STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. CHULA VISTA CITY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-73 PERB Decision No.70 September 18, 1978

Appearances; Charles Gustafson, Attorney for Chula Vista Elementary Education Association, CTA/NEA; Arlene Prater, Attorney for Chula Vista City School District.

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

DECISION

On October 3, 1977, Hearing Officer Kenneth Perea rendered the attached recommended unfair practice decision. The case involved a charge filed by Chula Vista Elementary Education Association, CTA/NEA (hereafter Association) against Chula Vista City School District (hereafter District). The charge alleged that the District permitted the Chula Vista Federation of Teachers (hereafter Federation) to address the District at a public meeting on the subject of increasing the wages of teachers. The charge further alleged that this act violated the Association's right, as the exclusive representative of certificated employees, to be the sole representative of those

employees in their employment relations with the District.[1]
The hearing officer found that the District did not meet and negotiate with the Federation within the meaning of section 3540.1(h) of the Educational Employment Relations Act (hereafter EERA).[2] The hearing officer further found that the acts alleged did not violate section 3543.1(a) of the

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[1] Government Code section 3543.1 (a) states:

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

[2] The EERA is codified at Government Code sections 3540 et seq. Hereafter, all statutory references are to the Government Code unless otherwise noted.

Section 3540.1(h) states:

> (h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

EERA.[3] Citing the decision of the United States Supreme Court in Madison School District v. Wisconsin Employment Relations Commission,[4] the hearing officer concluded that representatives of minority employee organizations have a First Amendment right of free speech, and that the record in this case showed no danger to the Association's status as exclusive representative that would justify curtailing the right of free speech of the Federation's representative.

The Association filed exceptions to the hearing officer's decision, claiming that the actions of the Federation constituted more than "a mere expression of views," in that the speech made by the Federation's representative was "meeting and negotiating" within the meaning of the EERA.

We have considered the record as a whole, and have evaluated the recommended decision in light of the exceptions filed by the Association. We affirm the rulings, findings and conclusions of the hearing officer to the extent that they are consistent with this opinion.[5]

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[3]The text of section 3543.1(a) is quoted at footnote 1, supra.

[4](1976) 429 U.S. 167 [93 LRRM 2970].

[5]In addition to the facts found by the hearing officer, there are three other facts discernible from the record. First, a representative of the Federation made presentations at two school board meetings after January 18. These presentations were similar in content to the presentation of January 18, and thus they provide no greater support for CTA's position than does the January 18 presentation. Second, members of the Federation picketed a school board meeting that occurred on April 12, 1977. This fact is irrelevant to the charge that the District negotiated with the Federation in

The fundamental purpose of the EERA is to guarantee collective negotiating rights to public school employees. The principle of exclusive representation, adopted in the private sector,[6] is the key medium prescribed by the EERA for effectuating collective negotiations. See sections 3540, 3540.1(a), and 3543.3.[7] Negotiations that take place between minority representatives and public school employers are inimical both to the EERA and to the cardinal principle of exclusivity, and are prohibited by the EERA.

(cont. of footnote 5)

violation of CTA's rights under the EERA. Third, uncorroborated hearsay testimony indicated that the superintendent of the District held meetings with the presidents of five employee organizations biweekly, and that the superintendent had taken the position that any matter, including those within the scope of representation, could be discussed at those meetings. We decline to give any weight to this evidence, both because it constitutes uncorroborated hearsay, and because no evidence indicates that matters within the scope of representation in fact were discussed at those meetings. We note that the original charge filed by the Association does not allege that such meetings occurred, and that the charging party did not amend its charge to allege that such meetings occurred.

[6]See Houde Engineering Corps (1934) 1 NLRB (old series) 35; Medo Photo Supply Co. v. NLRB (1944) 321 U.S. 678.

[7]Section 3540 states in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative

We find, however, that considering the entire record in this case, the District and the Federation were not engaged in negotiations, nor did the District violate the Association's right to be the sole representative of unit employees in their employment relations with the District. We accordingly uphold the hearing officer's conclusions.

(cont. of footnote 7)

> of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

Section 3543.1(a) is set forth at footnote 1, supra.

Section 3543.3 states:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation. (Emphasis added.)

ORDER

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

The charge filed by Chula Vista Elementary Education Association against Chula Vista City Elementary School District is hereby DISMISSED.

