STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA ELEMENTARY EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4125-E PERB Decision No. 1647 June 23, 2004

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for Chula Vista Elementary Education Association, CTA/NEA; Parham & Rajcic by Mark R. Bresee, Attorney, for Chula Vista Elementary School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Chula Vista Elementary Education Association, CTA/NEA (Association) of an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge as presented before the Board itself alleged that the Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (EERA) [1] by interfering with the protected rights of certificated employees at Mueller Charter School (MCS) and of the Association, the exclusive representative of those employees. The Association alleged that this conduct constituted a violation of EERA section 3543.5(a) and (b).

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

The ALJ found that the principal of MCS unlawfully interfered with the rights of teachers and the Association in violation of Section 3543.5(a) and (b), that the MCS principal was an agent of the District, making the District responsible for his unlawful conduct, and that as a remedy, the District should cease and desist from not promptly investigating allegations of interference at MCS and upon determination of such conduct, take appropriate steps to curtail the conduct. The ALJ also found that since MCS was not named as a party to the charge, the Board lacked authority to require MCS to comply with an order of the Board.

After review of the entire record, including the unfair practice charge, the amended charge, the District's response, the ALJ's proposed decision, the parties' exceptions, and the parties' responses to exceptions, the Board finds the ALJ's procedural history and findings of fact to be free from prejudicial error and adopts them as the findings of the Board itself. The Board further affirms in part and reverses in part the ALJ's proposed conclusions of law as discussed herein.

BACKGROUND

The original unfair practice charge, filed on September 15, 1999, alleged that the District entered into an agreement with MCS, a charter school formed by the District in 1994 pursuant to the Charter Schools Act (CSA) of 1992, Education Code sections 47600 et seq., based on an amended charter petition. The Association alleged that the charter petition and agreement unilaterally modified various terms and conditions of employment covered by the existing collective bargaining agreement (CBA) between the Association and the District, and that, by its actions, the District bypassed the Association, the exclusive representative, and negotiated directly with employees. On October 21, 1999, the Board agent placed the charge in abeyance until March 31, 2000 because of the enactment of AB 631(Migden) (Stats. 1999,

Ch. 828) but reactivated the charge on August 9, 2000 after the Association filed an amended charge.[2]

The Association's amended charge added specific allegations of interference, coercion and threats of reprisal by MCS Principal Bill Collins (Collins) and others against unit employees related to an election held to determine the "public school employer," a determination prompted by the passage of AB 631 referred to hereafter as the "Migden election." The charter petition required a two-thirds vote of the full time on-site certificated staff to amend or revoke the charter.[3] The Migden election occurred on February 28, 2000 and resulted in MCS being identified as the public school employer over the District. Of 41 eligible voters, 28, or exactly two-thirds of the eligible voters, voted for MCS and 13 for the District. MCS presented the charter petition amendment to the District's board for approval on March 28, 2000, at which time the board approved the charter petition amendment. The Association argues that the District's conduct compromised the election and so requests that the Board overturn the election.

On May 23, 2001, the Board agent dismissed portions of the charge pertaining to the District's alleged unilateral changes that occurred before the effective date of AB 631,

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[2]In 1999, the Legislature enacted amendments to the CSA through AB 631 (Migden). (Stats. 1999, Ch. 828.) The primary intent of AB 631 was to apply EERA to charter schools and to require the charter school charter to declare whether the charter school or the chartering entity shall be the public school employer for purposes of EERA. (Legis. Counsel's Dig.; Sen. Floor Analysis Aug. 27, 1999.)

[3]The charter petition provides for amendment as follows:

> This charter can be amended or revoked at any time through a two-thirds vote of the full time, on-site, certificated staff. The following voting procedures will be followed for Charter Amendments. Voting will be done by full-time certificated staff members. Each full-time certificated staff member will select proxy. Voting will be done by secret ballot and two days notice will be given prior to voting.

January 1, 2000. The remaining charges thereby allege interference with protected activities and unlawful encouragement of employees to join "no organization" over the Association in violation of EERA section 3543.5(a), (b) and (d).

ALJ'S PROPOSED DECISION

The primary issue before the ALJ concerned whether the District interfered with the rights of unit employees by its conduct before and during the Migden election for determination of the public school employer under Education Code section 47611.5. The proposed decision focused on the conduct of MCS Principal Collins and Don Mizock (Mizock), an MCS computer technician.

The ALJ noted that on May 3, 1994, the District board approved the original MCS charter. On May 18, 1999, the District board renewed and approved the revised MCS charter. The charter as revised provided that MCS may be excused from provisions of the Association/District CBA by 2/3 vote of the affected staff. The charter also may be amended or revoked by 2/3 vote of the amended staff. The 1999 amendment to the CSA required new charter schools to designate the "exclusive public school employer" in the charter (Educ. Code section 47611.5(b)). Existing charter schools were required to declare whether the charter school would be named the public school employer by March 31, 2000, or by default, the District would be deemed the public school employer. (Ed. Code sec. 47611.5(f).) That declaration had to be accomplished in material compliance with rules set forth in the charter. (Id.) In this case, as the District was the public school employer, to amend the MCS charter to designate MCS as the public school employer, would therefore require an amendment by 2/3 vote of the affected staff.

Initially, the ALJ concluded that PERB had jurisdiction to review all allegations occurring on or after January 1, 2000, regardless of the identity of the employer, since, as of

that date, charter schools became subject to EERA. The key issue under EERA is the vindication of the employees' rights.

The ALJ found that the Association failed to prove interference resulting from the conduct of Mizock via the alleged unlawful polling of teacher Jill Cook (Cook). Uncontroverted testimony from Mizock showed that Mizock merely answered questions posed by Cook out of her expressed confusion about the election and that he denied asking Cook how she would vote.

However, the ALJ found that Collins unlawfully polled probationary teacher Armando Vidales (Vidales). This is because Vidales had been placed in the uncomfortable position of hiding his true opinions when Collins questioned Vidales about how he and other teachers planned to vote. The ALJ also found through uncontradicted evidence that Collins threatened teacher Patti Neill (Neill) with an attack on her reputation, the loss of her job, and with physical violence. It is reasonable that Neill would feel threatened under the circumstances and that such conduct would chill her right to vote the way she wanted as well as share her views about the election with her fellow teachers.

The ALJ concluded that, as a principal, Collins was an actual agent of the District under National Labor Relations Board precedent. Under the more stringent PERB standard for agency, the ALJ found that the District ratified Collins' unlawful conduct, and consequently, became responsible for his actions. By letter dated December 15, 1999, from several MCS teachers, the District was put on notice of Collins' intimidating conduct similar to the alleged unlawful conduct and of a generally hostile work environment engendered by Collins. Assistant Superintendent Richard Werlin (Werlin) met with Collins and advised him that teachers should not feel pressured to vote a certain way. Werlin also returned to MCS a second time immediately before the election to assure teachers that they should vote their

consciences. Yet, once alerted to Collins' actions, the District did not undertake a comprehensive investigation of the accusations. Nor did Werlin repudiate any of Collins' actions when speaking to teachers. As the ALJ stated, Collins' threats "were quite extraordinary in their gravity" and Werlin's comments did not go far enough to ameliorate their effect. Consequently, teachers did not know if they could complain to Werlin about Collins without repercussions. As a result of the District's interference, the ALJ found that employees were discouraged from participating in union activities; such conduct also interfered with the Association's ability to represent its members, a derivative violation of EERA section 3543.5(b).[4]

The ALJ found that the CSA did not confer authority on the District to order MCS to conduct a new election. He stated that if the Association would have named MCS as a party, the Board could have directed MCS to order a new election. MCS is a separate employer from the District and under case precedent, only named parties may receive a remedy. (California Union of Safety Employees (Trevisanut, et al.) (1993) PERB Decision No. 1029-S.) As a result, the ALJ did not address the District's argument that the Association failed to show whether Collins' actions had a probable impact on the election result. The ALJ ordered the District to cease and desist from failing to investigate the accusations of unlawful interference, and upon finding any unlawful interference with Section 3543 rights to take appropriate action to curtail the unlawful acts. The District was also ordered to post a notice.

[4]The alleged violation of EERA section 3543.5(d) was not addressed in the ALJ's proposed decision. As neither party has raised this issue on appeal, the Board will not consider the Section 3543.5(d) allegation in this decision.

DISCUSSION

Before us is a simple case concerning a District principal who interfered with the protected right of individuals under his supervision to vote in a fair election, free from coercion, an election which effectively involved the decertification of the union that had long represented those employees at a time when the District was the employer of those employees under EERA. The Board's customary practice in such situations is to set aside the election. That is what we recommend here. The complexities in this matter arise from the District's invocation of the CSA as a means to shield the District from its unlawful conduct. We disagree with the District's approach as discussed herein.

As a preliminary matter, having determined that the ALJ has thoroughly reviewed and summarized the evidence as presented in testimony and supporting documents, the Board adopts the ALJ's findings of fact. The Board further adopts the ALJ's determination that Collins interfered with the protected rights of teachers at MCS by his intimidating conduct toward teachers Vidales and Neill. We will next address the exceptions of the parties.

Agency

The District has excepted to the ALJ's conclusion that Collins is an agent of the District. We agree with and adopt the ALJ's finding and reasoning that Collins is an agent of the District and that the District is therefore responsible for his conduct as explained below.

"Actual authority" is that which an employer intentionally confers upon the agent, or intentionally or negligently allows the agent to believe himself or herself to possess. It is undisputed that Collins, as principal of MCS, was an actual agent of the District. (Inglewood Teachers Assn. v. PERB (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228] (Inglewood v. PERB).) The District cites Inglewood Unified School District (1987) PERB Decision No. 792 (Inglewood USD), as affirmed in Inglewood v. PERB, in support of its contention that Collins

was not an agent of the District because he was not acting within the scope of his authority or with the apparent authority of the District when engaging in the unlawful conduct.

