

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CLOVIS FEDERATION OF TEACHERS  
LOCAL NO. 1463,

Charging Party,

v.

CLOVIS UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. S-CE-2

PERB Decision No. 61

August 7, 1978

Appearances; Garry G. Mathiason, Larry P. Schapiro and Thomas E. Campagne, Attorneys (Littler, Mendelson, Fastiff and Tichy) for Clovis Unified School District; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid and Sroloff) for Clovis Federation of Teachers, Local No. 1463.

Before: Gluck, Chairperson; Gonzales and Cossack Twohey, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter Board) on exceptions taken by the Clovis Federation of Teachers (hereafter Federation) to the hearing officer's recommended decision. The Federation filed 13 specific exceptions essentially objecting to the hearing officer's conclusion that speeches made by the superintendent of the Clovis Unified School District to teachers employed by the District did not violate Government Code section 3543.5(a) and (b).

The Board has considered the record as a whole and the

attached recommended decision in light of the exceptions. The Board adopts the hearing officer's findings of fact and conclusion that the superintendent's speeches were not threatening and did not interfere with, restrain or coerce employees in violation of Government Code section 3543.5(a) and (b).<sup>1</sup> It does not adopt his rationale.

To prove a violation of section 3543.5(a) it must first be shown that the employer's conduct constitutes reprisals, discrimination, threats of reprisals or discrimination, interference, restraint, or coercion. The Federation did not make such a showing in this case. The hearing officer resolved conflicting testimony to determine the content of the superintendent's speeches. Based on this determination, he found that the Federation did not prove by a preponderance of the evidence that the speeches threatened, interfered with, restrained or coerced employees. It follows that the speeches are not conduct which violates section 3543.5(a). The Board therefore finds it unnecessary to discuss whether the superintendent's speeches were constitutionally protected or whether the District had any intent to interfere with employee rights.

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<sup>1</sup>Gov 1/gov. Code sec. 3543.5(a) and (b) provides:

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.

In addressing the issue of whether or not the District violated section 3543.5(b), the hearing officer was forced to speculate as to which of its rights the Federation claimed the District violated. The Federation, in its charge, post-hearing brief, and exceptions, charged violations of both subsections (a) and (b) of section 3543.5, but provided no separate argument supporting its charge that the District violated section 3543.5(b). If the Federation assumes that a violation of employee rights under subsection (a) automatically constitutes a violation of employee organization rights under subsection (b), the Board does not agree.

Assuming that a single act by the employer can violate the rights of both employees and employee organizations, the charging party must argue specifically which rights of each are violated. The Board will not speculate on this issue, and therefore dismisses the Federation's charge that the District violated section 3543.5(b).

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that:

The hearing officer's dismissal of the unfair practice charge filed by the Clovis Federation of Teachers, Local No. 1463, against the Clovis Unified School District is affirmed.

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By: Raymond J. Gonzales, Member

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Harry Gluck, Chairperson

( / Jerilou Cossack Twohey, Member /

EDUCATIONAL EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

In the Matter of:	)			
	)			
CLOVIS FEDERATION OF TEACHERS,	)			
LOCAL NO. 1463,	)			
	)			
Charging Party,	)	Case	Unfair Practice	
	)		No.	S-CE-2
vs.	)			
	)			
CLOVIS UNIFIED SCHOOL DISTRICT,	)			
	)			
Respondent.	)			
_____	)			

Appearances: Garry G. Mathiason, Larry P. Schapiro and Thomas E. Campagne, Attorneys (Littler, Mendelson, Fastiff & Tichy), for Clovis Unified School District; Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff), for Clovis Federation of Teachers, Local No. 1463.

Before Kenneth A. Perea, Hearing Officer.

INTRODUCTION

The events preceding the administrative hearing held on February 7 and 8, 1977 before the Educational Employment Relations Board (hereinafter EERB) in the above-referenced matter are summarized as follows:

(1) On August 9, 1976, Clovis Federation of Teachers, Local No. 1463 (hereinafter Federation) filed with the EERB an unfair practice charge pursuant to the Educational Employment Relations Act, Government Code Section 3540 et seq. (hereinafter EERA), against Clovis Unified School District (hereinafter District).<sup>1</sup>

(2) On August 26, 1976, the EERB dismissed the charge with leave to amend within 15 calendar days on the grounds that it failed to state the specific section(s) of the EERA allegedly violated.

