STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION Charging Party, v. STATE OF CALIFORNIA (CALIFORNIA DEPARTMENT OF CORRECTIONS), Respondent.	Case No. S-CE-3-S (78-79) PERB Decision No. 127-S May 5, 1980

Appearances: Russell L. Richeda, Attorney (Carroll, Burdick & McDonough) for the California Correctional Officers Association; Angela Pickett, Attorney for the California Department of Corrections.

Before: Gluck, Chairperson, Gonzales and Moore, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the California Correctional Officers Association (hereafter CCOA) to the hearing officer's attached proposed decision dismissing unfair practice charges filed by CCOA against the California Department of Corrections (hereafter Department). The charges were based on the Department's decision to discontinue its practice of providing employee organizations with office or desk space, the assistance of inmate clerks at the prevailing institutional wage and separate bulletin boards within the 12 penal institutions operated by the Department.

The hearing officer's statement of the procedural history and facts relevant to this appeal is substantially correct and is adopted as the findings of the Board itself. For the reasons that follow, we affirm the hearing officer's decision on this case and adopt the proposed order as the order of the Board itself.

DISCUSSION

A. Section 3519(a)

Government Code section 3519(a)[1] provides that it is unlawful for the State to impose reprisals against employees, to discriminate against employees, or otherwise to interfere with or coerce employees because of their exercise of rights guaranteed under the State Employer Employee Relations Act (hereafter SEERA).[2] Because this is the first case decided

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[1]All statutory references herein are to the Government Code, unless otherwise noted.

[2]Employee rights under SEERA are provided in section 3515:

> Except as otherwise provided by the Legislature, state 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. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership

by the Board itself involving section 3519(a), we have looked to cases decided under section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)[3] for guidance in interpreting this section.[4] Although the Board is not bound to follow decisions issued under EERA in SEERA cases, the similarity of language and purpose found in the two sections compared here has led us to apply the rationale first articulated in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 and later applied by a majority of the Board as presently constituted in Santa Monica Community College District (9/21/79) PERB Decision No. 103. Those cases have been considered in reaching the conclusions in the present case.

Both section 3519(a) and section 3543.5(a) state that it is unlawful for the employer to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

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> provision, as defined in subdivision (h) of section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

[3]The EERA is codified at section 3540 et seq.

[4]Sections 3519(1) and 3543.5(a) parallel sections 8(a)(1) and 8(a)(3) of the federal Labor Management Relations Act, 29 U.S.C. 151 et seq., which may be used to guide interpretation of the SEERA. (See Firefighters Union v. City of Vallejo, 12 Cal.3d 608 (1974).)

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

CCOA alleges that the Department's policy change denied employees the right to join and participate in an employee organization in that withdrawal of office space and inmate clerical services effectively denied employees contact with CCOA due to the restrictive nature and rural location of the Department's institutions. Specifically, CCOA alleged that employees were unable to learn about the benefits of CCOA membership, membership records were not maintained, and delays occurred in the distribution of CCOA literature and the processing of grievance and insurance forms. In part, the delays described were due to CCOA's historical reliance on the Department's resources and its failure to establish its own field organizers or clerical employees at the chapter level. Thus, CCOA had no personnel readily able to assume the functions previously performed by the inmates.

It is not disputed that employees experienced a decline in the quality of services rendered to them by CCOA after office space and inmate clerks were withdrawn from CCOA. The question, however, is whether the Department's role in that decline in services amounted to unlawful employer conduct which violated employees' rights. The hearing officer concluded, and we agree, that it did not.

The right of employees to join and participate in an employee organization of their choice necessarily implies that organizations have the right to communicate with employees and members at their work site, where they are generally most accessible. Access to employees to facilitate an exchange of information is clearly a threshold concern not only in an organizing campaign but during the course of the ongoing relationship between the employee organization and its members.

Under EERA section 3543.1(b), employee organizations are expressly granted access, at reasonable times, to work areas, institutional bulletin boards and mailboxes for communication purposes. In addition, organizations have the right to use institutional facilities for meetings. No such express provision of rights is contained in SEERA.[5] However, notwithstanding the absence of such a specific statutory right, the Board finds that a right of access is implicit in the purpose and intent of the SEERA. Section 3512 of the SEERA provides, in part:

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages,

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[5]Under section 3522.9(c) of SEERA, the employer may adopt regulations providing for access by representatives of employee organizations representing supervisors. There is no comparable provision under SEERA for nonsupervisory employee representatives.

> hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employee-employer relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by such organizations in their employment relations with the state.

It remains for the Board to determine the parameters of the right of access which we have concluded is implicit in SEERA. As a guide to our analysis we have examined the right of access which employee organizations enjoy under laws administered by this Board as well as under federal case authority. As noted above, school districts may reasonably regulate access under the terms of EERA section 3543.1(b). The Higher Education Employer-Employee Relations Act (hereafter HEERA) contains an almost identical provision subjecting the right of access to reasonable regulation. (See Gov. Code, sec. 3568.)[6]

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[6]Under the Meyers-Milias-Brown Act (Gov. Code, sec. 3500 et seq.), local public employers are permitted to adopt reasonable rules regulating access of employee organization officers and representatives to work sites. (See Gov. Code, sec. 3507.) State agencies may do the same under the George M. Brown Act (Gov. Code, sec. 3525 et seq.) which covers state employees not covered by SEERA. These acts are distinguishable from the EERA, SEERA and HEERA in that the former do not require collective bargaining. They are like SEERA in that they do not provide a statutory right of access; nevertheless, they support the Board's conclusion that a right of reasonable access is implicit in the right of employees to be represented by organizations of their choice.

Furthermore, although the Labor Management Relations Act does not provide an explicit right of access, the NLRB and the federal courts have developed rules governing access to employer property by union organizers. While there are distinct rules covering access by employee and non-employee organizers, we are concerned here primarily with the effect of these rules on employees' right to organize. In Babcock-Wilcox Co., (1956) 351 U.S. 105 [38 LRRM 2001], the United States Supreme Court held that the employer may legitimately restrict access to its property by non-employee union representatives, where alternative effective channels of communication are available between representatives and employees and the employer does not discriminate against any employee organization. In an earlier case, Republic Aviation Corp. v. NLRB, (1945) 324 U.S. 793, the court held that a rule prohibiting union solicitation during working hours is presumptively valid unless overcome by evidence that the rule was adopted for a discriminatory purpose. The same type of rule covering solicitation outside working hours is presumed invalid unless evidence shows that special circumstances make the rule necessary to maintain production or discipline.