Apparent authority may be found where an employer reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question. (Compton Unified School District (2003) PERB Decision No. 1518 (Compton), citing Inglewood v. PERB.) In Inglewood USD, the court approved the case by case approach taken by Member Gonzales in Antelope Valley Community College District (1979) PERB Decision No. 97 (Antelope Valley). In Antelope Valley, Member Gonzales declared:

> Governing boards are responsible for the overall direction of school districts, but day-to-day decisions and actions, which may directly affect the organizational rights of employees, are often made by subordinates without specific authorization or ratification by the governing board. It is reasonable that under some circumstances employees may perceive their employer as responsible for such decisions and actions, regardless of whether the governing board itself is directly involved. Under other circumstances, such a perception may be unreasonable, and it may thus be inappropriate to attribute these actions to the employer. The question is in what situations should the employer be held responsible for acts by subordinates which are unlawful under section 3543.5. [Antelope Valley, p. 32, also cited in Compton, at p. 4.]

In Compton, the Board found that the District, through its principal, ratified threats made by a bargaining unit member Stacey Nickelberry (Nickelberry) to new teachers that they must immediately leave a union meeting. Although not a managerial or supervisory employee, and therefore not an actual agent of the school district, the Board found that Nickelberry exhibited the apparent authority of the District because the principal knew of Nickelberry's conduct, he had failed to repudiate it, and he had later called the room and interrupted the meeting to summon one of the teachers to his office. The principal then questioned that teacher about the union meeting and removed her from the school leadership team. In

Compton, the Board expressed the test for apparent or ostensible authority as "whether the perception of agency is reasonable under the circumstances." (Compton, at p. 5.)

In this case, as the principal and manager of MCS, Collins was the actual agent of the District. As the ALJ stated, this is enough under the National Labor Relations Act standards. We also find that Collins was acting within the scope of his employment since meeting with teachers during the school day at the school site is within a principal's authority. (Compton, ALJ's proposed dec., at p. 18.)

We find that it was reasonable for MCS employees to believe that Collins was an agent of the District and therefore, under the Inglewood v. PERB and Compton tests, that Collins was acting with the ostensible or apparent authority of the District to engage in the unlawful conduct. For example, the District argued that Werlin could not issue a proper retraction because he was unaware of the severity of Collins' conduct prior to the election. The evidence demonstrates otherwise. The District received early notice from MCS teachers in the December 15, 1999 letter regarding the hostile work environment caused by Collins' intimidating behavior. The letter specifically advised the District of Collins pressuring teachers to be "on his side" during campus votes and calling teachers into his office to poll them whether they would vote his way or not. In addition, Werlin testified that he had learned before the election that Collins was discussing the Migden election with teachers and making some of them uncomfortable. In response, Werlin met privately with Collins, and advised him not to pressure teachers and to allow them to vote their choice. When Collins denied his coercive conduct, there is no evidence that Werlin attempted to interview teachers at MCS to obtain additional facts.

Assistant Superintendent Werlin spoke to MCS teachers twice, the last time on the date of the election, to advise them to vote their consciences. He testified that MCS was the

only charter school that he had visited twice on this issue. Werlin testified that he went back to MCS because he had received reports about heavy electioneering at the school, which upset some of the teachers. Werlin however did not investigate the teachers' allegations or specifically repudiate Collins' actions when speaking to the MCS teachers.

On the other hand, the District also contends that Werlin's admonishments to teachers to vote their consciences constitutes a proper retraction. Unlike other campuses holding a Migden election, Werlin returned to MCS a second time to again advise teachers to vote their consciences; yet, he never specifically acknowledged or repudiated Collins' misconduct. Furthermore, once warned about Collins' actions by MCS teachers, there is no evidence that any District administrator investigated the allegations. Neill also testified that she was afraid to discuss Collins' behavior with Werlin before the election; she was unsure whether Collins and Werlin were good friends or whether her complaints would have credibility because of Collins' lengthier seniority with the District. Thus, Werlin's "retraction" did not alleviate Neill's fears about Collins.

Even after the election, when Neill advised Werlin of Collins' threats regarding the Hells' Angels, Werlin merely advised Neill to contact campus security. Shortly after the election, six teachers filed a grievance under the MCS charter questioning the validity of the election because of Collins' undue influence. This grievance was later dismissed as untimely under the charter by the new site administrator, Greg Valero.

In summary, there is no evidence that the District either conducted an investigation, took any further action to become informed about Collins' misconduct or its effects upon the MCS staff, or otherwise responded to teacher complaints about Collins' conduct. Despite the magnitude of the complaints against Collins and the closeness of the election results, the

District approved the charter petition amendment to declare MCS to be the public school employer.

We therefore conclude that under the more rigorous PERB standards, Collins acted as an agent of the District when he committed unfair practices against MCS teachers.

Impact on the Employees' Vote

The District argues in its response to the unfair practice charge that the Association failed to show a probable impact on the result of the election. Since the ALJ concluded in the proposed decision that the District lacked authority to rescind the election, he did not address this issue. Since we hold that the Board may set aside the invalid Migden election, we will now evaluate the impact on the employees' vote of Collins' unfair practice.

In determining whether to set aside an election, the Board looks at whether the employer's unfair practices establish a "probable impact on the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.) The question becomes "whether the employer's conduct would reasonably tend to coerce or interfere with employee choice." (Manton Joint Union Elementary School District (1992) PERB Decision No. 960.) Actual impact need not be shown. (San Ramon Valley Unified School District (1979) PERB Decision No. 111; Clovis Unified School District (1984) PERB Decision No. 389 (Clovis).) In deciding whether to set aside an election result, the Board will assess the totality of circumstances. (Clovis.)

After reviewing the facts in this case, we conclude that Collins' conduct tended to coerce or interfere with employee choice thereby creating a probable impact on the election result. In this case, under the charter rules, only one additional vote in favor of the District would change the election result. The ALJ concluded that the District, through its agent Collins, interfered with the rights of two employees, Vidales and Neill. The facts also show

Collins' electioneering with several teachers, which included tirades against the union coupled with the District's knowledge of and failure to investigate or repudiate Collins' conduct. Teachers Carolyn Williams (Williams), Gilda McAlister, Vidales, and Neill testified to Collins' diatribes against the union during discussions in which he promoted MCS as the public school employer. Interestingly, Williams, a District witness who admired Collins, testified regarding Collins' animus for the Association. Although insufficient on its own to show interference, Collins' intermeshing of the two issues inextricably binds them in evaluating the impact of his conduct on protected rights. As stated, Neill testified that she was afraid to discuss Collins' behavior with Werlin before the election because she did not know if they were good friends or whether her complaints would be credible based on Collins' greater seniority with the District. She testified that discussions with family encouraged her to report Collins' conduct immediately after the election.

Although the District was on notice about Collins' conduct, the District did not take any public action to disavow that conduct and so reassure the employees of a fair election. The District superintendent and assistant superintendent were advised of Collins' intimidating conduct by the December 15, 1999 letter from several MCS teachers. Assistant Superintendent Werlin spoke to MCS teachers twice, the last time on the date of the election, to advise them to vote their consciences. This was the only charter school that Werlin visited twice on this issue. Werlin also had met with Collins and advised him that teachers should not be pressured to vote a certain way but did not otherwise investigate the teachers' allegations. Werlin testified that he went back to MCS because he had received reports about heavy electioneering at the school, which had made some teachers uncomfortable. However, there is no evidence that either Werlin or any other District administrator ever specifically repudiated Collins' conduct at these meetings or in any other form of communication with the MCS teachers.

We find that the closeness of the election, Collins' threats, which "were quite extraordinary in their gravity," the District's notice by MCS teachers of Collins' conduct, and the unwillingness of the District to take decisive action to investigate and repudiate Collins' conduct demonstrated a probable impact on the election result. We therefore find sufficient evidence to invalidate the Migden election.

The Remedy

As a result of his findings, the ALJ ordered the District to cease and desist from not investigating interference allegations and to take appropriate action required by results of such investigations. The ALJ declined to order MCS to overturn the Migden election because MCS was not named as a party, although as a party, MCS would have been subject to the Board's jurisdiction. The ALJ further would not order the District to overturn the election finding that the District lacked the authority under the CSA.

The Association excepts to the ALJ's refusal to order the District to overturn the election and states that naming MCS as a party would require the Association to give effect to the act it seeks to overturn. The Association argues that it is unnecessary to name MCS as a party because at the time of the unlawful conduct, including the Migden election, MCS was not the public school employer under EERA section 3540.1(k), and so the Board could not have exercised jurisdiction over MCS. I agree. I find that whether or not MCS was named as a party is irrelevant to the decision before us. The unlawful conduct occurred before March 28, 2000 when the District approved the charter petition amendment to declare MCS the public school employer for purposes of EERA. Notwithstanding that designation, the Board has authority to set aside an election tainted by an employer's unfair practice.

As of January 1, 2000, under AB 631, the employees at MCS obtained full rights under EERA, including the right to representation. During the three month period between the onset

of Board jurisdiction and the amendment of the MCS charter petition, the District retained responsibility for the unlawful acts of MCS until MCS declared itself to be the public school employer under EERA. The unlawful conduct occurred during this period.

By law, the District as the chartering and funding authority bears ultimate responsibility for MCS pursuant to the CSA and legal interpretations of the CSA. The CSA (Ed. Code secs. 47600, et seq.) was enacted with the following purpose:

> It is the intent of the Legislature, in enacting this part, to provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure, as a method to accomplish all of the following:
> (a) Improve pupil learning.
> (b) Increase learning opportunities for all pupils, with special emphasis on expanded learning experiences for pupils who are identified as academically low achieving.
> (c) Encourage the use of different and innovative teaching methods.
> (d) Create new professional opportunities for teachers, including the opportunity to be responsible for the learning program at the schoolsite.
> (e) Provide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.
> (f) Hold the schools established under this part accountable for meeting measurable pupil outcomes, and provide the schools with a method to change from rule-based to performance-based accountability systems.
> (g) Provide vigorous competition within the public school system to stimulate continual improvements in all public schools.
> (Ed. Code sec. 47601.)

