

DECISION OF THE  
STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



In the Matter of: )  
 )  
SOCIAL SERVICES UNION, LOCAL 535, )  
SEIU, AFL-CIO, )  
 )  
Charging Party, ) Case No. S-CE-345  
 )  
v. ) PERB Decision No. 214  
 )  
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, ) April 30, 1982  
 )  
Respondent. )  
 )

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Appearances: Vincent Harrington, Attorney (Van Bourg, Allen Weinberg and Roger) for Social Services Union, Local 535 SEIU, AFL-CIO; Clifford D. Weiler, Attorney (Brown and Conradi) for the Sacramento City Unified School District.

Before Jaeger, Moore and Tovar, Members.

DECISION

On May 21, 1980, the Social Services Union, Local 535, SEIU, AFL-CIO (Local 535) filed an unfair practice charge against the Sacramento City Unified School District (District) alleging a violation of subsections 3543.5(a) and (d) of the Educational Employment Relations Act (EERA or Act).<sup>1</sup>

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<sup>1</sup>Government Code section 3540 et seq. Unless otherwise indicated, all references are to the Government Code. In relevant part, section 3543.5 provides as follows:

It shall be unlawful for a public school employer to:

The District excepts from a Public Employment Relations Board (PERB or Board) attached hearing officer's proposed decision holding that the District violated the aforementioned subsections of the Act by meeting and conferring with the Supervisory Council (the Council), an employee organization formed at the suggestion of the District, and by providing support to the Council while there was a pending question concerning representation. The District further excepts to the hearing officer's finding that subsections (a) and (d) were violated by remarks made by the District superintendent.

The hearing officer's procedural history and findings of fact are free of prejudicial error and are adopted as the findings of the Board. We further affirm his conclusions of law except as modified below.

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(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

.....

(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.

.....

DISCUSSION

Subsection 3543.5(d) makes it unlawful for a public school employer to:

[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

In Santa Monica Community College District (9/21/79) PERB Decision No. 103, the Board has found that subsection 3543.5(d) imposes on the employer an unqualified requirement of strict neutrality with respect to employee choice of representation. "The simple threshold test of subsection 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other." Santa Monica CCD, supra. See also Midwest Piping Co., Inc. (1945) 63 NLRB 1060 [17 LRRM 40] and Shea Chemical Corp., (1958) 121 NLRB 1027 [42 LRRM 1486].

The record clearly indicates that there was a question concerning representation pending when the District suggested to its employees that they form the Council and that the District was well aware of Local 535's representational efforts.

Honore' Hedlund testified that the Council was established/formed in approximately mid-1978 and that it was

right after the classified employees had their election and selected Local 22 SEIU, AFL-CIO.<sup>2</sup>

Thus, Local 535 filed their representation petition about the time the Council was formed or earlier.<sup>3</sup> Indeed, the Council was formed following the suggestion of the District superintendent and assistant superintendent.<sup>4</sup> The District proceeded to meet on a regular basis with the Council, during working hours, on District facilities, until the time of the hearing in this case.

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<sup>2</sup>Board records indicate that the election for the classified employees took place as follows:

The election for all units (paraprofessional aides; office tech, business services unit; operations support; and security unit) took place on November 11, 1977.

The election results were certified on November 18, 1977 for all units except the paraprofessional aides, which had a runoff election on April 20, 1978; with SEIU certified on May 3, 1978.

<sup>3</sup>In Sacramento City USD (3/25/80) PERB Decision No. 122 we upheld a hearing officer's conclusion that Local 535 was not the same organization as Local 22 and that it therefore could represent the District's classified supervisory employees.

<sup>4</sup>The Charging Party neither charged nor litigated a contention that the District violated the Act by suggesting the formation of the Council. That conduct occurred outside the 6-month statute of limitation established in section 3541.5. The meeting and conferring with the Council which did occur within the 6-month period could be understood only in the context of the District's earlier relationship with the Council. As noted by the hearing officer, evidence of earlier misconduct may be received at a hearing as background in order to shed light on the true character of events within the 6-month period. Local Lodge No. 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212]. NLRB v. Lundy Mfg. Corp. (2d Cir. 1963) 316 F.2d 921 [53 LRRM 2106].

The Council in effect negotiated with the District over matters within the scope of representation and became the only effective voice for supervisors in the District during a time when a question concerning representation with Local 535 was pending.

