



STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA MONICA CLASSROOM TEACHERS )  
ASSOCIATION, )  
 )  
Charging Party, )  
 )  
v. )  
 )  
SANTA MONICA UNIFIED SCHOOL DISTRICT, )  
 )  
Respondent. )  
 )

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Case No. LA-CE-60

PERB Decision No.147

December 10, 1980

Appearances: Hirsch Adell (Reich, Adell & Crost) Attorney for Santa Monica Classroom Association; Robert A. Siegel (O'Melveny and Myers) Attorney for Santa Monica Unified School District.

Before Gluck, Chairperson and Moore, Member.

DECISION

The Santa Monica Unified School District (hereafter District) has filed exceptions to the attached hearing officer's proposed decision which holds that the District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)<sup>1</sup> by reprimanding and by

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<sup>1</sup>EERA is codified at Government Code section 3540, et seq. All statutory references are to the Government Code unless otherwise noted.

Section 3543.5(a) provides:

It shall be unlawful for a public school employer to:

threatening Ralph Emch, the president of the Santa Monica Classroom Teachers Association (hereafter Association), with termination of his employment because of a communication he directed to unit members on December 2, 1976. The hearing officer did not find a separate violation of section 3543.5(b).<sup>2</sup> The Association did not file any exceptions or any response.

After considering the entire record and the District's exceptions to certain of the hearing officer's findings of fact, the Board finds no prejudicial error and adopts them. The Board affirms his conclusions of law regarding the section 3543.5(a) violation.<sup>3</sup> The Board finds a concurrent violation of section 3543.5(b), however, and reverses that

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(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

<sup>2</sup>Section 3543.5(b) provides:

It shall be unlawful for a public school employer to:

(b) Deny to employee organizations rights guaranteed to them by this chapter.

<sup>3</sup>The hearing officer based his finding of a section 3543.5(a) violation on the Board's decision in San Dieguito Union High School District (9/2/77) EERB Decision No. 22. We base our affirmance on the Board's superseding test in Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

part of the hearing officer's decision which dismisses that portion of the Association's charge.<sup>4</sup>

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is found that the Santa Monica Unified School District violated Government Code section 3543.5(a) by reprimanding and by threatening Ralph Emch, then the president of the Association, with termination of his employment because of a protected December 2, 1976 communication to unit members. The District's actions towards Emch also violated section 3543.5(b). The Association's statutory right to represent unit members (section 3543.1(a))<sup>5</sup> includes the right to communicate with them to enlist support for its negotiating positions. This

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<sup>4</sup>In dismissing the section 3543.5(b) violation, the hearing officer relied on the Board's decision in Placerville Union School District (9/18/78) PERB Decision No. 69. That decision was overruled in San Francisco Community College District (10/12/79) PERB Decision No. 105, where the Board held that if the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation. (See Oakland Unified School District (4/23/80) PERB Decision No. 126, at pp. 2-3, footnote 2 and San Diego Unified School District (6/19/80) PERB Decision No. 137, at p. 5, footnote 5.)

<sup>5</sup>Section 3543.1(a) provides in relevant part:

Employee organizations shall have the right to represent their members in their employment relations with public school employers. . . .

right was denied when the District disciplined Emch, the Association's representative, for sending the December 2, 1976 letter. IT IS HEREBY ORDERED that the District and its representative shall:

(A) CEASE AND DESIST FROM:

(1) Imposing or threatening to impose reprisals against Ralph Emch because of his December 2, 1976 communication to unit members.

(2) Denying the right of the Santa Monica Classroom Teachers Association to represent unit members by disciplining Ralph Emch for communicating with them, in his December 2, 1976 letter, to enlist support for the Association's negotiating position.

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

(1) Remove from Ralph Emch's personnel file Mr. Lucas' January 13, 1977 letter and all references to it.