Although independent operation is a key objective for charter schools, charter schools continue to be part of the public school system under the jurisdiction of the chartering authority and under the exclusive control of the officers of that authority. Education Code section 47615 provides, in pertinent part:

> (a) The Legislature finds and declares all of the following:

> (1) Charter schools are part of the Public School System, as defined in Article IX of the California Constitution.
>
> (2) Charter schools are under the jurisdiction of the Public School System and the exclusive control of the officers of the public schools, as provided in this part.
> (Emphasis added.)

Under Education Code section 47613, chartering agencies, including school districts, by definition, may charge for supervisorial oversight of charter schools. Under Education Code section 47607, the District must approve material revisions of the charter petition, may inspect or observe MCS at any time, and may revoke the MCS charter for specified reasons, including a violation of law. The chartering agency's ultimate responsibility for charter schools was confirmed in 97 Ops. AG 711 (1998) and later in Wilson v. State Board of Education (1999) 75 Cal.App.4th 1125, 1142 [89 Cal.Rptr.2d 745].

The MCS charter itself provides for MCS accountability to the District and District authority over MCS.[5] The MCS charter agreement, to which the charter petition is attached and incorporated by reference, provides for District oversight of MCS functions. (Jt. Ex. 5.) Among other provisions, e.g., the introduction of the MCS charter agreement states, in pertinent part, that:

> Mueller Charter School shall be accountable to the Superintendent of the District . . . and the District Board of Education . . . for the performance of the Charter School and for the obligations of the Charter School under this Agreement. The District and Mueller Charter School will work together to bring educational excellence and a laboratory for educational innovation to the Chula Vista Elementary School District.
> (Jt. Ex. 5, at p. 1.)

[5]Joint Exhibit 5, the MCS Charter Agreement and Charter Petition, comprises the MCS charter as revised on May 12, 1999, well before the occurrence of the conduct in question.

Section 3.2(B) requires MCS to implement educational programs in a manner consistent with State law. (Jt. Ex. 5, p. 3.) Section 14.2 allows the District to terminate the MCS charter agreement for specified reasons, including violation of "any provision of law with respect to the operation of the School from which the School was not specifically exempted" (Section 14.2(C)); and for substantial breach of the essential terms and conditions of the agreement (Section 14.2(D)). The charter petition also authorizes the District to revoke the charter for specified reasons including violation of any provision of law, mirroring the language in Education Code section 47607. (Charter Petition, Appendix A, p. 15.)[6]

As stated above, the election was tainted by Collins' unlawful conduct and the appropriate remedy under Board precedent is to rescind the election. The District argues that such a remedy would violate Education Code section 47611.5(e).[7] In this case, the Board is not reviewing or regulating the approval or denial of a charter petition; rather, the Board seeks to correct the effects of an election involving protected rights made invalid by Collins' interference and intimidation of MCS employees in violation of EERA.[8]

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[6]Other pertinent provisions require the District and MCS to jointly select and employ the principal, current District employees to maintain their employment status while working at MCS and to retain return rights to other District schools as well as rights and benefits accrued as employees of the District, and for MCS to be subject to the CBA between the District and the Association except as modified in the charter. (Art. 10.)

[7]Education Code section 47611.5(e) provides:

> The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.

[8]As a result, the District's reliance upon San Francisco Unified School District (2001) PERB Decision No. 1438 (San Francisco) is inapposite. In San Francisco, the charging party alleged that the creation of the charter school caused a unilateral change in terms and conditions of employment. Since the alleged conduct occurred before the enactment of AB 631, the Board upheld the ALJ's determination that the Board lacked jurisdiction over the

By analogy, the Board has remedied unfair practices in areas ordinarily governed by the Education Code in order to receive a just result under EERA. For example, in McFarland Unified School District (1990) PERB Decision No. 786, the school district had decided not to reelect a probationary teacher under Education Code 44882(b).[9] That provision does not require the district to provide any reason for nonreelection of a probationary teacher. However, the Board found that the teacher had engaged in various protected activities: (1) as the journalism teacher, after extensive discussions with district managers, allowing a student-written article to appear in the school newspaper that discussed the district's negotiations with the union; (2) posting union flyers in her classroom; (3) filing grievances; and (4) protesting an assignment. In a performance evaluation given shortly before the nonreelection notice, the principal rated the teacher's classroom performance as above average but criticized non-instructional issues, such as the posting of union flyers in her classroom. The Board found the performance evaluation to be a pretext for discrimination against the probationary teacher. The Board further ordered the teacher to be reinstated to a tenured position despite the ability of districts to nonreelect probationary teachers without cause. On petition to overturn the Board's order, the appellate court ruled that the ability of the district to deny tenure for any lawful reason did not insulate it from the Board's scrutiny when an unfair practice charge alleges that tenure was denied in retaliation for exercise of a protected right. (McFarland Unified School District v. PERB (1991) 228 Cal.App.3d 166, 169 [11 Cal.Rptr.2d 405]

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charter school. In addition to the Board's assumption of jurisdiction over charter schools under AB 631, this case may also be distinguished in that it does not involve the creation of the charter, but instead, involves the District's intimidation of employees and interference with their protected rights in circumstances in which the selection of the public school employer and the right to union representation were inextricably intertwined.

[9]This section has been recodified as Education Code section 44929.21(b).

(McFarland).) Citing EERA section 3541.5, the court further held that the initial determination over unfair practices and the appropriate remedy is within the exclusive jurisdiction of the Board. (Id.) To determine an appropriate remedy, the Board has express authority to order reinstatement. (Id.) The court concluded that the effect of this remedy, the probationary teacher automatically receiving a tenured position, does not mean that the Board is interfering with the district's authority to establish and regulate tenure, but rather "gives effect to the determination that (the teacher) would not have been denied tenure but for her exercise of protected rights." (Id., emphasis added.)

In this case, we have determined that the District, through its agent Collins, interfered with teachers' protected rights to vote freely and without coercion for representation by the Association, an issue expressly coupled with the Migden election. The unlawful conduct occurred during the three-month period in which the Board assumed jurisdiction over charter schools and their employees but before MCS was declared as the public school employer under Education Code section 47611.5. The Board has also found that this interference tainted the election to the extent that it had a probable impact on the employees' vote. As stated above, where an election has been deemed to be invalid due to employer interference, the Board will set aside the election if it is determined that the conduct has a probable impact on the employees' vote, which we have so found in this case. Under the logic in McFarland, the Board may rescind an unlawful election as an appropriate remedy for interference.

AB 631 was not intended to preclude such a remedy. Such a prohibition would defeat the purpose of the amendment. In her September 17, 1999 request to Governor Davis for signature on the bill, Assemblymember Migden elucidated her intent behind AB 631:

> The bill before you was developed after extensive negotiations between charter school advocates and union representatives. . . . This bill is not a mandate for charter schools to unionize, but it

> does ensure the statutory right of charter school employees to organize if they choose to. Furthermore, the EERA and HEERA will give charter school employees the right to appeal to the Public Employment Relations Board (PERB) if there are any disputes or grievances.
>
> Some have argued that charter school employees already have this right. However, because charter schools are exempted from most state laws governing public schools, including collective bargaining, charter school employees do not have statutory protections under state laws that are given to traditional public school employees. Even if charters decide to give employees collective bargaining rights, they are under no obligation to bargain fairly. Charters have free reign to dictate the rules and procedures for bargaining that may disadvantage employees.
>
> Without this bill, employees do not have access to an independent arbitrator who can address unfair practices, such as discrimination against employees for attempting to organize. Several months ago, two Oakland charter school employees were fired arbitrarily and without just cause. PERB did not have authority to intervene to resolve the problems in this case. The employees have since been rehired due to media attention. If AB 631 had been law at that time, these employees would have had an appropriate remedy.
>
> This bill does not interfere with charter schools' academic independence or their autonomous status. It only seeks to give employees the right to collective bargaining. People who work and educate our children with our tax dollars should be allowed to bargain for better pay and benefits.
> (Emphasis added.)

The District also contends that the ALJ did not consider the CSA in rendering his decision, thereby contravening Education Code section 47611.5(d) which provides:

> The Public Employment Relations Board shall take into account the Charter Schools Act of 1992 (Part 26.8 (commencing with Section 47600)) when deciding cases brought before it related to charter schools.

Again, I disagree. I find that the ALJ thoroughly considered the unique legal status of charter schools but concluded that this status in no way ameliorates unlawful interference with employees' protected rights under EERA. Although AB 631 requires the Board to consider the

CSA in determining disputes pertaining to charter schools, that does not override the author's firm intent to confer bargaining rights on charter school employees. Such rights are empty without an adequate remedy to correct serious violations of the EERA. If left without an appropriate remedy, conduct such as Collins' serves to chill the protected rights of employees under EERA and thus defeats the author's intent.

Member Neima's concurrence and dissent begins on page 21.

NEIMA, Member, concurring and dissenting: I concur with Member Whitehead that the Chula Vista Elementary School District (District) interfered with the protected rights of its employees under the Educational Employment Relations Act (EERA)[1]. As a result, it is proper to order the District to cease and desist from furthering interfering with these protected rights.

However, I dissent from that portion of Member Whitehead's decision finding that the Public Employment Relations Board has jurisdiction to order the District to set aside the election held by the Mueller Charter School to determine the public school employer for purposes of EERA. On this issue I am in agreement with the administrative law judge's proposed decision.

[1]EERA is codified at Government Code section 3540, et seq.

ORDER

The Public Employment Relations Board (PERB or Board) hereby AFFIRMS the administrative law judge's proposed decision in Case No. LA-CE-4125-E. In summary, the Board finds that the Chula Vista Elementary School District (District) interfered with the protected rights of Mueller Charter School teachers and Chula Vista Elementary Education Association, CTA/NEA (Association) through its agent Bill Collins in violation of the Government Code, Educational Employment Relations Act (EERA) section 3543.5(a) and (b).

Pursuant to section 3541.5(c) of the EERA, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to promptly investigate reports of interference by the Mueller Charter School principal with the rights of employees to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. Failing to promptly take corrective action when it is determined that the principal of Mueller Charter School has engaged in conduct that interferes with the protected rights of employees or the Association.