On April 30, 1980, the Council and the District held their last meeting before the June 2 representation election. During the meeting the superintendent was asked about the forthcoming election involving Local 535. The Superintendent responded that, if Local 535 won the election, then discussions which had been held with the Council about the various items would have to start over again. This statement could reasonably and logically be understood as an expression of disfavor for Local 535, a threat of loss of all gains achieved which would tend to make the employees apprehensive about voting for Local 535.

In the context of the situation, as well as because of the timing, the reasonable implication of the superintendent's statement is one of discouraging employees to vote in favor of Local 535 and instead, providing stimulus towards the Council.

As the hearing officer points out, it doesn't matter that the Council was not a petitioner to represent the supervisory unit -- the competition between the Council and Local 535 was real nonetheless. Utrad Corp. v. NLRB (CA 7, 1971), 454 F.2d

520 [79 LRRM 2080]; Versatube Corp. (1973) 203 NLRB 456 [83 LRRM 1118], enforced, 492 F.2d 795 [86 LRRM 2128] (CA 6, 1974).

It is the totality of the District's actions that tips the balance and indicates that the District favored the Council and provided subtle yet unmistakable stimulus in its direction, as opposed to adhering to a standard of strict neutrality, thus violating subsection 3543.5(d).

#### The Elements of a 3543.5(a) Violation

We have previously issued decisions in two cases where employer support/interference to an employee organization was the issue. In Antelope Valley Community College District (7/18/79) PERB Decision No. 97, we found a subsection 3543.5(a) violation based in large part on our conclusion that the employer had acted with animus toward the association. In Santa Monica Community College District, supra, we found a subsection 3543.5(a) violation where there was evidence of blatantly disparate treatment and coercive demands.

While the action by the District in the instant case does not reach the level of misconduct the Board found in either Antelope Valley or Santa Monica, nonetheless, PERB will find a violation of subsection 3543.5(a) when an employer's act(s) tend to result in some harm to employee rights and the employer is unable to justify its action(s) by proving operational

necessity. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.5

In an interference case like this one in which evidence of motive is not a necessary element, the charging party needs to make a prima facie showing that the employer's conduct tends to or does result in harm to employee rights granted under EERA. Then the burden shifts to the respondent to demonstrate justification based on operational necessity. The Board will then balance the parties' competing interests and resolve the charge accordingly. See Carlsbad and Novato.

The negotiating sessions between the District and the Council which preceded the June 1980 election did, in fact, tend to harm protected rights under the Act.

In order to file for a representation election Local 535 had to have a showing of support, indicating that there were a significant number of employees who favored their selection. As the hearing officer points out, those employees who were attempting to exercise their protected rights to assist the selection of Local 535 as their exclusive representative were confronted with a favored, in-house employee organization.

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<sup>5</sup>The hearing officer unnecessarily applies a "but-for" analysis to determine whether there's been a violation of subsection 3543.5(a). In a pure interference case such as this one, it is not necessary for the charging party to raise the inference that the District was motivated by the protected conduct. See Novato Unified School District (4/30/82) PERB Decision No. 210.

The superintendent's October 30th statement, in addition to violating subsection 3543.5(d) because of the District's violation of its obligation to neutrality, also constitutes a violation of subsection 3543.5(a) because it interferes with the employees' freedom of choice. The supervisory employees had gained some benefits as a result of the sessions between the District and the Council; the message behind the superintendent's statement was clear: If Local 535 wins all progress is lost and employees would have to start negotiating from scratch again. The superintendent's statement thus constitutes a promise of benefit should the employees decline to be represented by Local 535, and an accompanying threat of reprisal if they select Local 535 as their exclusive representative.

The Charging Party established a prima facie case. The District's conduct may only be excused if, on balance, the District's operational necessity rationale outweighs the harm to employee rights.

The operational necessity argument the District makes in the instant case is that they were compelled to meet with the Council pursuant to the requirement in subsection 3543.1<sup>6</sup> and

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<sup>6</sup>In relevant part, section 3543.1 provides as follows:

- (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee

the Board decision in Professional Engineers in California  
(3/19/80) PERB Decision No. 118-S.

We reject the District's argument. The obligation to meet with the nonexclusive representative does not mean the District can disregard the requirement of strict neutrality, nor does it allow them to meet exclusively with the Council while a question concerning representation is pending.

The totality of the circumstances in the instant case point to a lack of neutrality on the part of the District as well as unlawful stimulus towards the Council. The Council not only came into existence at the suggestion of a former District superintendent but also at approximately the same time Local 535 petitioned to represent supervisors. Then the District proceeded to meet and negotiate exclusively with the Council as if Local 535 did not exist while there was a clear question concerning representation pending.

