STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. SAN ANTONIO COLLEGE FACULTY ASSOCIATION, CTA/NEA, Charging Party, v. MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-541 PERB Decision No. 224 June 30, 1982
MT. SAN ANTONIO COLLEGE FACULTY ASSOCIATION, CTA/NEA, Charging Party, v. MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-547

Appearances: A. Eugene Huguenin, Jr., Attorney for Mt. San Antonio College Faculty Association, CTA/NEA; John J. Wagner, Attorney (Wagner & Wagner) for Mt. San Antonio Community College District.

Before Gluck, Chairperson; Jensen, Morgenstern and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions taken by the Mt. San Antonio Community College District (District) to the proposed decision of a PERB hearing officer attached hereto. In that decision, the hearing officer sustained the charge of the Mt. San Antonio

College Faculty Association, CTA/NEA, (Association) that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act) and dismissed the Association's allegation that the District violated subsection 3543.5(d).[1]

The Board has reviewed the record in light of the District's exceptions. We find that the hearing officer's procedural history and findings of fact are free from prejudicial error and are adopted as the findings of the

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[1]EERA is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code unless otherwise noted.

Subsections 3543.5(a), (b), (c) and (d) provide:

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

Board. We affirm the hearing officer's conclusions of law insofar as they are consistent with our decision set forth below.

DISCUSSION

As more fully described in the attached decision, the hearing officer found that the District violated subsection 3543.5(a) of EERA by disciplining two teachers who, at a graduation ceremony, distributed leaflets which were critical of the District's fiscal management.

In accessing the propriety of the District's disciplinary action, the Board must first determine whether the conduct of the teachers who distributed leaflets at the graduation ceremony was protected by provisions of the EERA. In that regard, section 3543 of the Act grants public school employees

> 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.

We conclude that, while the handbill itself did not specifically name or otherwise identify the Association as the responsible author, the record is clear that the document was the product of the Association.[2]

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[2]Since the Association could easily have avoided any ambiguity as to its authorship of the distribution, we view its failure to so identify itself with some displeasure. However, as noted by the hearing officer, the writing and distribution of the leaflet was planned and executed by the Association's action committee. The Association specifically authorized and

The District's exceptions to the hearing officer's decision, however, reassert its central argument that the content of the handbill constituted disloyalty and thus should not have been afforded protection as organizational activity. The case on which the District relies is NLRB v. Electrical Workers (Jefferson Standard Broadcasting Co.) (1953) 346 U.S. 464 [33 LRRM 2183]. We find the rationale set forth in Jefferson Standard to be inapplicable in this case.

The Jefferson Standard case involved the public distribution of a handbill by nine technicians which sharply attacked the quality of the company's television broadcasts. The Supreme Court contrasted that public appeal with the union's earlier picketing effort which charged the company with unfairness to technicians and which specifically referred to their labor controversy. The handbills distributed to the public in the Jefferson case were found to be impermissibly disloyal to the employer because they omitted reference to the labor controversy and attacked the policies of the broadcasting company which had no discernible relationship to that controversy. The rule of Jefferson Standard is to deny

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admitted responsibility for its distribution to management and the public during the distribution process. Indeed, as discussed infra, the District specifically acknowledged the Association's responsibility. Thus, while failure by the organization to properly identify the leaflet could, in some circumstances, jeopardize the protected nature of the activity, it does not have that impact here.

protection to employee activity detrimental to and disparaging of the employer's business that is not related to the employees' interest as employees.

Statements or comments to the public which do relate to labor disputes, however, are not beyond the bounds of protection. For example, in Stevens Institute d/b/a Academy of Art College (1979) 241 NLRB 839 [101 LRRM 1052], enf'd. (9th Cir. 1980) 620 F.2d 726 [104 LRRM 2524], a college instructor and active union member spoke at a student meeting and told those present that almost all of the classes cancelled by the administration had been taught by former union members and suggested that the students investigate the Academy's enrollment procedures. He also discussed accreditation of the Academy which had been of concern to the student body during a prior dispute between the union and the administration. The National Labor Relations Board (NLRB) found that the employee was unlawfully discharged because of his efforts to inform and involve the students in the union's labor dispute. The NLRB found that the comments, made to the students who were the ultimate consumers of the Academy's services, were in furtherance of the labor dispute and related to the interest of the faculty members who were union supporters. The NLRB stated:

