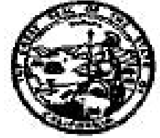

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, PSYCH TECH LOCAL 11555,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION, DEVELOPMENTAL SERVICES, AND MENTAL HEALTH),

Respondent.

Case No. S-CE-261-S

PERB Decision No. 601-S

December 30, 1986

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),

and

COMMUNICATIONS WORKERS OF AMERICA, PSYCH TECH LOCAL 11555,

and

CALIFORNIA ASSOCIATION OF PSYCHIATRIC TECHNICIANS.

Case No. S-OB-104-S
(S-D-87-S; S-R-18)

Appearances; Kanter, Merin, Dickstein & Kirk by Howard L. Dickstein for Communications Workers of America, Psych Tech Local 11555; Lester L. Jones, Attorney for the State of California (Departments of Personnel Administration, Developmental Services, and Mental Health); Loren E. McMaster, Attorney for the California Association of Psychiatric Technicians.

Before Hesse, Chairperson; Porter, and Craib, Members.

DECISION

This decision is rendered by the Public Employment Relations Board (PERB or Board) following the appeal by the Communications Workers of America, Psych Tech Local 11555 (CWA)

of a proposed decision by a PERB administrative law judge (ALJ). In that decision, the ALJ found that the State of California (the employer) had violated portions of the State Employer-Employee Relations Act (SEERA)[1] by certain actions that occurred prior to and concurrent with a decertification election. The ALJ declined, however, to overturn the results of the election on the grounds that the employer's conduct was neither widespread nor egregious enough to taint the election itself, that is, the employer's conduct did not have a probable impact on the outcome of the election.

The Board has carefully reviewed the entire record in this case, including the proposed decision, the exceptions thereto, and the hearing transcripts. We adopt the findings of fact and conclusions of law set forth in the ALJ's decision, attached hereto, consistent with our discussion below.

DISCUSSION

The ALJ's proposed decision provides a complete and persuasive analysis of all of the arguments raised by the parties over the extensive history of this case. We nonetheless will comment briefly on the exceptions to his decision raised by CWA in its appeal to this Board.[2]

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[1]SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2]We note that none of the parties excepted to the factual findings of the ALJ. CWA excepted only to several of the ALJ's conclusions of law.

CWA first argues that the ALJ erred when he ruled that the filing and subsequent withdrawal of a unit modification petition by the employer did not constitute an unfair practice that could be adequately remedied only by setting aside the decertification election. To the contrary, the Board finds that the ALJ thoroughly examined the relevant facts and properly applied the appropriate test to determine whether the employer's actions were unlawful. We find that the record supports his conclusion that no unfair practice occurred by the employer's filing of a unit modification petition at the end of the window period, and later withdrawal of the petition.

Second, CWA argues that the ALJ erred in not setting aside the election, given his finding that the state committed five unfair practices. We disagree and note specifically the ALJ's discussion of the limited impact of the violations, and his careful crafting of a remedy appropriate to the scope of the violations. The record amply supports the limited remedy of a cease-and-desist order, and restoration of access rights, bulletin board space, and telephone privileges. The record does not support setting aside the election and denying employees the free choice to select another representative because of the limited, almost minimal, nature of the violations.

Finally, CWA argues that the ALJ "ignored election objections which, on undisputed facts, require a new election." Again, we disagree. The ALJ fully considered the

allegation that the California Association of Psychiatric Technicians (CAPT) was granted improper access rights prior to the question of representation being raised. He correctly rejected this allegation as unproven and unfounded. Further, the ALJ carefully examined and rejected CWA's assertion that CAPT was improperly "recognized" by the employer at a time when CWA was the undisputed exclusive representative. We concur in his ruling that no such improper "recognition" was granted to the decertifying union.

In conclusion, the Board affirms the findings and conclusions of the ALJ, and adopts his proposed decision and remedy as those of the Board itself.

ORDER IN CASE NO. S-CE-261-S

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the State of California (Departments of Developmental Services and Mental Health) has violated sections 3519(a), (b), (c), and (d) of the State employer-employee Relations Act. Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that the Departments of Developmental Services and Mental Health (hereinafter DDS and DMH, respectively), their officers and representatives shall:

1. CEASE AND DESIST FROM:

A. Making unilateral changes in access rights of CWA representatives by banning them from the nocturnal distribution of literature at Camarillo State Hospital and by requiring them to give 24 hours notice prior to entering units at Camarillo and Napa State Hospitals.

B. Making unilateral changes in access rights of CWA by prohibiting representatives of the organization from using the telephone at Patton State Hospital for grievance processing and other representational purposes.

C. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT by the posting of a list of CAPT "stewards" at Metropolitan State Hospital.

D. Interfering with the protected access rights of CWA by reducing CWA's bulletin board space at eight DDS and DMH hospitals.

E. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT through pro-CAPT statements made by management and/or supervisory employees at Fairview, Lanterman, Metropolitan, and Stockton State Hospitals.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE STATE EMPLOYER-EMPLOYEE RELATIONS ACT:

A. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual access clause is changed by subsequent negotiation, access rights at Camarillo and Napa State Hospitals consistent with Article XII, sections 1 and 2, of CWA's current agreement with the State.

B. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the past practice is changed by subsequent negotiation, the right to use the telephone at Patton State Hospital for grievance processing and other representational purposes to the extent permitted prior to the spring of 1985.

C. Remove from all management bulletin boards at Metropolitan State Hospital all copies of the June 4, 1985 memo by Denise Bates listing CAPT "stewards" and her subsequent correction memo.

D. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual bulletin board clause is changed by subsequent negotiation, all bulletin

board space removed from CWA during the first six months of 1985 in hospitals operated by DDS and DMH.

E. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all work locations throughout DDS and DMH where notices to members of Unit 18 are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent to the state, indicating that the state 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 ensure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

F. Make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the Director's instructions.

All other allegations in Unfair Practice Charge No. S-CE-261-S are hereby DISMISSED.

ORDER IN CASE NO. S-OB-104-S

(S-D-87-S; S-R-18)

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Board ORDERS that the election objections in Case No. S-OB-104-S be DISMISSED. We further ORDER that the Regional Director certify the results of the election in Case Nos. S-D-87-S and S-R-18, and that he take all other action necessary in this case that is not inconsistent with this Decision.

By the BOARD [3]

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[3]Members Morgenstern and Burt did not participate in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. S-CE-261-S, Communications Workers of America, Psych Tech Local 11555 v. State of California (Departments of Personnel Administration, Developmental Services and Mental Health), and Representation Case No. S-OB-104-S, State of California (Department of Personnel Administration) and Communications Workers of America and California Association of Psychiatric Technicians, in which all parties had the right to participate, it has been found that the State of California has violated sections 3 519(a), (b), (c), and (d) of the State Employer-Employee Relations Act. The State violated the Act by making unilateral changes in the access rights of CWA by banning CWA organizers from making nocturnal distributions of literature at Camarillo State Hospital and by requiring the organization give 24 hours notice at Camarillo and Napa State Hospitals prior to visits by its representatives to hospital units. The State violated the Act by making unilateral changes in the access rights of CWA representatives at Patton State Hospital by prohibiting them from using the telephone for grievance processing and other representational purposes. The State violated the Act by interfering with the protected rights of employees and giving unlawful support to CAPT by posting a list of CAPT "stewards" at Metropolitan State Hospital. The State violated the Act by interfering with the protected access rights of CWA by reducing CWA's bulletin board space at eight DMH and DDS hospitals. The State violated the Act by interfering with protected rights of employees and providing unlawful support to CAPT through pro-CAPT statements made by management and/or supervisory employees at Fairview, Lanterman, Metropolitan, and Stockton State Hospitals.

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

1. CEASE AND DESIST FROM:

A. Making unilateral changes in access rights of CWA representatives by banning them from the nocturnal distribution of literature at Camarillo State Hospital and by

requiring that they give 24 hours notice prior to entering units at Camarillo and Napa State Hospitals.

B. Making unilateral changes in access rights of CWA by prohibiting representatives of the organization from using the telephone at Patton State Hospital for grievance processing and other representational purposes.

C. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT by the posting of a list of CAPT "stewards" at Metropolitan State Hospital.

D. Interfering with the protected access rights of CWA by reducing CWA's bulletin board space at eight DDS and DMH hospitals.

E. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT through pro-CAPT statements made by management and/or supervisory employees at Fairview, Lanterman, Metropolitan, Stockton State Hospitals.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE STATE EMPLOYER-EMPLOYEE RELATIONS ACT:

A. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual access clause is changed by subsequent negotiation, access rights at Camarillo and Napa State Hospitals consistent with Article XII, sections 1 and 2, of CWA's current agreement with the State.

B. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the past practice is changed by subsequent negotiation, the right to use the telephone at Patton State Hospital for grievance processing and other representational purposes to the extent permitted prior to the spring of 1985.

C. Remove from all management bulletin boards at Metropolitan State Hospital all copies of the June 4, 1985 memo by Denise Bates listing CAPT "stewards" and her subsequent correction memo.

D. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual bulletin board clause is changed by subsequent negotiation,

all bulletin board space removed from CWA during the first six months of 1985 in hospitals operated by DDS and DMH.

Dated:______________________ STATE OF CALIFORNIA
Department of Mental Health

By: ______________________________
Authorized Representative

Dated:______________________ STATE OF CALIFORNIA
Department of Developmental Services

By: ______________________________
Authorized Representative

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

COMMUNICATION WORKERS OF AMERICA, PSYCH TECH LOCAL 11555, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION, DEVELOPMENTAL SERVICES, and MENTAL HEALTH), Respondents.	Unfair Practice Case No. S-CE-261-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), and COMMUNICATION WORKERS OF AMERICA, PSYCH TECH LOCAL 11555, and CALIFORNIA ASSOCIATION OF PSYCHIATRIC TECHNICIANS.	Representation Case No. S-OB-104-S (S-D-87-S; S-R-18) PROPOSED DECISION (10/1/86)

Appearances: Kanter, Williams, Merin & Dickstein by Mark Merin, Howard L. Dickstein and Nancy Kirk for Communication Workers of America, Psych Tech Local 11555; Lester Jones, Attorney for the State of California (Departments of Personnel Administration, Developmental Services, and Mental Health); Loren E. McMaster, Attorney for the California Association of Psychiatric Technicians.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case grows out of the events surrounding an election for exclusive representative among employees in State Unit 18.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The Communication Workers of America, Psych Tech Local 11555 (CWA), contends that during the pre-election period the State of California (State) made unilateral changes in organizational rights. In addition, CWA continues, the State interfered with protected rights of CWA while favoring and supporting CWA's election rival, the California Association of Psychiatric Technicians (CAPT).

In response to these alleged wrongs, CWA filed an unfair practice charge and objections to the conduct of the election. As a remedy, it asks that the election be set aside and that a new election be ordered. Both the State and CAPT deny that any wrongful conduct took place and argue that even if there were some violation of law, it was insufficient to justify a new election.

The charge which commenced this action was filed on June 6, 1985, by CWA. It was subsequently amended on June 25, June 27, July 3, and August 2. On August 6, 1985, the Sacramento Regional Attorney of the Public Employment Relations Board (PERB or Board) issued a partial dismissal of the charge. On the same day, he also issued a complaint. CWA appealed the partial dismissal to the Board and on December 13, 1985, the Board, in Decision No. 542-S, reinstated the dismissed portions of the union's factual allegations.

As this case went to hearing, the complaint alleged that the State violated State Employer-Employee Relations Act

section 3519(c) and, derivatively, sections 3519(a) and (b)[1] by making unilateral changes in:

1) Contractual access policy by requiring that CWA representatives provide 24-hour notice for visitation to hospital units.

2) Telephone use policy.

3) Permissible locations for the distribution of literature.

The complaint also alleged that the State of California violated SEERA sections 3519(a), (b) and (d) by:

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[1]Unless otherwise indicated, all references are to the Government Code. The State Employer-Employee Relations Act (SEERA or Act) is found at section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
>
> (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.

1) Posting employer-written memoranda which imply support for CAPT over CWA.

2) Granting CAPT the use of State facilities denied to CWA.

3) Permitting supervisors to make statements which imply state support for CAPT over CWA.

4) Distributing literature for CAPT through the hospital mail system.

5) Filing a unit modification petition to remove senior psychiatric technicians from the bargaining unit.

The CWA objections followed a decertification election conducted via mail ballot during the summer of 1985. At the conclusion of voting on July 17, the ballots initially were impounded. This was to await a PERB decision on CWA's request to delay a ballot count pending resolution of the unfair practice charge. On December 13, 1985, the PERB, in Order No. Ad-151-S, directed that the ballots be counted. The ballots were counted on December 30, with the following result:

Approximate number of eligible voters - 7656
Void ballots - 86
Votes cast for CWA - 1662
Votes cast for CAPT - 2353
Votes cast for no representation - 129

Valid votes counted - 4144

A majority of the votes were thus cast for CAPT.

On January 9, 1986, CWA filed objections to the conduct of the decertification election. The objections set out four

basic arguments which may be summarized[2] as follows:

1) That CAPT was not an employee organization as defined in SEERA.[3]

2) That the State filed a unit modification petition which had the effect of undermining CWA's support among senior psychiatric technicians.

3) That the State misrepresented to Unit 18 employees the nature of CAPT's status compared to that of CWA.

4) That the State gave illegally broad recognition, access, visibility and support to CAPT.

The unfair practice charges and the objections to the election were consolidated for hearing. The hearing was conducted in Sacramento, San Bernardino and Van Nuys over 18 nonconsecutive days in February, March and April of 1986. With the filing of post-hearing briefs, the matter was submitted for decision on September 2, 1986.

FINDINGS OF FACT

The members of Unit 18 are employed by two State

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[2]The statement of objections contains 15 numbered paragraphs. In its brief, CWA summarizes the objections into four contentions listed here.

[3]At section 3513(a), SEERA contains the following definition:

> "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state.

departments, the Department of Developmental Services (DDS) and the Department of Mental Health (DMH). During the relevant period, the Department of Developmental Services operated Agnews State Hospital in San Jose, Camarillo State Hospital, Fairview State Hospital in Costa Mesa, Lanterman State Hospital in Pomona, Napa State Hospital, Porterville State Hospital, Sonoma State Hospital in Eldridge and Stockton State Hospital. The Department of Mental Health operated Atascadero State Hospital, Metropolitan State Hospital in Norwalk, and Patton State Hospital in San Bernardino. In 1986, subsequent to the events at issue, responsibility for Napa State Hospital was transferred from DDS to DMH.

Each State hospital is supervised by an executive director whose two primary operational subordinates are a clinical director and a hospital administrator. The clinical director is in charge of the program directors who operate those portions of a hospital where the patients or clients[4] are housed and treated. The hospital administrator is in charge of the maintenance of the physical plant and supervises, among others, the labor relations officer.

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[4]Persons under treatment in hospitals operated by the Department of Mental Health are generally referred to as "patients." Persons under treatment in hospitals for the developmentally disabled (formerly know as retarded) are generally referred to as "clients." (See Reporter's Transcript at Vol. I, pp. 39-40.) To avoid confusion and to keep the terminology in the Proposed Decision consistent with lay usage, the term "patient" will be used to denote all persons receiving treatment in the State hospitals.

The basic treatment component of a State hospital is a "program." Programs vary according to the type of patient involved and are subdivided into units, the living and service areas for patients. Units generally are composed of dormitories or private rooms where the patients sleep, a patient recreation area with a television set, a unit office, offices for various professional employees and a treatment room where medications are dispensed. Units typically also have an employee break room containing a table and chairs and usually one or more bulletin boards. During the relevant period, there were some 25 programs comprising 80 units within the Department of Mental Health. There were 60 programs comprising 291 units within the Department of Developmental Services.

State employees working within Unit 18 are divided into 11 civil service classes. As of the voter eligibility cutoff date for the election, the unit contained 7,656 employees. Of these, some 890 were Senior Psychiatric Technicians, a job classification key to the dispute at issue.

Employees work on three shifts, round the clock, seven days a week in the hospital units. The person in charge of each shift is called the shift lead and may be either a Senior Psychiatric Technician or a Registered Nurse II. The shift lead reports to a unit supervisor who in turn reports to a program director. The unit supervisor has 24-hour responsibility for a living unit.

Since November of 1981, the exclusive representative for Unit 18 employees has been CWA. CWA's original contract covering Unit 18 employees was entered into with the State on July 1, 1982. It expired on June 30, 1985.

ALLEGED UNILATERAL CHANGES

Access

State hospital administrators long have been concerned about intrusions upon the privacy of patients due to access by union representatives and others. Hospitals are the homes of patients. Patients live in the units, eat there, bathe there. Traffic by outsiders is disruptive and for a time union representatives were barred from patient living areas. In a 1980 settlement of a series of unfair labor practices, the two departments relaxed the prior ban and granted limited access to union organizers. Under the terms of the agreement, union representatives employed by the State were permitted to visit unit break rooms upon advance notice of at least 24 hours to the program director.