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to certificated employees customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the PERB in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Chairman Duncan's dissent begins on page 24.

DUNCAN, Chairman, dissenting: I respectfully dissent. Mueller Charter School (MCS) had been a charter school since 1994. The charter was renewed and approved by the school board in May 1999. The Migden legislation that went into effect in the year 2000 amended the Charter Schools Act (CSA) to require that the charter of each school state within its text whether or not the charter school "shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Government Code Section 3540.1." (Ed. Code sec. 47611.5.)

I agree with the Chula Vista Elementary School District (District) and the administrative law judge (ALJ) in this case before us, that the Legislature has placed charter school creation and operation outside of the Public Employment Relations Board's (PERB or Board) jurisdiction, which by law includes an original petition, an amendment or a renewal. (San Francisco Unified School District (2001) PERB Decision No. 1438 (San Francisco USD); Ed. Code sec. 47605(b).)

The District was correct in citing to the language of the ALJ proposed decision in San Francisco USD. The language there was upheld by the Board itself in affirming the dismissal. The issue there was whether the district violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by establishing the Edison Charter School and thereby unilaterally changing terms and conditions of employment. The same sections of EERA are at issue here.

In San Francisco USD, the charging party claimed the district should be required to negotiate regarding the effects of its decision to approve the charter.

[1] EERA is codified at Government Code section 3540, et seq.

The District argued that both the decision to approve the charter school and the effects of that decision on employees of the charter school are excluded from PERB's jurisdiction. The basis for the lack of jurisdiction is the CSA of 1992.

The ALJ in San Francisco USD noted that:

> The legislative intent stated within the Charter Schools Act of 1992 is:
>
> 'To provide opportunities for teachers, parents, pupils, and community members to establish and maintain schools that operate independently from the existing school district structure. . . .'

The ALJ in that case further noted that:

> Very strong evidence supports the District's argument that the EERA does not apply and, therefore, PERB is without jurisdiction in this case. The strongest evidence is the plain language of the Charter Schools Act itself. Education Code section 47610 provides: 'A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts except [regarding participation in the State Teachers Retirement System.]'
> (ALJ proposed dec. at pp. 5-6.)

The ALJ then pointed out that, "The EERA is a state law governing school districts. There is nothing within the Charter Schools Act suggesting that the EERA is not one of the laws from which charter schools are exempt." (San Francisco USD, ALJ proposed dec. at p. 6.)

The San Francisco USD proposed decision also states that the omission of the unions was not inadvertent. The ALJ there sets forth the legislative history and specifically addresses the issue of the Migden amendment at page 7:

> The Charter Schools Act specifies the procedure for establishment and operation of a charter school. In contrast to the EERA, a union, even one with exclusive representative status, is not a party to the decision making process resulting in a charter school, nor, at times pertinent to this unfair practice complaint,

> were unions given any legal status as representatives of employees within a charter school. Even the current law as amended, which allows collective bargaining rights, limits union and PERB involvement in the process:
>
> 'The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board. [California Education Code section 47611.5(e).]'

In the case before us, it is noteworthy that MCS has been a charter school since 1994. Here, the District argues that:

> 'It would make no sense to recognize that PERB has no jurisdiction to review conduct related to the "employer designation" decision in an original charter petition brought to a school district governing board in March, 2000, but to suggest that at the same time that it does have jurisdiction to review conduct related to the initial "employer designation" decision in an existing charter petition brought to a school district governing board the same month.' [ALJ proposed dec. at p. 17.]

I believe the Legislature made it clear that PERB is not to be involved in review of charter issues, particularly after reading Education Code section 476115.[1]

I disagree with the majority in this case. I believe this issue is a charter issue and therefore is not under the jurisdiction of PERB. It is my position that this should have been dismissed by the Board agent along with the other charges that were dismissed on May 23, 2001.

While I certainly do not condone the actions of Bill Collins in any way, I believe that the issues here are not under the auspices of PERB.

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[1]This section is set out at pages 16 and 17 in footnote 9 of the ALJ proposed decision of January 10, 2002, and states in pertinent part, "(e) The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board."

APPENDIX

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

In the matter of Unfair Practice Case No. LA-CE-4125-E, Chula Vista Elementary Education Association, CTA/NEA v. Chula Vista Elementary School District, the Public Employment Relations Board has found that the Chula Vista Elementary School District (District) violated Government Code section 3543.5(a) and (b), provisions of the Educational Employment Relations Act (EERA). The District violated EERA by failing to promptly investigate reports of interference by the Mueller Charter School principal in the right of employees to freely participate in an election that had the effect of determining whether or not the employees would continue to be represented by the Chula Vista Elementary Education Association, CTA/NEA (Association). The District also violated EERA by failing to take corrective action against the principal prior to the election. The District's failure to act promptly resulted in interference with both employees and Association rights.

Pursuant to section 3541.5(c) of EERA, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to promptly investigate reports of interference by the Mueller Charter School principal with the rights of employees to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. Failing to promptly take corrective action when it is determined that the principal of Mueller Charter School has engaged in conduct that interferes with the protected rights of employees or the Association.

Dated: _____

CHULA VISTA ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Agent

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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHULA VISTA EDUCATORS, CTA/NEA, Charging Party, v. CHULA VISTA ELEMENTARY SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4125-E PROPOSED DECISION (1/10/02)

Appearances: Rosalind D. Wolf, Attorney, for Chula Vista Educators, CTA/NEA; Parham & Rajcic by Mark R. Bresee, Attorney, for Chula Vista Elementary School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

In this case a union challenges an election held at a charter school, arguing that the principal of the charter school threatened teachers and thereby interfered with a fair vote. The election resulted in a decision that the charter school, and not the parent school district, would be the employer for purposes of collective bargaining. The school district replies that the Public Employment Relations Board (PERB or Board) has no jurisdiction to review charter school elections. Moreover, the district continues, the alleged interference was insufficient to affect the election results and such inappropriate conduct as may have occurred was in violation of express instructions by district administrators.

This case has a long history. It was commenced on September 15, 1999, as a challenge by the Chula Vista Educators, CTA/NEA (Union) to various unilateral changes in working conditions that allegedly took place in the Mueller Charter School, an institution of the Chula Vista Elementary School District (District). The case was placed in abeyance on October 21,

1999, pending the outcome of an election to determine whether the charter school or the District would be the employer for purposes of collective bargaining.[1] The case in its present form is the result of a first amended charge, filed by the Union on August 9, 2000, that added a challenge to the election to the earlier accusations of unilateral change. On October 17, 2000, the Office of the PERB General Counsel issued a complaint that, in 79 paragraphs, set outs allegations of unfair practice based on both the original and amended charges.

The District answered the complaint on November 11, 2000, denying most factual allegations and asserting numerous affirmative defenses including a contention that the PERB is without jurisdiction in this matter. In response to a motion filed by the District, the Board agent assigned to handle settlement discussions on May 23, 2001, dismissed all allegations of unilateral change. The basis for the dismissal was the Board's decision in San Francisco Unified School District (2001) PERB Decision No. 1438 (San Francisco USD). The dismissal removed the majority of the allegations in the complaint, leaving only those pertaining to the election of February 28, 2000. At the commencement of the hearing, the Union withdrew certain portions of the complaint[2] although it was later permitted to reinstate a portion of what had been withdrawn.[3]

The part of the complaint that went to hearing alleges interference by District agents in the February 28, 2000, election that determined whether the charter school would be the employer for collective bargaining purposes. Specifically, the complaint alleges that charter

[1] The election was held pursuant to the requirements of Education Code section 47611.5.

[2] See Reporter's Transcript, Vol. I, at pp. 9-10.

[3] See Reporter's Transcript, Vol. II, at pp. 112-113.

school principal Bill Collins questioned teachers Armando Vidales, Patti Neill, and Gilda McAllister about how they were going to vote in the election. The complaint further alleges that Mr. Collins threatened Ms. Neill that her reputation would be damaged and she might face physical violence if she voted against the charter school becoming its own employer. Finally, the complaint alleges that charter school business manager Don Mizock questioned teacher Jill Cook and told her she should vote to get rid of the Union. By these acts, the complaint alleges, the District violated section 3543.5(a) and (b)[4] of the Educational Employment Relations Act (EERA).

A hearing was held on September 20 and 21 at the Union office in Chula Vista. With the filing of briefs, the matter was submitted for decision on December 24, 2001.

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k). The Union is an employee organization as defined in section 3540.1(d) and at all times relevant has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's certificated employees. The District and the Union were parties to a collective bargaining

[4] Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

agreement that expired on June 30, 1998, but was extended by the parties in April of 1999 until June 30, 2001. During the relevant period, the District had 37 schools, five of which were charter schools.

Pursuant to the Charter Schools Act of 1992[5] Mueller Elementary School was converted into Mueller Charter School in 1994. The District governing board approved the Mueller charter on May 3, 1994. The charter was renewed and approved by the school board on May 18, 1999. The revised charter provides that the Mueller Charter School could be excused from selected provisions of the collective bargaining agreement between the District and the Union. In relevant part, the 1999 charter provides:

> Mueller Charter School will be subject to provisions of collective bargaining except as specified in the Charter Petition and/or this Agreement. In the event that there is a dispute about the requirements to implement the school design and the Agreement, the final decision shall rest with the Charter School.
>
> In addition, at any time, two-thirds of MCS [Mueller Charter School] affected staff may elect to exempt an established or prospective practice or policy from any contrary provision or provisions of the then-current collective bargaining agreement between the CVE or the CVCEO and the Chula Vista Elementary School District.

The charter also provides that its provisions could be "amended or revoked at any time through a two-thirds vote of the full time, on-site certificated staff." The charter requires all votes to be by secret ballot and authorizes proxy voting.

In 1999, the Charter Schools Act was amended to require that the charter of each charter school state within its text whether or not the charter school "shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of

[5] See Education Code section 47600 et seq.

section 3540.1 of the Government Code."[6] The amendment provided further that "[b]y March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer."