By supporting the Council to the exclusion of Local 535, the District contributed support to and encouraged employees to

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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.

join it in preference to Local 535, thus violating subsection 3543.5(d). Further, by the same conduct, the District concurrently interfered with employee rights in violation of subsection 3543.5(a).

Attached to the District's statement of exceptions is a request for oral argument in accordance with PERB Regulation 32315.<sup>7</sup> The District gives the following reasons why such a request should be granted: (1) "to respond to any concerns or reservations which any Board member might possess, or any inclination which any Board member might possess, to rule against the District; (2) to assist PERB in understanding the problems and practicalities faced by a public school employer in attempting to comply with subsection 3543.1(a); (3) the District believes that significant legal issues exist within this proceeding which will impact throughout California; and (4) oral argument is a necessary element of due process of law within their proceeding.

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<sup>7</sup>PERB Regulations are codified at California Administrative Code, title 8, section 31000 et seq. section 32315 states:

A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file, with the statement of exceptions or the response to the statement of exceptions, a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

We find no need to grant the request as the matter was thoroughly litigated by both parties and there are enough facts in the record to allow the Board to reach its decision. To allow for oral arguments is not only unnecessary but would be costly and would further delay the resolution of the dispute.

REMEDY

The remedy proposed by the hearing officer is affirmed.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, the unfair practice charges filed by the Social Services Union, Local 535, SEIU, AFL-CIO against the Sacramento City Unified School District alleging violation of subsections 3543.5(a) and (d) are affirmed.

Pursuant to Government Code subsection 3541.5(c) of the Educational Employment Relations Act, it hereby is ORDERED that the ballots impounded by the PERB following the June 2, 1980 election in the supervisory unit of the Sacramento City Unified School District shall be destroyed and that no effect be given to that election. A new election shall be conducted as may be ordered by the Sacramento regional director. It is also ORDERED that the Sacramento City Unified School District, Board of Trustees, superintendent and their respective agents shall:

A. CEASE AND DESIST FROM:

1. Commenting to employees that, if Local 535 wins the election, then we would have to start negotiations over again.

2. Showing favoritism toward the Supervisory Council while a question concerning representation is pending by continuing to meet and confer and/or negotiate with representatives of the Supervisory Council about any matter within the scope of representation (section 3543.2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within seven (7) workdays after the date of service of this decision, post at the headquarters office and at all work locations where notices to employees customarily are posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notices are not altered, reduced in size, defaced or covered with any other material.

2. Within forty-five (45) consecutive workdays from the service of the final Decision herein notify the Sacramento regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this Decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

By Irene Tovar, Member

John W. Jaeger, Member

Barbara D. Moore, Member

APPENDIX A

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-345, Social Services Union, Local 535 SEIU, AFL-CIO v. Sacramento City Unified School District, in which all parties had the right to participate, it has been found that the Sacramento City Unified School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a) and (d). The Public Employment Relations Board has ORDERED that the ballots impounded by the PERB following the June 2, 1980 election in the supervisory unit of the Sacramento City Unified School District shall be destroyed and that no effect be given to that election. A new election shall be conducted as may be ordered by the Sacramento regional director.

As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Commenting to our employees that, if Local 535 wins the election, then we would have to start negotiations over again.

2. Showing favoritism toward the Supervisory Council while a question concerning representation is pending by continuing to meet and confer and/or negotiate with representatives of the Supervisory Council about any matter within the scope of representation (section 3543.2).

SACRAMENTO CITY UNIFIED SCHOOL  
DISTRICT

Dated: \_\_\_\_\_

By \_\_\_\_\_  
Authorized Agent of the  
District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, REDUCED IN SIZE, DEFACED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



SOCIAL SERVICES UNION, LOCAL 535, )  
 )  
Charging Party, ) Unfair Practice  
 ) Case No. S-CE-345  
v. )  
 )  
SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ) PROPOSED DECISION  
 ) (2/18/81)  
 )  
Respondent. )  
 )  
\_\_\_\_\_ )

Appearances: Vincent Harrington, Attorney (Van Bourg, Allen, Weinberg and Roger) for Social Services Union, Local 535; Clifford Weiler, Attorney (Brown and Conradi) for the Sacramento City Unified School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

It is contended in this case that a public school employer negotiated with an "in-house" employee organization at the time a question of representation was pending with a labor union. The union alleges that the employer's conduct was an unfair practice which invalidated a subsequent election. Ballots cast in the election were impounded pending resolution of the present unfair practice charge.