In 1982, CWA and the State agreed to an access clause in their initial contract. During the relevant period, the clause provided that chapter officers and stewards would have access to the units upon notification and prior approval by the program director "or designee." The clause guarantees chapter officers and stewards ". . . access through work areas for purposes of posting literature in unit break rooms . . ." Access may be deferred for client care, privacy, safety,

security or other necessary business reasons. However, "access shall not be unreasonably denied."[5] The contract contains no

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[5]The contractual access provision is found in Article XII, section 1. It provides as follows:

> 1. <u>Access</u>
> (Revised July 1, 1983)
>
> CWA National Staff representatives, Local Staff, Local Officers, Chapter Officers and Stewards shall have access to employees for purposes of representation according to the following:
>
> (a) National Staff, Local Staff, and Local Officers seeking access to employees shall identify themselves to the facility Labor Relations Coordinator who will make the necessary arrangements for access to employees.
>
> (b) Chapter Officers and Stewards shall have access to employees in the area of responsibility they have been assigned by CWA. They shall notify the Program Director or designee and must receive his/her approval prior to entering the program. Where employees work in other than client programs, CWA shall notify the department head or designee, and must receive his/her approval prior to entering the work area.
>
> (1) Meetings, conferences or investigations may be held in resident care or treatment areas only with the approval of the Program Director or designee. Otherwise, all meetings, conferences or investigations shall be held in unit breakrooms, or other appropriate non-work areas.
>
> (2) Chapter Officers and Stewards shall have the right to access through work areas for purposes of posting literature in Unit breakrooms in conformance with Article XII, section 2.
>
> (c) Access may be deferred for reasons related to client care, privacy, safety, security, or other necessary business reasons. Access shall not be unreasonably denied.

requirement that CWA officers or stewards must give 24-hours notice prior to visiting a hospital unit.

When CAPT commenced its organizing campaign in early 1985, it requested but was denied hospital access equivalent to that of CWA. In April 1985, CAPT met the required showing of interest for a decertification election. Thereafter, the organization was granted limited access by both DMH and DDS. In virtually identical May memos, DDS Labor Relations Specialist Gary Scott and DMH Labor Relations Chief James Moore advised their respective hospital labor relations coordinators to permit CAPT to organize on hospital grounds. The memos directed that hospital employees representing CAPT be granted access to employee break rooms in the living units except for the nocturnal shift. CAPT representatives desiring to exercise the access privilege were to provide notice to the appropriate program directors 24 to 72 hours prior to their visits. CAPT organizers were to be granted space for the posting of leaflets in the unit break rooms but were to provide an advance copy of all posted or distributed materials. Moore testified that administrators of DMH hospitals were authorized to waive the 24-hour notice requirement if they desired.

Although the memos of Messrs. Moore and Scott pertained only to access for CAPT, hospital administrators at Camarillo, Fairview and Napa enforced some of the CAPT restrictions against CWA organizers.

Barbara Long, CWA grievance coordinator for the State hospitals, was told during the spring of 1985 that she could no longer visit the units at Camarillo State Hospital without giving 24 hours advance notice. She also was prohibited from posting literature on the nocturnal shift. Although she had been active with CWA for some time, she had never previously been requested to give 24 hours advance notice or been banned from visiting other units at night. CWA's contract with the State contains no prohibition against nighttime access to units.

Similarly, all employee organizations were requested to give 24 hours notice for access at Fairview State Hospital. Hal Britt, hospital personnel officer and labor relations coordinator, testified that the 24-hour rule was in effect even prior to January 1985. However, he continued, during the election campaign individual program directors often waived the 24-hour requirement for union representatives.

At Napa, Hospital Administrator Richard P. Friday directed the CWA representative to provide an advance written schedule of the times that union representatives would post materials on unit break room bulletin boards. The schedule was to be provided to the program director and approved prior to the representative's visit. CWA steward Deborah Whitlock credibly testified that she had been directed to give 24-hour advance notice prior to visiting unit break rooms in order to post literature. Mr. Friday testified that CWA representatives need not secure prior approval but were required only to give

advance notice. However, on June 14, 1985, he set out a requirement for prior written approval in a written instruction to CWA representative Buck Bagot. I find Mr. Friday's 1985 writing more persuasive than his testimony.

Use of Telephones

The contract between the parties makes no provision for the use of State telephones by employee organization representatives. Nonetheless, according to DMH Labor Relations Chief Moore, it has been the practice within the Department of Mental Health that exclusive representatives are permitted to use State phones to facilitate the resolution of grievances and other representation issues. Use of the State phones for other union business has not been permitted.

Both DMH and DDS consistently have prohibited the installation of private phones by employee organizations. As a matter of policy, the departments do not want any phones in State hospitals over which they lack control.

During the pre-election campaign period, CWA representatives at Patton State Hospital were told they could no longer use the State phone for union business. One of those representatives, Homer Silver, then asked to install a private CWA phone. His request was denied. Requests by CWA representatives to install private phones also were turned down at Agnews and Lanterman State Hospitals.

Leaflettina Locations

The contract between CWA and the State provides in Article

XII that "CWA representatives may, during non-work hours, distribute CWA literature in non-work areas."[6] Although the right is stated broadly, CWA agrees not to distribute literature that is "libelous, obscene, defamatory," politically partisan, or inconsistent with good labor relations. And, as noted elsewhere, literature distribution, like other access rights, is subject to deferral for "client care, privacy, safety, security" or other "necessary" business reasons. (See footnote No. 5, supra.)

During the campaign, disputes arose at Camarillo, Napa and Patton State Hospitals regarding outdoor locations at which CWA attempted to distribute literature.

At Camarillo State Hospital representatives of both CWA and CAPT were directed by the hospital police to stop distributing literature in locations which blocked traffic. Louis Watts, the labor relations coordinator at Camarillo, testified that the union organizers were standing in the middle of the street in front of buildings located on the principal access road to

---

[6]The contractual provision on distribution of literature is found in Article XII, section 2. It provides as follows:

2. Distribution of Literature

> CWA representatives may, during non-work hours, distribute CWA literature in non-work areas. CWA agrees that any literature distributed will not be libelous, obscene, defamatory, of a partisan political nature, or inconsistent with the promotion of harmonious labor relations between the State and CWA.

the hospital. He said they were stopped from distributing literature because their activity had backed up traffic.

At Napa State Hospital there are two locations where union leaflets were distributed during the 1981 campaign for exclusive representative. One location was at a stop sign at the intersection of Magnolia Drive and Spruce Drive, directly in front of the hospital administration building. The other location was at the rear entrance to the hospital at the intersection of Imola Avenue and Cedar Drive.

In 1985, CWA representatives again distributed literature at those locations. For a time, this practice proceeded without incident. However, on or about May 28, 1985, hospital peace officers halted the distribution of CWA literature at the Magnolia and Spruce stop sign. The officers told the CWA representatives that they were blocking traffic and asked that they move to the front entrance.

Nevertheless, the organizers soon were permitted to resume leaflet distribution at the stop sign. CWA representative Bagot testified that he was able to convince Hospital Administrator Friday that leafletting by the sign was safer than leafletting at the front entrance. Mr. Bagot testified that CWA organizers distributed leaflets at the Magnolia-Spruce stop sign before, during and after his discussions with Mr. Friday about access.

At the Imola Avenue site, CWA organizers at first distributed leaflets at the very entrance to the hospital

grounds. Hospital Police Chief James Stratton requested that they move slightly farther onto the grounds to keep traffic from backing up onto Imola. The organizers acceded to his request and there was no further incident at that location.

At Patton State Hospital, the traditional location for the distribution of literature was at two speed bumps located on Patton Avenue approximately 300 feet from the hospital entrance. Some 70 to 80 percent of hospital employees pass over the speed bumps on their way to work. In the past, union representatives or others who wished to distribute literature at the speed bumps were required to sign a waiver stating that they would not sue the hospital if they were injured.

Police protection and traffic safety at Patton Hospital are the responsibility of the Department of Corrections. James Wright, the correctional captain in charge of hospital security, had been concerned about leafletting at the speed bumps when he first observed the practice during 1983. However, Wright was new to Patton at that time and he acquiesced in the approval by the hospital labor relations office of leafletting at that location. In the spring of 1985, when CWA representatives again requested permission to leaflet at the speed bumps on Patton Avenue, Captain Wright urged that permission be denied. He advised hospital administrators that the practice was dangerous to both leaflet distributors and drivers and that it caused traffic congestion. CWA's request was denied but the union was told it could distribute

literature in front of three buildings and in the hospital parking lots. Virtually all Unit 18 members at Patton must pass through entrances to the buildings where CWA was given permission to leaflet.

On May 23, 1985, two CWA representatives commenced the distribution of literature at the speed bumps and a nearby intersection. Captain Wright and another officer intercepted them, reminded them of the prohibition and invited them to leaflet at the three approved locations. Although they protested his action, the two organizers complied. There were no other incidents involving leafletting at Patton.

ALLEGED INTERFERENCE/UNLAWFUL SUPPORT

Employer-Written Memoranda

The complaint alleges that the State gave unlawful support to CAPT through the circulation of three employer-written communications: A February 26, 1985, letter by Ivonne Ramos Richardson; a March 5, 1985, memo by Gary Scott; and a June 4, 1985, memo by Denise Bates.

The first of these communications was written to Kenneth C. Murch, a partner in the consulting firm of Western, Murch and Associates. On February 15, 1985, Mr. Murch had notified Dennis Batchelder, chief of labor relations for the State Department of Personnel Administration, of an impending effort by CAPT to decertify CWA in State Unit 18. Mr. Murch requested access to State facilities, bulletin boards and other methods of distributing literature.

For reply, Mr. Batchelder gave Murch's letter to Ms. Richardson, a senior labor relations officer. Ms. Richardson responded on February 26. Her letter identified its purpose as: "Recognition of the California Association of Psychiatric Technicians as an employee organization under SEERA." It continued as follows:

> This is to formally notify you that the Department of Personnel Administration has recognized your organization, the California Association of Psychiatric Technicians (CAPT), as an employee organization under section 3513(a) of SEERA.

The letter then repeated information contained in the Murch letter of February 15, including the names and addresses of the president, vice-president and secretary/treasurer of CAPT. The letter concluded with an explanation of the limits of access which would be extended to CAPT.

At the hearing, Ms. Richardson was questioned extensively about her use of the word "recognition." It was not her intention, she explained, to "recognize" CAPT as the exclusive representative of Unit 18 employees. Rather, she said, she intended only to recognize CAPT as an employee organization for the narrow purposes of section 3513(a) . She testified that in listing the names and addresses of the CAPT officers she sought merely to "confirm" the information contained in the Murch letter.

During a negotiations meeting sometime in the spring of 1985, CWA negotiator Charlie Strong stated to Ms. Richardson

that her memo was "all over" the hospital system. Later, CWA steward Barbara Long pinpointed the locations as Camarillo — where she testified she saw the letter on two unit bulletin boards — and Sonoma.

At Camarillo, Ms. Long testified, she saw the unit supervisor, Willie Stephens, post the Richardson letter on one unit bulletin board. Mr. Stephens denied the accusation. This credibility dispute is resolved in favor of Mr. Stephens. While I do not doubt Ms. Long's testimony that the Richardson memo was posted at Camarillo, I find it hard to believe that Mr. Stephens put it there. The letter was addressed to Ken Murch of CAPT. There is no evidence it was ever circulated by Ms. Richardson or any one else in management to unit supervisors. I therefore doubt that Mr. Stephens had access to the letter. I think it much more likely that the letter was posted at Camarillo by someone from CAPT. Whatever Ms. Long saw Mr. Stephens put on the board, I do not believe it was the Richardson letter.

Gary Scott testified that he investigated Long's complaint, but could never confirm that the Richardson letter had been posted at Camarillo. At Sonoma, he determined that a management memo had been posted, but that it was one written by him. He directed that it be removed. Mr. Scott credibly testified that the document he ordered removed at Sonoma was his May 3, 1985, memo on CAPT access rights, not the controversial March 5 communication which contained the

Richardson letter as an attachment. No witness testified to seeing the March 5 Scott memorandum posted at Sonoma or any-other hospital.

The third controversial management communication was issued by Denise P. Bates, labor relations coordinator at Metropolitan State Hospital. On June 4, 1985, she sent a memo to all managers and supervisors at the hospital. The memo directed that the name of "Lyle Vandagriff" be removed from the CWA job steward list and listed the names of seven persons described as newly "appointed job stewards for CAPT." Ms. Bates testified that the purpose of her memo was to identify for managers the persons from CAPT who would be authorized to post literature in unit break rooms. She said she had received from Mr. Vandagriff a copy of his resignation as a job steward and believed it appropriate that managers also be informed of his action. Although she neither anticipated nor requested that her memo be posted, it was posted on a number of unit break room bulletin boards and elsewhere. One supervisor, Harold Weed, testified that he posted the memo himself. Because the memo was sent only to managers and supervisors, it can be inferred that managers and supervisors were principally responsible for the posting.

Posting of the memo created both consternation and confusion among some Unit 18 members at Metropolitan State Hospital. Of particular concern was Ms. Bates' use of the term "stewards" in describing the CAPT representatives.

Sylvia Kuchenmeister, a CWA representative at Metropolitan, testified that she could not understand how CAPT could have stewards when it was not the exclusive representative. "It was like, . . . CAPT is in, and here's the people you contact now," she testified. Ms. Kuchenmeister said that at least 50 persons contacted her about the memo. She said people understood the memo to mean that the State wanted CAPT as the exclusive representative. She said she had to assure people that CWA was still representing employees in Unit 18.

Cynthia Downing, another Unit 18 member at Metropolitan, testified that following the posting of the Bates memo, employees who had been active in CWA "declined to go to meetings, they wouldn't help with leaflets, . . . help with union activities, or anything at all." Joan Cardin, another Unit 18 employee at Metropolitan, testified that the memo created confusion regarding the status of Lyle Vandagriff. She described conversations among Unit 18 members who misinterpreted the memo to be a statement that Vandagriff was resigning from CWA to go to CAPT.

Within a week of its distribution, the June 4 Bates memo had circulated to DMH labor relations chief Moore in Sacramento. He contacted Ms. Bates, expressed concerns to her over the use of the term "job stewards," and asked that she issue a correction. On June 13, Ms. Bates sent to all Metropolitan managers and supervisors a correcting bulletin which described the use of the term "job stewards" as an

error. Her memo further stated that the CAPT representatives were not job stewards, "and did not have any right to represent employees in grievances or adverse actions." A corrected memo relisting the names as "hospital employees representing CAPT" was attached. The June 13 memo was posted on some unit bulletin boards but, according to several witnesses, the original memo remained posted in other break rooms throughout the remainder of the election period.

Use of Hospital Facilities

CWA's rights to use hospital facilities are set out in the contract between CWA and the State.[7] This includes

[7]The contractual provisions on the use of State facilities is found in Article XII, section 3. It provides as follows:

> 3. Use of State Facilities
>
> (a) Meeting Rooms; The State will permit use of certain facilities for CWA meetings, subject to the operating needs of the State. Requests for use of such State facilities shall be made no less than forty-eight (48) hours in advance to the hospital labor relations coordinator or designee. The hospital labor relations coordinator or designee shall approve or deny said request within twenty-four (24) hours of receipt of request. Such approval shall not be unreasonably cancelled. CWA shall maintain such facilities in reasonable order, and is expected to provide necessary janitorial services so that the facility is returned to a condition similar to that in which it was found.
>
> (b) Employee Organization Rooms: Those hospitals which currently provide employee organization rooms shall continue to do so. Use of such rooms shall be in compliance

permission to use rooms for meetings. Access rights for CAPT were identified in the May memoranda from Gary Scott and James Moore. Although the memoranda do not specifically assure CAPT of the right to use rooms for meetings, the privilege is amply implied.

CWA presented evidence to show that CAPT received preferential treatment in the use of conference rooms at Atascadero and Stockton, building lobbies at Atascadero and Napa, and the public address system at Patton.

CWA steward Sandra Dunlea testified that prior to the election campaign she had never encountered difficulty in scheduling the use of a room at Atascadero. During the campaign, she testified, she was told that rooms were booked as much as several weeks in advance for meetings of managers and executive directors and of CAPT. She said she was twice refused use of the executive director's conference room and she knows that CAPT was able to use the room at least twice during the election campaign. On cross-examination, Ms. Dunlea said she had never asked to review a reservation book or list when she was turned down for a room. Asked if she ever sought rooms on alternative dates from the original dates she requested, she replied, "Sometimes I did, sometimes I didn't." Asked if rooms

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with applicable laws, hospital rules and regulations. Any hospital which does not currently provide an employee organization room shall make every effort to do so.

were available on alternative dates, she replied, "Sometimes they were, sometimes they weren't." Asked if she requested the rooms within the two-weeks notice desired by hospital management, she replied, "Sometimes I was, sometimes I wasn't."

Shirley McCall, labor relations analyst at Atascadero, testified that all requests for union use of the executive director's conference room were to be made with her. She credibly testified that CWA did not request the use of the room from her during the period of April through July 1985. Ms. Dunlea's glib testimony to the contrary is rejected as cavalier and unpersuasive.

Regarding the Stockton conference room, CWA steward Earl Lytle testified that he was denied use of the room whereas CAPT got to use it on at least two occasions. He said he requested the room on several occasions but was told that it was not available. Mr. Lytle said that he went to a secretary who handles the room assignments and, after examining a book, she told him that the conference room was not available on the dates he requested it. He then was granted the use of other rooms at the hospital.

