STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BELRIDGE TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, and BELRIDGE SCHOOL DISTRICT, Employer.	)	Case No. LA-CE-121 PERB Decision No. 157 December 31, 1980

Appearances: Charles R. Gustafson, Attorney for Belridge Teachers Association, CTA/NEA; Carl B. A. Lange III, Employer-Employee Relations Advisor, and Frank J. Fekete, Attorney for Belridge School District.

Before Gluck, Chairperson; Moore, Member.

DECISION

The Belridge School District (hereafter District) has filed exceptions to the attached hearing officer's proposed decision holding that the District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)[1] by

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[1]The EERA is codified at Government Code section 3540, et seq. Unless otherwise noted, all statutory references are to the Government Code.

Section 3543.5(a) provides:

> It shall be unlawful for a public school employer to:

reprimanding two representatives of the Belridge Teachers Association (hereafter Association). For the reasons that follow, the Public Employment Relations Board (hereafter PERB or the Board) affirms the hearing officer's decision to the extent consistent with this opinion.[2]

The District has requested an opportunity to orally argue this case before the Board. We deny this request; the issues have been adequately developed in the briefs submitted to the Board.

FACTS

The hearing officer's procedural history and findings of fact are free from prejudicial error and, with the exception of his findings regarding the District superintendent's motives,[3] are adopted by the Board itself.

> 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.

[2]The hearing officer dismissed charges alleging that the District's conduct violated section 3543.5(c) (failure or refusal to meet and negotiate in good faith) and section 3543.5(e) (failure or refusal to participate in impasse procedures in good faith). Since the Association did not except to the hearing officer's dismissal of these charges, that issue is not before the Board

[3]The Board's findings with respect to motivation are set forth infra at pp. 5-7.

DISCUSSION

The May 3 Incident Involving Mrs. Rhoten

Mrs. Rhoten, the chief negotiator for the Association, was reprimanded both orally and in writing for arriving between 8:45 and 9:00 a.m. on a day when a mediation session was scheduled, on the grounds that she was supposed to report to work at the regular 8:00 a.m. starting time. The released time agreement reached by the parties on March 7, 1977 provided that Mrs. Rhoten would receive released time "at all times mediation occurs during working hours."[4] The Association interpreted

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[4]This agreement settled a previously filed unfair practice charge (LA-CE-63). The letter memorializing the agreement stated, in pertinent part:

> By mutual consent, the parties have agreed as follows:
>
> 1. For the purposes of mediation pursuant to Government Code sections 3548 et seq., Ms. Jennine [sic] Rhoten will receive release time at all times mediation occurs during regular working hours.
>
> 2. Either Ms. Rita Kelly or Ms. Rosalee Wilson will receive release time commencing no earlier than 11:40 a.m. on any day mediation is in process.
>
> Concomitant with number 2 above, the individual not receiving release time will take over the teaching duties of the other by combining the classes. At those time [sic] mediation occurs outside of normal working hours both individuals may participate in the mediation session.

this clause to mean that Mrs. Rhoten would receive a day of released time whenever mediation occurred during working hours; under this interpretation, Mrs. Rhoten had no obligation to begin work by 8:00 a.m. The District's interpretation varied; at one point the superintendent testified as follows:

> Q. What was the result of [the released time settlement conference]?
>
> A. Mrs. Rhoten is released all day, one other teacher could be released at 11:40 but the other teacher would have to take her class until 2:30. Then, at 2:30 the third person could come in.
>
> * * * * * * * * * * *
>
> Q. Do you recall who that other teacher was?
>
> A. Well, the three bargaining agents for the Union were Mrs. Rhoten, released all day, then Mrs. Wilson and Mrs. Kelly were to alternate.
>
> Q. You used the phrase with respect to Mrs. Rhoten that she was to be released all day, could you elaborate on what you mean by all day?
>
> A. Well, the working days she was to be released during impasse from 8:00 to whenever, a working day.

