STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 250 and LOCAL 400, AFL-CIO, Charging Party, v. MARIN COMMUNITY COLLEGE DISTRICT, Respondent.	Case Nos. SF-CE-297 SF-CE-316 PERB Decision No. 145 November 19, 1980

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Service Employees International Union, Local 250 and Local 400, AFL-CIO; Jon A. Hudak, Attorney (Breon, Galgani & Godino) for Marin Community College District.

Before Gluck, Chairperson; Moore, Member.

DECISION

The Marin Community College District (hereafter District) has filed exceptions to the attached hearing officer's proposed decision which holds that the District violated section 3543.5(a)[1] of the Educational Employment Relations

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[1]Section 3543.5 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

Act (hereafter EERA)[2] by terminating its employee, Johnny Pace, because of his union activities. The hearing officer also found that the District had violated section 3543.5(a) and (b)[3] by adopting rules which, among other things, forbade access of classified employee organization representatives to the campuses of the District during coffee and rest breaks. After considering the entire record and briefs of the parties, the Board adopts the hearing officer's findings of fact, including his credibility determinations,[4] and affirms his conclusions of law to the extent modified herein.

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

[2]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

[3]Section 3543.5 provides:

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

[4]Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

FACTS

I. Background

Johnny Pace had been employed by the District as a carpenter since 1963 and was considered by his supervisors to be good at his job. From 1967 through 1976, Pace was very active in Service Employees International Union (hereafter SEIU), having served as a steward during those years. In this capacity, he participated in negotiations with the District, represented employees' grievances, attended college-wide meetings as the employee representative, and recruited on behalf of the union. Pace's union activities were not questioned until 1974 when Ole Prahm became supervisor of plant facilities, a position that placed him two supervisory levels above Pace.

Throughout the course of their relationship, there were numerous confrontations between Prahm and Pace centered on the latter's union activity. In addition to the examples described in the hearing officer's decision, Pace and Prahm also clashed over a hiring issue. Pace believed that Prahm had hired an unqualified employee from his (Prahm's) former place of employment. He complained first to Prahm, himself, and then to the SEIU business agent. As with the other controversies discussed in the hearing officer's decision, this matter was finally resolved before the board of trustees in favor of SEIU.

On other occasions, the District's agents expressed their opinions of unions. During one meeting with his employees, Prahm stated that, in his opinion, they did not need unions, as District employees were "one big happy family" which could take care of its own problems and did not need unions telling the District how to run its business. On another occasion, Leo Dunne, a supervisor working under Prahm, but not Pace's regular supervisor, warned Nick Garcia, an SEIU steward, that he should not be relying on Pace or the union so much because there would come a day when he would get in trouble and neither Pace nor the union would be able to help him out.

II. The Incident on April 21, 1978

This incident forms the basis for one of SEIU's unfair practice charges which alleges that Pace was disciplined because of his union activities.

On the morning of April 21, Pace arrived at work some time before his starting time. While waiting for a work assignment from his immediate supervisor, Mike Hughes, Pace became involved in a conversation between Nick Garcia and another employee, Mike Schrader, about procedures for transferring or retaining union membership upon quitting the District's employ. As the conversation was breaking up, Leo Dunne, supervisor of maintenance systems, criticized the group for holding union meetings on company time and on District property. Garcia and Pace both protested that they were not

holding a "union meeting" and Garcia left the area to resume work. Pace remained and challenged Dunne's authority to give him work orders since he was not Pace's immediate supervisor. This led to a shouting match between the two men which Hughes was forced to break up. The hearing officer found that, at one point, Pace took Dunne by the arm.

A few days later, Prahm asked Pace to meet with him about the April 21st incident. When Pace requested that a union representative be present during the meeting, Prahm replied that he wanted to see Pace alone and not anyone else. Pace refused to meet with him without a union representative, apparently believing that some discipline would result from such a meeting. After this refusal, Pace received from Prahm a written reprimand for challenging Dunne's authority, not following Dunne's orders, and for coming into "direct physical contact" with Dunne. Neither Garcia nor the third employee who was involved in the so-called "union meeting" received a reprimand, although they, too, were objects of Dunne's order to disperse.

Prahm set up two subsequent meetings, both of which Pace refused to attend because Geoffrey Sackett, the SEIU representative, was unavailable. Prahm made no attempt to ascertain when Sackett could attend the meetings. Although Sackett made several attempts to contact Prahm to set up a meeting time, his messages, left with Prahm's secretary, were never answered.

The parties finally did meet on May 4, pursuant to the District's equal opportunity grievance procedure.[5] At this meeting Prahm refused to discuss the April 21st incident which was the very purpose of the meeting. On the same day SEIU filed, on behalf of Pace, a formal grievance over the reprimand.

On May 17, Prahm wrote a memo to Les Bailey, the affirmative action officer who presided over the May 4 meeting. Prahm complained of Pace's "failure to follow instructions" to break up the "informal meeting" held during working hours, and also noted that neither Pace nor Garcia attended the two meetings he (Prahm) had scheduled to discuss the incident. Garcia, who also failed to attend these meetings, was not reprimanded. However, Pace received yet another letter of reprimand on June 26 from Prahm, reiterating the original charges and adding:

> . . . Additionally, you failed to follow my directions as the department head when requested to present yourself in my office for a meeting to discuss the issue . . . . This constitutes willful insubordination.[6]

Throughout the summer, Sackett made numerous attempts to process Pace's grievance beyond the first step in accordance

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[5]The District had two separate grievance procedures, one to be utilized to resolve complaints based on race, sex, or religious discrimination, and the other to be used for other grievances over working conditions. Mr. Pace pursued both avenues in his attempt to get the letter of reprimand removed from his file.

[6]Charging Party's Exhibit No. 6

with written District policies. His requests for responses from the personnel director, David Pia, were never responded to.

III. The Solicitation Rules

Shortly after the April 21st incident and in response to it, the District's board of trustees passed "Rules for Classified Employee Union Activity." During this period of time, SEIU was involved in an organizing drive at the College of Marin in which Pace was an active participant.

The rules applied only to classified employee organizations and were to expire upon the election of exclusive representatives for those employees. The relevant portion prohibits recruiting contacts during working hours which, by the District's definition, included coffee and rest breaks. Although the District had rules restricting non-union related solicitation and advertising, these were not enforced.

IV. Termination of Johnny Pace

In May 1978, Mr. Pace began seeing a physician about stress-related symptoms. Dr. Joseph Engleman, who treated Pace throughout the summer of 1978, concluded that Pace's condition was directly caused by the stress Pace was experiencing on his job and recommended that he take a few days off from work, which Pace did.

On July 17, Pace returned from a two-week vacation but felt ill in the morning. He so informed his immediate supervisor, Mike Hughes, and requested the rest of the day off in order to

see Dr. Engleman. To this Hughes assented and told Pace that he would see him the next day. Pace replied that he was not sure about that and left.

After consulting with Dr. Engleman, Pace returned to the college and hand-delivered to the president of the college (with whom he was on speaking terms), the personnel director, the affirmative action officer, and to the office of the District superintendent, written notification that his health was suffering[7] and that he would be absent from work. Sick leave payments commenced immediately. A couple of weeks later, the District placed in Pace's campus mailbox a sick leave certification form, which is typically completed by employees upon their return from sick leave. Pace, being absent from work at this time, never received this form.

At the time, procedures for taking sick leave at the college were very informal.[8] Employees were not given copies of the District regulations concerning sick leave, and the

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[7]The text of the letter is:

> Due to pressure created as a result of discrimination by Ole Prahm and his subordinates, I am compelled to stay away from the Campus temporarily because such pressure is causing serious damage to my health and a hardship to my family.
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> Sincerely yours, Johnny B. Pace, Sr.

[8]In fact, this same informality pervaded the procedures for taking leaves of absence. In 1977, Pace took a six-month leave due to his health. He merely asked Prahm for the time off, explaining it was for personal reasons, and was granted it.

general practice was to inform a supervisor of the need for sick leave and provide verification upon return.

By July 20, Prahm had received a copy of Pace's letter explaining his absence; however, he did not show this to Mike Hughes, who had been inquiring about Pace's absence. Instead, Prahm requested on August 2 that Pace be "removed from the District payroll," on grounds that he had been absent without leave since July 17. The District complied on August 2 and notified Pace by mail, but he did not respond to this letter, claiming his health would not withstand the additional emotional turmoil involved in answering the District. He was still under the care of Dr. Engleman, who wrote a verification on August 2 that Pace was, indeed, ill but would probably be able to return to work in September. The District, at one point, denied receiving Dr. Engleman's document, but evidence showed that it did have information from Kaiser, where Dr. Engleman practiced, indicating Pace was ill.[9] The president of the college made two phone calls to Pace, but was unable to contact him.

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[9]Sackett testified that these forms were routinely sent to employers upon the filing of disability claims, which Pace filed. Also, there was hearsay testimony to the effect that Pia admitted that he had received some documentation of Pace's condition from Kaiser. However, this statement would be admissible in a civil action as an admission of a party. California Evidence Code section 1220.

Charges ultimately resulting in Pace's dismissal were filed on August 25, stating that he would be fired for being absent without leave and for failing to follow District procedures for taking sick leave. Pace did not answer these or request a hearing, believing that responding would cause increased stress and further endanger his health. Termination procedures were finalized on September 6, 1978, but the dismissal was made retroactive to July 17, and Pace was required to reimburse the District for sick leave payments he had received.

DISCUSSION

I. Discriminatory Discipline and Discharge

The District claims that its discipline and discharge of Pace were not prohibited by EERA, section 3543.5(a) because both actions were taken for legitimate business reasons. In analyzing alleged section 3543.5(a) violations and defenses thereto, this Board has formulated the following test:[10]

> 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;
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> Where the harm to 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;

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[10]Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

> 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;
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> 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.

While the actual motive of an employer who disciplines a union activist is seldom revealed by direct evidence, the illegal purpose harbored by the discriminating employer may be inferred from the circumstances surrounding the discipline or discharge. These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification for the employer's action; or other failure to establish a business justification.[11] It has been held that the discharge of a union activist "gives rise to an inference of impermissible, anti-union discrimination."[12]

There can be little doubt that both the District's management team and Prahm, in particular, were very aware of Pace's union activities. He represented the union in

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[11] Shattuck Denn Mining Corp. v. NLRB (1966) 362 F.2d 466 [62 LRRM 2401].

[12] Head Division, AMF v. NLRB (1979) 593 F.2d 972 [100 LRRM 3035]. See also NLRB v. Montgomery Ward & Co. (1977) 554 F.2d 996 [95 LRRM 2433]; NLRB v. Glen Barry Mfg. (1970) 422 F.2d 748 [73 LRRM 2301].

negotiations, attended board of trustees' meetings and college-wide committee meetings in his capacity as steward, processed grievances through various levels of supervision, and participated in organizing campaigns.

