STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CLASSIFIED EMPLOYEES ASSOCIATION/ NEA,	)	
Charging Party,	)	Case No. LA-CE-2101
v.	)	PERB Decision No. 610
SAN DIEGO UNIFIED SCHOOL DISTRICT,	)	January 15, 1987
Respondent.	)	

Appearances: Rosalind D. Wolf, Attorney, California Teachers Association, for Classified Employees Association/NEA; Jose A. Gonzales, Attorney for San Diego Unified School District.

Before Hesse, Chairperson; Burt and Porter, Members.

DECISION

HESSE, Chairperson: The San Diego Unified School District (District) appeals the attached proposed decision of a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ), granting a Motion for Summary Judgment in favor of the Classified Employees Association/NEA (Association). The Board has reviewed the entire record in this case, and it adopts the findings and conclusions of the ALJ, and affirms his decision, consistent with the discussion below.

DISCUSSION

At the outset, we address the District's argument, raised only on appeal to the Board itself, that the Motion for Summary Judgment should not have been granted because there were factual disputes that had not been resolved. Under the

California Code of Civil Procedure (CCP), a motion for summary judgment should be granted if there is "no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." (CCP sec. 437c(c).) The District contests the ALJ's determination that there are no triable issues of fact on the grounds that when the District stipulated to facts, it did so for the limited purpose of establishing an affirmative defense and supporting its Motion to Dismiss and not for the purpose of summary judgment.

The District's argument must be rejected inasmuch as a close examination of the papers filed in this matter do not reveal any material fact relevant to a valid legal defense actually in dispute. The material facts in this case are not complicated. They include whether the District is a public school employer and the Association is an employee organization within the meaning of the EERA, as well as whether the District received and refused to honor a duly authorized request of the Association for the District to commence membership dues deductions. In its Answer, the District denied that it committed an unfair practice, and additionally raised the following affirmative defenses: (1) the charge did not allege a prima facie case; (2) the acts alleged fell within managerial prerogative; (3) the District acted reasonably in its failure to honor the Association's request; (4) the collection of dues would impose an unreasonable burden on the District; and (5) the decision to collect dues is discretionary. With respect

to the latter affirmative defense, the District argued in its Motion to Dismiss that section 3543.1(d) of the Educational Employment Relations Act (EERA)[1] and Education Code section 45168 do not require a school district to deduct dues for the non-exclusive representative on behalf of hourly classified employees, but instead only impose a discretionary duty. Upon the ALJ's rejection of this pivotal legal defense, the invalidity of the District's remaining affirmative defenses became a foregone conclusion. They too were ultimately rejected in the ALJ's proposed decision, affirmed herein.

CCP section 437c(b) requires that a party who moves for summary judgment set forth plainly and concisely all material facts which the moving party contends are undisputed. CCP section 437c(b) additionally provides that the party opposing the motion must set forth plainly any material facts which it contends are disputed. The Association's papers contain a partial reiteration of the facts to which the parties stipulated for purposes of determining the District's Motion to Dismiss, and a statement declaring that such material facts remain undisputed. By their reference to the parties' previous stipulation of facts, the Association's papers filed in support of its Motion for Summary Judgment are admittedly inartfully drafted. We believe, however, that they nonetheless

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

constitute a sufficient "statement setting forth plainly and concisely all material facts which [the Association] contends are undisputed." (CCP sec. 437c(b).)

The District has not argued, either in opposition to the Motion for Summary Judgment or in its exceptions, that a material issue of fact exists with respect to the essential allegations of the Association's prima facie case. Instead, the District finds fault with the Association's papers in that they fail to present undisputed facts to show that the District's business operations would not be "unreasonably burdened" in being required to make dues deductions, or that the District's refusals are otherwise "unreasonable" under these circumstances. However, the ALJ, in ruling on the District's Motion to Dismiss that EERA section 3543.1(d) does impose upon the District a mandatory duty to deduct dues, effectively eliminated the viability of the District's remaining affirmative defenses. Inasmuch as we now affirm the ALJ's ruling on the legal issue that the requirement of dues deduction pursuant to section 3543.1(d) is indeed mandatory with respect to classified employees, no purpose would now be served by overruling the ALJ's ruling on the Motion for Summary Judgment, and thereby permitting a hearing on affirmative defenses which we would not sustain as a matter of law.

CCP section 437c(b) requires the opposition to a motion for summary judgment to set forth "any other material facts which the opposing party contends are disputed." We note, however,

that the District, in its Opposition to the Motion for Summary Judgment, never identifies the specific facts that it alleges are in dispute. Certainly more is required than a general statement that there exist facts to which the parties have not stipulated. The burden was on the respondent to delineate specific disputed facts that would defeat the Motion for Summary Judgment, or that would alert the ALJ that certain unresolved factual issues bore on his ability to entertain and rule on the summary judgment request. The District failed to identify any such issues of material fact. Thus, the ALJ's Order was well-founded.