(2) 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 Santa Monica Unified School District where notices to certificated employees customarily are placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps

should be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other materials; and

(3) At the end of thirty-five (35) workdays from date of service of this decision, notify the Los Angeles Regional Director in writing of the actions taken to comply with this Order.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

APPENDIX

NOTICE TO CERTIFICATED EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS BOARD

An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-60, Santa Monica Classroom Teachers Association v. Santa Monica Unified School District, in which both parties had the right to participate, it has been found that the Santa Monica Unified School District violated section 3543.5(a) by reprimanding and by threatening Ralph Emch with termination of his employment because of his December 2, 1976 communication to unit members. The District also violated section 3543.5(b) in that its conduct denied the Association its right to represent unit members by disciplining Ralph Emch for communicating with them, in his December 2, 1976 letter, to enlist support for the Association's negotiating position.

As a result of this conduct, we have been ordered to post this Notice, and we will also 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 Ralph Emch, or otherwise interfering with, restraining, or coercing Ralph Emch because of his December 2, 1976 communication to unit members.

(b) In any like or related manner denying the right of the Santa Monica Classroom Teachers Association to represent unit members by disciplining Ralph Emch for communicating with them, in his December 2, 1976 letter, to enlist support for the Association's negotiating position.

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

(a) Remove from Ralph Emch's personnel file  
Mr. Lucas' January 13, 1977 letter and all references to it or  
to Ralph Emch's December 2, 1976 communication to unit members.

SANTA MONICA UNIFIED  
SCHOOL DISTRICT

Dated: \_\_\_\_\_

By \_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST  
THIRTY (30) WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE  
REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY OTHER  
MATERIALS.

Respondent.

(12/21/78)

<sup>2</sup>Government Code sec. 3540 et seq. Unless otherwise indicated, all references are to the Government Code.



On February 18, 1977, the Association filed an amended unfair practice charge against the District. The District filed its answer to this amended charge on March 16, 1977.

An informal settlement conference was held on March 9, 1977. A formal hearing was held before this hearing officer on September 27 and 28, October 12 and 13, and November 4, 1977.

Together, the unfair practice charge and the amended unfair practice charge list seven paragraphs specifying actions on the part of the District which allegedly violated section 3543.5. At the hearing, the Association withdrew the allegation that the District had violated subdivision (c) and it also withdrew all the allegations of unfair practices except those relating to the fourth paragraph. The fourth paragraph alleges that on or about January 13, 1977, the District threatened the president of the Association with termination of his employment because of his exercise of rights guaranteed to him and to the Association by the EERA.

Posthearing opening and closing briefs were filed by the parties, and the case was submitted on February 6, 1978.

### FINDINGS OF FACT

#### Background

The District is comprised of twelve elementary, three junior high and one high school, not including the continuing and alternative schools. Total enrollment is approximately 13,798

students.<sup>3</sup> The Association was certified by the PERB as the exclusive representative of the classroom teachers and various other certificated employees on November 4, 1976.<sup>4</sup>

Negotiations between the parties commenced shortly thereafter. One of the priority subjects of the negotiations was the Canyon Meadows Outdoor Educational Program (hereafter Camp Program).

The Camp Program involves sixth grade students. They are taken to a place called Canyon Meadows, which is a campsite located about 60 miles northeast of the City of Santa Monica, for three days and two nights. The Camp Program has two purposes: (1) it is a cultural exchange, the District's alternative to busing; and (2) it provides an opportunity for instructing the children in environmental education.

A similar Camp Program had been in operation through the 1971-72 school year, but was terminated for various reasons. One of the dissatisfactions expressed by the teachers at that time was the lack of extra duty pay for those teachers who participated in the program. A study committee was formed the following year to determine whether and how the program might be reinstituted. During the 1975-76 school year, the committee consisted of the supervisor, elementary curriculum and one

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<sup>3</sup>This information was obtained from the testimony at the hearing and from the 1978 California Public Schools Directory, published by the California State Department of Education. Official notice is taken of this publication.

<sup>4</sup>This information is contained in PERB case file LA-R-60, of which official notice is taken.

teacher representative from each of the 12 elementary schools. Jon Campbell also began attending the meetings of the study committee when he was appointed the District's coordinator of outdoor education in April 1976. The committee disbanded after making its final recommendations in a written report to the Board of Education on approximately November 12, 1976.

As recommended by the study committee, the personnel for the Camp Program was to consist of two environmental teachers whom the District would hire from its substitute list, a nurse and the coordinator who would be in charge of the school at Canyon Meadows. These persons would be permanently stationed at Canyon Meadows. The teachers of the two sixth grade classes whose students were there would also be present. In addition, there would be eight different junior or senior students each week on a volunteer basis who would assist in general supervision of the sixth graders and act as instructional aides.