Although Prahm had exhibited his dislike of unions before the April 21, 1978 incident with Pace, the supervisor's actions subsequent to that show more eloquently than his words his anti-union attitude. The Board is unconvinced by the District's argument that Pace was singled out for reprimand following the April 21 incident solely because he allegedly physically confronted and threatened Dunne. Pace was ultimately reprimanded for three things: 1) holding a "union meeting" on company time; 2) challenging Leo Dunne's authority to give work orders and physically confronting him; and, 3) refusing to attend meetings with Prahm to discuss the incident.[13] Two of these three transgressions were also committed by Garcia, yet only Pace was disciplined.[14] Such unexplained disparate treatment of Pace, coupled with the

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[13]Although the hearing officer failed to rule on that portion of the complaint concerning Pace's reprimand, the District places it in issue by claiming that they had legitimate business justification for reprimanding Pace.

[14]Although Garcia was a shop steward and thus also associated with the union, Pace was the much more visible union activist. According to uncontradicted testimony of a former SEIU business agent, Pace "was the union" to most of the people at the college. As noted, supra, Dunne had warned Garcia not to rely on "Pace or the union so much."

evidence of Prahm's prior antipathy towards him, tends to show that Pace's union activity was the underlying reason for disciplining him for holding a "union meeting" and refusing to attend Prahm's meetings.[15] In addition, Prahm's refusal to discuss the April 21 incident at the May 4 grievance meeting and the District's subsequent refusal to process SEIU's grievance of the reprimands, further supports an inference of anti-union animus in the District's treatment of Pace.

Apart from evidence of motive, the reprimand of Pace for failing to attend the meetings with Prahm without his union representative violates section 3543.5(a). In NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689], the Supreme Court upheld the right of an employee to have a union representative present at an investigatory interview with the employer which the employee reasonably believes may result in discipline. This right is based on that portion of the National Labor Relations Act which declares that it is the national labor policy to protect "the exercise of workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of . . . mutual aid or protection."[16]

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[15]See Bert Wolfe Ford (1978) 239 NLRB 555 [100 LRRM 1098]; National Tape Corp (1970) 187 NLRB 321 [76 LRRM 1008].

[16]29 U.S.C. section 151.

The Supreme Court noted:

> The union representative whose participation he [the employee] seeks is . . . safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.[17]

Similarly, under EERA, an employee's right to be represented in employment relations is specifically mentioned in the Act.[18]

Section 3543 declares:

> 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. . . .

It is appropriate, therefore, to find that employees under ERRA enjoy the right of representation at investigatory interviews, such as, the one involved in this case.

Hence, the District's reprimand of Pace for his failure to attend meetings with Prahm, as well as the reprimand for discussing union business allegedly during working hours, violates section 3543.5(a).[19]

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[17]Weingarten, supra, at 260; 2692.

[18]Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608.

[19] Van Tran Electric Corp. (1975) 218 NLRB 43 [89 LRRM 1336], illegal discharge of employee who refused to attend

We disavow the hearing officer's theory that Pace was constructively discharged. The doctrine of constructive discharge is applied in situations where an employee is forced to quit his/her employment because of the illegal acts of the employer.[20] Contrary to the implied finding by the hearing officer, Pace did not quit or abandon his job.[21] His notification of July 17 states specifically, "I am compelled to stay away from the Campus temporarily . . ." (emphasis added). Dr. Engleman's testimony and the medical verification he completed (Charging Party's Exhibit No. 11) on August 2, 1978, indicated that Pace would be able to return to work (and inferentially that he desired to resume work) in September 1978. The Board finds the District unequivocally dismissed Pace for his alleged absence without leave and failure to properly inform his supervisor of his absence. That

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Weingarten meeting without union representation; see also, Spartan Stores (1978) 235 NLRB 75 [100 LRRM 1181], employee illegally discharged for walking out of an investigatory meeting to get his union representative.

[20]J. P. Stevens Co. (1972) 461 F.2d 490 [80 LRRM 2609], enforcing 183 NLRB 25 [75 LRRM 1407]; Hertz Corp. (1971) 449 F.2d 711 [78 LRRM 2569], enforcing 184 NLRB 445 [74 LRRM 1633].

[21]The only documentary evidence relied on by the District that Pace quit his job was an unemployment insurance claim which he filed in July 1978. The credited testimony reveals, however, that in July Pace applied for State Disability which, like unemployment insurance, is administered by the Employment Development Department. It is unclear why this form was filled out, but Pace testified that he understood it to pertain to the disability benefits for which he was applying. On the line inquiring about reasons for no longer working, Pace checked the box, "Other," rather than "Discharged" or "Voluntary Quit."

Pace did not respond to the District's written notification of its proposal to terminate his employment does not convince us that he abandoned his job. He was, at that point, under doctor's orders to refrain from stressful encounters, to not think about his work and to stay away from work until September. Pace testified that he began to feel ill when he received the charge letter and felt unable to contest it.

We reject the District's proffered reasons for terminating Pace for several reasons. Pace put the District on ample notice that he was ill by notifying the president of the college, the personnel director, and the affirmative action officer of his need to be temporarily off work. Even if his immediate supervisor, Hughes, believed Pace did not properly request sick leave, he would have known of Pace's illness three days after Pace left work had Prahm told Hughes of the July 17 letter. Prahm's unexplained failure to communicate to Hughes becomes even more questionable in the face of the latter's repeated inquiries of Prahm as to Pace's whereabouts. The fact that Pace did not follow written regulations regarding sick leave reporting becomes irrelevant when we consider that he notified several officials of the college, putting Hughes on constructive notice that he was ill and would be off work indefinitely;[22] that the District put him on sick leave

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[22]Armstrong Circuit, Inc. (1971) 189 NLRB 92 [76 LRRM 1669].

immediately, even though they claimed after the fact that this was a result of a clerical error; that past practice for reporting illness and taking leave was very informal and allowed an employee to submit medical verification upon return to work;[23] and that the District's regulations concerning sick leave reporting were never circulated to its employees.[24]

The District made only minimal efforts to contact Pace during August when it was setting in motion the termination process. In this context, the two phone calls which the president made do not comport with treatment which would be expected towards a 15-year employee with a good work record, absent an anti-union motivation.[25]

We are further convinced that the District's claim of business justification does not stand in light of the numerous prevarications and contradictions of several of the District's key witnesses during the hearing.[26] For example, at the hearing Prahm expressed surprise that Pace had any job stress-related medical problems, and denied having received a copy of Pace's July 17 memo. Yet Prahm sent a memo to

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[23]St. Anne's Hospital (1979) 245 NLRB 130 [102 LRRM 1527].

[24]Avon Convalescent Center, Inc. (1972) 200 NLRB 702 [82 LRRM 1233].

[25]Los Gatos Joint Union High School District (3/21/80) PERB Decision No. 120.

[26]V. V. Castings (1977) 231 NLRB 912 [96 LRRM 1121].

Bob Hughes (as distinct from Mike Hughes) saying, "I received a copy of a letter . . . from Johnny Pace on Thursday, July 20, which stated that he was compelled to stay away from campus as a result of alleged discrimination . . ."[27] There were other denials by District witnesses that they had received certain documents--David Pia claimed that the last communication he received from the union concerning Pace's grievance was dated July 3, but there is in evidence a letter from Sackett to Pia dated August 10. The president of the college testified, that at the time of Pace's dismissal, he was unaware of any medical problems Pace was having, yet Pace had hand-delivered his July 17 memo to Diamond's office. Prahm claimed if an employee requested union representation, he would, without fail, have someone at the meeting, but a memo from him belies such sentiment. It reads:

> I was left a message that the union representative would again not be available . . . however, at my discretion, I chose to proceed with the meeting anyway and did not call it off.[28]

In light of all the facts, we conclude that Pace was terminated solely because of his union activities in violation of section 3543.5(a).

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[27]Charging Party's Exhibit No. 8(a).

[28]Charging Party's Exhibit No. 3.

II. The Rules Regulating Union Activity

We summarily affirm the hearing officer's findings of fact and conclusions of law on this aspect of the complaint, viz., that the prohibition of solicitation by employee organizations during rest and coffee breaks is presumptively invalid and that the District did not offer adequate justification to rebut the presumption. Additionally, the rules as a whole were enacted for a discriminatory purpose because they were promulgated at an important point in SEIU's organizing campaign,[29] because they were directed only at classified employee organizations, and because the prohibitions against non-union commercial activity were not enforced at the time these restrictions on employee organizations were enacted.[30]

REMEDY

Pursuant to the authority vested in this Board by section 3541.5(c),[31] we affirm the proposed remedy and, in addition, ORDER the District to retroactively reinstate to

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[29]State Chemical Co. (1967) 166 NLRB 455 [15 LRRM 1612]; Sardis Luggage Co. (1968) 170 NLRB 187 [70 LRRM 1230].

[30]Wm H. Block (1964) 150 NLRB 341 [57 LRRM 1531].

[31]Section 3541.5 provides:

> 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

July 17, 1978 Pace into the Public Employees Retirement System (PERS) in accordance with the rules and regulations of PERS.[32]

Having found that the District violated section 3543.5(a) by reprimanding Pace on April 27, 1978 and June 26, 1978, it is also appropriate that the District purge Pace's files of all material relating to those reprimands which this Board has found illegal and refrain from taking any disciplinary action against Johnny Pace based on those reprimands.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is found that the Marin Community College District has violated Government Code section 3543.5(a) by reprimanding and discharging Johnny Pace and has violated section 3543.5(a) and (b) by adopting overly

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> 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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> . . . . . .
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> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

[32]NLRB v. Rice Lake Creamery (1966) 365 F.2d 888 [62 LRRM 2332].

broad no-solicitation rules. IT IS HEREBY ORDERED that the District and its representatives shall:

(1) CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on Johnny Pace, discriminating or threatening to discriminate against Johnny Pace or otherwise interfering with, restraining, or coercing Johnny Pace because of his exercise of his rights to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations, including the right to be represented at a meeting with the employer from which he thought discipline would follow, by discriminatorily disciplining and terminating Johnny Pace's employment.

(b) In any like or related manner denying to employees rights guaranteed to them by Government Code section 3543 to form, join and participate in the activities of employee organizations by adopting rules restricting employee organization access to classified employees during rest and coffee breaks, and by regulating only classified employee organizing activity.

(c) In any like or related manner denying to employee organizations their rights guaranteed by section 3543.1 of reasonable access at reasonable times to employees by adopting rules restricting employee organization access to classified

employees during rest and coffee breaks, and by regulating only classified employee organization activity.

(d) Enforcing the, "Classified Union Activity Rules" passed by the board of trustees of the District on May 17, 1978.

(2) TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Immediately offer to fully reinstate Johnny Pace to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights, benefits and privileges previously enjoyed;

(b). Make Johnny Pace whole for any loss of pay and other benefit(s) he may have suffered by tendering to him a back-pay award equal to an amount that he would have been paid absent his unlawful discharge on July 17, 1978 until the date of the offer of reinstatement; this total amount to be offset by Pace's earnings as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due;

(c) Reinstate Johnny Pace into the PERS retroactive to July 17, 1978, in accordance with the rules and regulations of PERS;

(d) Remove from Johnny Pace's personnel files any and all material relating to the reprimands given to him for

discussing union business allegedly during working hours on April 21, 1978, and for refusing to attend meetings with his superiors regarding this incident without his employee organization representative.