At Mueller, an election was scheduled for February 28, 2000, for employees to determine whether the school or the District should be designated as the employer for the purpose of collective bargaining. Because Senator Carole Migden wrote the bill that contained the requirement that charter schools specify who is to be the employer, the employees and administrators in the District referred to the February 28 vote as the "Migden Election."

There was much discussion on the Mueller campus about how the teachers should vote in the Migden Election. Supporters of the Union wanted the District to be designated as the employer for purpose of collective bargaining. Opponents of the Union wanted the Mueller School to be designated as the employer for the purpose of collective bargaining. Teachers shared their views with each other.

Bill Collins, the principal at Mueller School at the time of the election, was a controversial figure. The faculty was deeply divided and at least in part the division was rooted in their contrasting opinions about Mr. Collins. On December 15, 1999, a group of Mueller teachers sent a lengthy letter to the superintendent and members of the Board of Education in which they set out numerous complaints about the principal. In one section of the letter, the authors described what they considered to be a "hostile workplace." The letter states that the "site administrator advises junior teachers to avoid veteran teachers, referring to them as the 'old negatives.'" The letter states that the site administrator campaigns for his

[6] See Education Code section 47611.5

causes with emotion and intimidation. It continues:

> A frequent example of this problem is when the site administrator pressures the staff to vote for something that he wants to pass. Prior to the meeting, he walks into teachers' classrooms and asks them to "be on his side" or to "be on his team." He calls individuals into his office to try to find out who is voting with him and who is not. [Emphasis in original.]
>
> .....
>
> Veiled threats and peer pressure are tactics the site administrator also uses. Even when the vote goes his way, he has told staff members that he will 'find out' who voted against his policies and 'get them.' He has announced that those who do not vote the way he wishes will be 'out of here.' A few staff members have been told that he has friends who are in tough motorcycle gangs who would 'do anything for him' including 'get those who give him trouble.' and/or that he is 'a master of the Curse of the Black Hand' which he has used successfully on others in order to cause them personal pain and tragedy.

The letter to the school board drew a response from teachers on the other side. Their letter, signed March 20, 2000, expressed their delight "to work in a school that puts children first and looks to the future." The letter continues:

> Mr. Bill Collins has created a wonderful, caring educational environment here at Mueller Charter School in which teachers are free and actively encouraged to explore their talents, new ideas and techniques. New teachers have been welcomed, embraced and supported in their enthusiasm for education and their teaching careers.
>
> The letter sent to you and the Board of Education does not represent the feelings of most of the dedicated and hardworking teachers at here [sic] Mueller Charter School. . . .

Mr. Collins was a strong advocate of having Mueller School designated as the employer. He was open in this view and it was widely understood that he wanted teachers to vote for Mueller as the employer. "He wanted to see us go completely autonomous, run our own ship and provide quality education. . . . He was very clear about how he wanted the

school to go," testified Carolyn Williams, a Mueller teacher called as a District witness. "He would say to me that people that feel that they need a union must be scared, or people that feel that they need a union don't understand really what the union is not doing for us, things of that nature. . . . He did say we don't need a union. And he'd say we didn't need a union because of the fact that the union would stop us from being a charter school and doing what we needed to do to be a charter school," testified Gilda McAllister, a Union witness. "[H]e made no bones about not wanting a union. . . . [A] union isn't necessary. You're paying dues into this union. You know, what are they doing. Things like that. I mean, just his demeanor. He was not keeping it a secret that he didn't think we needed a union," testified Patti Neill.

At meetings with teachers and in individual conversations, Mr. Collins frequently expressed the view that teachers needed to be "team players" and "on the team." Witnesses were not consistent in their interpretation of whether being a "team player" meant being opposed to the Union. Ms. Neill testified that she interpreted the phrase as meaning "[g]o down to Jake's and have a few drinks and that kind of deal" and "eating lunch in his office with him." Armando Vidales, a teacher called as a Union witness, testified that he understood Mr. Collins' comments to mean that a teacher who was a team player would "vote against the union." Ms. Williams testified that to be a team player meant that the staff "should all work together to build a cohesive whole for the education of the students." Ms. McAllister testified that she understood that to be a team player would be "working together and building a good foundation for the children at Mueller School."

At the core of this case are individual conversations between Don Mizock, the business manager, and one teacher and Mr. Collins and three teachers.

Mr. Mizock testified that he had one conversation with Ms. Cook about the election. He said she had called him to her classroom to fix a problem with a computer. He said he did

not ask her how she was going to vote but "might have asked her if she understood the issues that were relevant to the vote." He said she "indicated that she wasn't real clear, she was kind of confused." He said she asked him why he thought the election was important. He said he stated something "about the importance of the union representing education in Sacramento." However, he continued, he told her that in his opinion "as a charter school, it was incumbent upon us to be able to operate without the encumbrance of the union or the district, . . ." Mr. Mizock testified that he was not sent by Mr. Collins to talk to Ms. Cook. He said the views he expressed were his own. Ms. Cook, who no longer works for the District, was not called as a witness.

The Union presented evidence about conversations between Mr. Collins and three teachers: Mr. Vidales, Ms. McAllister and Ms. Neill.

Mr. Vidales, a probationary teacher at the time of the election, testified that he was organizing a multi-cultural festival and went to Mr. Collins' office to discuss it. He said Mr. Collins asked how he was going to vote in the forthcoming election. Mr. Vidales replied that he had not yet made up his mind. Mr. Vidales testified that he in fact had made up his mind but thought he "could be intimidated afterwards, and I didn't feel like telling him." He said Mr. Collins' inquiry made him feel "[u]ncomfortable, very uncomfortable" and he thought it was "inappropriate."

Mr. Vidales said that Mr. Collins then asked if he knew how two other teachers were going to vote. Mr. Vidales replied that he did not know. Mr. Vidales said that Mr. Collins then spent about 40 to 45 minutes "trying to convince me to vote against the union." He said Mr. Collins "kept saying the same things over and over again, that we had to be team

players . . . ." Mr. Vidales testified that Mr. Collins told him that he should not be undecided but should make up his mind.

Ms. McAllister testified that she had many conversations with Mr. Collins prior to the election. She said they were all pretty much the same. Mr. Collins said:

> Gilda, I need your support. I've been there for you, its time for you to be there for me. We are going to be having some real important elections coming up and you should listen very carefully and be supportive, . . .

She quoted him as saying "we don't need a union" and that "the union would stop us from being a charter school and doing what we needed to do to be a charter school."

The most serious comments were those attributed to Mr. Collins by Ms. Neill, a second grade teacher at Mueller who first had been employed as an instructional aide. As a result of a previous confrontation with Mr. Collins, Ms. Neill testified, she was afraid of him. That incident, which occurred in December of 1996, was the product of a misunderstanding over something she had said about a school budget committee. Ms. Neill said that when Mr. Collins heard about the comment he took her into his office and as she was sitting on a chair, "[h]e lifted his hand up and hit the desk so hard right in front of me, . . . [a]nd he screamed I will have your transfer papers on this desk immediately." Later, she testified, when she had explained what was said he stated, "[O]h, well, I guess I overreacted."

On the morning of February 28, the day of the election, Mr. Collins approached Ms. Neill on the playground during recess. She said the conversation started on the blacktop and continued as she walked toward the classroom at the end of recess. She said he followed her as she was taking her students back to the classroom and "wouldn't leave." Throughout this time, she said, he was "trying to convince me that I needed to vote the union out." She

said he told her that if she really wanted the Union he would help her to transfer to another school but "don't ruin this for the teachers that want to see the charter advance."

After her aide took the students into the classroom, she testified, Mr. Collins stated to her, "Patti, you owe me one, and you need to vote the way I want you to vote in this election." She said he then said that "if I didn't vote the way he wanted me to vote in this election that he was going to tell Mr. [Assistant Superintendent Richard] Werlin that I was having sex with one of the teachers in the classroom." Ms. Neill testified that she replied, "Bill, you know that's a lie. That is a complete lie, it's not true." She said he said, "[W]ell, I know it's not true, . . . but people tell lies about me all the time." She said he stated that "this would ruin my reputation, I would lose my job, and that – he told me that he had these Hell's Angels friends of his that have been wanting to come to the school and break arms for a long time, but he hasn't let them come yet." She said he told her that if she really wanted the Union he would help her transfer. During the conversation, Ms. Neill testified, Mr. Collins was pointing his finger at her.

The sex-in-the-classroom accusation was rooted in an incident that had happened at the school the prior month. A male teacher was discovered in a classroom, during school hours, engaging in a sexual act with the mother of a student. Ms. Neill, who was single at the time, was known to have dated the male teacher. Ms. Neill testified that after the incident between the teacher and the parent, Mr. Collins "made a big deal" of telling her that "he had to personally go talk to Mr. Werlin and save my job for me, because he had to assure Mr. Werlin that I was not having sex in the classroom with this teacher also." She said that Mr. Collins told her in advance that he was meeting with Mr. Werlin and then after the meeting called her on her classroom phone "to tell me everything is okay, don't worry, your job is saved."[7]

[7] Mr. Werlin testified that Ms. Neill's name was never brought up during his investigation of the incident between the teacher and the parent.

Ms. Neill testified that she was severely shaken by the February 28 incident with Mr. Collins. She described Mr. Collins as "real tall" and herself as "real short" and stated that "[y]ou don't understand how afraid I was of him. I was scared of this man." She said she should have said more to him but was just so afraid she didn't. She said he made her feel that he would know how she voted, although she knew this was not possible. She testified that he told her that as the principal he had the power to make life miserable for any teacher and predicted that he could keep it up for a year until the District found out and told him to stop. She said she felt insecure because she had no husband and was on her own. "I believed he had the ability to get rid of me like this if he wanted to," she said, snapping her fingers.

Ms. Neill's testimony is uncontradicted in the record. Mr. Collins was not called as a witness. Ms. Neill's testimony was corroborated by contemporaneous e-mail messages she sent to other teachers in the days immediately after February 28. On the witness stand, she came across as forthright and sincere. I credit her testimony about her February 28 conversation with Mr. Collins as accurate and truthful and find that the statements she attributed to Mr. Collins were in fact made by him.

