DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

OCEANSIDE-CARLSBAD FEDERATION OF TEACHERS, LOCAL 1344, CFT/AFT,	)	CASE NO. LA-CE-61
Charging Party,	)	PERB Decision No. 89
v.	)	
CARLSBAD UNIFIED SCHOOL DISTRICT,	)	January 30, 1979
Respondent.	)	

Appearances: Anne Fragasso, Attorney, California Federation of Teachers, for Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT; Arlene Prater, Deputy County Counsel, County of San Diego, for Carlsbad Unified School District.

Before Gluck, Chairperson; Cossack Twohey and Gonzales, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions to the attached hearing officer recommended decision. The hearing officer found that the Carlsbad Unified School District (hereafter District) violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (hereafter EERA)[1] when it

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[1]Sections 3543.5(a) and (b) of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.) states:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

transferred certain members/supporters of the Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT (hereafter O-CFT) from Carlsbad High School to Valley Junior High School. He also found that the charge was barred neither by the statute of limitations provision of the EERA nor by a requirement that the charging party exhaust the District's grievance procedure.[2] The District voices four exceptions to the proposed decisions:

> employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

Hereafter all references are to the Government Code unless otherwise indicated.

[2]Section 3541.5(a) states:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
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> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge;
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the

(1) Under San Dieguito Unified School District (9/2/77) EERB Decision No. 22, the applicable Board precedent, affirmative proof of discriminatory intent is required to establish a violation of section 3543.5(a), and the record failed to establish such intent;

(2) The transfers did not interfere with the rights of Bongiorni, Gill, Giordano and Schurch;

(3) No violation of section 3543.5(b) has been proven;

(4) The charge is barred by the six-month statute of limitations period for filing unfair practice charges.

The hearing officer's findings of fact are supported by the record, and are hereby adopted by the Board.

> grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery. (Emphasis added.)

DISCUSSION

The Question of Intent

The District's chief argument is that San Dieguito Unified School District, supra, requires that intent be proven affirmatively in all cases involving alleged violations of section 3543.5(a), and that no such proof was made by the charging party in this case.

San Dieguito concerned a charge filed by the San Dieguito Faculty Association against San Dieguito Unified High School District alleging that the District violated sections 3543.5(a), (b) and (d) of the EERA by unilaterally rescinding and revising certain personnel policies in June and August of 1976. In analyzing section 3543.5(a), the majority of the Board in San Dieguito stated:

> Government Code Section 3543.5(a) combines the language of National Labor Relations Act Sections 8(a)(1) and 8(a)(3).[3] ...
>
> Unlike section 8(a)(1) of the NLRA, Government Code Section 3543.5(a) seems to make motive or purpose a requirement for a violation. The pertinent part of Government Code Section 3543.5(a) reads: "It shall be unlawful for a public school employer to:

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[3]NLRA sections 8(a)(1) and 8(a)(3) state:

> (a) It shall be an unfair labor practice for an employer--
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> .....
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ....

> (a) ... interfere with, restrain or coerce employees because of [Emphasis in original.] their exercise of rights guaranteed by this chapter. ... Interference "because of" is quite different from mere "interference in." "Because of" connotes purposeful or intentional behavior; "interference in" connotes interference with or without an unlawful intent. [Footnotes omitted.] [Emphasis added.]

Due to this language, San Dieguito has been read to have held that an unlawful motive must be proven in every case where a violation of section 3543.5(a) has been alleged. To the extent that San Dieguito so held, it is hereby overruled.

San Dieguito gave unnecessary significance to the difference in the language between section 3543.5(a) and Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[4] Specifically, it advanced the theory that the term "because of," found in the EERA, as distinguished from the phrase "interference in," found in the NLRA, implied purposeful conduct or motivation and therefore necessitated proof of unlawful intent.

Perhaps, too, there is implicit in the San Dieguito rationale, the belief that because the EERA embraces in a single section, 3543.5(a), the various prohibitions found separately in 8(a)(1) and 8(a)(3), a single test should be applicable to all allegations of unlawful conduct; and that unlawful purpose or motivation would therefore be a common requirement.

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[4]29 U.S.C. sec. 151 et seq.

In Los Angeles Unified School District (11/24/76) EERB Decision No. 5, the Board indicated that while it was not bound by NLRB decisions, it would take cognizance of them where appropriate.

> Where provisions of California and federal labor legislation are parallel, the California courts have sanctioned the use of federal statutes and decisions arising thereunder, to aid in interpreting the identical or analogous California legislation.

But it is implicit in the cases cited that PERB does not believe that federal law is the invariable exegesis of the EERA.

The NLRA was designed for labor relations in the private sector. PERB will remain open to the possibility that there may be inherent and necessary distinctions to be drawn for public employment relations in California. Furthermore, the persuasiveness of federal ajudication is mitigated, if not defeated, by specific distinctions between the language of the respective statutes.

Intent Under The NLRA

Generally, with respect to "intent," the NLRB and federal courts have drawn a distinction between sections 8(a)(1) and 8(a)(3). While unlawful intent appears not to be a necessary element of an interference charge under 8(a)(1),[5] it has generally been held to be a necessary ingredient in finding a

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[5]Gorman, Basic Text on Labor Law (West 1976) p. 132 et seq.

violation of section 8(a)(3)[6]. The reason for this distinction lies in the language of that latter section. There, discrimination must be for the specific purpose of encouraging or discouraging membership in a labor organization.[7] Indeed, discrimination for any other purpose - whether lawful or unlawful - is not discrimination within the meaning of section 8(a)(3) and may not serve as a basis for sustaining a charge under that section.[8]

It appears that it is the specificity of purpose, rather than the phrase "interference in," that distinguishes the two NLRA sections with respect to the need to prove unlawful motivation. No such specificity is to be found in section 3543.5(a).

To the contrary, the EERA established for employees, a variety of rights, including the right to join and participate in the activities of employees organizations of their own choosing.[9] These rights are vested without patent condition. PERB finds no reason to conclude that the

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[6]Gorman, Basic Text on Labor Law (West 1976) supra, p. 137.

[7]NLRA section 8(a)(3) ante, fn. 3.

[8]Radio Officers' Union v. NLRB (1954) 347 U.S. 17 [33 LRRM 2417].

[9]Gov. Code sec. 3540 states in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school

protection of these rights is invariably dependent upon an affirmative finding of intentional infringement.

The "because of" language should not be so narrowly read as to preclude one whose rights have been damaged from seeking redress unless intentional harm can be demonstrated. PERB understands that brief phrase to mean only that some nexus must exist between the exercise of employee rights under the EERA and the actions of the employer which have provoked the filing of an unfair practice charge.

This interpretation of 3543.5(a) does not mean, however, that intent need never be proven in order to sustain a charge. The test will be in the nature of the charge and of the response. However, preliminary to establishing that test, the question to be resolved is whether the NLRB bifurcated model is to be followed, or whether a single test is more appropriate when considering the variety of charges that may be brought under section 3543.5(a).

As already indicated, the Legislature does not seem to have attached "conditions" to the exercise of rights granted to school employees. Furthermore, the statute lacks any specific "management rights" clause. Yet, it is unarguable that the

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> employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy ....