(e) Within five (5) workdays of date of service of this decision, post copies of the Notice attached as an appendix hereto at all work locations at the Marin Community College District where notices to employees customarily are placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps should be taken to insure that said Notices are not reduced in size, altered, defaced or covered by any other materials; and,

(f) At the end of thirty-five (35) workdays from date of service of this Decision, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the action the District has taken to comply with this Order.

It is further ORDERED that the "Classified Union Activity Rules" passed by the board of trustees of the District on May 17, 1978 be rescinded, effective the date of their enactment.

It is further ORDERED that the instant charges be dismissed in all other respects.

By: Harry Gluck, Chairperson

Barbara D. Moore, Member

APPENDIX

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

After a hearing in Unfair Practice Case Nos. SF-CE-297 and SF-CE-316, Service Employees International Union, Local 250 and Local 400, AFL-CIO v. Marin Community College District, in which both parties had the right to participate, it has been found that the Marin Community College District violated section 3543.5(a) of the Educational Employment Relations Act (EERA) by interfering with, discriminating against, and coercing its employee, Johnny Pace, because of his exercise of his rights under the Act by discipling and terminating him because of his union activities and has violated section 3543.5(a) and (b) of EERA by imposing an overbroad set of "Classified Union Activity Rules" (dated May 17, 1978) which unlawfully restrict organizational activity.

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

(1) WE WILL CEASE AND DESIST FROM:

(a) In any like or related manner imposing or threatening to impose reprisals on Johnny Pace, discriminating or threatening to discriminate against Johnny Pace, or otherwise interfering with, restraining, or coercing Johnny Pace because of his exercise of his right to form, join, and participate in the activities of employee organizations of his own choosing for the purpose of representation in all matters of employer-employee relations.

(b) Enforcing the Classified Union Activity Rules passed by the board of trustees of the District on May 17, 1978.

(c) In any like or related manner denying to employee organizations rights guaranteed to them by Government Code section 3540, et seq.

(2) WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Immediately offer to fully reinstate Johnny Pace to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make Johnny Pace whole for any loss of pay or benefit(s) he may have suffered by tendering to him a back-pay award which constitutes an amount equal to that which he would have received absent his unlawful termination on July 17, 1978 until the date of the offer of reinstatement, this total amount to be offset by Pace's earnings as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due.

(c) Retroactively to July 17, 1978, reinstate Johnny Pace into the PERS in accordance with the rules and regulations of PERS.

(d) Remove from Johnny Pace's personnel files any and all material relating to the reprimands given to him for discussing union business allegedly during working hours on April 21 and for refusing to attend meetings with his superiors without his employee organization representative, when he reasonably believed that discipline would result.

In addition, we note that the classified Union Activity Rules passed by the District's board of trustees on May 17, 1978 have been rescinded.

MARIN COMMUNITY COLLEGE DISTRICT

Dated _____

By_____
Authorized Agent
of the District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 250 and LOCAL 400, AFL-CIO, Charging Parties, v. MARIN COMMUNITY COLLEGE DISTRICT, Respondent.	Unfair Practice Case Nos. SF-CE-297 SF-CE-298 SF-CE-316 PROPOSED DECISION (3/21/80)

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for Service Employees International Union, Local 250 and Local 400, AFL-CIO; Jon A. Hudak, Attorney (Breon, Galgani & Godino) for Marin Community College District.

Before Michael J. Tonsing, Hearing Officer.

BACKGROUND

On August 11, 1978, charges were filed by the Service Employees International Union, Locals 250 and 400 (hereafter SEIU or the Organization) against the Marin Community College District (hereafter the District) in cases SF-CE-297 and SF-CE-298. On September 29, 1978, an additional charge was filed by SEIU against the District, SF-CE-316. The three charges were consolidated for hearing.

A hearing was convened on May 30, 1979. At that time, the Organization withdrew SF-CE-298. Evidence was received during four days of hearing relating to the other two

charges. Briefs were subsequently filed by the parties in October of 1979.

The two remaining charges allege in substance that the District violated sections 3543.5(a), (b) and (d) of the Government Code[1] by: (1) adopting a set of Union Activity Rules which regulate only classified employees; (2) discriminatorily enforcing these Union Activity Rules; (3) disciplining a classified employee because of his protected activities; and, (4) discharging or constructively discharging the same classified employee.

ISSUES

1. Did the District violate section 3543.5(a), (b) or (d) of the EERA by the adoption of Union Activity Rules directed solely against classified employees?

2. Did the District violate section 3543.5(a), (b) or (d) by their manner of enforcing these Union Activity Rules for classified employees?

3. Did the District violate section 3543.5(a) by disciplining, discharging, or constructively discharging a classified employee because of his protected activity?

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1. All statutory references herein are to sections 3540 et seq. of the California Government Code (also referred to as the Educational Employment Relations Act (EERA) or the Act) unless otherwise indicated.

FINDINGS OF FACT

General Background for Both Charges

Mr. Johnny Pace was employed by the Marin Community College District on December 16, 1963 as a carpenter. He first became active in an employee organization about 1965. He served as chapter president of the California School Employees Association (hereafter CSEA) before joining SEIU in about 1967. Shortly after switching to SEIU, Pace became shop steward, representing trades and crafts employees[2] in their employment relationship with their employer. As shop steward, Pace served on various committees, such as the salary committee and the grievance committee, and also served on the Organization's executive board.

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2. SEIU did not become the exclusive representative of the District's classified employees until 1978. The Public Employment Relations Board (hereafter PERB), formerly the Educational Employment Relations Board (hereafter EERB), held hearings in 1976 to determine appropriate classified negotiating units in the District. In October of 1977, the District entered into an interim agreement with both SEIU and CSEA. Units were determined in June of 1978 and SEIU became the exclusive representative of classified employees, as a result of an election, on December 7, 1978.

Prior to the operative date of the EERA, July 1, 1976, public school employer-employee relations were governed by the Winton Act, Education Code section 13080 et seq., which did not provide for exclusive representation.

According to the uncontradicted testimony of Ms. Diane Reynolds, presently the special assistant to the chief for the State Department of Industrial Relations and, during much of the time in question, a business agent for Local 400 of SEIU, it is found that Mr. Pace remained a central figure in campus employee relations matters for SEIU during a period extending at least through 1976, when the Organization was experiencing a relatively heavy turnover of paid staff:

> Through all of our changes, he was the shop steward and continued on after I had left, and in fact because of all of our changes, which I think were a little disruptive, he was the one thing that was a little constant there at the college, and remarkably, even when we had some periods with basically no representation, when we were moving from one assignment to another, at least he -- you know, he kept the membership up and he kept the organization going, and he was an extremely active shop steward. To most of the people there at the college, he was the union.

In February of 1974, Mr. Ole Prahm was hired by the District as supervisor of plant facilities, responsible for the maintenance, custodial and garden departments at the College of Marin. On August 23, 1978, Prahm was promoted to the position of director of facilities management. On March 31, 1979, he left District employment.

Since February of 1974 and continuing through the period when the instant charges were filed, Mr. Prahm directly supervised the men to whom Mr. Pace reported (Mr. Cal Davis until January 1978 and W. M. "Mike" Hughes thereafter).

As shop steward, Pace brought grievances to his immediate supervisor and then to Prahm. During 1974, Pace was a member of a number of College of Marin committees. It was over these committees that he had his first major disagreement with Prahm. Prahm challenged Pace, calling him out of a committee meeting and asking him why he was there. Committee meetings were absorbing about three or four hours of Pace's work time each week.[3]

Pace's committee participation, active before Prahm's arrival, had never been questioned. The District superintendent subsequently phoned Prahm in Pace's presence and at his behest, affirmed that Pace was entitled to participate in the work of committees to which he had been elected or appointed.

Prahm subsequently sought unsuccessfully to have all ex officio classified organizational participation in campus committees banned. But Prahm was informed that dropping classified employee participation would require banning certificated employee participation in committees, as well, something the administration was unprepared to do.

Later, Pace took his complaint regarding Prahm's interference with his committee work to the president of the

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3. While these were, strictly speaking, College of Marin activities rather than Organizational activities, Pace participated not only because of his active concern for employee interests, but also because of his SEIU stewardship.

campus, who also talked to Prahm about it.

Later still, in 1976, Prahm proposed to the District that it eliminate trade classifications, such as carpenters, plumbers, etc., and instead classify jobs with generic titles, such as laborer or general maintenance worker.

According to the SEIU Local 250 business representative at that time, Geoffrey Sackett, whose testimony below is corroborated and credited, the question was hotly debated and Prahm and Pace were again involved in a verbal confrontation.

> A. [By Mr. Sackett]...[t]here was a lot of acrimony and a lot of debate, and we [i.e., SEIU] took a very, very strong position against generic terms, and that position was voiced by Johnny Pace since he was the most outspoken and the most able to speak to that question.
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> Q. [By Mr. Bezemek] What was Mr. Prahm's involvement, if you know, in this reorganization?
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> A. As I understand it, he was a mover in the reorganization, and it was his recommendation in terms to increase productivity to make everybody a general worker, so that you could have a person who was, you know, a plumber, and put a broom in his hand and tell him to go sweep the science room, and it didn't matter that there was a job to be done by a worker, that as long as they had bodies available that the work would get done, and that it would then increase productivity because you might not need two janitors if you had a janitor and a plumber.
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> Q. And unions have traditionally opposed this sort of generic titling, haven't they?
>
> A. That's correct.

Pace testified that at a meeting of all crafts

employees and certain other classified employees, the proposal to change job classifications was discussed with supervisorial personnel and Prahm made comments at that time to the effect that, "We don't need any union."

> Q. [By Mr. Hudak] So who brought up unions at this meeting?
>
> A. [By Mr. Pace] I believe he [Mr. Prahm] did. I don't remember anyone else bringing it up. He just stated that he didn't think we needed any of them around, that we were one big happy family, and we could take care of all our own problems, and that they were really bothersome to be -- trying to tell the college how to run its business.

On the basis of the credibility determinations to be set forth hereinafter, Pace's account of this episode is credited.

The proposal which Prahm backed and Pace opposed was not implemented. Subsequently, however, in 1977 and 1978, the District undertook a reorganization which reduced the classified work force from 134 to about 80 employees.

It was Johnny Pace's perception that Ole Prahm was harassing him because of his race (Pace is black, Prahm is white) and because of his organizational activities. Pace spoke with the campus president about this. He felt that he was being discriminated against in the way work assignments were distributed and was being made an example of, in that he was, he felt, being given an unusually high percentage of menial jobs which did not utilize his skills as a professional carpenter. Pace also went to, among others, David Pia, the

District's personnel director. Pia later recalled their meeting at the hearing. His recollection is reported verbatim below because it so graphically reflects the extent of Johnny Pace's concern and the District's response. It also demonstrates what it was about Pace that Pia remembered best, perhaps reflecting on Pia's motivation later in the relationship.