This charge was filed on May 21, 1980 by Social Services Union, Local 535 (hereafter local 535), against the Sacramento City Unified School District (hereafter District). The charge

alleges that the District violated Government Code section 3543.5(a) by meeting with representatives of an organization known as the Supervisory Council during a time when an election was pending. It further alleges that on May 5, 1980 the District superintendent warned employees that if Local 535 won the forthcoming election the District "would not continue to pursue or implement any subjects" then under discussion with the Supervisory Council.

On May 29, 1980, the charging party was directed by the Sacramento Regional Office of the Public Employment Relations Board (hereafter PERB) to particularize its charge. The charging party responded to the order on June 17 and amended the charge, adding the allegation that the employer had rendered unlawful assistance to the Supervisory Council. The amended charge alleges violations of section 3543.5(a) and (d).<sup>1</sup> The District answered the charge on July 3, 1980.

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<sup>1</sup>Unless otherwise indicated, all references are to the Government Code. In relevant part, Government Code section 3543.5 provides 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.

. . . . .

After various continuances at the request of the parties, a hearing was conducted on December 2, 1980 at the Sacramento Regional Office of the PERB. The final brief was received on February 13, 1981 and the case was submitted for decision.

FINDINGS OF FACT

The Sacramento City Unified School District is an urban school district located within Sacramento County. The District has an enrollment of approximately 39,000 students. It was stipulated that at all times relevant the District was a public school employer and that Local 535 was an employee organization.

Events relating to the unfair practice charge are entwined totally with those leading up to an election conducted on June 2, 1980 among employees in the District's classified supervisory unit. The election occurred after a lengthy process which Local 535 commenced on March 14, 1978 by filing a petition seeking to represent the District's 160 classified supervisory employees. On March 28, 1978, the California School Employees Association filed an intervention.

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(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.

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On April 14, 1978, the District took the position that neither organization could represent the classified supervisory unit. The District based its position on a provision in the Educational Employment Relations Act (hereafter EERA) which prohibits supervisory employees from being represented by "the same employee organization" which represents employees subordinate to the supervisors.<sup>2</sup> At that time, Local 22 of the Service Employees International Union already had won the right to represent certain District classified employees and was in a runoff election with the California School Employees Association (hereafter CSEA) to determine which organization would represent the remainder. The District took the position that because Local 535 was affiliated with the Service Employees International Union it could not represent any employees who were the supervisors of persons represented by

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<sup>2</sup>In relevant part, section 3545 provides as follows:

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(b) In all cases:

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(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

. . . . .

Local 22. With respect to the intervenor, CSEA, the District took the position that because the organization might win the runoff election it too faced the problem of potentially representing both supervisors and subordinates.

A hearing about the status of Local 535 was conducted on July 5 and 6, 1978. At the start of the hearing, the District withdrew its objection to the status of the intervenor because CSEA no longer was in competition to represent rank-and-file employees. A hearing officer's proposed decision was issued on October 26, 1978, holding that Local 535 was not the same organization as Local 22 and that it therefore could represent the District's classified supervisory employees. Exceptions were filed to the proposed decision but the PERB on March 25, 1980 upheld the hearing officer's conclusion that Local 535 was not barred from representing the District's classified employees.<sup>3</sup> Following the PERB decision, the Sacramento

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<sup>3</sup>See Sacramento City Unified School District (3/25/80) PERB Decision No. 122. After the decision was issued, the California School Employees Association requested the PERB to certify the case as "one of special importance" and join in the organization's request for judicial review. See section 3542. The PERB granted the request in PERB Order No. JR-8 (6/18/80). Judicial review is now pending in the Court of Appeal for the Third District. At the commencement of the hearing in the present unfair practice case, counsel for the District moved that the hearing be continued until completion of judicial consideration of the pending representation case. This motion was denied on the ground that the unfair practice charge presents an issue separate from the representation case and the outcome of the representation case will not affect the unfair practice charge.

regional director ordered that an election be held on June 2, 1980 to determine whether members of the classified supervisory unit desired to be represented by Local 535.<sup>4</sup>

Throughout this long process, District officials met regularly with an employee organization which was started at the suggestion of high-ranking District managerial employees. That organization, known as the Supervisory Council, was started some time in 1978 after a meeting between several supervisory employees and then-Superintendent Joseph Lynn. It was the uncontradicted testimony of Daryl Cook, a District witness, that it was Mr. Lynn and Assistant Superintendent Robert Parker who proposed formation of the group.