Not long after Mr. Collins delivered his warning to Ms. Neill, Mr. Werlin appeared on the campus to deliver a last-minute pre-election speech to the voters at Mueller. All witnesses gave consistent descriptions of what Mr. Werlin said. He told the teachers that they should vote their consciences. He said they should vote as they wished, with their hearts, and that there would be no reprisals regardless of how the election turned out. He said it was their choice whether or not they wanted a union and that no one should feel intimidated. He made it clear that teachers should have no fear when they decided how to cast their ballots. He left immediately after concluding his remarks, prior to the commencement of voting. In his

comments, Mr. Werlin said nothing about Mr. Collins or any statements that may have been made by him.

Ms. Neill testified that she did not immediately tell Mr. Werlin what Mr. Collins had said to her because she was afraid to do so. She testified:

> . . . I didn't know if they were good friends or how it worked and if I would end up losing my job because I was a little nobody and had only worked a few years and Bill had worked so many, and I didn't know how it worked in the deal. . . . .

Mr. Werlin's pre-election speech was the second he had given to Mueller teachers during the time before the election. Earlier, he had visited all of the District charter schools that were conducting a Migden Election. He made the same presentation at each school, explaining the reason for the election and advising the certificated employees that they should make an independent decision and vote as they believed.

Mueller was the only school to which Mr. Werlin returned a second time. Mr. Werlin testified that he went back to Mueller because he had received reports about heavy electioneering at Mueller "and some people were feeling uncomfortable about that." He said he had received many telephone calls about the general atmosphere at the school and a division in the staff. Most of the complaints, he said, concerned pressure from peers and people being snubbed by peers. He said the expressions of concern he had received were about people on both sides of the election but he acknowledged that the principal was one of the persons about whom he had received complaints. "I heard allegations that Mr. Collins was talking to people about the election and it made some of them feel uncomfortable," he testified. Asked if he discussed with Mr. Collins any concerns about pre-election events at Mueller, Mr. Werlin testified:

> I don't remember all the specifics of our conversations, but I remember very clearly sharing with him that it was important that

> people felt like they could vote the way they wanted to vote, and it was not our role as administration very clearly to direct the way somebody should vote or to apply pressure to anyone in any format to vote a particular way with regard to Migden.

After Mr. Werlin left Mueller, the Migden vote was conducted by two non-voting employees, Cathy Dimapilis, the office manager, and Mr. Mizock. The ballot had two choices: (1) modify the charter to designate Mueller Charter School as the employer for the purpose of collective bargaining or (2) modify the charter to designate the District as the employer for the purpose of collective bargaining. A two-thirds majority was necessary to adopt either proposition. The record does not reflect whether the teachers were told what would have occurred had neither choice received the necessary two-thirds majority.[8]

The first order of pre-election business was to resolve the question of whether four special education teachers would be permitted to vote in the election. They were District employees assigned to the school. The teachers voted that the special education teachers would be eligible voters. The total number of voters was 41, including Mr. Collins who as a certificated employee was an eligible voter under the Mueller charter. Ms. Dimapilis distributed the ballots to voters who voted in secret. She and Mr. Mizock then counted the ballots in front of the entire faculty. The vote tally was 28 in favor of the designating the Mueller Charter School as the employer for purposes of collective bargaining and 13 in favor of designating the District, all eligible voters casting ballots. Because 28 was a two-thirds majority of the votes cast, the winning proposition was determined to be Mueller Charter School as the employer. The charter amendment was presented to the school board and ratified on March 28, 2000.

---

[8] Presumably, under Education Code section 47611.5(b) if Mueller Charter School was not deemed to be the employer, then as a matter of law the District would have been the employer for the purpose of collective bargaining.

Ms. Neill testified that although she did not initially tell Mr. Werlin about the principal's threats, she changed her mind after talking with members of her family. She said she decided she would "make a stand." The following Monday she met with Gina Boyd, the president of the Union, and with Tim O'Neill, a staff representative from the California Teachers Association. They arranged a meeting with the superintendent, Libia Gil, and Mr. Werlin during which she described the entire incident with Mr. Collins.

Mr. Werlin told Ms. Neill to report the threat about bringing the Hell's Angels onto the campus to the Chula Vista Police Department. He then reassigned Mr. Collins to work in the District office for the balance of the school year, handling arrangements with contractors who completed a renovation of Mueller over the summer. Mr. Werlin testified that during an investigation it was his practice to remove from the campus any principal facing a serious accusation. He assigned Greg Valero as the administrator in charge at Mueller for the remainder of the school year. Mr. Werlin testified that Mr. Collins denied making the statements attributed to him by Ms. Neill. As a result of the conflicting stories, Mr. Werlin said that he was unable to determine what had happened between the two of them.

Mr. Collins retired at the end of the school year. Mr. Werlin testified that he did not suggest to Mr. Collins that he should retire and that he long had talked about retiring after the modernization plan was completed. Teacher witnesses were in disagreement about what Mr. Collins had told the faculty regarding his expected retirement. Three Union witness agreed that Mr. Collins had told the faculty that he planned to stay another year or longer. A teacher called by the District testified that Mr. Collins had said he would retire in June after completion of the remodeling project.

Following the vote, Mueller teacher Jerry Lovelady and five other teachers filed a grievance under the Mueller School Charter asking for a mediation "to resolve the issue of

the validity of the vote taken to identify the Mueller Charter School" as the employer. Mr. Lovelady testified that it was the intention of the grievants to assert that the election was affected by the undue influence of Mr. Collins. However, the grievance was denied as untimely by Mr. Valero.

In the 2000-2001 school year, a review of the charter resulted in further amendments to the Mueller charter. These amendments were developed through a series of committees and all members of the staff were invited to propose changes in the charter. No proposal was made during this process that would have resulted in another vote on the question of whether the Mueller School or the District would be the employer for the purpose of collective bargaining.

LEGAL ISSUES

1. Does PERB have jurisdiction to review the question of whether pre-election conduct at a charter school constituted interference with employee and union rights?

2. Did the District, through the actions of its agent Bill Collins, during or about the period between February 21, 2000, and February 28, 2000, interfere with employee and Union rights in violation of section 3543.5(a) and section 3543.5(b) by:

A. Repeatedly questioning teacher Armando Vidales about how he and another teacher were going to vote in an election to amend the Mueller School charter and by stating that he needed Mr. Vidales on his team?

B. Stating to teacher Gilda McAllister that "we need team players" and asking her if she was thinking of transferring to another school, thereby implying that she should transfer?

C. Stating to teacher Patti Neill that if she did not vote his way he would tell Assistant Superintendent Werlin that Ms. Neill had sex in a classroom with another teacher,

that if she wanted to retain the Union she should transfer to another school, and that he would bring Hell's Angels onto the campus to break some legs?

3. Did the District, through the actions of its agent Don Mizock, during or about the period between February 21, 2000, and February 28, 2000, interfere with employee and Union rights in violation of section 3543.5(a) and section 3543.5(b) by stating to teacher Jill Cook that she should vote to get rid of the Union?

CONCLUSIONS OF LAW

Jurisdiction

The District raises as a critical first issue the question of whether the PERB has jurisdictional authority to resolve the dispute about the Mueller Charter School election. The purpose of this election, the District argues, was to amend the charter, an act which ultimately must be approved or disapproved by the District school board. The election was held, the District observes, to implement a 1999 amendment[9] to the Charter School Act. Under

[9] The amendment is contained in Education Code section 47611.5 which provides:

> (a) Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code shall apply to charter schools.
>
> (b) A charter school charter shall contain a declaration regarding whether or not the charter school shall be deemed the exclusive public school employer of the employees at the charter school for the purposes of Section 3540.1 of the Government Code. If the charter school is not so deemed a public school employer, the school district where the charter is located shall be deemed the public school employer for the purposes of Chapter 10.7 (commencing with Section 3540) of Division 4 of the Government Code.
>
> (c) If the charter of a charter school does not specify that it shall comply with those statutes and regulations governing public school employers that establish and regulate tenure or a merit or civil service system, the scope of representation for that charter

Education Code section 47611.5(e), the District notes, approval or denial of a charter petition is not subject to review by the PERB. Here, although the school board was not considering approval of an original petition, the District continues, the effect was the same.

Because for all new charter schools the original petition must contain an employer designation as part of the charter, Mueller School charter revisions should be treated as the functional equivalent to a new petition. "It would make no sense to recognize that PERB has no jurisdiction to review conduct related to the 'employer designation' decision in an original charter petition brought to a school district governing board in March, 2000, but to suggest that at the same time that it does have jurisdiction to review conduct related to the initial 'employer designation' decision in an existing charter petition brought to a school district governing board in the same month," the District reasons. It is abundantly clear, the District asserts, that the Legislature intended to preclude PERB's review or regulation of the initial employer designation of a new or existing charter school.

> school shall also include discipline and dismissal of charter school employees.
>
> (d) The Public Employment Relations Board shall take into account the Charter Schools Act of 1992 (Part 26.8 (commencing with Section 47600)) when deciding cases brought before it related to charter schools.
>
> (e) The approval or a denial of a charter petition by a granting agency pursuant to subdivision (b) of Section 47605 shall not be controlled by collective bargaining agreements nor subject to review or regulation by the Public Employment Relations Board.
>
> (f) By March 31, 2000, all existing charter schools must declare whether or not they shall be deemed a public school employer in accordance with subdivision (b), and such declaration shall not be materially inconsistent with the charter.

The Union argues that effective January 1, 2000, charter schools became subject to the EERA. As a result, the Union continues, charter school employees effective January 1, 2000, were given the right to form, join and participate in the activities of employee organizations. Coincident with these rights, the Union argues, came the statutory protections against interference with their exercise of protected rights. The Union reasons that because a vote to designate the Mueller Charter School as the employer would effectively decertify the Union, participation in the Migden Election at Mueller must have been accompanied with the same protections as applied to other representation elections. Therefore, the Union concludes, any employer interference with employee rights to advocate support for the Union must have been an unfair practice.