> Q. Now, can you tell us what you recall about that particular meeting you and he had?
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> A. [By Mr. Pia] I don't recall an awful lot, it's been quite a while, but I do remember one specific thing that he did to my desk which I recall quite clearly.
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> In the course of his conversation, he defaced the desk with the -- with the pencil, the metal portion of a pencil. I don't think he was doing it intentionally. He was so intent on describing his concerns that I guess he just didn't -- didn't know what he was doing.
>
> Q. What type of pencil was that?
>
> A. It was a regular yellow pencil.
>
> Q. An ordinary wooden pencil?
>
> A. Yes.
>
> Q. Was the eraser worn off?
>
> A. Yes.
>
> Q. And how did he deface the desk?
>
> A. Well, he was talking to me and he was concentrating on the issue, and he was carving a groove on the top of my desk. I remember it because it's there today.
>
> Q. Well, didn't you point it out to him?

A. Well, I was so amazed I guess I didn't. He is quite an intense man. He was more concerned about other things, and I was there to listen.

Q. Now, did he appear to be angry at you --

A. No

Q. --and that was the reason why he was gouging your desk?

A. No, no. I think he was extremely concerned about an issue, and he was concentrating on it, and I think he just subconsciously was doing that.

Q. Do you recall the details of his complaint concerning Mr. Prahm at that time?

A. I cannot recall specifically, but I do recall that -- that particular incident because I see it on my desk every day.

Q. But beyond that you don't have any recollection --

A. No.

Q. -- of what he was complaining about?

A. Simply that he was -- he was concerned about their relationship.

Q. Did you give him any assistance of any kind or any advice?

A. Well, I tried to explain to him that -- that, you know, there are several instances in this life where you -- where there might be conflicts between individuals, but it's important to try to work out some kind of understanding, if possible.

I was trying to -- as many times a personnel director does, I was trying to listen and trying to understand what the problem was to see if I can't give some help.

Pace applied for, and was granted, a six month leave of absence without pay for the last six months of 1977. He

testified that other employees told him Prahm said he hoped Pace would not return from his leave of absence.

According to Prahm, Pace came to him upon his return and said something to the effect that:

> I want to -- I want to just look out for me now. I'm tired of looking out for everybody else in the union, and I'm just going to be me.

Prahm said he felt since Pace was no longer shop steward the adversarial aspect of their relationship would be removed and things "would work themselves out."

Nonetheless, shortly after returning to work, Pace complained to Prahm regarding the same sort of harassment that had prompted his earlier complaints. Pace also contended that he was under surveillance and was being assigned more difficult work.

The Incident of April 21, 1978

On April 21, 1978, Johnny Pace had a conversation in the District maintenance yard with two other employees, Nick Garcia and Mike Schrader. Garcia had replaced Pace as SEIU shop steward. Schrader was the SEIU steward for classified employees at another campus in the District. The subject of the conversation was Schrader's planned withdrawal from the Organization. (He was moving to another job.) Four witnesses testified concerning what happened during and after the exchange. Leo Dunne and Mike Hughes, the two supervisors who became involved, also filed written reports, which were received into evidence.

There is an unresolved disagreement as to when it was that the above exchange took place. It was either just before or just after 7:00 a.m., the time the shift begins. In any case, Leo Dunne approached Johnny Pace and told him to, "Stop hanging around the damned yard holding union meetings." Pace asked Dunne what he meant by a union meeting and Dunne replied, "The Union meeting you were just holding."

Pace said he wanted to get things straightened out, and told Dunne that he wasn't his boss and that he hadn't been holding a union meeting. Pace suggested they go see Mike Hughes, Pace's immediate supervisor. Hughes had asked Pace to remain in the yard because he had a project for him.

Dunne responded that he'd get it straightened out when he was good and ready. Pace went into Mike Hughes' office and asked him to come out. Back out in the yard, Pace asked Hughes, in front of Dunne, who his boss was. Hughes replied that he was. Hughes then asked Pace to go into the corporation yard and forget the whole thing. Hughes went back to his office. Another heated exchange followed. Pace took Dunne by the arm. Dunne testified that he said (in a loud voice audible in Hughes' office), "Take your so-and-so hands off of my arm." Hughes returned to the scene and separated the two men.

The hearing officer concludes on the basis of the relative logic and consistency of the various versions, and his observation of the witnesses during the hearing, that the above facts can be believed. Though various versions of this scene

color the episode differently, further details offered by each of the witnesses are unnecessary. What is more significant to this decision is how the episode was subsequently dealt with.

After the confrontation, both Hughes and Dunne[4] wrote memoranda, describing what they had observed, to Ole Prahm. On April 27, 1978, Prahm wrote a memo to Pace reprimanding him for challenging Dunne's authority rather than "doing as requested." This memo was not given to Pace until May 1, 1978, nine days after the confrontation. The reprimand was placed in Pace's personnel file.

Prahm then attempted to schedule a meeting with Johnny Pace and Nick Garcia. Mr. Schrader, the third employee participant in the April 21st episode, was not included in the meeting, which was set for a Friday afternoon after work hours. Informed of the meeting, Pace refused to attend without a non-employee representative from the Organization present. Prahm pressed, but Pace was firm. Pace contacted Geoffrey Sackett, who then phoned Prahm to reiterate Pace's message.

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4. Because Dunne's account is written in the third person its authorship is open to serious doubt. There is an obvious implication that it was at least co-authored by Ole Prahm himself.

Prahm was not available. Sackett left a message with Prahm's secretary saying that neither Pace nor Garcia would be attending the Friday meeting.[5]

Prahm scheduled another meeting for the following week. He did not contact Pace, Garcia or Sackett before setting the meeting time. Again, Sackett claims he phoned Prahm to say that the date was inconvenient, that he'd like to be consulted before a new date was set, and that neither Pace nor Garcia would attend a meeting without him.

Prahm then prepared a second written reprimand for Pace which contended that Pace's refusal to attend a disciplinary meeting with him without union representation constituted "direct insubordination". Prahm made no further attempts to arrange meetings, testifying that it was obvious to him that the employees and their representative did not wish to meet with him. This, despite the fact that Sackett had sent a letter to Prahm the preceding week complaining that Prahm would not return his phone calls and would not meet with him.

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5. Prahm contends that this message was never received, but the witness who could have supported Prahm's position, his secretary, who allegedly took the message, was not called. Sackett's version is credited based on this fact and on the hearing officer's observation of the testimony of both Prahm and Sackett.

Later, on June 14, 1978, the Organization sent a letter to the personnel director, David Pia, with a copy to Ole Prahm, complaining that Prahm would not respond to the grievance that was eventually filed by the Organization over the April 21st incident.

Meanwhile, the Organization had been pursuing a second approach. At College of Marin there are, in fact, two grievance procedures available in certain situations and they are not mutually exclusive. A meeting was arranged for May 4, 1978 through the office of Les Bailey, the affirmative action officer who had jurisdiction over the grievance procedure dealing with complaints based upon race. Bailey thought that since the complaint alleged both racial discrimination and general harassment it would be beneficial to have a meeting involving not only Ole Prahm, Nick Garcia, and Johnny Pace, but also the direct participation of the Organization, presumably hoping that the need to invoke the formal grievance procedure could be avoided and an informal resolution could be achieved.

Prahm refused to discuss the Organization-related grievance in the context of the affirmative action inquiry. In fact, Prahm refused to discuss what had occurred on April 21, 1978 at all. The meeting ended with Bailey promising to investigate further. It was that same day that a formal grievance was filed by the Organization under the alternate procedure.

A second affirmative action inquiry meeting was arranged by Bailey for May 17, 1978, at a time when supervisors Leo Dunne and Mike Hughes could also be present. At this meeting both Dunne and Hughes were questioned extensively. Ole Prahm was present. Sackett revealed at this meeting that he had found the time clock relied upon by Dunne on April 21st was nine minutes fast. Contradictions in the stories of various participants and witnesses were explored, however nothing was resolved.

Subsequent to the meetings mentioned, and with no further effort being made to deal with the matter, on June 26, 1978, Ole Prahm issued a letter of reprimand, but to only one of the three employees involved -- Johnny Pace. Copies, however, were sent to Nick Garcia and Geoffrey Sackett, as well as Mike Hughes.

In its first paragraph, Prahm's letter claims that Pace's actions of April 21:

> ...demonstrate wilful insubordination for supervisory staff and conduct unbecoming an employee in the public service...

The reprimand goes on to state that:

> I would like to request that you immediately take steps to comply with the policies and procedures as adopted by the Board of Trustees of the Marin Community College District or you will be subject to dismissal.

The reprimand concluded that:

> It is apparent that the incident which took place on 4/21/78, being a verbal discussion among

District employees not related to District business, was clearly on District time.

The final two paragraphs state as follows:

> Additionally, you failed to follow my directions as the department head when requested to present yourself in my office for a meeting to discuss the issue. A second meeting was scheduled at your convenience during your regular work shift and you again chose not to attend. This constitutes wilful insubordination and shows your general disrespect for supervision.
>
> I would simply like to point out for your information that should you fail to comply with District policies and procedures in the future, disciplinary action will be sought. I trust I can count on your cooperation in the future.

On July 13, 1978, Geoffrey Sackett complained by letter to the District that his grievance filed over the reprimand was not being processed, but he received no response.

The District's Classified Employee Union Activity Rules

As a direct result of the April 21, 1978 episode described above, the District prepared new rules applicable only to classified employee organizational activity.

On May 11, 1978, Superintendent John Grasham sent the following memo, prepared by Director of Personnel David Pia:

> BACKGROUND
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> Attached the Board will find Rules for Classified Employee Union Activity. After an altercation which took place between a supervisor and a member of a labor organization which resulted in a threat of violence and physical contact, it was determined that a set of procedures needed to be established in order to regulate classified union activity within the District. These rules for procedure have been reviewed and approved by the

Board Personnel Committee and the Marin County Counsel.

RECOMMENDATION

It is the recommendation of the Superintendent that the Board of Trustees adopt the attached Rules for Classified Employee Union Activity to be in effect until an exclusive bargaining agent is elected for the classified units as determined by the Public Employees Labor Relations Board (PERB).

The rules which were subsequently approved by the board of trustees on May 17, 1978, provided in part that:

> Recruiting contact shall not be made with employees while engaged in District work. However, organizational representatives may meet on District property with employees who are off duty, limited to before or after work day or lunch hours. The employees on coffee or rest breaks are on paid status and such time is included as duty time.[6]

The rules also provided for the identification of organizers, restricted the distribution of literature, and limited the posting of notices and the use of District facilities.

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6. No evidence was introduced which would tend to show that employees actually worked during their breaks.

Within a few weeks of the promulgation of these rules, the PERB issued its unit determination decision (Marin Community College District (6/26/78) PERB Decision No. 55), establishing three classified employee units, including the skilled trades and operations unit which is the focus of this decision.[7]

The Termination of Johnny Pace

Johnny Pace, as noted above, was an employee of long standing with the District. He was clearly identified as an activist in Organizational matters by District management and supervisors, as well as by classified employees.