Following the 1978 suggestion of the superintendent and assistant superintendent, several supervisory employees conducted an organizational meeting in a District school building. It was generally concluded among those supervisory

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<sup>4</sup>On June 2, 1980, the day of the election, the regional director ordered that all ballots cast in that election should be impounded pending the resolution of this unfair practice charge.

This history of the pending representation question was drawn from the files of Representation Case No. S-R-8, which are contained in the files of the Sacramento Regional Office of the PERB. An administrative tribunal may take official notice of information in its own files. See California Administrative Agency Practice (Cont. Ed. Bar 1970) at p. 167, citing Broyles v. Mahon (1925) 72 Cal.App. 484, 491 [237 P. 763] and Anderson v. Board of Dental Examiners (1915) 27 Cal.App. 336, 338 [149 P. 1006]. Also see NLRB v. Seven-up Bottling Co. (1953) 344 U.S. 344, 348.

employees in attendance that because they did not have a negotiating representative they needed to do something on their own to form some type of organization to represent them. The Supervisory Council was the organization they started.

From the beginning, the Council took on all the earmarks of an employee organization. Representatives from the various departments were chosen through an informal election process. In some departments the election process was accomplished by written ballot. In other departments it was carried out by oral balloting. Ten persons were elected as council delegates. Don Barnes was informally picked as chairman and he became spokesman for the Council at meetings with the District administrators. Supervisory Council stationery was printed. The stationery contains the names and work locations of the delegates. The stationery letterhead features an illustrated slogan carrying the words, "Team Work May Win For You!!! Supervisory Council." This stationery was used for periodic communications to all supervisory employees.

Council Chairman Barnes prepared the meeting agenda, relying in part on suggestions he received from various Council members. He also scheduled the meetings by making arrangements with the superintendent's secretary. Usually, the agenda was handed out at the start of meetings between the Council and the District's representatives. Meetings were held during working hours on District facilities. Initially, meetings were

conducted in a conference room at an annex to the District administration building. Later, they were conducted in the superintendent's office. The meetings between the administration and the Council were informal with the parties seated around a table. Although seated around a table, Council members and the administrators did not sit on separate sides across from each other. Rather, the administrators sat among the Council representatives.

The District always was represented by high-ranking officials at its meetings with the Supervisory Council. The District's representatives at meetings with the Council were successively Robert Parker, Donald Hall and Donald James, each of whom held the position of assistant superintendent with responsibility for employer-employee relations. After he became District superintendent on August 1, 1979, Thomas Guigni also joined the meetings as one of the District's representatives. Mr. Guigni testified that upon arriving in the District he was advised of the existence of the Supervisory Council and told that its purpose was to enable the administration to hear about the interests and concerns of supervisors. He said that meeting with the organization seemed like a good idea and so he continued the process.

Meetings between the Council and the administration occurred on a regular basis from the time it was formed. From February through June of 1980 the meetings took place at

intervals of two to three weeks. At the time of the hearing in December of 1980, the meetings were continuing.

Representatives of the Supervisory Council discussed with District administrators a number of proposals relating to salaries and fringe benefits. Among these were proposals for a cost of living increase, an increase in the salary differential between the supervisors and the persons they supervise, an increase in longevity bonuses and a vision care plan. The Supervisory Council also proposed a comparison study of the salaries paid to persons holding supervisory positions in other local school districts.

Some Supervisory Council proposals ultimately were accepted by the District. The discussions with the supervisors did not result in a written agreement between the Supervisory Council and the District. However, the superintendent testified that he twice made recommendations to the school board on the basis of a consensus reached with the Council.

One of the meetings between the District and the Supervisory Council which was attended by the superintendent was the session of April 30, 1980. That meeting was the last scheduled prior to the June 2 representation election involving Local 535. At a time in the meeting when the various participants were engaged in small talk, someone asked the superintendent a question about the forthcoming election involving Local 535. The superintendent responded that if

Local 535 won the election then discussions which had been held with the Supervisory Council about the various items would have to start over again. The comment was brief and the superintendent did not further explain what he meant.

