STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CLOVIS UNIFIED TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. CLOVIS UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-635 PERB Decision No. 389 July 2, 1984
CLOVIS UNIFIED TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and CLOVIS UNIFIED SCHOOL DISTRICT, Employer.	)	Case No. S-R-729

Appearances; Diane Ross, Attorney for the Clovis Unified Teachers Association, CTA/NEA; Harry Finkle and Mary Beth de Goede, Attorneys (Finkle & Stroup) for the Clovis Unified School District.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions to the attached proposed decision of an Administrative Law Judge (ALJ) filed by both the Clovis Unified School District (District) and the Clovis Unified Teachers Association, CTA/NEA (CUTA or Association).

In Case No. S-CE-635, the Association charged, and the ALJ found, that the District violated subsections 3543.5(a), (b) and (d) of the Educational Employment Relations Act (EERA or Act)[1] by favoring the Faculty Senate over the Association, granting benefits inconsistent with past practice, and threatening an Association organizer, all during the period immediately preceding a representation election in which the Association sought to represent a unit of the District's certificated employees. In Case No. S-R-729, the Association objects to the conduct of that election, held on May 26,

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[1]EERA is codified at Government Code section 3540 et seq. All references herein are to the Government Code unless otherwise indicated.

Section 3543.5 provides, in relevant part:

> 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.
>
> . . . . . .
>
> (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.

1983.[2] The Association alleged, and the ALJ found, that essentially the same District conduct[3] interfered with employees[1] right to freely choose a representative, so that the results of the election should be set aside.

The Board has carefully reviewed the entire record in this case. We conclude that the ALJ's findings of fact are free of prejudicial error and adopt them as the findings of the Board itself. We affirm in part and reverse in part the ALJ's conclusions of law consistent with the following discussion.

DISCUSSION

Case No. S-CE-635 - Unfair Practices

Relationship to the Faculty Senate

The District excepts to the ALJ's finding that it violated subsections 3543.5(a), (b) and (d) by failing to maintain the "unqualified requirement of strict neutrality" (Santa Monica

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[2]PERB rules are codified at California Administrative Code, title 8, section 31001 et seq.

Section 32738(c) provides as follows:

> Objections shall be entertained by the Board only on the following grounds:
>
> (1) The conduct complained of interfered with the employees' right to freely choose a representative, or
>
> (2) Serious irregularity in the conduct of the election.

[3]In addition to the conduct alleged to constitute unfair practices, a captive audience speech made within 24 hours of the election is alleged as an independent basis for CUTA's election objections.

Community College District (9/21/79) PERB Decision No. 103) in its dealings with CUTA and the Faculty Senate during the pendency of a question concerning representation (QCR). The ALJ found that, by meeting and conferring exclusively with the Faculty Senate about matters fundamental to the employment relationship, by providing the Faculty Senate with financial assistance and support (typing and distribution of minutes, stationery, and release time), and by making express statements favoring the Senate, the District created the impression that it favored the Senate over the Association, thereby unlawfully encouraging employees to support that organization, by a vote for "no representative," in preference to CUTA.

The District does not contest the ALJ's finding that the Faculty Senate is an "employee organization" within the meaning of the Act.[4] However, it argues that, since the Faculty Senate was not listed on the ballot, it was not a rival organization, so that the District's support for it was permissible.

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[4]Subsection 3540.1(d) defines 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.

As the ALJ noted, this argument has previously been rejected by the Board in Sacramento City Unified School District (4/30/82) PERB Decision No. 214. There, we held, consistent with precedent established by the National Labor Relations Board (NLRB), that when an employer's campaign for no representation has the practical effect of providing support to a rival organization, it is inconsequential that the rival organization is not actually listed on the ballot.

In the remainder of its exceptions, the District merely reasserts arguments raised before the ALJ and properly disposed of in his proposed decision. However, in order to provide guidance to the parties, we offer the following clarification of the nature of the obligation of strict neutrality during the pre-election period.

Here, the finding of violation is based on three distinct categories of District conduct, each of which raises somewhat different considerations.

1. Statutory Rights

As the District argues, EERA guarantees a nonexclusive representative certain statutory rights -- the right to represent its members, the right of reasonable access to school facilities, and the right to dues deduction.[5] In addition,

[5]Section 3543.1 provides in pertinent part as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school

we have held that, so long as no exclusive representative exists, a nonexclusive representative has the right to represent its members in grievance proceedings (Mt. Diablo Unified School District et al. (12/30/77) EERB Decision No. 44),[6] and the right to receive notice and an opportunity to meet and confer regarding matters fundamental to the employment relation prior to any employer change of such

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> 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. . . .
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> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.
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> . . . . . .
>
> (d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

[6]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

matters. Los Angeles Unified School District (2/17/83) PERB Decision No. 285.

The District argues that it acted consistently with its past practice and with its obligations under EERA by continuing to grant the Faculty Senate its statutory rights, and that it would be senseless if strict neutrality required it to terminate such a cooperative relationship. It further argues that CUTA failed to prove that it ever requested or was denied the exercise of such rights.

The District is correct that termination of its existing relationship with the Faculty Senate is not required. Indeed, the denial of statutorily mandated rights could constitute an unfair practice. However, given an existing relationship with one employee organization, the appearance of a competing employee organization, announced by the filing of a representation petition, imposes on the employer an additional affirmative obligation of "strict neutrality." Santa Monica Community College District, supra, p. 22.

Thus, strict neutrality requires an employer contemplating a change in fundamental matters to provide notice and an opportunity to meet and confer to all employee organizations which represent employees affected by the change (Sacramento City Unified School District, supra) or, alternatively, to

refrain from making any change until the QCR is resolved.[7] Here, as in Sacramento, the District violated strict neutrality by meeting exclusively with one organization while failing to offer to meet with its competitor.

2. Financial Assistance and Support

In addition to failing to meet and confer equally with both the Faculty Senate and CUTA, the District also provided the Faculty Senate with financial assistance and support (typing and distribution of minutes, stationery and release time) in excess of that required by section 3543.1. In this respect, the case is similar to State of California (Department of Corrections) (5/5/80) PERB Decision No. 127-S, wherein the State provided employee organizations with, inter alia, office space, utilities, and inmate clerical services.

There, the Board found that the employer's discontinuance of these practices did not violate the Act. The majority reasoned that the employer's need to avoid favoring one

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[7]Compare Pittsburg Unified School District (6/10/83) PERB Decision No. 318 where we held that, during the pendency of a QCR initiated by the filing of a decertification petition, strict neutrality precludes a unilateral change of benefits. Pittsburg is distinguishable from the instant situation in that here the employer never had a duty to negotiate with an exclusive representative but only the more limited duty to meet and confer with a nonexclusive representative. Given this limited duty, a strict prohibition on unilateral change during the pendency of a QCR initiated by the filing of a representation petition would unduly burden the employer and is unwarranted. Rather, the employer may make a unilateral change after satisfying its duty to meet and confer in good faith with all employee organizations which represent employees affected by the change.

employee organization over another constituted legitimate business justification for the change. In his concurring opinion, Chairperson Gluck additionally noted that the employee organizations had no statutory entitlement to employer support of this kind. The concurring opinion states as follows at pp. 18-19:

> Interference with organizing is not necessarily unlawful. It is interference with protected organizational activities which are to be condemned. . . .
>
> . . . I find nothing . . . which obligates an employer to provide to an employee organization the type of facility involved in this case. Indeed, it is arguable that such action is prohibited.

Similarly, in the instant case, the District's typing and distribution of minutes, provision of stationery and release time to the Faculty Senate in themselves arguably constitute illegal financial assistance and support in violation of subsection 3543.5(d). However, it is not necessary to decide whether, as the District claims, its conduct constituted "permissible cooperation" rather than unlawful support. Given the pending election, strict neutrality clearly required the District either to discontinue these practices, as expressly authorized in Department of Corrections, supra, or, to the extent that its conduct constituted "permissible cooperation," to affirmatively make similar assistance available to all employee organizations. The District did neither. Clearly, the Association had no obligation to request such assistance.

Indeed, it might well be opposed to such management aid to employee organizations. Thus, the Association's failure to request support is no defense to the District's conduct.

3. Employer Statements

Given the context of District favoritism toward the Faculty Senate noted above, Superintendent Buchanan's statement, during a mandatory meeting ten days before the election, that the Senate did "a really good job" and was responsible for teachers not having to work the final Saturday of the school year, was likely interpreted by employees as a further indication of favoritism. Similarly, the District appeared to endorse the Faculty Senate by preparing and paying for a mailing to all teachers, just two weeks before the election, which contained both a letter from the superintendent and a letter from the Faculty Senate, in which the Senate claims responsibility for the elimination of the Saturday workday, reorganized grievance procedures and the introduction of a proposed salary increase. Especially when made so close to an election, such overt expressions of favoritism for one employee organization over another clearly exceed an employer's free speech right and violate strict neutrality.

For these reasons, we affirm the ALJ's finding of violation.

Grant of Benefits

The District next excepts to the ALJ's conclusion that it violated subsections 3543.5(a), (b) and (d) by continuing in effect a two percent pay increase and by eliminating a required

Saturday workday. The ALJ relied on the Board's holding in San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111 that, during the period prior to an election, an employer is obligated to act precisely as it would if a union were not in the picture and, absent operational necessity, is prohibited from either granting or withholding benefits inconsistent with past practice.

We affirm the ALJ's decision with respect to the elimination of the Saturday workday. The District's claim that its action was consistent with past practice and with a pre-existing plan is without support in the record. Equally meritless is its contention that no election was pending at the time the change was made.

However, contrary to the ALJ, we find that the District's decision to continue the two percent salary increase constitutes the implementation of a previous plan rather than a change in benefits, and that the decision and timing were justified by factors other than the pendency of the election. Micro Measurements (1977) 233 NLRB 76; Centralia Fireside Health, Inc. (1977) 237 NLRB 20.

In Micro Measurements, prior to the onset of an organizing campaign, the employer initiated an employee benefits improvement program which included a tentative decision to grant a wage increase the following year, conditional on the success of a price increase in its products. The NLRB found that the subsequent announcement of the wage increase, granted

to unit and nonunit employees alike ten days before the election, was justified by factors other than the pendency of the election.

Here, as in Micro Measurements, prior to CUTA's filing of its representation petition, the District issued a salary schedule which stated that:

> It is currently anticipated that the increase shall not be included in the 1983-84 salary schedule.

This was followed by a letter a month later stating that the District's ability to continue the wage increase "will depend upon any increased funding from the State Legislature."

These clauses are vague and tentative. They neither definitively eliminate nor preserve the two percent increase, but merely reserve the District's decision on the matter to a later date, conditioned on State funding.

As in Micro Measurements, the District subsequently removed the uncertainty and granted the increase when it appeared that the financial condition had been satisfied by the inclusion of a six percent increase for school districts in the Governor's proposed budget. Given the District's announcement, prior to the filing of CUTA's representation petition, that the continuation of the salary increase would depend upon increased funding, the District's subsequent conduct consistent with its announced plan, provides no indication that the District altered its behavior because "a union was in the picture." Neither is there any evidence of Faculty Senate involvement in

the District's decision. Moreover, the timing of the District's action was prompted by its settlement of an unfair practice charge regarding classified employees.[8] And, the fact that the increase was granted to employees not involved in the organizing campaign, further indicates that the action was governed by factors other than the election. Centralia, supra; Town and Country Supermarkets (1979) 244 NLRB 303; Tiffin Div, of Hayes-Albron (1978) 237 NLRB 20.

We, therefore, reverse the ALJ's finding of a violation based on this conduct.

Threats

The District excepts to the ALJ's finding that Principal James Fugman's statements to Ken Klein during an evaluation conference constituted an unlawful threat of reprisal in violation of subsections 3543.5(a) and (b), rather than protected employer free speech, citing Rio Hondo Community College District (5/19/80) PERB Decision No. 128. Based on his observation of demeanor during hearing, the ALJ credited Klein's account of the meeting over Fugman's. He concluded that Klein had received a "warning" about his union activities and was told by Fugman that he had "intimidated and threatened teachers." However, the circumstances were not revealed, Klein was not asked for an explanation or permitted to offer a

[8]We reject, however, the District's additional claim that, in order to avoid a charge of discrimination, it was obligated to treat all employees alike and to provide the same salary increase to CUTA members as it did to classified employees.

defense, and Fugman offered no evidence that Klein had in fact harassed or intimidated other employees or conducted improper activities during work time so as to provide any operational justification for the warning. Thus, the warning could have led Klein to believe that continued union activities might jeopardize his next evaluation.