In the beginning of the 1976-77 school year, the District determined that it would implement the Camp Program as a pilot project sometime after January 1, 1977. Participation by sixth grade teachers was to be on a voluntary basis of those who were on the study committee. The priority negotiations referred to earlier were directed at reaching agreement for the amount of extra duty pay for the sixth grade teachers who participated in the pilot program. The general level of extra duty for the Camp Program and other assignments was being negotiated as a separate issue.

On November 15, 1976, the District made its initial offer of approximately \$80<sup>5</sup> as extra duty pay for the sixth grade teachers who participated in the pilot project. The Association requested \$320. The District then proposed \$80 plus room, board and transportation. The Association countered with \$240 plus room, board and transportation. The District raised its offer to \$100 plus room, board and transportation. The Association lowered its request to \$200 plus room, board and transportation, and then to \$180 plus "incidental expenses." The District's negotiator, Peter Sweers, advised the Association that the District had made its last offer, which was the \$100 plus room, board and transportation. This offer was refused by the Association. The record does not reflect the exact date when this last offer was made and refused, but the evidence does establish that this was the status of negotiations as of December 1, 1976.

Mrs. Lowry's December 1, 1976 Bulletin

Patricia Lowry is the dean of students at the high school. On December 1, Mrs. Lowry distributed a bulletin to all first period faculty at the high school. The bulletin consisted of three pages. The first page stated:

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<sup>5</sup>The proposals and counterproposals were expressed in terms of extra duty units of pay. In November 1976, one unit was the equivalent of approximately \$80.

First Period Faculty

From: Patt Lowry, Dean of Students  
Date: December 1, 1976  
Subject: Bulletin Regarding High School  
counselors--Canyon Meadows

The Santa Monica Unified School District is sponsoring a program of student instructional aides for the Outdoor School at Canyon Meadows. For your information, the attached letter, which will be given to interested students, gives details.

Your cooperation is enlisted in posting the accompanying bulletin in your classroom and directing attention to it so that your Junior and Senior students will know of the meeting to be held Tuesday, December 7, 12:30 P.M., in Barnum Hall. (Emphasis in the original.)

The second page was a copy of the letter referred to in the first paragraph of the first page of the bulletin, written by Mr. Campbell. The third page consisted of an 8-1/2" x 11" hand-drawn flyer publicizing the date, time and place of the meeting about the Canyon Meadows Program. It was this flyer which Mrs. Lowry desired to have posted in the classroom.

At the hearing, Mrs. Lowry testified that there was nothing in her memo which would have suggested to teachers that they were required to urge students to be counselors. She stated that she nevertheless believed her memo to be a directive to post the flyer and call attention to it. However, she also testified as follows about an October 22, 1976 memo she authored which began, "Please send the following students to the Greek Theater, Friday, October 22 at 12:00 Noon.":

Q. (By Adell) Okay. So this is to inform the teacher--

A. That's correct.

Q. That Susie may go, but doesn't have to, right?

A. That's right.

Q. And when you say, "Please send the following students to the Greek Theater, what you're really saying is, "Please send them or don't send them"?

A. That's correct.

#### Mr. Emch's December 2, 1976 Communication to Teachers

Ralph Emch was the president of the Association during the 1976-77 school year and a member of the Association's negotiating team. On the morning of December 2, Mr. Emch prepared a one-page communication, which he distributed to the teachers at the high school. The top half of the front side of this communication consisted of a copy of the first page of Mrs. Lowry's December 1 bulletin. On the bottom half of the front side, Mr. Emch wrote the following:

Fellow Teachers --

Please review the above bulletin and the memorandum copied on the back of this sheet. The Board of Education is currently refusing to negotiate extra duty pay for sixth grade teachers.

To support them and our negotiations, it seems appropriate that we NOT urge either teachers or students to participate in this program at this time. Thanks for your help. (Emphasis in the original.)

The memorandum on the back which Mr. Emch referred to was a reproduced copy of a memo which Mr. Emch had previously sent to sixth grade teachers concerning the status of the Canyon Meadows

Program and urging the sixth grade teachers to delay participation in the Canyon Meadows Program until after negotiations on that item had been completed.