At no time during the months of consultation between the District and the Supervisory Council did the District ever advise Local 535 of these meetings or invite the union to participate. It was only after the impounding of ballots at the June 2 election that the District notified Local 535 of the meetings. Then, it was in a communication which asked whether the union opposed further meetings between the District and the Council.

#### LEGAL ISSUE

Did the District's relationship with the Supervisory Council, while a question concerning representation was pending, constitute a violation of section 3543.5(a) and/or (d)?

#### CONCLUSIONS OF LAW

##### Alleged Violation of Section 3543.5(a)

Under section 3543.5(a), it is unlawful for a public school employer to impose reprisals on employees, discriminate against them or otherwise interfere with, restrain or coerce them because of their exercise of the protected right of self-representation. The right of self-representation includes the unfettered ability "to form, join and participate in the

activities of employee organizations."<sup>5</sup> The PERB has found a violation when an employer's acts interfere or tend to interfere with the exercise of this right and the employer is unable to justify its actions by proving operational necessity. See Carlsbad Unified School District (1/30/79) PERB Decision No. 89. In Carlsbad, the PERB further decided that a charge will be sustained whenever it is proven that but for the exercise of protected rights, the employer would not have acted.<sup>6</sup>

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<sup>5</sup>Section 3543, in relevant part, provides 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. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

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<sup>6</sup>The Carlsbad test reads as follows:

1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;

The charging party contends that the District violated the right of self-representation by negotiating with a rival group, the Supervisory Council, while a question concerning representation was pending. Moreover, the charging party continues, the District further chilled employee rights when the superintendent on the eve of the election stated that all benefits which had been gained through the meetings with the Supervisory Council would be lost if Local 535 won the election.

The District denies that it has interfered with any protected right. The District contends that it did not negotiate with the Supervisory Council but only met and conferred with it. The District reasons that in the absence of an exclusive representative it had the obligation to listen to

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2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
  3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
  4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
  5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

the wishes of employees. The District argues that the Supervisory Council was the only organization which made any effort to inform the District of employee desires. As to the superintendent's alleged remark on April 30, 1980, the District argues that the superintendent did no more than make an accurate statement of the law.

In Antelope Valley Community College District (7/18/79) PERB Decision No. 97, the PERB found a violation of section 3543.5(a) when, during the time prior to an election, agents of the employer formed a rival organization with which the employer negotiated. That decision, however, was based in substantial part on a conclusion that the employer had acted with animus toward the union. In Santa Monica Community College District (9/27/79) PERB Decision No. 103, a case involving employer favoritism between organizations, the PERB also found a violation of section 3543.5(a). The key element in Santa Monica was blatantly disparate treatment and coercive demands that the employee organizations waive statutory rights.

No action by the District in the present case reaches the level of employer misconduct found in Antelope Valley or Santa Monica. There is no evidence of animus toward Local 535, as in Antelope Valley. Nor is this case like Santa Monica, supra, in which the employer denied a pay increase to certain employees because an employee organization refused to waive statutory rights.

Under the Carlsbad test- however, a violation of section 3543.5(a) may be found for conduct much less egregious than that in either Antelope Valley or Santa Monica. A violation will exist whenever the challenged conduct is of such a nature that it tends to result in some harm to employee rights and the employer fails to offer justification based on operational necessity. To establish a prima facie case under Carlsbad it is not necessary to show actual harm. That the employer's conduct has a tendency to cause harm to protected rights is sufficient.

The violation alleged in the present case is that the District interfered with the right to form an employee organization, specifically Local 535. The interference was through support of another organization, namely the Supervisory Council. Although the Supervisory Council was not a competitor on the ballot, it plainly was a rival employee organization.<sup>7</sup> The evidence establishes that from its

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<sup>7</sup>The Educational Employment Relations Act in section 3540.1(d) defines the term "employee organization" as follows:

"Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

initial meeting forward, the Supervisory Council existed for one reason, i.e., to represent employees in their employment relationship with the District. The very subjects which the Council discussed with the District -- wages, differentials, fringe benefits -- show that the Supervisory Council meets the statutory definition of an employee organization. See, e.g., NLRB v. Cabot Carbon Co. (1959) 360 U.S. 203 [44 LRRM 2204].

In the context of the District's role in the original formation of the Supervisory Council, the meet and confer sessions which preceded the June 1980 election tended to harm protected rights. Employees attempting to exercise their protected right to assist the selection of Local 535 as exclusive representative were confronted with what obviously was a favored in-house employee organization. The District encouraged formation of the Supervisory Council and then consistently met and conferred with it, ultimately granting some of the organization's requests. No effort was made to bring Local 535 into this process. The District conducted business with the Supervisory Council as if Local 535 did not exist and there were no pending question concerning representation.