Hospital Administrator Harry Olson produced a policy under which labor organizations at Stockton are required to request meeting rooms from the labor relations officer. Olson, who also serves as labor relations officer, said CWA made no request to him for use of the conference room during the election campaign. He said CAPT was the only employee

organization to use the room during that time and CAPT used it only once. Mr. Olson said he personally assigned the executive conference room to CAPT because it was appropriate for the anticipated size of the gathering. Mr. Olson said the other rooms available for meetings were too large for the 25 to 30 employees expected by CAPT.

In addition to its purported problems in securing conference rooms, CWA also contended that it was denied equal access to the lobbies in the Atascadero and Napa administration building. The Atascadero administration building lobby is considered a uniquely good place for an employee organization to distribute literature. The lobby feeds into a secured area and virtually all employees who work in the treatment areas must pass through the lobby. At shift change, an organization distributing leaflets in the lobby can contact all employees going to and from work.

It apparently is an established requirement that organizations secure permission before distributing literature in the lobby.[8] But there is some dispute about whether permission is required in all cases or only where an organization plans to set up a table. Hospital Director Sidney Herndon testified that because the lobby is used by employees on breaks, hospital visitors and others, coordination

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[8]Permission was sought by CWA when it attempted to use the lobby for organizing purposes on July 13, 1983, well before CAPT entered the scene. See CWA Exhibit No. 48, at p. 4.

is necessary when an organization wants to encroach on the space with a table. Shirley McCall, labor relations analyst at the hospital, testified that no reservation is necessary if an organization desires to hand out literature in the lobby, but not to use the table. Her testimony was effectively contradicted, however, by documents submitted by the State regarding a CSEA grievance on use of the lobby. The employer's response to the CSEA grievance makes no distinction about the use of a table. The response states simply that for "at least nine years . . . [t]he practice has been that only one of these groups at a time is scheduled in the lobby."

Sandra Dunlea, the CWA steward at Atascadero, testified that on four or five occasions during the election campaign she requested the right for CWA to distribute literature in the lobby but was told that CAPT already had booked the space for that day. On some of those occasions, she said, CAPT did not appear. Ms. Dunlea testified that she did not always request alternative dates for the use of the lobby because the literature she sought to distribute was time sensitive and would not have been useful for distribution on a different date.

Several witnesses testified that despite the restrictions upon distribution of literature in the lobby, organizations could freely distribute literature outside the door to the administration building. Like the lobby, this location also is passed by virtually every unit employee on the way to and from a job shift. Sandra Dunlea testified that she had seen

employee organizations distribute literature outside the entrance to the Atascadero Administration Building and was aware of its potential.

Regarding Napa, CWA presented evidence intended to show that CAPT was permitted to distribute literature in the lobby of the administration building whereas CWA was denied that right. Since at least 1981, the distribution of literature in the main building has been prohibited at Napa. Hospital Administrator Friday testified that the ban was instituted because "people [were] laying literature all over the lobby" and "we had a real cleanup problem . . ." After CAPT commenced its organizing campaign, Mr. Friday met with Earl Dale, the CAPT representative at Napa, and outlined for him the restrictions upon access. Nothing specifically was stated regarding the administration building lobby.

At about 7 a.m. one payday morning during the spring of 1985, Mr. Dale distributed literature in the Napa administration building lobby to night shift employees who were waiting in the pay line. He testified that he did not know of any prohibition against this conduct and he did not seek permission prior to distributing the literature. According to Dennis Linehan, a CWA steward at Napa, three hospital administrators including Mr. Friday walked past Mr. Dale while he was distributing literature. Mr. Linehan said the administrators said nothing to Mr. Dale. Both Mr. Dale and Mr. Friday denied that they had seen each other while Dale was

distributing literature. Debra Solarez, a personnel assistant who distributed paychecks during the election period, testified that she did not see Mr. Friday or any administrators present during the time of check distribution. She testified that administrators normally commence work at 8:00 a.m. and that she usually is finished distributing paychecks by 7:40 a.m. I conclude that if the administrators were present in the administration building at the time Mr. Dale was distributing CAPT literature, they did not see him.

Regarding Patton State Hospital, CWA presented evidence intended to show that hospital administrators had permitted CAPT to make an announcement over the public address system while denying the same right to CWA. The evidence establishes that, at least through 1982, employees could call the hospital telephone operator, who controls the public address system, and request the reading of an announcement which would be heard throughout the hospital. Later, this privilege was suspended and employees thereafter were required to secure special permission to have announcements read over the public address system.

Sometime in late 1984 or early 1985,[9] an announcement was made over the hospital loud speaker that there would be a union meeting of psych techs at the hospital ball field. A time and

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[9] No witness could identify the exact date of the announcement.

date for the meeting was given. Wedgeane McArthur, a CWA steward, testified that the name CAPT was never mentioned as part of the meeting. Tom Ogden, a psychiatric technician called by CWA, testified that he attended the meeting and that the discussion concerned "what could be done to get CWA out of being our bargaining agent and elect somebody else."

Holmer Silver, a CWA steward at Patton, testified that during both 1984 and 1985 CWA made requests to hospital administrators to have messages read over the public address system. The requests were declined.

Literature in the Nursing Station

Both the Department of Mental Health and the Department of Developmental Services prohibit the circulation and display of union literature in work areas. Unit nursing stations are work locations from which union literature has traditionally been banned. During the election campaign, however, union literature did appear in the nursing stations at a number of hospitals.

CWA, in an attempt to show favoritism toward CAPT in the use of facilities, established the existence of CAPT literature in one or more nursing stations in Agnews, Camarillo, Lanterman, Metropolitan, Napa, Patton, and Sonoma State Hospitals. But CAPT was not alone in bringing literature into forbidden areas. State witnesses testified that they saw CWA literature in work areas in Fairview, Metropolitan and Patton State Hospitals.

Although CAPT literature remained in some nursing stations for lengthy periods, there was evidence that a number of unit supervisors attempted to keep literature out of their nursing stations. Several unit supervisors testified that they regularly told employee organization activists to remove the literature from the nursing stations and place it in the unit break rooms. Willie Stephens, a unit supervisor at Camarillo, testified that if employees failed to remove the material he would "throw it in the trash." Harold Weed, a unit supervisor at Metropolitan, testified that he removed material from the nursing station and posted it in the unit break rooms. At Lanterman State Hospital, CWA representatives complained to Nancy Irving, labor relations coordinator, about the regular appearance of CAPT literature in the nursing station. Ms. Irving contacted all program directors and told them to have the offending material removed. Even CWA witness Joe Hessen acknowledged that after one of his complaints, Ms. Irving "evidently . . . got on somebody about it because they quit bringing the stuff into the office and the nursing station."

There is no persuasive evidence that management representatives participated in the placement of CAPT material in unit nursing stations. The record reflects that the material which did appear in the nursing stations was brought there by unit members who supported CAPT.

Reduction of Bulletin Board Space

The contract between CWA and the State provides in Article XII that "CWA shall have designated CWA bulletin board space in each unit break room and other designated areas to post materials related to CWA business."[10]

This provision, CWA Chief Negotiator Charlie Strong testified, grew out of a CWA demand for a bulletin board in every break room or, where break rooms did not exist, in some other location on every unit. He testified that the State resisted the demand on the ground it would be expensive and that in some units similar requirements by other unions could lead to the installation of as many as four bulletin boards. As a compromise, he testified, the parties agreed upon the "designated CWA bulletin board space" language. Mr. Strong

[10] The contractual provision on bulletin boards is found in Article XII, section 4. It provides as follows:

> 4. Bulletin Boards
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> CWA shall have designated CWA bulletin board space in each unit breakroom and other designated areas to post materials related to CWA business. Any materials posted must be dated and initialed by the CWA representative responsible for the posting, and a copy of all materials posted must be distributed to the facility labor relations coordinator or designee at the time of posting. CWA agrees that nothing of a libelous, obscene, defamatory, or of a partisan political nature, or inconsistent with the promotion of harmonious labor relations between the State and CWA shall be posted.

understood that language to mean that if there were no bulletin board, space would be designated on the wall for CWA. Where there was a bulletin board, he testified, "there would be adequate space on there set aside for exclusive CWA use." Mr. Strong's description of the negotiating history was not contradicted by State witnesses who followed him.

Initially, CAPT was provided with no bulletin board space in the hospital units. The organization's right to post literature was confined to that of any outside organization, such as the United Way or Red Cross. At a meeting with Ivonne Richardson in March 1985, CAPT representative Ken Murch asked whether CAPT supporters within the hospitals could post literature on the bulletin boards in their own units. He was told they could not and would not be permitted to do so until after CAPT had met its showing of interest requirements with the PERB.

In early May 1985 the PERB determined that CAPT had established the required showing of interest and commenced the processing of a decertification election. Within days, Gary Scott of DDS and James Moore of DMH sent their nearly identical memoranda to their hospital labor relations coordinators outlining increased access rights for CAPT.[11]

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[11]In relevant portion, the Scott and Moore memoranda described the access rights for CAPT as follows:

> Until the conclusion of the PERB election process, the Department has agreed with the

These memoranda provided that representatives of CAPT be granted the right to post materials "in living unit break rooms

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CAPT to the following regarding access, posting of materials and the use of State facilities:

1. Representatives of the CAPT may be granted access to non-work areas such as the employee cafeteria(s), employee organization room(s) and other non-work areas outside the living units.

2. Representatives of CAPT may be granted the use of employee organization bulletin boards outside the living units for posting of materials.

3. Hospital employees representing the CAPT may be granted access to the employee break room in the living units. One or more (equal to the number of programs in the hospital) employees may be designated by the CAPT to be privileged with such access. CAPT will submit a written verification of their designation(s) to the Hospital Labor Relations Coordinators. Persons so designated must be employees of that hospital. Changes will be kept to a minimum.

a. Notice of the intent to exercise access privileges to unit breakrooms must be provided to the appropriate Program Director at least twenty-four (24) and not more than seventy-two (72) hours in advance.

b. Neither the designated employee representative nor the employee to whom literature is being distributed may be on work time.

c. Except for the employee breakrooms, the distribution or display of all employee organization literature is prohibited in all living units.

d. Copies of all employee organization literature to be distributed or posted

and other areas outside the resident living units where such employee organization material is normally posted." The main impact of the change was to permit CAPT to post literature in employee break rooms.

Both Mr. Moore and Mr. Scott testified that they specifically instructed hospital labor relations coordinators not to divide up CWA space on the existing bulletin boards. "I said use the wall next to it if that is the only option, that the space should be as equal as we can make it, but not the same," Mr. Moore testified. Similarly, Mr. Scott testified that he personally told every labor relations coordinator "not to alter CWA space in any respect." He testified that he told the labor relations coordinators that CAPT could use space on a wall next to the CWA bulletin board or, if the board was big enough, it could be divided "as long as we didn't alter CWA

> in the employee breakroom will be provided to the Hospital Labor Relations Coordinator in advance.
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> 4. No access will be permitted during the nocturnal shifts; and,
>
> 5. Space for posting CAPT materials will be provided in living unit breakrooms and other areas outside the resident living units where such employee organization material is normally posted.
>
> Access for both employee organizations should not be unreasonably denied; however, access may be deferred for reasons related to client care, privacy, safety, security or other necessary business reasons.

space." Testimony about practices in the various hospitals showed that the instructions of Messrs. Moore and Scott frequently were not followed.

At Agnews State Hospital, the record establishes, the bulletin boards in units 42 and 58 had been used exclusively by CWA prior to May 1985. After that, CAPT material was posted on both boards. Complaints by CWA representatives to hospital administrators were unavailing.

At Atascadero State Hospital, CAPT commenced posting materials on unit bulletin boards soon after it got access. CWA steward Sandra Dunlea testified that the bulletin boards were divided in some instances and in others CWA's material was removed and placed on a clipboard. In still another situation, CAPT was given its own board. Ms. Dunlea complained about CWA's loss of space to Shirley McCall, labor relations analyst at Atascadero. The two of them then inspected the bulletin boards on a unit-by-unit tour of the hospital. Following her inspection tour with Ms. Dunlea, Ms. McCall personally toured each unit of the hospital and divided up the bulletin board space. She testified that she went with the unit supervisor and/or shift lead to review the bulletin board space available "and marked off, either by tape or string, a space for CAPT to post that would be equal to but separate from . . . CWA space." The effect of this action was to reduce space available to CWA.

At Camarillo State Hospital, CWA had a glass-enclosed, locked bulletin board in the main lobby of the personnel building. This board historically had been used only by CWA. In the spring of 1985, CWA steward Barbara Long discovered CAPT literature inside the locked bulletin board. She removed it and took it to the labor relations office. There, she was told that CWA would have to share the board with CAPT and she could not remove any CAPT literature.

On the Camarillo break room bulletin boards, CWA had not traditionally enjoyed the same exclusivity as on the locked personnel building bulletin board. Occasionally, both the California State Employees' Association and the American Federation of State, County and Municipal Employees would post material on the same bulletin boards as CWA. On occasion, restaurant menus and notices for employees to bid on new jobs also were posted on the bulletin boards used by CWA.

There is some dispute about when the bulletin boards were divided at Fairview State Hospital. Hal Britt, labor relations coordinator at the hospital, testified that bulletin boards were installed in 1982 and "probably" were divided around July of that year. However, Steven Gillan, CWA steward at the hospital, testified that the division took place in March 1985. He testified that he came to work one day and found that the board had been divided with a piece of paper stenciled at the top with the letters "CWA" and approximately

17 to 20 inches set aside for CWA materials. This was less than the space previously available to CWA.

This conflict in testimony is resolved in favor of Mr. Gillan. Mr. Britt was hesitant and tentative in his testimony about the timing of the division whereas Mr. Gillan was definite. Moreover, Mr. Gillan testified that he was told by his unit supervisor, Robert Mariner, that Mariner himself divided the bulletin board. Finally, I find it hard to imagine that the boards would have been divided in the fashion described by Mr. Britt at a time when no election was pending or anticipated.

At Lanterman State Hospital there are some 40 bulletin boards ranging in size from two feet by two feet to four feet by four feet. The hospital long has had a prohibition against placing materials on the break room walls by the use of adhesive tape. Therefore, when CAPT was granted access to the units in May 1985, the only space available for posting was the existing bulletin boards. Nancy Irving, the labor relations coordinator at Lanterman, testified that when she granted CAPT access to the break rooms, she told the CAPT representative not to post materials in CWA space. Where the boards were small, she told the CAPT representative, CAPT literature would have to be tacked on the edge of the bulletin board, but it could not cover CWA materials.

Although Ms. Irving disavowed any intent to divide the bulletin boards, a series of witnesses testified that on a

number of units the boards were in fact divided, either by tape or felt tip pen. In each instance, the amount of space available to CWA was reduced. George King, a CWA representative, testified that the space available to post in his unit diminished just as the amount of material from CWA increased. He said that the spaces left for him "were getting smaller and smaller" and that before people had a chance to read what he had posted, he would have to post new material over old material.

There was no persuasive evidence that the bulletin boards were ever divided at Metropolitan State Hospital. Nonetheless, it appears from the record that once CAPT gained the right to post literature in the employee break rooms, there was some incursion upon space formerly used only by CWA.

At Patton State Hospital, management took an affirmative stand that it would not become involved in disputes between the unions about the use of bulletin board space. After receiving complaints from CWA about the removal of bulletin board materials, Patton Executive Director Don Z. Miller sent a memo to CWA representative Susan Sachen advising her of the hospital's noninvolvement position.[12] He stated that

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[12] CWA describes the Miller memorandum as "probably the most egregious incident exposing Patton's disparate treatment" of CWA over bulletin board space. The memo was sent in response to CWA's complaints about the removal of CWA material from the bulletin board by the alleged CAPT organizers. CWA complains that the memo went "exclusively to CWA chastising them for tearing down literature" and was not sent also to

administrative staff would not intercede on behalf of any organization regarding bulletin board access "unless and until there is a perceived impact on hospital operations."

When CAPT acquired posting rights in May of 1985, it was given no specific space upon which to post its leaflets and other materials. As a result, CAPT posted literature on any uncovered location of the CWA board or the CSEA boards. Bulletin boards that formerly were used exclusively by CWA became boards jointly shared with CAPT. The obvious impact of the change was that the amount of space available to CWA was diminished.

At Sonoma State Hospital, the bulletin boards apparently were not divided during the election campaign. CWA had enjoyed the exclusive use of some boards and wall space prior to the election. After the campaign started, CAPT material was posted on the boards formerly used exclusively by CWA. According to the testimony of CWA steward Kathie Pinotich, the use of the bulletin board by CAPT reduced the space available to CWA.

CAPT. When read in context, the memo does not "chastise" anyone. It is a response to CWA that the hospital did not intend to become involved in disputes over literature removal unless they became disruptive. Tricia Torres, labor relations analyst at Patton, testified that the memo was sent only to CWA because CWA was the only union which had complained. There is nothing unreasonable in this. The hospital policy was noninvolvement in disputes between unions about the removal of literature. CWA complained about the removal of literature. The hospital responded, in effect saying, "We're sorry. We don't intend to become involved unless the disputes become disruptive." CAPT had not complained and so there was no reason to send a noninvolvement letter to CAPT.