While the Board takes cognizance of the above cited cases, we must consider the inherent and substantial distinction between the property interest of the private employer and that of the public employer. The public employer may not exclude

members of the public wishing to conduct business with the public agency. However, the public employer may reasonably regulate access where necessary to assure the safety of its employees, wards and facilities and the efficient operation of its official business.[7] In particular, prison officials may properly restrict entry of persons and certain articles into their institutions.[8] It is thus clear that access to public property may be reasonably regulated under varied circumstances. With this in mind, we turn to the particular circumstances of the present case.

As noted earlier, after the Department withdrew the office space, et cetera, CCOA was still able to distribute its

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[7]For example, the California State Police are authorized to remove from state buildings persons who have no legitimate reason for their presence, persons creating noise which impedes the performance of employees' duties or impedes the public's receipt of administrative services, persons who obstruct passageways. (See Cal. Admin. Code, tit. 2, sec. 1201 et seq.)

State Personnel Board regulations under the Meyers-Milias Brown Act, supra, restrict access "so as not to interfere with state business or established safety or security requirements." (Cal. Admin. Code, tit. 2, sec. 544(d).)

The question of whether the public has a right to enter prisons has not been answered by the courts. In KQED v. Houchins, 546 F.2d 284 (1976), the Ninth Circuit held that the press and public have a constitutional right of access under the First Amendment to be informed about prison conditions since prisons are public institutions. However, the United States Supreme Court rejected this finding on appeal, and left the issue of public access undetermined. (See KQED v. Houchins, (1978) 438 U.S. 1.)

[8]See, e.g., Penal Code section 4570 et seq.

literature through Department mailboxes and bulletin boards and was able to meet with employees concerning grievances.[9] CCOA

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[9]The Department's access policy, which was not changed, does not appear to distinguish between employee and non-employee representatives. Nor does the policy specify when and where representatives may have access to employees for purposes of solicitation. It has not been contended on appeal that the Department's policy illegally limited solicitation and we see nothing in the policy itself which precludes solicitation in nonwork areas or during nonworking hours. The policy provides:

Department Administrative Manual, section 2504.

> Access to Employee Work Locations.
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> (a) Reasonable access to employee work locations during working hours shall be granted to employee organization officers and representatives on employment relations matters. This does not include visits for the purpose of solicitation of membership or routine contact, but only where specific problems exist which necessitate the employee organization representative seeing the work location to understand the situation.
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> (b) Such employee organization representatives shall notify and obtain the approval of the appropriate official before entering an employee work location as follows:
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> (1) Any institution - warden or superintendent.
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> (2) District office of Parole and Community Services Division - district administrator.
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> (3) Regional office of Parole and

argues that these alternatives were inadequate and that employees did not continue to have easy access to the organization. Because of CCOA's long-term reliance on the use of Department resources, it had no place to store written materials, had greater difficulty producing and distributing chapter bulletins, and had no central location at which members could gather to air complaints or exchange information. Consideration was given by CCOA to alternative sites outside the institutions, but these were rejected, primarily because CCOA felt that office space, clerical help, mail distribution and other communication costs were excessive. Whether or not CCOA's limited financial resources prevented CCOA from filling the void left by the Department's action, we are not persuaded that that action was unreasonable.

The record shows that the Department faced a number of problems throughout the period during which employee organizations were granted use of institutional facilities. At

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Community Services Division - regional administrator.

(4) Central office of Parole and Community Services Division - Deputy Director - Parole and Community Services Division.

(5) Central office of Department of Corrections - personnel officer (who will clear with appropriate division chief.)

times, there was conflict between competing organizations over the use of space or desks, or the amount of time an inmate clerk spent on a given organization's work. In addition, there had been disputes over which organization should have the right to carry out particular programs such as running snack bars and selling employee badges. Further, organizations claimed that competitors had better bulletin board locations or were assigned inmate clerks with better security clearances that allowed them to move about the institution more freely, or that some representatives received identification cards permitting easier access to the prisons. Coupled with this history of conflict was the fact that under SEERA, the Department faced the prospect of even more organizations competing for the limited space and resources then available. The Department clearly faced the dilemma of continuing to provide the substantial aid it had in the past without favoring any organization over another. To choose to accommodate only as many groups as it could would have put the Department in the position of violating the new law. Under these circumstances, the Department was forced to follow a course that continued to permit reasonable access yet did not improperly aid any organization.

Notwithstanding our determination that CCOA had reasonable alternatives available by which to maintain communication with existing and potential members, the Board acknowledges that

some slight harm may have been done to employees' organizing rights by the withdrawal of office space, clerks and separate bulletin boards. However, the Board finds that even if there was some slight harm, the Department did not commit an unfair practice. In reaching this conclusion the Board has considered our decision in Carlsbad Unified School District, supra, where we first set forth a balancing test for determining violations of EERA section 3543.5(a). As noted earlier, section 3543.5(a) is the counterpart to SEERA section 3519(a).

In Carlsbad, the Board held that where there is a connection between the employer's act and the exercise of employee rights, a prima facie case is established upon a showing that the employer's action tended to harm or did harm employee rights. If the employer offers a justification that its action was based on operational necessity, the competing interests of the employer and employees are balanced. The facts underlying the Department's action have been detailed above. In sum, the inadequate space available for all employee organizations and the potential for providing unlawful assistance combined with the many conflicts resulting from sharing space to motivate the Department to withdraw the assistance it had previously offered. The Board concludes that this justification outweighs the comparatively slight harm to

employees which resulted from the interruption of CCOA services inside the institutions.[10]

CCOA's second contention alleging a violation of section 3519(a) is that withdrawal of the office space, etc., amounted to illegal withdrawal of an employee benefit during a pre-election campaign period. It is apparent that the Department's provision of space and clerks benefited employees in some way. However, the present case is clearly distinguishable from those cases cited by CCOA in which the employer withdrew benefits that directly affected wages and employment conditions.[11] Whatever benefit may have accrued

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[10]Member Gonzales also concludes that the Department did not violate section 3519(a). However, he would apply the test set forth in his concurring opinion in Carlsbad, supra. There, he stated that "employer intent is an integral part of the behavior prohibited by section 3543.5." Unlawful intent may be actually proven or inferred from the entire record. An inference of unlawful intent may be rebutted by the employer with a showing of legitimate and substantial justification for its action. Applying this test, Member Gonzales concludes that any inference of the Department's intent to harm employee rights is rebutted by the Department's reasons for its action (inadequate space, conflict among organizations over shared space, and a potential 3519(d) violation). These are legitimate and substantial reasons, particularly since there is a unique need for order and stability within penal institutions.