Legislature did not intend to deny to employers the opportunity to fulfill the mission of the public agency.

A school district does not operate in a functional vacuum. State legislation imposes on school districts specific mandates.[10] Compliance with these mandates, in turn, imposes on the district management certain obligatory duties and responsibilities. It is in recognition of this fact, at the very least, that one is inescapably drawn to the conclusion that inherent managerial interests coexist with those rights vested by statute in the district's employees.

What, however, if these come into conflict? Are the employer's needs to be sacrificed? Must the employees' rights give way unless unlawful intent underlies the employer's assertion of its managerial interests? We think the answer to both questions is in the negative.

Rather, PERB finds a relatively uncomplicated, single test is both useful and consonant with the legislative scheme which placed the various forms of prohibited conduct in a single section of the EERA. Essentially, competing interests of the parties should be placed in balance and the matter resolved accordingly. This concept eliminates both the need for separate levels of proof for interference and discrimination or

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[10]For example, Ed.Code sec. 37020 - 37022 requires school districts to maintain various levels of schools, Ed Code sec. 51041 requires district evaluation of its educational program, Ed Code sec. 51050 requires enforcement of appropriate courses of study, Ed.Code sec. 51215 requires adoption of standards of proficiency in basic skills. Ed.Code sec. 41420 requires districts to provide a minimum of 175 days per school year in order to receive ADA funding.

attribution to the word "discrimination" a definition unique to section 8(a)(3) of the NLRA and absent in the EERA.

Under this approach, the matter of unlawful intent remains significant where it is affirmatively proven by the charging party or where the employer claims of justification for its conduct.

The Test

To assist the parties and hearing officers in this and future cases, PERB finds it advisable to establish comprehensive guidelines for the disposition of charges alleging violations of section 3543.5(a):

1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;

2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by

circumstances beyond the employer's control and that no alternative course of action was available;

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

Proof Of Unlawful Intent Where Offered Or Required

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.[11]

The Case Before The Board

Here, the gravaman of the charge is discriminatory conduct directed against Gill, Bongiorni, Schurch and Giordano. The hearing officer found that the total evidence produced with respect to Bongiorni and Gill failed to support the District's argument of business justification and supported a finding of intent to discriminate. These findings and conclusions are sustained.

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[11]Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]; see also Radio Officers' Union v. NLRB (1954) 347 U.S. 17 [33 LRRM 2417].

The Schurch Transfer. Schurch had a long history of O-CFT activism. He had been a member of that organization for ten years. In 1964 he had participated in an attempted work stoppage. In 1969 and 1970 he had served as O-CFT president. Considering his background it would be logical to expect that Schurch, upon his return to Carlsbad High School, would fill the organizing vacuum created by the District's transfer of Bongiorni and Gill.

Furthermore, the Board cannot conclude that Schurch's transfer was only coincidental and based on legitimate operational need. He had taught psychology, sociology and anthropology at the high school for nine years. All of his teaching experience had been at the high school level, including the three years he had taught abroad. His transfer, ostensibly to accomplish enhanced educational objectives, was to Valley Junior High School to teach history and geography, courses in which he had had no previous experience.

The hearing officer found that similarly idiosyncratic reassignments for Bongiorni and Gill supported the conclusion that their transfers were "not based on educational considerations, but because of their organizing efforts on behalf of (O-CFT)." He also found that it "was reasonable to infer that Schurch would resume an 'activist posture' upon return from his sabbatical leave."

Schurch's transfer, under these circumstances, is comparable to the instance where an employer formulates and implements a discriminatory hiring policy designed to prevent

the introduction into the work facility of known union sympathizers or activists.[12]

Beyond the question of Schurch's rights, however, lies the matter of the effect of the District's actions on other O-CFT supporters. In the Board's opinion, considering Schurch's long-standing known identification as an O-CFT "activist," his transfer, even before his actual return to Carlsbad High School, together with those of Bongiorni and Gill, would have the natural and probable consequence of causing other employees reasonably to fear that similar action would be taken against them if they engaged in organizing for O-CFT. This chilling effect on the exercise of the employees' right of self-organization was unlawful interference within the meaning of section 3543.5(a).

For these reasons the Board finds that the District violated section 3543.5(a) by its transfer of employee Schurch.

Giordano: The Board, however, agrees with the District that Giordano's transfer was not proven to be related to the exercise of EERA rights. The only evidence made available to the hearing officer was that Giordano was a member of O-CFT. It cannot be concluded from this single fact that Giordano was engaged in organizing or intended to be so engaged at any future date. Further, there is neither evidence nor a claim that the District violated or intended to violate the rights of

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[12]Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 [8 LRRM 439].

teachers simply because they were O-CFT members. For these reasons the Board concludes that the transfer of Giordano did not violate section 3543.5(a).

Other District Positions

The District also argues that the right to organize does not extend "to being in the most beneficial position" for that activity and that the charging party was not precluded from organizing in the new locations to which they were tranferred. In a related argument, the District claims that the consequence of the hearing officer's proposed decision would be to "immunize" employees against "virtually any directions of the employer." Each of these arguments misses the point and is found to be without merit.

The District provides no authority for its position that the six-month period for filing a charge started with the issuance of the transfer notices. Its reasoning seems to be that since the employees had no choice in the matter of their transfers, it was the decision to transfer them that had to serve as the basis of the charge. If there was interference, the argument continues, it occurred at the time that decision was made. We do not agree with this reasoning. The charge is predicated on the physical relocation of the charging parties from an area in which they were effectively organizing for O-CFT to areas where their efforts were likely to be ineffective. While it may have been possible for O-CFT to have filed a charge at the time the decision to transfer the

employees was announced, it was not precluded from doing so when those transfers actually became effective. The interference with the employees' rights did not start and end with the announcement. It existed at the time the transfers actually occurred and persisted thereafter. The District's conduct constituted a continuing violation of section 3543.5(a) [See Swift Service Doors Inc. (1969) 169 NLRB 359 (67 LRRM 1181)]. We therefore sustain the hearing officer's finding that the charge was timely filed.

Section 3543.5(b)

The Board declines to uphold the hearing officer's conclusion that O-CFT's rights under 3543.5(b) were violated by the District's actions. The rights of employees were interfered with by the District's actions. However, an interference with employee rights does not of necessity constitute a denial of the rights of employee organizations. See San Francisco Unified School District (10/3/78) PERB Decision No. 75. There is no evidence that the District denied to O-CFT any right guaranteed to it by the EERA. The alleged violation of section 3543.5(b) therefore is dismissed.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the Carlsbad Unified School District and its representatives shall:

(1) Cease and desist from discriminating against employees by transferring them because of their exercise of their right to join or not join an employee organization, to participate in the activities of an employee organization or to engage in organizing activities on behalf of an employee organization.

(2) Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

(a) Offer Harry Bongiorni, Mary Anne Gill and Harry Schurch full, immediate reinstatement to their former or equivalent positions at Carlsbad High School, without prejudice to their seniority or other rights and privileges.

(b) Post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive days from receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, within 20 days from the date of this Decision, of what steps the District has taken to comply herewith.