> The Board has held, with Supreme Court approval, that where employee activity is detrimental to and disparages the employer's

> business it is "not related to the employees' interest as employees" and no longer enjoys the protection of the Act. Jefferson Standard Broadcasting Company, 94 NLRB 1507, enf'd. sub nom. Local Union Number 1229, International Brotherhood of Electrical Workers v. NLRB, 346 U.S. 464 (1953); American Arbitration Association, Inc. 233 NLRB 71 (1977). However, it has been held that where employee statements or comments to third persons relate directly to the labor dispute and are not opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice the protection of the Act is not forfeited. (Emphasis added.) American Hospital Association, 230 NLRB 54 (1977); Dries & Krump Manufacturing, Inc., 221 NLRB 309 (1975), enf'd. 544 F.2d 320 (7th Cir. 1976).

In the instant case, we find the Association's handbill more akin to the protected communication in Stevens Institute than the distribution found improperly disloyal by the Court in Jefferson Standard.

First, far from being opprobrious, malicious or defamatory, the leaflet distributed at the graduation ceremony touts the college as the finest in the land and expresses the hope that the public will help prevent deterioration in the quality of the product. The appeal is not, like that of Jefferson Standard, to urge the public to turn away from the college but, rather, to bring attention to the plight of the college, allegedly endangered by bad management, and to work for the preservation of the college's high educational quality. This factual difference amply distinguishes Jefferson Standard from the instant case.

We therefore find that the Association's allegations, while not directly addressing issues in dispute at the bargaining table nor in the form of negotiating proposals, were nonetheless their comments on matters which were of legitimate concern to the teachers as employees.[3] By distributing the leaflet, the teachers were participating in representational activities of the Association and were improperly disciplined by the District for doing so.

We reject the District's contention that the teachers were engaged in unprotected activity because the distribution of leaflets was on "duty" time. The hearing officer's factual finding to the contrary is amply supported by the record.

The District's memorandum to the faculty regarding the academic procession at graduation specifically instructed employees to be at the stadium by 6:45 p.m. and in the processional line by 7:10 p.m.

The employees complied with the letter of this directive, but between 6:45 p.m. and 7:10 p.m., they distributed leaflets, and this activity is the basis of the District's allegation that the distribution occurred while the employees were on duty.

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[3]While some of these issues as stated in the leaflet are not negotiable subjects as defined by subsection 3543.2(a) of EERA, they are matters upon which the Association has consultation rights. Therefore, the teachers' distribution of the leaflets falls well within their permissible right to participate in activities of an employee organization relating to all matters of employer-employee relations.

The District's otherwise detailed directive does not refer to any duties or responsibilities between 6:45 p.m. and 7:10 p.m., nor does the record otherwise allude to such duties. The District did not present evidence concerning any duties specified or unspecified that were assigned during the time of the distribution but rather relates the employees' duty to the directive's admonition that decorum equal to the solemnity of the occasion be maintained. Yet, no evidence is offered indicating that the civil distribution of printed matter seriously detracts from the subsequent graduation ceremony.

The requirement that the employees be present at 6:45 p.m. surely implies that they might well have been assigned tasks or responsibilities at that time if the situation so required, but there is simply no evidence in the record indicating that any such assignment was actually made, no less neglected. Rather, the argument that this was "free time" is entirely credible. Cf. Long Beach Unified School District (5/28/80) PERB Decision No. 130 and cases cited therein.

For the reasons stated above, we affirm the hearing officer's conclusion that the District violated subsection 3543.5(a) of EERA when it issued letters of reprimand to the two teachers who caused those leaflets to be distributed.