Consistent with established Board precedent, we afford deference to an ALJ's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (9/26/79) PERB Decision No. 104. Moreover, based on our review of the record, we find no reason to alter the ALJ's findings here.

Contrary to the District's contentions, the fact that the comments were brief and made to only one employee does not eliminate their coercive nature. North American Aviation, Inc. (1967) 163 NLRB No. 115 [65 LRRM 1017]; PPG Industries, Inc. (1980) 251 NLRB No. 156 [105 LRRM 1434]. Similarly, the finding that Fugman's comments reasonably tended to coerce Klein does not require evidence that Klein actually felt threatened or intimidated, or was in fact discouraged from participating in Association activities as a result of the meeting. As the court stated in NLRB v. Triangle Publications (3d Cir. 1974) 500 F.2d 597, 598:

> That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under

> the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

We, therefore, affirm the ALJ's finding of violation.

Interrogation

The Association excepts to the ALJ's dismissal of its allegation that Learning Director Robert Uldall's interviews of 12 teachers at Clark School constituted unlawful polling or interrogation. Citing Blue Flash Express, Inc. (1954) 109 NLRB 591 [34 LRRM 1384], the ALJ examined the circumstances surrounding the conversations and determined that the questioning was neither so threatening nor coercive as to constitute an interference with employee rights.

The Association correctly claims that the conversations cannot be characterized as completely casual in that they were initiated at the request of school management to ascertain how teachers felt about the union, and the outcome of the conversations was reported to management. In addition, as argued by the Association, we disavow the ALJ's reliance on the fact that Uldall never directly asked employees how they were going to vote. The specific words used are not determinative where the inquiry conveys employer disapproval toward the union and creates an expectation of employee response. PPG Industries, supra. And, as the Association contends, the District offers no legitimate business purpose to justify the interviews.

Nonetheless, we find that the totality of circumstances, although questionable, does not in this instance rise to a level of coercion which could cause even slight harm to employees' rights. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

As the ALJ notes, the interviews were conducted in a friendly manner by a well-liked administrator in a low-key style and involved only a small percentage of the entire electorate. While Uldall's assurance of a right to remain silent does not amount to an assurance against reprisal, since silence could be construed as support for the union (Ethyl Corp. (1977) 231 NLRB 431 [97 LRRM 1465]), here, the facts indicate that Uldall was effective in quelling any teacher anxieties or fears. In sum, we find in these conversations no hint of hostility or implied retaliation against teachers for their views and, therefore, no evidence that the conversations reasonably tended to coerce or intimidate the employees.

Case No. S-R-729 - Objections to Election

The ALJ found that, taken collectively, the District's favoritism toward the Faculty Senate, grant of benefits, and threats to Association organizer Ken Klein, all found to be unfair practices, as well as a captive audience speech made within 24 hours of the election, are more than adequate to establish a "probable impact on the employees' vote." Jefferson Elementary School District (6/10/81) PERB Decision No. 164. He, therefore, sustained the Association's objections and ordered a new election. Both parties except.

The Association reasserts its claim, rejected by the ALJ, that PERB should adopt the per se rule stated by the NLRB in Peerless Plywood Co. (1953) 107 NLRB 427 [33 LRRM 1151] that an employer's anti-union speech to a captive audience during work time within 24 hours of an election is, in itself, grounds for setting aside an election.

In contrast, the District contends that a party complaining of election results must establish that pre-election conduct had not merely a probable impact, but an actual impact, on the employees' vote. It claims that the captive audience speech was unlikely to affect the employees' vote because it was a brief statement presented to less than ten percent of the electorate at a regularly scheduled meeting and that, unlike the private sector, in the schools, faculty meetings are a routine, nonthreatening event. In addition, according to the District, the other factors which the ALJ "erroneously determined to be unfair practices" had no relation to the election and could not have had an actual impact on it.

We reject the arguments advanced by both parties and affirm the ALJ's reasoning and conclusion.

While the Board has not previously had occasion to consider an employer's captive audience speech occurring within 24 hours of an election, we find no reason why that conduct compels a departure from our well-established rule that the decision to set aside an election "depends on the totality of circumstances raised in each case and, when appropriate, the cumulative

effect of the conduct which forms the basis for the relief requested." San Ramon Valley Unified School District, supra, p. 29; Jefferson Elementary School District, supra.

We, therefore, adopt the ALJ's conclusion that the timing of the speech is one factor to be considered along with others in determining whether the District's conduct had a probable impact on the employees' vote so that the election should be set aside.

In making such determination, demonstration of unlawful conduct is "a threshold question." San Ramon Valley Unified School District, supra, p. 28. The Board will not, necessarily, in every situation where conduct tantamount to an unfair practice is evidenced, order that the election be rerun. Neither do we preclude the possibility that conduct which is not tantamount to an unfair practice, including, for example, a captive audience speech made within 24 hours of an election, might so interfere with employee free choice as to warrant setting aside an election.

Moreover, we have previously rejected the District's argument that proof of an actual impact on employees' vote is required. As we stated in San Ramon Valley Unified School District, supra, at p. 27:

> In cases involving election challenges, the Board is unwilling to require that the secrecy of an individual's election conduct be invaded in order to present affirmative proof that the protested activity had a direct impact on the election results. In the appropriate case, the Board may infer

> from the record as a whole that the conduct tantamount to an unfair practice improperly influenced the employees' vote.

Here, we have found that during the pre-election period, the District committed unfair practices by encouraging employees to support the Faculty Senate in preference to CUTA, by eliminating a required Saturday workday, and by threatening Association organizer Ken Klein regarding his Association activities. The conclusion that these actions, along with the captive audience speech, had a probable impact on the election is fully warranted.

Initially, the District established a relationship of support for the Faculty Senate which not only exceeded its statutory obligations, but tended to create the appearance, if not the fact, of an "in-house" or "company" union. It provided the Senate with financial support, typing and distribution of its minutes, stationery and release time, which was not made equally available to the Association, thereby facilitating the Senate's operation and its ability to communicate with employees. Conversely, it unlawfully interfered with the Association's right to communicate with employees and to conduct its election campaign by making unsupported allegations and threats against Association organizer Ken Klein. Most egregiously, by meeting and conferring exclusively with the Faculty Senate about the Saturday workday, then eliminating that required workday, long a matter of keen employee interest, the District clearly encouraged employees to stay with the

Senate and reject the Association. Then, if any employee had missed the point, the District expressly credited the Senate with having eliminated the Saturday workday -- both in a mandatory meeting ten days before the election and in a mailing to teachers two weeks before the election. Finally, the morning before the election, Principal Fugman conducted a mandatory faculty meeting in which he urged the teachers to vote for no representation.

We find it highly probable that this entire course of conduct interfered with employees[1] opportunity to exercise their free choice in the election held on May 26, 1983, and we will order that election set aside and a second election conducted by the Sacramento Regional Director of the PERB.

REMEDY

We have found that the District unlawfully eliminated the final Saturday workday of the school year while a question concerning representation was pending. However, we find that it would not effectuate the purposes of the Act to reinstate the Saturday workday. This finding is consistent with orders of the NLRB. Triangle Sheet Metal Works (1978) 237 NLRB 364; Eastern Industries (1975) 217 NLRB 712.

In addition, because this Decision will issue during summer vacation when teachers will not be on District premises, we find that personal delivery of the attached Notices is necessary, in addition to customary posting, in order to ensure that employees receive prompt and effective notice of the resolution of this controversy.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Clovis Unified School District violated subsections 3543.5(a), (b) and (d) of the Educational Employment Relations Act. It is further found that the District denied employees the opportunity to exercise free choice in the election held on May 26, 1983. Pursuant to subsection 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Encouraging employees to join any organization in preference to another at a time when a question concerning representation is pending by:

(a) providing the Faculty Senate with financial assistance and support which is not made equally available to the Clovis Unified Teachers Association, CTA/NEA;

(b) meeting and conferring exclusively with the Faculty Senate about matters fundamental to the employment relationship;

(c) making changes in employee benefits that are not consistent with past practice; and

(d) crediting the Faculty Senate with securing improvements in employee benefits.

2. Interfering with the right of employees to form, join and participate in the activities of employee organizations of their own choosing by:

(a) encouraging employees to join the Faculty Senate in preference to the Clovis Unified Teachers Association, CTA/NEA;

(b) making changes in employee benefits that are not consistent with past practice, at a time a question concerning representation is pending; and

(c) threatening an employee because of his participation in activities protected by the Educational Employment Relations Act.

3. Denying the Clovis Unified Teachers Association, CTA/NEA, rights guaranteed to it by EERA by:

(a) encouraging employees to join the Faculty Senate in preference to the Association;

(b) making changes in employee benefits that are not consistent with past practice at a time a question concerning representation is pending; and

(c) threatening an employee because of his participation in Association activities.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Within thirty-five (35) days following the date of service of this Decision, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notices attached hereto as appendices. The Notices must be signed by an authorized agent of the District, indicating that the District will comply with the

terms of this Order. 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 reduced in size, altered, defaced or covered by any other material.

2. Within thirty-five (35) days following the date of service of this Decision, mail a copy of the attached Notices to each employee in the certificated unit.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that the results of the May 26, 1983 representation election shall be declared invalid and a new election shall be conducted as ordered by the Sacramento Regional Director.

Members Tovar and Jaeger joined in this Decision.

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-635, Clovis Unified Teachers Association, CTA/NEA v. Clovis Unified School District, in which all parties had the right to participate, IT has been found that the Clovis Unified School District violated subsections 3543.5(a), (b) and (d) of the Educational Employment Relations Act.

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

CEASE AND DESIST FROM:

1. Encouraging employees to join any organization in preference to another at a time when a question concerning representation is pending by:

(a) providing the Faculty Senate with financial assistance and support which is not made equally available to the Clovis Unified Teachers Association, CTA/NEA;

(b) meeting and conferring exclusively with the Faculty Senate about matters fundamental to the employment relationship;

(c) making changes in employee benefits that are not consistent with past practice; and

(d) crediting the Faculty Senate with securing improvements in employee benefits.

2. Interfering with the right of employees to form, join and participate in the activities of employee organizations of their own choosing by:

(a) encouraging employees to join the Faculty Senate in preference to the Clovis Unified Teachers Association, CTA/NEA;

(b) making changes in employee benefits that are not consistent with past practice, at a time a question concerning representation is pending; and

(c) threatening an employee because of his participation in activities protected by the Educational Employment Relations Act.

3. Denying the Clovis Unified Teachers Association, CTA/NEA, rights guaranteed to it by EERA by:

(a) encouraging employees to join the Faculty Senate in preference to the Association;

(b) making changes in employee benefits that are not consistent with past practice at a time a question concerning representation is pending; and

(c) threatening an employee because of his participation in Association activities.

Dated: _____ CLOVIS UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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

APPENDIX B

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

After a hearing in Representation Case No. S-R-729, Clovis Unified Teachers Association, CTA/NEA, employee organization, and Clovis Unified School District, employer, in which all parties had the right to participate, it has been found that the Clovis Unified School District denied employees the opportunity to exercise free choice in the election held on May 26, 1983.

The Public Employment Relations Board has, therefore, ordered that the results of that election shall be declared invalid and a new election shall be conducted by the Sacramento Regional Director of the Public Employment Relations Board.

Dated: _____ CLOVIS UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CLOVIS UNIFIED TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. CLOVIS UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. S-CE-635
CLOVIS UNIFIED TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and CLOVIS UNIFIED SCHOOL DISTRICT, Employer.	Representation Case No. S-R-729 PROPOSED DECISION (10/18/83)

Appearances: Diane Ross, Attorney, for the Clovis Unified Teachers Association, CTA/NEA; Harry Finkle and Mary Beth de Goede, Attorneys (Finkle & Stroup), for the Clovis Unified School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

In this consolidated unfair practice and objections to election case, an employee organization alleges numerous grounds for setting aside a representation election. The election resulted in the defeat of the organization's bid to become exclusive representative.

The Clovis Unified Teachers Association, CTA/NEA (hereafter Association) on June 7, 1983, filed objections to the conduct of a representation election which had occurred the previous month in the Clovis Unified School District (hereafter District). On June 13, 1983, the Association filed an unfair practice charge which parallels the allegations in the objections and contends that the District thereby violated the Educational Employment Relations Act subsections 3543.5(a), (b) and (d).[1]

The Sacramento regional attorney of the Public Employment Relations Board (hereafter PERB) on June 30, 1983, issued a

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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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.

complaint against the District on certain portions of the unfair practice charge. On the same day, the regional attorney dismissed other portions of the charge and, acting as an agent for the director of representation, also dismissed those portions of the objections which parallel the dismissed portions of the unfair practice charge. The dismissed portions of the charge and objections alleged that the District had polled certain employees who were not members of the unit the Association sought to represent and was responsible for polling which was conducted by an organization known as Teachers for Unity. Also dismissed was a contention that the District made certain misrepresentations during the weeks before the election. No exceptions were filed to the partial dismissal.