It is further ordered that the alleged violation of Section 3543.5(b), and so much of the charge that alleges a violation of the rights of Art Giordano, are hereby dismissed.

This order shall become effective immediately upon service of a true copy thereof on the Carlsbad Unified School District.

By: Harry Gluck, Chairperson

Jerilou Cossack Twohey, Member

Concurring opinion of Board Member Dr. Raymond J. Gonzales begins on page 19.

APPENDIX

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

After a hearing in which all parties had the right to participate, it has been found that the Carlsbad Unified School District violated the Educational Employment Relations Act by discriminatorily transferring employees because of their exercise of rights guaranteed by the EERA, thereby interfering with the right of employees to organize for the Oceanside-Carlsbad Federation of Teachers. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

Cease and desist from discriminating against employees by transferring them because of their exercise of their right to join or not join an employee organization, to participate in the activities of an employee organization or to engage in organizing activities on behalf of an employee organization.

WE WILL offer to Harry Bongiorni, Mary Ann Gill and Harry Schurch immediate reinstatement to their former or equivalent positions at Carlsbad High School, without prejudice to their seniority or other rights and privileges.

OCEANSIDE-CARLSBAD UNIFIED SCHOOL DISTRICT

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By: Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Raymond J. Gonzales, Member, concurring:

I concur in the result reached in this case. I differ with the majority on the test to be applied in section 3543.5(a) cases.

I agree with the majority's finding that a single test is appropriate. However, I think the statute requires that the employer's intent play an integral part in determining when section 3543.5(a) has been violated.

The Legislature chose very specific language in writing this section. It did not follow the NLRA and most other state statutes[1] which contain two related unfair practice provisions: one prohibiting interference, restraint, or coercion in the exericse of employee rights, and one prohibiting employment discrimination to encourage or discourage labor organization membership. Instead, the Legislature adopted one section which did the following: (1) It added prohibitions against imposing or threatening to impose reprisals on and discriminating or threatening to discriminate against employees to prohibitions against interference with, restraint or coercion of employees; and (2) it added the requirement that the employer's conduct be "because of" employees' exercise of protected rights.

Because the Legislature did not follow a commonly accepted statutory model, I believe that we must examine the language of

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[1]See, e.g., Alaska Stats., §23.40.110(a)(1)(3); Florida Stats., §447.501(a),(b); Indiana Code, tit. 20, art. 7.5 §7(a)(1)(3); Maine Rev. Stats., tit. 26, Ch. 9-A, §964(1)(A),(C); Mass. Gen. Law, Ch. 150E; §10(a)(1), (3).

section 3543.5(a) very carefully to ascertain under what circumstances the Legislature intended to hold employers liable for acts which may affect employee rights. I believe this language indicates the employers are not to be held strictly liable for any act which might interfere with the exercise of employee rights. Instead, the employer must have some intent, either inferred or actual, to impose reprisals on, discriminate against, interfere with, restrain, or coerce employees.

I reach this conclusion for two reasons. First, the language on imposing reprisals on and discriminating against employees clearly seems to require some showing of intent. How can one impose reprisals on an employee without intending to do so? The word "reprisal" connotes a purposeful act, as does "discrimination." Also, threatening to impose reprisals or to discriminate is obviously purposeful behavior. Therefore, employer intent is an integral part of much of the behavior prohibited by section 3543.5(a).

Second, the prohibition against interfering with employees because of their exercise of guaranteed rights to me requires more than the mere "nexus" between the employer's act and the exercise of employee rights required by the majority. "Because of" connotes a causal relationship; the statute requires that the employer have acted because of the employees' exercise of their rights. This, to me, indicates that employer intent is part of a violation of section 3543.5(a).

The majority minimizes the significance of the Legislature's inclusion of the words "because of" in this statutory section. However, I think that the Legislature's refusal to follow a model

that has been accepted by virtually every other state that has adopted collective negotiation legislation for public employees is entitled to special consideration. Therefore, I find that the overall language of section 3543.5(a) requires that unlawful intent be a requisite factor in finding a violation of that section.

To say that unlawful intent is a necessary element of a violation of section 3543.5(a) is not to say that the charging party in all cases must prove actual intent. Intent can be inferred where the employer fails to justify conduct which is likely to or does impose or threaten to impose reprisals on, discriminate or threaten to discriminate against, interfere with, restrain, or coerce employees, and proves that act is likely to or does result in some harm to protected employee rights. The employer can rebut this inference of unlawful intent with an affirmative showing of a legitimate and substantial educational or budgetary justification. The charging party can then refute the employer's justification by showing actual unlawful intent.[2] Such unlawful intent may be established by inference from the entire record.

When the employer's conduct is inherently destructive of employee rights, the employer can justify its behavior, thus refuting the inference of unlawful intent, only when it can show that the conduct was occasioned by circumstances beyond the

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[2]The NLRB has developed a similar test for violations of NLRA section 8(a)(3) in Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465].

employer's control and that no alternative course of action was available.

In developing this test, I am not overruling the thrust of San Dieguito Unified School District (9/2/77) EERB Decision No. 22, which was that unlawful intent is a requirement for finding a violation of section 3543.5(a). I have merely added a way in which intent can be demonstrated; that is, by inference from the employer's lack of justification. I think that my test clarifies rather than refutes San Dieguito.

The test I have developed is obviously quite similar to that devised by the majority. The basic difference is the role which unlawful intent plays in finding a violation of section 3543.5(a). The majority's test requires no showing of unlawful intent. However, I find the majority's discussion of intent somewhat confusing. For example, the majority states that its interpretation of section 3543.5(a) does not mean that "intent need never be proven in order to sustain a charge. The test will be in the nature of the charge and of the response." The majority also states that "the matter of unlawful intent remains significant . . . where the employer claims of justification for its conduct." These statements imply that intent must be shown in some circumstances in order to sustain a charge. I would agree, and note that the test I propose does require a showing of unlawful intent when the employer demonstrates a legitimate justification. The majority's test, contrary to the discussion leading up to it, does not.

In the present case, the evidence failed to substantiate the District's claim of justification for the transfers of

Bongiorni, Gill, and Schurch. Since the District's conduct had the effect of discriminating against these employees, interfering with their rights and the rights of other employees, I would infer that the District had the requisite intent to discriminate against these employees because of their exercise of their EERA rights, and would thus find that the District violated section 3543.5(a).

I agree with the majority that O-CFT's charge was timely filed under section 3541.5(a)(1). While O-CFT may have been able to file a charge when the District announced its decision to transfer the employees, the actual transfers could, and in this case did, constitute an unlawful act, and O-CFT filed its charge within six months of that act. I disagree with the majority's contention that the District's conduct constituted a "continuing violation of section 3543.5(a)." The unfair practice occurred when the actual transfers took place. To find a continuing violation would make a mockery of the six months limitation; the teachers could then file an unfair practice charge years after being transferred, providing they remain in the position that occasioned the charge. Finding a continuing violation here would mean that almost every act which interfered with employee rights would be a continuing violation until remedied by the District or the Board.

I concur in the majority's decision to dismiss O-CFT's charge that the District violated section 3543.5(b), and in the Order.