Pace had taken a six months leave of absence (plus vacation time) from May of 1977 through December of 1977. Just prior to this time, Pace began to seek medical assistance at Kaiser Hospital. The symptom which had caused him to see a doctor was chest pain. Pace felt it might be a heart problem but the physician he saw told him it was stress and recommended that Pace find a way of alleviating tension.

At that point Pace himself decided to take a leave of absence at his own expense. Pace said Prahm was "jovial" about granting the leave when Pace approached him and that "the word was around the campus within an hour." Pace's request was approved not only by Prahm, but also by David Pia, by the

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7. Notice is taken of PERB case file No. SF-R-14B, the representation case which culminated in Marin Community College District, supra.

college president and the board of trustees. At the hearing Pace described his motivation in seeking the leave:

> I suppose it was just a combination of things, being a long-term employee, and what I felt to be fairly respected in the college community. I knew my work, I felt competent, and then to be abused by not being allowed any overtime, laughed at by employees that would see me working out of my job description, moving furniture and packing -- digging post holes, and you name it, and generally looked down upon and given all of the menial tasks, it was too much to bear, so I felt getting away would do me some good and maybe the situation would change in the meantime.

Pace returned from his leave and had the conversation with Prahm described earlier where he indicated he hoped that their relationship would improve because the adversarial aspect had been removed. But Pace said he was told by at least five other employees, whom he identified by name, that Prahm was out to get him. One of these persons was the campus chief of police.

The episode of April 21st followed. Pace received a verbal reprimand and three written reprimands. The others did not. Although both Pace and Garcia refused to attend two meetings with Ole Prahm without the presence of Geoffrey Sackett, only Pace was reprimanded. Only Pace was threatened with discharge for insubordination.

Pace returned to Kaiser Hospital and began seeing Dr. Joseph Engelman. Dr. Engelman's treatment of Pace began on May 4, 1978 during the pendency of the April 21st related

grievance. Dr. Engelman testified at the hearing and was a credible expert witness.

On May 4th, he examined Pace and found him to be "somewhat striking in his appearance, looking quite physically anxious."

Pace told Dr. Engelman then that over the last couple of weeks he felt tense and nervous, that his appetite had decreased, that he was having muscle aches and pains, and that he was fatigued and had poor concentration.

Dr. Engelman went on to describe Pace's responses to his questions about the basis for these symptoms, Pace indicating that he'd been on the job for 15 years, and that there had been a change in supervisors, and that then things started getting difficult for him. Then the following exchange occurred:

> Q. [By Mr. Hudak] Okay. Does that pretty well summarize what he said about the job? Was there anything else of any significance that you can recall that he said about the job?
>
> A. [By Dr. Engelman] Yeah. He spoke about his union activities.
>
> Q. What did he say about that?
>
> A. That he had been involved in either union organizing or furthering the goals of the union. I can't recall specifically, but he felt like that there was -- some of that harassment was secondary to his involvement.
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> Q. Did he tell you what kind of harassment he was suffering at work?
>
> A. Yes, he did, and I can't recall specific details.

Dr. Engelman diagnosed Pace's condition as extreme anxiety and depressed behavior. Dr. Engelman indicated that his approach to the treatment of cases like Pace's, which he described as "more extreme than the usual", was to attempt where possible to relieve the underlying pressure rather than treat the effects of the tension with medication. Apparently, Engelman's decision to withhold drugs was not made because he felt that Pace's symptoms were trivial. He noted that Kaiser doctors are allotted between seven and ten minutes per patient but that he spent thirty minutes with Pace because "this man was in a pretty bad state."

Dr. Engelman recommended that Pace remain away from his job for a few days. Pace remained away from work the remainder of that day, returning on May 10th. There was no evidence to indicate that he informed the District about the reason for his absence before his return, nor is there evidence that the District expected him to do so. Upon his return he completed an absence form which had been placed in his box and attached the treatment and diagnosis verification form provided to him by Kaiser Hospital on May 4th. There was no evidence presented to indicate that the sick leave procedure Pace followed in this instance was criticized in any way.

Dr. Engelman saw Pace at least monthly from May until September 1978. He also had some telephone contact with Pace during this time.

Pace took a two week vacation at the end of June, 1978 and was scheduled to return to work on July 17, 1978. On that date, he arrived at work and went to see Mike Hughes, his supervisor. Pace told Hughes that he was sick, that he was going to see a doctor and that he did not know when he would be returning. At that time, Pace had approximately three months of sick leave accumulated. Hughes said something to the effect that he would see Pace tomorrow, but Pace responded by saying that he was not sure about that.

Pace saw Dr. Engelman that morning. The doctor strongly urged him to again stop working for a while, feeling that Pace's symptoms were work related. Pace returned home and typed a letter to David Pia, the director of personnel for the District. He hand-delivered copies of the letter that same day to the offices of the District superintendent, the campus president, the affirmative action officer, the president of the District's board of trustees, as well as Mr. Pia. The text of that letter reads as follows:

> Due to pressure created as a result of discrimination by Ole Prahm and his subordinates, I am compelled to stay away from the Campus temporarily because such pressure is causing serious damage to my health and a hardship to my family.
>
> Sincerely yours, Johnny B. Pace, Sr.

Sick leave payments to Pace commenced immediately, paying him from July 17th.

Pace, still under Dr. Engelman's care, stayed home for the next several months. A doctor's certificate prepared by Dr. Engelman on August 2, 1978 includes the following notation under the heading of comments on findings: "Depressed, tearful affect and agitated." By tearful affect, the doctor testified that he meant that Pace was crying. He further testified that as of August 2, Pace was "disabled from performing the duties of his work." His diagnosis was "situational anxiety and depression." By situational anxiety, he indicated that he meant that the anxiety he observed was related to a particular situation as opposed to general anxiety, that is anxiety having no specific cause.

Dr. Engelman testified that Johnny Pace would be ready, in his opinion, to return to work as a carpenter in September of 1978, but not to return to the specific work environment which had generated the anxiety in the first place.

A form was placed in Pace's mail box at the college during his absence, to be used in certifying that he had taken sick leave. The District policy governing sick leave (section 3085) states:

> All employees shall submit absence reports in order to receive payment for days absent.
>
> Classified employees absent shall notify their supervisor. It shall be the responsibility of the supervisor to report absences monthly on forms provided by the Business Office.

Pace, of course, did not pick up the form from his box since he was not at work. As far as submitting an absence

report in order to qualify for sick pay, Pace typed his letter to Pia, with multiple copies sent, and was receiving sick pay.

Both Pace and Garcia testified that the sick leave procedure followed by Pace in this instance conformed to the practice commonly followed in the District up until then. District witnesses contended otherwise, but no firm evidence was presented by them to substantiate their claim. In fact, the forms introduced into evidence support Pace's and Garcia's view. Moreover, the one previous episode involving sick leave procedure noted above (the absence of May 4 through May 9) strongly suggests that either Pace's and Garcia's interpretation is correct or that Pace was justified in relying on the acceptability of his previously uncriticized absence reporting procedure. Thus, Pace's and Garcia's testimony on this matter is credited.

On July 20, 1978, Ole Prahm received a copy of Pace's letter to David Pia (indicating he must stay away from campus due to discrimination by Prahm and his subordinates.) Prahm did not show this copy of the Pace letter to Mike Hughes.[8] On August 1, 1978, Prahm wrote to the District's classified personnel analyst, Mr. Robert Hughes, as follows:

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8. Hughes testified that this was the only instance he could remember where Prahm had not shared correspondence of this sort with him. Hughes was plainly upset by Prahm's behavior.

> I would like to request in accordance with Marin Community College District Policies and Procedures manual section 3085 that Johnnie [sic] Pace be removed from the District payroll as a result of not complying with notification of his immediate supervisor as to an impending absence.
>
> Johnnie [sic] Pace was scheduled for vacation during the period of June 30th, 1978 until July 14, 1978 and was to return on Monday July 17, 1978 to report for work at 7:00 a.m. Johnnie [sic] reported at approximately 7:00 a.m. on July 17, 1978 to Mike Hughes and informed him that he had a doctors [sic] appointment that morning. Neither Mike Hughes, Rita Meyer nor I have heard from Johnnie [sic] Pace since that day as of the above date of writing.
>
> I received a copy of a letter addressed to Dave Pia from Johnnie [sic] Pace on Thursday July 20, 1978 which stated that he was compelled to stay away from campus as a result of alleged discrimination by Ole Prahm and his subordinates. I was not copied on this letter nor was Johnnie's [sic] direct supervisor Mike Hughes and this indirect method of notification does not qualify under section 3085 Absence reporting of the Marin Community College District Policies and Procedures and as such has been absent without leave since July 17, 1978.
>
> Please make the necessary changes to the personnel action form to reflect this absence.

On August 1 or August 2, 1978, the District processed a personnel action form to terminate Pace's salary and fringe benefit contribution by reason of absence without official leave beginning July 17, 1978.

Pace was sent a notice on August 2, 1978 that "written information of a derogatory nature will be placed in your employee file" 10 days following the date of the notice, referring to an attached departmental report of unauthorized absence and to the personnel action form to effect his

separation from the active payroll and from District sponsored benefit programs.

That same day, Dr. Engelman filled out another doctor's certificate. The form indicated that Pace had been his patient since May 4, 1978, had become disabled on June 29, 1978, and that the approximate date Pace's disability should end sufficiently to permit his return was expected to be September 1, 1978. The District claims that it never received this form from Kaiser Hospital. However, on August 4, 1978, a notice was sent from the Employment Development Department of the State of California to the District, and received by the District, indicating that Pace had filed a claim for disability insurance benefits. (The District returned that form on August 15, denying that there was a valid claim to their knowledge, indicating that though Pace had been on unauthorized absence from July 17, he would be compensated in the form of sick leave, vacation or other type of payment "if claimant immediately returns to work." This is taken to be an affirmation that Pace was being compensated for his absence, in the District's present contemplation, and that one available form of compensation remained sick leave, i.e., that Pace had not legally precluded this option as of August 15.)

On August 7, 1978, Mike Hughes sent Ole Prahm a memorandum noting that he had not heard from Pace since July 17, that Hughes had a great deal of carpentry work scheduled for him, that this work was scheduled to be

accomplished before school opened, that there was a shortage of carpentry staff and that this had placed a serious burden on Hughes' ability to meet the requirements of the maintenance department. Hughes indicated that he had "patiently awaited a call or some notification from Johnny for the past three weeks, and I have heard absolutely nothing." Hughes further stated that he was in desperate need of carpentry assistance, and made the following request: "Would you please make some determination as to whether Johnny will be returning to work and when, or find a replacement for him?"

That same day, Prahm wrote to Pia, referring to the above letter from Mike Hughes and requesting Pia to "take steps to permanently remove Johnny Pace from the payroll and process steps to replace the vacant carpenter's position." This memorandum stated that the maintenance department was unable to fulfill its commitments as a result of Pace's absence and needed a carpenter as soon as possible.