The superintendent's comment of April 30, 1980, although innocently made, was of such a nature that it would tend to harm protected rights. The meet and confer sessions between the District and the Supervisory Council were producing

benefits for supervisory employees. In that context, a statement that a Local 535 victory would require discussions to start over again would tend to make employees apprehensive about voting for Local 535. The message was implicit: Vote for Local 535 and all progress is lost; Vote against Local 535 and things can continue as before.

Under the Carlsbad test, a prima facie case is thus established. The conduct of the District can be excused only if the operational necessity outweighs the harm to the rights of employees. Here, the District finds operational necessity in the section 3543.1(a)<sup>8</sup> provision that prior to the selection of an exclusive representative, employee

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<sup>8</sup>In relevant part, section 3543.1 provides as follows:

(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.

. . . . .

organizations have the right to represent their members. Because there is no exclusive representative for supervisors, the District reasons, it has no basis for refusing to meet with the Supervisory Council. Indeed, the District argues, it would be in violation of the EERA only if it refused to meet with the Supervisory Council.

The District's argument ignores the facts of the case. The Supervisory Council was not a long-existing employee organization with which the District had an established relationship. The Supervisory Council came into existence at the suggestion of a former District superintendent at approximately the same time that Local 535 petitioned to represent supervisors. Then, in the face of petitions from Local 535 and CSEA, the District commenced exclusive discussions with the Supervisory Council. It was not the even-handed continuance of a past practice, as the District would suggest. It was, rather, an imbalanced slant toward an in-house employee organization in a manner which would tend to influence the election results. A school employer can hardly help create an organization and then plead that it must bargain with the product of its own handiwork in order to remain neutral.

For these reasons, it is concluded that by meeting and conferring with the Supervisory Council during the time prior

to the June 2, 1980 election the District was in violation of section 3543.5(a).<sup>9</sup>

Alleged Violation of Section 3543.5(d)

Section 3543.5(d) makes it unlawful for a public school employer to:

[d]ominate 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.

This section, the PERB has found, imposes upon employers an unqualified requirement of strict neutrality. In order to find a violation of the statute, it is not necessary to show that the employer's action was "intended" to have an impact on employees' free choice. "The simple threshold test of section 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other." Santa Monica Community College District, supra;

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<sup>9</sup>It should be noted that the violation which the District has committed is not that the former superintendent suggested creation of the Supervisory Council. That event occurred far outside the six-month period of limitation established in section 3541.5. However, the meeting and conferring with the Supervisory Council which did occur within the six months period can be understood only in the context of the District's earlier relationship with the Council. Evidence of earlier misconduct may be received at a hearing as background in order to shed light on the true character of events within the six months period. Local Lodge No. 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212]; NLRB v. Lundy Mfg. Corp. (2d Cir. 1963) 316 F.2d 921 [53 LRRM 2106].

Antelope Valley Community College District, supra. See also Midwest Piping Co., Inc. (1945) 63 NLRB 1060 [17 LRRM 40] and Shea Chemical Corp. (1958) 121 NLRB 1027 [42 LRRM 1486]. It is not necessary under PERB decisions to prove that as a result of employer favoritism there was an actual change by employees in organizational membership. Santa Monica Community College District, supra.

Little need be added to demonstrate that in addition to violating section 3543.5(a) the District's actions also violated section 3543.5(d). The question is whether by meeting and conferring with the Supervisory Council the District provided a stimulus toward the Supervisory Council and against Local 535. It is self-evident that such was the case. Formed at the suggestion of the former District superintendent, the Supervisory Council quickly became the only effective voice for supervisors within the District. It reached this status by the District's obvious acceptance of the organization as the voice of supervisory employees.

It makes no difference that the Supervisory Council was not a petitioner to represent the supervisory unit. The competition between the Supervisory Council and Local 535 was real nonetheless. If Local 535 were to win the election, the Supervisory Council would be precluded from further meeting with the District and benefits would be lost. However, if

Local 535 were to lose the election, the discussions between the District and the Supervisory Council could continue as before. This is the inevitable and reasonable conclusion which one could draw from the superintendent's April 30 comment. As the union argues in its brief, the superintendent's comment "obviously amounted under any reasonable construction, to an inducement to these supervisors that they reject Local 535." Conditioning the retention of benefits upon the retention of an incumbent union is an unfair practice which warrants setting aside the results of an election. Humble Oil & Refining Co. (1966) 160 NLRB 1088 [62 LRRM 1593].