There is no evidence of incursions onto CWA bulletin board space at Napa, Porterville and Stockton State Hospitals. CWA makes no argument in its brief regarding bulletin boards at these hospitals.

Despite the encroachments upon its bulletin board space, CWA was clearly able to circulate its literature throughout the two departments. A number of witnesses described the heavy-flow of literature from CWA which they contrasted with a trickle from CAPT. "CWA was much more visible," testified Bobbie Reed, the hospital administrator at Agnews. "There were newsletters, newspapers that were more frequent than CAPT." David Hale, a unit supervisor at Patton State Hospital, said that, "CWA had just about covered the whole hospital . . . You really didn't hear too much about CAPT. . . . The majority of it was CWA literature that you were handed or that you heard about . . . ." Naomi McKee, a Senior Psychiatric Technician at Patton, testified that she got "bulletins passed out, literature . . . things in the mail that I wasn't expecting from CWA." By contrast, she said, she saw only one bulletin regarding CAPT. Betty Dwire, a Senior Psychiatric Technician at Sonoma State Hospital, testified that she saw "a lot" of CWA material but only "a brochure or two" from CAPT. She said the CWA literature "far outweighed the CAPT's." Harry Olson, hospital administrator at Stockton, described a similar imbalance. "I think CWA had certainly the . . . existing organization," he said. "They . . . had a better opportunity

to share information within the facility and they used their resources to do that." CAPT, he said, conducted "a very low key election" at Stockton.

Statements by Supervisory Employees

In both written and spoken directives, management of the two departments instructed all supervisors and managers to remain absolutely neutral during the campaign. The demand for "absolute neutrality" was set out in the May 3 memorandum of Gary Scott to DDS labor relations coordinators and the May 6 memorandum of James Moore to DMH labor relations coordinators. Typical of the instruction given to departmental managers is that contained in a May 6, 1985, memorandum from Arthur Choate, chief of the DDS labor relations branch. In the memo, Mr. Choate explained, "The department's task is to stay neutral and insure equal treatment of both parties in terms of access and use of state resources." Witnesses from Agnews, Atascadero, Napa, Patton and Stockton State Hospitals also testified that supervisory employees at those hospitals were instructed at meetings with management to remain absolutely neutral during the election campaign.

CWA presented evidence about pro-CAPT statements allegedly made by supervisory employees at six hospitals: Camarillo, Fairview, Lanterman, Metropolitan, Napa and Stockton.

The incident at Camarillo was described by Jeanne M. Moon, a Senior Psychiatric Technician. She testified that during the

spring of 1985 her unit supervisor told her and "wrote it up in one of my evaluations" that,

> . . . as long as I was going to be active in CWA, that I should not count on becoming a, going up the management ladder, becoming a unit supervisor, that it would go against me, the more active I was in the union.

At the time in question, Ms. Moon had only recently been promoted to Senior Psychiatric Technician and was still on probation. In rebuttal, the State introduced Ms. Moon's performance evaluations for January 22, March 11, and June 20, 1985, together with a two-page letter of March 5. Nowhere in any of these documents is contained any statement resembling that described in testimony by Ms. Moon. I conclude that the incident simply did not happen.

At Fairview State Hospital, two managerial employees allegedly made comments regarding CAPT to unit members. Steven Gillan, a CWA steward, testified that after he had represented an employee in a grievance meeting, he was sitting alone with Richard Singleton, a program director. Mr. Gillan said that he was asked by Singleton about how negotiations were going "and referred in a very general way to the thought that we probably were going to be beaten." The discussion then turned to the subject of parity pay between Senior Psychiatric Technicians and registered nurses. Mr. Gillan testified that Mr. Singleton stated it "would be easier" for Senior Psychiatric Technicians to achieve parity pay "if they were, in fact, management people."

The other Fairview incident involved Jean Nelson, a unit supervisor. Norman Montgomery, a witness for CWA, testified that on one occasion at the change of shift Ms. Nelson stated that, "CAPT should win." Mr. Montgomery said he interpreted the statement as "not a prediction" but "more as advice than even personal preference." He said she then repeated this statement twice more.

On two later occasions, Ms. Nelson made similar statements but was challenged by Montgomery. After that, she included a disclaimer saying that "she believed" CAPT should win. In those situations, Montgomery said, Ms. Nelson's remarks suggested "personal opinion rather than policy." A combined total of approximately six unit members in addition to Montgomery overheard Ms. Nelson's remarks on the three occasions that she commented about the election.

Two unit members from Lanterman testified that supervisory employees had made comments to them regarding the election. Debra Saviano, a CWA steward, testified that her unit supervisor, David Campbell, told her that she should leave CWA and that "CAPT was a much better organization." She testified that he told her CWA didn't do a good job for employees and that "CAPT was going to." Mr. Campbell was a unit member at the start of the balloting and voted in the election. He then was promoted and made his remark within the first week of becoming a unit supervisor. Ms. Saviano testified that the promotion was prior to July 15. Balloting ended July 17. It

appears, therefore, that Mr. Campbell's remark was made before the end of the election. One other unit member was present with Ms. Saviano when Mr. Campbell expressed his preference for CAPT.

The unit member who reported the most extensive pro-CAPT comments by members of management was Pattie Bartlett, a CWA organizer at Lanterman. Ms. Bartlett identified five management representatives as having made comments to her that she considered to be pro-CAPT. She testified that Jan Gleim, a nursing coordinator, said to her, "Oh, Pattie, don't you think you're beating a dead horse with CWA?" Ms. Bartlett testified that Ms. Gleim proceeded to identify other employees who were involved with CAPT and stated, "Doesn't that seem like a much better alternative." Ms. Bartlett testified that on another occasion Ms. Gleim stated that she thought CAPT was going to win in the long run and that Ms. Bartlett would be on the wrong side.

Ms. Bartlett testified that Art Parks, the hospital personnel officer, told her that he had noticed her name on the steward's list and stated:

> I am surprised that you are a steward with CWA again. I would have thought you would have gone with CAPT now that we're going to have an election . . .

Ms. Bartlett testified that Wendell Goodwin, a program assistant, also commented on her return to the CWA steward's list. She testified that he said, "Pattie, you're back with

them again?" She also quoted him as saying that it was "too much of a hill to climb," and "I think that CAPT will be much easier to work with." She quoted Ken Harrison, a program director, as saying to her, "You know, it's hopeless for CWA. I'm an old union man myself, but it's hopeless."

Ms. Bartlett also quoted Sheri Ochoa, a program assistant, as stating that it was Ms. Bartlett's choice to work with CWA and that, "she respected that I was working real hard and that I was the best thing that CWA had going for it, but that, you know, that probably wouldn't be enough."

The comments made to Ms. Bartlett by the various administrators must be considered in the context of her previous and open falling out with CWA. Ms. Bartlett was an active member in Concerned Psych Techs, an organization formed within CWA to reform certain failings which its members had discerned. Ms. Bartlett testified that she had publicly criticized officers of CWA for alleged fiscal irregularities, for a salary increase to certain officers and for what she considered the unfair disqualification of her from running for local office. She said some of her criticisms were on printed material which was circulated within the hospitals. She acknowledged that she had discussed with some members of management, including Sheri Ochoa and Art Parks, her concerns about internal CWA affairs. There also was evidence that over a 12 year period Ms. Bartlett had been a personal friend of Jan Gleim. She had told Ms. Gleim about her falling out with

CWA and at one point she had stated that she was interested in pursuing a career as a union representative and that, if the opportunity came, she would work with CAPT. The evidence establishes that virtually all of the comments made to Ms. Bartlett by various management persons were made to her alone and in the context of what the management persons could reasonably have assumed to have been a personal friendship.

At Metropolitan State Hospital, CWA activist Michael Jolly testified that he told his unit supervisor Dennis Masoner that he was thinking about becoming active with CWA. Mr. Jolly quoted Mr. Masoner as responding that, "Why even do that? CAPT is going to win anyway. Everyone is going to CAPT. CWA is a lost cause."

From Napa State Hospital, CWA called Bea Bloyd who testified vaguely about management statements that her pay would be affected if she were not represented by CWA. Pressed on cross-examination for details, she indicated only her nursing coordinator, Marguerite Selden, as the source of such a statement. This occurred, she said, during a meeting conducted by Ms. Selden in March of 1985.

The State called a succession of witnesses who testified about the meeting. None recalled any statement resembling that alleged by Bea Bloyd. The closest was Hollis Williams, a Senior Psychiatric Technician. She testified that during the meeting it was announced that a State representative would interview two Senior Psychiatric Technicians about their

duties. Ms. Williams testified that she asked whether the planned interviews meant that Senior Psychiatric Technicians would have a chance at parity pay with registered nurses. Ms. Williams testified that the response was, "I don't know."

This credibility dispute is resolved in favor of Ms. Williams. Ms. Bloyd's vague, over-stated testimony lacked persuasive value. She was plainly irritated that her working hours had been changed on several occasions by Ms. Selden and I believe her testimony was influenced by her irritation.

From Stockton State Hospital, two employees testified that Program Director Jake Myrick had made pro-CAPT comments. Earl Lytle testified that he encountered Mr. Myrick in the administration building. At that time, Lytle was going to attend a CAPT meeting. Mr. Lytle said that Myrick asked him where he was going and when Lytle told him to a CAPT meeting, Myrick replied, "I hope they beat the hell out of you." Mr. Lytle at that time was a CWA steward which was known to Mr. Myrick. Mr. Lytle testified that although he and Myrick have sometimes teased each other about the size of their bellies, he did not understand Myrick's comment about CAPT to be a joke.

Another Stockton CWA steward, Bob Barker, testified that once following a grievance session Mr. Myrick stated that he

> . . . was glad to see somebody else coming in and fighting us because CWA had a good contract and we were fighting it and forcing it and he was tired of having to fight trying to beat the contract.

Mr. Barker testified that Myrick was not laughing when he made the comment and Barker understood the remark as serious.

Use of the Hospital Mail

Since at least 1978, both the Department of Mental Health and the Department of Developmental Services have prohibited the use of the hospital mail for the delivery of personal letters. This prohibition has included union literature sent to employees at their work locations. The hospitals have employed various techniques for handling mail received in violation of the prohibition. These have included calling individual employees to the mail room to pick up their mail, placing all union mail in containers for distribution by union representatives, and placing union mail in the union's own mail box if it has one.

During the hearing, CWA presented evidence to show that CAPT was preferentially permitted to send literature through the hospital mail system at three hospitals, Lanterman, Metropolitan and Sonoma.

During the first two weeks of June 1985, CAPT sent a large mailing to several hundred employees at Lanterman. Hospital Labor Relations Coordinator Nancy Irving contacted DDS Labor Relations Chief Gary Scott to request instructions. Mr. Scott told her to refuse use of the hospital mail in accord with the past practice. But, rather than calling employees to the mail room, Mr. Scott told Ms. Irving to send the mail to the individual programs and have the employees go to the program

office to pick it up. This would avoid the problem of having several hundred employees disrupt the mail room.

The burden of determining the unit location of each employee fell principally on Ms. Irving. Using a computerized printout, she looked up the work address of each employee to whom CAPT had sent a letter. She then bundled the letters and sent them to the individual program directors who in turn notified the employees they had mail in the office. The literature was not distributed through the hospital mail system.

While Ms. Irving was in the process of looking up the employee work locations, CWA representative George King happened into her office. When he saw what she was doing, he requested that she look up the work locations for employees who had been sent a similar mailing of CWA material. The CWA mail had been deposited in CWA's mailbox at the hospital for distribution by CWA representatives. It had not been possible to dispose of the CAPT mailing in the same manner because Ms. Irving earlier had rejected CAPT's request for a hospital mailbox. Ms. Irving told Mr. King she would consider his request to look up addresses for CWA. A week later, after conferring with Gary Scott, she informed Mr. King that since she had looked up the addresses for CAPT, she would do the same for CWA. By that time, Mr. King stated, he already had distributed most of the CWA mailing.

Two CWA witnesses from Metropolitan State Hospital testified that they several times saw CAPT material in State

interoffice envelopes which were delivered to their units with the mail. Neither employee knew who placed the CAPT literature in the envelopes. There likewise was no indication that hospital management knew of this use of the mail system. Johnie Savee, the mailroom assistant at Metropolitan, testified that although hospital policy prohibits the distribution of union literature through the mail system, she was not authorized to open interoffice envelopes. It is possible for any employee to place material in an interoffice envelope and drop it into the hospital mail system.

A witness from Sonoma State Hospital, CWA representative Kathie Pinotich, testified that she found CAPT literature in her unit and "it appeared" that the literature had been distributed through the mail system. The literature, a group of envelopes with a CAPT return address, was addressed to individual employees by name. In ink, the employees' unit addresses were entered on the face of the envelopes. Ms. Pinotich theorized that the CAPT literature came through the mail system because the unit numbers resembled those typically affixed in the hospital post office.

However, Joanne Marino, the Sonoma mailroom supervisor at the time, credibly testified that she did not place the unit addresses on any CAPT envelopes. Further, she testified that it was her regular practice to notify hospital administrators whenever she received what she believed to be personal mail.

Dan Sorrick, the CAPT representative at Sonoma, testified that he addressed and distributed CAPT mail during the election campaign after one of the hospital's executive secretaries told him it could not go through the hospital mail. He described the mail as a collection of envelopes between four and six inches thick. He went through the envelopes and with the assistance of other CAPT supporters, sorted and delivered the mail to the individual employees.

Unit Modification

On March 29, 1985, the State Department of Personnel Administration filed a unit modification petition seeking to remove from Unit 18 the job classification of Senior Psychiatric Technician.[13] The petition was filed during the window period,[14] near the expiration date of CWA's first contract with the State.

DMH and DDS administrators had long pushed for removal of Senior Psychiatric Technicians from the unit. Originally, the State had opposed placement of the Senior Psychiatric Technicians within the unit but had conceded the point in 1980 during meetings with the three unions then vying to represent

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[13]The petition was filed under title 8, Cal. Administrative Code, section 32781 (b) (5) (C).

[14]The SEERA window period is defined under title 8, Cal. Administrative Code section 40130 as "the 29-day period which is less than 120 days, but more than 90 days prior to the expiration date of a memorandum of understanding between the employer and the exclusive representative."

hospital employees. The concession on unit placement did not sit well with DMH and DDS officials, and they agitated during the ensuing years for the removal of Senior Psychiatric Technicians.

In response to pressures from the two departments, the State proposed during the 1983 negotiations to remove Senior Psychiatric Technicians from the unit. However, the proposal was dropped at the negotiating table because the Department of Personnel Administration was unwilling to take the issue to impasse. The following year, the executive directors of DMH and DDS renewed their campaign and pressed hard for the filing of a unit modification petition during the impending window period. Initial conversations about a unit modification commenced between the departments and DPA as early as November 1984. After an investigation, the Department of Personnel Administration became convinced that sufficient evidence could be garnered to support the removal during a hearing. Accordingly, a timely unit modification petition was filed.

CWA's answer to the proposed unit modification was immediate and negative. In a formal response to PERB, CWA argued that the Senior Psychiatric Technicians did not perform the statutory duties of a supervisor. CWA characterized the proposal as "a frivolous and inappropriate attempt to gut the unit of its leadership and reduce its bargaining strength." A CWA newsletter quoted Charlie Strong as saying the union would

"let the Senior Psych Techs out when hell froze over." CWA's opposition was widely publicized throughout the State hospitals.

CAPT's position was ambivalent. At one point, CAPT officers and directors suspended discussion about the proposal during a board meeting because the issue had become so divisive. Some officers were opposed; some supported the change. Because members of the CAPT board could not reach a consensus, CAPT as an organization took no position. However, individual CAPT leaders made their personal views known. Jay Salter, interim president of CAPT, stated his personal opposition to the unit modification during a debate with CWA Representative John Tanner. The debate, which was conducted in early June, was videotaped and shown widely during campaign gatherings at a number of hospitals.

Thirty-eight witnesses from nine hospitals testified about the impact of the unit modification petition on Senior Psychiatric Technicians. The witnesses revealed widely varying degrees of knowledge about the proposal. Some could trace the petition from the inception of efforts by the State to remove Senior Psychiatric Technicians from the unit. Others did not know that a unit modification petition had been filed until well after the election was over. Many witnesses described conversations in which Senior Psychiatric Technicians discussed the proposed unit modification and the positions of the competing unions as a significant election issue. Most of these witnesses were called on behalf of CWA and testified to

hearing pre-election statements by Senior Psychiatric Technicians who planned to vote for CAPT because they believed CAPT would agree to let them out of the bargaining unit. Persons who espoused such a view purportedly were motivated by a belief that removal of Senior Psychiatric Technicians from the bargaining unit would lead to parity pay with the job class of Registered Nurse II. Both Senior Psychiatric Technician and Registered Nurses II serve as shift leads in the State hospitals. However, the nurses are paid at a substantially higher rate than Senior Psychiatric Technicians.