[11]See, e.g., NLRB v. Dothan Eagle, Inc. (5th Cir. 1970) 434 F.2d 93 [75 LRRM 2531] (employer denied a pay increase automatically given every six months in the past); Davis Wholesale Co. (1967) 165 NLRB 271 [65 LRRM 1494], enfd. (D.C. Cir. 1969) 413 F.2d 407 [70 LRRM 3436] (employer discontinued coffee break during the night shift); Buddy Schoellkopf Products Inc. (1967) 164 NLRB 660 [65 LRRM 1231] enfd. (5th Cir. 1969) 410 F.2d 82 [71 LRRM 2089] (employer discontinued employee privilege of purchasing employer's products).

to employees here was of an indirect nature. Further, the period of time involved here was not preceding an election, but was rather before even an organizing campaign under SEERA had begun. Although CCOA claims it was unable to process its own benefit programs as a result of the Department's action, the Board finds that removal of the benefit of office space, et cetera, was amply justified and any harm resulting from its loss was slight. Moreover, as noted earlier, the decline in CCOA's programs was attributable in part to CCOA's own lack of resources. For the reasons expressed here and in the foregoing discussion, we conclude that no unfair practice was committed by the Department.

B. Section 3519(b).

CCOA's second charge alleges that the Department interfered with CCOA's organizing rights under section 3519(b). This subsection also has an EERA counterpart, section 3543.5(b), whose language is identical. Both sections make it unlawful for the employer to "[d]eny to employee organizations rights guaranteed to them by this chapter."[12]

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[12]SEERA section 3515.5 provides, in relevant part:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized

The hearing officer's discussion of the alleged violation of section 3519(b) noted that PERB had not fully delineated the dimensions of a non-exclusive employee organization's "right to represent," although the Board had made references to this right in a decision involving employee organization rights under EERA section 3543.1. (Hanford Joint Union High School District Board of Trustees, (6/27/78) PERB Decision No. 58.) In Hanford, the Board acknowledged that a nonexclusive employee organization has "some" representation rights prior to recognition or certification of an exclusive representative.

In a more recent decision, Professional Engineers in California Government (PECG), (3/19/80) PERB Decision No. 118-S, a majority of the Board expanded the non-exclusive representative's right to represent its members in their employment relations. To protect the employees' right to be represented when an exclusive representative has not been selected, the Board held that the nonexclusive representative's right encompasses "at a minimum . . . the right to meet and discuss with the state employer a subject as basic to the employment relationship as wages." (PECG, supra, maj. opn. at p. 9.) The employer was found to have a corresponding

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> employee organization is the only organization that may represent that unit in employment relations with the state. . . .

obligation to meet and discuss wages with the nonexclusive representative.[13]

Here, the hearing officer discussed whether CCOA's "right to represent" included the right to discuss the termination of office space with the Department before the Department's action was taken. The Board's decision in PECG, supra, was expressly limited to apply to a matter of "fundamental" interest to employees. Whether or not the subject at issue here is such a matter or otherwise included in the "right to represent" CCOA did discuss the proposed change before it was implemented, with the result that the effective date of the change was postponed. Under the circumstances, we find no violation of CCOA's rights under section 3515.5.

C. Section 3519(d)

SEERA section 3519(d) provides that it is unlawful for the employer to:

> Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to

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[13]Member Gonzales dissented from these findings. He found that "unlike the explicit right of a recognized employee organization to meet and confer in good faith (sections 3517 and 3519(c)), a right to discuss appears nowhere in the statute." Allowing a multitude of employee organizations to exercise a right to meet and confer would lead to "endless and confusing" meetings and would encourage minority organizations "to attempt to thwart [the] exclusive representation" design contemplated by the SEERA. (PECG, supra, dis. opn. at pp. 19-20.)

> it, or in any way encourage employees to join any organization in preference to another.

The evidence here demonstrates clearly that the Department's action was a justifiable response to the enactment of SEERA, as well as to the problems revealed in the Department's investigation of its previous policy. In no way did the Department dominate CCOA or interfere with its activities nor encourage participation in any other organization preferred by the Department. To the contrary, the record shows that throughout the period during which the Department began to phase out various ties with employee organizations, all organizations were evaluated and treated equally. We must, therefore, conclude that CCOA has failed to support its claim that the Department violated section 3519(d).

D. Section 3530

Government Code section 3530 is a provision of the George Brown Act, supra, a statute which covers state employees not covered by SEERA. PERB has statutory authority to administer the SEERA but not the Brown Act. Therefore, we affirm the hearing officer's dismissal of this charge.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, the unfair practice

charge filed by the California Correctional Officers Association is hereby DISMISSED.

By: Raymond J. Gonzales, Member Barbara D. Moore, Member

Harry Gluck, Chairperson, concurring:

While I concur in the ultimate conclusion reached by the majority, I do not find the business justification test of Carlsbad Unified School District (1/30/79) PERB Decision No. 89, to be the appropriate measure of the Department's conduct in this case.

Interference with organizing is not necessarily unlawful. It is interference with protected organizational activities which are to be condemned. An employer's refusal to release employees from their work during working hours may "interfere" with the employees' organizing preferences or ambitions. Similarly, an employer's refusal to finance organizing activities may have a dampening effect on such efforts. Yet, it should not be necessary to prove that neither of these employer decisions would constitute a violation of statutory rights. It may be true that the employees' opportunity to organize and CCOA's opportunity to communicate with Departmental employees were interfered with by the Department's

withdrawal of free office space, utilities, and inmate clerical services. Whether the alleged interference was unlawful eventually must rest on whether the employees and CCOA had a statutory right to such facilities.

It is not necessary to repeat here the majority's analysis of the right of access afforded employees and employee organizations under the SEERA. It is sufficient to indicate my substantial agreement with those portions of the primary decision. I would add, however, that I find nothing in the SEERA or in the pertinent literature which obligates an employer to provide to an employee organization the type of facility involved in this case. Indeed, it is arguable that such action is prohibited. Section 3519(d), prohibits the state from contributing financial or other support to an employee organization. However, it is not necessary to decide whether by providing the requested facilities the state, in this case, would be violating the Act or merely cooperating with CCOA.[1] The absence of a statutory prohibition against the state's donation of such facilities is not equivalent to a statutory grant of a right to such space and services to the employees or the organization.