### Subsequent Events

Mr. Sweers was given a copy of Mr. Emch's December 2 communication by the principal of the high school, and he brought it to the attention of George Lucas, the Director of Personnel Services. Mr. Lucas interpreted Mrs. Lowry's December 1 bulletin as not only imposing an obligation upon teachers to post the flyer, but also requiring them to urge students to participate in the Camp Program. However, no evidence was presented that this interpretation was based on anything which Mrs. Lowry had told him; rather, Mr. Lucas considered the language on the first page of the bulletin to be the polite way of dealing with professionals in lieu of giving them direct orders.

Mr. Lucas also felt that Mr. Emch's communication was an attempt to "somehow or other" reduce student participation in the Camp Program by getting teachers not to call students' attention to the Camp Program and getting them to sign up for it. However, no evidence was presented regarding the basis of Mr. Lucas' interpreting Mr. Emch's communication in this manner. For example, no evidence was presented that Mr. Lucas had confronted Mr. Emch about his December 2 communication to ascertain Mr. Emch's intent or that Mr. Lucas had learned that Mr. Emch told some teachers to discourage students from

participation in the Camp Program. Nor was any evidence presented that teachers in fact failed to post the flyer or in any way encouraged students not to participate in the Camp Program.

On December 14, Mr. Lucas wrote Mr. Emch a letter about the December 2 communication. This letter stated, in part, as follows:

. . . We feel that your attempts to use students to gain power for teachers represents obstructionism in the development of a very worthwhile program.

We interpret your action in attempting to interfere with the administration of the program to be an example of conduct which may be interpreted as unprofessional. We intend to so notify the Board of Education at the meeting of January 10, 1977.  
(Emphasis in the original.)

The Board of Education met in executive session at its January 10 meeting to discuss Mr. Emch's December 2 communication. Mr. Emch and a representative from the California Teachers Association were present to explain their point of view. On January 13, Mr. Lucas wrote Mr. Emch the following letter:

Dear Mr. Emch:

The purpose of this letter is to inform you about the Board of Education's decision after our discussion in an executive session on January 10, 1977. The Board carefully considered the incident which happened and the facts as they knew them before arriving at a decision.

They felt that your actions in attempting to somehow or other reduce the effectiveness of our Outdoor Education by attempting to keep students from becoming involved constitutes



cause for giving you notice of unprofessional conduct. Therefore, the Board directed me as its authorized representative to notify you of this fact according to Education Code Section 13407. Any further attempts on your part to obstruct student participation in a Board-approved program will constitute cause for disciplinary action.

I am enclosing, for your information, a copy of Education Code Section 13407 along with the evaluation pursuant to Article 5.5 of the California Education Code.

Regretfully yours,

George Lucas  
Director of Personnel Services

A copy of this letter was placed in Mr. Emch's personnel file and was still there as of the time of the hearing.

Hearing Officer's Findings Regarding Mr. Emch's Communication

The District characterizes Mr. Emch's December 2 communication as one which was designed to "use students to gain power for teachers," specifically "to get teachers not to call students' attention to the Camp Program and getting students to sign up for it." However, the hearing officer finds that Mr. Emch was not attempting to (1) use students to gain power for teachers, (2) get teachers to refrain from posting the flyer about the Camp Program or calling attention to it, or (3) reduce student participation in the Camp Program by improper means. These findings are based on the following analysis.

The language used by Mr. Emch is somewhat ambiguous. In making reference to Mrs. Lowry's bulletin, Mr. Emch uses the

phrase "not urge. . . students to participate." However, Mrs. Lowry's bulletin does not request teachers to "urge students to participate"; it requests only that they post the accompanying flyer in their classrooms and direct students' attention to it. Thus, Mr. Emch's use of the phrase "urge. . . students to participate" is either (1) not intended to relate to Mrs. Lowry's request that teachers post the flyer and direct students' attention to it or (2) a veiled request by Mr. Emch that teachers not post the bulletin and not call attention to it.