On or about May 2, 1985, PERB Representative Terry Lindsey conducted a meeting among the participants in the decertification election. During the meeting, Mr. Lindsey made a comment indicating that the unit modification could have an impact upon the counting of ballots in the decertification election. At that point, one of CWA's representatives suggested that the State withdraw the unit modification petition. Dennis Batchelder, chief of labor relations for the Department of Personnel Administration, rejected the suggestion. However, the idea arose again in early June, after a telephone conversation between Janet Caraway, PERB chief of representation, and Ivonne Richardson. The call was placed by Ms. Caraway, who asked whether the Department of Personnel Administration "was serious" about the unit modification. The State previously had filed and then withdrawn unit modification petitions, and Ms. Caraway wanted to know if the pattern would

be repeated. Ms. Richardson responded that the State was serious and intended to go forward with the unit modification. Ms. Caraway then suggested that the pendency of the unit modification petition could delay a final vote count after the election. Ms. Richardson shared these concerns with Mr. Batchelder.

On June 18, Ms. Caraway called Mr. Batchelder and stated that the PERB would challenge the eligibility of the Senior Psychiatric Technicians to vote in the election. She asked him to prepare a list of the names of the Senior Psychiatric Technicians to assist in the challenging of the ballots. Mr. Batchelder replied that the State, in order to avoid the delay, might withdraw the petition. Ms. Caraway said that if the State intended to withdraw, it would be better to do so before the vote count. She said that it would be more difficult to withdraw after the initial tally because, by withdrawing at that point, the State could appear to favor whichever organization was ahead. Mr. Batchelder testified that the basic idea he drew from the conversation was that withdrawal of the unit modification petition would make the election go much smoother and quicker.

Mr. Batchelder notified the departments that he was considering withdrawing the unit modification petition. Both departments opposed withdrawal and urged that the process be pursued to its completion. In a second telephone conversation on June 20, 1985, Ms. Caraway repeated her plan to challenge

all Senior Psychiatric Technician voters in the election. She also said that withdrawal of the unit modification petition would "really help speed up the overall election process." Subsequently, Mr. Batchelder decided that he wanted the status of the Unit 18 exclusive representative to be quickly resolved. Under his instructions, Ms. Richardson withdrew the unit modification proposal on June 27, 1985.

It was clear from both CWA and State witnesses, that whatever the impact of the proposed unit modification, it was but one of many issues in the campaign. A number of witnesses testified that they overheard and/or participated in pre-election discussions about the alleged misuse of dues money by CWA officers, the trusteeship which had been imposed upon the local by CWA international officers, perceived failures of local officers to effectively represent employees in grievances and other representation questions, the closure of a CWA office near Lanterman State Hospital, the alleged unavailability of CWA job stewards, and the purported failure of CWA officials to return phone calls.

Internal problems within CWA were widely aired in a May 23, 1985, memo from John Tanner, assistant director of organizing, to all members of the local. In that memo, he stated that his review of representation, financial affairs, and the overall operation of the local was "disappointing" and that "We must all admit that the psych tech union has drifted away from the purpose and principles that guided our union in

1980-81." His letter stated that the local union officers "have acted in a manner that benefited their personal, political positions over the needs of the members" and that they had "failed to lead the membership in the strong and democratic manner we all envisioned." The letter then described the various changes which had taken place in the local leadership in an effort to cure the problems which the survey and Mr. Tanner's review had disclosed. It was apparent from the testimony that the problems identified in the Tanner memo were fully discussed among psychiatric technicians during the election campaign.

OBJECTIONS TO THE ELECTION

CAPT As an Employee Organization

Except for one, CWA's objections to the election are essentially identical to the unfair practice charges. Unique is the contention that the California Association of Psychiatric Technicians is not an employee organization as defined in SEERA. Although this objection was dismissed at the conclusion of CWA's case-in-chief,[15] it is necessary to set out the findings of fact upon which the dismissal was made.

CAPT, as an organization, is the product of dissatisfaction which began to grow among CWA members as long ago as December 1983. Ultimately, some CWA members formed an organization known as Concerned Psych Techs to press within CWA for change.

[15] See Reporter's Transcript, Vol. 13, p. 14.

By the fall of 1984, Linda Pinkerton, an activist in Concerned Psych Techs, became so dispirited with CWA that she attempted to file a decertification petition with the PERB. The document was rejected because it was not timely filed. She retained a list of those who had signed her petitions, and that list was used by CAPT in the decertification effort which resulted in the 1985 election.

One of the psychiatric technicians who had worked with Ms. Pinkerton in the decertification effort was Dan Sorrick. Sometime in the second half of 1984, Mr. Sorrick's name was passed on to Dan Western by a field representative from the California State Employees' Association. Mr. Western had been the general manager of CSEA until he left the organization in July 1984. Mr. Western testified that it was common knowledge when he was at CSEA that a number of psychiatric technicians were dissatisfied with CWA and that the organization might be susceptible to decertification. He testified that in November 1984, he called Mr. Sorrick and arranged to meet with him in Vacaville. During the meeting, the two discussed the potential for the decertification of CWA as the exclusive representative for Unit 18. Mr. Sorrick told Mr. Western that he would set up a meeting of persons interested in pursuing the decertification and that Western should attend and assist in forming an organization for that purpose.

In late December 1985 Mr. Western invited Kenneth Murch, also a former employee of CSEA, to join with him in a

consulting firm to offer assistance to employee organizations. The two formed a partnership and divided responsibilities to prepare for the meeting with the employees who were considering the decertification of CWA.

The meeting was scheduled by Mr. Sorrick for January 26, 1985, in Bakersfield. In preparation for the meeting, Mr. Western hired an attorney to draft proposed bylaws, constitution, and articles of incorporation for any organization which might be formed at the Bakersfield meeting. He also drafted an agreement to spell out what services would be rendered by Western, Murch and Associates to the new organization and to spell out the fees. Mr. Western prepared a document which outlined a plan for the decertification of CWA.

Approximately eight psychiatric technicians attended the meeting. The only one of them who knew Mr. Western was Mr. Sorrick. The meeting was conducted in three parts. In the first part, the participants became acquainted and expressed interest in forming an organization. In the second part, interim officers were chosen, with Mr. Salter picked as the interim president. Also, during the second part of the meeting, the group took the initial steps to form a corporation. In the third part, the corporation was formally organized. A board of directors and executive committee was elected from among the participants. A constitution and bylaws was adopted following the draft prepared at the request of

Mr. Western. The consulting contract was adopted with the modifications discussed and agreed to by the psychiatric technicians in attendance. The attendees chose a name for the organization and approved a strategy for the decertification of CWA.

Following the meeting, the participants returned to their respective hospitals, recruited members, and solicited signatures for the decertification of CWA. The CAPT organizers continued to have regular monthly meetings to discuss strategy for the decertification campaign. At one of those meetings, in April 1985, the consultants' agreement was revised and signed.

CAPT has members who are employees of the State of California. A membership list was kept by Mr. Salter and Ms. Pinkerton. The purpose of CAPT as outlined in the February 15, 1985, letter from Kenneth Murch to Dennis Batchelder is "to represent the interests of psychiatric technicians and related classifications in all matters relating to negotiations of wages, hours and other terms and conditions of employment." This purpose is further apparent in the consulting contract between CAPT and Western, Murch and Associates under which the consultants agree to represent the organization in "contract negotiations," "arbitration representation," "punitive action representation," "consulting or contract enforcement," and other representational activities. CAPT's purpose also is described in a

March 5, 1985, letter to members of Unit 18 which states that the organization was "founded to replace CWA as the exclusive representative of Unit 18."

LEGAL ISSUES

1) Did the State fail to negotiate in good faith and thereby violate SEERA section 3519(c) and, derivatively, sections 3519(a) and (b) by making unilateral changes in:

A) Access policy

B) Telephone use policy.

C) Permissible locations for the distribution of literature.

2) Did the State interfere with the protected rights of unit members and CWA and/or provide unlawful support to CAPT, thereby violating sections 3519(a), (b) and (d) by:

A) Posting employer-written memoranda which imply support for CAPT over CWA.

B) Granting CAPT the use of State facilities denied to CWA and authorizing CAPT to encroach on CWA bulletin board space.

C) Permitting supervisors to make statements which imply State support for CAPT over CWA.

D) Distributing literature for CAPT through the hospital mail system.

E) Filing a unit modification petition to remove Senior Psychiatric Technicians from the bargaining unit.

3) Did the conduct of the State, when considered as a whole, sufficiently interfere with the election that the result should be set aside?

CONCLUSIONS OF LAW

ALLEGED UNILATERAL CHANGES

Although in their briefs the parties do not argue that the State committed any violation of SEERA subsection 3519(c) during the pre-election period, the issue is set out in the complaint and evidence on the contention was presented during the hearing. This proposed decision, therefore, will consider whether the State made unilateral changes in access policy, telephone use policy, and permissible locations for the distribution of literature in violation of subsection 3519(c).

It is well settled that an employer that makes a pre-impasse unilateral change affecting an established policy within the scope of representation violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se in the duty to negotiate in good faith. See generally, Davis Unified School District et al. (1980) PERB Decision No. 116, San Francisco Community College District (1979) PERB Decision No. 105, State of California (Department of Transportation) (1983) PERB Decision No. 361-S.

Established policy may be reflected in a collective agreement, Grant Joint Union High School District (1982) PERB

Decision No.196, or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history, Colusa Unified School District (1983) PERB Decision Nos. 296 and 296(a), or the past practice, Rio Hondo Community College District (1982) PERB Decision No. 279, Pajaro Valley Unified School District (1978) PERB Decision No. 51.

Where the purported violation involves the alleged repudiation of a contract clause, the exclusive representative must prove: (1) That the employer breeched or otherwise altered the parties' written agreement; and (2) that the breech had "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." Grant Joint Union High School District, supra, PERB Decision No. 19 6.

Access

Regarding access, the complaint alleges that the employer unilaterally changed past practice by requiring CWA representatives to provide a 24-hour notice prior to visitation of the hospital units. The contractual access provisions (footnotes 5 and 6, supra) set out no requirement that CWA give 24-hours notice prior to receiving access to hospital facilities, or to distributing literature. The contract requires only that chapter officers and stewards "notify the program director or designee" and receive "approval prior to entering the program." No reference is made to any minimum amount of advanced notice required. Similarly, the contractual

access clause contains no ban against the nocturnal posting of literature by CWA stewards.

There is no evidence that the past practice was any more stringent than the contract. Barbara Long, CWA steward at Camarillo, credibly testified that during the spring of 1985 she was told that she could no longer visit unit breakrooms without giving 24-hours advance notice. She also was told she could not post literature at night. Although she had been active with CWA for some time, she had never previously been requested to give such notice.

Regarding Napa, CWA steward Deborah Whitlock credibly testified that a 24-hour notice requirement was imposed during the pre-election campaign period. She testified that the rule, which was newly imposed during 1985, applied to the posting of literature on a CWA steward's own unit breakroom bulletin board as well as to posting on the bulletin boards of other units.

The prohibition against nocturnal visits at Camarillo and 24-hour notice requirement at Camarillo and Napa were changes from the access requirements set out in the agreement between the parties. These changes had "a generalized effect" and a "continuing impact" upon employment conditions in the unit. Grant Union High School District, supra. PERB Decision No. 196. They were made unilaterally without any prior notice to CWA. By making the changes, the State violated section 3519(c) and derivatively sections 3519(a) and (b).

San Francisco Community College District, supra, PERB Decision No. 105.[16]

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[16]CWA contends that while placing new restrictions on CWA organizers, the State ignored violations of existing rules by two CAPT supporters. CWA identifies them as Dennis Foster at Metropolitan State Hospital and Jay Salter at Atascadero State Hospital. This is one of several Unalleged violations which CWA raises for the first time in its brief.

With respect to Foster, CWA contends that whereas hospital rules prohibit organizing during work time, Mr. Foster went freely to other units and talked to employees about CAPT during work time. The State, CWA argues, did not halt Mr. Foster's activities until approximately three weeks after balloting ended.

As noted by both the State and CAPT, Mr. Foster at various times worked for both unions. Mr. Foster's ambivalence certainly clouds the case for employer partiality. But more importantly, contrary to the contentions of CWA, the State did not idly watch as Mr. Foster violated the rules. Mr. Foster was told to stop distributing union literature during work time by his shift lead, Frank Abasta. Harold Weed, the unit supervisor in charge of the unit where Mr. Foster works, directed that Mr. Foster be advised that if he did not stop, further action would be taken. Mr. Foster apparently did not stop and ultimately, on August 6, 1985, he was given a written memorandum warning that further violations would "not be tolerated." While the action against Mr. Foster may not have been as strong as CWA would have liked, it certainly cannot be said that the State ignored Mr. Foster's violations of the rules.

At Atascadero, CWA argues, interim CAPT President Jay Salter "was allowed virtual limitless access." CWA argues that Mr. Salter was permitted access to any unit on hospital grounds merely by telling management he planned to be there, contrary to the restrictions governing access for CAPT. Mr. Salter was a former CWA steward. He testified that before he began to distribute literature for CAPT, he consulted hospital administrative directives and the CWA contract. He then attempted to adhere to the policies as he understood them. He was not "allowed" greater access by the State. Whatever access he enjoyed, he took on his own. No management witnesses were questioned about Mr. Salter's practices and there is no basis for concluding that management knew about any deviations Mr. Salter may have made. In the absence of any showing of knowledge on the part of State management, there is no basis for concluding that Mr. Salter was "given" favored treatment.

No violation will be found for the imposition of a 24-hour requirement at Fairview. CWA failed to present convincing evidence about the past practice there. The only witness to testify on this subject was Hal Britt, the hospital personnel officer. At one point, he testified that union stewards could gain access to units by simply making a request to the program director. Then he amplified his answer to say that 24-hours advance notice was required, but frequently waived. Neither Mr. Britt nor any other witness explained when the 24-hour notice requirement was instituted. It is unclear from the record whether this was a new requirement or whether the hospital had imposed it at some earlier date. The burden of showing a change is on the Charging Party. Walnut Valley Unified School District (1981) PERB Decision No. 160. There is no persuasive evidence to establish when the 24-hour requirement was instituted at Fairview. Although it is a deviation from the contract, the requirement appears to have been of some longstanding. It was not, therefore, a unilateral change made during the relevant period.

Use of Telephones

The contract between the parties is silent regarding telephone usage. Nevertheless, DMH labor relations Chief James Moore testified that the department has permitted employee organizations to use State phones to facilitate the resolution of grievances and other representational issues. Use for other union purposes has not been permitted.

During the pre-election period CWA representatives at Patton State Hospital were told that they could no longer use the State phone for union business. Patton, one of the hospitals within the jurisdiction of the Department of Mental Health, previously had permitted union officers to use the State phone for grievance resolution and other representational purposes. Prohibiting the use of the phone during the election was a change in past practice. An employer is permitted to unilaterally halt a prior practice where that practice amounted to unlawful assistance to an employee organization. See Gonzales Union High School District (1984) PERB Decision No. 410. But there is nothing in the employer's authorization for an exclusive representative to use the State telephone for grievance resolution that implies unlawful support. Indeed, it would be to both the employer's and the union's disadvantage to prohibit the union from making a telephone call which might bring about speedy resolution of a grievance.

Because the prohibition against all CWA usage of the telephone was imposed unilaterally and marked a change from the past practice, the State's action amounted to a violation of section 3519(c) and, derivatively, sections 3519(a) and (b).

There is no violation in the State's refusal to permit the union to install private lines at Patton, Napa and Agnews State Hospitals. The State has had a consistent policy over a number of years of prohibiting the installation of private lines in its hospitals. When requests for lines have been made they

were refused and when private lines were discovered they have been removed.

Leafletting Locations

Two contract provisions are applicable in establishing the limits upon the distribution of literature. The contractual access clause provides that access may be "deferred for reasons related to client care, privacy, safety, security, or other necessary business reasons." The contractual provision on distribution of literature provides that materials may be distributed "during nonwork hours . . . in nonwork areas." During the election period, disputes arose about the distribution of literature at Camarillo, Napa and Patton State Hospitals.

At Camarillo, representatives of both CWA and CAPT were directed by hospital police to stop distributing literature in locations which blocked traffic. There is no evidence to show that employees were ever permitted to distribute literature at those locations on any prior occasion. CWA makes no argument in its brief about the halt to literature distribution at certain locations at Camarillo and in the absence of evidence about past practice it cannot be concluded that the State's action amounted to a unilateral change.

At Napa, the literature distribution location was moved a few feet at the Imola Avenue entrance. This change was to get the leaflet distributors farther onto hospital grounds in order to avoid a backup of traffic onto a nearby city street. The

CWA leaflet distributors acceded to the request voluntarily.

CWA presented a great deal of evidence about instructions that CWA organizers not distribute literature on the facility grounds at the intersection of Magnolia and Spruce Drives. In its brief, CWA contends that the State actually moved the organizers to a site near the main entrance to the hospital grounds. In fact, there was no move. Although hospital police officers spoke to CWA representatives and asked them to move to the other location, they did not do so. As both the State and CAPT point out in their briefs, CWA continued to leaflet at the Magnolia-Spruce location. Buck Bagot successfully protested the proposed change in distribution sites. Mr. Friday, the hospital administrator, yielded to Mr. Bagot's protest and CWA activists remained at the Magnolia-Spruce intersection throughout the campaign.[17]

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[17]During the course of the debate between Mr. Friday and Mr. Bagot about literature distribution locations, Mr. Friday sent two letters to CWA officials in Los Angeles. Hospital police filed a written report about an incident involving leaflet distribution and Mr. Friday and other administrators wrote an account for their records of a conversation between Friday and Mr. Bagot. In its brief, CWA characterized these communications as "a threatening paper war with CWA representatives . . . all of which chastise CWA for not complying with the illegal requirements established by Friday." CWA describes the letters and reports as representing "particularly harsh treatment" of CWA.