I find no basis for a finding that the state violated section 3519(a) by unilaterally changing "an established past practice." Absent a showing that the Charging Party enjoyed a right to the facilities, the requirement for finding a violation based on

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[1]See Morris, The Developing Labor Law (1971) p. 140 et seq.

unilateral change is that the employer failed to meet its obligation to first provide notice and opportunity to negotiate to the exclusive representative.[2] At the time the Department adopted its current policy, the collective bargaining law for state employees had only recently been implemented. Units of representation had not been determined and no exclusive representative had been selected. The Department, however, did confer with CCOA prior to implementing the change and actually delayed withdrawal of facilities after this consultation. Prior to selection of an exclusive representative, the employer satisfied its obligation to meet and consult.[3]

There is a further consideration which militates against CCOA's past practice argument. The original practice was developed and maintained under a different law involving substantially different employer obligations and constraints. Under SEERA, the state is the single employer, a matter recognized by CCOA in its charge. To require the state to maintain the CCOA facilities now would be to require it either to make available comparable facilities in every state department to every employee organization with membership among those departments' employees or face the possibility of an unfair practice charge based on the discriminatory treatment

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[2]Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 359 U.S. 735 [50 LRRM 2177].

[3]See Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S.

among eligible labor organizations. Unequal application of employee access policy is at least arguably a violation of section 3519. To place on the state that double burden, particularly to sustain a voluntary practice relevant to and adopted at a different time and under a different law, would be a distortion of the Board's obligation to protect employee rights under the Act.

Harry Gluck, Chairperson

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (CALIFORNIA DEPARTMENT OF CORRECTIONS), Respondent.	Unfair Practice Case No. S-CE-3-S (78-79) PROPOSED DECISION (4/27/79)

Appearances: Russell L. Richeda, Attorney (Carroll, Burdick & McDonough), for the California Correctional Officers Association; Angela Pickett, Attorney, for the California Department of Corrections.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This case raises the issue of whether the California Department of Corrections committed an unfair practice by abandoning a long-standing policy of providing employee organizations with office space and the assistance of inmate clerks and permitting them to have their own, separate bulletin boards. The policy was abandoned just as the State Employer-Employee Relations Act (Gov. Code § 3512 et seq.) went into effect.

The present charge was filed by the California Correctional Officers Association (hereafter CCOA) on August 18, 1978. The charge alleges that the California Department of Corrections (hereafter Department) violated Government Code sections 3519(a), (b) and (d)[1] and 3530[2] by its policy change in July of 1978.

Following an unsuccessful effort to settle this case at an informal conference, a formal hearing was scheduled and held in Sacramento on October 27, October 31 and November 3, 1978.

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[1]Government Code section 3519 provides as follows:

> It shall be unlawful for the state to:
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
> (e) Refuse to participate in good faith in the mediation procedure set forth in Section 3518.

[2]Government Code section 3530 provides as follows:

> The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

FINDINGS OF FACT

The Department of Corrections is the state agency which operates the state prisons and which has "responsibility for the care, custody, treatment, training, discipline and employment"[3] of all prison inmates. The Department operates 12 institutions throughout the state and employs approximately 8,900 persons. As of October 25, 1978, there were 20,821 inmates confined in the Department's custody.

CCOA[4] has about 3,675 members who are employed by the Department. All but about 175 of these members are peace officers employed either in the correctional officer series or the correctional program supervisor series of jobs. As peace officers, they have the responsibility for the custody of the prison inmates. Correctional officers are on duty in shifts around the clock. They supervise inmates in the housing units, in the yard, in the dining rooms and elsewhere in the institutions. Correctional officers are assigned to specific posts and they are required to remain at those posts during their shifts. They may not move freely about the institution. Correctional officers live off institutional grounds.

For at least 15 years the Department made it a practice to provide office space for employee organizations within various institutions. The practice has been subject to the availability

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[3]Penal Code section 5054.

[4]It was stipulated at the hearing that CCOA is an employee organization as that term is defined in Government Code section 3513(a).

of space and from time to time two or more organizations were required to share the same office in some prisons.

The Department also made it a practice for at least 12 years to permit employee organizations to hire inmates to perform clerical tasks. An inmate clerk worked in an organization's office within the prison and from time to time two or more organizations were required to share the same inmate clerk. The Department's long-standing policy on the use of facilities and the employment of inmate clerks provided as follows:

> Sec. 2506. Use of State Facilities and Time. Uniform standards of treatment will be applied to all employee organizations concerning the use of state facilities, equipment, and work time.
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> . . . . . .
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> (d) Subject to the approval of the warden or superintendent, employee organizations may be jointly assigned office space and the use of an inmate clerk if such space and assistance are available. The costs of each shall be shared equally by all organizations involved.

CCOA took full advantage of the policy. The organization had a number of institutional offices and employed a number of inmate clerks. Evidence presented at the hearing demonstrates that CCOA at one time or another has used an office and/or the services of an inmate clerk in 11 of the state's 12 prisons. Through stipulation and testimony, it was established that:

1) At the California Correctional Center, Susanville, CCOA had the use of an inmate clerk for three years and two months, ending in December of 1977. This clerk was shared with the

California State Employees Association (hereafter CSEA) and Teamsters Local 960 (hereafter the Teamsters). CCOA shared an office at the institution for the last four years with CSEA and the Teamsters.

2) At the California Institution for Men, Chino, CCOA had the use of an inmate clerk for approximately 12 years. Services of the clerk were shared at various times between CCOA and CSEA. CCOA also shared an office at the institution with CSEA for a period of time until 1975 when the office was converted to an institutional use. After that date, CCOA had the use of a desk at the Chino prison.

3) At the California Medical Facility, Vacaville, CCOA used an office for 15 years and employed a clerk for 11 years. At all times prior to February of 1978, CCOA had shared the office in this institution with other employee organizations.

4) At the California Men's Colony, San Luis Obispo, CCOA employed the services of an inmate clerk for the last 10 years. For part of that time, the clerk was shared with CSEA. CCOA had the use of an office for 10 years ending in February of 1978. During part of that time, the office was shared with CSEA.

5) At Folsom State Prison, CCOA had the unshared services of a clerk and the unshared use of an office for the three years immediately prior to the 1978 change in policy.

6) At San Quentin State Prison, CCOA had the unshared services of an inmate clerk for at least the last seven years prior to the change in policy and the use of an office which it shared with CSEA for the same seven years.

7) At the Sierra Conservation Center, Jamestown, CCOA employed an inmate clerk for the five years prior to the change in policy. The services of this clerk were shared with the Teamsters. CCOA also had an office at the Jamestown institution for the same five years, sharing it part of the time with the Teamsters.

8) On July 3, 1978, the date on which the Department announced elimination of its previous office and inmate clerk policies, CCOA had no office in four institutions. Those four were:

--- The California Correctional Institution at Tehachapi where CCOA had shared an office with CSEA from October of 1975 through March of 1977. CCOA had the unshared part-time services of an inmate clerk at Tehachapi from October of 1975 through March of 1977;

--- The California Institution for Women at Frontera where CCOA once had shared an office for about three years with another organization but had elected not to use the office space in the four to five years prior to July of 1978. At one time CCOA had employed an inmate clerk at Frontera but it has not done so for the last four to five years prior to July of 1978;

--- The California Correctional Training Facility at Soledad where for about 15 years, ending in 1973, CCOA had the use of an office which it shared with CSEA. CCOA had employed an inmate clerk at Soledad from November of 1972 through March of 1975, sharing the clerk part of the time with CSEA;

--- The Deuel Vocational Institution at Tracy where an office was made available to CCOA for less than a year but the office was not used by CCOA. CCOA had the unshared services of an inmate clerk at Deuel for the last six years prior to July of 1978.