Notwithstanding the possible ambiguity of Mr. Emch's words, the hearing officer believes that the words do have a logical, literal meaning which does not contravene Mrs. Lowry's request for posting and directing students' attention to the flyer. For example, teachers could post the flyer and say to their students, "There's an announcement about the Camp Program on the bulletin board, which you can read after class." In addition, some teachers might be inclined to also say, "And kids, I think that this is a very worthwhile program which you should get involved in." Thus, Mr. Emch's communication, if given a literal interpretation, would not be requesting teachers to refrain from making the first statement, but would only be requesting that they not make the second one. In the hearing officer's opinion, this is the only reasonable interpretation of Mr. Emch's words, standing alone. The words themselves ask nothing more of teachers than that they not express their gratuitous thoughts about the merits of the Camp

Program or otherwise assist the District in actively recruiting students for the program.

The District's interpretation of a veiled request by Mr. Emch that teachers refrain from posting the flyer and calling attention to it would have been more viable if there had been evidence to support it. For example, if Mr. Emch had stated to others that his intent was to cause teachers not to post the flyer or not to direct students' attention to it or if teachers had actually not posted the flyer and directed students' attention to it in response to Mr. Emch's communication, then Mr. Emch's communication could have been evaluated in that light. But no such evidence was presented. The conclusion reached by Mr. Lucas and the Board of Education was not based on any investigation to determine what Mr. Emch's intent was, but only on the words themselves. Based on the words alone, their conclusion was unreasonable.

Furthermore, the evidence is not persuasive that the teachers were required to post the flyer, even if Mr. Emch had intended that they not do so. The words in Mrs. Lowry's December 1 bulletin were "Your cooperation is enlisted in posting . . . ." It would not have been unreasonable for Mr. Emch to assume that Mrs. Lowry was aware of the dispute between the District and the Association on the amount of the Camp Program stipend and that she was literally only requesting teacher cooperation, rather than directing it, so as not to further intensify the dispute. In the past, Mrs. Lowry had written more direct memos, such as the one which began, "Please

send the following students to the Greek Theater. . .", and even in this instance, Mrs. Lowry did not feel that the teachers were required to send the students to the Greek Theater if they did not want to.

Even if Mrs. Lowry's bulletin did require teachers to post the flyer, there is no basis whatsoever for concluding, as Mr. Lucas did, that teachers were required to actively encourage students to participate in the program. First, as noted earlier, Mrs. Lowry's bulletin does not request teachers to encourage students to participate in the Camp Program. Second, it is one thing to expect teachers to post or read notices from administrators which encourage students to participate in the Camp Program; but it is quite another matter to demand that teachers represent that they themselves subscribe to the administration's views that the Camp Program is worthwhile and that students should be encouraged to participate in it.

Since the teachers were not required to encourage students to participate in the Camp Program, it was not improper for Mr. Emch to request that they refrain from doing so.

Finally, it should be emphasized that Mr. Emch did not request teachers to discourage students from participating in the Camp Program. Mr. Emch wrote:

. . . it seems appropriate that we NOT urge either teachers or students to participate in this program . . . . (Emphasis in the original.)

He did not write:

. . . it seems appropriate that we urge teachers and students NOT to participate in this program at this time. . . .

The difference in meaning between the two phrases is clear. While the words which Mr. Emch did not use connote a request for active "derecruitment" of students from participating in the Camp Program, the words used by Mr. Emch connote a request for teachers to remain silent about the Camp Program.

In summary, it is found that Mr. Emch's communication did not request teachers to refrain from posting Mrs. Lowry's flyer or calling attention to it, but requested teachers to adopt a neutral course of action in not actively encouraging student participation when they were under no obligation to do otherwise.

#### ISSUE

Whether the District violated section 3543.5(a) and (b) by sending the January 13, 1977 letter to Mr. Emch and placing a copy of it in his personnel file in response to Mr. Emch's December 2 communication to high school teachers.

#### CONCLUSIONS OF LAW

Section 3543.5(a) of the EERA provides that it shall be unlawful for a public school employer to:

Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Additionally, section 3543 provides, in part, that:

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.

When these two sections are applied in concert, it becomes unlawful for a public school employer to threaten reprisals against employees for participating in the activities of an employee organization. However, employees may not use the EERA as a shield to engage in whatever kind of conduct they desire in total disregard of the rights of the employer. It is within this framework that Mr. Emch's December 2 communication and Mr. Lucas's January 13 letter are examined.