This indicates that the District agreed with the Association that Mrs. Rhoten was to receive a full day of released time on days when mediation sessions occurred. Later, the superintendent modified the above statement and testified that Mrs. Rhoten "was supposed to report on a regular working day during impasse," and the District's position in its briefs

was that Mrs. Rhoten was obligated to report for work at 8:00 and would be released only during the time mediation actually took place.

The settlement agreement is ambiguous. It could, as the Association asserts, reflect an intent to provide Mrs. Rhoten with a full day of released time on days when mediation occurs during working hours. Or it could, as the District argues in its briefs, mean that Mrs. Rhoten would be released only during the hours when mediation is taking place. The Board takes note of the District superintendent's apparent confusion during his testimony as to the meaning of the agreement, along with the fact that the District consistently hired an all-day substitute for Mrs. Rhoten on days when mediation occurred, and concludes that the agreement provided Mrs. Rhoten with a full day of released time on days when mediation occurred during working hours.

Thus, on May 3, Mrs. Rhoten was released for a full day. The record provides no indication of any District policy requiring Mrs. Rhoten's presence on campus during her released time. Therefore, the District had no legitimate grounds for reprimanding Mrs. Rhoten; rather she was reprimanded solely because she used the released time she was entitled to under the settlement agreement. But for her exercise of her protected right to the released time granted by the agreement, Mrs. Rhoten would not have been disciplined. Thus, under one

prong of the Board's test in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 for determining violations of section 3543.5(a),[5] the District violated that section by

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[5]In Carlsbad, the Board stated:

> To assist the parties and hearing officers in this and future cases, PERB finds it advisable to establish comprehensive guidelines for the disposition of charges alleging violations of section 3543.5(a):
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> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
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> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

reprimanding Mrs. Rhoten orally and placing a written reprimand in her personnel file.

Furthermore, even if the settlement agreement were interpreted to grant Mrs. Rhoten released time only during the time the parties engaged in mediation, the District's imposition of a written reprimand, with a copy placed in Mrs. Rhoten's personnel file, constitutes a violation of section 3543.5(a). The record indicates that the placement of a written reprimand in Mrs. Rhoten's file was inconsistent with the superintendent's normal practice of giving only an oral reprimand when an employee first acts improperly. The imposition of discipline on an employee organization representative which is in excess of what would normally be imposed clearly tends to result in at least some harm to employee rights by demonstrating that participation in organizational activities may result in discriminatory treatment. The only justification offered by the District for its imposition of a written reprimand in addition to an oral reprimand is that Mrs. Rhoten's lateness violated the released time settlement agreement as well as District rules governing working hours. This justification does not establish a reason for treating this alleged offense differently from others and does not outweigh the harm to employee rights which may be caused by disparate treatment of the Association's chief

negotiator. Thus, under paragraph 3 of the Carlsbad test,[6] regardless of how the released time settlement agreement is interpreted, the Board finds that the placement of a written reprimand in Mrs. Rhoten's personnel file violates section 3543.5(a).

The May 3 Incident Involving Mrs. Wilson

Under the second paragraph of the released time settlement agreement,[7] Mrs. Wilson had a right to attend mediation sessions beginning at 11:40 a.m. However, on May 3, instead of arriving at 11:40, Mrs. Wilson participated in the mediation session beginning at 9:00 a.m. Later that afternoon, Mrs. Wilson was reprimanded both orally and in writing for her participation in the mediation session on that day. The written reprimand, a copy of which was placed in her personnel file, stated:

> The District superintendent requested Mrs. Wilson to accompany her children on all field trips she schedules in the future. The superintendent felt that her children needed their teacher present to carry out the pre-planning done, answer questions asked by the children, and to better be able to condut [sic] the follow-up discussion after the field trip. In the opinion of the superintendent, Mrs. Wilson's primary responsibility is to her students. All other matters including contract negotiations of all kinds are secondary.

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[6]See note 5, ante.