Raymond J. Gonzales, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of OCEANSIDE-CARLSBAD FEDERATION OF TEACHERS, LOCAL 1344, CFT/AFT, Charging Party, vs. CARLSBAD UNIFIED SCHOOL DISTRICT, Respondent.	CASE NO. LA-CE-61 RECOMMENDED DECISION (10/27/77)

Appearances: Anne Fragasso, Attorney, California Federation of Teachers, for Oceanside-Carlsbad Federation of Teachers, Local 1344; Arlene Prater, Deputy County Counsel, County of San Diego, for Carlsbad Unified School District.

Before Jeff Paule, Hearing Officer.

STATEMENT OF THE CASE

On January 12, 1977, the Oceanside-Carlsbad Federation of Teachers, CFT/AFT, AFL-CIO, Local 1344 (hereinafter referred to as O-CFT or charging party) filed an unfair practice charge against the Carlsbad Unified School District (hereinafter referred to as District or respondent) with the Educational Employment Relations Board (EERB), alleging violations

Government Code Sections 3543.5(a), (b) and (c).[1, 2]

The gist of the unfair practice charge is that the respondent discriminated against, or otherwise interfered with or restrained Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano, because of their exercise of rights guaranteed by the Educational Employment Relations Act when the District transferred them from Carlsbad High School to Valley Junior High School in September 1976. The charging party contends that the District's purpose in the transfer of these members was to weaken the charging party's support base at the high school and thus interfere with the O-CFT's and its supporters' organizational activities.

On February 5, 1977, the respondent filed its answer to the unfair practice charge.

A hearing was held in Los Angeles on April 29, 1977. At the hearing, the respondent moved to dismiss the allegation relating to Section 3543.5(c). Inasmuch as the parties stipulated that the charging party was not the exclusive representative at the time the alleged violations occurred, this motion was granted.

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[1] All section references are to the Government Code unless otherwise noted.

[2] Sections 3543.5(a), (b) and (c) state:

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

The respondent also moved to dismiss the charge on the basis that the charging party did not exhaust the District's grievance procedure as allegedly required by Section 3541.5(a) and that the charging party failed to comply with the six-month statute of limitations set forth in Section 3541.5(a).[3] These motions are disposed of in accordance with the findings and conclusions below.

ISSUES

1. Whether the charging party complied with the statute of limitations set forth in Section 3541.5(a).

2. Whether the charging party was required to exhaust the District's grievance procedure pursuant to Section 3541.5(a).

3. Whether the respondent violated Section 3543.5(a) and (b) when it transferred certain O-CFT members/supporters from Carlsbad High School to Valley Junior High School.

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[3] Section 3541.5(a) states as follows:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

FINDINGS OF FACT

The Carlsbad Unified School District is located in San Diego County. The District has one high school, one continuation high school, one junior high school, and four elementary schools. The District serves approximately 4,232 students and employs approximately 205 teachers.[4]

The O-CFT organized and became a local of the American Federation of Teachers (AFT) in 1959. For many years thereafter, however, the union was a dormant organization. In 1975, the charging party's organizational activities intensified in anticipation of the enactment of the Educational Employment Relations Act (EERA). The membership elected as its president Harry Bongiorni, who had served as president on prior occasions.

The California Teachers Association (CTA) chapter is the dominant certificated employee organization in the District with its major source of strength centered at the junior high school and the elementary schools. The O-CFT has a small membership with most of its members located at the high school. An independent high school faculty association also exists.

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[4] This information is obtained from the 1977 California School Directory and the EERB representation files involving this school district. The hearing officer takes official notice of these documents. The representation files also indicate that a dispute as to the appropriate unit exists which has not yet been resolved. As of the date of this recommended decision no representation election has been conducted in the the Carlsbad Unified School District.

On April 2, 1976, the local CTA chapter filed a request for exclusive representation of the certificated personnel of the District. Mr. Harry Bongiorni, current O-CFT president, and a few ardent supporters of the AFT commenced an intense organizational campaign to obtain enough signatures to qualify the O-CFT as an intervenor. The campaign was successful and on April 30, 1976, the charging party filed its intervening petition with the EERB, thus setting in motion the machinery for a representation election.

The charging party's "strategy" for winning the representation election was best stated at the hearing by Mr. Bongiorni: "I felt we had a strong core of people at the high school. It was our plan to get the high school teachers together as a solid unified group. [T]hen once we [did] this, organize them, and get workers in that, we could work into the other schools."

The charging party did not intend Valley Junior High School to be a primary target for organization and campaign purposes because the teachers there overwhelmingly support the local CTA chapter. Several past presidents, the current president and the president-elect of the CTA chapter teach at Valley Junior High School. Additionally, the charging party felt that Valley Junior High School's physical structure was not conducive to usual organizing techniques. Valley

Junior High School is a modern, innovative "pod-type" school. Each "pod" operates like a separate mini-school; there are five or six teachers in each pod who generally have contact only with each other. Some of the pods operate year-round, and thus vacations occur at all times of the year. Because of the "pod-type" structure, the teachers at Valley Junior High School are more isolated from each other than in a regular school.

On or about May 20, 1976, subsequent to District-wide administrative reassignments, the District notified 37 teachers, approximately 17 percent of the District's teaching staff, that they were to be transferred to new teaching assignments at different schools commencing September 1976. Seven teachers were selected to be transferred from Carlsbad High School, which has approximately 75 teachers, to Valley Junior High School. Two of the transfers were voluntary. All five of the involuntary transferees were signatories on the AFT petition for intervention. The five are: Harry Bongiorni, Harry Schurch, Mary Ann Gill, Art Giordano and Mr. Albierco. At the hearing, Mr. Albierco was dropped by the charging party as a subject of this action.

(1) Harry Bongiorni

Harry Bongiorni taught geometry, algebra and basic mathematics for 19 years at Carlsbad High School. During the 1976-77 school year, Mr. Bongiorni taught basic arithmetic and an algebra course at Valley Junior High School. He had

no prior teaching experience at this grade level except for student teaching in 1956. Mr. Bongiorni's educational background includes a Masters Degree in mathematics and five National Science Foundation Grants in mathematics. Mr. Bongiorni was the only mathematics teacher transferred to the junior high school. The evidence indicates that Mr. Bongiorni was replaced at the high school by a physical education teacher from Valley Junior High School who last taught mathematics 15 years ago.

Mr. Bongiorni is closely identified with the charging party and is known among the faculty as the "union person". He has assisted certificated personnel with grievances and other employment complaints for much of his 19 years at the high school. Mr. Bongiorni's posture as an AFT activist is well known among District administrators.

(2) Harry Schurch

Harry Schurch taught psychology, sociology and anthropology for nine years at Carlsbad High School. His last teaching assignment at the high school, however, was English. During the 1976-77 school year, Mr. Schurch taught U.S. History and geography at Valley Junior High School. During the year just prior to his junior high school assignment, Mr. Schurch was on sabbatical leave and prior to that he was on personal leave for two years teaching at a high school in a foreign country. Mr. Schurch's teaching experience has always been on the high school level.