This case presents a novel question regarding jurisdiction, a question that is unlikely to be repeated because the events at issue could only have arisen during the three-month period between January 1 and March 31, 2000. Prior to January 1, 2000, the EERA was not applicable to charter schools or events occurring within them. (San Francisco USD.) This changed on January 1, 2000, when the Migden amendment to the Charter School Act made the EERA applicable to charter schools.[10] (Education Code section 47611.5(a).) The Migden amendment, however, delegated to the charter schools themselves the determination of whether a charter school or its parent school district would be the employer for the purpose of collective bargaining. The deadline for making the choice was set at March 31, 2000. (Education Code section 47611.5(f).) That left a three-month period during which it was not

[10] In accord with the discussion, infra, I find it unnecessary to consider the legislative history submitted by the Union in its reply brief. The language of section Education Code section 47611.5(a) is adequate in itself to resolve this issue without reference to legislative history.

clear whether a charter school existing prior to January 1, 2000, was the employer for purposes of collective bargaining or whether the employer was the school's parent district.

The events at issue took place during that three-month period of uncertainty. Indeed, they involve the action taken by the Mueller Charter School to resolve the uncertainty. The District concludes that because the conduct at issue involves a change the to charter, the PERB has no jurisdiction. This is because, the District asserts, the PERB would have no power to pass on the designation of employer status in an original charter and therefore it should have no status to pass on the designation of employer status in an amendment to a charter. The District's argument, however, ignores the fact that as of January 1, 2000, charter school employees had full rights under the EERA. That means, as the Union argues, that as of January 1, 2000, charter school employees had the right to form, join and participate in the activities of employee organizations.[11]

Under section 3541.3(i). PERB is authorized

> . . . [t]o investigate unfair practice charges or alleged violations of this chapter, and take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter. . . .

Because the EERA was applicable to charter schools as of January 1, 2000, it seems evident that PERB had the authority as of that date to investigate allegations of unfair practices committed in a charter school. This conclusion is not affected by the fact that prior to the vote of February 28, 2000, it was not yet clear whether the Mueller Charter School or the District would be the employer for the purposes of collective bargaining. It is the employee rights that are to be vindicated regardless of whether the employer was the Mueller Charter School or its parent, the District. PERB has jurisdiction either way.

[11] Section 3543.

Accordingly, I conclude that the PERB does have jurisdiction to review the allegations at issue here.[12]

Alleged Interference

Public school employees have the protected right under EERA section 3543:

> . . . 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. . . .

It is an unfair practice under section 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.

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.)[13] In an interference case, it

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[12] I also reject the District's argument that this dispute should be deferred to the grievance procedure contained in the Mueller School charter. PERB must defer an unfair practice charge under section 3541.5(a)(2) when the conduct at issue is "also prohibited by the provisions of the agreement between the parties." The District acknowledges that there is no contractual provision which would prohibit the conduct at issue. That concession is dispositive of the issue. None of the cases the District cites are authority for the proposition that PERB must defer to a non-contractual procedure.

[13] The Carlsbad test for interference provides, in relevant part, as follows:

> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was

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.)

The Union argues that it was evident to all participants that a vote to declare the Mueller Charter School to be the employer would have the same effect as a decertification of the Union. As a result, the Union argues, when employees participated in the election, they enjoyed the same protections as in a representation election. This included the right to participate freely and without coercion from agents of the employer. This right was violated, the Union asserts, when Mueller Principal Collins engaged in unlawful interrogation and polling. The right to participate was violated further, the Union continues, when Mr. Collins threatened employees with a loss of benefits and warned of reprisals, including a warning that he would make a false sexual accusation against Ms. Neill. Moreover, the Union continues, he also threatened her with physical violence. Finally, the Union asserts, Mr. Collins violated his obligation of strict neutrality when he expressed an opinion in favor of designating Mueller Charter School as the employer, thereby decertifying the Union.

The District rejects these arguments, asserting that the elements of an interference case have not been established. As an initial argument, the District contends that the Union has failed to establish that Mueller Principal Collins was an agent of the District. Mere surmise is insufficient to establish agency, the District asserts, and "there was no testimonial or documentary evidence presented, credible or otherwise, that the District felt Collins was acting

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> 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.

or speaking on its behalf." To the contrary, the District continues, Mr. Collins and other principals had been specifically told that they should not attempt to influence how employees would vote in the election. Thus, insofar as Mr. Collins did that, the District reasons he was acting outside his authority. Moreover, the District continues, an employer is free to express antipathy toward a labor organization. He had the right to say that he was opposed to having employees represented by the Union and to urge employees to vote to designate the Mueller Charter School as the employer for purposes of collective bargaining.

To establish a violation, there must be some showing that the statements made constituted a threat of reprisal or promise of benefits. Citing federal cases interpreting the National Labor Relations Act, the Board concluded early in its history that employers must be given latitude to speak to employees. In Rio Hondo Community College District (1980) PERB Decision No. 128 (Rio Hondo), the Board held that:

> . . . a public school employer is nonetheless entitled to express its views on employment related matters . . . in order to facilitate full and knowledgeable debate. . . . [T]he employer's right to freely express its views, arguments or opinions is impliedly established by the fact that the employer is prohibited only from engaging in negotiations with persons or groups other than the exclusive representative. While the protection afforded the employer's speech is not without limits, it must necessarily include both favorable and critical speech regarding a union's position provided the communication is not used as a means of violating the Act. [Citation; emphasis in original.]

Thus, the issue in an interference case is whether the employer's speech was coercive and thereby interfered with employee exercise of protected rights. In Rio Hondo the Board explained the rule as follows:

> . . . an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. [Fn. omitted.]

The effect of the employer conduct is measured against an objective standard and not whether a particular employee actually felt intimidated. (Clovis Unified School District (1984) PERB Decision No. 389.)

Initially, I reject the Union's argument that Mr. Collins and Mr. Mizock violated the obligation of strict neutrality by urging teachers to vote to designate the Mueller Charter School as the employer. It is true that the effect of such statements was to request that the employees vote against continuing representation by the Union. Employers, however, are free to express a view that they do not want a union representing their employees. Employers can freely urge employees to vote against a union in any representation election. (Clovis Unified School District (1978) PERB Decision No. 61.) The obligation of strict neutrality imposed on employers requires employers to be neutral only among competing unions. An employer will violate its requirement of neutrality if it shows a preference, either by words or by deeds, for one union over another. (Sacramento City Unified School District (1982) PERB Decision No. 214.) Here, no other union was involved. The comments of Mr. Collins and Mr. Mizock were directed against the idea of unionism at a charter school. The strict neutrality rule, therefore, was not applicable.

The more significant question here is whether any of the comments made by Mr. Mizock or Mr. Collins constituted unlawful polling or threats of reprisal or promises of benefits. Mr. Mizock had a conversation with one teacher, Ms. Cook. The only version of that conversation in the record is that of Mr. Mizock. He describes a simple conversation in which she expressed uncertainty about how to vote and he offered his opinion. He testified that he did not ask her how she was going to vote. There is, therefore, no evidence of polling. Nor is there any statement in his version of the conversation that could be described as a threat or a

promise of a benefit. I conclude that the Union has not established by a preponderance of the evidence that Mr. Mizock interfered with employee choice in his conversation with Ms. Cook.

The uncontradicted evidence establishes that Mr. Collins did ask Mr. Vidales how he planned to vote in the election and asked him also if he knew how two other teachers planned to vote. The conversation was such that Mr. Vidales felt pressured to respond. It was a particularly uncomfortable situation for a probationary teacher, and Mr. Vidales stated that he had not made up his mind, when in fact he had.

Polling of employees about how they plan to vote in a representation election constitutes interference if the circumstances of the conversations interfere with employee free choice. (Clovis Unified School District, supra, PERB Decision No. 389; see also Blue Flash Express, Inc. (1954) 109 NLRB 591 [34 LRRM 1384].) The specific words used are not determinative where the inquiry conveys employer disapproval toward the union and creates an expectation of employee response. (PPG Industries, Inc. (1980) 251 NLRB 1146 [105 LRRM 1434].) Here, Mr. Vidales was placed in such a difficult situation that he felt compelled to hide his true opinions. Such questioning plainly interferes with employee choice. The District offers no legitimate business purpose to justify the interviews.

The uncontradicted evidence also establishes that Mr. Collins threatened Ms. Neill with an attack on her reputation, the loss of her job and with physical violence. Applying an objective test, it is evident that any teacher would feel threatened by a principal who warned he would smear the teacher's reputation, possibly resulting in the teacher's termination and, as if that were not enough, that the teacher might become the victim of physical violence. Plainly, Mr. Collins interfered with Ms. Neill's right to participate in the activities of an employee organization by his threats of retaliation. Although Ms. Neill may have known intellectually that Mr. Collins would not know how she would vote in a secret ballot election, it is not

unreasonable that she would feel threatened nonetheless. She had a right, moreover, not only to vote in a way that would retain the Union as her exclusive representative but to urge others to do the same. She should not be required to keep her views secret for fear of retaliation. Mr. Collins' threats would effectively preclude any reasonably prudent teacher from voicing open support for continued Union representation.

The District would find no violation on these acts, however, asserting that if Mr. Collins engaged in such conduct he was acting outside the scope of his authority and contrary to express instructions given to him by Mr. Werlin.

PERB's current rules on agency are set out in Compton Community College District (1987) PERB Decision No. 649 (Compton) and Inglewood Unified School District (1990) PERB Decision No. 792 (Inglewood). In Compton , the Board affirmed the dismissal of an unfair practice charge because the factual allegations were insufficient to set out a prima facie case of agency. The two-member majority concluded that in cases where the principal actor is not alleged to have been a supervisory or managerial employee:

> . . . some factual demonstration of a relationship beyond employment alone is necessary to impute or infer an agency relationship. [Citation.] For an agency relationship to exist [the union] must allege facts which show that [the principal actor] was acting with some direction, instigation, approval or ratification of the action by the [d]istrict. [Citation.]