[7]See note 4, ante.

> In this respect Mrs. Wilson's presence for the entire day of impasse negotiations on May 3, 1977 was in violation of the agreement reached at the E.E.R.B. office in Los Angeles in March 1977.

As this letter indicates, Mrs. Wilson was apparently disciplined for two reasons: (1) attending the mediation session before 11:40 a.m. in violation of the released time settlement agreement; and (2) attending the mediation session at all on a day when her class went on a field trip. Mrs. Wilson's attendance of the mediation session before 11:40 a.m. was not protected activity since she was not entitled to released time until 11:40; thus, nondiscriminatory discipline based on that attendance would not violate section 3543.5(a). But her attendance after 11:40 a.m. was protected under the settlement agreement so that discipline based on that activity violates section 3543.5(a).

The discipline imposed by the District is thus explicitly based on "mixed" conduct, that is, conduct of which part is protected and part is unprotected. Under these circumstances, the Board has found it appropriate to order rescision of all the discipline imposed. San Ysidro School District (6/19/80) PERB Decision No. 134. The reprimand imposed on Mrs. Wilson was based on both protected and unprotected activity. Since we cannot determine what portion of the discipline is based on unprotected activity, the entire reprimand must fall.

The May 6 Incident Involving Mrs. Rhoten

Mrs. Rhoten and other members of her carpool arrived at school late on May 6, 1977. Only Mrs. Rhoten received a written reprimand for this conduct; in fact, none of the other late-arriving teachers were reprimanded in any manner. The District has given two reasons for singling out Mrs. Rhoten for discipline. First, Mr. Fischer, the District superintendent, testified that Mrs. Rhoten was reprimanded because she was the driver of the carpool on that day and, as such, had responsibility for ensuring the carpool arrived on time. He acknowledged, however, that the driver may not be at fault for a late arrival. Nevertheless, he took immediate disciplinary action against Mrs. Rhoten without making any effort to ascertain whether she was in fact responsible for the carpool's arriving late.

Second, the District argues that since Mrs. Rhoten had been previously reprimanded for lateness, a written reprimand was justified under normal District procedure. The record indicates two incidents which could be construed as reprimands. The first occurred on April 9, 1976, when the superintendent spoke to Mrs. Rhoten, as the representative of all the teachers, regarding lateness by all the teachers. This does not appear to have been a reprimand directed at Mrs. Rhoten individually and hence does not justify, more than a year later, the imposition of a written reprimand. The

second, the reprimand received by Mrs. Rhoten on May 3, has been found to be an unfair practice and thus cannot be used as a basis justifying the May 6 letter.

While the District may have had legitimate reasons for orally reprimanding all of the teachers who were late on May 6, the reasons given by the District for singling out Mrs. Rhoten for discipline and for imposing a written reprimand on her are clearly pretextual. In light of all the circumstances, we find that the District discriminatorily disciplined Mrs. Rhoten on May 6 based on her status as the Association representative in violation of section 3543.5(a).

Although the May 6 reprimand was not alleged to be an unfair practice in the charge filed by the Association, we find it appropriate to find an unfair practice based on this conduct. In Santa Clara Unified School District (9/26/79) PERB Decision No. 104, the PERB found a violation which had not been alleged in the unfair practice charge where the unalleged violation was fully litigated and was related to the specifically alleged violation. Federal courts have held that the National Labor Relations Board may find an unfair labor practice when the issue has been fully and fairly litigated even though no specific charge was made in the original complaint. See Alexander Dawson, Inc. v. NLRB (9th Cir. 1978) ___ F.2d ___ [99 LRRM 3105]. In that case, the court stated:

> [T]he evidence concerning this unlawful practice was relevant to the question of antiunion animus and the ALJ received evidence on this issue as bearing on the company's motivation. We agree with the Board's findings that the company had ample opportunity to offer, and did offer, evidence on this point . . . .