Geoffrey Sackett wrote to David Pia on August 10, 1978, as follows:

> Re: Grievance filed on behalf of Jonnie [sic] Pace & Nick Garcia
>
> Dear Mr. Pia,
>
> I have requested that the grievance cited above proceed to the next step as outlined in the Policies for Classified Personnel. To date this has not been arranged and I feel that the College is neglecting to proceed in good faith. Mr. Pace has informed me that he is unable to continue working under the tension and harassment presently a result of Mr. Prahm's surveillance.

> Mr. Pace has informed the Personnel Office of his need for a Leave of Absence confirmed by his physician.
>
> If I receive no indication of the College's desire to proceed with the grievance procedure in this matter I shall request our attorneys to proceed with an Unfair Labor Practice before the Public Employees' [sic] Relations Board.

Sackett received no response to his letter.

On August 23, 1978, Mike Hughes submitted a report to the District stating that Pace had been absent from July 17, 1978 and noting the type of absence as "AWOL".

On August 25, 1978, Chancellor David M. Sims signed charges for Pace's dismissal from employment. The charges set forth the causes for dismissal as:

> Neglect of duty, namely, unauthorized absence; willful violation of rules and regulations of the District, namely, purposeful and wanton disregard of Section 3085 of District policies and procedures regarding submission of absence reports and notification of supervisor when absent.

The charges also contained details with respect to the factual basis for the charges.

The charges further stated that on August 16, 1978, Mr. Irwin Diamond, the College of Marin president, concurred in and approved the dismissal recommendation. The charges were sent to Pace about August 25, 1978. The accompanying letter notified Pace that he could demand a hearing in writing by completing and signing the attached demand for a hearing and filing it with the chancellor within five days from the date of service of the notice. The letter further informed Pace that

if he did not request a hearing within the specified time period, "the order of the president shall be final" and he would have waived his opportunity for a hearing. The letter also informed Pace that he could be represented by counsel.

President Diamond testified that before he concurred in the recommendation to fire an employee of 15 years who had such a good work record that it was important to him to investigate the matter. He wanted to assure himself that Pace understood the situation and how he was likely to be affected. He made two phone calls to Johnny Pace. Neither time was the phone answered. He did not pursue the matter further. Diamond said he was unaware that Pace was having any medical problems. (This despite the fact that a copy of Pace's July 17 letter to Pia saying he was staying away from the campus due to medical reasons occasioned by Prahm's harassment had been hand-delivered to him and he had discussed Pace's absence two or three times with Pia. No probe was initiated by Diamond regarding this allegation of harassment.)

Pace received the charge and letter and the earlier August 2 "AWOL Notice" but did not request a hearing or otherwise contact the District. He turned neither to Geoffrey Sackett nor to Nick Garcia. (Sackett didn't learn of Pace's fate until the following month.) Pace explained his reaction to the charges thusly:

> I read the document, and it caused me mental distress , and I began to get ill again, and my wife and I talked about it, and I was in no condition to appear to contest it. My doctor had gave me [sic] strict orders not to get all upset, and to try to not think about the job for the time being.

In a memorandum dated September 1, 1978, Chancellor Sims transmitted to the board of trustees copies of the charges for dismissal. The memorandum noted Pace's absence from work from July 17 to the present and stated that his immediate supervisor and the director of facilities management had no contact from him. The memorandum further states that the college president had tried on at least two occasions to reach Pace by telephone, but all attempts had been without success. The memorandum also referred to an attached copy of Pace's July 17, 1978 letter to the director of personnel and stated that "the accusations contained in the letter have not been substantiated."

The memorandum further stated: "the loss of work sustained by the District, the inordinate strain placed on other employees, and the pattern of behavior of Mr. Pace add weight to the charges filed." The memorandum recommended that the charges filed by the president be considered; that Pace be afforded a hearing if one were demanded; that in the absence of a demand for hearing the board affirm the charges; and that Pace be dismissed as a regular member of the classified service.

On September 6, 1978, at a regular board meeting, the board of trustees approved the recommendation to dismiss Pace.

Nick Garcia attended. There was no discussion.

On September 7, Robert Hughes, the District's classified personnel analyst, notified Pace in writing of this action and transmitted Public Employment Retirement System (PERS) Form No. 167, which had to be completed in order to vest Pace's contributions with the retirement system or withdraw his funds. The letter stated that Pace's final check would be withheld until he had returned any district property currently in his possession, including any and all keys. At the time of his dismissal, Pace was still receiving sick pay. The District claims that this was due to a clerical error.

On September 8, 1978, the District processed a personnel action form to terminate Pace's employment. The form noted that his sick leave balance was 523.5 hours and his vacation balance was 8 hours.

On September 12, 1978, Pace signed and returned the PERS form, checking the box indicating that he had permanently separated from employment and desired a refund of his accumulated contributions.

It was about this time that Geoffrey Sackett inadvertently learned of the termination of Johnny Pace while attending an election meeting with District personnel at the PERB office in San Francisco. Sackett investigated and, in October of 1978, asked that Pace be returned to work, that his time off be treated as a leave of absence, and that all references to terminations and abandoning the job be removed

from his file. No action was taken on this request. The charge in the instant case (SF-CE-316) was then filed.

On October 6, 1978, the District controller wrote to Pace stating that although he had been absent without leave beginning July 17, 1978, a full paycheck was issued for July resulting in an overpayment of $503.08; that a paycheck was issued for August, resulting in an overpayment of $1,077.39; that these overpayments were offset by 8 hours of earned vacation and an erroneous deduction for Kaiser health coverage; and that the net overpayment was $1,475.15. The letter requested that Pace "please make a check payable to the Marin Community College District for this amount." The letter also referred to an enclosed PERS statement of his contributions and stated that the submission of his report of separation form to withdraw his PERS contributions would be delayed pending the receipt of his repayment to the District. Pace gave the District a check in the correct amount, filled out the necessary forms and withdrew his PERS contributions.

Pace's medical condition improved and before the end of the year he had begun to work part time jobs where he could find them. (Dr. Engelman had previously predicted that Pace would be able to resume work about September 1, though not under the same supervision.) As noted earlier, Ole Prahm left District employment on March 31, 1979. Leo Dunne left the District in June of 1978. At the hearing, Pace testified that he wished to return to work and that he felt he was physically

and emotionally able to do so at that time. Mike Hughes noted that, despite his pleas, his department has not replaced Johnny Pace, that now two full time equivalent carpenters are working where three worked before.

CREDIBILITY DETERMINATIONS

The testimony of Pace and that of Prahm differ in many respects, only some of them material. Moreover, Pace's version of what happened in the yard differs from that of Dunne. Each man's testimony was supported by other witnesses in certain respects, giving each at least a superficial aura of credibility.

Having personally and quite carefully observed the testimony of each of the witnesses, the hearing officer credits the charging party's version in every crucial aspect. There were numerous minor discrepancies between the two sides that could easily be ascribed to good faith differences of perception of the same reality. Yet, where crucial inconsistencies existed, the hearing officer found the witnesses for SEIU to be more believable. The Organization's version had a ring of truth that followed from its consistency and inherent probability.

Direct evidence of anti-organizational animus is

seldom available. The self-serving declarations of neutrality of witnesses such as Prahm and Dunne can hardly be considered probative.[9] Hence, most of this testimony is disregarded here.

Prahm's testimony as to facts was, at times, contradictory and evasive, as for example, where he claimed that he discussed with Sackett the time for setting a meeting and then moments later admitted that he had not done so, with no apparent realization that his testimony had changed. Prahm had expressed surprise at the hearing, saying he learned that Pace had a job stress related medical condition for the first time there, yet he had plainly been aware of Pace's medical situation before. (Certainly he had read Pace's memo of July 17, 1978, if nothing else.)

Later, Prahm denied having seen Pace's memo until confronted with a copy of his own memo to Pia which said, at one point, "I received a copy of a letter addressed to David Pia from Johnny Pace... ." He then reversed his field without further explanation.

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9. It is a well-established rule that the NLRB is free to draw inferences from all the circumstances, and need not accept self-serving declarations of intent even if they are uncontradicted. (NLRB v. Pacific Grinding Wheel Co. (9th Cir. 1978) 572 F.2d 1343; Shattuck Denn Mining Corp. v. NLRB (9th Civ. 1966), 362 F.2d 466; NLRB v. Warren L. Rose Castings, Inc. (9th Cir. 1978) 587 F.2d 1005, 1008; Royal Packing v. ALRB et al. (4th Cir. 2/4/80) 4 Civ. No. 18956.) It is appropriate that this rule be applied here.

What came through in Prahm's testimony was that it amounted to a self-serving effort to downplay his negative feelings toward Pace and his negative views regarding the efficacy of organizational activity. Ole Prahm's distaste for Johnny Pace is reflected throughout the record. Three employees were involved in the April 21st episode, only Pace was reprimanded. Two refused to attend Prahm's meeting, only Pace was reprimanded. Pace was not only reprimanded, he was reprimanded three times. Yet, Prahm insisted that his relationship with Pace was positive.

Dunne's testimony was also less credible than that of Pace, Garcia and Sackett. Pace's and Garcia's version of what went on in the maintenance yard was more plausible and consistent. The testimony of Mike Hughes supported their version in certain key aspects. This, in turn, leads the hearing officer to believe Garcia's statements that Dunne told him only a week before the April 21st episode that he "shouldn't be relying on Johnny so much, or on the union," and that one of these days Garcia would get into such trouble that "Johnny or the union are not going to be able to help you." Such statements are consistent with other findings, further undercutting the reliability of Dunne as a witness.

Other District witnesses had enough minor discrepancies in their testimony as to cast some doubt on their truthfulness as well.

On the other hand, the testimony of Pace, Garcia and the other witnesses for the charging party was shaken in no materially important aspect and in no way that would call into question their veracity or their perceptiveness.

Pace himself was a particularly believable witness. His sincerity and his responsiveness, especially during cross-examination, marked him as quite different from Prahm and Dunne, particularly. His demeanor throughout the hearing conveyed a seriousness and a sense of personal integrity that were unmistakable[10]. His testimony was fully supported by that of Dr. Engelman, who was neither a party to this case nor the agent of a party.

Thus, the version of the facts related by the witnesses for SEIU has been credited in large measure and is incorporated into the findings of fact above. What remains is to determine whether the facts, as found, constitute unfair practices under the EERA.

CONCLUSIONS OF LAW

1. Did the District Violate the EERA by Enactment or Enforcement of its Rules for Classified Employee Union Activity?

The Organization contends that the promulgation of the Classified Employee Union Activity Rules discussed above

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10. Pace did testify that he held membership in the faculty senate and then later disavowed this testimony when cross-examined. The hearing officer draws no conclusion from this inconsistency.

constituted a violation of section 3543.5(a), (b) and (d) of the Act.

a. The Presumptive Invalidity of the Rules

An organization has the right of reasonable access to areas in which employees work and the right to use District bulletin boards, mail boxes and facilities for meetings and announcements. Richmond Federation of Teachers v. Richmond Unified School District and Simi Educators Association CTA/NEA v. Simi Valley Unified School District (8/1/79) PERB Decision No. 99. In Richmond the Public Employment Relations Board (hereafter Board) discussed the limits of "reasonable regulation." There, the Board noted that "effective and non-disruptive organizational communications are an important aspect of employee rights 'to form, join, and participate' in employee groups (section 3543), by serving as necessary links between employees and their representatives." (Richmond, supra, p. 15.) The Board went on to indicate that employee organizational communication should be "relatively unhampered."