By: Harry Gluck, Chairperson   Raymond J. Gonzales Member

Jerilou Cossack Twohey, Member, concurring:

I agree with my colleagues' decision to dismiss the unfair practice charges against the District. While upholding the conclusions of the hearing officer, my colleagues have conspicuously refrained from adopting the rationale of the hearing officer, yet have not fully stated their own reasoning. My colleagues merely admonish that minority organizations possess a right to freedom of speech, and baldly conclude that curtailment of that constitutional freedom could not be justified in this case since the District did not negotiate with the minority organization or violate the right of the Association to be sole representative. Their discussion gives little guidance on how the Board will distinguish expressions of view from attempts to usurp the role of the exclusive representative,

The circumstances of this case raise one of the most sensitive and delicate problems of public sector labor relations: how to reconcile the freedom of speech of minority organizations before public meetings of a governmental body with the requirements of the principle of exclusive representation. A similar question does not arise in private sector labor relations as there are no comparable public forums by which minority organizations have access to the employer.[1] In this delicate field it is incumbent upon the Board to delineate the contours of acceptable and unacceptable behavior.

The Board deals in this case with a charge brought by an exclusive representative against the public school employer alleging that the employer violated sections 3543.5 and 3543.1(a) by allowing a minority employee organization to represent the unit after the time the charging party was established as exclusive representative. Such a charge may be sustained by a showing that the public school employer: (1) negotiated or attempted to negotiate with the minority organization; or (2) allowed the minority organization to represent the unit in some manner other than negotiating or attempting to negotiate.

In either instance, the first step of the analysis is to determine whether the conduct of the minority organization constituted negotiating, an attempt to negotiate, or representation of the unit. The second step is to determine to what extent

[1] See Madison v. WERC (1976) 429 U.S. 167, 174-75 (majority opinion), 178-180 (separate concurring opinions of Justices Brennan and Stewart) [93 LRRM 2970, 2973, 2975-76].

the employer participated in the action of the minority-organization.

Conduct of the Minority Organization

The United States Supreme Court has repeatedly held that exclusivity is so central to the legislatively created structure of industrial relations that some infringement of First Amendment rights of association is justified.[2] Only the exclusive representative may negotiate with the employer about matters within the scope of representation.

Negotiation is the process whereby an employee organization and an employer seek to secure agreement.[3] When a minority or non-exclusive organization strives to reach an agreement with the employer, the employer is subject to conflicting demands which may severely disrupt the foundations of stable labor relations. In these circumstances, a minority organization may be forbidden from continuing to press its demands.[4] Constitutional

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[2] Railway Employees Dept. v. Hanson (1956) 351 U.S. 225, 233-235 (federal statute authorizing agency shop agreements for private railway employees held constitutional) [38 LRRM 2099, 2104]; Abood v. Detroit Bd., of Ed. (1977) 431 U.S. 209, 220-21, 232 (state statute authorizing agency shop agreements in public sector held constitutional) [95 LRRM 2411, 2415, 2420].

[3] Section 3540.1(h) defines meeting and negotiating as "meeting ... in a good faith effort to reach agreement (Emphasis added.) See Madison, supra. 429 U.S. at 176 [93 LRRM at 2973]; Abood, supra. 431 U.S. at 221 [95 LRRM at 2416-17]; The Emporium (1971) 192 NLRB 173, 185-86 [77 LRRM 1669, 1671] affmd. 420 U.S. 50, 60-61 [88 LRRM 2660, 2664-65].

[4] See Abood, supra. 431 U.S. at 221 [95 LRRM 2415].

protection of speech certainly extends to an organization's mere expression of its viewpoint. But, when a minority organization moves beyond a mere expression of view and begins to press for an accommodation with the employer, or indicates to the employer that harmonious employment relations will be secured only when its separate demands are met regardless of the accommodation reached with the exclusive representative, the minority organization has engaged in activity which is neither protected by the EERA or sheltered by the constitutional guarantees of speech and association.