Mr. Lucas' January 13 Letter Constituted a Reprisal and a Threat of Reprisal

The reference in Mr. Lucas's January 13 letter to Education Code section 13407 (renumbered to section 44938 effective April 30, 1977) is to a statutory notice which must be sent to permanent school employees prior to dismissal for immoral or unprofessional conduct. The District sent this letter because of Mr. Emch's December 2 communication. The clear implication of the letter is that Mr. Emch was in danger of being dismissed for unprofessional conduct if he continued to advocate the action called for in his December 2 communication. It hardly need be stated that the threat of dismissal is a significant threat.

Indeed, the letter is more than just a threat of reprisal; it itself is a reprisal, since it was placed in Mr. Emch's personnel file and stands as an official and permanent record that the District believes his conduct to have been unprofessional, which can certainly be expected to have an adverse influence on Mr. Emch's opportunities for promotional advancement in the District and perhaps elsewhere.

Mr. Emch Was Engaged in Organizational Activity When He Sent the December 2 Communication to the High School Teachers

In his opening posthearing brief, the District's attorney contends that the distribution of the December 2 communication by Mr. Emch did not constitute "organizational activity" because it was not pursuant to an official Association policy; rather, it is argued, the communication was an expression of individual sentiments on a subject which had nothing to do with the ongoing dispute in negotiations--viz., the participation of high school students in the Camp Program. The District contends that Mr. Emch's conduct cannot be deemed to constitute activity of the Association, within the meaning of section 3543, solely by virtue of the fact that he was the president of the Association at that time, as such a rule would potentially grant blanket protection to all conduct of any individual officer of an employee organization, however tenuous its connection to official policy of that organization.

The District's argument is not persuasive. Officers of employee organizations should be presumed to be acting with the authorization of and on behalf of the organization on those

matters which even remotely relate to the goals or interests of the organization. If the determination of "organizational activity" were dependent upon specific authorization, the natural result would be that public school employers and the PERB would be required to continuously monitor the internal affairs of employee organizations in order to ascertain whether an individual had been properly authorized to act on behalf of the organizaion. This is hardly the function of either public agency.

Mr. Emch's December 2 communication was directed to members of the negotiating unit and was related to an issue which was the subject of negotiations. Therefore, the preparation and distribution of that communication constituted "organizational activity." Whether it was protected "organizational activity" is discussed in the next portion of this decision.

#### Mr. Emch's December 2 Communication Was Protected Activity

The District's defense to the unfair practice charge, and its basis in sending Mr. Emch the January 13 letter, is that Mr. Emch improperly attempted to draw students into the dispute between the Association and the District or to victimize them because of it. The District contends that Mr. Emch attempted to obstruct the participation of the high school students by attempting to encourage the teachers to refrain from posting Mrs. Lowry's flyer about the Camp Program and calling attention to it. By attempting to manipulate students and student sentiment, it is argued, Mr. Emch engaged in the kind of



flagrant conduct which justifies disciplinary action. The District cites NLRB v. Thor Power Tool Co. (7th Cir. 1965) 351 F.2d 585, 587 [60 LRRM 2237, 2238] as authority that the right of employees to engage in concerted activity must be balanced against the District's right to maintain order and respect.

It is not necessary to address the District's legal argument, however, because it has been found that Mr. Emch's December 2 communication did none of the improper things which the District alleges it did. The balancing test set out in Thor Power Tool Co. does not apply to a situation where the concerted activity is not even arguably improper. The right to engage in organizational activities under the EERA is not restricted merely because the public school employer perceives that there has been interference with its right to maintain order and respect, if in fact there has been no such interference. Mr. Emch's December 2 communication was a lawful communication and constituted "protected organizational activity."

Mr. Lucas' January 13 Letter Constituted an Unlawful Reprisal and Threat of Reprisal

In San Dieguito Faculty Association v. San Dieguito Union High School District (9/2/77) EERB Decision No. 22, at p. 14, the PERB held that in order for a violation of section 3543.5(a) to occur,

. . . we would at minimum have to conclude that the District's conduct was carried out with the intent to interfere with the rights of the employees to choose an exclusive representative, or that the District's

conduct had the natural and probable consequence of interfering with the employees exercise of their rights to choose an exclusive representative, notwithstanding the employer's intent or motivation.