In the four institutions where CCOA had no office in July of 1978, its membership was lower than its statewide average of 70 percent of those law enforcement employees in job classes sought by CCOA.

CCOA used bulletin boards at various institutions for many years. The parties stipulated that CCOA had the unshared use of bulletin boards at seven institutions for periods of two to twenty years. The parties also stipulated that CCOA had shared the use of bulletin boards at two other institutions for periods of four to twenty years.

CCOA offices in the prisons were used to prepare and store records, to distribute CCOA literature, and to prepare and process grievances. CCOA members went to the offices to obtain insurance forms and materials relating to various CCOA benefits. The offices also served as lounges and places where employees could assemble during times of tension in the institution. In general, CCOA used its institutional offices as the primary location for the transaction of business with its members.

Of perhaps even greater importance to the CCOA were the inmate clerks who operated the organization's offices in the prisons. Basically, the inmate clerks served the role of a field staff for CCOA. CCOA has no employees other than those who work in the organization's Sacramento headquarters office. The inmate clerks historically filled a role of the type that paid organizers have performed for many labor organizations. They also have been the entire clerical staff for the local chapters.

The duties which an inmate clerk performed for CCOA were legion. Among the clerk's tasks which a field organizer might otherwise perform was the explanation of the various benefits of CCOA membership. Inmate clerks were conversant with all facets

of the CCOA benefit package including life and dental insurance programs and such vacation benefits as discounts at amusement parks. Inmate clerks also distributed CCOA literature to new employees and sometimes signed up new members for the organization.

Among the secretarial tasks of the inmate clerk were the typing, filing and completion of forms which accompany the running of any organization. The inmate clerk maintained the membership records, typed and distributed the chapter publications, received and distributed materials from the CCOA office in Sacramento, typed most of the grievances, placed literature on the bulletin boards and distributed dental claim forms. Typically, inmate clerks worked a 40-hour week but one inmate clerk testified that he routinely took messages and received requests for insurance forms during his off-duty hours.

Inmate clerks were paid varying amounts by the local chapters which employed them. According to law, the rate of compensation could range between 2 cents per hour and 35 cents per hour.[5] The particular rate of pay for an individual clerk was determined according to that clerk's level of experience and competence. In those institutions where two or more organizations shared the services of a single inmate clerk the salary of the clerk was split between the organizations. In such situations, there were occasional complaints to the Department that a clerk did more work for one organization than another or that a clerk favored one organization over the other. In a shared office at San Quentin

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[5]Penal Code section 2700.

there also was an occasional complaint that some of CCOA's paper supply was missing.

The Department's decision to change its policies on office space and inmate clerks can be traced to a study undertaken by Gil Hawkins shortly after he was employed as Department industrial relations director in the fall of 1977. Mr. Hawkins was asked to review the Department's policies toward employee organizations to determine if there was any basis to various complaints that the Department afforded preferential treatment to some organizations.

What Mr. Hawkins found was a welter of crossing accusations of favoritism. The Teamsters were complaining that the best locations for bulletin boards already were taken by other organizations. CSEA was complaining that the Department improperly permitted CCOA to operate a badge program. CCOA was complaining that the Department improperly permitted CSEA to operate snack bars and employee canteens.

The badge project and the snack bar complaints were closely tied together. The Department had entered an agreement with CCOA whereby CCOA would collect monies for badges to be worn by the Department's peace officer employees. CSEA contended this project provided CCOA an unfair advantage at signing new employees because new employees would have to get their badges from CCOA. As a result of CSEA's complaints, the Department cancelled the project with CCOA.

Following the Department's cancellation of the badge project, CCOA initiated a complaint about CSEA snack bars and concessions

at the California Institution for Women, the California Rehabilitation Center and the California Institution for Men. By a letter of November 9, 1977, CCOA called upon the Department to halt all employee benefit functions then existing under the sponsorship of CSEA. CCOA renewed this complaint in a letter to the Department on March 31, 1978. CCOA raised the matter a third time at an April 10, 1978 meeting with the director of the Department of Corrections.

There also were complaints that some employee organizations received favored treatment in the assignment of inmate clerks by receiving clerks with a better security clearance than those of a competing organization. Inmates with the best security clearance have access to the largest portion of the prison grounds. Thus, clerks with better security clearances are more useful to employee organizations than inmate clerks with less good security clearances.

Finally, there were complaints of favoritism in the issuance of prison identification cards. Employee organization representatives with identification cards had easier access to Department institutions than organizations whose representatives did not have identification cards.

Mr. Hawkins testified that after reviewing these various complaints he concluded that "Number one, . . . there wasn't a sufficient policy or enforcement of the policy to ensure that the employee organizations would be treated equally; number two, they were not being treated equally; number three, just about every institution had a separate set of policies in practice and there

wasn't any uniformity whatsoever that I could detect and I looked hard."

The problem with office space was especially complex. Three employee organizations already had used office space in some institutions and the Department had good reason to anticipate that more organizations would seek institutional offices as the State Employer-Employee Relations Act (hereafter SEERA) went into effect. How many organizations might seek institutional office space was unclear but it was apparent to Department officials that the number could be substantial. Nine Organizations each had paid $30 to purchase a list of the Department's employees, an action indicating an interest in organizing the Department's employees. In the months after October of 1977, between six and twelve organizations had made direct inquiries with Mr. Hawkins about the availability of institutional office space. Mr. Hawkins advised these organizations that the policy of providing office space and inmate clerks was under review.

It was Mr. Hawkins' uncontradicted testimony that all 12 prisons have space problems, a factor which limits the amount of space available for employee organization offices. He said he did not favor placing all employee organizations into a single office at each institution. He testified that in the expected election campaigns the various organizations would be in a competition for survival and should not be in the same office together. The spirit of competition had reached such intensity in late 1977 that material had been torn from the bulletin boards of various organizations.

