrath who took it to a printer on December 6, 1976. The next day, Mr. McGrath picked up the printed copies at noon. He testified that he gave the copies to Mr. Aiello and did not see the leaflets again until later that afternoon when he observed eight to ten copies on the table in the faculty room at the District's Central Junior High School. He gave a copy to Betty Brown, a teacher in the school, and a clerk in the school took a copy from him. Mr. McGrath said he then went home and had nothing more to do with the leaflets

Ms. Collins said she obtained the printed copies at about 4:30 p.m. on December 7. She took them home with her, stuffed them into intradistrict envelopes and addressed them to various CSEA building representatives. On the morning of December 8, she took the envelopes with her to her job in the District maintenance department and gave them to various employees who were being dispatched to the schools. She also made arrangements for employees at the schools to receive the envelopes and place the leaflets in the CSEA boxes at the schools.

The first District official to see the leaflet was the superintendent, Bob Rothschild, who was given a copy during the evening of December 7 by Ms. Brown. The next morning, the principal of Pittsburg High School brought a copy of the leaflet to a District staff meeting. Immediately thereafter, Superintendent Rothschild and Deputy Superintendent Sal P. Cardinale initiated an investigation about the source of the leaflet.

There is no identification of a source on the face of the leaflet. There is one reference to a "CSEA person" but there is no writing which identifies it as a publication of CSEA. Because the source of the leaflet was not clear, District officials were uncertain about which, if any, employee organization was responsible. Officers were called in from the CSEA, the Pittsburg Education Association, the Pittsburg Federation of Teachers and a federation affiliate seeking to represent paraprofessional employees. CSEA officers were the first group contacted by the District because of the document's reference to a "CSEA person."

The CSEA officers met twice on December 8 with the superintendent and the deputy superintendent. The first meeting occurred early in the day, around 9 a.m. The CSEA officers called in were Mr. McGrath, Mr. Costanza, Mr. Aiello, Ms. Collins, Ms. McDowell and Madelyn Cardinalli.

Deputy Superintendent Cardinale told the group he was very disturbed, that he was restraining himself, that there might be legal implications from the leaflet and that he wanted to know who was responsible for it. It is undisputed that none of the employees acknowledged responsibility during that first meeting and none of them told the District the leaflet was a CSEA publication. The employees asked if they could have a caucus. The District officials agreed and the employees adjourned to a nearby coffee shop where they called the CSEA representative, Mr. Young.

Following their call to him, Mr. Young arrived in Pittsburg and joined the employees in their second meeting of the day with the superintendent and deputy superintendent. There is much conflict in the testimony about what happened during that second meeting. Mr. Young testified that he advised the District officials that CSEA took full responsibility for the leaflet and that the blame could not be placed on individual employees. Mr. McGrath's testimony agreed with that of Mr. Young. However, Ms. McDowell and Mr. Aiello testified that Mr. Young only told the District that if CSEA or any of its members were involved, CSEA would accept the responsibility and back the person up. Mr. Cardinale testified that Mr. Young said only that CSEA would support any "active" member who might have been involved.

The hearing officer resolves this conflict by concluding that no CSEA representative made a clear, unequivocal admission of responsibility for the leaflet on December 8.

The District continued its investigation on December 9 by calling CSEA officers back alone for further discussions. Some of the employees would answer no questions. It is undisputed, however, that on December 9 Mr. Young told the District that the leaflet had been produced by the CSEA.

For a negotiations bulletin, the leaflet is an unusual document. At the top left is a drawing of a comical figure biting his hand. Beneath it are the words, "IF I ONLY COULD TELL YOU." Testimony at the hearing established that the drawing was a well-known illustration in the District. It was prepared originally as a cloth patch by Mr. Costanza and sold for $2 a copy as a joke on Mr. Aiello. According to the testimony, Mr. Aiello has a habit when asked certain questions of biting his hand and saying, "If I only could tell you." Numerous District employees are familiar both with Mr. Aiello's habit and the patch.

The leaflet is numbered at the top as "Volume 1 Number 1." Immediately below that begins a series of questions. The first of these reads as follows:

> What confidential secretary told her boss "You can't see it cuz its confidential!"

The second question reads:

> What employee took a "go to hell day" and went to a San Francisco Hotel and ran into no one other than his boss? What was the boss doing there??????

Testimony at the hearing established that Mr. Costanza contributed that item to the leaflet. He said the "boss" in question was the superintendent. The superintendent testified that he knew the reference was to him and resented the inference.