In his opening posthearing brief, the District's attorney argues that the District sent Mr. Emch the January 13 letter in a good faith belief that Mr. Emch had attempted to unlawfully obstruct student participation in the Camp Program and that it did not intend to threaten any reprisals against Mr. Emch for communications to teachers and attempts to strengthen the Association's negotiating position so long as his efforts did not involve or affect students.

Regardless of the District's actual intent, the San Dieguito standard is met here. The District's conduct cannot be absolved merely because it incorrectly mischaracterized Mr. Emch's communication as an attempt to manipulate students and student sentiment. What the District has done is to threaten Mr. Emch with dismissal for engaging in the protected activity of urging teachers to undertake a neutral course of action when they were under no obligation to do otherwise. If the District may lawfully take the action it did against Mr. Emch, even if the District did not intend to interfere with the lawful exercise of employee rights guaranteed by the EERA, the natural and probable consequences will invariably be to cause employees to forego the exercise of their rights under the EERA.

For these reasons, it is found that the District has violated section 3543.5(a).

### The Alleged Violation of Section 3543.5(b)

The Association also alleges that the District has violated section 3543.5(b), which provides that it shall be unlawful for a public school employer to deny to employee organizations rights guaranteed to them by the EERA.

The Association's attorney argues that the January 13 letter had the additional consequence of undermining the Association's negotiating stance on the Camp Program stipend issue. Presumably, the alleged violation of section 3543.5(b) is founded on the basis of a derivative violation of section 3543.5(a) in that Mr. Emch was president of the Association and the unlawful reprisal against Mr. Emch interfered with the Association's rights.

The PERB itself has previously rejected the theory of a derivative section 3543.5(b) violation on the basis that section 3543.5(b) was not designed to protect the same rights guaranteed by section 3543.5(c). See California School Employees Association, Chapter 658 v. Placerville Union School District (9/18/78) PERB Decision No. 69, at pp. 9-10. It follows, therefore, that there would be no derivative violation of section 3543.5(b) arising from a section 3543.5(a) violation.

Accordingly, it is found that the District did not violate section 3543.5(b).

### REMEDY

Section 3541.5(c) authorizes the PERB to issue a decision and order in an unfair practice case directing an offending

party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA. In California School Employees Association, Chapter 658 v. Placerville Union School District, supra, (9/18/78) PERB Decision No. 69, at pp. 11-12, the Board itself, citing the United States Supreme Court decision in NLRB v. EXPRESS Publishing Co. (1941) 312 U.S. 426, 438 [8 LRRM 415, 420], ordered a public school employer to post copies of the order of the decision. Such a posting requirement in this case effectuates the policies of the EERA in that it serves to advise the employees in the negotiating unit of the disposition of the unfair practice charge and, further, announces the readiness of the District to comply with it.

Furthermore, it is also appropriate to effectuating the policies of the EERA that Mr. Lucas' January 13, 1978 letter and all references to it be removed from Mr. Emch's personnel file. Cf. Community Hospital of Roanoke Valley v. NLRB (1975) 220 NLRB 217 [90 LRRM 1440], enfd. (4th Cir. 1976) 538 F.2d 607 [92 LRRM 3158], where the Circuit Court of Appeal upheld a similar order of the National Labor Relations Board.

## PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and discussion, and the entire record in this case, and pursuant to section 3541.5(c) of the EERA, it is hereby ordered that the Santa Monica Unified School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

Taking or threatening to take reprisals against Ralph Emch because of his December 2, 1976 communication to high school teachers.

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

1. Remove from Ralph Emch's personnel file Mr. Lucas' January 13, 1977 letter and all references to it.

2. Prepare and post copies of this order for twenty (20) working days at the District's headquarters offices and at each school in conspicuous locations where notices to certificated employees are customarily posted.

3. At the end of the posting period, notify the Los Angeles Regional Director of the actions taken to comply with this Order.

IT IS FURTHER ORDERED that the unfair practice allegation arising under section 3543.5(b) is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 12, 1979 unless a party files a timely

statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on January 10, 1979 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 concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: December 21, 1978

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David Schlossberg  
Hearing Officer