For these reasons it is concluded that the District's actions during the pre-election period provided a stimulus toward the Supervisory Council and were thus in violation of section 3543.5(d).

#### REMEDY

The charging party seeks an order that the District cease and desist from meeting and negotiating with any employee organization pending the resolution of the representation case. The charging party also asks that the June 2, 1980 election be set aside and that a new election be ordered in the supervisory unit. Finally, the charging party asks that the District be required to sign and post a notice about the resolution of this matter.

Under Government Code section 3541.5(c), the PERB is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The ordinary remedy in a case where employer unfair practices have tainted an election is to set aside the result of that election and to direct a new election. Antelope Valley Community College District, supra, PERB Decision No. 97. In such situations, the election is set aside because the employees did not cast their ballots in an atmosphere free from coercion.<sup>10</sup>

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<sup>10</sup>Relying on the decision of a hearing officer, the District argues that in order to have the election result set aside Local 535 must prove that the District's activities actually interfered with the election process. Franklin-McKinley School District (6/27/80) Case No. SF-R-604 [4 PERC 11119]. Hearing officer decisions, of course, are not precedential. The PERB itself has held that it is unnecessary for an employee organization to prove that an employer's misconduct had the direct result of changing votes. ". . . [I]t is unnecessary for . . . [the union] to demonstrate that this conduct directly translated into a negative vote by employees . . . ." San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111. The test for determining whether there shall be a new election is more expansive. A new election will be ordered whenever "[t]he nature and extent of the unlawful conduct engaged in by the District made it impossible for the employees to exercise their free choice in the selection of an exclusive representative." Antelope Valley Community College District, supra.

It also is appropriate that the District be directed to cease meeting and conferring and/or negotiating with the Supervisory Council about any matter within the scope of representation while the representation question is pending with Local 535. The Supervisory Council is not a petitioner for the supervisory unit and given the history of its creation at the suggestion of the District it is not possible for an untainted election to be conducted while the meetings continue. Antelope Valley Community College District, supra.

Finally, it is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and announces the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code section 3541.5(c) of the Educational Employment Relations Act, it hereby is ordered that the Sacramento City Unified School District, Board of Trustees, superintendent and their respective agents shall:

A. CEASE AND DESIST FROM:

Showing favoritism toward the Supervisory Council while a question concerning representation is pending by continuing to meet and confer and/or negotiate with representatives of the Supervisory Council about any matter within the scope of representation (section 3543.2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within seven (7) workdays after the date of service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notices are not altered, reduced in size, defaced or covered with any other material.

2. Within forty-five (45) consecutive workdays from the service of the final decision herein notify the Sacramento Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

It also is ordered that the ballots impounded following the June 2, 1980 election in the supervisory unit of the Sacramento City Unified School District shall be destroyed and that no effect be given to that election. A new election shall be conducted as may be ordered by the Sacramento Regional Director in accord with PERB Decision No. 122.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 10, 1981 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on March 10, 1981 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any

statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the PERB itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Dated: February 18, 1981

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Ronald E. Blubaugh  
Hearing Officer



NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California

After a hearing in Unfair Practice Case No. S-CE-345, Social Services Union, Local 535 v. Sacramento City Unified School District, in which all parties had the right to participate, it has been found that the Sacramento City Unified School District violated the Educational Employment Relations Act, Government Code section 3543.5(a) and (d).

As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

A. CEASE AND DESIST FROM:

Showing favoritism toward the Supervisory Council while a question concerning representation is pending by continuing to meet and confer and/or negotiate with representatives of the Supervisory Council about any matter within the scope of representation (section 3543.2).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Within seven (7) workdays after the date of service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, copies of this notice signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notices are not altered, reduced in size, defaced or covered with any other material.

2. Within forty-five (45) consecutive workdays from the service of the final decision herein notify the Sacramento Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

It also is ordered that the ballots impounded by the PERB following the June 2, 1980 election in the supervisory unit of the Sacramento City Unified School District shall be destroyed and that no effect be given to that election. A new election shall be conducted as may be ordered by the Sacramento Regional Director.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT

Dated: \_\_\_\_\_ By \_\_\_\_\_  
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, REDUCED IN SIZE, DEFACED OR COVERED WITH ANY OTHER MATERIAL.