CWA makes too much of the documents. The letters are nothing more than written statements of the same position Mr. Friday espoused in conversations with CWA representatives. The police report is hardly "threatening" and does not "chastise" anyone. The report for the file is a rather straightforward account of a series of conversations. No unlawful conduct is revealed in any of the documents.

At Patton State Hospital, the State halted the distribution of leaflets at the traditional location near two speed bumps on Patton Avenue. Although hospital administrators previously had permitted the distribution of literature near the speed bumps, the location was seen as sufficiently dangerous that persons distributing literature at the site were requested to sign a waiver stating that they would not sue the hospital if they were hurt. At the insistence of the correctional captain in charge of hospital security, hospital administrators prohibited leafletting at the speed bumps during the 1985 campaign. CWA representatives were notified of the change prior to any efforts by them to distribute materials. They were offered three alternative sites plus the hospital parking lots.

In its brief, CWA rejects the safety concerns expressed by State witnesses at the hearing. CWA argues that no State witness ever "convincingly explained" why safety concerns became paramount in 1985 and why they could not have been handled in some manner other than "outright prohibition of distribution." In actuality, correctional Captain James Wright explained why he went along with distribution at the speed bumps in 1983. Using photographs and a hospital map, he also convincingly described the safety dangers he believed inherent in leaflet distribution at the speed bumps. It is quite clear, moreover, that the prohibition of distribution at the speed bumps was not an "outright" ban. The other locations offered

by the hospital administration permitted CWA to reach a comparable number of employees.

The contract between the parties permits the deferral of access for "safety" and "other necessary business reasons." Evidence presented at the hearing established that the State had legitimate concerns about employee safety in redirecting the leaflet distributors away from the speed bumps to other locations on hospital grounds. Because the contract, as the embodiment of past practice, permits deferral of access for safety reasons, it cannot be said that the State's action amounted to a unilateral change.

For these reasons, it is concluded that the State did not act improperly in redirecting leaflet distributors to other locations at Camarillo, Napa and Patton State Hospitals.[18]

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[18]In another series of Unalleged violations, CWA argues in its brief that during the campaign the State changed CWA's representational rights at Patton State Hospital and its release time policy at Patton and Lanterman.

Regarding representational rights at Patton, CWA cites the testimony of one of its stewards, Homer Silver, who said that in 1985 he, for the first time, was told he could discuss grievance matters with employees only at break times. Prior to the change, Mr. Silver said, he "had been allowed to use time necessary and, as possible, . . . off of the unit." Mr. Silver complained to Tricia Torres, the labor relations analyst at Patton, who told him that "the needs of the unit" were "the overriding factor." The restriction was lifted, he said, several months later. The State responds that under the contractual access clause, footnote No. 5, supra, access may be deferred "for reasons related to client care." The State's argument seems perfectly reasonable. Mr. Silver was denied the right to leave his duties for CWA business, except for break and lunch times, because of "the needs of the unit." There is nothing untoward in such a restriction. It seems plainly contemplated within the contractual language.

With respect to release time, CWA's complaint at Patton is

ALLEGED INTERFERENCE/UNLAWFUL SUPPORT

There is a great deal of overlap in both the evidence and rules of law which establish interference and unlawful employer support. In nearly any situation where an employer has unlawfully supported one union against another that conduct also will constitute interference in the protected rights of employees. The applicable rules of law are well established

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that a steward, for the first time, was asked in 1985 to complete a form when he wished to be released on CWA business. Prior to that, no form was required. As the State replies, however, there is no evidence the Patton steward was denied any released time or prevented from completing any CWA duties by the recording-keeping device. In the absence of any evidence that the change affected hours or some other matter within the scope of representation, it did not violate the Act.

CWA's complaint regarding release time at Lanterman is that the State changed the identity of the person authorized by the State to grant release time. CWA contends that prior to the election, union stewards could secure released time from their shift leads but that during the election they were told to go to unit supervisors. CWA contends that the effect of this change was to require its steward, George King, to make release time requests to the acting unit supervisor who was a CAPT supporter. Lanterman Labor Relations Coordinator Nancy Irving testified, however, that shift leads are bargaining unit members and have never had the authority to grant release time. Only unit supervisors, who are excluded from the unit, can grant release time. Acting unit supervisors, who also are members of the unit, are likewise barred from granting release time. During the campaign, she testified, she made no change but simply reminded Mr. King and others of the policy. The question again is whether there was any change affecting hours or any other matter within the scope of representation. Surely, it is within the employer's discretion to identify which person within management shall have the authority to grant release time. CWA has made no claim that release time was unreasonably denied to its stewards and there is no basis for reaching such a conclusion on the record, here. In the absence of evidence that the change, if indeed there was one, affected hours or some other matter within scope,there is no violation of the Act.

and, as CWA observes, "there is a remarkable agreement, or at least no disagreement expressed, among the parties as to the legal standards that apply."

State 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.[19]

It is an unfair practice under section 3519(a) for the State "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.[20]

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 District (1979) PERB Decision No. 89.[21] See also,

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[19]SEERA section 3515.

[20]Section 3519 is found at footnote No. 1, supra.

[21]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

Novato Unified School District (1982) PERB Decision No. 210, Sacramento City Unified School District (1982) PERB Decision No. 214 and Sacramento City Unified School District (1985) PERB Decision No. 492. In an interference case, it is not necessary for the Charging Party to show that the Respondent acted with an unlawful motivation. Regents of the University of California (1983) PERB Decision No. 305-H.

Like individual employees, organizations also have protected rights under SEERA. Although there is no specific statutory listing, the PERB has found that employee organizations under SEERA are entitled to access at reasonable times to work areas, to institutional bulletin boards and to mailboxes for communication purposes. In addition, organizations have the right to use institutional facilities for meetings. State of California (Department of Corrections)

> 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.

(1980) PERB Decision No. 127-S. The employer "may reasonably regulate access where necessary to assure the safety of its employees, wards, and facilities and the efficient operation of its official business." Ibid.

It is an unfair practice under section 3519(b) for the State employer to "deny to employee organizations rights" protected under SEERA. An alleged interference with organizational rights is analyzed in the same manner as an alleged interference with individual rights.

Under section 3519(d) it is an unfair practice for the State 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." The PERB has interpreted this language as imposing on employers "an unqualified requirement of strict neutrality." Santa Monica Community College District (1979) PERB Decision No. 103 and Clovis Unified School District (1984) PERB Decision No. 389. 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 . . . 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. State of California (Departments of Personnel Administration. Mental Health and Developmental Services) (1985) PERB Decision No. 542-S. See

also Sacramento City Unified School District (1982) PERB Decision No. 214.

In a case involving an allegation of unlawful support, "each individual factual assertion need not stand alone as conduct violative of the Act, but, rather, the totality of circumstances must be considered." State of California, supra, PERB Decision No. 242-S. Where, for example, various employer communications are under attack, they are to be viewed "together, with each capable of lending support to the underlying claim." Ibid.

Although the parties agree on these general principles of law, they are in vigorous dispute about the application of these rules to the facts at issue. As CWA correctly observes, the key issue is "what facts do exist and whether those facts constitute unfair practices or grounds to set aside the election." For the most part, the factual findings dictate the result.

Employer-Written Memoranda

Although the complaint lists three employer-written memoranda in its accusation of interference and unlawful support, there was a total failure of proof regarding one of these. There is no evidence in the record that a March 5, 1985, memo by Gary Scott was ever posted at Sonoma State Hospital or anywhere else. Indeed, CWA makes no argument regarding the memo in its briefs. Because of the failure of proof, the allegation regarding this memo is dismissed.

The two other contested communications are a February 26, 1985, letter by Ivonne Ramos Richardson and a June 4, 1985, memo by Denise Bates. The evidence establishes that the Richardson memo was posted on at least two units at Camarillo State Hospital and that the Bates memo was posted on a number of units at the Metropolitan State Hospital.

CWA characterizes the Richardson letter as the "recognition" of CAPT by the Department of Personnel Administration. The State rejects this argument characterizing as "tortured logic and a selective reading of the record," the CWA contention that the Richardson letter constituted a premature recognition of CAPT. The State points to the text of the letter which in context, the State argues, gives CAPT standing only as an employee organization. Moreover, the State continues, there is no evidence that the letter was widely distributed or even seen by many State employees. Thus, its impact was minimal at most.

While the Richardson letter assuredly was deficient in clarity and precision, CWA makes too much of it. By its very terms, the letter did not purport to "recognize" CAPT as the exclusive representative. The letter granted CAPT "recognition" as an employee organization and specifically tied the "recognition" to SEERA section 3513(a).[22] While this

[22]Section 3513(a) is the definition of "employee organization." See footnote No. 3, supra.

legalistic wording might be confusing, there is nothing in the context of the letter which constitutes unlawful support by the State for CAPT.

In addition, there is no evidence the letter was posted anywhere other than on two units at Camarillo State Hospital and even on those two units, there is no persuasive evidence that the letter was posted by a representative of management. More likely, it was posted by someone from CAPT. Given the very narrow circulation of the letter, it is hard to believe that it amounted to an interference with the protected rights of either individual employees or of CWA.

A more significant problem is presented by the Bates memo at Metropolitan State Hospital. The Bates memo listed the names of seven persons which it described as newly appointed "job stewards" for CAPT. It also contained the name of Lyle Vandagriff who it said should be removed from the CWA job steward list.

CWA reviews the testimony of a number of its witnesses who described the negative impact of the Bates memo. CWA asserts that the evidence shows that the memo "had precisely the negative impact one would reasonably expect when management lists and publishes job stewards" from a union trying to unseat the incumbent union. Both the State and CAPT minimize the impact of the memo. The State notes that Bates candidly admitted that the term "steward" was incorrect and argues that it was used innocently. The State finds no persuasive evidence

of impact from the testimony of CWA's witnesses. CAPT notes that a memo correcting the inappropriate terminology was sent promptly to all management representatives. CAPT contends that CWA makes too much of the word "steward" and that in the ordinary speech of psychiatric technicians the word steward could not have caused the problems attributed to it by CWA witnesses.

The problem here is not so much the use of the word "steward" as in the posting of the memo by management representatives. CWA witnesses credibly testified that the posting of the memo created confusion and, at least to some employees, suggested management favoritism toward CAPT. While the purported effects of the memo listed by CWA witnesses seem somewhat overdrawn, I believe that at minimum the posting of the memo resulted in "some harm to employee rights." It requires no imagination to believe that the posting by management of a memo listing the representatives of a rival union would tend to discourage employees working for the other union. The mere posting of the names of one union's representatives suggests management support for that union. The problem is accentuated when the same list shows the removal of a steward representing the other union. While Ms. Bates persuasively testified about the need to inform unit managers of the identify of CAPT representatives, no operational necessity was shown for why the list needed to be posted.

Similarly, the posting of the Bates memo fell short of the "unqualified requirement of strict neutrality" imposed upon the State employer by section 3519(d). See e.g. Santa Monica Community College District, supra. PERB Decision No. 103. Posting of the Bates memo gave wide circulation to the names of CAPT representatives and may well have assisted the organization by identifying to employees persons who could tell them about CAPT. Although Ms. Bates did not intend for her memo to be posted and took steps to replace it when she learned of its erroneous use of the word steward, the record is clear that supervisory persons were responsible. The actions of a supervisor will be imputed to the employer. Office of Kern County Superintendent of Schools (1985) PERB Decision No. 533.

For these reasons, it is concluded that the State violated SEERA sections 3519(a) and (d) by the posting of the Bates memo at Metropolitan State Hospital.[23]

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[23] CWA contends in another Unalleged violation that the State was responsible also for the posting of lists of CAPT representatives at Lanterman and Napa State Hospitals. The evidence of this assertion is far from persuasive. At both hospitals, management sent to program directors and other administrators memoranda identifying CAPT representatives. The purpose of these memoranda, which is apparent from their wording, was to identify for program directors the CAPT representatives who would be entitled to post literature on unit breakroom bulletin boards.

At Lanterman, CWA witness Debra Saviano testified that she saw a listing of "CAPT stewards" posted in the breakroom. She said the memo bore no identification as being from the hospital administration. Plainly, what Ms. Saviano saw was not the memorandum circulated by hospital management. That document carried a hospital letterhead and identified the CAPT workers as "representatives." There is no evidence that what

Use of Hospital Facilities

CWA contends that the State interfered with its protected rights by denying it the use of conference rooms at Atascadero and Stockton State Hospitals and building lobbies at Atascadero and Napa State Hospitals. CWA also contends that it was denied the use of the public address system at Patton State Hospital. In each instance, CWA argues, the State permitted CAPT to use the facilities which were denied to CWA. Such conduct, CWA argues, constitutes not only an unlawful interference with the protected rights of employees, it also interferes with CWA's rights of access and amounts to a display of employer favoritism toward CAPT.

Both the State and CAPT responded that the evidence simply will not support CWA's allegations. Regarding the alleged denial of CWA's request to use the executive director's conference room at Atascadero, the State cites the testimony of Atascadero labor relations analyst, Shirley McCall.

Ms. Saviano saw was posted by management and one can reasonably infer from her testimony that it was a document posted by someone representing CAPT.

At Napa, CWA witness Dennis Linehan testified that he saw the management memo listing CAPT representatives posted in the nursing station of his unit. The evidence reveals nothing untoward about the memo. It was placed on a clipboard with other management memos. The wording of the memo is indicative of its very narrow purpose. Unlike the memorandum at Metropolitan State Hospital, the record is devoid of any evidence of impact the Napa memo may have had upon protected rights of employees or CWA. Given the location and wording of the memo, together with its limited circulation, the absence of evidence of impact is what one would expect.

Ms. McCall, who is responsible for arranging room use for unions, testified that CWA made no request for the executive director's conference room during the period from April through July 1985. CAPT argues similarly that CWA was denied the use of the room because it did not make a timely request.

I conclude that the State and CAPT are correct. CWA's allegations regarding the executive director's conference room at Atascadero must be dismissed for want of proof. The evidence suggests that, as argued by CAPT, the reason CWA was unable to schedule the conference room at Atascadero was that it made no timely request for it. The glib testimony of CWA witness Sandra Dunlea regarding her efforts to secure a room at Atascadero was singularly unpersuasive. Although the State has an obligation to make meeting rooms available upon request by unions, it has the right to rationally regulate such usage. This includes the right to request a union to give advance notice of its desire to use a room and to deny the room if it already is in use for State purposes or by some other organization.

CWA's contention that it was denied the use of the conference room at Stockton also is dismissed for failure of proof. CWA steward Earl Lytle acknowledged that on each occasion he requested the room the secretary who handles the room assignments examined a book before advising him that the room was unavailable. He made no request to examine the book personally. On each occasion, Mr. Lytle was granted another

room in the hospital for use by CWA. The evidence establishes that CAPT used the room only once and that the room was assigned to CAPT because it is a small room and CAPT expected a small gathering.

Regarding the Atascadero lobby, the State argues that by longstanding policy only one organization at a time is permitted to set up a table and distribute literature. Representatives of a second organization may hand out literature in the lobby, the State contends, but CWA never attempted to do this. CAPT notes that there is no restriction on leafletting outside of the lobby and there was no evidence that CWA was denied the opportunity to leaflet there or elsewhere.

CWA has demonstrated no interference with its ability to distribute literature at the Atascadero administration building. As CAPT argues, there was at no time any restriction upon the distribution of literature just outside the doors to the lobby. The evidence establishes that approximately the same number of employees pass the location outside the lobby as pass the location inside. CWA was aware of the opportunity to distribute literature at this location, but apparently chose not to. Once more, CWA's primary problem was a failure to make a timely request to use the facilities it desired. CWA's unpersuasive witness on this issue, Sandra Dunlea, admitted that she did not request alternative dates for the use of the lobby when she ascertained that it already was in use by

another organization. There can be no finding that the State showed favoritism toward CAPT when CAPT made a timely request to use the lobby and CWA, after making a later request, did not bother to seek an alternative date.

CWA makes an even less compelling case in its contention that CAPT received favored treatment in the usage of the lobby of the Napa State Hospital administration building. It is undisputed that CAPT representative Earl Dale distributed literature to employees standing in the pay line prior to 7:40 a.m. on one payday morning in the spring of 1985. CWA finds employer support for CAPT in that CWA previously had been told it could not distribute literature in the lobby of the administration building. Mr. Dale, however, distributed the literature without the permission of hospital administrators. He credibly testified that he was unaware of the prohibition and there is no credible evidence that any hospital administrator knew of Mr. Dale's action.