Mr. Schurch has been an active AFT supporter since the early 1960's. In 1964, he participated in an attempted

work stoppage against the District, and in 1969 and 1970, Mr. Schurch served as the charging party's president.

(3) Mary Ann Gill

Mary Ann Gill taught English courses for nine years at Carlsbad High School. During the 1976-77 school year, Ms. Gill was transferred to Valley Junior High School to teach seventh and eighth grade reading. The individual who Ms. Gill replaced, a reading specialist, was tranferred to Carlsbad High School to assume Ms. Gill's former English assignment. Ms. Gill has only eight units in reading which she earned by taking extension courses and attending conferences. Ms. Gill prefers teaching older students, and prior to her Valley Junior High School assignment, had no experience teaching junior high school students.

Ms. Gill is a strong and vocal supporter of the AFT and was highly instrumental in arousing the interest, mustering the support, and obtaining the necessary signatures of the teachers at Carlsbad High School to qualify the O-CFT as an intervenor. Although the District's witness testified that the administration generally was unaware of Ms. Gill's active support of the O-CFT, the contrary evidence, that the District was aware, is more credible. It is found that the Respondent knew of Ms. Gill's activities on behalf of the O-CFT.

(4) Art Giordano

The evidence with respect to Mr. Giordano is nil. He did not testify at the hearing nor was any deposition or affidavit submitted on his behalf. The only testimony regarding Mr. Giordano is that he is a member of the AFT, and was transferred from Carlsbad High School to Valley Junior High School.

Mr. Rexford Hartle, a former principal, testified for the charging party that during a meeting of school administrators in January 1976 he allegedly overheard the superintendent say to a group of principals, "let's break up the clique at the high school -- let's send Harry down to Valley." The charging party urges in its brief that Mr. Hartle's testimony "should be given great weight." Mr. Hartle's testimony is very confusing. He did not remember exactly when he heard the remark, who made the remark or what was meant by the word "clique". Therefore, no weight is given to Mr. Hartle's testimony.

CONCLUSIONS OF LAW

Six-Month Statute of Limitations

The respondent contends that the unfair practice charge should be dismissed on the ground that the charging party failed to comply with the statute of limitations provided for in Section 3541.5(a)(1). This section states that, "Any . . . employee organization . . . shall have the right to file an unfair practice charge, except that the [EERB] shall not . . . issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge . . . ."

In the instant case, the charging party and its members who were transferred were notified of the transfers in May 1976. The transfers took place when school commenced in September 1976. The unfair practice charge was filed in January 1977. The respondent contends that the sending of the transfer notices in May 1976 constitutes the alleged unfair practice whereas the charging party insists that the actual transfer forms the basis for the charge.

The charging party's reasoning is more convincing and is supported by National Labor Relations Board (NLRB) precedent. The physical transfer of teachers from Carlsbad High School to Valley Junior High School, and not the mere expression of an intent to transfer, is the act upon which the charge is based. Thus, the six-month limitation period began to run when the District actually transferred the employees, not when the employer advised the employees that they would be transferred. See Swift Service Stores, Inc., 169 NLRB 359, 67 LRRM 1181 (1968).

Exhaustion of the District's Grievance Procedure

The respondent also argues that the EERB does not have jurisdiction over the instant case because the charging party failed to exhaust the District's grievance procedure as allegedly required by Section 3541.5(a)(2). This section states that, "Any . . . employee organization . . . shall have the right to file an unfair practice charge, except that the [EERB] shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted . . . ."

The charging party maintains that Section 3541.5(a)(2) applies only to a situation where there is a contract in existence between a school district and an exclusive representative and the contract provides for a grievance procedure.

In the instant case, there is no exclusive representative and no contract.

The charging party's interpretation of Section 3541.5(a)(2) is correct. The charging party is required to exhaust a grievance procedure only if such grievance procedure is part of a contract between the parties.[5]

Section 3543.5(a)

Government Code Section 3543.5(a) provides:

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

The main thrust of the charging party's allegation of a Section 3543.5(a) violation is that the District interfered with, restrained and discriminated against certain employees because of their AFT affiliation and/or vigorous AFT organizing activities. The O-CFT contends that its members' rights to organize and campaign for exclusive representation have been abridged by the District's conduct. (See Sections 3540, 3543, and 3543.1(b).)

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5 This reasoning is buttressed by the following proviso in Section 3541.5(a)(2): "However, when the charging party demonstrates that resort to [the] contract grievance procedure would be futile, exhaustion shall not be necessary." (Emphasis added)

Section 3543.5(a) of the EERA appears to combine the protections of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. These sections state that:

> It shall be an unfair labor practice for an employer, (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. . . .

The United States Supreme Court has held that the finding of a Section 8(a)(3) violation will normally turn on the employer's motivation. See American Ship Building Co. vs. NLRB, 380 U.S. 300, 58 LRRM 2672, 2676 (1965). Section 8(a)(1) makes it unlawful simply to interfere with the employees in the exercise of their organizing rights; there is no language of motive or purpose. However, the use of the words "discrimination" and "discouragement" in NLRA Section 8(a)(3) suggests that motivation is a key factor in any Section 8(a)(3) violation.

The EERB's interpretation of Government Code Section 3543.5(a) and its relationship to NLRA Sections 8(a)(1) and 8(a)(3) may be found in the recent case of San Dieguito Faculty Association vs. San Dieguito Union High School District, EERB Decision No. 22, (September 2, 1977). In that case, the Board concluded that for a violation to be found it must be shown "at minimum" that an employer acted either with "the intent

to interfere with the rights of the employees" or that the employer's conduct "had the natural and probable consequence" of interfering with the rights of the employees. Additionally, the Board held that the interference by the employer must be shown to have been "because of" the employees' exercise of rights guaranteed by the EERA. The Board said that the phrase "because of" "seems to make motive or purpose a requirement for a [Section 3543.5(a)] violation." With respect to the "because of" language in Section 3543.5(a), the Board concluded:

> Interference "because of" is quite different from mere "interference in." "Because of" connotes purposeful or intentional behavior; "interference in" connotes interference with or without an unlawful intent.

Thus, in order to find a violation of Section 3543.5(a) the charging party must prove that the respondent interfered with, restrained, coerced, or discriminated against employees and that this conduct was taken against employees because of their exercise of rights guaranteed by the EERA.

The EERB's "test" is not inconsistent with the United States Supreme Court's decision in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967), a case both parties rely on extensively in their briefs. Under this decision, the law pertaining to motive and burden of proof in NLRA Section 8(a)(3) cases may be summarized as follows:

> Where the employer's conduct results in severe harm to, or is inherently destructive of employee rights, evidence of union animus need not be shown and an unfair practice may be found to have been committed regardless of any legitimate business justification. Where, however, the employer's conduct results in only slight harm (i.e., some harm) to employee rights, the employer must affirmatively show a legitimate and substantial business justification for its conduct. If employer justification is established, then independent evidence of anti-union motivation is an essential element for a finding of an unfair practice. Thus, regardless of whether the employer's conduct results in severe harm or slight harm to employee rights, the employer must come forward and with evidence of legitimate and substantial business purposes.