The remaining objections and those portions of the charge upon which a complaint was issued, in summary, allege that the District:

-- Interrogated employees at six schools about their election preferences and the preferences of fellow workers;

-- Made a pre-election announcement about employee salaries at a time much earlier than such announcements usually are made;

— Made a pre-election reduction in the length of the 1982-83 school year;

— Conducted a pre-election mandatory meeting with temporary teachers during which the superintendent warned that election of the Association would lead ultimately to the layoff of temporary teachers;

-- Threatened retaliation against Ken Klein, an Association activist, for his organizing efforts;

-- Conducted a pre-election meeting at which the superintendent threatened a reduction of benefits under collective bargaining including a change in policies on emergency leaves;

-- Supported a rival employee organization, the Faculty Senate, by meeting and negotiating with it during the pre-election period;

-- Gave representatives of Teachers for Unity a list of the addresses and telephone numbers of substitute teachers after denying such information to the Association and then provided the information to the Association when it was too late to be of use;

-- Conducted a mandatory faculty meeting at Kastner Intermediate School within 24 hours of the commencement of the election during which the District's anti-collective bargaining position was reiterated.

-- Conducted surveillance of Association meetings.

The District answered the charge on July 19, 1983, denying the factual allegations and asserting various affirmative defenses including the contention that the charge failed to state a prima facie case. Also on July 19, the District filed a motion for particularization which was denied the following day by the undersigned hearing officer.

The Association on July 19 filed an amendment to the unfair practice charge, seeking to add a contention that the District's conduct violated subsection 3543.5(c). The proposed amendment was denied at the commencement of the hearing. Following the presentation of its case-in-chief, the Association reduced from six to one the number of schools at which it contends there was employer interrogation about employee election preferences. The Association also withdrew

its allegation that the District had conducted surveillance of Association meetings.

The hearing was held in Fresno on July 25, 26, and 27, 1983. The parties filed responsive briefs, the last of which was received on October 13, 1983. The case was submitted for decision as of that date.

FINDINGS OF FACT

The Clovis Unified School District and the Clovis Unified Teachers Association are an employer and an employee organization within the meaning of the EERA. The District operates kindergarten through twelfth grade classes for approximately 15,000 students in 12 elementary schools, two intermediate schools, two high schools and a continuation high school. There were 680 employees in the unit which the Association sought to represent. Approximately 80 of that number were substitute teachers.

The events at issue arose in the context of an election campaign through which the Association sought to become exclusive representative of the District's certificated employees. The Association filed a representation petition with the PERB on November 10, 1982, seeking to represent all certificated employees with certain specified exceptions. Among those listed for exclusion were substitute teachers.

On December 28, 1982, following the completion of a supplemental showing of interest, the Sacramento Regional

Director of the PERB determined that the Association had demonstrated support by a majority of the employees in the proposed unit. There was no intervention by a competing organization within the appropriate time period. On January 13, 1983, the District denied recognition asserting that the proposed unit was inappropriate because it failed to include substitute teachers. On February 4, 1983, both parties met with a PERB representative to discuss their disagreement about the appropriate unit. As a result of that meeting, the parties entered the following agreement:

> The Clovis Unified School District and the Clovis Unified Teachers Association/CTA/NEA stipulate to the following:
>
> 1. If CUTA/CTA/NEA files an amendment to include the substitute teachers in the proposed unit, the District shall not raise additional issues regarding the appropriateness of the proposed unit. (PERB Rule Section 33100).
>
> 2. If the petition is found to be valid, the District hereby requests an election to determine what, if any, organization the employees choose to represent them for the purposes of collective bargaining. (PERB Rules, Article 4, Section 33190, Format B (5).

On March 18, 1983, the Association filed an amended petition which added substitute teachers to the proposed unit. In accord with PERB rules, the District posted the amendment and there was no intervention. On April 25, 1983, the regional director signed an agreement with the parties to conduct an

election on May 26, 1983, within the enlarged unit. On the ballot were the Association and "no representation." The four polling locations were open from 7 a.m. to 9 a.m. and from 2:30 p.m. to 5 p.m. on the day of the election. There were 697 eligible voters of whom 614 actually voted. The vote tally was 323 for no representation, 288 for the Association and three challenged ballots.

During the pre-election campaign, District administrators actively urged employees to vote for no representation. Superintendent Floyd B. Buchanan wrote and had distributed among employees seven letters stating the District's opposition to collective bargaining.

Several of the letters specifically urged employees to vote for no representation. As will be seen, infra, other lower-ranking administrators reflected the superintendent's position and urged employees to vote for no representation.

Interrogation at Clark Intermediate School

Although it originally alleged that the District had interrogated employees at six schools, the Association presented evidence of employer interrogation at only one school, C. Todd Clark Intermediate School. Administratively, Clark is divided into three "clusters," each headed by a learning director who reports to the principal, Beau Carter. The learning directors — Robert Uldall, Virginia Thomas and Jack Bohan — are the equivalent of vice principals and are

each responsible for one-third of the 50 to 60 member faculty. Individual faculty members report to their learning directors who complete their evaluations and assign them work.

Of the three learning directors, the one who discussed the election with the largest number of teachers was Robert Uldall. Mr. Uldall discussed the election with at least 12 teachers over a three-day period in mid-April. Eight of those teachers were witnesses at the hearing and, with one exception, were undisturbed by Mr. Uldall's comments. Several of the teachers volunteered favorable comments about Mr. Uldall as a supervisor and stated that they found nothing in his remarks to be intimidating or coercive. There were no significant variations in the witnesses' descriptions about the conversations.

Mr. Uldall testified that he was asked by his principal, Mr. Carter, "to get a feeling of how the teachers on my team felt with regards to collective bargaining." He understood this to mean that he should talk to the teachers who reported to him and find out their attitudes. Mr. Uldall called some teachers into his office in groups of three and he spoke to others individually.

Mr. Uldall credibly testified that at the commencement of each meeting with teachers he mentioned that the election was drawing near and he wanted them to know his position and where he "would be coming from." He said he then told them that,

> . . . if they chose not to say anything with regards to the election or collective bargaining, that they did not have to say anything, that it specifically was not really any of my business. But if they felt comfortable with me, that they could discuss it with me because I was going to tell them my position related to collective bargaining.

Mr. Uldall said he told the teachers that at the time of a 1977 PERB election in Clovis he had been president of the Clovis Federation of Teachers and worked for collective bargaining. However, he continued, the passage of Proposition 13 had destroyed the value of collective bargaining because "the school board no longer had control of the purse strings." Only the Legislature has control now, he said.

Mr. Uldall said he did not ask individual employees how they would vote in the election or how others would vote and that he made no threats. However, as a result of comments made by the teachers during the discussions and his general observations of them, Mr. Uldall reached conclusions about their individual positions. He then passed on the conclusions he had reached about teacher sentiments to Assistant Superintendent Dale Stringer.

Teacher recollections of those meetings, with one exception, do not differ significantly from Mr. Uldall's testimony. Mary Ross testified that Mr. Uldall asked about her "feelings" regarding the election. She said he was "just generally talking, pros and cons and different things of this

sort" and "nothing (was) really directed toward" her. Gayle Taylor testified that she couldn't say "that he asked me how are you going to vote" but she believed that basically was "what he was wanting me to tell him." Robert Ulrich described his meeting with Mr. Uldall as "very low key" and that the learning director "mentioned something about my views and he says if you feel that you don't need to answer or you don't want to answer that's perfectly all right." He said Mr. Uldall did not specifically ask him how he would vote.

Rosemarie Bezzera-Nader testified that Mr. Uldall asked "a vague question such as did I have any feeling about the election" but did not specifically ask her how she would vote. She described him as being "very professional with me." Barbara Dark said Mr. Uldall asked her if she "would support the District" in the election. He did not ask her how she would vote in the election. Carolyn Neumann testified that Mr. Uldall initiated a brief discussion by saying, "You know we're having an election." At that point, she responded saying, "Wait a minute, if we were going to vote right now I'd know how I would vote but I've got . . . two or three weeks . . . and I'll look things over and make a decent judgment." The conversation was thereupon terminated with Mr. Uldall asking Ms. Neumann to let him know if she had any questions. Karl Peterson testified that he had strong opinions about the outcome of the election and discussed the subject often with

Mr. Uldall, whom he described as a close friend. However, Mr. Peterson said he had himself initiated the discussions on most occasions and that Mr. Uldall knew his position.

The only witness to testify that she specifically was asked how she would vote was Christina Cole. She said that she was called into a meeting with two other teachers.

> . . . [H]e said that as we all knew, there would be an upcoming election as to whether Clovis Unified would be going CTA or not and that he was going to just point-blank ask us how we were going to vote and, of course, we didn't have to tell him if we did not want to.

Ms. Cole was highly annoyed about the meeting with Mr. Uldall and displayed that annoyance on the witness stand. Her version of Mr. Uldall's comments was not corroborated by Mary Ross, one of the two teachers present at the same meeting with Mr. Uldall. All witnesses who testified about the meetings with Mr. Uldall, except for Mr. Uldall himself, were called by the Association. Ms. Cole's testimony was in striking contrast to the others and it is concluded that her recollection of Mr. Uldall's statements was colored by her obvious annoyance that an administrator had made any comment at all to her about the election. It is concluded that while Mr. Uldall, in the words of Ms. Ross, asked whether Ms. Cole had "any feelings" about the election, he did not "point blank" ask her how she would vote.

The Association called four witnesses to testify about comments and statements made by learning director Virginia Thomas regarding collective bargaining. None of the witnesses testified that Ms. Thomas asked how they would vote. Richard Cook said Ms. Thomas asked him whether anything bothered him or was there anything he needed to know about the election. Robert Hatmaker said Ms. Thomas asked him if he would be willing to attend a meeting regarding the election. He replied that he would be willing but a meeting was not conducted. Carole Kampfe testified that she was not asked how she would vote and Linda Linder said she raised the issue of the election with Ms. Thomas and that Ms. Thomas, whom she likes, asked no questions.

The Association called one witness, Michael Davis, to testify about comments made by learning director Jack Bohan. He said that Mr. Bohan called him into the office two to three weeks before the election and asked how he felt about collective bargaining. After Mr. Davis gave "a general answer," Mr. Bohan asked if he would read all the statements that came into his mailbox. Mr. Davis said that he would and the subject of the conversation then shifted to sports.

Benefit Improvements

On February 9, 1983, the District school board voted to continue into the 1983-84 school year a 2 percent pay increase which employees had received in the fall of 1982. The

District's action pertained to all employees and it removed a cloud which had hung over the pay increase.

When teachers in October of 1982 received copies of a revised 1982-83 certificated salary schedule reflecting the 2 percent increase, they were warned that the increase might be for one year only. The pay schedule itself contained the following notation:

> The 1982-83 school year salary schedule reflects a two percent across-the-board salary increase.
>
> It is currently anticipated that the increase shall not be included in the 1983-84 salary schedule, and the 1983-84 school year schedule will be identical (sic) to the 1981-82 school year salary schedule.

A further warning was contained in a letter to employees from the governing board president who advised that,

> The District's ability to continue the 2 percent increase into the 1983-84 school year will have to depend upon any increased funding from the State Legislature.

Similar warnings were given to confidential, management and business-support employees, all of whom received a 2 percent pay increase in October of 1982.

The pay situation was a concern of the Faculty Senate throughout the fall and winter of 1982-83. The record establishes that teachers were concerned about whether or not they would retain or lose the 2 percent increase.

The question of the permanence of the pay raise became an issue between the District and the California School Employees Association (hereafter CSEA), exclusive representative of employees in the District's operational-support unit. On January 20, 1983, CSEA filed an unfair practice charge[2] against the District, alleging that the District had failed to negotiate in good faith when it unilaterally added the warning note to the salary schedule after the parties had reached tentative agreement. The charge further alleged that the school board had approved the tentative agreement with the restrictive note as part of its contents. CSEA alleged that the matter had never been discussed in negotiations.

After some discussion, CSEA and the District settled the unfair practice case without a hearing when the District withdrew the restrictive language from the contractual salary schedule. Associate Superintendent David E. Cook, the District's chief representative in labor relations, testified that the school board dropped the restriction from all salary schedules following the settlement with CSEA.