With respect to the alleged use by CAPT of the public address system at Patton State Hospital, the State argues that CWA provided no proof that hospital management authorized the announcement or had knowledge that the discussions at the meeting would relate to the decertification campaign. CAPT argues that CAPT as an organization was not mentioned in the announcement and there was no evidence that CAPT was ever mentioned at the meeting.

I find the evidence unpersuasive that the use of the public address system at Patton amounted to unlawful State support for CAPT. Indeed, it seems highly likely that the announcement was made before CAPT was even formed. CAPT did not come into existence as an organization until January 26, 1985. The disputed public address system announcement was made sometime in late 1984 or early 1985. One would expect that if the meeting concerned CAPT the name CAPT would have been mentioned in either the announcement or during the meeting itself. There is no evidence that the name CAPT was mentioned at any time. The announcement over the public address system could not constitute favoritism toward CAPT if indeed CAPT did not yet exist. In addition, there is no evidence that Patton administrators authorized the reading of the announcement. The public address system is controlled by telephone operators. It is as easy to infer from the record that one of the operators made the announcement without authorization as it is to conclude the contrary. On this question, therefore, CWA has failed to establish its contentions by a preponderance of the evidence.

For these reasons, the contentions that the State interfered with protected rights and/or showed favoritism toward CAPT regarding the usage of conference rooms at Atascadero and Stockton, lobbies at Atascadero and Napa, and the public address system at Patton, are all dismissed.

Literature in the Nursing Station

CWA argues in its brief that CAPT literature could be found in various hospital nursing stations. CWA contends that the literature was present in violation of hospital rules and that supervisory persons failed to enforce the rules by prompt removal of the CAPT material. CWA finds the presence of CAPT literature in the nursing station to be part of a climate of support for CAPT which CWA found prevailing throughout the hospitals during the pre-election period.

There was credible evidence that CAPT literature appeared during the time before the election in one or more nursing stations at seven State hospitals. It is not uncommon, however, that employees bring union literature to work during an election campaign. And there were witnesses to CWA literature in nursing stations at three State hospitals.

The circulation of union literature in working areas clearly violates rules of both the Department of Mental Health and the Department of Developmental Services. While there were obvious violations, there is no evidence to suggest that management encouraged this activity. Several unit supervisors described the methods that they used to try to keep union literature out of the nursing station. Even CWA witness Joe Hessen acknowledged that after one of his complaints to the hospital administration, CAPT supporters "quit bringing the stuff into the office and the nursing station."

Management had a rule against union literature in work areas. Management attempted to enforce that rule. Evidence that the rule was sometimes broken simply does not establish interference with protected rights of employees or of CWA or that the State favored CAPT.

Reduction of Bulletin Board Space

It should be noted initially that the complaint makes no reference to the division of bulletin boards or to the reduction of CWA's bulletin board space. Allegations concerning the bulletin boards thus involve an Unalleged violation. Unalleged violations may be considered where the conduct at issue is intimately related to the subject matter of the complaint, where the communicative acts are part of the same course of conduct, where the Unalleged violation is fully litigated and where the parties have had the opportunity to examine and be cross-examined on the issue. Santa Clara Unified School District (1979) PERB Decision No. 104.

The reduction of CWA bulletin board space meets these tests. It is closely related to CWA's allegations that the State interfered with protected rights. The same course of conduct is involved in the reduction of the space as with the alleged violations. The issue of reduced bulletin board space was litigated at length and fully briefed by the parties. Thus I conclude that the nature of the State's conduct in reducing CWA's bulletin board space may be considered despite the

absence of a specific allegation regarding the reduction in the complaint.

CWA argues that its bulletin board space "was violated by CAPT at hospital after hospital at the direction of or with the approval or subsequent ratification by hospital management." CWA argues that its contractual right to bulletin board space was diminished unilaterally by the employer without any justification.

The State and CAPT rely heavily upon contract language which provides that CWA shall have "designated" bulletin board space. The contract does not provide for "exclusive" bulletin board space, the State argues, noting a history of shared space between CWA and other unions. The State contends that the amount of space given to CWA could not be "ascertained with any degree of exactness to thereafter determine whether a diminution in space occurred." CAPT attributes CWA's contention to "confusion" by its officers and agents. CAPT argues that CWA representatives believed that the organization had "exclusive" bulletin board space which is contrary to the terms of the contract.

Despite the efforts of the State and CAPT to put the best face on the division of the bulletin boards, CWA's bulletin board space was diminished with the explicit or tacit approval of management at all hospitals except Napa, Porterville and Stockton. CWA correctly characterizes the arguments of the State and CAPT as a contention that because CWA had no

exclusive bulletin board space there could have been no interference with its rights. It is hard to conceive how the reduction in the vast majority of the State's hospitals of the amount of space allocated to CWA would not have resulted in at least "some harm" to employee and CWA rights guaranteed by SEERA. To diminish the amount of space on which an organization could post materials during the peak of a heated campaign obviously interferes with its rights of access. It seems implicit in the specific warnings given by Messrs. Moore and Scott to the hospital labor relations representatives that the State was aware of the dangers of reducing CWA's bulletin board space. Local administrators, nevertheless, proceeded with the redistribution of bulletin board space anyway.

The record is devoid of any justification by the State for the reduction of CWA's space. While the State doubtless was obligated to provide posting space for CAPT, there is no reason why the space given to CAPT had to be taken from CWA. As Mr. Moore told his hospital labor relations coordinators, CAPT could be given space on "the wall next to [the CWA space] if that is the only option." In the absence of any justification by the State for its interference, the reduction of CWA bulletin board space was a violation of SEERA sections 3519(a) and (b). It interfered not only with CWA's rights of access but also the rights of individual employees to participate in the activities of an employee organization. Although the State interfered with protected rights by removing bulletin board

space from CWA, this action did not constitute unlawful support for CAPT. There is, therefore, no violation of SEERA section 3519(d).

Statements by Supervisory Employees

CWA argues that statements made by supervisory employees at six State hospitals were unlawful because they contained either a promise of benefit, a threat, or a statement of preference for one organization over the other. Each of these statements, CWA argues, constituted separate violations of SEERA sections 3519(a) and/or (d). Both the State and CAPT argue that when considered in context none of the individual statements constituted an impermissible threat of reprisal or a promise of benefits. In most instances, the State and CAPT argue, the comments were mere statements of opinion. In other situations, according to the respondents, the comments simply were not made.

In Rio Hondo Community College District, supra. PERB Decision No. 128, the Board concluded that an employer has the right,

> . . . 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 constitutes 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 (1981) PERB Decision No. 188.

Under the National Labor Relations Board formulation of the rule, an employer may lawfully offer uncoercive opinion and make predictions based upon "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." Ibid.

At issue here are comments allegedly made by supervisory persons at Camarillo, Fairview, Lanterman, Metropolitan, Napa and Stockton State Hospitals. Initially, the allegations regarding Camarillo and Napa must be dismissed. I conclude that the statements as alleged by CWA simply were not made. The evidence will not support the allegation that Jeanne Moon, a Senior Psychiatric Technician at Camarillo, was threatened with retaliation if she remained active in the union.[24] The evidence likewise fails to support the allegation that Bea Bloyd, a Senior Psychiatric Technician at Napa State Hospital, was promised pay raises if she and other Senior Psychiatric Technicians were no longer represented by CWA.[25]

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[24]See discussion in the findings of fact, supra, pp. 40-41.

[25]See discussion in the findings of fact, supra, pp. 45-46.

I similarly reject the contention that management and supervisory persons violated SEERA in any of the comments made to Pattie Bartlett, a CWA organizer at Lanterman State Hospital. I found Ms. Bartlett to be an engaging witness with a disarming personality. She testified to a series of comments that were made to her by management and supervisory persons. I have no doubt that the comments were made exactly as described by Ms. Bartlett. However, as Ms. Bartlett candidly acknowledged, she had a lengthy personal friendship with one of the management persons about whom she testified. Ms. Bartlett also described her public falling out with CWA, an occurrence which was widely publicized throughout the hospital system and would have been known to all of the management and supervisory persons who made comments to her.[26] In this context, the comments made to Ms. Bartlett were obviously personal. They did not reflect management or supervisory criticism of CWA or criticism of her. For the most part, the comments were friendly expressions of surprise that after publicly disagreeing with CWA Ms. Bartlett would become a CWA activist in the election. For these reasons, I reject the contention that the comments made to Ms. Bartlett amounted to interference with either her or CWA's protected rights or to employer support of CAPT.

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[26]See discussion in the findings of fact, supra, pp. 43-45.

The remarks of Richard Singleton, a program director at Fairview State Hospital, also lack the earmarks of interference or unlawful support. In a one-on-one conversation with CWA steward Steven Gillan, Mr. Singleton referred "in a very-general way" to his opinion that CWA probably would be beaten in the election. There is no evidence that the remark was coercive and in context appeared to be little other than a statement of opinion.

Mr. Singleton then stated that it would be easier for Senior Psychiatric Technicians to achieve parity pay with registered nurses if they were management people. CWA asserts that the latter remark was a promise of benefit made in an election context. There was, of course, nothing on the ballot about whether Senior Psychiatric Technicians would be in or out of the unit. CWA links this comment to a promise of benefit only through an argument that CAPT favored the removal of Senior Psychiatric Technicians from the unit. The evidence makes it clear that CAPT never asserted such a position in the campaign. Officially, CAPT was neutral on the issue, and the opposition to the proposal of CAPT's interim president, Jay Salter, was widely publicized. There is no evidence, moreover, that Mr. Singleton had any authority to make any promises on behalf of the State regarding the prospective pay of Senior Psychiatric Technicians, be they in or out of the unit. In this context, Mr. Singleton's remark can be seen as nothing more than another statement of personal opinion.

Less benign were the remarks of Jean Nelson, a unit supervisor at Fairview, of David Campbell, a unit supervisor at Lanterman, of Dennis Masoner, a unit supervisor at Metropolitan State Hospital, and of Jake Myrick, a program director at Stockton State Hospital.

Ms. Nelson stated on at least three occasions before small groups of employees that "CAPT should win" the election. Had she made an isolated comment to a single employee, one might reasonably interpret it as a statement of personal opinion. However, there is uncontradicted testimony that Ms. Nelson made the remark on at least three occasions in front of employees. There is no reason why she should be offering her personal opinion on so many occasions unless it was intended to influence voters.

Mr. Campbell told CWA steward, Debra Saviano, that she should leave CWA and that "CAPT was a much better organization." He also told her that CWA didn't do as good a job for employees as CAPT would do. A similar comment was made by Mr. Masoner who remarked to Michael Jolly upon Mr. Jolly's expression of interest in CWA,

> Why even do that? CAPT is going to win anyway. Everyone is going to CAPT. CWA is a lost cause.

Likewise, Mr. Myrick remarked to Earl Lytle that, "I hope they beat the hell out of you," in reference to CAPT. The remarks of Messrs. Campbell, Masoner and Myrick stepped beyond the bounds of opinion. They plainly were advocacy on behalf of

CAPT. In each instance, the comments would have the natural effect of discouraging an employee from engaging in protected conduct. No justification was offered by the State for these comments which were clearly contrary to instructions that had been given by State management to hospital level supervisors and managerial employees.

I conclude that the comments of Jean Nelson, David Campbell, Dennis Masoner and Jake Myrick each constituted interference and unlawful support and were a violation of SEERA section 3519(a) and (d).[27]

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[27] In a curious argument about a document that fails even to mention CAPT, CWA would also find unlawful State support in "an unusual commendation" given July 16, 1985, to a Senior Psychiatric Technician at Sonoma State Hospital. The technician, Betty Dwire, refused access to a paid CWA organizer. CWA characterizes Ms. Dwire as an "anti-CWA employee."

Ms. Dwire, a member of CWA, testified that a paid CWA representative came onto her unit during the weekend. He had possession of a Sonoma State Hospital nursing key. Ms. Dwire advised the representative that he could not enter the unit at that time. She then sent a memorandum to her supervisor explaining what she had done and asked to be told if her "behavior was inappropriate." Subsequently, hospital Administrator Thomas Gillans sent a memorandum to Ms. Dwire's program director expressing his appreciation for the way Ms. Dwire had followed hospital procedures.

Under the contract between the parties, CWA staff representatives seeking access to hospital units must first "identify themselves to the facility Labor Relations Coordinator who will make the necessary arrangements for access to employees." No arrangements had been made for the visit of the CWA organizer. Under these circumstances and in light of Ms. Dwire's specific request to be advised if she had acted improperly, there is nothing untoward about the note of appreciation given to her. It is hard to understand, in any case, how this document — which is dated the day before the close of balloting — shows unlawful support for CAPT.

Use of the Hospital Mail

CWA presented evidence that the State distributed CAPT mail through the hospital mail systems at Lanterman, Metropolitan and Sonoma State Hospitals. CWA argues that the State thereby showed preferential treatment for CAPT, because it refused to distribute mailings on behalf of CWA.

The evidence regarding the distribution of CAPT mail at Metropolitan State Hospital was totally unconvincing. Two witnesses testified that they saw CAPT material in State interoffice envelopes which were delivered to their units with the mail. Neither employee knew who placed the CAPT literature in the envelopes. There was no indication that hospital management knew of this abuse of the mail system, and Johnie Savee, the mail room assistant at Metropolitan, was not authorized to open interoffice envelopes and thus was unaware of their contents. In the absence of any evidence that the State knew of this violation of its rules, I cannot conclude that the State preferentially distributed CAPT mail at Metropolitan.

Similarly unpersuasive was the evidence concerning distribution of CAPT mail at Sonoma State Hospital. CWA witness, Kathie Pinotich, testified that she found CAPT literature on her unit and it "appeared" that the literature had been distributed through the hospital mail system. The only evidence in support of this contention was that the employees' unit addresses had been written in ink on the face

of the envelopes. Ms. Pinotich testified that the method of writing numbers resembled that of hospital postal workers who sometimes write unit addresses on mail they deliver.

Much more persuasive was the testimony of Joanne Marino, the Sonoma mail room supervisor, who testified that she did not place the unit addresses on any CAPT envelopes. Her testimony was buttressed by that of Dan Sorrick, the CAPT representative at Sonoma, who testified that he and other CAPT workers sorted, addressed and delivered the mail after one of the hospital executive secretaries told him the CAPT letters could not go through the hospital mail system. I conclude that the preponderance of the evidence establishes that CAPT mail was not distributed through the mail system at Sonoma State Hospital.

CWA makes a better case on behalf of its contention that CAPT mail was distributed through the mail system at Lanterman State Hospital. CWA argues that hundreds of CAPT letters were distributed personally by hospital administrators after the unit addresses had been determined by the hospital Labor Relations Coordinator Nancy Irving. CWA contends that the personal delivery of such mail by administrative employees "left a much stronger state imprimatur than simply mail delivery." CWA contends that unit members could receive no other message but that "the hospital approved of CAPT's effort."

Both the State and CAPT argue that there was no use of the hospital mail system. They assert that the mail was delivered

in this way in order to remain in compliance with the prohibition against delivery through the mail system. Moreover, the State and CAPT argue, CWA was offered similar assistance with a mailing it had made at approximately the same time.

The June 1985 CAPT mailing presented something of a dilemma to administrators at Lanterman. In the past, employees who received personal mail were invited to pick up that mail at the hospital post office. It was not delivered to them. The CAPT mailing, however, comprised hundreds of pieces. It was plain to both Lanterman Labor Relations Coordinator Nancy Irving and DDS Labor Relations Chief Gary Scott that the appearance of so many employees would be disruptive to the hospital mail room. They could not, as they had done with a similar CWA mailing, simply place the letters in a CAPT mailbox. Ms. Irving earlier had denied CAPT's request for a mailbox. Thus, the hospital administrators were confronted with the following problem: They could not deliver the mail through the mail system because that was against a long-held hospital rule. They could not place the mail in a CAPT mailbox because they had denied CAPT the right to have a mailbox. They could not have employees individually go to the mail room as is traditional with personal mail because the large number of employees involved would have disrupted the mail room's operation. Refusal to deliver the mail at all, would have constituted different

treatment for CAPT than that afforded to CWA. The CWA mailing was at least placed in a CWA receptacle.

State and hospital administrators concluded that the best solution was to send the mail to the individual programs, notify employees it was there, and permit them to pick it up. This decentralized approach would eliminate confusion at the mail room and would keep intact the prohibition against the delivery of personal mail. CWA ultimately was offered the same privilege.

The process chosen by the State did not interfere with any protected rights of either CWA or of employees loyal to it. Nor do I believe that the simple act of inviting employees to pick up their mail in the program offices amounted to unlawful support for CAPT. There is no evidence that employees who chose to pick up the CAPT mail were subjected to any comments by management persons about CAPT. In the absence of evidence about any surrounding events, I do not believe that an employee who is notified about the presence of union mail in an administrative office should necessarily deduce that the administrator therefore supports the union. For these reasons, I do not believe that the manner of distributing the CAPT mailing at Lanterman State Hospital constituted unlawful State support for CAPT.

Unit Modification

CWA argues that by filing the unit modification petition the State interfered with the protected rights of employees.