The third question reads:

> What CSEA person while traveling in far east county saw what deputy superintendent engaged in intercourse with more than one woman concurrently?

Testimony established that the traveling CSEA person was Mr. Young and that the District has only one deputy superintendent, Mr. Cardinale. The item was written by Mr. Young who testified that it referred to Mr. Cardinale. According to Mr. Young, the item concerns an incident in the spring of 1976 where Mr. Cardinale was speaking to a group of employees in the Brentwood Elementary School District about the EERA. Mr. Young further testified:

> There were several women in the audience, and following the main discussion, you know, everybody--there were people chatting with groups--chatting in groups after the thing had broken up, and Mr. Cardinale was at that time, well, speaking, and afterwards speaking, discussing the issue with more than two women concurrently. A very simple matter of communication.

Mr. Young testified that the item was humorous "as a double entendre" because "it could appear to say more than it actually does." The testimony continued as follows:

> Q. What could it appear to say?
>
> A. It could appear to refer to anything somebody would care to mention. Specifically, the word "intercourse" was in there without a modifier because it could, in the eyes of the, in the minds of some people I know, be taken to mean something other than it actually means.
>
> Q. And what would that be?
>
> A. Obviously there is some form of sexual relationship taking place. You know the answer as- well as I do.

Another item contained in the leaflet reads as follows:

> Whatever happened to Judy C? Was she replaced by V,G, or maybe V.D.?

Immediately following appears this entry;

> What twosome at the Ad. Bldg, is playing around? Watch it, you might become a threesome!

Testimony at the hearing established that Mr. Cardinale formerly had a secretary named Judy whose last name then began with the letter "C." She subsequently married and her married name begins with the letter "B," She still is employed in the District as a secretary. Testimony further established that there is an administrative secretary who works in the administration building with the initials V.G. The hearing officer takes notice of the common usage of the initials, "V.D." to mean venereal disease.

The next entry asks this question:

> What aging, balding, boy scout, hot shot is still looking for a job for his title? Be prepared!

Testimony at the hearing established that the reference was intended to apply to a particular District employee and was understood to apply to that employee by Mr. Cardinale.

A subsequent entry asks this question;

> What employee requested a vanilla rope and the secretary replied, "It only comes in strawberry"?

Testimony at the hearing established that the incident was a reference to an event which occurred in the maintenance office and was witnessed by about seven persons. An employee had come into the office to ask for a manila rope, a type of twine, but mispronounced "manila" as "vanilla." The secretary involved was Ms. Collins.

The document next contains various references to persons with the initials, "B.M." and "B.R." and conversations between them. Testimony at the hearing established that the common interpretation of these initials was that "B.M." referred to business manager and "B.R." referred to Bob Rothschild, the superintendent.

The leaflet also contains a telephone number which is one digit off from the telephone answering service number for the District's substitute employees. Further, the leaflet contains a section called "negotiations report" with a series of cryptic comments having an unclear relationship to negotiations. Down the left front side is the slogan "Fables U Can Kopy," written in such a fashion to form an easily recognizable acronym. No witness at the hearing knew the origin of that inscription on the leaflet.

At the bottom of the reverse side of the leaflet there is this statement:

> NAMES IN THIS DOCUMENT ARE FICTITIOUS! NAMES HAVE BEEN CHANGED TO PROTECT THE GUILTY! ANY SIMILARITY BETWEEN PERSONS LIVING OR DEAD IS PURELY FACT!!!! NO NEWS IS GOOD NEWS! WE NEED YOUR NEWS! DO UNTO OTHERS BEFORE THEY DO UNTO YOU!

Other than the single reference to a "CSEA person" there is no identification on the document which indicates its source. At the hearing, various explanations were offered for this omission. Collectively, the CSEA witnesses testified that a CSEA identification was left off because there was no room for it, because the typist was new, because

the typist forgot, because it was an oversight. The District introduced various leaflets which CSEA has at other times distributed and which clearly identify CSEA as the source. The CSEA introduced various documents distributed by the Pittsburg Teachers Association which fail to explicitly identify the association as their source, although the source is apparent from the context.

It is not clear how widely the leaflet was distributed. One witness estimated that not more than 20 copies were circulated. However, it also was estimated that eight to ten were seen in a single school. Another witness estimated that the leaflets got out to about four schools before their circulation was halted. Both classified and certificated employees saw copies of the leaflet.