See also Kawano, Inc. v. Agricultural Labor Relations Bd. (1980) 106 Cal.App.3d 937, in which the court enforced an Agricultural Labor Relations Board order finding an unfair labor practice which was not specifically alleged in the complaint where the issue was fully litigated to show antiunion animus and no prejudice to the employer was apparent from the record.

In this case, evidence related to the May 6 letter was admitted to show the District's unlawful motivation. The reprimand, which occurred only a few days after the incident on May 3, was a continuation of the District's discriminatory behavior towards Mrs. Rhoten. It became a subject of the hearing and was fully litigated; both the Association and the District thoroughly explored the circumstances surrounding the letter in examination and cross-examination. Accordingly, even though the May 6 written reprimand was not specifically alleged as an unfair practice, we conclude there is no impediment to the exercise of our jurisdiction over this matter.

REMEDY

Section 3541.5(c) authorizes 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 take such affirmative action as will effectuate the policies of the EERA. The Board has consistently found that posting a notice effectuates the policies of the EERA by notifying the employees of the offending party's unlawful conduct and of the Board's remedy.[8]

The District argues that posting should not be ordered in this case because of the length of time that has passed since the conduct found to be an unfair practice occurred. It contends that posting would only disrupt the atmosphere that now exists in the District. The Board acknowledges these concerns, but nevertheless finds that posting is an appropriate remedy here. Posting ensures that employees affected by this decision are informed of their rights under the EERA. The fact that the case has been delayed does not lessen the importance of that remedy as a means of effectuating policies of the EERA.

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[8]See, e.g., Placerville Union School District (9/18/78) PERB Decision No. 69; Carlsbad Unified School District, supra, PERB Decision No. 89. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415] (National Labor Relations Act); Pandol and Sons v. ALRB (1978) 77 Cal.App.3d 822 (Agricultural Labor Relations Act).

To further effectuate the policies of the EERA, it is appropriate to order that the May 3 letters to Mrs. Rhoten and Mrs. Wilson and the May 6 letter to Mrs. Rhoten be removed from their personnel files.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, the Public Employment Relations Board ORDERS that the Belridge School District and its representatives shall:

1. CEASE AND DESIST FROM discriminating against, interfering with, restraining or coercing District employees Jeannine Rhoten and Rosalee Wilson by reprimanding those employees because of their exercise of rights guaranteed by the Educational Employment Relations Act on May 3, 1977 and by reprimanding Jeannine Rhoten for her conduct on May 6, 1977..

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

(a) Remove from Jeannine Rhoten's personnel file the May 3, 1977 and May 6, 1977 letters from Louis Fischer.

(b) Remove from Rosalee Wilson's personnel file the May 3, 1977 letter from Louis Fischer.

(c) Within five workdays of the date of service of this Decision, post copies of the Notice attached as an appendix hereto at all locations in the school where notices to

certificated employees are customarily placed. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that these notices are not reduced in size, altered, defaced, or covered by any other material.

(d) Notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, at the end of 35 workdays from the date of service of this Decision, of the action the District has taken to comply herewith.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS BOARD

After a hearing in Unfair Practice Case No. LA-CE-121, Belridge Teachers Association, CTA/NEA v. Belridge School District, in which both parties had the right to participate, it has been found that the Belridge School District violated section 3543.5(a) of the Educational Employment Relations Act by discriminating against District employees Jeannine Rhoten and Rosalee Wilson because of their exercise of rights protected by the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

WE WILL CEASE AND DESIST FROM discriminating against, interfering with, restraining or coercing District employees Jeannine Rhoten and Rosalee Wilson by reprimanding those employees because of their exercise of rights guaranteed by the Educational Employment Relations Act on May 3, 1977 and by reprimanding Jeannine Rhoten for her conduct on May 6, 1977.

WE WILL TAKE AFFIRMATIVE ACTION TO:

(1) Remove from Jeannine Rhoten's personnel file the May 3, 1977 and May 6, 1977 letters from Louis Fischer.