The Great Dane criteria are applicable, however, only after the charging party meets its burden under the Board's San Dieguito decision.

Interference or Restraint

In order to satisfy the criteria established by the Board in San Dieguito, the charging party must prove, at minimum, that the Respondent's conduct in transferring

Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano from Carlsbad High School to Valley Junior High School had "the natural and probable consequence" of interferring with these employees' organizing and campaign rights. "To interfere with" generally is defined as "to hinder or prevent," and "to restrain" as "to limit, suppress or restrict."[6] For the following reasons it is found that the transfer of Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano interferes with and restrains these employees from organizing and campaigning on behalf of O-CFT.

The transferees in question are active supporters and organizers of the O-CFT. They had taught at the high school for many years and were well acquainted with most of their colleagues. The O-CFT president himself stated, and the District did not controvert, that he was the individual whose assistance was generally sought by certificated personnel at the high school, and that for much of his nineteen years at the high school he was the person primarily responsible for processing teachers' grievances. Given the reputation that Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano have in the District for espousing the "AFT platform," and the fact that the charging party had just completed an intense organizational campaign to qualify itself as an intervenor, it seems clear that the transfer of O-CFT's leaders to a school distinctly inhospitable to AFT organizational efforts, and at a crucial time in the organizing

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[6] Webster New World Dictionary, Second edition, 1976.

campaign for exclusive representative, "hinders and restricts" these individuals' organizational activities.

Clearly, the charging party has met the first part of its burden: The transfer of Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano from Carlsbad High School to Valley Junior High School interferes with the free exercise of important employee rights. The next inquiry, therefore, is whether the District's decision to transfer these employees from Carlsbad High School to Valley Junior High School was made "because of their exercise of rights guaranteed by the EERA."

The District's Intent

The charging party's burden that the transfers in question were effectuated because of the transferees' exercise of organizing rights is more difficult to sustain. It is axiomatic that the transfer of a union president from a school where teachers would be most receptive to his proselytizing efforts to a "new and unfamiliar milieu," J.W. Mays, Inc., supra, 147 NLRB at pg. 943, impedes further organizing activities. The crux of this case, however, turns on the answer to this question: were Harry Bongiorni, Harry Schurch, Mary Ann Gill and Art Giordano transferred because of their AFT affiliation and/or vigorous organizing efforts on behalf of O-CFT or because of legitimate and substantial educational considerations? See Howard Johnson Co. 209 NLRB 1122, 86 LRRM 1148 (1974); NLRB v. Atkins Saw Division, 395 F.2d 907, 69 LRRM 2200 (5th Cir. 1968); and NLRB v. Great Dane Trailers, Inc. supra.

With respect to two of the employees, Art Giordano and Harry Schurch, the charging party has failed to meet its

burden of proving by a preponderance of the evidence that these two individuals were transferred because of their exercise of rights guaranteed by the EERA. The charging party failed to produce any evidence with respect to Art Giordano other than the fact he is an AFT member and he was transferred from Carlsbad High School to Valley Junior High School. Without more, the District cannot be held to have committed an unfair practice with respect to this employee.

Mr. Harry Schurch's situation requires a more extensive analysis. While it is true that Mr. Schurch was an active AFT member in the early 1960's, and in 1969 and 1970 he was O-CFT's president, the critical time frame with respect to the unfair practice charge is 1976. Full-fledged organizing rights under the EERA were not available to employees until April 1, 1976, and from this date until late May, 1976, Mr. Schurch was in Africa on a sabbatical leave.

The charging party asserts that Mr. Schurch was transferred because of his anticipated exercise of EERA organizing rights. Although given Mr. Schurch's background and image as an AFT supporter, it is reasonable to infer that he would resume his "activist posture" upon his return from his sabbatical leave, the nexus between the transfer of Mr. Schurch and his alleged O-CFT organizing activities is too tenuous. To find the District guilty of an unfair practice based on mere conjecture would be manifestly unfair.

With respect to Harry Bongiorni and Mary Ann Gill, however, there are several factors which, when considered in the aggregate, show that the transfer of these two

employees was not based on educational considerations, but rather was because of their organizing efforts on behalf of the O-CFT.

The organizing activities of Harry Bongiorni and Mary Ann Gill are well documented. Mr. Bongiorni's image as an AFT activist for the past 19 years at Carlsbad High School is well known among both the faculty and the administration. Ms. Gill is a strong and vocal AFT advocate and was highly instrumental during O-CFT's organizing campaign in April 1976 in obtaining the necessary signatures of the teachers at Carlsbad High School to qualify O-CFT as an intervenor.

It is well established that proof of an employer's unlawful intent or motive in discharging or transferring employees can be shown by circumstantial evidence. NLRB v. Laney & Duke Co., 63 LRRM 2552, 2557 (5th Cir. 1966); NLRB v. Putnam Tool Co., 48 LRRM 2263, 2265 (6th Cir. 1961); NLRB v. Like Belt Co., 311 U.S. 584, 7 LRRM 297, 306 (1941). In determining whether an employer's action was justified on the grounds assigned by the employer or was the result of an improper motive, the following factors are considered: The entire background, including any employer anti-union activity; the percentage of union members or leaders among the employees affected, NLRB v. Bachelder, 120 F.2d 574 (7th Cir. 1941); Harold Baker, 71 NLRB 44 (1946); the failure to call as a witness management representatives having personal knowledge of the reason assigned; the effect on unionization -- whether or not the leading organizers of the union have been

transferred or discharged; the extent to which the transferred or discharged employee engaged in union activity; the relation in point of time of the employer's action to the employee's union activity, Marx-Haas Clothing Co., 211 NLRB 350, 87 LRRM 1054 (1974); Howard Johnson Co., 209 NLRB 1122, 86 LRRM 1148 (1974); and the location of the employee's new work location, J.W. Mays Inc., 147 NLRB 942, 56 LRRM 1339 (1964), enf'd 356 F.2d 693, 61 LRRM 2538 (2nd Cir. 1966); NLRB v. Varo Inc., 425 F.2d 293, 74 LRRM 2096 (5th Cir. 1970).

In the instant case, the notices of transfers were mailed in May 1976, and the transfers took effect in September of the 1976-77 school year, just shortly after the charging party's successful gathering of thirty percent support for intervenor status in April 1976.

With respect to the transferees' new work location, the junior high school to which the transferees were sent is distinctly unreceptive to AFT organizational efforts. The pod arrangement at Valley Junior High, where teachers work in separate buildings and are organized into small units of five or six teachers each, obviously hampers AFT's attempts to expand its base of support. Additionally, the teaching staff at the junior high school is predominately supportive of the CTA.

The charging party places considerable reliance on the alleged lack of evidence presented by the respondent with respect to legitimate and substantial education justification for the transfers. The charging party contends that it has proved improper intent because the transfers were not made,

according to the charging party, for legitimate and substantial educational considerations. In this regard the charging party presented evidence that Mr. Bongiorni was the only mathematics teacher transferred to Valley Junior High School, and further, that he was replaced at the high school by a physical education teacher who last taught mathematics fifteen years ago. With respect to Ms. Gill, the evidence shows that for nine years she taught English courses at Carlsbad High School. Her assignment at Valley Junior High School is seventh and eighth grade reading. Ms. Gill's replacement at the high school is the former reading specialist at the junior high school. Ms. Gill testified that her educational preparation for teaching reading consists only of extension courses and conferences she has attended and that this background is inadequate to teach reading courses.