The disciplinary process got underway when the District scheduled formal investigatory interviews on January 7, 1977. Five employees were directed to appear for separate interviews with the superintendent, the deputy superintendent and the District's legal counsel. They were advised by the District that they could have "a conferee or legal representative" with them during the interviews. Because Mr. Young and certain other CSEA staff members were engaged in a strike against CSEA on that day, the employees asked the District to delay the interviews. The District declined the request. Mr. Young was not present at the interviews.

On January 13, 1977, the District superintendent wrote to Mr. McGrath, to Mr. Costanza and to Ms. Collins informing each of them of his intention to recommend to the governing board that they each be suspended without pay for 30 days.

The District rules provide various grounds for suspension, demotion or dismissal.[6] Mr. McGrath was

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6/ "The District's rule covering causes for suspension, demotion or dismissal is set forth below:

SECTION 10.1 - CAUSES FOR SUSPENSION, DEMOTION, DISMISSAL
The tenure of every employee holding a position in the classified service under the provisions of these rules shall be during good behavior. Upon the approval of the Board of Education any person may be dismissed, demoted suspended or otherwise disciplined for any of the following causes.

a. Incompetency or inefficiency.
b. Insubordination, including but not limited to, refusal to do assigned work.
c. Carelessness or negligence in the performance of duty or care of district property.
d. Discourteous, offensive or abusive conduct or language.
e. Dishonesty.
f. Drinking on the job, or reporting for work while intoxicated.
g. Addiction to use of narcotics.
i.(sic) Engaging in political activity during assigned hours of employment.
j. Conviction of any crime involving moral turpitude.
k. Repeated and unexcused absence or tardiness.
1. Abuse of sick leave privileges.
m. Falsifying any information supplied to the school district, including but not limited to, information supplied on application forms, employment records or any other district records.
n. Persistent violation or refusal to obey established safety rules or regulations.
o. Offering anything of value or any service in exchange for special treatment in connection with the employee's job or employment; or accepting anything of value or any service in exchange for granting any special treatment to another employee or to any member of the public.
p. Willful or persistent violations of the Education Code or rules of the Board of Education.
q. Any willful failure of good conduct tending to injure the public service.
r. Abandonment of position.
s. Advocating the overthrow of federal, state or local government by force, violence or other unlawful means.
t. Physical or mental incompetency. (If suspended, the Board reserves the right to have the employee examined and approved by the Medical doctor or psychiatrist of its choice before allowing the employee to return to his job.)

accused of:

1) Willful failure of good conduct tending to injure the public service;
2) Discourteous, offensive or abusive conduct or language;
3) Insubordination, including but not limited to, refusal to do assigned work;
4) Dishonesty.

The first two charges were based on Mr. McGrath's alleged role in the preparation and distribution of the leaflet. The third charge was based on Mr. McGrath's refusal to answer questions about the leaflet and the fourth charge was based on Mr. McGrath's alleged denial that he had an envelope containing multiple copies of the leaflet in his possession on December 7. The dishonesty charge ultimately was dropped.

Mr. Costanza was accused of insubordination. The charge was based on his refusal to answer questions about his role in preparation and distribution of the leaflet.

Ms. Collins was accused of:

1) Willful failure of good conduct tending to injure the public service;
2) Discourteous, offensive or abusive conduct or language;
3) Insubordination, including but not limited to, refusal to do assigned work.

The first two charges were based on her alleged participation in the preparation and distribution of the leaflet. The third charge was based upon her refusal to answer questions about her role in the incident.

The Board of Education conducted a hearing on the charges on February 1, 1977, and subsequently ordered a suspension of 30 calendar days without pay for Mr. McGrath, a suspension of 21 calendar days without pay for Ms. Collins and a suspension of seven calendar days without pay for Mr. Costanza.

The number of employees belonging to CSEA made no unusual change in the months following the disciplining of the three CSEA officers. In late 1976 and early 1977, CSEA membership in the Pittsburg chapter was as follows: September, 241; October, 240; November, 233; December 233; January, 229; February, 226; and March, 223.

CSEA was involved in an election in the Pittsburg District just after the distribution of the leaflet. The EERB-conducted election for employees in a paraprofessional unit of aides was held on December 9, 1976, the day after the circulation of the leaflet. According to records in the EERB case file, CSEA was certified as the exclusive representative of employees in this unit on December 16, 1976.