<sup>1</sup>All statutory references are to the California Government Code unless otherwise noted.

(3) On September 10, 1976, the Federation filed an amendment to the charge alleging that the District violated Section 3543.5(a).

(4) On September 24, 1976, the EERB notified the parties in the matter that pursuant to EERB Emergency Regulation 35005, it had determined that the Federation filed a timely amendment to the charge on September 10, 1976, and that the charge as amended stated a prima facie case.

(5) On October 13, 1976, the Federation filed a "Second Amended Charge"<sup>2</sup> alleging:

During the months of March, 1976, the Superintendent of the above-named school district met with elementary school faculties and Cluster groups of teachers at Clovis High School. At some of these meetings, held during school time with mandatory attendance of teachers, the Superintendent said that if the teachers elect a bargaining agent, the administration will confront the bargaining agent with a list of 150 demands on teacher performance, including the installation of time clocks, no release time for dental appointments, and he further stated that the district will spend in excess of \$50,000 to hire an agent to deal with the employees' bargaining agent. This conduct is in violation of Government Code Sections 3543.5(a) and (b).

Moreover, in further violation of Government Code Sections 3543.5(a) and (b), the administration of the above-entitled school district allowed Carl Tomlinson, a classroom teacher, to circulate their no representation petitions on school time. David Ward, a teacher, was allowed release time from his class to talk to teachers at another school on the issue of no representation. The school district has forbidden employee organizations from using school time for analogous organizational purposes.

(6) On November 11, 1976, the Federation further amended its charge to correct a "clerical oversight" alleging that the conduct referred to in the Second Amended Charge occurred "During the month of March and April, 1976. . ."

(7) The District filed timely answers to all the above charges and amended charges.

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<sup>2</sup> While the unfair practice charge filed on October 13, 1976 was not labeled "Second Amended Charge," at the administrative hearing held on February 7 and 8, 1977, the hearing officer requested the parties to so refer to it for clarification.

(8) At the administrative hearing on February 7, 1977, the Federation moved to withdraw the second paragraph of the Second Amended Charge beginning with the words "Moreover, in further . . ." and ending with the words ". . . organizational purposes" 3/ and said motion was granted.

#### FINDINGS OF FACT

A. Events Preceding the Superintendent's Meetings on April 6 and April 8, 1976

To properly assess the precise scope of the expressions made by the District's Superintendent, Dr. Floyd Buchanan, to certificated employees of the District, it is necessary to examine the context of the labor relations setting in which they were made. NLRB v. Gissel Packing Co., 395 U.S. 575, 23 L. Ed. 547, 71 LRRM 2481 (1969).

In late February 1976, Associate Superintendent Peter Mehas suggested that Superintendent Buchanan make a "State of the District" address, as requested by some of the District's school site principals and teachers, at the District's school sites due to Mehas' concern that Buchanan had lost some of his personal association with the teaching faculty and site principals in recent years because of the District's rapid growth.

The District's associate and assistant superintendents concurred with Mehas' recommendation. Buchanan then requested Mehas to set up a schedule for visiting the District's school sites during the months of March and April 1976.

The meetings commenced as scheduled and Buchanan discussed with the District's certificated employees the following subjects:

- (1) The progress and future of the District's "war against illiteracy;"
- (2) How many teachers would be hired and how many teachers would be transferred due to the rapid growth of the District;

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Although in November 1976, the District received a copy of the amendment from the Federation, the District agreed to formally accept service by the EERB of the amendment at the administrative hearing on February 7, 1977.

- (3) The \$17 million budget as it reflected the District's past growth;
- (4) The District's construction of an elementary school every year;
- (5) The extent of the District's building program for the future; and
- (6) The effect of collective bargaining for public school employees on the future of the District.<sup>4</sup>

Having established the context of the labor relations setting in which the employer expressions were made, we shall now turn to the events in April which were stipulated by the parties as the speeches referred to in the unfair practice charge.

B. The Meetings of April 6 and April 8, 1976

On April 6, 1976, Superintendent Buchanan addressed Cluster I of the Clovis High School which included the social science, English and driver training departments. On April 8, 1976, a similar speech was delivered at the Dry Creek Elementary School with the entire teaching staff present, consisting of approximately 20 teachers. The meetings were held on school time and teachers attending the meetings reasonably understood that attendance was mandatory.

Both the April 6 and April 8 meetings were divided into three-fifteen minute segments. The first segment was devoted to subject items one (1) through five (5) above. The second segment of Superintendent Buchanan's address concerned collective bargaining. The final segment was reserved for questions and answers from teachers present at the meetings.

There is conflicting testimony in the record regarding precisely what Dr. Buchanan stated on the subject of collective bargaining at the meetings of April 6 and April 8, 1976. The Federation called six witnesses on its behalf. The testimony of each witness is summarized as follows:

(1) Mrs. Janet Wigim. Mrs. Wigim was present at the meeting of April 6, 1976 at Clovis High School. Dr. Buchanan stated to the teachers that if the teachers

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<sup>4</sup>/At the end of the Superintendent's first presentation covering subject items one (1) through five (5) above, several questions were raised by District employees regarding collective bargaining and how it would affect the District. Based upon these questions, Buchanan decided to incorporate a discussion of collective bargaining into his presentation at subsequent sites.



elected a bargaining agent "they" would present a list of demands on teachers which would include such things as time clocks and the elimination of release time for dental appointments.

Dr. Buchanan stated that open communication between teachers and administrators would no longer exist, things would have to be much more formal and the "homey" atmosphere that existed would be dissolved by collective bargaining.

Dr. Buchanan discussed the possibility of the District being required to pay for legal advice in order to interpret all the dealings between teachers' organizations at the cost of sacrificing other things within the District.

Dr. Buchanan cited examples of schools in New York where the above items did exist and where collective bargaining did exist.

(2) Mr. Benjamin C. Jameson. Mr. Jameson was also present at the meeting of April 6, 1976 at Clovis High School.

Dr. Buchanan stated that several people had asked him what was going on regarding collective bargaining within the District and that he had called the meeting to explain to people his views on collective bargaining.

Dr. Buchanan suggested that if collective bargaining were implemented, he would not be able to speak to the teachers very freely. Dr. Buchanan further suggested that collective bargaining might result in the installation of time clocks and that people would not be able to get release time for dental appointments.

Dr. Buchanan stated that it would be better for the teachers to go slowly in the area of collective bargaining because most people don't know too much about it.

Dr. Buchanan stated that if collective bargaining took place in the District, the District would place a "long list" of demands on the bargaining table.

Dr. Buchanan stated that release time and time clocks would be a matter of negotiation if a collective bargaining agent was elected.

Dr. Buchanan stated, in answer to a question from the teachers regarding where the money that the District might need to employ negotiating personnel and lawyers

would come from, that the money for negotiations would come out of the District's general fund.

Dr. Buchanan stated his observations that some teachers in the New York schools were allowed a break in the afternoon and that resulted in a cost of thousands of dollars to the taxpayers.

(3) Mrs. Charlene Dilliard. Mrs. Dilliard also attended the April 6, 1976 meeting at Clovis High School. Dr. Buchanan stated that the District had always tried to be fair with the teachers and had taken care of its teachers and that collective bargaining could bring side effects into the District that would not be beneficial to "us". Dr. Buchanan stated that he had visited schools in the East and had seen the effect of unionization in the schools where teachers had demanded things that had nothing to do with the benefit of children.

Dr. Buchanan then stated that he could foresee that if collective bargaining came into being it could result in such things as time clocks being installed on campuses, teachers not being given the freedom that they now had and that we would no longer be able to work together and sit down and work out our differences as we had done in the past.

Dr. Buchanan, in answer to a question about where the money would come from if it came to impasse or negotiations, stated that the money would have to come from the general fund and that it could run up to more than \$50,000 and that the general fund is the same fund that teachers' salaries come from.

Dr. Buchanan stated that one of the school districts he had visited in New York had to employ armed guards due to the disruption within the schools because all the teachers were on coffee breaks.

Dr. Buchanan stated that if collective bargaining took place the District could place on the bargaining table a list of 150 demands including such things as time clocks.

Dr. Buchanan stated that time clocks might be one of the items included in that 150 demand list.

Dr. Buchanan stated that in collective bargaining, teachers could be held accountable for every minute of their time.

Dr. Buchanan stated that collective bargaining and a contract could cut down on the flexibility or freedom to work together between the administration and the teachers.

Dr. Buchanan stated that the teachers could vote for no representation rather than the union or the CTA.

The list of demands by the District also potentially included the elimination of certain release time, for example, time currently taken for dental appointments and this would be subject to negotiations. The District could place on the bargaining table as one of its demands the elimination of this type of release time.

Dr. Buchanan stated that if time clocks became a provision in the contract the teachers would be required to put in so much time and they would be penalized for any time that they clocked out.

(4) Ms. Sandra Smith. Ms. Smith testified that she attended a meeting with Dr. Buchanan at the Temperance-Kutner School. The parties to the hearing stipulated that the meeting at Temperance-Kutner occurred on March 30, 1976 and that all testimony from Ms. Smith regarding said meeting would therefore be stricken.

(5) Mr. Emory Haggin. Mr. Haggin attended the meeting at Dry Creek Elementary School on April 8, 1976.

Dr. Buchanan related some stories about other districts in the East that had collective bargaining laws and some of the problems that they had.

Dr. Buchanan cited examples about what had happened in other school districts he had visited on the East coast which had collective bargaining such as the institution of time card machines and the elimination of doctor visit privileges without some kind of formal process or excuse.

Dr. Buchanan stated that he thought we would be well advised not to participate in collective bargaining at least for a couple of years in order to see how it was going to work.

Dr. Buchanan said that we need to have trust in each other, and we could have our teacher representatives in schools cooperate on a basis similar to the Winton Act.

At the conclusion of Dr. Buchanan's speech, one of the teachers, David Ward, said he would like all of the teachers to remain for moment. Petitions were then produced stating language to the effect that the undersigned did not believe that collective bargaining is in the best interests of the teachers of Clovis Unified School District. David Ward spoke to the effect: "Now that you've heard Dr. Buchanan's side, if you would be interested in signing these petitions, we have them here."

Emory Haggin offered hearsay evidence of a general conversation between Mr. John Welfare, a teacher at Clark School, and Mr. Haggin. Mr. Welfare stated that some people who had signed pledge cards for California Teachers Association (hereinafter CTA), had asked that their names be withdrawn or their pledge card be returned.

Dr. Buchanan stated that these things could happen in Clovis Unified School District.

Dr. Buchanan indicated that if negotiations took place the District might have to put a large number of demands on the bargaining table.

Dr. Buchanan used the term "proceed slowly" in connection with collective bargaining.

In answer to a question regarding the cost of collective bargaining for the District, Dr. Buchanan said it was his understanding that it could run into a considerable amount of money and that money all came out of one pool and it may well come out of "our" pocketbook.

Dr. Buchanan said that we should sit back and see what happens, "til the water clears," and that there could be some things that would be bad for us to be involved in.

(6) Ms. Judith Farrington. Ms. Farrington attended the meeting at Clovis High School on April 6, 1976.

Dr. Buchanan said that if we elect a bargaining agent, one of the things that the school district would do would be to install time clocks and restrict release time for doctor's appointments.

The District presented two witnesses, Dr. Peter Mehas and Superintendent Buchanan. Their testimony is summarized as follows:

(1) Dr. Peter Mehas. Dr. Mehas attended the meeting at Clovis High School on April 6, 1976. Superintendent Buchanan appealed to the teachers in attendance to "go slow and plow deep." He asked them to take a close look and move cautiously before anybody made any rash decisions.

Dr. Buchanan said that it was conceivable that the District would have to counter the teachers' initial proposal by bringing up another 150 items that might not even be relevant to the needs of the District. As an example, Dr. Buchanan said that there was talk in the administrative circles of putting in time clocks at a school and Dr. Buchanan let the teachers be aware that this was a negotiable item under collective bargaining.

Dr. Buchanan made everyone at the meeting aware that the money for collective bargaining had to come from somewhere and that in the District it would probably have to come from the general fund.

In answer to a question regarding what would be the choices on the ballot, Dr. Buchanan answered that they could choose one of the representatives or they could choose no representation at all.

(2) Superintendent Buchanan. At the meetings of April 6 and April 8, Superintendent Buchanan explained to the teachers that principals had substantial autonomy concerning working conditions, working hours, and teacher starting times under the existing structure of the District. Buchanan then enumerated some of the things that could happen under collective bargaining. Dr. Buchanan testified that he

stated to the employees that:

. . .one of the things that could possibly happen is that teachers could come in with large demands, the School Board comes back with large demands. Then somewhere in the middle they try to decide a working package for the School District.

Buchanan explained that this type of process could restrict prerogatives of school principals due to the binding nature of the contract and that this in turn would apply to medical and dental leaves which may be covered by the contract.

The subject of time clocks entered into Dr. Buchanan's presentation. Buchanan testified:

The question came up about length of the school day and some of the things that are working conditions that are discussed in collective bargaining and I pointed out that sometimes people on both sides ask for ridiculous positions in hopes of getting a concession from the other side in the relation what they want, and I pointed out for example that time clocks is one of these things, and people sometimes in the bargaining process end up giving the other person something that might be a ridiculous request that they really didn't want, but they wanted to trade away, and that as a result sometimes we do end up with such things as time clocks, we end up with principals that no longer have the prerogative of interpreting school time and duties of teachers, and so forth.

Continuing, Buchanan explained to the teachers that he had observed that some of the contracts that had been negotiated were 150 pages long or longer and that the CTA had prepared 240 pages of demands in some school districts. Buchanan asked the teachers to make their initial proposals more reasonable and to follow the negotiations to see that the exclusive representative did not accept something as "heinous" as time clocks to get something in return that was important to it and that may or may not be important to the teachers and/or the children's' education.

Dr. Buchanan also expressed to the employees his concern about the expense to the District of negotiations. Buchanan stated that he had read a recent article in the newspaper involving Fresno Unified School District and a statement by that District's then superintendent, Dr. Finch, that the District would have to spend \$50,000 in attorney's fees to negotiate on

behalf of the Fresno Unified School District. Buchanan then stated that within the near future it could cost the District \$50,000 to administer employer-employee relations under collective bargaining.

All of the witnesses testified from memory regarding Dr. Buchanan's statements. All witnesses, with the exception of Ms. Farrington and Superintendent Buchanan who were representatives of the parties, were sequestered prior to testifying.

Resolution of conflicting testimony by witnesses such as those in this matter, all of whom appeared sincere and credible, is a difficult task. Memories, however, are often eroded by the passage of time. It is therefore understandable that there may be some inconsistency among witnesses because the hearing was held several months after the subject speech. It therefore appears likely that any inconsistencies in testimony were the result of the passage of time rather than any deliberate attempt by any of the witnesses to color the truth.

It is concluded that Dr. Buchanan stated at the meetings of April 6 and 8, 1976 that if collective negotiations were implemented in the District it was Buchanan's opinion that relations between the District and the teachers would become more formal. Dr. Buchanan further stated that if the teachers choose to bargain with the District that the District would have to counter the teachers' demands with a long list of demands which might run as high as 150 items. Dr. Buchanan stated that items such as release time for dental appointments, which was currently administered informally by the school principals, and time clocks, would be subject to negotiations. Dr. Buchanan cautioned that collective negotiations could possibly be expensive to the District and would require sacrificing other budgeting items. Dr. Buchanan cited examples of what he considered to be some of the negative effects of collective bargaining as he had observed them in public schools outside California which included having to use armed guards to supervise students during the teachers' coffee breaks.

The conclusions regarding Dr. Buchanan's statements at the meetings of April 6

and 8 are based upon Dr. Buchanan's own testimony as corroborated by the District's witness, Dr. Mehas, and four of the five witnesses for the Federation whose testimony has been considered regarding Dr. Buchanan's speech. The testimony of Ms. Farrington, the only witness whose testimony substantially differed from all other witnesses, is found to be inaccurate. As noted above, said inaccuracy can be explained due to the passage of time between Buchanan's speech and the hearing.

#### ISSUES

(1) Whether Sections 3543.5(a) and (b) may be retroactively applied to conduct occurring in April 1976.

(2) Whether the Federation's Second Amended Charge was timely filed pursuant to the EERB's administrative rules and regulations.

(3) Whether the District's superintendent may inform certificated employees that in the course of negotiations it is possible for 150 demands to be placed on the negotiating table, including such topics as release time and time clocks, without violating Sections 3543.5(a) and (b).

(4) Whether the District's superintendent may inform certificated employees that the expenses of being represented in negotiations could exceed \$50,000 for a school district, without violating Sections 3543.5(a) and (b).

#### CONCLUSIONS OF LAW

##### I

#### THE CONSTITUTIONALITY OF THE RETROACTIVE APPLICATION OF SECTIONS 3543.5(a) AND 3543.5(b)

Respondent strongly urges that the charges in this matter should be dismissed since the expressions by Superintendent Buchanan giving rise to the charges occurred in April 1976, and the retroactive application of Sections 3543.5(a) and 3543.5(b) thereto would violate the federal and state Constitutions' mandate against ex post



facto laws.<sup>5</sup>

The EERB itself has recently had the opportunity to examine the question of Sections 3543.5(a) and 3543.5(b) retroactive application in San Dieguito Faculty Association v. San Dieguito Union High School District, EERB Decision No. 22, September 2, 1977. In considering the issue of the constitutional validity of the EERA's retroactivity amendment, the Board declared:

As a statutory administrative agency with no powers to find a statute unconstitutional, we are bound to interpret the EERA as we find it and leave to the judiciary questions concerning the constitutional validity of the EERA on its face.

Accordingly, the hearing officer has no alternative but to find as the Board has in San Dieguito, that he is without power to find Sections 3543.5(a) and 3543.5(b), retroactively applied, unconstitutional and leave to the judiciary any questions regarding the constitutional validity of the EERA.

## II

### THE AMENDED UNFAIR PRACTICE CHARGE FILED ON SEPTEMBER 10, 1976

Respondent argues that the Second Amended Charge filed on September 10, 1976 should be dismissed because it was not timely filed.

The original charge filed by the Federation on August 9, 1976 failed to state a prima facie case pursuant to 8 Cal. Admin. Code Section 35004 in that it failed to allege which specific section(s) of the EERA had been violated. On August 30, 1976, the Regional Director dismissed said charge with leave to amend within 15 calendar days.

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<sup>5</sup>The EERA, Chapter 961 of the Statutes of 1975, effectuated Sections 3543.5(a) and 3543.5(b) on July 1, 1976. By Chapter 421 of the Statutes of 1976, the California State Legislature on July 10, 1976 amended the EERA and made Sections 3541.5, 3543.5 and 3543.6 retroactively operative to April 1, 1976.

The hearing officer assigned to process the case correctly determined pursuant to 8 Cal. Admin. Code Section 35007(a) that by letter filed September 10, 1976 the Federation filed a timely amendment alleging therein that respondent "has engaged in or is engaging in an unfair practice within the meaning of Sections 3543.5(a) of the California Government Code . . ."

The District's argument that the amended charge was untimely filed for failure to file within 20 days from a letter from the Acting Director to the Federation dated August 18, 1976 must fail. The EERB's letter of August 18, 1976 merely stated that "we request you submit your amended unfair labor practice charge postdated no later than Tuesday, August 24, 1976." Said "request" is not construed to have been an order from the EERB, non-compliance with which would result in the immediate dismissal of the charge without leave to amend. The Federation was instead warned that if an amendment was not filed by August 24, 1976, the EERB would then dismiss the charge at some time in the future. The EERB carried out this warning on August 30, 1976 when the charge was dismissed with leave to amend within 15 calendar days pursuant to a formal "Notice of Dismissal". The Federation's letter filed September 10, 1976 was therefore a timely filed amendment to the charge.

### III

#### SUPERINTENDENT BUCHANAN'S SPEECHES OF APRIL 6 AND 8

##### A. The Applicable Standard for Pure Speech Cases Arising under the EERA

Before it may be determined whether a violation of Sections 3543.5(a) and 3543.5(b) occurred as a result of Buchanan's speeches on April 6 and 8, 1976, the standard by which such speech shall be judged must be established.

The Federation alleges a violation of Sections 3543.5(a) and 3543.5(b) which 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.

- (b) Deny to employee organizations rights guaranteed to them by this chapter.

The conduct of which the Federation complains in this case consists solely of the speeches of Superintendent Buchanan before teachers of the District. Section 8(c) of the Labor Management Relations Act<sup>6</sup> protects such speech in private sector labor relations so long as it contains no threat of force or reprisal or promise of benefit.<sup>7</sup> But before Section 8(c) became law in 1948, the United States Supreme Court had occasion to outline the rough parameters of an employer's right to speak to its employees. In Virginia Electric and Power Co. v. NLRB, 314 U.S. 469, 9 LRRM 405, 408 (1941), the National Labor Relations Board (NLRB) concluded that the employer had interfered with its employees' right to organize. The Court feared that the Board had based its conclusion solely on a poster and speeches which in very general terms urged the formation of an "independent" (company) union instead of considering the whole course of employer's conduct, which included interrogation of employees regarding union activities, and a supervisor's threats of discharge for "messing with the C.I.O." The Court considered the poster and speeches not to be coercive in themselves and remanded the case to the NLRB saying:

Neither the [National Labor Relations] Act nor the Board's order here enjoins the employer from expressing its view

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<sup>6</sup>29 U.S.C. Section 158(c).

<sup>7</sup>Section 8(c) of the Labor Management Relations Act states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

on labor policies or problems. The employer in this case is as free now as ever to take any side it may choose on this controversial issue. But certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways.

Following this decision, the NLRB continued to limit employer speech, in cases involving little more than pure speech and had at least some success obtaining enforcement of its orders in this case in the Courts of Appeal.<sup>8</sup> In 1948, the Taft Hartley Amendments to the NLRA, including Section 8(c), were introduced in Congress. The House version of Section 8(c) would have restricted the NLRB to using only employer statements which constituted threats or promises in and of

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themselves. The Senate version took the contexts of statements into account. A conference committee of both houses wrote the final version which was a compromise between the two original versions. Scholars dispute whether the final version represents an enactment of the First Amendment or whether its authors meant for it to go further.

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<sup>8</sup> See American Tube Bending Co., 44 NLRB 121, 11 LRRM 61 (1942) enf.den. 134 F.2d 994, 12 LRRM 615; Clark Bros. Co., C.A.2, 70 NLRB 802, 18 LRRM 1360 (1946), enfd, other grounds 163 F 2d 313, 20 LRRM 2436 (1947); Monumental Life Insurance Co., CA.6, 69 NLRB 247, 18 LRRM 1206, enfd. 162 F.2d 340, 20 LRRM 2225 (1947).

<sup>9</sup>Morris, The Developing Labor Law, BNA, 1971, pp. 72-73.

<sup>10</sup> Ibid.

<sup>11</sup> Gorman, Robert, Basic Text on Labor Law, West Publishing Co., 1976, p. 150.

In NLRB v. Gissel Packing Co., supra, Chief Justice Warren stated that Section 8(c) "implements" the First Amendment. The hearing officer, however, need not decide whether Section 8(c), and all of the case law following it need be taken cognizance of pursuant to Fire Fighters Union v. City of Vallejo, 12 Cal. 3d 608 (1974) nor whether Section 8(c) is constitutionally mandated. Virginia Electric and Power Co., supra, expressly protects noncoercive statements of opinions on labor problems, pursuant to the First Amendment. Courts recognized long before Section 8(c) became law that a threat of reprisal was one of the sorts of coercive conduct referred to in that decision.<sup>12</sup> As will be discussed below, Buchanan's statements, which must stand or fall as threats, were not threatening.<sup>13</sup>

B. Application of the Standard to Superintendent Buchanan's Speeches of April 6 and 8

Examination of the facts in this case in light of the standards established in Virginia Electric and Power Co. and Gissel leads to the conclusion that the speech in question did not contain a threat of reprisal or discrimination. The evidence shows that the "State of the District" address, covering five separate subjects in addition to negotiations, was conceived of and delivered as a means of bridging a communication gap between the superintendent and the employees of a rapidly expanding suburban school district. The subject of negotiating was only added after the first address when it became obvious through questions from employees in attendance that the topic was of vital interest to the employees.

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<sup>12</sup>See e.g. NLRB v. Brown Brockmeyer, 143 F. 2d 542, 14 LRRM 763 (1944), CA.6.

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While there was some evidence in the record that some authorization cards signed by certain employees were withdrawn by employees and that recruiting efforts by the Federation were difficult, such evidence was based upon hearsay, is speculative and lacks a showing of a causal nexus between Dr. Buchanan's addresses on April 6 and 8 and the withdrawals of authorization cards and recruiting efforts. Accordingly, it is concluded that charging party has not shown, by a preponderance of the evidence, that there was any actual interference, restraint or coercion in the employees' exercise of their free will in violation of Section 3543.5(a).

The subject of medical and dental leaves was expressed by Buchanan as one of the things that possibly "could" be affected through the give-and-take negotiations process of negotiating. The superintendent did not, however, threaten to curtail medical and dental leaves if negotiating was implemented. His speech can only reasonably be interpreted to be the expression of his opinion regarding one of the possibilities under negotiating.

Nor did Buchanan threaten to install time clocks should the certificated employees of the District choose to institute negotiating. Rather, Superintendent Buchanan used time clocks as an example of what were in his opinion, "ridiculous" conditions that may result when people begin negotiations from extreme positions which they intend to trade away during negotiations.