The change in Department policies toward employee organizations began in about February of 1978. The operation of snack bars and employee canteens was the first area subject to change. The organizations which operated those facilities were advised that the Department intended to buy out all food and canteen operations by July 1, 1978. The Department first assumed operation of a snack bar run by the San Quentin Employees Mutual Benefit Association. As soon as the policy change was announced, the San Quentin organization requested the Department to take over its facility, immediately. The San Quentin snack bar had failed a Department of Health sanitary inspection and the employee organization did not want to commit the funds necessary to bring the snack bar up to the required health standards. The Department also took over a canteen facility operated by an employee benevolent organization at the California Correctional Institution, Tehachapi. As was the case at San Quentin, the Department moved rapidly at Tehachapi because the employee organization wanted relief from the operation of the canteen.

Before the Department could acquire the other employee organization-operated snack bars, the California electorate approved Proposition 13, a measure which significantly reduced tax revenues to local government. Following the passage of Proposition 13, the State Department of Finance instituted new cost-control procedures which delayed further acquisition of the employee-operated snack bars. As of the date of the hearing in this matter, the Department still had not purchased the CSEA snack bars.

On approximately May 1, 1978, Mr. Hawkins recommended to the Department's top management that the use by employee organizations of institutional office space and inmate clerks be eliminated. On July 3, 1978, the Department's assistant director, Carlos M. Sanchez, sent to all wardens, superintendents and regional administrators a memorandum which implemented Mr. Hawkin's recommendations. With respect to the use of office space and inmate clerks, the memorandum directed as follows:

> There is a lack of uniformity in the procedure in which we provide office space for employee organizations. In an attempt to uniform [sic] that practice, the following will be implemented within 30 days:
>
> . . . . . .
>
> The use of state property should be directly related to the goals and mission of the Department. Inasmuch as membership in labor organizations is not a mission of the Department of Corrections, the department will not provide to labor organizations office space, telephones, and inmate assistance (whether free or rented) for the purpose of organizational or membership activities. Institutions that currently lease office space to labor organizations will terminate all such arrengements [sic] no later than 30 days hence.

With respect to bulletin boards, the new policy provided that the Department would provide bulletin boards and that the bulletin boards would be placed in locations "reasonably visible and accessible to all employees." The July 3 memorandum directed that all bulletin boards would be shared equally by all employee organizations.

In the words of CCOA Executive Director Ken Brown, the change was "a major disaster" for his organization. Because CCOA had

relied heavily on the use of inmate clerks and institutional offices, the elimination of those services had a detrimental effect upon that organization. With no field organizers and no clerical employees at the chapter level, CCOA found itself hard-pressed to continue a number of routine operations at the chapter level. At those institutions where CCOA had employed inmate clerks, an effort was made to shift the work of the clerks onto the chapter officers. But this effort was only marginally successful. Delays began to occur in the distribution of CCOA literature, in the processing of grievance and insurance forms, in the preparation of chapter bulletins. Records were not maintained and the process of signing up new members became less efficient.

With the elimination of a CCOA office, there was no convenient location for members to pick up forms or other materials or to leave messages to officers of the local chapter. The offices long had been used as places where members could speak with CCOA officers about grievances. After the offices were closed, CCOA officers could make special arrangements with prison administrators in order to have a private room in which to interview members. However, in at least one institution CCOA officers have had to meet with members in the hallways to discuss grievances.

Members have complained to CCOA officers about the erosion of services which followed the Department's change in policy. However, the change has had no significant impact on CCOA's total membership, although the organization's officers attribute several resignations to the Department's action.

The Department did not meet with the CCOA prior to announcing its change in policy. At CCOA's request, Department administrators met with the organization on August 3, 1978 to discuss the change in policy. CCOA offered various alternatives to the closure of the organization's institutional offices and the elimination of the inmate clerk program. However, in a letter dated August 9, 1978, Assistant Department Director Sanchez restated the Department's decision to conclude the programs. That letter reads, in part, as follows:

> As a result of our meet and confer of August 3, 1978, we re-evaluated this decision. The re-evaluation confirmed our belief that we must take this action in order to be fair to all organizations and to prevent what we perceive to be unavoidable problems in the future if we continue to provide office space and inmate help. However, as agreed upon at the meet and confer session, the current office arrangements will not be terminated on August 15, 1978, but will be terminated on August 31, 1978.
>
> Although there is a difference of opinion regarding the interpretation of SEERA we believe that to continue to provide office space and inmate help is prohibited unless we provide it to all organizations requesting the same consideration. We do not believe that we can accommodate all those who would request office space; nor do we believe it would be in our best interests to begin providing office space to all who request it. Additionally, we believe that by providing office space and inmate help we are indirectly subsidizing employee organizations which we feel is inappropriate.

CCOA has developed no long range solution to the loss of institutional office space and the services of inmate clerks. CCOA's Board of Directors has concluded that the circumstances at each institution are so different that no uniform statewide

solution is possible. Local chapters have considered leasing offices and hiring clerical employees but as of the time of the hearing no chapter had elected to pursue this course.

There are significant costs involved in leasing offices and hiring clerical employees. A real estate appraiser who inspected the former CCOA office at the California Medical Facility testified that comparable space in Vacaville would cost between $140 and $150 per month including utilities. CCOA Executive Director Brown testified that it would cost the organization from $400 to $500 per month at each chapter to rent adequate facilities and employ part-time clerical assistants. Mr. Brown said the organization would have to increase its dues substantially to cover such costs. He said CCOA members had agreed to a dues increase from $5 per month to $8.50 per month just prior to the Department's decision to remove employee organization offices. He said that another dues increase proposal would not be well-received so soon after the earlier increase.

CCOA also considered using mass mailings as a method of replacing the information distribution services formerly provided by inmate clerks. However, it would cost between $900 and $1,000 for each mass mailing from Sacramento to all members. Mr. Brown testified that such costs were too expensive for CCOA.

After the employee organizations were removed from offices in the Department's various institutions, the Department continued to allow some outside organizations to retain offices within prisons. Employee credit unions retain offices within the

institutions. Two organizations designed to help parolees return to society -- the 7th Step Foundation and Friends Outside -- both retain offices within the prisons. Offices also are maintained by an Indian cultural group and by groups involved in inmate recreational activities such as those for artists and model train enthusiasts. Mr. Hawkins testified that these organizations are permitted to remain in the institutions because they support the Department's mission of care, custody and treatment of the incarcerated.

Although the Department changed its policy on the provision of offices and inmate clerks for employee organizations, it made no change in its practice of allowing organization representatives to have access to employee work sites. The access policy, which is contained in section 2504 of the Department's administrative manual, provides as follows:

> Access to Employee Work Locations. (a) Reasonable access to employee work locations during working hours shall be granted to employee organization officers and representatives on employment relations matters. This does not include visits for the purpose of solicitation of membership or routine contact, but only where specific problems exist which necessitate the employee organization representative seeing the work location to understand the situation.
>
> (b) Such employee organization representatives shall notify and obtain the approval of the appropriate official before entering an employee work location as follows:
>
> (1) Any institution - warden or superintendent.
>
> (2) District office of Parole and Community Services Division - district administrator.