CONCLUSIONS OF LAW

The EERA provides public school employees with the "right to form, join and participate in the activities of employee organizations."[7] Additionally, the statute makes it unlawful for a public school employer to impose or threaten reprisals or to discriminate against employees for their exercise of statutory rights.[8] When the two sections are applied in concert, it becomes unlawful for a public school employer to punish school employees for participating in the activities of an employee organization.

In this case, the initial question is whether these employees were engaged in the activities of an employee organization when they wrote and distributed the leaflet. It is clear that after-the-fact, CSEA stepped forward and claimed responsibility for the leaflet. What is important, however, is whether the leaflet was intended to be a CSEA publication at the time of its preparation and distribution.

The document was written by three CSEA officers and a field representative employed by CSEA. Even though the leaflet has only a passing reference to CSEA and its contents show only a tenuous relationship to negotiations, it seems likely that the employees involved intended that their leaflet be a product of CSEA. The circumstances surrounding the preparation of the document suggest that the employees intended that it vent their frustration over the slowness of negotiations. Probably, they chose not to identify the source because of the nature of the leaflet's contents. This failure of identification did not destroy

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[7] Government Code Section 3543 provides, in part, as follows:

> 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....

[8] Government Code Section 3543.5(a), Footnote No. 3, supra.

the origin of the leaflet as the product of CSEA officers who apparently believed it would further the purposes of their organization.

However, the. document's CSEA origin provides no blanket immunity to the authors of its contents. Employees may be punished for improper activities. Precedent from the NLRB and the federal courts makes this clear.

The National Labor Relations Act has never been a shield to permit employees to engage in whatever kind of conduct they desire in total disregard of the rights of the employer. From the beginning, the United States Supreme Court has held that employers may discipline employees for many reasons without violating the Act.[9] Ultimately, the federal law was specifically amended to prevent the NLRB from ordering the reinstatement of an employee who was disciplined for cause.[10]

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9 In ~~NLRB~~ v. ~~Jones & Laughlin Steel Corp.~~, 301 U.S. 1, 1 LRRM 703 (1937), the case in which the constitutionality of the Wagner Act was upheld, the Supreme Court wrote:

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under the cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. 1 LRRM 714.

10 Section 10(c) of the NLRA,as amended. For a discussion of how this section was added and the judicial precedent upon which it was based see NLRB v. ~~LOCAL 1229, IBEW~~, 346 U.S. 464, 33 LRRM 2183 (1953) .

In the federal context, cases such as the present case arise as allegations that an employer violated Section 8(a)(1) and/or Section 8(a)(3) of the National Labor Relations Act.[11] The National Labor Relations Board and the federal courts have evolved differing approaches for analyzing cases brought up under the two sections.

If the allegation is that the employer violated Section 8(a)(1) by interfering with, restraining or coercing employees engaged in protected activity, the NLRB and the federal courts increasingly engage in a balancing process.[12]

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[11] The relevant provisions of the National Labor Relations Act, as amended, are the following:

> Sec. 7. 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).
>
> 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 hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization...

[12] The balancing test is explained in NLRB v. Thor Power Tool Co., 351 F.2d 584, 60 LRRM 2237 (CA 7, *1965):*

> As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect. 60 LRRM 2238. (con't)

Both the employer and the employees have important rights in such cases. The employer has the right to maintain order, respect and control of a plant or factory. The employees have the right to form, join or assist labor organizations and to engage in other concerted activities for mutual aid or protection. The NLRB and the courts look to the facts of the particular case and weigh the rights of the parties against each other. Employee exercise of speech and subsequent employer retaliation often lead to the balancing process. In a number of cases, the federal courts have considered inflamatory speech and reversed NLRB decisions to reinstate employees. But other cases on similar facts have

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12 (con't) See also: Farah Mfg. Co., 202 NLRB 666, 82 LRRM 1623 (1973); Bob Henry Dodge Inc., 203 NLRB 78, 83 LRRM 1077 (1973); Prescott Indus. Prods.Co., 205 NLRB 51, 83 LRRM 1500, enf. denied 500 F.2d 6, 86 LRRM 2963 (CA 8, 1974).