Mr. Cook testified that as early as January the District had concluded that it would not have to reduce employee salaries in the fall of 1983. This became apparent, he said,

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[2]California School Employees Association, Chapter No. 250 v. Clovis Unified School District, Case No. S-CE-572.

after the governor's proposed budget was made public. He said the District assumed that the Legislature would appropriate no less than what the governor proposed and the amount proposed by the governor was sufficient to eliminate any need for a reduction. Mr. Cook said the school board wanted to do something for employee morale and that "if they could remove that one particular little thing that's bothering people," it should do so.

Nevertheless, within two weeks of when the District concluded that it had sufficient money to maintain the 2 percent pay increase in the fall of 1983, the school board was considering budget reductions. The superintendent on March 8, 1983, presented the board with a list of tentative reductions totaling $1 million. The superintendent's memorandum to the school board was based in part on an assumption that "there will not be additional funding provided by the State Legislature for 1983-84." The memo then proceeds to list certain areas which District administrators had marked for reduction if necessary.

Pay increases for employees ordinarily are approved by the school board during the summer, typically in August.

On February 23, 1983, the school board voted to shorten the school year by one day through elimination of a requirement that teachers work on the Saturday after the release of

students. There was widespread faculty opposition to the Saturday workday and its cancellation long had been a goal of the Faculty Senate.

Teachers had worked on the final Saturday of the school year for at least three years. The District intended to abandon the Saturday workday in the 1981-82 school year. When the school calendar for 1981-82 academic year originally was adopted on December 10, 1980, the final workday of the year was set for Friday, June 11, 1982. Subsequently, however, the Legislature established a Martin Luther King holiday on January 15, effective in the 1981-82 school year. When the new holiday was added, the District decided to make up the lost day by extending the school year. The Faculty Senate on September 23, 1981, was invited to choose between adding the Saturday after the completion of classes or the Monday after that. The teachers opted for the Saturday.

The Saturday workday was continued in the 1982 83 school calendar but faculty opposition to it remained persistent. On December 15, 1982, the Faculty Senate voted to form a committee to meet with Associate Superintendent Cook and seek elimination of the Saturday workday. At the subsequent meeting, the committee was told that while the District could drop the Saturday workday and still meet state requirements on length of school year, it did not want to do so. The District wanted a school year longer than the minimum.

On January 26, 1983, Faculty Senate representative Ron Reel spoke to the school board and gave members a copy of a letter from the senate requesting elimination of the Saturday workday. He told the board that while the teachers understood the District's concerns about students, it was bad for teacher morale to have to report to school that final Saturday. The school board took no action on the proposal that night but the matter arose again at the February 23, 1983, meeting in the context of a discussion about the 1983-84 school calendar. The proposed 1983-84 calendar did not contain the end of school year Saturday workday and during the course of discussion, the school board members decided that if the Saturday workday was to be eliminated in 1983-84 it might as well be dropped also for 1982-83.

The effect of the school board's decision was that the 1982-83 school year was shortened by one day to a total of 179. Associate Superintendent Cook, who attended the February 23 meeting, testified that in discussion the board members indicated a belief that employees had done a good job and the board wanted to do more for them.

Even though the 1983-84 school calendar does not contain the end-of-year Saturday workday, the school year will return to its previous length of 180 days.

In May, about three weeks before the election, District

Superintendent Floyd Buchanan held a 45-minute after school meeting with the District's temporary teachers. Some 35 to 40 teachers were present. The various witnesses who testified about the meeting are in substantial agreement about what was said.

The superintendent called the meeting to inform the temporary teachers about their prospects for reemployment in the 1983-84 school year. He described the District's financial problems which he attributed, in part, to a less-than-projected increase in student enrollment. He said that fewer permanent teachers had gone on leave and it therefore was probable that the District would need fewer temporary teachers in 1983-84. He said that the situation would not be like previous years when 95 percent of the temporary teachers were rehired and he predicted that 10 to 15 of the temporaries employed in 1982-83 would not be rehired for the next year.

Some of those attending got the clear impression that it would be advisable to look for another job because there was no guarantee of reemployment in Clovis. The superintendent reinforced this impression by advising the temporary teachers that the District would provide whatever assistance possible to those who decided to look for jobs elsewhere.

The superintendent spoke for about 30 minutes and then opened the meeting to questions. At the time the meeting was opened to questions the superintendent had made no mention of

the forthcoming election and had offered no opinion about collective bargaining or the Association.

One of the questions to Dr. Buchanan was, "If the union were to win this election, how would that affect the hiring of us as temporary teachers?" The superintendent commenced his answer by observing that he had not raised the issue of the election but that it had been brought up by the questioner. Witnesses gave similar versions of the superintendent's answer. Marilyn Mack, an Association witness, recalled that the superintendent,

> . . . said something to the effect that if the union did pass and the District were required to spend monies in certain ways by, I assume, salary raises or so forth, that there might be less money available and that would mean that there would be less teachers to be able to be hired and he said, of course, that would probably affect the hiring of temporary teachers.

Brian Allen, another Association witness, recalled the superintendent as saying that,

> . . . most times when unions come into a district . . . what they ask for first is for [a] pay increase, and if that was the case . . . the money only comes from one area . . . and if . . . we didn't get extra money from the State, which they weren't sure of at that time, that they'd have to prioritize people . . . [P]ermanent people would have [to be] hired first and down the line, and it could be likely that . . . there wouldn't be any positions available for the temporary because of the money. But at that point it was all put in a hypothetical situation.

Gary Hudson, an Association witness, testified that,

> His [the superintendent's] response was fairly well worded but it was a statement that if the union got in and if the union's demands were for money at all cost, then temporary teachers would be let go.

Asked on cross-examination if Dr. Buchanan actually said that temporary teachers would lose their jobs if the Association won the election, Mr. Hudson responded:

> Not in those words. The only things, as I've already said, that temporary teachers would be an obvious place to pick up funding for a raise if it was demanded. But he never said that teachers would lose their job if the union came in.

The superintendent recalled his response to the question as follows:

> Well, I told her in the first place that this meeting had not been called to discuss the election. And on that basis I wanted everybody to understand that I would answer the question, but I wanted them to know that I had not planned to get into the election in this meeting. And I pointed out to her that, in essence, or in a nutshell, that generally when negotiations take place that salaries, working conditions, items affecting budgetary restraints are involved. And that it all came out of one pot and who knew what really would happen, and it's quite possible that it would affect the number of jobs if it depended upon what the governing board did or there might be no effect at all. But I wasn't sure, except one thing I could tell them that over the years that supplies, equipment, materials, salaries, personnel, it was all in the operating budget, and whatever final conclusion that the governing board and CTA reached, then obviously what was left would be what we would have to work with.

Comparison of the respective versions of the superintendent's comments makes certain facts evident. The superintendent did not raise the issue of the election or its potential effect on temporary teachers. The issue was raised in a question by a teacher. After the question was asked, the superintendent responded to it in a highly conditional manner. His response, to quote Association witness Allen, "was all put in a hypothetical situation." He made no direct linkage between the election and the possible elimination of temporary jobs. He did little more than state an obvious fact of school finance: there is a limited amount of money and funds spent for one purpose will have an effect on other facets of a school district's operations.

Fugman's Statements to Klein

In late February of 1983, Association activist Ken Klein was cautioned about certain of his organizing efforts by the principal of his school, James Fugman. The caution was given at the conclusion of a meeting at which Mr. Klein received a favorable evaluation. The nature of Mr. Fugman's comments are highly disputed.

Mr. Klein is a woodshop teacher at Kastner Intermediate School. During the pre-election campaign, he was an openly active supporter of the Association. He was a member of the Association strategy committee which made plans for the campaign and he distributed Association literature in teacher

mailboxes at Kastner. The mailboxes are located near the principal's office and Mr. Klein had discussed with the vice principal his belief in the need for collective bargaining.

With respect to the disputed comments of Mr. Fugman, Mr. Klein testified that the evaluation conference took place in Mr. Fugman's office. Present in addition to himself and the principal was the vice principal, William Wachtel. During the evaluation conference, Mr. Klein was handed a copy of the evaluation and told that the principal was happy with his work. Mr. Klein testified that the portion of the conference which concerned his teaching performance was not long. When that was finished, Mr. Klein testified, Mr. Fugman said that,

> [h]e wanted to warn me concerning my activities involved with trying to get an election in Clovis Unified School District and he also stated that it had been reported to him that I had threatened and intimidated teachers.

Mr. Klein testified that Mr. Fugman did not say from whom he had received the report about intimidation and threats. Mr. Klein responded that he had a legal right to assist the Association and that the principal had no right to warn him about his participation in the union activities. Mr. Klein said that the conversation then turned into a discussion about legal rights, ending abruptly when the school bell rang.

Mr. Fugman denied saying that he wanted to "warn" Klein about his organizational activities. The principal testified

that he spent 13 to 13-1/2 minutes going over with Mr. Klein each of 14 areas on the evaluation form. He said he spent about a minute to a minute and a half in a "fleeting comment" to Mr. Klein about his activities.

Mr. Fugman testified that he had received a report from a learning director that Mr. Klein "was being persistent or bothering a teacher . . . named Karen Marcos." He acknowledged on cross-examination that he had not spoken with Ms. Marcos to ascertain the nature of her alleged complaints. Nonetheless, Mr. Fugman testified, he cautioned Mr. Klein "to make sure that he conducted his activities on his time and not on school time." Mr. Fugman testified that he said nothing to Mr. Klein about the alleged harassment or persistence but limited his remarks only to an admonition that Mr. Klein should be sure to conduct his Association business on his own time.

On cross-examination Mr. Fugman at first could offer no explanation for why he admonished Mr. Klein to conduct his organizational activities on his own time when the complaint he had received was that Mr. Klein was bothering a teacher. Then Mr. Fugman modified his testimony and said that the report he received was not necessarily about harassment of a teacher, "but that potentially some of these activities might have been occurring during school time." Mr. Fugman said that while he "wasn't sure" that Mr. Klein was acting improperly, he wanted to "make sure that he was aware of the law."

The third witness to the evaluation conference was William Wachtel, the vice principal. Mr. Wachtel testified that most of the time spent in the conference dealt with the favorable evaluation. With respect to Mr. Klein's union activities, Mr. Wachtel said Mr. Fugman advised Klein of a report "that Mr. Klein had been conducting collective bargaining activities during the hours of the school day." Mr. Wachtel quoted the principal as then saying that organizing "is not something that he would like to have Mr. Klein doing during the course of the school day." Mr. Wachtel said the entire discussion about union activities took less than a minute and no warning was given to Klein.

Mr. Wachtel said that he had heard "very general" comments about Mr. Klein's union activities from other teachers. He could not, however, be specific about the nature of those comments. Asked about the content of the statements, Mr. Wachtel testified:

> Just basically that there was a lot of talk going on and that it was, you know, there was a lot of just discussion.

Counsel for the District made vigorous efforts at the hearing to discredit the testimony of Mr. Klein. This was done in part by presenting evidence that Mr. Klein had falsified a claim for sick leave during the 1982-83 school year and was docked for a day's pay.[3] The evidence establishes that

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[3]Evidence of specific instances of a person's conduct is admissible under Evidence Code section 787 if relevant to

Mr. Klein developed a severe rash in his groin and took a day of sick leave. Because he was embarrassed about having a rash in his groin, he falsely reported that he missed the day of school because of the flu. On the day of his absence from school, Mr. Klein went with his wife to a store to purchase some medication for the rash and he stopped in the store for lunch where he was seen by the principal, Mr. Fugman.

When later questioned by Mr. Wachtel about eating lunch on a day he supposedly had the flu, Mr. Klein stated that he was going to the doctor. Mr. Klein subsequently admitted that he had not had the flu and lowered his pants to show Mr. Wachtel the rash. Mr. Wachtel docked Mr. Klein for the day of pay and placed a letter in his personnel file for giving a false reason for his absence from school. Mr. Klein did not contest the pay dock or reprimand because, "I felt that I was wrong because I stated the wrong reason for being absent and I just wanted it ended."

The hearing officer finds Ken Klein to be a credible witness. Neither his demeanor on the witness stand nor the nature of his testimony suggest that he was biased against the District because of the sick leave incident. Indeed, the

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attack credibility other than as tending to prove a trait of character. See generally, California Evidence Benchbook by Bernard S. Jefferson at p. 540. Here, the evidence would be relevant to show bias or prejudice against Fugman who discovered the abuse of sick leave and Wachtel who ordered the pay dock and wrote the letter of reprimand.

evidence establishes the contrary. Stating a false reason for an absence from work because of embarrassment about the true reason, although not laudatory, is an understandable human reaction. Mr. Klein knew he was wrong and accepted the punishment. On the witness stand, Mr. Klein maintained his composure under pointed cross-examination. He did not try to cover up or justify his falsification of the sick leave documents and testified about the incident forthrightly, despite obvious embarrassment.