While the Board's "because of" requirement is difficult to prove, the evidence presented by the O-CFT, when considered in the aggregate, is sufficient to satisfy the Board's standard. Evidence of which teachers were selected for transfer from the high school to the junior high school, the timing of the transfers, the transferees' new work location and most importantly, the failure of the respondent to call as witnesses the individuals who could best explain the reason for these particular transfers, raises more than an inference that the District was motivated by improper considerations.

Accordingly, where, as here, there is evidence of at least "slight harm" to employee rights, then as aforementioned under Great Dane, supra, the employer must come forward with evidence of "legitimate and substantial business purposes." It is necessary, therefore, to examine the District's defense that when making the decision to transfer Mr. Bongiorni and Ms. Gill it was motivated by substantial educational considerations.

According to the District, transfers of principals and other administrators were made to effect "changes in relationship to the operation of the District's schools" and to facilitate "general curriculum change policies being implemented in the District." The subsequent teacher transfers purportedly were necessitated because "the new principals were involved with new ideas and things they wanted to implement at their new locations . . . which in some cases required different personnel."

The District failed to produce the witnesses, however, who, by its own admission, would have been most crucial in establishing that the transfers of Mr. Bongiorni and Ms. Gill were necessary to "implement new ideas which required different personnel," and were not, therefore, motivated for proscribed reasons. The sole District witness was Dr. Lynn Davies, prior principal at Carlsbad High School. Dr. Davies was reassigned to an elementary school position pursuant to the overall administrative transfers and so was not going to be working

at the high school or the junior high school during the 1976-77 school year. Thus, Dr. Davies was not the principal who selected these individuals to transfer from his school to the junior high school. Moreover, neither Dr. Doug Deason, the new principal at the high school, who according to the District rationale, might have wanted these teachers transferred out of the high school so as to institute changes in the high school curriculum that he felt were not compatible with the transferees' skills, nor the new junior high school principal, Mr. Clark Vollbrecht, who might have desired these teachers in his school because they were compatible with the junior high school's new curriculum program, were called to testify at the hearing.

Repeatedly during the hearing, Dr. Davies' testimony proved inadequate in providing a substantial answer as to how or why the transfers were "good for the District." Typical of Dr. Davies' knowledge with respect to the particular transfers and the curriculum changes at the junior high school are the following excerpts from the transcript:

Q: You were principal of the High School. Could you tell us where curriculum changes were made in the High School?

A: I can give you an overall view of that, I am -- because I immediately turned my attention to working out problems in my

newly assigned school, my new responsibilities; I don't have finite detail. * * *

* * * *

Q: And do you have any knowledge of the curriculum changes that were made in the Junior High School?

A: No. I was not associated with that. So I couldn't give you any real feedback on that change.

* * * *

Q: Who came in to replace these people that went to varying places? [at the High School]

A: I would have to consult notes to get any closer than that on exactly what the new schedule was for this year, because I was not running the school, and did not really pay that much attention -- that close attention -- to the new master schedule.

* * * *

Q: Are you aware of the position that Mr. Bongiorni was transferred to at the Junior High School?

A: Only from the standpoint that it is a math assignment.

* * * *

It is evident that the individual who really decided upon the transfers was Dr. Deason, who was the principal at Valley Junior High School at the time of the transfer announcements, and was to be the new principal at Carlsbad High School. The District admits that Dr. Deason has known the transferees personally for many years and that it was at his behest that they were selected for removal. The failure to call Dr. Deason, who, by the District's own rationale and repeated assertions during the hearing had the clearest knowledge of why these particular employees were selected for transfers, is a fatal defect in the District's case.[7]

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[7] In addition to the NLRB and the federal courts, several state courts have found unfair labor practices based on similar facts. In Massachusetts, the Massachusetts Labor Relations Commission found that a public employee who was president of his union had been unlawfully transferred from the day shift to the night shift, even though the employer had come forward with a number of reasons necessitating the transfer. Town of Sharon and Joseph B. Puchalski, 3 MLC 1052 (1976). After noting that the employer had failed to satisfy its burden of proof, the Commission stated: "We note that even the existence of a legitimate reason to discipline an employee is no defense if the action was motivated in whole or in part by intent to discourage union activity."

In another case, the New York Court of Appeals upheld a New York Public Employment Relations Board (PERB) finding that three firefighters had been transferred in order to discourage their organizational activities. City of Albany Professional Permanent Firefighters' Association, 3 PERB 3612 (1970), enf'd City of Albany v. New York PERB, 29 N.Y. 2d 433 (1972). The New York PERB declared this conduct unlawful even though the record showed that the transfers were part of (con't)

The District's "for the good of the District" defense is based on Education Code Section 35035(c). This section provides that:

> The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him: Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. Such power to assign includes the power to transfer a teacher from one school to another school at which the teacher is certificated to serve within the district when the superintendent concludes that such a transfer is in the best interest of the district.

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7 (con't)

an overall transfer program. In affirming the decision the New York Court of Appeals concluded: "...the [Employer] cannot, under the guise of exercising ministerial or management prerogative, deprive its employees of their statutory rights to form, join or participate in an employee organization.

In a case involving the recommended transfer of a teacher who was also a vocal union spokesperson, the Wisconsin Supreme Court in Muskego-Norway Consolidated Schools Joint District No. 9 vs. Wisconsin Employment Relations Board, 35 Wis. 2d 540, 150 N.W. 2d 617 (1967), upheld the finding of unlawful employer conduct in the face of considerable proof that numerous legitimate reasons for the transfer might exist. The court declared that if illegal discrimination is even an element motivating a transfer, the employer's conduct is prohibited.

Lastly, in International Association of Fire Fighters v. County of Merced, 204 Cal.App. 2d 387 (1962), a retrial was ordered on a questioned discharge of a fireman allegedly for his union activities. The Court noted that the failure of the employer to call a crucial witness to substantiate its claim that the discharge was justified was a serious flaw in the employer's defense.

The questioned transfers, it is argued, fall squarely within the District's managerial prerogative and are immune to charges by employees that the transfers are unfair. This contention is not persuasive.

In support of its argument that Section 35035(c) of the Education Code immunizes the questioned transfers from EERB scrutiny, the District places considerable reliance in its brief on Macy's Missouri-Kansas Division v. NLRB, 389 F.2d 835, 67 LRRM 2563 (8th Cir. 1968). In Macy's the court determined that an employer had transferred a union activist for legitimate business reasons rather than out of union animus as the NLRB had found. The court stated that an "employer has a fundamental right to assign employees to positions the employer deems, in the exercise of its managerial discretion, most expedient." Macy's is not particularly helpful to the District's argument, however. For one thing, following the above-quoted passage which the District cites in its brief, the court enunciates the rule that managerial immunity from NLRB and court inspection is suspended if the employer acts in order to interfere with or discriminate against its employees' organizational rights. 67 LRRM at 2565. Thus, though the court found on the particular set of facts before it that the employer had not acted unlawfully, Macy's certainly does not stand for the proposition that an employer

may "pick the time, place, and manner of employment," as the District suggests in its brief, absent any restrictions at all. Moreover, there are several crucial, factual differences between the situation in Macy's and the instant case.