The Board in Richmond then turned to an analysis of Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620] where the Supreme Court[11] affirmed a finding of the NLRB that an employer's rule prohibiting union solicitation on

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11. PERB may use federal labor law precedent where it is applicable to public sector labor law issues. (Sweetwater Union High School District (5/23/76) EERB Decision No. 4. (PERB was previously known as the Educational Employment Relations Board, or EERB). See also Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 611.)

company premises during the employee's own time was presumptively invalid, stating:

> . . . time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

The Board, relying on Republic and Los Angeles Teachers Union v. Los Angeles County Board of Education (1969) 71 Cal.2d 551, concluded that:

> "school employer regulation under section 3543.1(b) should be narrowly drawn to cover time, place and manner of the activity, without impinging on content unless it presents a substantial threat to peaceful school operations."

Under the cases cited above, the District's imposition of a broad non-solicitation rule as the keystone to its Classified Employee Union Activity Rules, covering even employee coffee and rest breaks, makes them presumptively invalid. Given the Republic Aviation test adopted by the Board, the altercation of April 21, 1978, during which no blows were struck (and at the time of adoption of the rule the cause of which was an unresolved question to be the subject of two pending grievances) can hardly be considered as ample justification for the immediate imposition of such a harsh

rule. An isolated incident involving but a few people and subject to serious question as to whether it was an imposition on work time and whether or not it was provoked is an inadequate basis for the establishment of such a restrictive rule. See American Cast Iron Pipe Co. (8th Cir. 1979) 600 F.2d 132 [101 LRRM 2522] where eight serious disciplinary problems per year were held to be "fairly minor" and an inadequate ground for a similarly restrictive rule.

The circumstances presented here are hardly so grevious as to warrant so apparently retaliatory a response. Certainly the rules fail to satisfy the test of being narrowly drawn as to time and place. The District has failed to show by a preponderence of evidence that the rules were necessary to meet a substantial threat to peaceful school operations. Thus, the presumption remains unrebutted and the rules considered as a whole are found invalid. (This does not mean that the District could not adopt any rules of this sort, but only that the rules as drawn are invalid.)

b. The Mootness of the Rules

The District argues that since the rules were governed by the superintendent's memorandum which stated that they would be in effect "until an exclusive bargaining agent is elected for the classified units as determined by the Public Employment Relations Board," the rules expired when the Organization became the exclusive representative. They point out that the rules have not been enforced since that time.

However, as noted by the Board in Amador Valley Secondary Educators Association v. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74, mere discontinuance of wrongful conduct does not ordinarily end the underlying controversy absent evidence that the party acting wrongfully has lost its power to renew its conduct.

Since the District neither rescinded nor disavowed its rules, but has admitted only the current discontinuance of active enforcement, it is appropriate, under Amador Valley, supra, that the validity of the rules be considered here. See also Paceco v. NLRB (5th Cir. 1979) 601 F.2d 180 [102 LRRM 2146] and NLRB v. National Nursing Home Consultants (6th Cir. 1976) 572 F.2d 143 [98 LRRM 2516].

c. The Nature of the Violation

The Board articulated the test to be employed in section 3543.5(a) cases in Carlsbad Unified School District (1/30/79) PERB Decision No. 89. The test was employed in Richmond, supra. There, the Board found that denial of access to the employer's internal mail system caused "some harm" to employee rights under the Act. The PERB then held that, where "some harm" to employee rights has been found, absent the respondent's showing its conduct was a result of operational necessity or circumstances beyond its control, the conduct constitutes interference, restraint or coercion in violation of section 3543.5(a) of the EERA.

Here, the absence of a successful showing that the District's Union Activity Rules were narrowly tailored to meet a substantial threat to peaceful school operations has already been noted. Circumstances which would justify the infringements imposed, for example, on employee time have simply not been demonstrated. The District has cited no authority, and none has been found by the hearing officer, which justifies such conduct which plainly causes, and has caused, "some" harm.

See also Essex International, Inc. (1974) 211 NLRB No. 112 [86 LRRM 1411] and Republic Aviation Corp. v. NLRB, supra, 324 U.S. 793.

Moreover, a violation can be found under the final prong of the Carlsbad test quite independent of any finding of harm. The final prong of the test reads as follows:

> 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.

The convergence of the Rules, the April 21st episode and its aftermath, the explicit statement in the superintendent's memo and the anticipated PERB unit determination decision for classified employees create an overwhelming inference of unlawful motivation. The rule simply would not have been enacted but for the employees actively seeking to organize. The District violated section 3543.5(a) by responding as it did.

By the same conduct the District violated section 3543.5(b)[12] in that they promulgated rules which, on their face, restricted only classified employee organizations (i.e., classified organizations which are not exclusive representatives) and restricted them, without adequate justification, from otherwise protected activity, as noted above. Republic Aviation Corp. v. NLRB, supra. No violation of section 3543.5(d) was argued in SEIU's brief. No violation is found based on the record.

Having found the rules themselves unlawful, it is, of course, unnecessary to resolve the question of their application to find a violation. However, since their application may reflect on the District's attitudes and motives, it is noted that the rules were plainly selectively applied (affecting only classified employee organizations), and were promulgated at a time when a membership drive had started and an election was but a few months away (indeed, the rules were designed to expire as soon as an exclusive representative was selected).

2. Did the District Violate Section 3543.5(a) by Reprimanding and then Discharging Johnny Pace?

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12. Section 3543.5(b) makes it an unfair practice to deny to employee organizations rights guaranteed to them by the EERA.

The Oceanside Carlsbad test noted earlier is controlling also in this context. Once again, the charge of a section 3543.5(a) violation 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.

An unlawful intent on the part of a supervisory employee can be attributed to the District. Prahm was, without question, a supervisory employee.[13]

The gravamen of this aspect of SEIU's charge is that the District, through Prahm and others, altered working conditions, making them so difficult and unpleasant as to cause Pace to be unable to work thereunder and that these changes were motivated by Pace's organizational activity. These allegations add another dimension to the charge of discrimination.

In cases where an employee has left work, it is important to consider the vulnerability any employer would have to specious claims by disgruntled or disaffected former employees if claims were entertained lightly. Accordingly, the NLRB and the courts, when considering allegations of what has come to be called a "constructive discharge" have imposed

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13. There can be no doubt that Prahm's conduct is attributable to the District in this instance. See Antelope Valley Community College District (7/18/79) PERB Decision No. 97.

rather stringent tests. To warrant a finding that a constructive discharge has taken place, SEIU will be required to show that Pace's working conditions were altered in such a substantial fashion that a reasonable person could not be expected to remain at that employment, that these changes were a result of Pace's protected activites, and that the employer's motive was improper. See Federal Collectors (1973) 201 NLRB 944 [82 LRRM 1686], citing Montgomery Ward and Co. (1966) 160 NLRB 1729, 1742 [63 LRRM 1249] enf'd in part (8th Cir. 1967) 385 F.2d 760 [66 LRRM 2689].

a. Changes in Working Conditions

Ole Prahm began altering Johnny Pace's working conditions almost immediately upon Prahm's being employed by the District, as demonstrated by the evidence.

The District lodged a standing objection at the time of the hearing to the introduction of any evidence having to do with Pace's employment relationship more than six months prior to the filing of charges in this case. The objections were overruled, despite the wording of section 3541 which states:

> [T]he board 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 construing the analogous section of the Labor Management Relations Act (hereafter LMRA), section 10(b) [29 U.S.C. sec. 160(b)], the United States Supreme Court held in Local Lodge 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212]

that in certain circumstances section 10(b) is to be considered a rule of evidence as well as a statute of limitations. The Court held that events prior to the six month limit are to be allowed in, inter alia, when they explicate present actions that may themselves be unfair practices, saying:

> [W]here occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. . . earlier events may be used to shed light on the true character of matters occurring within the limitations period . . . . (Local Lodge 1424 v. NLRB, supra, 45 LRRM at p. 3214.)

On the basis of Local Lodge it is clear that all admitted evidence can be considered. The District's renewed argument is rejected. When the evidence is considered as a whole it is apparent that Pace's working conditions were altered by Prahm's conduct which was supported, if not endorsed, by the District.[14]

b. Substantiality of the Change

In Sterling Corset Co. (1938) 9 NLRB 858 [3 LRRM 344] the National Labor Relations Board (hereafter NLRB) found that working conditions could be made intolerable by incremental changes. Accord, Newberry Lumber and Chemical Co. (1939) 17 NLRB 795, 808 [5 LRRM 342] enfd. as modified (6th Cir. 1941) 123

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14. See also Communication Workers v. NLRB (2d Cir. 1975) 520 F.2d 411 [89 LRRM 3028] cert den. 423 U.S. 1051 [91 LRRM 2099]; NLRB v. Longshoremen, Local 30 (9th Cir. 1977) 549 F.2d 698 [94 LRRM 3072]; Beckett Aviation Corp. (1975) 218 NLRB 238 [89 LRRM 1341].

F.2d 831 [9 LRRM 479]; Reliance Mfg. Co. (1945) 60 NLRB 946, 951-2 [16 LRRM 13].

Johnny Pace made repeated efforts to improve relations between himself and Prahm. The decision to take a six month leave of absence was certainly not something done without serious thought and personal sacrifice. Pace's decision to withdraw from his position within the Organization in a vain effort to produce harmony cannot be ignored. The orchestrated harassment which began in April through the offices of Leo Dunne, Ole Prahm's supervisor of systems, following as it did the exchange of olive branches in January, plainly exacerbated the level of Pace's tension and increased the feelings of mistrust and futility. Pace was further reprimanded for demanding Organizational representation of his own choosing in dealing with Prahm and Dunne's charges[15] and was confronted for the first time with a supervisor who "stonewalled" him at the meeting with the affirmative action officer, both of which events, whether or not otherwise unlawful, were evidently calculated to isolate Pace and break his resistance further. It is concluded that this chain of events revealed to Pace for the first time the extent of Prahm's enmity and intractability and constituted a substantial change in working conditions, which served to verify the rumor that Prahm was out to get

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15. See Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994 [159 Cal. Rptr. 222]. See also NLRB v. Weingarten (1975) 420 U.S. 251 [88 LRRM 2689].

him. The fact that the grievance filed by Pace was not processed from step one to step two from May 17, 1978 through Pace's departure exactly two months later could only add to Pace's frustration. Clearly, Pace's relationship with Prahm and the District had reached a new low.

c. The Reasonableness of Pace's Departure

SEIU clearly demonstrated at the hearing that Pace's departure was based on competent medical advice. It was shown that Pace resisted the recommendation to leave and did not act impulsively when he finally conceded. Pace's seeking medical advice and the doctor's diagnosis are strong evidence in his favor. Dodson's Market, Inc. (1971) 194 NLRB 192 [78 LRRM 1628] enfd. (9th Cir. 1973) 553 F.2d 617 [83 LRRM 2987].