13 In Maryland Drydock Co. v. NLRB, 183 F.2d 538, 26 LRRM 2450 (CA 4, 1950), the court set aside an NLRB order that the employer reinstate an employee who distributed literature which held company officials up to ridicule and tended to undermine discipline. In NLRB v. Blue Bell Inc., 219 F.2d 796, 35 LRRM 2549 (CA 5, 19337, the court denied enforcement of an NLRB order that an employer reinstate an employee discharged for calling the company's vice president "a liar." In NLRB v. Superior Tool and Die Co., 309 F.2d 692, 51 LRRM 2504 (CA 6, 1962), enforcement was denied to an NLRB order that an employer rehire employees with whom non-strikers refused to resume working because they had used "scurrilous epithets and threats" on the picket line. In Chemvet Laboratories, Inc. v. NLRB, 497 F.2d 445, 86 LRRM 2262 (CA 8, 1974), the employer was held not to have violated the Act by discharging a union adherent who used profanity against a supervisor. In NLRB v. Garner Tool and Die Mfg., Inc., 493 F.2d 263, 85 LRRM 2652 (CA 8, 1974), enforcement was denied because there was no evidence of union animus in the discharge of an employee who called a company president an "s.o.b." during a dispute over working conditions.

led to the opposite result.[14] Each case appears to have been decided on its individual facts as weighed by the NLRB and courts for competing interests.

If the allegation is that the employer violated Section 8(a)(3) by discrimination to encourage or discourage membership in a labor organization, the NLRB and the federal courts look both at the inherent effect of the employer's act and the motivation behind it. Depending upon the nature of the employer's act, a showing of anti-union intent may be required.

The EERA combines the protections of Sections 8(a)(1) and 8(a)(3) in Government Code Section 3543.5(a). That section[15] prohibits both interference with the exercise of protected rights and discrimination against employees because of their exercise of rights.

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[14] In Offner Electronics, 134 NLRB 1064, 49 LRRM 1307, the NLRB ordered reinstatement of an employee who circulated an anonymous gossip sheet. In NLRB v. Thor Power Tool Co., 351 F.2d 584, 60 LRRM 2237 (CA 7, 1965), the court enforced an NLRB order to reinstate a grievance committee member who called a supervisor a "horse's ass" after a grievance session. In Owens-Corning Fiberglass Corp. v. NLRB, 407 F.2d 1357, 70 LRRM 3065 (CA 4, 1969), the court enforced a board order that an employer reinstate workers who circulated a leaflet which criticized a supervisor for refusing to allow a worker to take home a fellow employee whose wife was killed in a car wreck. In NLRB v. Cement Transportation, Inc., 490 F.2d 1024, 85LRRM 2292 (CA 6, 1974), the court enforced reinstatement of a union leader who used profanity against the employer's president and made statements that he would help "tear down" the company.

[15] See footnote No. 3, supra.

The EERB's initial interpretation of Government Code Section 3543.5(a) can be found in the recent case of San Dieguito Faculty Association v. San Dieguito Union High School District, EERB Decision No. 22, September 2, 1977. In that case the Board concluded that for a violation to be found it must be shown "at minimum" that an employer acted either with "the intent to interfere with the rights of the employees" or that the employer's conduct "had the natural and probable consequence" of interfering with the rights of the employees.[16]

In the present case, the District evidenced no unlawful intent. It disciplined three employees for breaking District rules unrelated to organizational activity. The three employees involved were suspended for the preparation and distribution in the public schools of a leaflet which, among other claims,

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[16] The EERB test appears to be a modification of the United States Supreme Court's test NLRB v. Great Dane Trailers Inc., 388 U.S, 26, 65 LRRM 2465 *(1967)* . In applying the rule of Great Dane Trailers, the NLRB considers whether the employer's conduct is inherently destructive of employee rights. If the conduct is inherently destructive, no evidence of anti-union motivation is needed and the NLRB balances the rights of employees against the interests of the employer. If the employer's conduct is not inherently destructive of employee rights and if the employer has legitimate business reasons, then there must be proof of anti-union motivation by the employer. Proof of anti-union motivation can be found in anti-union comments made before or after the discharge or, in some circumstances, prior conduct. See generally, W.T. Grant Co. , 210 NLRB 622, 86 LRRM 1365 (1974); United Cement Co., 209 NLRB 1137, 86 LRRM 1237 (1974); Radiodores Paragon dePuerto Rico, Inc., 206 NLRB 918, 84 LRRM 1591 (1973), enforced 87 LRRM 3274 (CA 1, 1974); Mademoiselle Shoppe Inc., 199 NLRB 983, 82 LRRM 1022 (1972).