This rule was augmented in Inglewood[14] where the Board held that a school principal was not the agent of a public school employer when he filed a lawsuit against certain teachers because of their activities on behalf of a union. Even though as a management employee the principal was an actual agent of the employer, the Board concluded that he had no express

[14] Affirmed in Inglewood Teachers Association v. Public Employment Relations Board (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].

authorization to file the lawsuit and that in filing the lawsuit he had acted outside the scope of his authority.

The Board then turned to the question of whether in filing the lawsuit the school principal acted with ostensible authority. The Board held that:

> . . .To prove ostensible or apparent authority, the Association was bound to establish representation by the principal (the District) of the agency, justifiable reliance by the party seeking to impose liability on the principal (the teachers); and a change in position resulting from that reliance. . . .

The Board concluded that the charging party did not prove that the public school employer had made any representation that the lawsuit was filed on the school district's behalf or that the union had detrimentally relied on any such representation. Accordingly, the Board concluded that the school principal did not act with ostensible authority when he filed the lawsuit against the union leaders.

Finally, the Board considered the question of whether the school employer had "condoned or ratified the filing of the lawsuit" thereby incurring liability even though the school principal was not acting as an agent at the time he filed the lawsuit. Again, the Board found the evidence insufficient to establish that the school employer was responsible for the principal's action. The Board concluded that the union had failed to prove that the school employer had knowledge that the school principal had filed the lawsuit. Absent knowledge, the Board concluded, the school employer's silence about the filing of the lawsuit could not be interpreted as ratification. "Since we do not find that the Association proved that the District . . . had any knowledge of the filing of the lawsuit, we do not find that any duty arose on the part of the District to disavow the lawsuit," the Board concluded.

As a principal, Mr. Collins was an actual agent of the District. Authority to manage the Mueller Charter School came with the job title. I believe it clear that under National Labor

Relations Board (NLRB) case law the District would be held responsible for the acts of Mr. Collins. The NLRB does not apply strict principles of agency and will hold an employer liable regardless of whether a supervisor's conduct is authorized or ratified.[15]

But I conclude that even under the stricter PERB interpretation of agency law the District bears responsibility for the acts of Mr. Collins. The District clearly was placed on notice that something was going on at Mueller when it received the letter of December 15, 1999, from teachers at Mueller complaining about a hostile work place. The letter specifically warned about the principal pressing teachers to be on his side during campus votes and calling teachers into his office to question them about who is voting on his side and who is not. In addition to this warning, Mr. Werlin acknowledges that prior to the election he had heard that "Mr. Collins was talking to people about the election and it made some of them feel uncomfortable."

In response to this information, Mr. Werlin met with Mr. Collins and advised him that it was the District's view that teachers should feel that they could vote as they wished and not be pressured. Mr. Werlin also returned to the campus to give a second speech to teachers, assuring them of their right to vote their conscience only minutes prior to the election. But there is no evidence that once alerted to possible coercive actions by Mr. Collins that any District administrator undertook a comprehensive investigation of the accusations. Nor in his pre-election speech to Mueller teachers did Mr. Werlin specifically repudiate any of the actions attributed to Mr. Collins.

The threats made by Mr. Collins were quite extraordinary in their gravity. Although at the time of his pre-election speech Mr. Werlin did not know about the specific threats made to

[15] See discussion of NLRB case law in opinion of PERB Chairperson Gluck in Antelope Valley Community College District (1979) PERB Decision No. 97.

Ms. Neill, he had been tipped off to similar allegations by the teacher letter of December 15, 1999. He also had "heard allegations that Mr. Collins was talking to people about the election and it made some of them feel uncomfortable." While Mr. Werlin's comments to teachers were certainly appropriate, given the severity of the threats, they did not go far enough. "[A]n honestly given retraction can erase the effects of a prior coercive statement." (Inglewood Unified School District (1987) PERB Decision No. 624; see also, Long Beach Community College District (1998) PERB Decision No. 1278.) Here, however, Mr. Werlin made general statements that did not acknowledge any specific threats or even that Mr. Collins had made threats. A simple management reiteration of protected rights was not sufficient to attenuate the harsh threats made by Mr. Collins. In order to be effective in a representation context, the employer's retraction must repudiate the offending supervisor as a spokesperson for the employer. (NLRB v. Crown Laundry & Dry Cleaners, Inc. (1971) 437 F.2d 290 [76 LRRM 2336, 2338].)

Failure to repudiate the offending supervisor as a spokesperson creates the situation that faced Ms. Neill. While welcoming the remarks of Mr. Werlin, she initially was inhibited from complaining to him because she

> . . . didn't know if they were good friends or how it worked and if I would end up losing my job because I was a little nobody and had only worked a few years and Bill had worked so many . . . .

Absent a clear repudiation of the ability of an offending supervisor to speak for the employer, an employee cannot rely on management's assertions of employee rights.

I conclude that the District had sufficient knowledge of Mr. Collins' coercive activities to alert it of the need to conduct a thorough investigation. The District's failure to conduct an investigation and its failure to specifically disavow Mr. Collins as a spokesperson for the District, left employees in the situation of believing that Mr. Collins' apparent authority was

actual. Accordingly, I find that Mr. Collins was an agent of the District and threats made by him are chargeable to the District.

This is not an unreasonable result. When an employer places a manager in charge of a workplace and vests the manager with authority, the employer bears responsibility for the conduct of the person to whom it has granted authority over others. Were this not so, employers would have an easy escape from charges of unfair practice. Presumably, no supervisor is authorized to commit an unfair practice. An employer could escape all responsibility for acts of managers simply by pleading after the fact that its agent acted outside the scope of authority when the agent committed an unfair practice. Such an approach would make statutory protections very hollow shields indeed.

I conclude, therefore, that the District interfered with employee rights when it did not take adequate actions to nullify the unlawful conduct of Mueller Charter School Principal Collins. The District's failure to act resulted in uncorrected interference with employee rights at the Mueller Charter School in violation of section 3543.5(a). Because the District's failure to remedy the behavior of Mr. Collins would have the natural effect of discouraging employees from participating in the activities of the Union, the District's failure to act also interfered with the ability of the Union to represent its members. When employees are intimidated not to participate in Union activities, the collective strength of the Union is weakened, thereby interfering with its ability to represent its members. For this reason, I find also that the District's failure to act also violated section 3543.5(b).

REMEDY

The PERB in section 3541.5(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 reinstatement

> of employees with or without back pay, as will effectuate the policies of this chapter.

The Union argues that the only appropriate remedy is an order directing a new election at Mueller Charter School to decide whether the school or the District should be the employer for the purpose of collective bargaining. The District argues that the issue is moot because employees had an opportunity subsequently to amend the charter subsequent to the vote of February 28, 2000, and made no change in the identity of the employer. The District argues further that a new vote would be inappropriate because no impact on the election was demonstrated. And the District argues finally that the District has no power to order the Mueller Charter School to conduct a new vote because the charter school is an independent entity not subject to instructions from the District.

I reject the District's argument that this case is moot. Employee rights were interfered with during a critical election. There has been no subsequent superceding action by the parties that changes this essential fact. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) That there were later amendments to the charter does not make what happened in February of 2000 moot. In February of 2000 it took a two-thirds majority to amend the charter so as to designate the Mueller Charter School the employer for purposes of collective bargaining. In the subsequent charter amendments, it would have taken a two-third's majority to amend the charter so as to designate the District as the employer for purposes of collective bargaining. Subsequent charter amendments plainly do not moot what happened in February of 2000.

The difficult question presented here is whether PERB can direct the District to conduct a new election at the Mueller Charter School on the question of which entity is the employer for purposes of collective bargaining. I do not find in the Charter Schools Act authority for the

District to order Mueller Charter School to conduct a new election. Obviously, if Mueller Charter School had been named as a party to this action, the PERB would have the power to direct the school to conduct a new election. With the Migden amendment, charter schools are subject to the provisions of the EERA.

However, as the District notes in its brief, the Union did not amend its charge or request that the complaint be amended to bring the Mueller Charter School into this case as a party. The Mueller Charter School is a separate employer from the District and a charge against the District is not a charge against the Mueller Charter School. PERB has held that only named charging parties are entitled to the benefit of a remedy. (California Union of Safety Employees (1993) PERB Decision No. 1029-S.) It logically follows that only named respondents can be required to carry out the orders in a PERB remedy. I know of no basis whereby PERB could order the Mueller Charter School to take an action when the school was never brought into this case and was not a participant in the hearing.[16]

According, I will confine the remedy to actions which the District alone can carry out. While the Mueller Charter School is an entity separate from the District, the District retains some authority over the school's administrators. The District demonstrated its authority when it transferred Mr. Collins to the District office and installed an interim principal once it learned of the complaints of Ms. Neill. The failure here is that the District did not investigate earlier reports of problems at the school and did not act sooner. Therefore, I will order the District to cease and desist from failing to promptly investigate allegations of interference at Mueller Charter School with employee participation in activities protected by section 3543. I also will

[16]Because of this conclusion, I find it unnecessary to consider the District's argument that the Union failed to show that Mr. Collins' actions had a probable impact on the election result.

order the District, upon determination of the existence of any activities at Mueller Charter School that interfere with section 3543 rights to promptly take steps to curtail such activities.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Chula Vista Unified School District (District) violated Government Code section 3543.5(a) and (b), provisions of the Educational Employment Relations Act (Act). The District violated the Act by failing to promptly investigate reports of interference by the Mueller Charter School principal in the right of employees to freely participate in an election that had the effect of determining whether or not they would continue to be represented by the Chula Vista Educators, CTA/NEA (Union). The District also violated the Act by failing to take corrective action against the principal prior to the election. The District's failure to act promptly resulted in interference with both employee and Union rights.

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

A. CEASE AND DESIST FROM:

1. Failing to promptly investigate reports of interference by the Mueller Charter School principal with the rights of employees to form, join and participate in the

activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. Failing to promptly take corrective action when it is determined that the principal of Mueller Charter School has engaged in conduct that interferes with the protected rights of employees or the Union.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge