

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 407,

Charging Party,

v.

DESERT COMMUNITY COLLEGE DISTRICT,

Respondent.

Case No. LA-CE-4715-E

PERB Decision No. 1921

August 10, 2007

Appearances: California School Employees Association by Christina C. Bleuler, Attorney, for California School Employees Association & its Chapter 407; Liebert Cassidy Whitmore by Steven M. Berliner and Jill W. Babington, Attorneys, for Desert Community College District.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Desert Community College District (District) to an administrative law judge's (ALJ) proposed decision. The ALJ held that the District violated the Educational Employment Relations Act (EERA)¹ when it directed California School Employees Association & its Chapter 407 (CSEA) to revise an agenda item for a union meeting entitled "COD (College of the Desert) Board of Trustees Election" and threatened employees with discipline or criminal prosecution for discussing the election or other political matters at the meeting. The ALJ held that this conduct interfered with protected employee rights and denied employee organization rights in violation of EERA section 3543.5(a) and (b). The ALJ further

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

held that Education Code section 7054 did not prohibit CSEA from discussing political matters at its regular meeting. Additionally, the ALJ found that the District's emails threatening employees with reprisals for engaging in political discussions at the CSEA meeting constituted unlawful threats of reprisal, although that violation was not alleged in the complaint. The ALJ thereupon ordered the District to cease and desist from interfering with employees' protected rights and from denying CSEA the right to use District facilities for the purpose of meetings concerned with the exercise of employees' protected rights, and ordered the District to post notice of the order.

The Board has reviewed the entire record in this matter, including but not limited to the complaint, the District's answer, the hearing transcript, the parties' post-hearing briefs, the ALJ's proposed decision, the District's statement of exceptions and supporting brief², and CSEA's response thereto. Based upon this review, the Board concurs with the ALJ's finding that the District violated EERA sections 3543.5(a) and (b), based on its own rationale.

STATEMENT OF FACTS

The pertinent portions of the ALJ's proposed decision are stated almost verbatim with minor changes in the following:

The facts are virtually undisputed.

The District is a public school employer within the meaning of EERA section 3540.1(k). CSEA is a recognized employee organization within the meaning of section 3540.1(1), representing a unit of approximately 180 classified District employees.

²The District requested oral argument in this matter. The Board has historically denied requests for oral argument where an adequate record has been prepared, and the parties had an ample opportunity to brief and did, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453; Monterey County Office of Education (1991) PERB Decision No. 913.) These criteria are met in this case. Thus, we deny the request for oral argument.

On September 22, 2003,³ CSEA placed in unit employee mailboxes a notice of an upcoming CSEA chapter membership meeting to be held at 3 p.m. on September 25 at the District's college campus.⁴ The notice contained an agenda which included the following item: "COD (College of the Desert) BOARD OF TRUSTEES ELECTIONS." David Bugay (Bugay), vice president, human resources and employee relations, also received a copy of the notice on September 22, and phoned Joyce Moore (Moore), CSEA chapter president. According to Bugay, he asked Moore for an explanation of the agenda item and whether CSEA would be endorsing any Board of Trustees candidates at the meeting. Moore responded that she did not think it appropriate for him to ask. According to Moore, she said they would not necessarily be discussing politics, but would just talk about when the election would be held, and Bugay insisted the agenda be changed. Moore also testified that Bugay "may" have said the police might be called to stop the meeting; Bugay emphatically denied mentioning the police. Comparing the conviction in Bugay's testimony with the lack of conviction in Moore's, I credit Bugay and find that he did not threaten to call the police.

Bugay then phoned Tim Taggart (Taggart), CSEA's labor representative, and asked if he was bringing a Board of Trustees candidate to the meeting. According to Bugay, Taggart responded that he might or might not, depending on how the agenda went. Bugay also testified that he asked Taggart for clarification of the agenda item in writing and Taggart responded that Bugay was making an information request which he should put in writing. Late in the day on September 23 Bugay sent the following e-mail to Taggart, Moore and other CSEA officers:

³All dates refer to the year 2003 unless otherwise specified.

⁴CSEA holds its monthly membership meetings in a room on the District's premises. The District does not charge a fee; it provides the appropriate air-conditioning and utilities. Pursuant to the parties' collective bargaining agreement, unit members may take paid release time to attend the meetings.

I am extremely concerned about the agenda for tomorrow's meeting (the e-mail would probably not be read until September 24) and must insist that it be revised immediately. There is an item entitled 'COD Board of Trustees Election' that is a clear violation of the Education Code 7050 through 7054.^{5]}

We have had this discussion extensively in December 2002 and January 2003 when it was made clear that the College of the Desert will not allow any political activity of any kind to take place on the campus. This was again discussed when there was an upgrade on the computer the College provided CSEA that the computer, any College equipment, telephones, or electricity or the use of the office provided to CSEA would not be used for any political activity. There is no circumstance when political activity should take place utilizing any College facilities, the use of College time, or the use of College equipment by CSEA. The computers, the telephones, the room, and the

⁵California Education Code section 7050 states in relevant part: "(T)he Legislature finds that political activities of school employees are of significant statewide concern." Thus, section 7054 provides as follows:

"(a) No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district." (Emphasis supplied.)

Section 7054(c) makes a violation of the section a misdemeanor or felony punishable by imprisonment or fine or both.

Further, section 7055 provides that:

(T)he governing body of each local agency may establish rules and regulations on the following:

- (a) Officers and employees engaging in political activity during working hours.
- (b) Political activities on the premises of the local agency.

However, section 7052 states in part: "(E)xcept as otherwise provided in this article. . . . no restriction shall be placed on the political activities of any officer or employee of a local agency. . . ."

electricity that the College provides may not be used for this.

Please revise the Agenda for this meeting immediately, redistribute it to the CSEA Group, and provide a copy of the revised agenda to this office. Failure to do so will be a clear violation of law. (Emphasis in original.)

Taggart responded on September 24, citing relevant statutory and case law, noting that the meetings are open only to unit members who are on release time and therefore not on work time, and concluding that CSEA was permitted to use District facilities for its meetings and could lawfully discuss "any and all topic(s) that are relevant to it(s) MISSION and goals, including political issues and candidates." (Emphasis in original.) Taggart contacted Moore and assured her that unit members had the legal right to discuss, in a private meeting, matters affecting their working conditions, and advised her not to change the agenda.

Notwithstanding Taggart's assurances, CSEA officers testified that after receiving Bugay's e-mails, they were fearful that if they attended the September 25 meeting they might be arrested or risk losing their jobs; they testified that some unit members told them they would not attend because of that fear. Mary Lisi, unit member and CSEA treasurer, testified that before work on the morning of September 24, supervisor Bima Isaac (Isaac) said to an informal gathering of employees, "(Y)ou better be careful, this is against the law, you could be fired or lose your job."⁶

At 1:00 p.m. on September 25, just hours before the chapter meeting was to begin, Bugay sent another e-mail to Taggart and CSEA officers, with copies to unit employees and

⁶Isaac did not testify at the hearing. The District contends that even if she made such a remark, she had no authority to do so, and that neither Bugay nor anyone else in the District knew she had made such a remark or condoned it.

supervisors, the District president's cabinet, division deans, and other confidential and support staff, stating:

I must again reiterate my extreme concern regarding the placement of an item that is a clear violation of the State of California law on the agenda for the CSEA meeting for September 25, 2003. This item, entitled 'COD Board of Trustees Election,' has all of the appearances of violating Education Code 7054 and 7051.

Education Code

7054. (a) No school district or community college district funds, ser (remainder blank)

(c) A violation of this section shall be a misdemeanor or felony

7051. This article applies to all officers and employees of a local agency.

'Local agency' means a county superintendent of schools, an elementary, high, or unified school district, or a community college district.

When I previously asked that this item be removed from the agenda there was discussion that this would be informational but the written response was that this is a right that CSEA had that supercedes the law.

This is a surprise change in the philosophy of CSEA. In January of this year CSEA threatened to take the College of the Desert to PERB (Public Employment Relations Board) if the District did not enforce Education Code 7054.

I will state the College's position simply: The College of the Desert is required to follow the law even if there are those who do not desire to or wish the law did not exist. Political activities urging support or defeat of a candidate or ballot measure using College facilities during College time by employees of the College is against the law. This can all be avoided if the agenda item is changed, as we discussed, to reflect the initial claim that this item is informational regarding the dates of the elections. Alternatively, we ask that CSEA provide us written assurance that they will comply with the letter and spirit of Education Code 7054 and Collective Bargaining Agreement Article 3.1.^[7]

⁷Article 3.1 gives CSEA representatives the right to reasonable use of District facilities.

Of course, if we later find out that some individual did not comply with the law, those individuals will be subject to disciplinary action and possible criminal prosecution pursuant to Education Code Section 7054(c).

The classified bargaining unit is copied here solely so that it may understand that there is a need for accountability for violation of the law. All the college would like here is for CSEA to follow the law so we can all - get along.
(Emphasis added.)

The CSEA meeting went forward without a change in the agenda. However, one CSEA officer stationed himself at the back of the room and kept an eye on the door in case police arrived. Approximately 27 members and officers attended, fewer than the 35 or more who usually attend the first meeting after summer break. . . . The police were not called to the meeting, and no attendee was arrested or punished for attending.

CSEA contends that it has the legal right to discuss political matters in general on campus. Moore testified that the California Teachers Association, which represents the District's teaching staff, holds its meetings on campus, discusses political issues including Board of Trustees elections, and has never been told by the District to refrain from doing that.

District Defenses

The District defends its conduct on the basis that Education Code section 7054 prohibits the District from letting a meeting room on its property be used for political activity. According to Bugay, he never got any clear answer as to whether the endorsement of school board candidates, or any discussion beyond a general description of the school board election, would take place at the September 25 meeting. Thus, he had no assurances that the Education Code would not be violated. As noted above, Bugay denies having threatened to call the police or having condoned any such threat by supervisor Isaac, and the District argues that if employees were spreading such rumors, they were creating a climate of fear for which they

themselves were responsible. The District notes that the September 25 meeting went forward with almost the usual numbers in attendance and without incident. . . .

There is no evidence that the District had any (formal) policy or regulation concerning political activities.

DISCUSSION

The issue in this case is whether the District vice principal's emails seeking to remove an item referencing an upcoming Board of Trustees election from an agenda for a members-only union meeting to be held at the college premises constituted unlawful interference with the protected rights of the employees and the employee organization. In its exceptions to the proposed decision, the District alleges that the ALJ erred: (1) by finding that the item on the CSEA meeting agenda entitled "COD Board of Trustees Election" qualified as protected activity under EERA, and (2) by concluding that the prohibition under Education Code section 7054 against the use of "school district funds, services, supplies, or equipment" for the purpose of urging the support or defeat of any ballot measure or candidate did not apply to this case.

In reviewing exceptions to an ALJ's proposed decision, the Board reviews the record de novo, and is free to draw its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a.) The Board ordinarily gives deference to an ALJ's credibility determinations based upon considerations such as witness demeanor and appearance. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

The test for whether a respondent has interfered with the rights of employees under Section 3543.5(a) of EERA is as follows. 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. Once the charging party has established a

prima facie case, the burden shifts to the employer to prove that its action(s) would have been the same despite the protected activity. Novato Unified School District (1982) PERB Decision No. 210 (Novato.) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interests of the employer and the rights of the employees will be balanced and the charge resolved accordingly. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. A charge of interference does not require that unlawful motive be established; it requires only that at least slight harm to employee rights results from the conduct. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); Novato.) In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

EERA Rights Affected by the District's Emails

Union meetings on community college district property are protected under EERA sections 3543⁸ and 3543.1: Section 3543.1(b) expressly provides that employee organizations "shall have . . . the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by this chapter." In Compton

⁸Section 3543(a) of EERA provides that "(p)ublic school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

⁹Section 3543.1 (a) of EERA provides, in part, that "[e]mployee organizations shall have the right to represent their members in their employment relations with public school employers."

Unified School District (2003) PERB Decision No. 1518, the Board held that an employee's attendance at a union meeting is a protected activity. The District does not dispute the fact that CSEA was entitled to hold a meeting on District property to discuss matters of employment relations.

The District alleges, however, that employees do not have a protected right under EERA to urge the support or defeat of Board of Trustees candidates at a union meeting on school premises. It argues that EERA only protects activities within the "scope of representation," which is defined in EERA section 3543.2(a) to include "matters relating to wages, hours of employment, and other terms and conditions of employment."

The Board has held that "school employer regulation under section 3543.1(b) should be narrowly drawn to cover the time, place and manner of the activity, without impinging on content unless it presents a substantial threat to school operations." (Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 (Richmond/Simi Valley), see also, San Ramon Valley Unified School District (1982) PERB Decision No. 254 (San Ramon Valley)). In Richmond/Simi Valley, the Board held that the school districts' rules prohibiting the distribution of certain types of materials through the schools' internal mail systems unlawfully interfered with the employee organizations' access rights under EERA section 3543.1(b), by impermissibly restricting the content of employee organizations' speech. (Richmond/Simi Valley, at p. 19.) The Board has thus substantially limited an employer's ability to censor or impose prior restraints upon the content of union communications.¹⁰

Applying the Richmond/Simi Valley test, the record in this case contains no evidence that the

¹⁰As discussed below, however, Education Code section 7054 imposes certain limitations on the use of District "funds, services, supplies or equipment," which do not apply in this case.

inclusion of an item entitled "COD Board of Trustees Election" on the CSEA meeting agenda would present a substantial threat to school operations.¹¹ Therefore, under Richmond/Simi Valley, the District violated Section 3543.1(b) when it attempted to restrict the content of the union meeting agenda.

The District contends that the right of access under Section 3543.1(b) is limited to purposes concerning employer-employee relations. We agree.¹² However, the requirement was met in this case. The meeting was scheduled by CSEA to discuss other matters which indisputably were related to employer-employee relations. Furthermore, there is no evidence that the disputed agenda item entitled "COD Board of Trustees Election" did not concern employer-employee relations. Therefore, the CSEA meeting and its agenda were protected under Section 3543.1(b).

¹¹The Richmond/Simi Valley decision also states that proscription of speech should be permitted in cases of "actual malice or reckless disregard for truth." (At p. 27.) This condition does not apply here.

¹²The rights guaranteed by EERA include the employees' right "to form, join, and participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations" (Sec. 3543(a)), and to present grievances to the employer (Sec. 3543(b)); as well as the employee organizations' right "to represent their members in their employment relations with public school employers" (Sec. 3543.1 (a)). Under the quoted language, EERA protects activities of employees and employee organizations that have to do with employer-employee relations.

Neither Richmond/Simi Valley nor San Ramon Valley should be read to provide blanket protection under EERA for all "political" speech. Although the Board in Richmond/Simi Valley generally stated that school employees and employee organizations have a right to communicate at the worksite about "matters of more general political, social or economic concern to employees," the communications at issue in Richmond/Simi Valley concerned employer-employee relations. Richmond involved a union newsletter that slightly mis-stated the raise received by non-management employees, while Simi Valley involved a flyer pertaining to the union's proposal for binding arbitration. In San Ramon Valley, the Board found that the district had violated EERA by refusing to distribute through the internal mail system a union newspaper containing an advertisement related to a statewide ballot measure, because the former version of Education Code section 7054 applied to "any school measure of the district," and a statewide measure did not fall within that category. Therefore, we do not believe that all political speech is necessarily protected under EERA.

Harm to Protected Rights

The District's actions tended to or did result in some harm to protected employee rights. By telephoning and emailing CSEA to seek revision of the agenda item, and implying in an email that discussing the board of trustees election during the union meeting could subject employees to disciplinary action and possible criminal prosecution pursuant to Education Code section 7054(c), the District created a chilling effect on the exercise of protected rights. The record indicates that as a consequence of the District's pre-emptive measures in restricting the agenda of the union meeting, certain union members who otherwise would have attended the union meeting felt intimidated against attending the after-hours union meeting. Additionally, the record includes evidence that as a result of the emails, certain members who attended the meeting limited their own discussions of the Board of Trustees election.

Under the interference test in Carlsbad and Novato, we find that the harm to employees' rights was slight, but that the District has not demonstrated any operational necessity for its actions. As discussed in the next section, Education Code section 7054 did not justify the District's actions. Therefore, we find that the District impermissibly interfered with the employees' and CSEA's rights under EERA section 3543.5(a) and (b).

Whether Education Code Section 7054 Prohibits Discussion of Agenda Item at Union Meeting on Community College Property

The District alleged as an affirmative defense that its actions were compelled by Education Code section 7050 et seq.¹³ We find, however, that the prohibition under Education

¹³We note that: "While PERB has no jurisdiction to enforce provisions of the Education Code, it has jurisdiction to interpret the Education Code as necessary to carry out its duty to administer EERA." (Whisman Elementary School District (1991) PERB Decision No. 868, citing San Bernardino City Unified School District (1989) PERB Decision No. 723.)

Code section 7054 against the use of "community college district funds, services, supplies, or equipment" for the purpose of urging support or defeat of a ballot measure or candidate, does not apply to the facts in this case.

Education Code section 7054(a) provides as follows:

No school district or community college district funds, services, supplies or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.

Education Code section 7054 prohibits only the use of District "funds, services, supplies, or equipment" for the purpose of urging the support or defeat of any ballot measure or candidate. These four terms, however, do not include community college "premises" or "property."

In contrast, the Legislature authorized community college districts to regulate political activities on college premises under Education Code section 7055. That section provides that local agencies may establish rules regarding "(p)olitical activities on the premises of the local agency." (Emphasis added.) In this case, however, the record indicates that the District had not established an applicable rule under Section 7055.

This holding is consistent with California Teachers Association v. Governing Board of San Diego Unified School District (1996) 45 CaLApp.4th 1383 (53 Cal.Rptr.2d 474), in which the appellate court held that the school's ban on political advocacy could not be enforced in non-instructional settings because "school employees have the right to express to each other their respective political viewpoints on school property." (Id., at p. 1392.) That case held that, under Education Code section 7055, the school district could prohibit teachers from wearing political buttons in the classroom, but not in non-instructional settings.

In sum, because Education Code Section 7054 does not include the terms "premises" or "property," we find that Section 7054 did not apply to discussions during the meeting. The incidental use of the District's electricity and janitorial services during the meeting was insufficient to bring the discussions within the scope of Section 7054.

The District cited San Diego Community College District (2001) PERB Decision No. 1467, in which the Board held that Education Code section 7054 prohibited the use of the college mail system and photocopying services for the distribution of "political,"¹⁴ flyers. The use of District premises in this case is distinguishable because the term "premises" is not one of the items specifically enumerated in Section 7054.

For these reasons, the Board finds that Education Code section 7054 did not give the District the right to impose a prior restraint upon CSEA's discussions at its meeting.

Conclusion

Accordingly, the Board affirms the ALJ's holding that the District unlawfully interfered with protected employee rights and denied employee organization rights under EERA section 3543.5(a) and (b). Additionally, the Board affirms the ALJ's finding that the District's emails implying that disciplinary action or criminal prosecution would result from discussing the Board of Trustees election at the CSEA meeting constituted unlawful threats of reprisal.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the Desert Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

¹⁴In that case, "political materials" were defined as "materials 'urging the defeat or support of any ballot measure or candidate.'",

Pursuant to EERA section 3541.5(c), and Public Employment Relations Board (PERB) Regulation 32325 (Cal. Code Regs., tit. 8, sec. 31001, et seq.), it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employees' protected rights by directing California School Employees Association & its Chapter 407 (CSEA) to revise the agenda items of its membership meetings regarding discussion of school board elections;

2. Interfering with employees' protected rights by threatening them with discipline or criminal prosecution for discussing school board elections at CSEA membership meetings;

3. Denying CSEA the right to use District facilities for the purpose of meetings concerned with the exercise of employees' protected rights.

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 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 General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General

Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Chairman Duncan and Member McKeag joined in this Decision.

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



After a hearing in Unfair Practice Case No. LA-CE-4715-E, California School Employees Association & its Chapter 407 v. Desert Community College District in which all parties had the right to participate, it has been found that the Desert Community College District (District) violated the Educational Employment Relations Act, Government Code section 3543.5(a) and (b) by directing that California School Employees Association and its Chapter 407 (CSEA) delete from its membership meeting agenda an item entitled "COD Board of Trustees Elections" and by threatening employees with discipline or criminal prosecution for discussing the election or other political matters at the meeting.

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

A. CEASE AND DESIST FROM:

1. Interfering with employees' protected rights by directing CSEA to revise the agenda items of its membership meetings regarding discussion of school board elections;
2. Interfering with employees' protected rights by threatening them with discipline or criminal prosecution for discussing school board elections at CSEA membership meetings;
3. Denying CSEA the right to use District facilities for the purpose of meetings concerned with the exercise of employees' protected rights.

Dated: _____

DESERT COMMUNITY COLLEGE 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.