(3) Regional office of Parole and Community Services Division - regional administrator.

(4) Central office of Parole and Community Services Division - Deputy Director - Parole and Community Services Division.

(5) Central office of Department of Corrections - personnel officer (who will clear with appropriate division chief.)

In accord with this policy, CCOA officers and representatives including Executive Director Brown have been allowed access during work hours to employees with grievances. This access, in some situations, has included the time off for both the CCOA officer and the grievant to discuss the problem.

LEGAL ISSUES

Did the Department, by its unilateral removal of employee organizations from institutional offices, cancellation of the inmate clerk program and elimination of separate organizational bulletin boards:

1) Violate Government Code section 3519(a)?

2) Violate Government Code section 3519(b)?

3) Violate Government Code section 3519(d)?

4) Violate Government Code section 3530?

CONCLUSIONS OF LAW

Section 3519(a)

Government Code section 3519(a) makes it unlawful for the state employer to take reprisals or discriminate against employees or to otherwise interfere with their participation in rights given them by SEERA. CCOA advances two theories in its effort to establish a violation of section 3519(a) (all references are to the Government Code). CCOA first contends that by its actions, the Department of Corrections effectively has deprived Department employees of their right to join or participate in the activities of employee organizations.[6] Secondly, CCOA contends that the Department has coerced employees by the withdrawal of expected benefits prior to an election. CCOA supports both theories through the extensive citation of National Labor Relations Board cases.[7]

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[6]Government Code section 3515 provides as follows:

> Except as otherwise provided by the Legislature, state 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. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (h) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

[7]Relevant cases under the National Labor Relations Act are persuasive precedent in the interpretation of California labor relations statutes. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Comm. v. Superior Court (1978) 23 Cal.3d 55 [___ Cal.Rptr. ___].

To support its contention that the Department has denied employee rights, CCOA asserts that the new policy has inhibited the ability of employees to learn about the benefits of membership in CCOA. The organization further asserts that the policy has hindered CCOA's access to employees and that there are no reasonable alternative means of communications, citing NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001] and related cases. CCOA argues that because of the restrictive nature of a prison, the organization no longer has an adequate ability to reach employees. Restriction of this access, CCOA contends, is a restriction on the rights of employees to exercise their section 3515 rights.

To support its contention that the Department has coerced employees, CCOA argues that the change in policy is an illegal withdrawal of expected benefits prior to the conduct of an election. CCOA relies on National Labor Relations Board precedent that a preelection withdrawal of benefits coerces employees in the exercise of their right to freely choose a union. See, e.g., NLRB v. Dothan Eagle, Inc. (5th Cir. 1970) 434 F.2d 93 [75 LRRM 2531] (employer denied a pay increase automatically given every six months in the past); Davis Wholesale Co. (1967) 165 NLRB 271 [65 LRRM 1494], enfd. (D.C. Cir. 1969) 413 F.2d 407 [70 LRRM 3436] (employer discontinued coffee break during the night shift); Buddy Schoellkopf Products Inc. (1967) 164 NLRB 660 [65 LRRM 1231] enfd. (5th Cir. 1969) 410 F.2d 82 [71 LRRM 2089] (employer discontinued employee privilege of purchasing employer's products).

In response to these contentions, the Department simply asserts that CCOA has failed to demonstrate that any Department action intruded upon the section 3515 rights of employees. Therefore, the Department concludes, the allegation that the Department violated section 3519(a) should be dismissed.

It is concluded that the Department is correct and that CCOA has failed to establish a violation of section 3519(a).

CCOA relies upon NLRB precedent which simply does not fit the facts of its case. The evidence totally rebuts CCOA's contention that the Department's new regulations deny the organization access to employees. The new Department policies do not prohibit the circulation of CCOA material by employee members within the institutions. The policies do not prohibit the posting of CCOA materials on institutional bulletin boards. The policies do not prohibit CCOA members from soliciting for new members within the institutions. Moreover, Department policy 2504 specifically permits "reasonable access to employee work locations during working hours" by nonemployee representatives of employee organizations. Evidence presented at the hearing demonstrates conclusively that nonemployee representatives of CCOA, including Executive Director Brown, have regular access to the Department's institutions and have met frequently with employees inside institutional walls. CCOA continues to have easy access to Department employees through the use of both employee members and nonemployee representatives. The new Department policies merely remove the Department from its former role of affording support to the organizing process.

Neither is CCOA persuasive in its contention that the Department has withdrawn a "benefit" from employees at a time prior to the election. Every NLRB case cited by CCOA involves an employer's removal of a direct benefit to employees. In the cases cited by CCOA, the employees were deprived of a pay raise, a coffee break, the right to purchase the employer's product. Employees suffered no such deprivation in the present case. They suffered no loss of benefits, no change in hours. CCOA contends that the loss of benefits can be found in the delays which removal of the inmate clerk program brought to CCOA's processing of its own benefit program, e.g., dental insurance, passes for amusement parks. But these problems cannot be charged to the Department. They are the product of CCOA's decision not to hire a professional staff to process its benefit program at the institutions.

Precedent from the Public Employment Relations Board also demonstrates that the CCOA has failed to show a violation of section 3519(a). In a recent case construing a comparable section of the Educational Employment Relations Act (Gov. Code sec. 3540 et seq.), the PERB established the following guidelines for disposition of alleged 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;
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> 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 of intent.

Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT v. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

Because section 3543.5(a) of the EERA is identical in wording to section 3519(a) of SEERA,[8] it is likely that the PERB will

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[8]It also should be noted that the rights guaranteed to state employees under SEERA (footnote no. 6, supra) are in relevant part identical to the rights provided school district employees under EERA. Section 3543 (EERA) provides as follows:

Public 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. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

construe them in the same manner. Applying the Oceanside-Carlsbad test to the present case, it is concluded that the harm to employees' rights is slight. The new policies of the Department have not precluded employees from distributing CCOA materials, from soliciting on behalf of CCOA, from posting CCOA materials on the bulletin boards, or from having access within the institutions to CCOA's nonemployee representatives. All the Department has done is to tell the CCOA that it will no longer be allowed to use inmates under the Department's custody and offices provided by the Department to further these activities.

Furthermore, the Department's policy change was a justifiable reaction to the changing conditions brought about by the enactment of SEERA. The new statute requires the state employer to be fair in its dealings with competing employee organizations. (See section 3519(d), footnote no. 1, supra.) Where two or more employee organizations are competing for membership, the employer must be strictly neutral in extending organizational opportunities.[9] In order to be fair to all organizations, the Department had three choices: (1) Provide individual offices and inmate clerks for all organizations which requested them; (2) place all organizations in shared offices with their own individual or shared inmate clerks; or (3) provide no offices or inmate clerks for any organization.