Further, we affirm the hearing officer's remedy ordering the District to remove the letters of reprimand from the

teachers' personnel files. We reject the District's assertion that ordered removal would require it to undertake an unlawful act by altering a public record in contravention of Government Code section 6200.[4] The only logical construction of that section is that it would be unlawful for a public official to remove material that was lawfully entered in an employee's personnel file.[5] Since our finding is that the reprimand letters were unlawfully placed in the employees' personnel files initially, it would be incongruous to hold that it would be unlawful to order their removal. Prior decisions of this Board have so ordered (Belridge School District (12/31/80) PERB Decision No. 157 and, as in this case, ordering removal of the

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[4]Section 6200 provides:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutiliating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the state prison for two, three, or four years.

[5]In accord, see California Teachers Association v. Nielson (1978) 87 Cal.App.3d 25 [149 Cal.Rptr. 728] wherein the Court of Appeal held that a writ of mandate to compel a school district to remove and destroy certain letters of reprimand that had been placed in employees' files was not in conflict with section 6200 where the employees demonstrated that the letters were placed in their files in contravention of a valid "no reprisals" strike settlement agreement.

reprimands is well within the Board's authority to fashion appropriate remedial orders.[6]

The hearing officer correctly found that the Association was entitled to be provided the names of other employees disciplined by the District for distributing the leaflets. The sole basis[7] for the District's exception to this conclusion rests on the fact that the Association president did not ask the person in charge of the handbilling for the names of those employees who did so.

In Stockton Unified School District (11/3/80) PERB Decision No. 143, this Board concluded that the exclusive representative is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees.[8] Included among those duties is the Association's insistence

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[6]Subsection 3541.5(c) provides:

> (c) The board shall have 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.

[7]The District also excepted to the hearing officer's finding "that the Association is entitled to the addresses of the disciplined persons." No such finding appears in the hearing officer's proposed decision nor did the Association request such information.

[8]Disciplinary letters have been held to be presumptively relevant to the union's duty to represent employees. Transportation Enterprises, Inc. (1979) 240 NLRB 551 [100 LRRM 1330].

that employees not be disciplined for engaging in protected activity. Consequently, as the Association was clearly entitled to the names of all other disciplined employees, the District's refusal to provide that information was in violation of subsections 3543.5(a) and (c) of the Act.

A second, unrelated charge by the Association was consolidated with the case above. It involved the District's refusal to comply with the Association's request to disclose the home addresses of part-time instructors who the Association reasonably believed might have been affected by the California Supreme Court's decision in Peralta Federation of Teachers v. Peralta Community College District (1979) 24 Cal.3d 369 [155 Cal.Rptr. 679, 595 P.2d 113].[9] The District has taken exception to the hearing officer's conclusion that those addresses were reasonably related to the Association's representational function and the District's refusal to provide them violated subsections 3543.5(a), (b) and (c) of EERA.[10]

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[9]Peralta concerned the status and rights of part-time community college faculty under pre-existing and modified provisions of the Education Code. According to the Supreme Court, part-time faculty who were initially employed prior to November 8, 1967, became probationary employees with potential for attaining permanent status and entitled to pro rata compensation at the permanent faculty salary rate. The determination as to whether an individual part-time teacher would attain permanent status and salary rate involved an examination of each individual's record of employment.

[10]As to the violation of subsection 3543.5(b), the District argues that neither the hearing officer nor the

We agree with the hearing officer's conclusion that the addresses of those persons potentially affected by the Peralta decision were necessary and relevant to the Association's representational duties. We are not persuaded that the Association evinced a clear and unmistakeable waiver of its right to this information by acceding to Article IV, paragraph 2, of the parties' collective negotiating agreement.[11] Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. In our view, the release of addresses as contemplated by the contract provision sets forth a routine procedure whereby the District provides the

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Association provided any argument in support of that violation.

Since we affirm the hearing officer's conclusion that the District violated subsection 3543.5(c), infra, relying on San Francisco Community College District (10/12/79) PERB Decision No. 105, we also conclude that in so doing the District concurently violated subsection 3543.5(b).

[11]Article 12, paragraph 2 provides in pertinent part:

ARTICLE IV

INFORMATION

. . . . . .

2. Names and job titles of all unit members shall be provided to the Association as soon as possible following the beginning of each academic year. Home addresses and home telephone numbers of unit members shall be provided to the Association for all members who authorize the release of such information.