Of course, an employer may be made aware that it is being pressed into negotiations with a minority organization by words and actions that fall short of an express invitation to negotiate. In The Emporium the NLRB examined the activities of two employees who sought to rectify what they perceived as racially discriminatory working conditions. Abandoning the grievance procedure which the exclusive representative had determined to utilize, the two employees sought to "discuss what was happening among minority employees" with the "top management" of the employer. The employees attempted to secure these discussions by holding a press conference on their allegations of the employer's racially discriminatory policies and by picketing and leafletting in front of the employer's establishment. Reviewing these activities the NLRB found that something more than a presentation of grievances had taken place,

and that the employees had in fact demanded to negotiate with the employer for the entire group of minority employees.[5]

In the instant case insufficient evidence has been presented to sustain a finding that the Federation attempted to negotiate with the District. The record reveals that on one occasion a Federation representative addressed the school board urging the board to consider the special demands and strains to which teachers are subject. On two other occasions the President of the Federation addressed school board meetings spelling out in greater detail her desire that teacher's salaries be as high as administration salaries, characterizing the prior year's raise as inadequate, and predicting that unless salaries met cost-of-living increases that the District's charity drive would falter. What the record lacks is any indication that the views expressed on these occasions by Federation speakers materially differed from the views of the Association. In fact, the Association argues that its negotiating position was undermined because the Federation presented arguments at the January 18, 1977 school board meeting that the Association was holding in reserve for negotiations. The Association complains only that the Federation spoke out of turn. We must conclude that the Association was not troubled by the presentation of the views of the Federation. Rather the Association sought only to remove Federation personnel

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[5] Based on this finding the Board dismissed an unfair practice charge alleging the employees had been discriminatorily discharged for engaging in protected concerted activity.

from the spotlight of public attention available at public school board meetings. But the EERA is not designed to protect exclusive representatives from political rivals who find their way into the public eye. Without more, the mere allegation that the Federation gained attention by appearing at the employer's public meeting affords no basis for a charge against the employer for permitting the appearances.

However, the presentations of the Federation did not take place in isolation. The record reveals that at the April 12, 1977 meeting of the school board Federation members picketed outside and brought their signs inside (but there is no evidence of what the signs said or whether they identified a position as that of the Federation), chanted "16 percent and not a penny less" before the meeting, and walked out of the meeting at an unspecified point. Again, there is no evidence in the record on the precise reference of the chant, the occasion of the walk-out, or language on the picket signs. Thus we cannot determine whether Federation members were thereby presenting demands which differed from those of the Association, While the picketing, chant and walk-out by some employees of the District all could convey to the District that harmony in the District's schools was dependent on meeting the demands of those particular employees, no evidence indicates that their demands differed from those of the exclusive representative.

In short, we are presented with a case in which the exclusive representative appears to be complaining that a minority organization echoed its demands but in a louder voice. In these circumstances it cannot be held that the minority organization was attempting to negotiate with the District,

The charging party has also argued that, whether or not the Federation attempted to negotiate with the District, the Federation represented the unit members in their employment relations within the meaning of section 3543.1(a). If so, the Federation would be subject to an unfair practice charge under section 3543.6(a)[6] And, if the District acquiesced in the representational activities of the Federation, it would potentially be subject to an unfair practice charge under section 3543.5(b)[7]. But sections 3543.1(a) and 3543.5(b) and 3543.6(a) will, if possible, be interpreted so as to be constitutional, that is, constitutionally protected freedom of speech will not be treated as a representational activity in violation of the EERA. And speech which does not effectively

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[6] Sec. 3543.6(a) provides:

> 3543.6. It shall be unlawful for an employee organization to:
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.

[7] Sec. 3543.5(b) provides:

> 3543.5. It shall be unlawful for a public school employer to:
>
> . . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

See Mount Diablo Unified School District (12/30/77) EERB Decision No. 44 at p.6.

[8] People v. Amor (1974) 12 Cal.3d 20.

undermine the exclusive status of the exclusive representative is constitutionally protected.[9]

To demonstrate that the status of the exclusive representative had been undermined by the activities of the Federation, the Association presented the opinion of the Association's chief negotiator that the impact of his presentations during negotiations had been lessened because the Federation's representatives used the same information in presentations before the governing board. But, the bald opinion of the Association's negotiator was not corroborated in any way. The Association also presented evidence that "two or three" Association members threatened to resign if the Federation was permitted to behave as it was. In these circumstances it cannot be found that the status of the charging party was demonstrably harmed.

Conduct of the District

The record indicates that the District acquiesced in the presentations of the Federation on January 18, February 15 and April 12, 1977 on the advice of its counsel that failure to allow the presentation could well violate the rights of the Federation to freedom of speech. On the other hand, the school board prudently refrained from engaging in probing questions fearing that it would thereby provoke a charge that it had allowed the Federation representative to represent the unit. Caught between

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[9] See Madison, supra. 429 U.S. at 174-75 [93 LRRM at 2973] Abood, supra. 431 U.S. at 22-23 [95 LRRM at 2416].

the constitutional demand of freedom of speech and the statutory commitment to allow only the Association to represent the unit, the school board chose a narrow middle path which we cannot fault.

As to the picketing, chanting, and walk-out on April 12, there is no evidence that the school board acquiesced in the behavior. We are told that chanting took place before the meeting. By implication, it ended when the meeting began. In these circumstances improper involvement of the school board in the events of April 12th cannot be found.

In sum, the Association did not establish that either the Federation or the District engaged in conduct forbidden by the EERA.

Jerilou Cossack Twohey, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA, Charging Party, vs. CHULA VISTA CITY SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-73

Appearances; Charles R. Gustafson, Attorney for Chula Vista Elementary Education Association; Arlene Prater, Attorney for Chula Vista City School District.

Before Kenneth A. Perea, Hearing Officer.

INTRODUCTION

On February 11, 1977 the Chula Vista Elementary Education Association (Association) filed an unfair practice charge with the Educational Employment Relations Board (EERB) alleging a violation of Government Code Section 3543.5(a).[1] The Chula Vista City Elementary School District (District) filed an answer on March 4, 1977. An informal conference was held on March 28, 1977 and a formal hearing was held before an EERB hearing officer on April 21, 1977 at the EERB Regional Offices in Los Angeles. Opening and closing briefs were filed by the parties and an amicus Curiae brief was filed by the Chula Vista Federation of Teachers.

1 All section references are to the Government Code unless otherwise specified. Section 3543.5(a) protects the rights of employees under the Educational Employment Relations Act (EERA). (continued)

The charging party contends that presentations by the Chula Vista Federation of Teachers (Federation) at public meetings of respondent's Board of Education (Board) are disruptive to the meet and negotiate process and to the exclusive negotiating representative status of the Association. The respondent argues that public expressions by a representative of a minority employee organization (one not certified as the exclusive representative) are protected by the First Amendment according to the recent United States Supreme Court decision in Madison School District v. Wisconsin Employment Relation Commission, 429 U.S. 167, 97 S. Ct. 421 (1976).

ISSUE

Did the respondent's Board of Education violate Section 3543.5(b) by allowing a representative of an employee organization, which is not the exclusive representative, to make presentations regarding wages, hours of employment and other terms and conditions of employment at a public Board meeting?

(footnote 1 cont'd)

Section 3543.5(b) protects the rights of employee organizations under the EERA. The Association apparently intended to allege a violation of Section 3543.5(b) because it alleges interference with the right to represent under Section 3543.1(a). This is technically an improper statement of the charge. All parties, however, have treated this case as if there were an allegation that the employer violated Section 3543.5(b) by: (1) meeting and negotiating with a minority employee organization representative; and (2) not allowing the charging party to be the sole party to represent the unit in its employment relations with the public school employer pursuant to Section 3543.1(a). Because there was no objection to the manner in which the charge was filed and because all parties have treated it as cited above, the hearing officer will do the same.

FINDINGS OF FACT

The Chula Vista City Elementary School District is located in San Diego County and has an average daily attendance of approximately 15,395 students.[2] The Association was recognized as the exclusive representative of a classroom teachers unit on July 6, 1976 after the Federation withdrew its intervening petition. There are approximately 730 certificated employees in the unit.

On December 6, 1976 the Association and the District signed a collective negotiations agreement. That contract contains a reopener clause. Under that clause[3] the Association could reopen negotiations on salary and health by notifying the Board between February 15, 1977 and March 15, 1977. On February 15, 1977 the Association notified the Board of its desire to reopen negotiations on salary and health provisions.

On January 18, 1977 Mr. Doug Hill, spokesperson for the Chula Vista Federation of Teachers, addressed the Board regarding the wages, hours of employment and working conditions[4] of the

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[2] ~~1977 California Public School Directory~~ published by the Superintendent of Public Instruction, State of California.

[3] Section 42, Paragraph 2 reads:

"The exclusive representative may give notice to the Board by certified mail between February 15, 1977 and March 15, 1977 of its desire to reopen negotiations on Salary and/or Health. ... Upon receipt of written notice, arrangements shall be made pursuant to provisions of SB 160, including the public notice provision, for meeting and negotiating to commence."

[4] These matters are included in the scope of representation under Section 3543.2.

District's certificated employees and concluded by encouraging good faith negotiations by the District on February 15.[5]

Mr. Hill's presentation received publicity in a community newspaper and in the District's Staff Newsletter.[6]

The Association objected to the Federation's public presentation on subjects within the scope of representation to the Board on January 18, 1977. Representatives of the Federation have subsequently addressed the Board at regular public meetings.