The court in Macy's found that the NLRB had based its finding of an unfair labor practice primarily on the mere coincidence between union activity and the transfer. However, in Macy's the employer decided on the need for a new position in a different department long before the union organization drive had begun. The employer requested help from the union in finding an appropriate person and finally selected the particular transferee because she had the requisite qualifications and had previously requested a transfer to the department in which the vacancy now existed. Only after other employees were offered the new position and refused and the employer was therefore unable to fill the vacancy was the employee activist transferred. This set of facts is clearly distinguishable from those in the instant case.

In summary, the absence of an exclusive representative does not confer on a public school employer the absolute power to transfer its employees. With advent of the EERA, Education Code Section 35035(c) must be read and interpreted in light of

the provisions of the EERA. That is, although a public school employer has the power to transfer its employees "for the best interest of the District," it cannot do so with the proscribed intent to, inter alia, interfere with, restrain, coerce or discriminate against employees because of their exercise of rights guaranteed by the EERA. Thus, if it is apparent that a public school employer was motivated by anti-union feelings of an intent to interfere with the protected organizing activities of its employees, then an otherwise lawful act may become an unfair labor practice, regardless of the power to transfer granted under the Education Code. See NLRB v. Atkins Saw Division, 399 F.2d 907, 69 LRRM 2200, 2204 (5th Cir. 1968); NLRB v. Varo, Inc., 425 F.2d 293, 74 LRRM 2096, 2102 (5th Cir. 1970); NLRB v. White Superior Division, 404 F.2d 1100, 69 LRRM 2903, 2904 (6th Cir, 1968); NLRB v. J.W. Mays, Inc., 356 F.2d 693, 61 LRRM 2538, 2541 (2nd Cir. 1966); American Ship Building Co., v. NLRB, 380 U.S. 300, 58 LRRM 2672, 2676 (1965); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835, 53 LRRM 2480, 2484 (1st Cir. 1963); NLRB v. Hertz Corp., 449 F.2d 711, 70 LRRM 2569, 2571 (5th Cir. 1971).

The District further defends its transfer of Mr. Bongiorni and Ms. Gill by asserting that the substantial and legitimate educational goals requiring large numbers of transfers throughout the District also necessitated and legitimized the transfer of these particular employees from the high school to the junior high school.

It is not enough, however, for an employer to assert business justification or even to show that some legitimate business reasons existed for it to layoff, transfer, reassign, or discipline some employees. Merely showing that the District acted legally toward some employees does not independently prove that it acted lawfully toward the employees in question. The NLRB and the federal courts have found an unfair labor practice in instances where substantial and legitimate business reasons existed for the employer to layoff, transfer or discharge some employees but the employer selected particular employees for discharge, layoff or transfer because of its desire to impede their union and organizational activities. The NLRB found in one case that an employer had attempted to camouflage the discriminatory layoff of union activists by the simultaneous layoff of employees uninvolved in union activity. In Howard Johnson Co., 209 NLRB 1122, 86 LRRM 1148 (1974), the NLRB noted:

> The point is not who could the respondent have chosen to layoff once deciding a layoff was economically necessary, but upon what criterion was their selection made. We have already seen that both logic and the underlying record compel the conclusion that the criterion used was connected to the aim of defeating the Union's efforts to organize the employees. 86 LRRM at 1149, fn. 5.

In the instant case, even assuming the transfers of all other employees were necessary, the District failed to show that the transfer of Mr. Bongiorni and Ms. Gill was motivated by substantial and legitimate educational goals.

In conclusion, after examining the totality of the District's conduct, including the timing of the transfer, the District's awareness of internal AFT organizing, the selection of Valley Junior High School as the transferees' new work location, and most importantly, the lack of convincing evidence of an adequate business justification for the District's conduct, there exists more than sufficient evidence to find that Mr. Bongiorni and Ms. Gill were transferred because of their union activities and not for legitimate and substantial education reasons. As the United States Supreme Court noted:

> [A]s often happens, the employer may [claim] that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to . . . invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct does speak for itself. . . and whatever the claim of overriding justification may be, it carries with it unavoidable consequences which the the employer not only foresaw but which he must have intended. NLRB v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121, 2124 (1963).

The District is found to have violated Section 3543.5(a). by restraining and interfering with Harry Bongiorni and Mary Ann Gill because of their exercise of rights guaranteed by the EERA.

Section 3543.5(b)

Government Code Section 3543.5(b) provides that:

> It shall be unlawful for a public school employer to (b) deny to employee organizations rights guaranteed to them by this chapter.

Having found that the respondent violated Section 3543.5(a) by discriminating against the president of O-CFT and one of its members because of their exercise of rights guaranteed by the EERA it follows that the employer has denied to the organization itself organizing rights guaranteed by the EERA. The respondent's discriminatory conduct, when examined in the aggregate, could only have been intended to weaken the charging party's base of support in the District which, of necessity, serves to undermine and thwart O-CFT's legitimate organizing efforts.

A violation of Section 3543.5(b) exists.

REMEDY

Section 3541.5(c) authorizes the EERB to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA.

In cases where unlawful transfers have occurred under the NLRA, the NLRB has required the employer to reinstate the employees at their option to the positions occupied by them prior to the transfer. See J.W. Mays, Inc., 147 NLRB 942, 56 LRRM 1339, enf'd. 356 F.2d 693, 61 LRRM 2538 (2nd Cir. 1966). Such a remedy is appropriate in this case.

ORDER

Upon the foregoing findings of facts, conclusions of law, and the entire record of this case, and pursuant to Government Code Section 3541.5(c), it is hereby ordered that the Carlsbad Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

   (a) In any manner discriminating against or interfering with employees because of their exercise of rights guaranteed by the EERA;

   (b) In any manner denying to the Oceanside-Carlsbad Federation of Teachers rights guaranteed by the EERA.

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

   (a) Offer Harry Bongiorni and Mary Ann Gill reinstatement to their former or substantially equivalent positions at Carlsbad High School at the commencement of the next school year or the next school semester, whichever occurs first;

   (b) Prepare and post copies of this order at each of its schools and work sites for twenty (20) workdays in conspicuous places, including all locations where notices to employees are customarily posted;

   (c) At the end of the posting period, notify the Los Angeles Regional Director of the Educational Employment Relations Board of the actions it has taken and intends to take to comply with this order.

It is further ordered that the charges shall be dismissed with respect to Art Giordano and Harry Schurch.

Pursuant to Title 8, Cal. Admin. Code, Section 35029, this recommended decision and order shall become final on November 8, 1977, unless a party files a timely statement of exceptions. See Title 8, Cal. Admin. Code, Section 35030. Any statement of exceptions must be accompanied by proof of service on the other party.

Dated: October 27, 1977

Jeff Paule
Hearing Officer