By contrast, the hearing officer finds both Mr. Wachtel and Mr. Fugman to be not credible witnesses. Mr. Wachtel was less than candid in his testimony about the sick leave incident. Although he admitted that Mr. Klein had lowered his pants to display his affliction, Mr. Wachtel was evasive in his description of what he saw. Asked if Mr. Klein had a rash, Mr. Wachtel retreated into statements that he was not a physician and therefore was unable to say whether or not Mr. Klein had a rash.[4]

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[4]Mr. Wachtel's inability to recognize a rash is revealed at pages 470-471 of the Reporter's Transcript.

> Q. (By Ms. Ross) You have no doubt that Mr. Klein missed school on that day because something was physically wrong with him, correct?
>
> A. That's not correct, no.
>
> Q. I thought I heard you testify earlier that Mr. Klein showed you his rash, is that

Mr. Wachtel evidenced a stubborn reluctance during the hearing to admit that anything might have been wrong with

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correct?

A. I'm certainly not a physician.

Q. Well, it is true that Mr. Klein had a rash?

A. And there, again, I'm not a physician.

Q. Well, did you see anything odd about Mr. Klein's body?

A. That's very ludicrous. I'm not in a position to judge that.

Q. Well, you know a rash when you see it, don't you? I mean, there's normal skin and then there's a rash. You're sort of familiar with that concept, right?

A. Why would I be familiar with that?

Q. You've never had a rash?

A. Yes, I can recognize my own rashes, yes.

Q. You think maybe your rashes are different than other people's rashes, Mr. Wachtel?

A. There, again, I'm not a doctor.

Q. Have you ever seen a rash on anybody else?

A. Yes.

Q. But you think you wouldn't recognize one if you saw it because you're not a doctor? Is that your testimony?

A. What is your question?

Q. My initial question was whether or not

Mr. Klein the day he was absent from school. The hearing officer interprets Mr. Wachtel's testimony about the rash as an indication of unwillingness to provide any information which might reflect favorably on Mr. Klein. Such an attitude raises doubts about all of his testimony.

Mr. Fugman was even less believable as a witness. His testimony was marked by contradictions and improbable versions of his conversation with Klein. For example, his statement that he warned Klein about union activities on District time seems highly unlikely, given that Klein was accused of harassment and not of organizing on District time. Mr. Fugman

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> Mr. Klein actually had a rash, and you said you were not a doctor so you couldn't answer that question.
>
> A. It could appear that it might have been.
>
> Q. It could appear that it might have been? What did it look like to you? I'm just asking for your lay —
>
> A. A red area on his groin.
>
> Q. Okay.
>
> A. Now, it could have been caused by medication, it could have been caused by several things —
>
> Q. Something was wrong?
>
> A. Obviously, yes. Yes.
>
> Q. You have no question about that?
>
> A. No.

also displayed an uneven memory. He was able to recall with amazing precision, even to the half minute, the length of time he spent talking about certain subjects in meetings as long ago as five months prior to the hearing.[5] Yet, despite this precise recall of events which occurred months earlier, when at the conclusion of his testimony Mr. Fugman was asked how long he had spent on the witness stand, he had to estimate the time at 10 to 15 minutes. During cross-examination about sensitive points, Mr. Fugman evidenced nervousness, was fidgety, covered his mouth with his hand while answering certain questions, swallowed and occasionally stuttered. Based upon the nature of his testimony, his demeanor as a witness and the selective precision of his memory, Mr. Fugman is rejected as a credible witness.

On the basis of these credibility determinations, it is concluded that Mr. Fugman did state during a February evaluation conference that he "wanted to warn" Mr. Klein about

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[5]For example, Mr. Fugman remembered that his February evaluation conference with Mr. Klein lasted 15 minutes of which 13 to 13-1/2 minutes were spent going over each of 14 areas of evaluation and only a minute to a minute and a half were spent discussing Mr. Klein's protected activities. Mr. Fugman also remembered that a faculty meeting he conducted on May 25, 1983, lasted about 23 minutes of which only three minutes "or maybe less" was spent discussing collective bargaining. He remembered that the faculty meeting ended "around 7:53, 7:52, 7:53 and one half, right around there, because I can remember looking up at the clock." He also testified that he had not, in preparation for the hearing, gone over with his attorney how many minutes the evaluation conference lasted and how many minutes the faculty meeting lasted.

his activities in trying to get an election in the Clovis Unified School District. He told Mr. Klein that he had received reports that Mr. Klein had "threatened and intimidated teachers" but failed to provide Mr. Klein with sufficient information that he might answer the charges.

Superintendent's State of the District Speech

On May 16, 1983, Superintendent Buchanan made a "state of the District" speech at Clovis West High School. Attendance was mandatory for the after-school speech which lasted approximately one hour. During the meeting the superintendent spoke about a number of subjects and answered questions which had been submitted in writing. Among the subjects covered in his answers to the questions were the grievance procedure, salaries and benefits in Clovis in comparison to other districts and the Faculty Senate.

With respect to the Faculty Senate, the superintendent was asked whether or not the organization was "an impotent type body that does relatively nothing for teachers that the District doesn't want them to." Dr. Buchanan replied that he did not know how to respond to the question but believed that the senate did "a really good job" and was responsible for some reforms. He added that because of the senate, teachers would not have to work on the final Saturday of the school year.

In its objections to the election, the Association alleged that during a "state of the District" message held "during

working hours" on May 17, the superintendent described the District's opposition to the Association and to collective bargaining. (Paragraph No. 4 of the Objections.) In its unfair practice charge, the Association alleged that the superintendent on May 17, "threatened to reduce benefits" if the employees voted for the Association by stating that it would alter its current practice of allowing employees to leave work early in emergencies (Paragraph No. 9 of the unfair practice charge.)

No evidence was presented that the superintendent made either of these statements during his May 16 speech at Clovis West High School or at any other time. Some evidence was presented that in March or April Mr. Wachtel told several teachers that under collective bargaining he might lose the flexibility to cover classrooms for employees during emergencies or medical appointments.

District Relationship With Faculty Senate

The Faculty Senate was formed after a 1977 election in which affiliates of both the California Teachers Association and the California Federation of Teachers sought to become the exclusive representative of Clovis teachers. As in 1983, the District conducted a campaign in favor of no representation and no representation was the ultimate winner.

During the previous campaign, a proposal for the formation of a Faculty Senate was raised as an alternative to exclusive

representation and collective bargaining. The concept of a Faculty Senate was endorsed by Superintendent Buchanan in a March 11, 1977, letter to the faculty.

The Faculty Senate was formed after the election. For some time, the District exercised significant influence upon and involvement in the operations of the senate. Anne Ritter testified that she became a Faculty Senate member in the 1979-80 school year after the principal of her school sought volunteers. Paul Robinson testified that he was solicited by his learning director, acting at the request of the principal, to volunteer for service on the Faculty Senate during the 1981-82 school year. Faculty Senate minutes show that as many as four top ranking administrators regularly attended meetings in 1980 and 1981. By the 1982-83 school year, however, the principal method for selecting senate representatives was by election and administrators attended meetings only on invitation.

In the 1982-83 school year and earlier, Faculty Senate minutes were typed, duplicated and distributed by the secretary to Associate Superintendent Cook. On at least one occasion, in August of 1982, the District also distributed for the senate a letter to members about the prospects for a salary increase. The senate letter accompanied a letter to employees by a District administrator. It was the regular practice in at least two schools, Kastner Intermediate School and Clovis West High School, for reports about senate activities to be made during faculty meetings.

For several years, the District provided regular District stationery for senate use. In the 1982-83 school year, the District prepared and gave to the senate new stationery bearing a distinctive Faculty Senate letterhead. In the past, the senate has had no operating budget. Senate meetings are held in District facilities.

Faculty Senate members have been excused from some work time for senate duties. During the 1982-83 school year, senate meetings commenced at 7 a.m. and extended until approximately 7:55 a.m. Although the teacher workday begins at 7:30 a.m. with instruction commencing at 8 a.m., senate representatives have been excused for the first 30 minutes of duty on meeting days. Senate representatives also have been given released time for meetings with the administration.

In addition to meeting with District administrators about continuation of the 2 percent pay raise and the Saturday workday, representatives of the Faculty Senate also met with the District in 1982-83 to discuss salaries for 1983-84, the school calendar, health benefits, the grievance policy, curriculum and textbooks. With respect to salaries, Senate President Jordan on March 23, 1983, urged the board to grant a 17 percent pay boost for 1983-84. The board took the proposal under submission.

Employee health benefits have been a subject of Faculty Senate concern for some years. Senate publications introduced

into the record show concerns about health benefits as long ago as the 1980-81 school year. The subject was again before the senate in the 1981-82 and 1982-83 school years. On March 16, 1983, Associate Superintendent Cook was invited to a senate meeting to explain the existing health plan and possible changes under contemplation. Mr. Cook was invited specifically to answer questions from senate members about why employees were not being reimbursed for certain medical expenses.

In the fall of 1982, a newly established senate grievance committee commenced a process aimed at the ultimate revision of the District grievance policy. The committee polled faculty members about modifications, including their preferences regarding the use of a neutral outside person in grievance processing. By January, the senate had completed its plan for a new policy and presented it to the school board. The administration rejected certain portions of the proposal, specifically opposing changes which might compromise the confidentiality of the procedure. In addition, the District informed the faculty committee that anything related to hiring, firing or moral turpitude was "out of bounds" for the grievance committee.

Discussions between the committee and the administration continued until about March or April when the District broke them off. District administrators asked that the talks be "tabled" until after the election, explaining that it would be

"inappropriate" to change the grievance policy during the pre-election period.

The senate itself voted to halt its activities during the month of May in order, according to its April 20 minutes, "to allow every member the opportunity to get involved and take a stand, as individuals, on the issues leading up to the election." However, before voting to recess in May, the senate approved the distribution of a letter to all District teachers describing the purpose and work of the senate. Although the letter did not take a position on the election, it was an obvious statement of senate accomplishments. Its May 10 distribution was just over two weeks from the election day and in that context the document reasonably can be read as urging retention of the status quo. There is no evidence any member of the administration had a role in the preparation or distribution of the letter.

In the letter, the Faculty Senate claims credit for "elimination of the Saturday 'workday' for certificated members," the preparation of a new grievance procedure and the proposal of a salary increase for the 1983-84 school year.

Telephone Numbers and Posters

Under the terms of the PERB election order, the District was directed to provide a list of eligible voters, including substitutes, to the Association by April 22, 1983. The District complied with the requirement and on or about May 3,

the Association made telephone calls to all of the substitutes whose numbers were listed in the Clovis telephone directory. Through this process, the Association was able to reach approximately 47 of the 80 eligible substitute teachers. Some 25 to 30 substitutes had unlisted telephone numbers.

Under the terms of the election order, May 3 was a critical date. Substitutes along with teachers on vacation, leave of absence, temporary layoff, long-term illness or on military duty were to vote by absentee ballot. The ballots were mailed by PERB on May 3 and were to be returned by mail to Sacramento no later than 5 p.m. on May 24. Association representative Alan Frey testified that the Association believed it was necessary to reach the substitutes before they got their ballots in order to be effective in soliciting their votes.

Teachers for Unity, an organization seeking a vote in favor of no representation was formed on or about May 4, 1983. The date of the formation of the organization can be fixed through the credible testimony of Tom Nation, one of the founders of the group. Mr. Nation's testimony that the organization was founded on May 4 was corroborated by the introduction of a cancelled check which he wrote on that day for the purchase of doughnuts which he distributed at the group's first meeting.

Mr. Nation credibly testified that sometime after the formation of Teachers for Unity, he learned that the Association had been calling substitute teachers. He then

approached Associate Superintendent Peter Mehas and requested a list of substitutes and their telephone numbers. Mr. Mehas agreed to give him the telephone numbers and Mr. Nation sought reassurance that it was proper for him to have the numbers. Mr. Mehas responded that the numbers were public records. Mr. Nation asked if the Association had the numbers and Mr. Mehas responded that all the Association had to do in order to get them was to ask. Mr. Nation credibly testified that he received the telephone numbers no more than two days prior to a press conference which Teachers for Unity conducted on May 10 or 11.[6]

At the press conference on or about May 10, Mr. Nation informed Mr. Frey, who was in attendance, that he had obtained a list of telephone numbers from Associate Superintendent Mehas. The next day, Mr. Frey wrote a letter to the District demanding a copy of the list of telephone numbers. On the same day, Associate Superintendent Cook independently asked Mr. Mehas if he had, indeed, given a list of telephone numbers to Teachers for Unity. When Mr. Mehas acknowledged that he had

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[6]The Association alleges that Teachers for Unity got the list of telephone numbers on May 2, 1983. The only evidence of that date was the uncorroborated hearsay testimony of Mr. Frey that a substitute named Darrell Cox had told him that Mr. Nation had called him the night before the Association made its May 3 telephone calls to the substitutes. Even if Mr. Nation had called Darrell Cox before May 3, there is no proof that Mr. Nation got Mr. Cox's telephone number from the District. He might well have obtained it from the Clovis telephone directory.

done so, Mr. Cook responded that, the District had better get a list to the CTA. That same day, a copy of telephone numbers of all eligible substitutes was given by Mr. Cook to Debra Diel, president of the Association. The list of telephone numbers was turned over to the Association prior to Mr. Cook's receipt of the letter of demand from Mr. Frey.