Members of the Association have threatened to resign because they felt that the Federation presentations were not fairly representing the collective negotiations unit. The Association's chief negotiator claims that the impact of his presentations during negotiations was lessened because the Federation's representatives previously used the same information in their public presentations.

[5] The final paragraph of Mr. Hill's presentation reads:

"In conclusion I'd like to say that if you honestly believe we're a first-class district and you honestly believe that we're working in first-class programs and you honestly believe that we're a district of first-class teachers then show your support of our efforts by sitting down at the negotiating table February 15 and renegotiating a salary schedule that mirrors your good faith and support and not empty rhetoric."

[6] The Chula Vista City School District Staff Newsletter of January 19, 1977 contained the following under "Communications":

"Doug Hill, representing the Chula Vista Federation of Teachers, shared some of CVFT's concerns regarding upcoming budgetary considerations and negotiations with the teachers' exclusive bargaining representative (CVEEA). He said teachers have more responsibilities, more pressures, extra work and should be justly compensated for these increases."

CONCLUSIONS OF LAW

Meeting and Negotiating

Section 3543.3 creates the duty of the public school employer to meet and negotiate with an exclusive representative of its employees. Section 3540.1(h) defines meeting and negotiating under the EERA as:

> "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

The presentation by Doug Hill on January 18, 1977 was made at a public Board meeting. The speaker discussed the increased workload and stress of the District's teachers and he requested that the District negotiate in good faith in the upcoming negotiations.

It would stretch the imagination to conclude that Hill's presentation was more than an expression of his views. Hill did not attempt to reach an agreement with the Board by making his presentation. Hill's address on January 18, 1977 preceded the Association's request on February 15, 1977 to reopen negotiations. Nothing in Hill's speech was privileged information. Any other concerned citizen or non-Federation member teacher in the District could have delivered the same message. The Association, as the exclusive representative of that unit, was not committed to

follow Hill's proposals. The speech made by Hill, together with the subsequent brief questions and answers, did not constitute "meeting and negotiating" by the Board and Hill. Madison School District v. Wisconsin Employment Relation Commission, 429 U.S. 167, 97. S. Ct. 421 (1976), 93 LRRM 2970.

To find that this presentation constituted "meeting and negotiating" by the parties would disrupt existing negotiating relationships.

To conclude that Doug Hill and the District were "meeting and negotiating," as defined in Section 3540.1(h), on January 18, 1977 would be contrary to National Labor Relations Board precedents regarding bargaining in good faith. To hold that Doug Hill's general presentation to the school board and the board's subsequent limited questions met the test for meeting and negotiating in good faith would make it extremely difficult for any employee organization to sustain a bad faith negotiating charge since almost any discussion between an employee organization and a school district, no matter how vague or innocuous, would still be meeting and negotiating in good faith. See Akron Novelty Mfg. Co., 1224 NLRB 998, 93 LRRM 1106 (1976) and Herman Sausage Co., 122 NLRB 168, 43 LRRM 1090 (1958), enfd 275 F. 2d 229 (5th Cir., 1960). Therefore, Doug Hill's presentation did not constitute "meeting and negotiating" under the EERA.

Right to Represent

The Association contends that the District, in allowing Doug Hill to address it in a representative capacity, has denied it the right to exclusive representation defined in 3543.1(a) of the Act. That section provides:

> 3543.1 (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Because the interpretation urged by the Association would interfere with important liberties of Federation's members, guaranteed to them by the First Amendment to the United States Constitution, as applied to the State of California by the Fourteenth Amendment[7] (Edwards v. S. Carolina, 372 U.S. 229, 83 S. Ct. 68 1963) the hearing officer cannot adopt Association's interpretation. Rather, Section 3543.1(a) will, if possible, be interpreted to be consistent with the Constitution. People v. Amor, 12 Cal. 3d 20 (1974): National Movement for Student Vote v. Regents of University of California, 50 Cal. App. 3d 131 (1975).

The briefs of the parties discussed the recent United States Supreme Court decision City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, supra, at 2. In that case, the Supreme Court reversed an order by the Wisconsin Commission which forbade the plaintiff school board to allow any employee other than the exclusive representative to address the board on matters subject to collective bargaining. The board had previously allowed a member of an employee unit which was represented by an exclusive

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[7] Article I, Sec. 2 and 3 of the California Constitution insure the rights of free speech and assembly to Californians, as does the First Amendment to the United States Constitution. The hearing officer believes therefore, that the rights to be discussed arise under both Constitutions.

representative to address the board on its adoption of a "fair share" (compulsory payment in lieu of organizational dues) provision in a proposed collective, bargaining agreement. Although the employee had announced to the board that he represented "an informal committee of 72 teachers in 49 schools," since the Wisconsin Commission's order purported to ban all speeches before the board by employees, the Court did not reach the issue of the employee's representative capacity.