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[9]Azusa Federation of Teachers, AFT Local 3298 v. Azusa Unified School District (11/23/77) EERB Decision No. 38; NLRB v. Waterman S.S. Co. (1940) 309 U.S. 206 [5 LRRM 682]; NLRB v. Corning Glass Works (1st Cir., 1953) 204 F.2d 422 [32 LRRM 2136]; Wyco Metal Products (1970) 183 NLRB 901 [74 LRRM 1411].

There was uncontradicted evidence that the Department has a shortage of space at all of its institutions. Based upon various inquiries, the Department reasonably concluded that as many as 12 employee organizations might organize some Department employees, although not all of these groups wanted correctional officers. The Department reasonably concluded that it did not have separate office space for 12 organizations or even a small portion of that number.

The Department also reasonably rejected the alternative that the organizations be placed into shared offices. Bickering between CCOA and CSEA over the badges and over the snack bars already had become a constant source of friction. Reasonably, the Department concluded that the situation would only get worse as the competing organizations approached an election for an exclusive representative. The Department reasonably concluded that the placement of rival employee organizations in the same office would not be conducive to the stability needed to properly operate a prison.

That left the third alternative, removal of all organizations from offices within the institutions, an action which the Department ordered. Elimination of the inmate clerk program was the inevitable result of the decision to eliminate institutional offices. Without a place to work, without a typewriter and materials, inmate clerks could provide no service to any organization.

Finally, the Department also reasonably concluded that individual organizations could not have individual bulletin boards. Faced with the complaint that all good locations for bulletin boards had been

taken by the older organizations, the Department once more had the obligation to insure equal treatment. It chose to mount all bulletin boards in the same location and permit all organizations to have equal access to those bulletin boards. There was no demonstration that the Department had an unlawful motivation, purpose or intent in any of these actions. Therefore, the Department did not violate section 3519(a).

For these reasons, the charge that the Department violated Government Code section 3519(a) is hereby dismissed.

Section 3519(b)

Government Code section 3519(b) makes it unlawful for the state employer to deny employee organizations rights guaranteed to them by SEERA.[10] In support of its theory that the Department violated section 3519(b), CCOA asserts that at minimum the "right to represent" includes the right to organize. CCOA contends that the Department's new regulations effectively have denied it the right to organize. This rationale is rejected. For the reasons stated above, it is concluded that CCOA has not been deprived of the right to organize within the state's prisons.

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[10]By Government Code section 3515.5, employee organizations are given the following specific rights:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

The meaning of the "right to represent" has not yet been fully analyzed by the PERB. In an early case, San Dieguito Faculty Association v. San Dieguito Union High School District (9/2/77) EERB Decision No. 22, the "right to represent" was construed very narrowly. In that case, which involved the interpretation of section 3543.1(a) of the EERA,[11] the PERB held that a public school employer was not obligated to "consult" with an employee organization prior to the selection of an exclusive representative.

However, in Hanford High School Federation of Teachers, AFT, AFL-CIO v. Hanford Joint Union High School District Board of Trustees (6/27/78) PERB Decision No. 58, the PERB wrote:

> It is unarguable that section 3543.1(a) grants some representation rights to a nonexclusive employee organization prior to the time an exclusive representative is recognized or certified. The nature and extent of those rights have not been clearly articulated by the Board in any of its decisions to date. . .

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[11]Government Code section 3543.1(a) of the EERA provides as follows:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

This language implies clearly that the narrow San Dieguito interpretation of "right to represent" may no longer be viable.

However, even on the assumption that San Dieguito is no longer valid, CCOA cannot prevail in its contention that it was denied the right to represent its members. The evidence establishes unequivocally that at CCOA's request Department officers met with CCOA on August 3, 1978. At that meeting, CCOA presented various alternatives to the elimination of the institutional office and inmate clerk programs. As a result of that meeting, the Department agreed to postpone the termination date of the programs. Moreover, the evidence suggests and it is found that after the August 3 meeting, the Department reevaluated its decision and then concluded that it should proceed with its original plan.

It is plain that the Department met with CCOA, considered CCOA's position, modified the date of the change, reevaluated its decision but then decided to go forward. CCOA was thus allowed the right to represent its members.

For these reasons, the charge that the Department violated Government Code section 3519(b) is hereby dismissed.

Section 3519(d)

Government Code section 3519(d) makes it unlawful for the state employer to dominate or interfere with the formation of an employee organization or to contribute financial or other support to it or to encourage employees to join one organization in

preference to another. In support of its theory that the Department violated this section, CCOA argues that the state can violate section 3519(d) by taking any action "deleterious to full communication." CCOA contends that the Department took such an action and therefore violated the section.

In this argument, CCOA uses section 3519(d) in an unusual fashion. The evidence demonstrates that the Department's primary reason for ending the institutional office and inmate clerk programs was to avoid the accusation that it was violating section 3519(d). The section specifically requires the state employer to be equal in its treatment of employee organizations. CCOA has presented no evidence of employer domination. There is no evidence of interference in the formation of an employee organization. Any interference in the operation of CCOA was due to the justifiable removal of the Department's past assistance to CCOA. There is no evidence the Department's action constituted support to an employee organization or the encouragement of employees to join one organization in preference to another.

For these reasons, the charge that the Department violated Government Code section 3519(d) is hereby dismissed.

Section 3530

Government Code section 3530[12] is a provision of the George Brown Act (Gov. Code sec. 3525 et seq.), a statute which covers state employees not covered by SEERA. CCOA contends that the PERB has authority to administer section 3530 of the George Brown Act. Plainly, such is not the case.

The George Brown Act is codified as title 1, division 4, chapter 10.5 of the Government Code. SEERA is codified as title 1, division 4, chapter 10.3 of the Government Code. The PERB is given the authority to administer the provisions of chapter 10.3 (SEERA) by section 3513(g). There is no provision giving the PERB the authority to administer the provisions of chapter 10.5 (George Brown Act). Therefore, the PERB lacks jurisdiction over the alleged violation of section 3530.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, the unfair practice charge filed by the California Correctional Officers Association against the State of California is hereby DISMISSED.

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[12]Government Code section 3530 provides as follows:

> The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 17, 1979 unless a party files a timely statement of exceptions. See Calif. Admin. Code, tit. 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on May 17, 1979 in order to be timely filed. See Calif. Admin. Code, tit. 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See Calif. Admin. Code, tit. 8, sections 32300 and 32305, as amended.

Dated: April 27, 1979

Ronald E. Blubaugh
Hearing Officer