implies sexual misconduct among certain District employees. The leaflet is a crude document, hardly the kind of literature which school district employees might be expected to circulate. Its connection to negotiations is tenuous.[17]

The District could properly conclude that a leaflet such as that prepared by the CSEA has no place in a public school. The District has an interest in insuring that children are not exposed to innuendoes about the sexual activities of employees whom they might know. The District has an additional interest in protecting the reputations of its employees from locker room gossip. The circulation of such stories could be expected to have a lethal effect on the morale of the employees involved. The evidence was clear in this case that real persons were being discussed in the leaflet, despite the disclaimer that the names in the document were fictitious. Some items -- like the "vanilla rope" incident -- described events witnessed by many employees. This would provide the appearance of credibility to other entries, like the suggestion of persons "playing around" in the administration building. The reputations of both management and non-management employees were maligned. It is reasonable that the District should have reacted quickly to identify and punish those responsible.

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[17] The District cites the "Jefferson Standard" case, footnote No. 10, supra, as justification for the discipline of the CSEA members who wrote and distributed the leaflet that caused this action. The hearing officer does not believe the Jefferson Standard case is directly on point. That case raised the issue of whether employees can tear down their employer in leaflets distributed to the public. The Supreme Court concluded that the discharge of the employees was permissible because they were disloyal to their employer. In the present case, the leaflets were not circulated to the general public. Their target audience was the employees of the school district. Thus, the hearing officer concludes that the concept of disloyalty, as explained by the Supreme Court, is not applicable here.

In its brief, CSEA cites the California case of Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596 (1976) as standing for the proposition that publications arising from labor disputes are given "special safeguards" in a libel action. CSEA reasons that "if the same broad standards are not used with regard to what constitutes interference with union activity, school employees of the State of California will be placed in the anomalous position of being disciplined for making statements in the course of union activity, which statements are constitutionally protected."

The central question in Gregory was whether certain statements made about two union leaders were statements of fact or statements of opinion. The court observed that for libel to exist there must be a statement of fact. It concluded that the statements in Gregory were statements of opinion and it upheld the judgment for the defendants.

As the California court noted in Gregory, the United States Supreme Court has adopted the rule of New York Times v. Sullivan, 376 U.S. 254 (1964) as the test for libel in cases involving labor disputes. Linn v. Plant Guard Workers, 383 U.S. 53 (1966); Letter Carriers v. Austin, 418 U.S. 264 (1974). For libel to be proven under the New York Times rule, the plaintiff must show "actual malice" which the court has defined as publication with (1) knowledge of falsehood or (2) reckless disregard of whether the statement was true or not.

In Linn, the Supreme Court summarized NLRB precedent in speech cases and observed that employees have been given protection even for statements that are erroneous and defamatory. However, the court continued:

> . . .the Board indicated that its decisions would have been different had the statements been uttered with actual malice, 'a deliberate intention to falsify[1] or 'a malevolent desire to injure.' E.g., Bettcher Mfg. Corp 76 NLRB 526 (1948); Atlantic Towing Co. 75 NLRB 1169, 1170-1173 (1948). In sum, although the Board tolerates intemperate, abusive and

> inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. 383 U.S. 61, 15 L. Ed. 2d 589.

These cases provide little solace for CSEA. The Gregory distinction between fact and opinion is not helpful. The suggestion in the leaflet that the District's deputy superintendent had intercourse with more than one woman concurrently is a factual inquiry, not a matter of opinion. The apparent suggestion that either Judy C. or V.G. might be "playing around" with someone in the administration building is not a statement of opinion.

Neither is the explanation that "intercourse" means "conversation" helpful to CSEA. In the context of this leaflet a reasonable reading of the word "intercourse" is "coitus." Indeed, Mr. Young testified that the item was humorous because it had a dual meaning and could appear to suggest "some form of sexual relationship" was occurring. By his own testimony, Mr. Young intended to imply more than a "conversation" between the deputy superintendent and the women. The item, written with that intention in mind, might well qualify as what the Supreme Court describes as "a deliberate intention to falsify" or "a malevolent desire to injure."

It seems apparent, therefore, that the District had a legitimate personnel and educational intent in the disciplining of these employees. No evidence was presented to show any other motivation. There was no evidence the District harbored bias against these three employees because of their CSEA involvement, or that it had bias against the CSEA as an organization, or that it disciplined the three employees in an effort to discourage membership in the CSEA.