On the subject of the District's presentation of initial demands on the negotiating table, Buchanan expressed to the teachers, as an example of what in his opinion happens when the parties do not approach negotiations reasonably, that the District would have to counter the teachers' initial proposal with a long list of demands which might run as high as 150 items. Buchanan's personal assessment of what the District might do during the give-and-take negotiation process cannot reasonably be interpreted as a threat.

Finally, Superintendent Buchanan expressed his concern regarding the cost of the District of the negotiating process, using as an example Fresno Unified School District, where the superintendent was quoted in the press as stating that the Fresno School District would have to spend \$50,000 in attorneys fees to negotiate on behalf of the school district. Buchanan then went on to state that the Legislature had not allocated funds to school districts to offset the increased costs of collective bargaining, that such costs must come from the same school budget as salaries and that it would not surprise him if within a year or two \$50,000 would not be an unreasonable amount to have budgeted for collective bargaining in the Clovis Unified School District.

Like the superintendent's statements regarding medical and dental leaves, time

clocks, and initial demands, Buchanan's statements regarding the costs of negotiating cannot be construed to have been an actual or implied threat. Buchanan's speech was clearly the expression of his view or opinion wherein he reiterated to the employees a newspaper article he had read regarding Fresno Unified School District, stated his concern over the fact that the Legislature had not allocated funds to the local school districts to offset costs to the school budget for negotiating and expressed an opinion that it would "not surprise me if \$50,000 would be a reasonable amount to have budgeted for collective bargaining in a year or two." Such vague and casual opinions are simply not threats within the meaning of Section 3543.5(a) and are therefore protected speech pursuant to the First Amendment and Virginia Electric and Power Co., supra.

In the absence of a threat, the burden is upon the Federation to prove by a preponderance of the evidence that there was actual interference, restraint or coercion in the employees' exercise of their free will. The Federation has failed to meet that burden in this case.

Even assuming that the speech in question was not protected pursuant to the First Amendment and Virginia Electric and Power Co., supra, it would still be necessary to dismiss the charge. In San Dieguito, supra, the EERB held that in order to find a violation of Section 3543.5(a):

. . .we would at a 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.

As stated above, the uncontradicted evidence shows that Buchanan's "state of the District" address was conceived of and delivered as a means of bridging a communication gap between Superintendent Buchanan and the employees of a rapidly expanding suburban school district. Furthermore, the subject of negotiations was only added as an afterthought when questions were posed on the subject from employees during Buchanan's first address. There is no evidence in the record, therefore, from which to conclude that the subject speech was intended to interfere with the rights of employees to choose an exclusive representative.

Furthermore, the hearing officer cannot conclude that the subject speech 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. As in San Dieguito, it is concluded that "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."

C. Application of the Findings to Section 3543.5(b)

The Federation has additionally alleged that Superintendent Buchanan's speeches of April 6 and 8 were a violation of Section 3543.5(b).

Section 3543.5(b) states:

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

(b) Deny to employee organizations rights guaranteed to them by this chapter.

The Federation apparently contends that its rights as an employee organization to conduct a preelection campaign free from threats of reprisals or discrimination against employees and/or interference, restraint or coercion of employees because of their exercise of rights guaranteed by the EERA were denied.



Having found, however, that the employees of the District were not threatened with reprisals or discrimination nor actually interfered with, restrained or coerced, pursuant to Section 3543.5(a), it cannot be found that any rights of the Federation were concomitantly denied in this case.

In conclusion, it should be noted that the fact that Buchanan's addresses on April 6 and 8 took place during normal school hours and that attendance was reasonably understood to be mandatory does not alter the findings that no violation of Sections 3543.5(a) or 3543.5(b) occurred. Charging party did not show through direct testimony that it asked for nor was denied equal opportunity to make preelection speeches during school time nor that the Federation did not have alternative means to carry its message to the employees. Thus, under the facts of this case, it would be premature to begin formulating guidelines regarding so called "captive-audience" speeches.

ORDER

The unfair practice charge filed by the Clovis Federation of Teachers, Local No. 1463, is hereby dismissed.

Pursuant to Title 8, California Administrative Code, Section 35029, this recommended decision and order shall become final on October 20, 1977, unless a party files a timely statement of exceptions. See 8 Cal. Admin. Code Section 35030.

Dated: October 8, 1977

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Kenneth A. Perea  
Hearing Officer