CWA reaches this conclusion as follows: A majority of the unit 18 members were aware during the decertification campaign that the State was formally attempting to remove Senior Psychiatric Technicians from the bargaining unit. It was widely believed that CAPT was aligned with the State on this issue and that CAPT supported the unit modification petition. A majority of the Senior Psychiatric Technicians wanted out of the unit, because they believed that their removal from the unit would increase the likelihood that they would receive parity pay with Registered Nurses II. Therefore, the filing of a unit modification petition had the natural effect of influencing unit members to vote for CAPT. By influencing the outcome of the election, the petition interfered with the protected rights of employees to form, join and participate in the activities of employee organizations.

The problem with CWA's rationale, as the State points out, is that it is built upon conclusions which are not borne out by the evidence. While it is doubtless true that many Senior Psychiatric Technicians were aware of the unit modification petition, it is also clear that not all were aware. Indeed, several witnesses professed no knowledge of the unit modification petition until after the election was completed. This factor alone makes the impact of the unit modification somewhat problematical. An even more basic defect in CWA's rationale is its assumption that employees who wanted out of the unit could vote for CAPT, confident in the belief that CAPT

would not oppose the unit modification. CAPT as an organization took no position on the question and even employees who interpreted no position as support must have been shaken if they viewed CAPT interim President Jay Salter personally opposing the unit modification during the videotaped debate with a CWA representative.

It must be understood, moreover, that insofar as it was an election issue the unit modification was but one of many. Discussions about whether Senior Psychiatric Technicians should be in or out of the unit were held against a backdrop of controversy over CWA's internal problems. It seems highly improbable that in the swirl of election charges about CWA's integrity and competency, the filing of the unit modification petition interfered with any employee's free choice.

But as the State and CAPT argue, even if it be assumed that the filing of the unit modification petition had some impact upon protected rights, the State nevertheless has demonstrated ample business justification. From the beginning of collective bargaining in Unit 18, State managers have believed that Senior Psychiatric Technicians are supervisors and should be excluded from the unit. Hospital administrators have pressed the Department of Personnel Administration on numerous occasions to secure removal of the Senior Psychiatric Technicians from the unit. The petition was filed on the first possible occasion under PERB rules following the certification of CWA. CWA argues that the State has established no more than "employer

convenience or desire" and not business justification. But the record provides no basis for doubting the sincerity of the State's desire to remove Senior Psychiatric Technicians from the unit. The issue here is not whether the petition is meritorious. The question here is whether, given a desire on the part of the State to modify the unit, the State had a business justification for the timing of its action. Clearly, it did.

The State's business justification is in no way rebutted by the subsequent decision by Dennis Batchelder to withdraw the petition for unit modification. The evidence establishes without contradiction that PERB Chief of Representation Janet Caraway had advised the State of her intention to challenge the ballots of all Senior Psychiatric Technicians voting in the representation election. Ms. Caraway had made it clear to Mr. Batchelder and other State representatives that the challenging of the ballots would inevitably delay resolution of the decertification petition. Because he believed the resolution of the representation question was more important than the removal of Senior Psychiatric Technicians from the unit, Mr. Batchelder directed that the petition be withdrawn. His action was reasonable under the circumstances and does not undercut the State's rationale for filing the unit modification when it did.

For these reasons, I conclude that the State did not interfere with any protected rights of either CWA or its supporters by filing the unit modification petition.

OBJECTIONS TO THE ELECTION

CAPT as an Employee Organization

In its objections to the election, CWA reasserted essentially all the allegations made in its unfair practice case. In addition to these, CWA asserted one additional grounds for objection, i.e., that CAPT was not a bona fide employee organization because State employees were neither included in it nor participants in its management. This objection was dismissed at the completion of CWA's case-in-chief. CAPT contends that because CWA did not reassert this objection in its brief, the objection has been waived. CWA, of course, had no obligation to reassert the objection after it was already dismissed. My purpose in raising the issue in this proposed decision is simply to explain in more detail the reasons that the motion to dismiss was granted.

CWA's rationale for contending that CAPT is not an employee organization was advanced during a discussion of CAPT's motion to dismiss.[28] CWA makes two basic arguments. It contends first that under the literal wording of SEERA section 3513(a) it is not possible for there to be an "employee organization" other than the exclusive representative at the time a contract is in existence. CWA reaches this conclusion by noting that an employee organization must have as one of its primary purposes "representing" employees in their relations with the State.

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[28] See Reporter's Transcript, vol. 13, pp. 3-14.

CWA observes that only an exclusive representative can represent employees and therefore it is literally impossible for any other group to be an "employee organization." If this argument were accepted, of course, there would be no such thing as a decertification election. The statute evidences an intent that employees have a choice of exclusive representative. The definition of "employee organization" does not nullify employee choice.

CWA next argues that an employee organization under the definition in SEERA necessarily must permit participation in its activities by State employees. CWA notes that in State of California (Department of Personnel Administration) (1985) PERB Decision No. 525-S, the Board indicated that a party could make a successful challenge to a decertifying organization's status if it could show that the organization was "unlawfully dominated by management or has managerial and confidential employees in elective offices." That language, CWA reasons, significantly widens the requirements for an organization to qualify as an employee organization. CWA contends that CAPT, because of its alleged domination by Western, Murch and Associates, does not qualify as an employee organization.

CAPT initially demurs to this argument. Assuming that everything alleged by CWA is true, CAPT responds, so what. CAPT still meets the minimal requirements for qualifying as an employee organization per State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S.

If the matter be considered on the merits, however, CAPT vigorously argues that CWA's assertions about outsider control of CAPT are baseless. CAPT contends that the initial impetus for its formation came not from Western, Murch and Associates, but from psychiatric technicians employed in Unit 18. Furthermore, CAPT continues, the PERB made no change in its standards for determining the qualification of an employee organization in State of California, supra. PERB Decision No. 525-S. CAPT points to State of California (Department of Developmental Services), supra, PERB Decision No. 228-S as the yardstick for measuring the status of an organization.

I agree with CAPT. The leading case in this area is State of California, supra PERB Decision No. 228-S, popularly known as the Monsoor case after the last name of the charging party. In Monsoor the PERB found it "unnecessary for a group of employees to have a formal structure, seek exclusivity, or be concerned with all aspects of the employment relationship in order to constitute a statutory labor organization." Indeed, the Board continued, a group of employees need have no formal structure and need pursue no more than a single narrow area of interest and still qualify as an employee organization.[29]

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[29]Not even the failure of an organization's articles of incorporation and bylaws to mention representation as one of its purposes can disqualify it as an "employee organization." See, e.g., California School Employees Association v. Willits Unified School District (1966) 243 Cal.App.2d 776 [52 Cal.Rptr. 765].

The only significant question is whether the organization seeks on behalf of employees to deal with the employer on a matter of employer-employee relations. There was a similar holding in Oak Grove School District (1986) PERB Decision No. 582.

Measured against this standard, CAPT qualifies easily as an employee organization under SEERA. CAPT has members who are employees of the State of California and its purpose, as evidenced in a number of written communications, is "to represent the interests of psychiatric technicians and related classifications in all matters relating to negotiations of wages, hours, and other terms and conditions of employment." CAPT likewise has no problem when measured against the language favored by CWA in State of California (Department of Personnel Administration), supra, PERB Decision No. 525-S. There was no showing that CAPT is "dominated by management or has managerial or confidential employees in elected offices." Indeed, there is no showing that CAPT has any management or confidential employees in its membership. Nor has CWA made a persuasive case that CAPT is somehow the creature of Western, Murch and Associates. While it is apparent that the consulting firm served the role of midwife at CAPT's first meeting, the genesis of the organization predates Western, Murch and Associates. CAPT is the product of employee dissatisfaction with CWA which began as long ago as December 1983. In fact, a premature decertification attempt was made in the fall of 1984 by a group

of unit 18 employees. This was long before the first conversations between Dan Western and Unit 18 members.

CWA raises questions about the nature of the consulting contract between CAPT and Western, Murch and Associates. As CAPT correctly argues, the nature of the consulting contract was a matter for the election campaign. Evidence introduced during the hearing demonstrates that the subject was fully aired prior to the balloting. In any event, there is nothing inherent in the consulting contract which disqualifies CAPT as an employee organization. For these reasons, CWA's objection that CAPT is not an employee organization was dismissed.

Effect of the Violations

CWA has been sustained in five unfair labor practice charges against the State. These are: a failure to negotiate in good faith by unilaterally changing access rights for CWA representatives at Camarillo and Napa State Hospitals and by removing access for CWA representatives to the telephone at Patton State Hospital; interference and unlawful support by the posting of the Denise Bates memo at Metropolitan State Hospital; interference by the reduction of CWA bulletin board space in eight DMH and DDS hospitals; and interference and unlawful support by pro-CAPT statements made by administrators at Fairview, Lanterman, Metropolitan and Stockton State Hospitals.

In cases involving objections to elections, the demonstration of unlawful conduct is "a threshold question."

San Ramon Valley Unified School District (1979) PERB Decision No. 111; Clovis Unified School District (1984) PERB Decision No. 389. The PERB will not in every situation where conduct tantamount to an unfair practice is demonstrated, order that the election be rerun. The basic question is whether taken collectively the various unlawful activities establish a "probable impact on the employees' vote." Jefferson Elementary School District (1981) PERB Decision No. 164. It is unnecessary that actual impact be proven. San Ramon Valley Unified School District, supra, Clovis Unified School District, supra.

The question here, therefore, is whether taken collectively the unlawful conduct in which the State engaged had "a probable impact upon the employees' vote." If this were a small school district with several hundred employees in the bargaining unit, the unfair practices which have been demonstrated by CWA might be sufficient to justify setting aside the election and ordering a new vote. But the employer here is quite different. The 7,656 employees in bargaining Unit 18 are employed by two State departments. Collectively, the departments are divided into some 85 programs comprising some 371 units. The violations which have been found were not concentrated at any single hospital. There was no pervasive system-wide or hospital-wide anti-CWA or pro-CAPT behavior. For the most part, the violations occurred at low levels within the departmental administration and were not reflective of any

anti-CWA conduct by the Department of Personnel Administration or the Departments of Mental Health and Developmental Services.

The unilateral imposition of a ban on the nocturnal distribution of literature at Camarillo and a 24-hour notice rule at Camarillo and Napa State Hospitals were doubtless hindrances to CWA organizers. The removal of access to the telephone at Patton for representational purposes probably delayed the resolution of some grievances. But in each of these situations, although inconvenienced and delayed, CWA organizers were nonetheless able to get their message out to the voters. The division of the bulletin boards on numerous units throughout both departments similarly inconvenienced CWA organizers. At a time when they had increasing amounts of literature to post, they had a decreasing amount of space upon which to post it. But there is substantial evidence that CWA leaflets and flyers were circulated throughout the hospital system. There was no shortage of CWA material. Numerous witnesses testified that CWA was far more effective than CAPT in circulating written materials to the voters.

Perhaps the most serious infraction was the posting of the Bates memo at Metropolitan Hospital. By identifying the names of CAPT "stewards" the memo suggested State support for CAPT. After higher-ranking State administrators learned of the memo, they directed that it be corrected. A correction was made and circulated throughout the hospital. The memo was not distributed in an atmosphere of pervasive State support for

CAPT. Although there is some evidence of confusion caused by the memo, it cannot be said that the memo had a probable impact upon how unit members marked their ballots.

The evidence establishes that five individual supervisors throughout the 11 hospitals made improper, pro-CAPT statements to unit members. These comments were made in violation of specific instructions from the departments that supervisors were not to become involved in the election debate. It is important to note that the improper remarks were made to a very small group of employees. A combined total of approximately six unit members heard the remarks of Unit Supervisor Jean Nelson at Fairview State Hospital. The remarks of David Campbell, a unit supervisor at Lanterman State Hospital, were made to two employees. The remarks of Dennis Masoner, a unit supervisor at Metropolitan State Hospital, and Jake Myrick, a program director at Stockton State Hospital, were each made to lone CWA activists. Although the remarks were improper, their impact was minimal.

An election need not be perfect in order to be valid. Mistakes are made in any human endeavor. The question is whether the mistakes were sufficient to affect the outcome. Here, there was no pervasive anti-CWA campaign. There was no pervasive atmosphere of intimidation. The unilateral changes which occurred, while significant to the organizers they affected, had no widespread impact throughout the unit. For the most part, the unlawful practices were isolated and minimal

in their impact. On this record, there could be no basis for setting aside the election result. Accordingly, the objections to the election filed by CWA must be dismissed.

REMEDY

Because the objections have not been sustained, CWA's request for a new election is not appropriate. CWA is entitled to the ordinary remedies granted in unilateral change, interference and unlawful support cases. The PERB in section 3514.5(c) is given:

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

The ordinary remedy in a unilateral change case is the return to the status quo ante. Here, the State unilaterally banned CWA organizers from the nocturnal distribution of literature at Camarillo State Hospital and imposed upon CWA representatives a requirement that they give 24 hours advance notice prior to visiting the units at Camarillo and Napa State Hospitals. The State also unilaterally removed access of CWA representatives at Patton State Hospital to the usage of the telephone for grievance processing and other representational matters. The State must return to the prior practice in each situation.

The State engaged in interference by the posting of the Denise Bates memo at Metropolitan State Hospital, by the

reduction of CWA bulletin board space at eight State hospitals, and by pro-CAPT statements made by management and supervisory employees at Fairview, Lanterman, Metropolitan and Stockton State Hospitals. The posting of the Bates memo and the statements also amounted to unlawful support of CAPT. The appropriate remedy for interference and unlawful support is a cease and desist order requiring the State to post a notice incorporating the terms of the order.

Posting of a notice, signed by an authorized agent of the State, will provide employees with notice that the State 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 SEERA that employees be informed of the resolution of the controversy and the State's readiness to comply with the ordered remedy. Davis Unified School District, et al. (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.

CAPT urges that CWA be required to pay CAPT's attorney fees and other costs on the grounds that the charges brought by CWA are frivolous and dilatory. Although many of CWA's charges have been dismissed, other charges have been sustained. By no measurement could it be said that CWA's contentions are "without arguable merit." See Modesto City Schools and High School District (1985) PERB Decision No. 518 and cases cited therein. CAPT's request for legal fees and other expenses are therefore denied.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the State of California (Departments of Developmental Services and Mental Health) has violated sections 3519(a), (b), (c) and (d) of the State Employer-Employee Relations Act. Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that the Departments of Developmental Services and Mental Health, their officers and representatives shall:

1. CEASE AND DESIST FROM:

A. Making unilateral changes in access rights of CWA representatives by banning them from the nocturnal distribution of literature at Camarillo State Hospital and by requiring they give 24 hours notice prior to entering units at Camarillo and Napa State Hospitals.

B. Making unilateral changes in access rights of CWA by prohibiting representatives of the organization from using the telephone at Patton State Hospital for grievance processing and other representational purposes.

C. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT by the posting of a list of CAPT "stewards" at Metropolitan State Hospital.

D. Interfering with the protected access rights of CWA by reducing CWA's bulletin board space at eight DMH and DDS hospitals.

E. Interfering with the protected rights of employees to participate in the activities of employee organizations and giving unlawful support to CAPT through pro-CAPT statements made by management and/or supervisory employees at Fairview, Lanterman, Metropolitan and Stockton State Hospitals.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE STATE EMPLOYER-EMPLOYEE RELATIONS ACT:

A. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual access clause is changed by subsequent negotiation, access rights at Camarillo and Napa State Hospitals consistent with Article XII, sections 1 and 2, of CWA's current agreement with the State.

B. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the past practice is changed by subsequent negotiation, the right to use the telephone at Patton State Hospital for grievance processing and other representational purposes to the extent permitted prior to the spring of 1985.

C. Remove from all management bulletin boards at Metropolitan State Hospital all copies of the June 4, 1985, memo by Denise Bates listing CAPT "stewards" and her subsequent correction memo.

D. Restore to CWA, until either CWA ceases to be the exclusive representative of Unit 18 or the contractual bulletin board clause is changed by subsequent negotiation, all bulletin

board space removed from CWA during the first six months of 1985 in hospitals operated by DMH and DDS.

E. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations throughout DMH and DDS where notices to members of unit 18 are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent to the State, indicating that the State 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 ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

F. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations in Unfair Practice Charge No. S-CE-261-S and companion complaint and the objections in Representation Case No. S-OB-104-S are hereby DISMISSED.[30] 30

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[30]As has been seen, CWA at various points in its two briefs, reaches into the record for bits of testimony which it then fashions into allegations that are nowhere apparent in the complaint or underlying unfair practice charge. Perhaps the most blatant of these is the contention that the State showed unlawful support for CAPT through the promotion of CAPT supporters at Atascadero and Lanterman State Hospitals during the election campaign. This assertion was based on testimony of Sandra Dunlea that three CAPT supporters were promoted at

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing. . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board

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Atascadero and the testimony of Debra Saviano that two CAPT supporters were promoted at Lanterman. There is no allegation anywhere about unlawful promotions. If there were, the evidence provided by Ms. Dunlea and Ms. Saviano would be far from compelling. There is no evidence that CAPT supporters did not meet the requirements for the jobs to which they were promoted. There is no evidence that qualified CWA applicants were passed over for promotion during the campaign period. In short, the fact that five CAPT supporters were promoted during the election proves nothing. CWA's argument is rejected.

itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: October 1, 1986

Ronald E. Blubaugh
Administrative Law Judge