Association with the addresses of willing, currently employed teachers at the beginning of each school year. However, the individuals whom the Association was unable to contact via the intra campus mail system and for whom home addresses were sought were not currently employed by the District. Indeed, the District esentially concedes the contract's inapplicability by arguing that the addresses are beyond the bounds of the Association's concern because the individuals are not in the unit. Contrary to the District's assertion, the Association's contact with the potentially affected individuals will permit a determination of their former status as employees and unit members and whether they are entitled to Peralta benefits which they might have earned while employees of the District.

Information about employees whose status in the unit is in question is necessary and relevant to discharging the Association's duty to represent those potential unit members. Cf. Goodyear Aerospace Corporation (1966) 157 NLRB 496 [61 LRRM 1395], enf'd (6th Cir. 1968) 388 F.2d 673 [67 LRRM 2447]. Absence of an express statutory mechanism for the release of the requested information does not bar access under the general obligation to provide information that is needed by the bargaining representative for the proper performance of its duties both during and after contract negotiations. NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069]. Thus, consistent with the reasons expressed herein, we affirm the

hearing officer's decision that the District unlawfully refused to supply the Association with the addresses requested.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Mt. San Antonio Community College District has violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. It is hereby ORDERED that the District and its representatives shall:

1. CEASE AND DESIST FROM

(a) Imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining or coercing employees by:

(1) Placing letters of reprimand in the personnel files of employees who exercised their right to communicate with the public on representational matters;

(2) Refusing or failing to provide the exclusive representative, as requested, with the names of any and all employees within the negotiating unit who have been similarly disciplined by the employer;

(3) Refusing or failing to provide the exclusive representative with the home addresses of all part-time teachers (whose names appear on the list enclosed with Dr. Randall's letter to President

Markham, dated August 17, 1979) whose employment status may have been altered by the decision of the California Supreme Court in Peralta Federation of Teachers v. Peralta Community College District (1979);

(b) Refusing or failing to meet and negotiate in good faith with the exclusive representative by:

(1) Refusing or failing to provide the exclusive representative with the names of any and all employees within the negotiating unit represented by the exclusive representative who have been disciplined by the employer for communicating with the public on representational matters;

(2) Refusing or failing to provide the exclusive representative with the home addresses of all part-time teachers (whose names appear on the list enclosed with Dr. Randall's letter to President Markham, dated August 17, 1979) whose employment status may have been altered by the decision of the California Supreme Court in Peralta Federation of Teachers v. Peralta Community College District (1979);

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

(a) Within five (5) workdays of date of service of this Decision, prepare and post copies of the Notice to Employees attached as an appendix hereto, signed by an authorized agent of the employer, for thirty (30) workdays

at its headquarters office and in all locations where notices to employees are customarily posted;

(b) Within five (5) workdays after service of this Decision, remove from any and all personnel or other files in the District's possession regarding Ms. D. G. Wilson and Dr. James D. Thomas, in their presence, Dr. Randall's respective letters of reprimand dated June 26, 1979, to Ms. D. G. Wilson and Dr. James D. Thomas as well as any and all references to said letters of reprimand, including the respective responses of Ms. D. G. Wilson and Dr. James Thomas to their letters of reprimand;

(c) Similarly remove any other letters of reprimand and responses thereto which were issued to other employees who, like Wilson and Thomas, exercised their right to communicate with the public on representational matters.

(d) Upon request, provide the Association with the addresses of all persons whose names appear on the list enclosed with Dr. Randall's letter to President Markham, dated August 17, 1979.

(e) At the end of the posting period, thirty-five (35) workdays from the date of service of this Decision, notify in writing the Los Angeles regional director of the Public Employment Relations Board of the actions the District has taken to comply with this Order.

It is further ORDERED that the hearing officer's dismissal of the alleged violation of subsection 3543.5(d) is AFFIRMED.

By:

Matty Morgenstern, Member

Harry Gluck, Chairperson

Irene Tovar, Member

The concurrence and dissent of member Jensen begins on page 18.