Mr. Frey testified that he had not asked for the list of substitute teacher telephone numbers until the May 12 letter which followed the press conference. Asked why he did not ask for the list prior to that date, he responded, "primarily because the District wasn't giving out any more information than they had to and I didn't think we'd get them."

During the pre-election campaign, the District's graphic arts department prepared one or more posters for Teachers for Unity. No evidence was presented about the exact content of the posters. It was the uncontradicted testimony of Associate Superintendent Cook that after he saw the posters he inquired about them and was assured that the organization had paid for them. He testified that the District graphic arts department in the past has done work for employees and has a regular billing system under which it receives full reimbursement for the cost of the job.

The Election Eve Speech at Kastner

On May 25, 1983, Kastner Intermediate School Principal James Fugman conducted a mandatory meeting of the school's

approximately 40 faculty members. The meeting commenced at 7:30 a.m. and lasted until just before the 8 a.m. start of the first teaching period of the day.

Mr. Fugman discussed a number of subjects at the meeting, including end of year duties of teachers, the need to maintain student discipline through the end of the year, the result of various competitions with Clark Intermediate School, various events scheduled for the final week and the recognition of various teachers. Estimates vary on how long Mr. Fugman discussed these subjects. He put the amount of time at 23 minutes. James Schlievert, a teacher at the school, estimated it at 20 to 25 minutes. Ken Klein, a teacher and Association activist, said he recorded the amount of time as 17 minutes.

Following his remarks about school-related matters, Mr. Fugman spoke to the assembled teachers about the election scheduled for the next day. There is no significant disparity in how the witnesses recall Mr. Fugman's remarks. Mr. Fugman said he had done his dissertation on collective bargaining and offered his opinion about its current state, i.e., that it was the Legislature which held the key to improvements and not bargaining. He discussed agency shop and the payment of dues and mentioned teachers in San Jose. He said that a vote for no representation was a vote for Kastner. He told the teachers that it was important that they vote the next day and urged

that they cast their votes for no representation.

Estimates on the amount of time spent on the no representation speech, vary from 3 minutes (Fugman) to "half the meeting" (Klein). Two witnesses called by the District put the time at 3-4 minutes and 4-5 minutes. A rebuttal witness called by the Association put it at "10 minutes at least." Given the number of subjects discussed before collective bargaining in relation to what was said about bargaining, it is reasonable to conclude the Mr. Fugman's no representation speech was somewhat less than "half the meeting" but longer than 3 to 5 minutes estimated by District witnesses.

Polling commenced at 7 a.m. the next day.

LEGAL ISSUES

1. Did the District, in violation of subsection 3543.5(a), (b) and/or (d), interfere with the protected rights of its employees during the pre-election period by:

   A. Polling workers about their support for the union?

   B. Granting benefits?

   C. Making threats?

   D. Showing favoritism toward rival organizations?

2. Should the objections to the election be sustained?

3. What is the appropriate remedy?

CONCLUSIONS OF LAW

In this consolidated unfair practice and objections to election case, the allegations of unfair practices are nearly

identical to the allegations which form the basis of the objection. In summary, it is contended that conduct by the District interfered with employee exercise of the protected right to select an exclusive representative.

Public school employees have the protected 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".[7] It is an unfair practice under subsection 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" these protected rights.[8] When a party's conduct interferes "with the employees' right to freely choose a representative," it may be the basis for sustaining objections to an election[9] as well as an unfair practice.

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

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations . . . .

[8]Section 3543.5 is found at footnote no. 1, supra.

[9]The grounds for objections to elections are set out at title 8, California Administrative Code, section 32738, paragraph (c), which provides as follows:

> (c) Objections shall be entertained by the Board only on the following grounds:

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity. Carlsbad Unified **School Di**District (1/30/79) PERB Decision No. 89.10 See also,

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> (1) The conduct complained of interfered with the employees' right to freely choose a representative, or
>
> (2) Serious irregularity in the conduct of the election.

[10]The Carlsbad test for interference provides as follows:

> . . . . . .
>
> 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.

Novato Unified School District (4/30/82) PERB Decision No. 210 and Sacramento City Unified School District (4/30/82) PERB Decision No. 214.

Here, the Association has alleged four types of interference: interrogation, grant of benefits, threats and favoritism toward rival organizations and, as a separate ground for sustaining the objections, a captive audience speech within 24 hours of the election. Each of these will be separately analyzed.

Interrogation

The Association argues that the District interfered with employee rights by Learning Director Uldall's interrogation of teachers at Clark Intermediate School. The Association contends that the PERB should adopt NLRB rules on interrogation, specifically the rule of Struksness Construction Co., Inc. (1967) 165 NLRB 1062 [65 LRRM 1385]. Under Struksness, a violation will be found unless the polling was conducted under strict safeguards to insure that employees are not intimidated.[11] At minimum, the Association contends,

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[11] In Strucksness Construction Co., the NLRB concluded that:

> Absent unusual circumstances, the polling of employees by an employer will be violative of section 8(a)(1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal

PERB should follow Blue Flash Express, Inc. (1954) 109 NLRB 591 [34 LRRM 1384] and, after evaluating the surrounding circumstances of Uldall's questioning, conclude that the interrogation was coercive.

The District rejects the Association's contention, arguing that Mr. Uldall's statements to employees were "in reality, innocuous, non-threatening discussions on a topic of mutual interest — the upcoming election." The District contends that the comments of the learning director were noncoercive and did not constitute an interference with employee rights.

The evidence establishes that in a negotiating unit with 680 members, Mr. Uldall discussed the election with approximately 12 employees. The evidence also establishes that although he asked some of those employees about their "feelings" regarding the election, he did not specifically ask how they planned to vote. Mr. Uldall was well-liked by his subordinates and the discussions about the election were variously described by the teachers as "very low key," "very professional" and preceded by assurances that employees did not have to offer any opinions.

> are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.
>
> (165 NLRB 1062, 1063.)

Although Mr. Uldall conceded that he was attempting to discern employee opinion about the election, the evidence fails to support the contention that he "polled" or "interrogated" them. Plainly, he shared his views with employees and he offered them the opportunity to share their views with him. However, when all of the circumstances are considered, Blue Flash, it cannot be said that the statements of Mr. Uldall were coercive or threatening to employees. Nothing in the statements of Mr. Uldall or in the circumstances of his pre-election conversations with employees could reasonably have suggested to employees that the employer might take action against them because of their pro-union sympathies.

For these reasons, no unfair practice can be found in the conduct of Mr. Uldall.

Grant of Benefits

The Association contends that the District granted two benefit improvements during the critical pre-election period, specifically, rescission of a scheduled 2 percent pay reduction and the elimination of a requirement that teachers work the final Saturday of the school year. Elimination of the Saturday work requirement also had the consequent effect of shortening the school year by one day. These actions, the Association argues, violate well-established NLRB prohibitions against benefit increases during a union election, citing NLRB v. Exchange Parts Co. (1964) 375 U.S. 405 [55 LRRM 2098]. A

benefit increase during an election campaign can have the effect of interfering with employee free choice, the Association argues. Because neither benefit improvement was consistent with past practice, the Association concludes they cannot be justified.

As a threshold argument, the District contends that the rescission of the one-year limitation on the 2 percent pay increase and the elimination of the end-of-year Saturday did not occur during the pendency of a representation petition. The District argues that when the Association "acceded" to the District's position that the appropriate unit must contain substitutes, the Association thereby "voluntarily agreed to withdraw" its initial petition. Thus, the District reasons, there was no valid representation petition pending between the February 4 meeting at which an understanding was reached on the unit configuration and the March 16, 1983, filing of the amended petition. The March petition was separately posted by the District and treated as a new filing by all parties, the District argues. Thus, the District concludes, nothing that happened during the February 4-March 16 period is relevant to establish either an unfair practice or to sustain the Association's election objections.

One searches the representation record in vain, however, for any evidence that the Association ever withdrew its November 10, 1982, petition or evidenced any intent to withdraw

it. There is no withdrawal of the petition in the PERB representation file; nor was the petition ever dismissed by PERB. Nothing in the wording of the "stipulation" entered by the parties states or even suggests that the prior petition had been withdrawn. Moreover, when the March 16 petition was filed, it was described by the Association as an "amended" petition and was treated as an amendment by the parties. A party would not normally "amend" a petition it had withdrawn. It would simply file a new petition.

The District argues that by requiring posting of the amended petition, the PERB treated it as a new petition. However, the intent of PERB regulations regarding amended representation petitions is apparent. Where an amendment would "correct technical errors or delete job classifications" there is no requirement for posting. Title 8, California Administration Code, section 33100(a). Where an amendment would add job classifications to a proposed unit, the amendment must be filed with the employer which must then post a notice for 15 workdays. Title 8, California Administrative Code, section 33100(b). A new posting is required, obviously, to provide notice that certain employees not formerly claimed for the requested unit are now being sought for it. The requirement of a second posting is a continuation of a single process. There is nothing inherent in the rules which create a break between the filing of an original petition and its

amendment. The District's argument that there was no pending petition during the February 4 - March 16 period is therefore rejected. A question concerning representation commenced on November 10,

and continued unresolved at least through election day on May 26, 1983.

The District next argues that the February 9 action on salaries had no relationship to the Association's organizing efforts but was an attempt to treat all employees alike, whether represented or not, citing MGM Grand Hotel-Reno, Inc. v. NLRB (9th Cir. 1981) 653 F.2d 1322 [108 LRRM 2348]. The District argues that the timing of the action was governed by the filing of an unfair practice charge by CSEA and that there was nothing even to suggest a discriminatory motive.

With respect to the cancellation of the Saturday workday, the District argues that its action was consistent with a decision made in the 1981-82 school year. At that time, the District argues, it had planned to end the requirement that teachers work the final Saturday and the day was added only because the Legislature had imposed a requirement that the schools provide a Martin Luther King holiday. The 1983 action was consistent with the earlier decision and "had absolutely no relation to the election," the school District concludes.

In San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111, the Board observed that "an employer is prohibited from granting benefits to employees during the

period prior to an election," citing with approval, NLRB v. Exchange Parts Co., supra. The Board concluded that either granting or withholding benefits during the "sensitive" pre-election period interferes with employee choice. Citing McCormick Longmeadow Stone Co., Inc. (1966) 158 NLRB 1237, 1242 [62 LRRM 1185], the PERB in San Ramon Valley, supra, wrote that a public school employer is,

> . . . obligated to act "precisely as it would if a union were not in the picture" and commits an unfair practice "if the employer's course is altered by virtue of the union's presence."

Thus, the question here is whether the District acted precisely as it would had the Association not been seeking to represent teachers in Clovis. The evidence compels the conclusion that this question must be answered in the negative.

The District removed the possibility of a pay reduction in February, ostensibly because it had concluded that finances would be adequate the next fall to permit retention of the 2 percent increase. Yet, less than two weeks after the District committed itself to retention of the 2 percent increase it again was considering budget reductions for the ensuing school year. If the financial picture was sufficiently clear in February to permit cancellation of the prospective pay reduction, one wonders why the District was considering budget reductions in March.

Historically, the District's approach to employee benefits has been cautious. Benefit improvements for the succeeding year are announced in the summer, typically in August. Yet in 1983, the District took the unusual step of acting on benefits in February. It is true that the District cancelled the scheduled pay reduction for unit members at the same time as it reached settlement with CSEA on an unfair practice charge. But there is no evidence about why that settlement with CSEA required the District to also announce cancellation of the scheduled reduction for teachers. Indeed, the only explanation given for the timing of the action was Mr. Cook's testimony that the school board wanted to do something for employee morale.