Neither was there any evidence that the disciplining of the three CSEA officers had "the natural and probable

consequence of interfering'' with the employee exercise of statutory rights. The EERB-conducted election in which CSEA was a party occurred the day after the distribution of the leaflet. It was not until December 9 that the District even determined which organization was responsible. The full disciplinary process did not get underway until January, long after CSEA already had been certified as the exclusive representative. The drop in CSEA membership after the distribution of the leaflet was no greater than membership losses CSEA had incurred in the months before. Thus, given the timing of the disciplinary process in relation to the election, there is no reason to conclude its natural and probable consequence would be an invasion of employee rights.

For these reasons, the hearing officer concludes that the District's suspension of the three employees was not an improper reprisal or discrimination and did not violate Government Code Section 3543.5(a).

As an alternate theory, CSEA alleged in its original charge that the District's actions constituted domination or interference with the administration of CSEA. If proven, this would be a violation of Government Code Section 3543.5(d). CSEA argues that the interrogation of its officers on January 7, 1977 was "an attempt to interfere with the administration of an employee organization." This is a misreading of the law. Government Code Section 3543.5(d) parallels [18]Section 8(a)(2) of the National Labor Relations Act[18]. The

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[18]Section 8(a)(2) of the National Labor Relations Act reads as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer ---
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: ~~Provided~~, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

federal law has been enforced to prevent an employee organization from being controlled by an employer or becoming so dependent upon the employer's favor that it cannot give wholehearted attention to the needs of employees. The law also has been enforced to prevent employer interference with the internal working of an employee organization.

The hearing officer finds nothing in the District's conduct in the present case to substantiate a charge of employer domination or interference.

In its original charge, CSEA also contends that the District's action was a violation of rights guaranteed under Government Code Section 3543.1(b).[19] This section gives employee organizations the access to areas in which employees work and the right to use certain means of communication. In its post-hearing brief, CSEA does not set forth its legal theory for how the District violated this right. The hearing officer finds nothing in the evidence presented at the hearing to substantiate the allegation. Accordingly, the hearing officer concludes that this charge also has not been proven.

Finally, in its post-hearing brief, CSEA raises the theory that the District violated the statute by going forward with its January 7, 1977 investigation when the CSEA members were unrepresented because Mr. Young was out on strike against the CSEA. In support of this theory, CSEA cites Social Workers Union 535 v. Alameda County Welfare Department, 11 Cal.3d 382 (1974) and NLRB v. Weingarten, Inc., 420 U.S. 251, 43 L.Ed.2d 171, 88 LRRM 2689 (1975). Also relevant is a

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19 Government Code Sec. 3543.1(b) reads as follows:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

companion case to Weingarten, International Ladies Garment Workers' Union v. Quality Manufacturing Co., 420 U.S. 276, 43 L. Ed. 2d 189, 88 LRRM 2698 (1975).

In Weingarten, the Supreme Court enforced an NLRB cease-and-desist order to an employer who had denied an employee the right to have a union representative present during an investigatory review which the employee reasonably believed might lead to disciplinary action. The court upheld the NLRB reasoning that the employer's action was a violation of Section 8(a)(1) of the National Labor Relations Act because it interfered with, restrained, and coerced the employee's rights under Section 7 to engage in concerted activities.[20]

But neither Weingarten nor Social Workers Union 535 is helpful to CSEA. In both of those cases the employer specifically denied a request from an employee that a union representative accompany the employee into an investigatory meeting with a management official. That is not the factual situation in the present case. In the present case the District advised the employees of their right to have a representative present at the January 7, 1977 interview. No representative was present because the representative chosen by the employees was on strike. There was no evidence that they would have been prevented from bringing a private attorney with them had they so desired. As counsel for the District argues in her brief, the "failure of representation lies not with the District but within CSEA." The District had no obligation to grant a continuance under these circumstances.

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[20] Section 7 of the National Labor Relations Act is reproduced at footnote No. 11, supra.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of the case, it is hereby ordered that:

The unfair practice charge filed by the California School Employees Association, Chapter No. 44, against the Pittsburg Unified School District, alleging violations of Government Code Sections 3543.5(a) and 3543.5(d), is dismissed.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become final on September 21, 1977, unless a party files a timely statement of exceptions within seven (7) calendar days of service. fee, 3 Cal. Admin. Code Sec. 35030.

Dated: September 8, 1977

Ronald E. Blubaugh
Hearing Officer