Virgil Jensen, Member, concurring and dissenting:

I disagree with the conclusions reached by the hearing officer and the Board majority that the teachers were not on duty during the period in which they distributed Association leaflets.

A letter dated May 30, 1979,[1] from the office of the college president, specifically directed the faculty to " . . . be at the stadium by 6:45 p.m. and in line by 7:10 p.m." and "[f]aculty decorum should be in conformity with the solemnity of the occasion." This clearly indicates that the teachers were to be on duty status at 6:45 p.m.

Under direct examination one of the teachers who distributed Association leaflets testified as follows:[2]

> Q. Approximately what time did you reach the area where you passed out these documents, which are Charging Party's Exhibit 1, and start passing these out?
>
> A. Around 6:00.
>
> Q. Approximately how long were you engaged in the process of handing the literature out?
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> A. Until the time of . . . of line up, which was at 7:00.
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> Q. I see. Were the other faculty members who were there with you also similarly engaged in the handing out of the material throughout this time?
>
> A. Yes.

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[1]District Exhibit B.

[2]Volume I, PERB hearing transcript, pages 74-77.

This direct testimony clearly indicates that the teachers were distributing the leaflets during the period of 6:45 p.m. to 7:00 p.m., which, in my opinion, would have been duty time. I cannot concur with the majority's analysis of the facts which leads them to conclude that the period of 6:45 p.m. to 7:00 p.m. was non-duty time. The fact that the leaflets were also distributed prior to duty time does not make it a protected activity to engage in such Association activities during duty time.

I would therefore find that the distribution of Association leaflets at the graduation ceremony, during the period of 6:45 p.m. to 7:00 p.m., was not a protected activity and that the letters of reprimand to those engaged in this activity were justified.

I concur with the majority opinion and order regarding the other issues in these cases.

Virgil W. Jensen, Member

APPENDIX

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 Nos. LA-CE-541 and LA-CE-547, Mt. San Antonio Community College Faculty Association, CTA/NEA v. Mt. San Antonio Community College District, in which all parties had the right to participate, it has been found that the Mt. San Antonio Community College District has violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

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

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining or coercing employees by:

(1) Placing letters of reprimand in personnel files of employees who exercised their right to communicate with the public on representational matters;

(2) Refusing or failing to provide the exclusive representative, as requested, with the names of any and all employees within the negotiating unit who have been similarly disciplined by the employer;

(3) Refusing or failing to provide the exclusive representative with the home addresses of all part-time teachers (whose names appear on the list enclosed with Dr. Randall's letter to President Markham, dated August 17, 1979) whose employment status may have been altered by the decision of the California Supreme Court in Peralta Federation of Teachers v. Peralta Community College District (1979);

(b) Refusing or failing to meet and negotiate in good faith with the exclusive representative by:

(1) Refusing or failing to provide the exclusive representative with the names of any and all employees within the negotiating unit represented by the exclusive representative who have been disciplined by the employer for communicating with the public on representational matters;

(2) Refusing or failing to provide the exclusive representative with the home addresses of all part-time teachers (whose names appear on the list enclosed with Dr. Randall's letter to President Markham, dated August 17, 1979) whose employment status may have been altered by the decision of the California Supreme Court in Peralta Federation of Teachers v. Peralta Community College District (1979);

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

(a) Within five (5) workdays after service of this Decision, remove from any and all personnel or other files in our possession regarding Ms. D. G. Wilson and Dr. James D. Thomas, in their presence, Dr. Randall's respective letters of reprimand dated June 26, 1979 to Ms. D. G. Wilson and Dr. James D. Thomas as well as any and all reference to said letters of reprimand, including the respective responses of Ms. D. G. Wilson and Dr. James Thomas to their letters of reprimand.

(b) Similarly remove any other letters of reprimand and responses thereto which were issued to other employees who, like Wilson and Thomas, exercised their right to communicate with the public on representational matters.

(c) Upon request, provide the Association with the addresses of all persons whose names appear on the list attached to Dr. Randall's letter to President Markham, dated August 17, 1979.

Dated:

MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT

BY_____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.