From the date of his departure to the date of his discharge, the District did nothing to address the conditions which precipitated his leaving, though they were unquestionably on notice that Pace considered himself to be ill as a result of harassment and discrimination. Whatever perfunctory efforts to reinstate him were made by the District created no obligation on Pace's part because they failed to address the conditions which had led to his justified departure. The status quo ante

remained. Curtis Mfg. Co. (1971) 189 NLRB 192 [77 LRRM 1220]; Donahue Beverages (1972) 199 NLRB 581, 586 [81 LRRM 1580].[16]

Geoffrey Sackett's uncontroverted and credited testimony regarding his unanswered October demand that Pace be restored to his position persuasively demonstrates that any proffered reinstatement would be on the District's own terms or would only be acceptable without Organizational intervention. In sum, the District's resolve to coerce Pace persisted undiminished through the time that the instant charge was filed. The reasonableness of Pace's original action and his continuing nonresponsiveness are amply established. Curtis Mfg. Co., supra, at p. 201.

d. Linkage to Protected Activity

The nexus between Pace's protected activity and his departure is obvious. It is clear from the record that Prahm manipulated Mike Hughes, denying him information about the circumstances of Pace's departure and then using Hughes' resulting distress to provide a "business justification" for replacing Pace.

The hostility of Prahm toward Pace's organizational activity is well established from the record. Prahm effectively undermined and frustrated Pace's efforts to secure

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16. Compare Jumping Jacks Division, U.S. Shoe (1973) 206 NLRB 88 [84 LRRM 1218] where a union adherent was advised by her doctor to seek a transfer to alleviate aggravation. The employee's departure was held voluntary because the aggravation was not within the employer's power to remove.

representation at the disciplinary hearings. In addition, he reprimanded Pace for failure to attend meetings without his representative after having made representation difficult.

The District's position that Pace was rightfully discharged for failure to personally notify Mike Hughes of his absence is rejected. The reason given for discharge was but a pretext.

The timing of the move against Pace is also telling. The Organization's stalwart was discharged exactly midway between unit determination and the unit election. The signal to other employees which that timing undoubtedly conveyed must be considered as a motive for the District's position.[17]

e. Conclusions

On the basis of the analysis above, it is concluded that Pace was constructively discharged.

Further, under Oceanside Carlsbad, supra, the District failed to adequately rebut the inference that Pace would have been terminated had he not been an organizational activist and an irritant to Ole Prahm for that reason.

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17. Regarding the propriety of drawing inferences from the time of such actions under somewhat different circumstances, see Big "G" Corp. (1976) 223 NLRB 1349 [92 LRRM 1127]; City of Boston and Michelle McMullin (Mass. MLRC 12/28/78) 5 MLC 1557, 1559; County of Bucks (Penn. PLRB 10/11/79) 10 PPER 10280; and, Salem County Board for Vocational Education (N. J. PERC 5/23/79) 5 NJPER 10135.

Granting, arguendo, that Pace left of his own accord and did not provide proper notice, the District's argument that it was justified in releasing Pace still falls flat. Though the District made reference at the hearing to other classified employee discharges based on absence without leave, it failed to show sufficient similarity of circumstances to warrant an inference of neutrality here. Further, the business justification rationale is doubly unpersuasive since less oppressive alternatives were available, Pace was not quickly replaced, and Pace was paid sick leave up to the time of his actual discharge.

In summary, the evidence clearly establishes all of the elements necessary to find that Johnny Pace was constructively discharged on July 17, 1978, and that this act was in violation of section 3543.5(a).

REMEDY

Section 3541.5(c) of the EERA sets forth the PERB's remedial authority in unfair practice cases. It provides:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

This section is similar to section 10(c) of the NLRA and, therefore, in fashioning the appropriate relief, cognizance is taken of applicable NLRB precedent.

(Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608.

In the instant case, it is concluded that the Marin Community College District, through its agent Ole Prahm and others, violated section 3543.5(a) of the EERA by harassing, discriminating against, and coercing its employee, Johnny Pace, because of his exercise of his rights under the Act.

The remedy set forth for this violation is "designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." (NLRB v. Rutter-Rex Mfg. Co., (1969) 396 U.S. 258 [24 L.Ed.2d 405, 72 LRRM 2881] reh. den. 397 U.S. 929 [25 L.Ed.2d 109].) Therefore, to fully compensate Pace and to place him in the position he would have been in but for the District's actions, it is appropriate to order that he be reinstated, on request, as a carpenter at Marin Community College. This relief is consistent with remedial orders of other state public employment relations boards and commissions involving reinstatement of wrongfully discharged or transferred public employees. (City of Boston (MA 1978) 5 MLC 1558; City of Elizabeth (NJ 1979) 5 NJPER 10048; Freeport Union Free School District (NY 1979) 12 PERB 3038; City of Green Bay Board of Education v. Wisconsin Employment Relations Commission (1976) 92 LRRM 3170.)

Pace is also entitled to a back pay award which will compensate him that amount he would have earned had he been employed by the District in his position as a carpenter, including all additional benefits of employment, and without

prejudice to his seniority or other rights and privileges. (F. W. Woolworth Co. (1950) 90 NLRB 289 [26 LRRM 1185]; NLRB v. Seven-Up Bottling Co. (1953) 344 U.S. 344 [31 LRRM 2237]; Reeths Puffer School District (MI 1979) MERC LO-1979, Vol. XIV, p. 37; City of Elizabeth, supra.) Consistent with NLRB precedent, this amount should include interest on the award (Isis Plumbing & Heating Co. (1962) 138 NLRB 716 [51 LRRM 1122]) in the amount of 7 percent per annum.[18] This amount will be offset by any earnings received by Pace during the period beginning on or about July 17, 1978, the date he was constructively discharged, until such time that the District offers him the position ordered herein. Deduction of Pace's interim earnings is in accordance with NLRB practice. (Big Three Industries (1975) 219 NLRB No. 159 [90 LRRM 1147].)

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18. The California Constitution, article XV, section 1, prescribes a rate of interest at 7 percent per annum. See also Florida Steel Corp. (1977) 231 NLRB No. 117 [96 LRRM 1070].

Having also found that the District violated section 3543.5(a) and (b) by the imposition of an overbroad set of "Union Activity Rules" in a discriminatory manner and in reprisal for protected activity, the Classified Union Activity Rules passed by the board of trustees of the District on May 17, 1978 will be ordered rescinded, effective the date of their enactment, and the board of trustees will be ordered to refrain from infringing on employee or organizational rights "in any like or related manner" in violation of sections 3543.5(a) and (b).[19]

Finally, it is appropriate that the District be required to post a copy of the attached Order. Posting will provide classified employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from the activity. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy by means of a posting requirement. Placerville

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19. In view of the breadth and extent of the unfair practices committed in these cases, the District will be ordered to cease and desist from "in any like or related manner" infringing on rights protected by the sections of the EERA which were violated. Hickmott Foods (1979) 242 NLRB No. 177 [101 LRRM 1342].

Union School District (9/18/78) PERB Decision No. 69. A posting requirement has been upheld in a California case involving the Agricultural Labor Relations Act, Pandol and Sons v. ALRB (1979) 98 Cal.App.3d 580, 587. Posting orders of the NLRB have been upheld by the United States Supreme Court, NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is found that the Marin Community College District has violated Government Code section 3543.5(a) and (b). IT IS HEREBY ORDERED that the District and its representatives shall:

1. CEASE AND DESIST FROM:

   a. In any like or related manner imposing or threatening to impose reprisals on Johnny Pace or other employees, discriminating or threatening to discriminate against Johnny Pace or other employees, or otherwise interfering with, restraining or coercing Johnny Pace or other employees because of their exercise of their right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation in all matters of employer-employee relations.

b. In any like or related manner denying to employee organizations rights guaranteed to them by Government Code section 3540 et seq.

c. Enforcing the Classified Union Activity Rules passed by the board of trustees of the District on May 17, 1978.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Immediately offer to fully reinstate Johnny Pace to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed;

b. Make Johnny Pace whole for any loss of pay or other benefit(s) he may have suffered by tendering to him a back pay award which constitutes an amount equal to that which he would have been paid absent his unlawful constructive discharge on July 17, 1978 until the date of the offer of reinstatement, this total amount to be offset by Pace's earnings as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due;

c. Post copies of the Notice attached as an appendix hereto at all work locations at the Marin Community College District where notices to employees customarily are placed, immediately upon receipt of the final decision. Such posting shall be maintained for a period of thirty (30) consecutive calendar days. Reasonable steps should be taken to insure that said Notices are not altered, defaced or covered by any other materials; and,

d. At the end of the posting period notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the action the District has taken to comply with this Order.

It is further ORDERED that the Classified Union Activity Rules passed by the board of trustees of the District on May 17, 1978 be rescinded, effective the date of their enactment.

It is further ORDERED that the instant charges be dismissed in all other respects.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 11, 1980 unless a party files a

timely statement of exceptions. See California Administrative Code, title 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 of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on April 11, 1980, in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served, concurrent with its filing, upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administative Code, title 8, sections 32300 and 32305, as amended.

DATED: March 21, 1980

MICHAEL J. TONSING
Hearing Officer

APPENDIX

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

After a hearing in Unfair Practice Cases No. SF-CE-297, SF-CE-298, and SF-CE-316, Service Employees International Union, Local 250 and Local 400, AFL-CIO v. Marin Community College District, in which both parties had the right to participate, it has been found that the Marin Community College District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) by harassing, discriminating against, and coercing its employee, Johnny Pace, because of his exercise of his rights under the Act and by imposing an overbroad set of "Union Activity Rules" (dated May 17, 1978) which unlawfully restrict organizational activity.

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

1. WE SHALL CEASE AND DESIST FROM:

   a. In any like or related manner imposing or threatening to impose reprisals on Johnny Pace or other employees, discriminating or threatening to discriminate against Johnny Pace or other employees, or otherwise interfering with, restraining or coercing Johnny Pace or other employees, because of their exercise of their right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation in all matters of employer-employee relations.

b. Enforcing the Classified Union Activity Rules passed by the board of trustees of the District on May 17, 1978.

c. In any like or related manner denying to employee organizations rights guaranteed to them by Government Code section 3540, et seq.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Immediately offer to fully reinstate Johnny Pace to his former job, or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed;

b. Make Johnny Pace whole for any loss of pay or benefit(s) he may have suffered by tendering to him a back pay award which constitutes an amount equal to that which he would have received absent his unlawful constructive discharge on July 17, 1978 until the date of the offer of reinstatement, this total amount to be offset by Pace's earnings as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due.

In addition, we note that the classified Union Activity Rules passed by the District's board of trustees on May 17, 1978 have been rescinded.

Dated _____

MARIN COMMUNITY

COLLEGE DISTRICT

By _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 30 CONSECUTIVE CALENDAR DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.