The Board notes the District's exception to the ALJ's reliance on Fresno Unified School District (1982) PERB Decision No. 208 in rendering his decision. We do not agree that the application of section 3543.1(d) in Fresno turns solely on whether the employees were certificated or classified. Moreover, the Board finds that the ALJ did not rely exclusively on Fresno in arriving at his decision.

Here, the harm to the organization is clear and results in a violation of section 3543.5(b). Yet the organization's right to deductions arises because of (1) the enabling language of section 3543.1(d), and (2) the employee's deduction authorization. The right under section 3543.1(d) is inchoate until the employee indicates by signed authorization that he or she wishes such deductions to be made. Therefore, denial of the organization's right to petition the District for duly

authorized deductions concurrently interferes with the authorizing employees' right to participate in the activities of their employee organization, a violation of section 3543.5(a).

Therefore, having reviewed the whole record in light of the exceptions filed, the Board affirms and adopts the ALJ's decision as that of the Board itself.

ORDER

Upon the foregoing conclusions of law, including those attached hereto in the Proposed Decision, and on the entire record of this case, it is found that the San Diego Unified School District has violated section 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

A. Interfering with the protected right of employees to have their organization membership dues deducted from their paychecks through payroll deduction.

B. Denying the Association its statutory right to have the dues of its members deducted from their paychecks through payroll deduction.

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

A. Effective with the first employee payroll after the Decision is no longer subject to reconsideration, deduct

Association dues from the paychecks of all instructional aides employed by the District who have submitted payroll deduction authorization cards for Association dues.

B. Within thirty-five (35) days after this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

C. Upon issuance of this Decision, make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with the Director's instructions.

Member Burt joined in this Decision.

Member Porter's concurrence and dissent begins on page 8.

Porter, Member, concurring and dissenting: I join the majority in affirming the ALJ's conclusion that the District violated section 3543.5(b) of the EERA by refusing the Association's duly authorized request, pursuant to EERA section 3543.1(d), for membership dues deductions. However, I would disavow the ALJ's reliance on Fresno Unified School District (1982) PERB Decision No. 208, and disassociate myself from the majority opinion to the extent to which it approves the ALJ's reliance on Fresno. Furthermore, I cannot find that the District violated any rights of employees that are protected under the EERA, and, accordingly, I dissent from the majority's finding of a section 3543.5(a) violation.

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. LA-CE-2101, Classified Employees Association/NEA v. San Diego Unified School District, in which all parties had the right to participate, it has been found that the San Diego Unified School District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act. The District violated the Act by refusing to deduct Association dues from the paychecks of five Association members, all hourly instructional aides who had submitted payroll dues deduction authorization cards to the District in October of 1984. By refusing to deduct the dues from the employees' paychecks, the District denied the employees their right to have their dues deducted and denied the Association the right to have the dues of its members deducted.

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

1. CEASE AND DESIST FROM:

A. Interfering with the protected right of employees to have their organization membership dues deducted from their paychecks through payroll deduction.

B. Denying the Association its statutory right to have the dues of its members deducted from their paychecks through payroll deduction.

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

A. Deduct Association dues from the paychecks of all instructional aides employed by the District who have submitted payroll deduction authorization cards for Association dues.

Dated: _____ SAN DIEGO UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 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

CLASSIFIED EMPLOYEES ASSOCIATION/NEA, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent,	)	Unfair Practice Case No. LA-CE-2101
	)	PROPOSED DECISION (12/20/85)

Appearances; Rosalind D. Wolf, Attorney, for the Classified Employees Association/NEA; Jose A. Gonzales, Assistant General Counsel, for the San Diego Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

ORDER GRANTING SUMMARY JUDGMENT

In this pre-hearing motion, the charging party seeks summary judgment and asks that it be granted an order directing the respondent to cease and desist from its refusal to commence payroll dues deduction for five employees. The charging party bases its motion upon a factual stipulation and an earlier denial of the respondent's motion to dismiss. The charging party argues that, together, the factual stipulation and the ruling on the motion to dismiss remove the only triable issue and the only significant defense to the respondent's actions. Therefore, the charging party continues, it is entitled to an order for summary judgment as a matter of law.

It is concluded that the motion for summary judgment must be granted.

CONCLUSIONS OF LAW

The principal legal issue in this case was disposed of in the October 31, 1985, denial of the motion to dismiss, incorporated herein by reference. That motion was submitted on a stipulated record. As part of the stipulation, the San Diego Unified School District (District) admitted that on November 9, 1984, it refused to deduct membership dues from the paychecks of five members of the Classified Employees Association/NEA (Association). It was stipulated that all of the employees properly completed dues authorization forms. By so stipulating the District also removed the only triable factual issue.

The Association relies upon Section 437 (c) of the California Code of Civil Procedure. Under that section, a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party is entitled to a judgment as a matter of law where there is no dispute over the material facts and there is no defense to the respondent's action. Here, the Association argues, the only remaining contentions are four affirmative defenses, all of which are meritless.