In its brief, the District argues that by extending the 2 percent increase into the 1983-84 school year, the District was treating all employees alike. The District's obligation, however, was not to treat all employees alike. The obligation was to act the same as it would have acted were there no pending election. Based upon past practice, the ordinary time for the District to have evaluated its situation and reached conclusions about pay increases would have been in the summer and fall months when the District would have had a clear picture of its finances. After an evaluation at that time, the District might well have concluded that it could have afforded to continue the 2 percent increase for certificated employees

into the 1983-84 school year and thereby have treated all employees alike. There was no urgency in February to act on a pay scale that would not take effect until the following September.

The District's citation of MGM Grand Hotel v. NLRB, supra, is inapposite. In that case, the court found that the pay increase was prompted by an intense competition for qualified employees that reached a crisis situation. The employer decided to give the raise after reviewing the matter in its normal business fashion and of 1,200 employees affected, only 49 were in the negotiating unit. There is no evidence in Clovis that the early decision on continuation of the pay increase was due to intense competition for teachers. While the record does not contain evidence about the number of nonunit employees affected by the February decision on pay, there is nothing to suggest a relationship anything like that in MGM Grand Hotel.

The District likewise has failed to offer a convincing justification for its decision to eliminate the end-of-year Saturday workday and shorten the school year by one day. The District argues that it originally had intended to eliminate the Saturday workday when it adopted its 1981-82 and 1982-83 calendars in 1980. It was only an action of the Legislature which "forced" return to the Saturday workday, the District argues. Although the Faculty Senate was the source for the

original request to eliminate the day, the District argues that it did not act at the same meeting when the senate representatives spoke and that when the issue later arose at the suggestion of a board member, there was no mention of the Association or the election.

It is important to note, however, that the conditions which existed in February of 1983 were actually no different from conditions which existed when the District decided to continue the Saturday workday for the 1981-82 school year. Because of the institution of the Martin Luther King holiday, the District in 1981-82 could not have had a 180-day year unless the teachers worked on that final Saturday or the subsequent Monday. In 1981-82, the need to maintain a 180-day year was seen as so important that the final Saturday was restored despite professed intentions to remove it. Yet in February of 1983, the importance of the 180-day year was suddenly diminished and for one-year only — the year of the election — the year was reduced to 179 days so that the final Saturday could be eliminated.

To again pose the question asked by the PERB in San Ramon Valley, supra, PERB Decision No. 111, would the District in February have cancelled the scheduled return to the prior year's pay schedule "if a union were not in the picture?" Would it have done away with the Saturday workday and shortened the school year by one day? The District's conduct supplies

the answer. When a union was not in the picture, the District announced pay rates in late summer or early fall and it religiously insisted on a 180-day year, even if it meant that teachers would be required to work on the final Saturday of the year. The only thing different in 1983 was the presence of the Association in a campaign to become exclusive representative.

Because the granting of benefits during the pre-election period has the natural and probable consequence of interfering with employee rights to organize, the District must be found in violation of subsection 3543.5(a) in the absence of justification by operational necessity. Mr. Cook testified that the reason for both the withdrawal of the threatened pay reduction and the shortening of the school year was the improvement of employee morale.

Any benefit increase can be expected to improve employee morale at any time it is given. However, under San Ramon Valley, supra, public school employers are not free to "improve morale" by deviating from past practice. The District's goal of improving morale is inadequate to outweigh the harm which numerous NLRB and PERB decisions have found in pre-election boosts in benefits.

Accordingly, the District violated subsection 3543.5(a) in February of 1983 by cancelling the scheduled 2 percent pay reduction, eliminating the end-of-year Saturday workday and shortening the school year by one day. The unilateral grant of

benefits without any consultation with the Association also would have the inherent effect of denying the Association the right to represent its members[12] in violation of subsection 3543.5(b). In addition, as will be seen infra, the grant of benefits here separately violated subsection 3543.5(d).

Threats

The Association contends that District administrators made threats which had the natural and probable effect of interfering with the campaign to become exclusive representative. Specifically, the Association contends that during a May meeting the superintendent threatened temporary employees with the loss of their jobs should the Association win the election. The Association contends further that Kastner Intermediate School Vice Principal William Wachtel

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[12]The protected rights of employee organizations are set out in section 3543.1, which in relevant part, provides as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers . . .
>
> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

during March or April told five or six teachers that collective bargaining would adversely affect the ability of teachers to leave school for personal emergencies. Finally, the Association argues that Kastner Principal James Fugman threatened Association activist Ken Klein because of Mr. Klein's organizing activities.

Citing NLRB and PERB precedent, the Association argues that the employer's speech was not protected because in each situation there was an implied threat of reprisal. At minimum, the Association argues, the employer's speech would in each situation cause at least "slight harm" to protected rights and, in the absence of justification, constitute unlawful interference.

The District denies that it made any threats. At most, the District argues, the comments of the superintendent and Mr. Wachtel were mere campaign rhetoric and could not reasonably be interpreted as threats. The superintendent's comments were highly conditional and were made in response to an employee question. As for Mr. Wachtel's remarks, the District continues, they were not coercive in tone or situation and were similar to remarks found to be unobjectionable in Clovis Unified School District (8/7/78) PERB Decision No. 61. With respect to Mr. Fugman's statements to Ken Klein, the District would credit the testimony of Mr. Fugman and reject that of Mr. Klein. Under this analysis, Mr. Fugman's remarks

were no more than a correct statement of the law, i.e., that an employer has the right to prevent solicitation on behalf of a union during work time.

In Rio Hondo Community College District (5/19/80) PERB Decision No. 128, the Board concluded that a public school employer has the right under the EERA,

> . . . to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate.

But the right of employer speech is not unlimited and,

> . . . speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection . . .

In accord, John Swett Unified School District (12/21/81) PERB Decision No. 188.

Under the NLRB formulation of the rule, an employer may lawfully offer uncoercive opinion and make predictions based on "objective fact" about "demonstrably probable consequences beyond his control." NLRB v. Gissell Packing Co. (1969) 395 U.S. 575, 618, [71 LRRM 2481], However, a violation will be found where the speech implies that the employer "may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him." NLRB v. Gissel Packing, supra, 395 U.S. 575, 618.

When measured against these standards, no violation can be

found in either the superintendent's speech to the temporary employees or Mr. Wachtel's comments about personal emergency leaves.

When asked about the effect of the election on the hiring of temporary teachers, the superintendent gave a highly conditional answer. He stated that if the union insisted upon improvements that cost money, and the District received no additional state funds, then the cost of the negotiated items would have to come from somewhere. Because all District expenditures come from one pot, he continued, money used for one purpose would have an effect on others. In such a situation, he concluded, there could be an effect upon the number of jobs available for temporary teachers.

That school districts have limited amounts of money and that expenditures for one purpose affect other possible expenditures is an objective fact of school finance. This is a consequence beyond the control of the District. The superintendent did not state that certification of an exclusive representative would result in a reduction in the jobs of temporary teachers. He said that temporary teachers are at a lower priority in rehiring than permanent teachers and insofar as reductions might be required, temporary teachers could be affected. His statement was not a prediction but a conditional analysis of possibilities and did not step over the bounds of permissible statements.

The evidence is scanty in regard to Mr. Wachtel's statements about emergency leaves and medical appointments. The evidence establishes only that Mr. Wachtel stated to a small group of employees that collective bargaining might result in the loss of his flexibility to cover classrooms for employees absent for emergencies or medical appointments. The comment was neither a prediction nor a threat.

As the District observes, the comment of Mr. Wachtel closely parallels a statement of Superintendent Buchanan found not to be coercive in Clovis Unified School District, supra, PERB Decision No. 61. In the prior case, Superintendent Buchanan observed that such items as release time for dental appointments, then administered informally by school principals, could be affected by the give-and-take of negotiations. The comment was held to be a statement of opinion about one of the possibilities under negotiations. The statement of Mr. Wachtel, similarly, should be seen in the same light. It was an opinion about a possible effect of collective bargaining. There is no reason to believe it would tend to interfere with protected employee rights.

The statement of Kastner Principal Fugman to Mr. Klein, however, is a quite different matter. Mr. Klein, an Association activist, was called into the office of the principal for a job performance evaluation. Following discussion of the evaluation, which was favorable, the

principal advised Mr. Klein that he wanted "to warn" him regarding his activities on behalf of the union. Specifically, Mr. Klein was warned that the principal had been advised that Mr. Klein "had threatened and intimidated teachers." The circumstances of the alleged threats and intimidation were not revealed and Mr. Klein was not asked for an explanation. He thus stood accused but unable to proffer a defense.

A "warning" made by the principal in the context of an evaluation, albeit favorable, would at minimum tend to interfere with Mr. Klein's protected right to participate in Association activities. The very use of the word "warn" by the principal carried with it the overtone of retaliation for failure to adhere to the warning. A union organizer, confronted with a warning about unspecified improprieties might easily choose to stop organizing. If he chose to continue, it doubtless would be with a sense of trepidation. As the Association argues, the warning could well have caused Mr. Klein "to believe that his next evaluation might not be as favorable if he continued those activities." The record is devoid of proof that the warning by Mr. Fugman was operationally justified. No convincing evidence was presented that Mr. Klein in fact harassed or intimidated anyone or that he improperly conducted any of his organizing activities during work time.

On this basis, it is concluded that Mr. Fugman's warning to

Mr. Klein was interference with Mr. Klein's protected right to participate in the activities of an employee organization in violation of subsection 3543.5(a). Intimidation of an Association activist and organizer would have the concurrent effect of interfering with the Association's protected right of access to employee work areas and means of communication (footnote 12, supra) in violation of subsection 3543.5(b).

Domination and/or Favoritism Toward Rival Organizations

The Association contends that the District violated subsections 3543.5(a), (b) and (d) by dominating, assisting and favoring the Faculty Senate while a question concerning representation was pending. The Association finds two separate violations of subsection 3543.5(d) in the District's relationship with the Faculty Senate. It is contended first that the District unlawfully dominated and supported the Faculty Senate. In addition, and separately, the Association argues that the District violated its obligation of strict neutrality during the pre-election period.

The Association asserts, and the District does not disagree, that the Faculty Senate is an employee organization with the meaning of EERA.[13] The Association argues that the

[13]The definition of an employee organization, which is set out in subsection 3540.1(d), reads as follows:

> (d)"Employee organization" means any organization which includes employees of a

District has supported the senate from its inception in 1977 when it was formed as an alternative to collective bargaining. For at least three years and continuing though 1982-83, the Association continues, the District has typed, duplicated and distributed minutes of senate meetings. It has provided the senate with stationery, printed at District cost, allowed members to meet on District premises during work time and been involved in the selection of at least some senate representatives.

Furthermore, the Association argues, the District has accorded the senate with de facto recognition by meeting with its representatives about negotiable matters during the period a representation petition was pending. Throughout this period, the Association complains. District administrators, including the superintendent, have praised the work of the senate. Taken together, the Association concludes, these various factors unquestionably establish District domination and support for the Faculty Senate under various NLRB and PERB decisions.

The District responds that the Association relies on evidence about time-barred events in order to make its case.

> 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.

During the period within six months of the filing of the charge, the District argues, there has been no showing of unlawful domination or assistance.

The District acknowledges that it "has had a long-standing, six-year relationship of cooperation and communication with the Faculty Senate." But it argues that the EERA in no way prohibits cooperation between an employer and a nonexclusive representative. Citing Los Angeles Unified School District (2/17/83) PERB Decision No. 285, the District argues that the PERB has encouraged and the EERA in part requires communication and cooperation between an employer and nonexclusive representatives as a method of furthering improved employer-employee relationships. Federal cases similarly encourage cooperation, the District argues.

The District maintains that while its relationship with the senate would be lawful under private sector principles, that result is even more obvious under the unique provisions of the EERA. Citing the section 3541.5(b) requirement, footnote No. 12, supra, that public school employers must afford access to employee organizations, the District argues that provision of a meeting room and similar assistance to the senate was nothing other than lawful cooperation.

It is concluded initially that the evidence simply cannot sustain the Association's contention that the Faculty Senate is dominated by the District in violation of section 3543.5(d).

Whatever the historic relationship may have been, it is apparent that by the 1982-83 school year, the senate had removed the District from control over its operations. Administrators no longer routinely attended senate meetings and appeared only upon senate request. Senate representatives were chosen by election in 1982-83 except in cases where the absence of competition permitted volunteers to become the representatives. There is no evidence to indicate that the District controlled the subjects of senate interest or influenced senate positions. Simply put, there is no evidence of the kind of "pervasive involvement . . . in the organizing and administering" of an employee organization which the PERB elsewhere has found to constitute employer domination. Antelope Valley Community College District (7/18/79) PERB Decision No. 97.