Thus, the Madison decision does not directly answer the question posed by the instant case. However it does provide a useful starting point. It establishes beyond question the right of a public school employee to speak at public sessions of the governing board of the employer.

Many decisions of the United States Supreme Court, in many contexts, have recognized that the people often exercise their First Amendment rights collectively through organizations. In NAACP V. Alabama, 357 U.S. 449 (1957) the Court wrote:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly (citations omitted). It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces the freedom of speech. 357 U.S. at 460.

In Sweezy v. New Hampshire, 354 U.S. 234 (1957) the Court found that state's criminal prosecution of a defendant, a Progressive Party activist, for failure to answer questions regarding political activities, very probably interfered with the activities of the

Progressive Party. It then concluded that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." (at page 250)

One extremely important aspect of constitutionally protected group association is the ability of a group to project its views outside of itself, as the Federation did in this case by appointing a spokesperson to address the Board. No one would doubt, for instance, the right of a political party to put forward a candidate for office. In Kusper v. Pontikes 414 U.S. 51, for example, the Court struck down an election statute which "virtually precluded" candidates of small parties from obtaining a place on the ballot. In a footnote to Madison, supra at 2, Chief Justice Burger, although in dictum, made a statement applying these principles to employer-employee relations in the public schools:

> Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.[8]

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[8] 429 U.S. 167, 176, 97 S. Ct. 421 (1976).

To hold that members of the minority teacher organization could not express themselves through a representative at a school board meeting would strain First Amendment concepts just as extraordinarily. It would impose upon each member of the Federation the ponderous alternative of appearing in person before the board in order to make known the same collective view. The hearing officer does not believe that Section 3543.1(a) requires, nor that the Constitution allows, a result which would so limit the enhanced advocacy recognized in NAACP v. Alabama, supra, p. 8. It is therefore concluded that in using the words "represent that unit in their employment relations..." the Legislature did not preclude a non-exclusive representative from making presentations at public meetings of school boards.

Of course, Chief Justice Burger specifically stated in Madison that the Court did not have to reach the issue of a State's ability to exclude minority teachers from actual collective bargaining sessions. Given the Supreme Court's recent deference to a legislative determination of the value of exclusive representation by a majority employee organization in a public employment setting (Abood v. Detroit Board of Education ______U.S.______, 95 LRRM 2411, 2415, May 23, 1977), it seems quite likely that such an exclusion would endure constitutional scrutiny. However, the hearing officer need not, and does not decide that issue here.

Like the Court's holding in Madison, supra at 2, the record in this case shows no danger to the Association's status as exclusive representative that would justify curtailing the speech of a minority employee organization's representative.

The harm to the exclusive representative's status must be a direct result of the Board's willingness to listen to minority employee organization speakers. The Association's claims of a threatened loss of membership and membership unhappiness were not supported by evidence detailing their direct causation by the Federation representative's public presentations.

There is no evidence in the record, that said demonstrations were a result of Hill's presentation to the Board. The presentation and the demonstration occurred at separate Board meetings. Nor is there any evidence that the same principal parties were involved in both. Without evidence showing a causal nexus between the speech in question and member dissatisfaction it is impossible to find any harm to the Association. The Association's negotiator claims that mistimed factual revelations disrupted the negotiation process. He claims that Hill's presentation contained facts that would be better used during negotiations, not at a public meeting before those negotiations commenced.

There is no evidence, however, that negotiations have been lengthened to necessitate an impasse or that the parties' positions have been irrevocably altered as a result of Hill's presentation. Therefore, this claim is insufficient to preclude the First Amendment rights of concerned minority employee organization representatives.

ORDER

The unfair practice charge filed by the Chula Vista Elementary Education Association is hereby DISMISSED.

Pursuant to Title 8, Cal. Adm. Code Section 35029, this recommended decision shall become a final order on October 17, 1977, unless a party files a timely statement of exceptions. See Title 8, Cal. Adm. Code Section 35030.

Dated October 3, 1977.

Kenneth A. Perea
Hearing Officer