Originally, the District advanced five affirmative defenses to its refusal to collect membership dues. The District argued that the charge and complaint fail to allege a prima facie

case, that the acts alleged are within management's prerogatives, that the obligation to collect dues is discretionary, that the District's action is reasonable and that the collection of dues would impose an unreasonable burden on the District.

The complaint alleges that the District violated Educational Employment Relations Act subsections 3543.5(a) and (b)[1] by refusing to collect the dues of five Association members through payroll withholding. It is an unfair practice under EERA subsection 3543.5(a) for a public school employer to "interfere with, restrain or coerce employees" in the exercise of protected rights. It is an unfair practice under EERA subsection 3543.5(b) for a public school employer to "deny to employee organizations rights guaranteed to them" by the EERA.

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

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. See also, Novato Unified School District (1982) PERB Decision No. 210 and Sacramento City Unified School District (1985) PERB Decision No. 492 and cases cited therein. In an unfair practice case involving interference, it is not necessary for the charging party to show that the respondent acted with unlawful motivation. Regents of the University of California (1983) PERB Decision No. 305-H.

EERA subsection 3543.1(d) provides that:

> (d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 [now §§45060 and 45168] of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

The PERB has interpreted this section to mean that individual employees have a derivative right to have their dues deducted. Fresno Unified School District (1982) PERB Decision No. 208. Thus, where the District has admitted that it refused to deduct the dues from the paychecks of five employees it is

clear that a prima facie violation of subsection 3543.5(a) has been shown for interference.

Similarly, it is clear that a prima facie violation of subsection 3543.5(b) also has been shown because of the District's denial of the Association's right to have the dues of its members deducted by checkoff. In Fresno, supra, the PERB found that subsection 3543.1(d) provides "an absolute guarantee of dues deduction, unlike the NLRA which leaves the issue to the collective bargaining area." Fresno, supra. The admitted refusal to collect dues from the five employees obviously ignores what the PERB found to be an absolute right. Because the deduction of dues is an "absolute" right under the EERA, it cannot be a subject of managerial prerogative as the District argues. Thus the District's first two affirmative defenses are wrong as a matter of law.

The District's third affirmative defense, that the collection of dues is discretionary, rests upon its interpretation of Education Code section 45168 and was the basis for the District's August 1, 1985, motion to dismiss. The defense was rejected in the October 31, 1985, denial of the motion.

The District's final defenses are based upon a rule of reasonableness. The District argues that its refusal to deduct the dues is reasonable and that a requirement that the District deduct dues would impose an unreasonable burden. The District

argues that because the factual stipulation does not pertain to the reasonableness defense, a motion for summary judgment is not proper.

However, as the Association notes, subsection 3543.1(d) differs from other statutory guarantees of employee organization rights in that it does not contain the word "reasonable." By contrast, the right of access is subject to "reasonable regulation" and is available only at "reasonable" times. Subsection 3543.1(b). Similarly, employee organizations are entitled to released time for a "reasonable" number of representatives for a "reasonable" period of time. Subsection 3543.1(c). These differences are consistent with the PERB's conclusion in Fresno, supra, that dues deduction is an "absolute" right. If it is an "absolute" right, dues deduction is not subject to a rule of reasonableness.

Respondent has provided no citation for why it should be excused from a statutory mandate because compliance would constitute an "unreasonable" burden on the District. Indeed, there are numerous cases which hold that public agencies must carry out statutory obligations even where burdensome. An inability to pay, for example, will not excuse the performance of a mandatory duty to act. Bellino v. Superior Court, Riverside County (1977) 70 Cal.App. 3d 824 [137 Cal.Rptr. 523]. See also City and County of San Francisco v. Superior Court (1976) 57 Cal.App.3d 44 [128 Cal.Rptr. 712].

It is concluded, therefore, that there is no evidentiary record which would support a "reasonableness" defense to the District's failure to afford the Charging Party its "absolute" right to dues deduction. Accordingly, an order for summary judgment is proper and it is found that the District has violated EERA subsections 3543.5(a) and (b).

REMEDY

The Association has requested a cease-and-desist order and the posting of a notice. These are the appropriate remedies in an interference case. Posting of a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's willingness to comply with the ordered remedy. Davis Unified School District (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing conclusions of law and the entire record of this case, it is found that the San Diego Unified School District has violated subsections 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to subsection

3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

A. Interfering with the protected right of employees to have their organization membership dues deducted from their paychecks through payroll deduction.

B. Denying the Association its statutory right to have the dues of its members deducted from their paychecks through payroll deduction.

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

A. Effective with the first employee payroll after service of a final decision in this matter, deduct Association dues from the paychecks of all instructional aides employed by the District who have submitted payroll deduction authorization cards for Association dues.

B. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps

shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

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

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 9, 1986, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on January 9, 1986, or sent by telegraph, certified or Express United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each Party to this

proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code. title 8, part III, section 32300 and 32305.

Dated: December 20, 1985

Ronald E. Blubaugh
Administrative Law Judge