A more substantial question is raised by the District's assistance to and support for the senate. It is not here necessary to consider whether the typing and distribution of minutes, the gift of stationery and the provision of released time to attend meetings would be lawful in a nonelection environment. Some types of conduct are considered nothing other than lawful cooperation and, as the District argues, may be permissible in certain circumstances. Here, however, the District's assistance to and support for the Senate occurred during the pendency of a question concerning representation.

It is an unfair practice for a public school employer to "contribute financial or other support" to an employee organization or to "in any way encourage employees to join any organization in preference to another."[14] The PERB has interpreted this section as imposing on employers "an unqualified requirement of strict neutrality." Santa Monica Community College District (9/21/79) PERB Decision No. 103. There is no requirement that the employee organization show that the employer intended its actions to impact on employee 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. The District's actions fall far short of the required neutrality in its dealings with the Faculty Senate.

During the critical period following the filing of the Association's representation petition, the District pursued its relationship with the Faculty Senate as if nothing had happened. It continued to provide free typing and distribution of the minutes of senate meetings. It continued to supply the senate with stationery and to excuse its members from work assignments in order to attend meetings. Unlike the State of

[14]See subsection 3543.5(d), footnote no. 1, supra.

California in Department of Corrections (5/5/80) PERB Decision No. 127-S, the District apparently did not even consider the possibility that it might have been obligated to offer the same assistance to the Association or to offer it to neither organization.

District representatives continued to meet with Faculty Senate representatives about matters fundamental to the employment relationship (e.g., length of the school year, wages, health benefits, grievance policy), and made a significant change in benefits without first notifying the Association. Then, on May 16, 1983, some 10 days before the election, Superintendent Buchanan told teachers attending a Clovis West High School faculty meeting that the senate did "a really good job" and that because of the senate, teachers would not have to work the final Saturday of the school year. Such conduct could not help but create the impression that the District favored the Faculty Senate, thereby providing the prohibited "stimulus in one direction or the other." Santa Monica, supra, PERB Decision No. 103.

The District's citation of Los Angeles Unified School District, supra, PERB Decision No. 285, is not helpful to its case. Los Angeles Unified did not arise in a pre-election context where an employer was accused of favoring one employee organization over another. It does not deal with a situation where an employer met with one competing organization about matters of fundamental interest while failing even to inform

the other organization about intended changes. Los Angeles Unified involves an employer which failed to give a nonexclusive representative notice of its intended changes in matters fundamental to the employment relationship and thus denied the organization the opportunity to represent its members. The requirement that an employer permit nonexclusive representatives to represent their members in no way permits an employer to show favoritism between competing organizations by meeting with, supporting and crediting one organization with achieving benefits, while ignoring the other.

The District argues that a public school employer should not be required to "immediately cease all forms of even innocuous cooperation with a well-established employee organization as soon as a representation petition is filed." Indeed, an employer should not be so required. But in maintaining a relationship with an existing employee organization a public school employer must not, during the pendency of a question concerning representation, breach its "unqualified requirement of strict neutrality." Santa Monica, supra, PERB Decision No. 103.

During the critical pre-election period, the District breached the requirement of neutrality. Even though the senate was not listed on the ballot, it was a very real competitor of the Association, nonetheless. Sacramento City Unified School District, supra, PERB Decision No. 214. A vote for the

Association was a vote to abolish the existing system of Faculty Senate representation. The evidence is substantial that the District failed to remain neutral. Its support for the Faculty Senate would have been obvious to even the most casual observer of the election.

The District's conduct was a violation of subsection 3543.5(d) and, because such a display of favoritism would tend to interfere with employee rights, of subsection 3543.5(a). Employer favoritism toward a rival organization also has the effect of hindering the Association's ability to represent its members in violation of subsection 3543.5(b).

The Association also has challenged District assistance to an organization known as Teachers for Unity. Specifically, the Association contends that the District gave Teachers for Unity copies of a telephone list for substitute teachers after denying such information to the Association. The Association also alleges that the District made a poster for Teachers for Unity.

The evidence is conclusive that the Association did not request the telephone list until after Teachers for Unity requested it. Further, the evidence establishes that the District gave the list to the Association prior to receiving a formal request for the information. With respect to the poster, the evidence establishes that the District followed its regular practice for outside work and charged Teachers for

Unity the reasonable cost of the poster. There is no evidence that the organization was given any special treatment.

Accordingly, the contention that the District discriminatorily gave Teachers for Unity a telephone list and improperly made a poster for the organization must be dismissed.

Objections

The Association's objections case contains all of the above allegations and one in addition. In its objections to the election, the Association contends also that Kastner Principal James Fugman conducted a captive audience meeting within 24 hours of the election at which he urged rejection of the Association. There is no claim that the content of Mr. Fugman's remarks was itself coercive. The complaint is about the timing.

In making this complaint the Association urges adoption of the per se rule of Peerless Plywood Co. (1953) 107 NLRB 427 [33 LRRM 1151]. Under the rule, the NLRB will set aside an election upon a showing that an employer made a captive audience campaign speech to a massed assembly of employees within 24 hours of the election. Even a slight encroachment upon the insulated period will result in overturning the election.

The Association urges that PERB adopt the NLRB rationale that,

> . . . last-minute speeches . . . to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect.
>
> (Peerless Plywood Co., supra, 107 NLRB 427, 429.)

The District urges rejection of the per se rule, contending that the principal question is not when the speech was made but its content. The District argues that there is no evidence that Mr. Fugman's comments had any probable impact on employee free choice. Moreover, the District argues, the comments of Mr. Fugman were brief and consumed only a small portion of the meeting which generally was devoted to end-of-year business. At most, the District concludes, Mr. Fugman's remarks were "de minimus" in effect.

If the Peerless Plywood rule were adopted by PERB, the Fugman speech on May 25, 1983, would of itself be sufficient to set aside the election. Under the NLRB approach, it makes no difference whether the captive audience speech was made to the entire workforce or only to a small portion of it. Speeches by a supervisor to groups of 3 to 10 employees at 8 of 396 stores involved in an election were sufficient to trigger the rule and bring about a new election. The Great Atlantic & Pacific Tea Co. (1955) 111 NLRB 623 [35 LRRM 1537]. See also, Honeywell Inc. (1966) 162 NLRB 323 [64 LRRM 1002].

The PERB, however, has eschewed per se rules in elections, preferring to examine the entire circumstances in an objections case. In this respect, PERB decisions involving objections differ from National Labor Relations Board cases which often focus on whether or not "requisite laboratory conditions" were present during the pre-election period. See, General Shoe Corp. (1948) 77 NLRB 124 [21 LRRM 1337]. Because the PERB has not demanded "laboratory conditions" for elections, it has refused to follow certain NLRB-adopted per se rules for setting aside elections. See, for example, Tamalpais Union High School District (7/20/76) EERB Decision No. 1 where the Board refused to follow the NLRB practice of automatically setting aside an election where a party has marked a nearly exact reproduction of an NLRB ballot. Rather than evaluate elections on the basis of per se rules, the PERB has examined the totality of pre-election conduct to determine if there was interference or conduct which would have that natural and probable effect.

Although the Board has yet to deal with the effect of a captive audience speech within 24 hours of an election, it is concluded that the Board would treat the timing of the speech as one factor to be considered along with others in determining whether the conduct of a party interfered with "the employees' right to freely choose a representative."

Applying the totality of the conduct approach, it is concluded that the objections to the election in Clovis must be

sustained. A number of factors compel this conclusion. During the period after the filing of the Association petition, the District cancelled a scheduled 2 percent pay reduction, eliminated a requirement that employees work on the final Saturday of the school year thereby shortening the year by one workday. The elimination of the Saturday workday gave support to the Faculty Senate, a rival employee organization. Within 10 days of the election, the Senate was credited by the superintendent with the elimination of the much-disliked workday. The District further supported the senate by typing, copying and distributing senate minutes on stationery provided by the District and by giving senate representatives time off from work to attend its meetings. Finally, a District administrator threatened Association organizer Ken Klein because of his protected participation in Association activities and the same administrator, within 24 hours of the election, gave a captive audience speech to a massed assembly of employees at which he urged them to vote against the union. All of these actions were taken without operational justification.

Taken collectively, the various District actions are more than adequate to establish a "probable impact on the employees' vote." Jefferson Elementary School District (6/10/81) PERB Decision No. 104.

As they prepared to cast their ballots, the District's employees had a rather clear choice. On one side was a vote for "no representation," and continuation of the existing system of Faculty Senate representation. The senate was an organization obviously favored by the District. Employees knew that the senate, as a favored organization, had been successful in obtaining some benefits, including the recent elimination of the much-disliked end-of-year Saturday workday. The District had cooperated with the senate in the past and the superintendent's eleventh hour praise of the organization was an implied promise of cooperation in the future. The other choice was a vote for the Association, an organization rigorously disfavored by the District. While employees were witnessing cooperation between the District and the senate they were being urged by the District to reject that "outside" organization, the Association, which has had "no positive input on any matter involving the District over the past seven years."15

When confronted with such a choice, a number of employees reasonably could have decided that it was easier to go along with the District than run the risk and uncertainty of change. Such an environment would inherently interfere with employee

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[15]Superintendent Buchanan's letter to employees, dated April 28, 1983, Association Exhibit No. 40.

free choice. Accordingly, the objections to the election must be sustained.

REMEDY

The Association seeks a bargaining order, arguing that the District's unfair practices are so pervasive that there is no possibility of erasing their effects. The Association cites NLRB v. Gissel Packing Co. (1969), supra, 395 U.S. 575 and urges that a bargaining order is appropriate. The Association observes that it at one time demonstrated majority support and the District's subsequent practices were such that they "would have the tendency to undermine majority strength and impede the election processes." NLRB v. Gissel Packing, supra, 395 U.S. 575, 614. The Association cites several NLRB cases where bargaining orders were issued and argues that because those cases are factually analogous to the events in Clovis, the PERB should issue a bargaining order here.

The District describes a bargaining order as a totally inapplicable remedy. Bargaining orders are disfavored remedies, the District argues, and should be given only in response to outrageous, egregious employer misconduct not capable of remedy through traditional sanctions. Viewed at their worst, the District contends, the unfair practices alleged here are "routine and remediable."

It is concluded that a bargaining order is not appropriate because the unfair practices committed here are not so

pervasive as to nullify the possibility of a fair rerun election.

In Clovis, there were no proven threats of layoff, no proven incidents of coercive employer interrogation, no proven retaliation for union activity, no warnings that a union would be unable to secure a contract with the District. These are all factors in typical bargaining order cases. The most serious pre-election misconduct was the cancellation of the threatened 2 percent pay reduction and the one-day reduction in the school year. While both of these actions doubtlessly had an effect on the election, they do not preclude the possibility of a fair rerun. Federal cases do not hold even that a pay increase during the crucial period automatically entitles a complaining union to a bargaining order. See, NLRB v. Gruber's Super Market, Inc. (7th Cir. 1974) 501 F.2d 697 [87 LRRM 2037].

The threat made against Mr. Klein was isolated and there is no showing that other employees knew about it, much less that it engendered such widespread apprehension that employees would be fearful of exercising free choice in a rerun election. Finally, there is no reason to believe that the District would not cease exclusively meeting with and supporting the Faculty Senate if ordered to do so by PERB, the remedy found appropriate by the Board in Sacramento City Unified, supra, PERB Decision No. 214.

A new election is an appropriate remedy along with a cease and desist order requiring the District post a notice

incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District (2/22/80) PERB Decision No. 116; see also Placerville Union School District (9/18/78) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Clovis Unified School District violated subsection 3543.5(a), (b) and (d) of the Educational Employment Relations Act. It is further ordered that the objections to the election of May 26, 1983, filed by the Clovis Teachers Association, CTA/NEA are sustained, consistent with the findings and conclusions in this proposed decision. Pursuant to subsection 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST PROM:

(a) Making changes in employee benefits that are not consistent with past practice, at the time a question concerning representation is pending;

(b) Interfering with the right of employees to participate in the protected activities of employee organizations by issuing warnings to employees who choose to engage in such activities;

(c) Showing favoritism toward the Faculty Senate while a question concerning representation is pending by supporting the activities of the Faculty Senate and by exclusively meeting with representatives of the senate about matters fundamental to the employment relationship and subsequently crediting the senate with securing improvements in employee benefits.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Within seven (7) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(b) Within twenty (20) workdays from service of a final decision in this matter, notify the Sacramento Regional

Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this order. 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 IS FURTHER ORDERED that the results of the May 26, 1983 representation election shall be declared invalid and a new election shall be conducted as may be ordered by the Sacramento Regional Director.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 7, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 7, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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 proceedings. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: October 18, 1983

Ronald E. Blubaugh
Hearing Officer