(2) Remove from Rosalee Wilson's personnel file the May 3, 1977 letter from Louis Fischer.

BELRIDGE SCHOOL DISTRICT

Dated:_____

_____
By:

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

BELRIDGE TEACHERS ASSOCIATION, CTA/NEA, Employee Organization, v. BELRIDGE SCHOOL DISTRICT, Employer.	)	Unfair Practice Case No. LA-CE-121 PROPOSED DECISION (3/22/79)

Appearances: Charles R. Gustafson, Attorney for Belridge Teachers Association, CTA/NEA; Carl B. A. Lange III, Employer-Employee Relations Advisor, and Frank J. Fekete, Attorney, for Belridge School District.

Before David Schlossberg, Hearing Officer.

PROCEDURAL HISTORY

On May 6, 1977, the Belridge Teachers Association, CTA/NEA (hereafter Association) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB)[1] against the Belridge School District (hereafter District). The charge alleges that the District had violated section 3543.5(a), (c) and (e) of the Educational Employment Relations Act (hereafter EERA)[2] in reprimanding two certificated employees.

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[1]Prior to January 1, 1978, the PERB was named the Educational Employment Relations Board.

[2]Government Code sec. 3540 et seq. Unless otherwise stated, all references are to the Government Code.

(Footnote cont'd on page 2)

On May 20, 1977, the District filed its answer to the unfair practice charge.

A formal hearing was held before this hearing officer in Los Angeles, California on November 7 and 16, 1977. At the close of the Association's case-in-chief, the District's attorney moved for dismissal of the charge in its entirety. The motion as to subdivision (a) of section 3543.5 was denied. The ruling with respect to subdivisions (c) and (e) was reserved for this decision, and is discussed below, at pp. 21-22.

Each attorney filed a posthearing brief, and the matter was submitted on February 17, 1978.

FINDINGS OF FACT

The District is comprised of one K-8 school. During the 1976-77 school year, there were 7 teachers and 82 students.

(Fn. 2 cont'd)

Section 3543.5 provides that it shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

The Association is the exclusive representative of the certificated employees in the District.

Participants

The unfair practice charge relates to the activities of three teachers--Jeannine Rhoten, Rosalee Wilson and Rita Kelly--and the District's superintendent, Louis Fischer.

During the 1976-77 school year, Mrs. Rhoten was president of the Association and the chairperson of its negotiating team. Mrs. Rhoten taught a combined 5th-6th grade class of 13 students. Her work hours, like all teachers employed by the District, were from 8:00 a.m. to 3:45 p.m. Her student hours were from 9:00 a.m. to 3:25 p.m.

Mrs. Wilson was a third grade teacher during the 1976-77 school year. There were seven or eight students in her class. Mrs. Wilson's student hours were from 9:00 a.m. to 2:30 p.m.

Mrs. Kelly was a kindergarten teacher during the 1976-77 school year. There were between 10 and 12 students in her class. Mrs. Kelly's student hours were from 9:00 a.m. to 2:30 p.m. Mrs. Kelly had the assistance of a full-time instructional aide in her classroom.

Both Mrs. Wilson's and Mrs. Kelly's lunch period was from 11:40 a.m. to 12:30 p.m.

Mr. Fischer was the District's superintendent in 1976-77, his second year in that capacity.

Release Time Agreement

During the 1976-77 school year, the Association and the District held eight negotiating sessions, but were unable to reach an agreement. After impasse was declared, but before mediation began, the Association filed an unfair practice charge against the District (LA-CE-63) alleging that the District refused to release a reasonable number of teachers from their classroom duties to participate in the mediation sessions. The Association sought to have three teachers released; the District offered to release one.

An informal conference was held on this earlier charge on March 7, 1977 and the parties settled the dispute at that time. A letter was composed by the hearing officer who conducted the informal conference as written acknowledgment of the agreement reached by the parties. The letter stated, in pertinent part:

> By mutual consent, the parties have agreed as follows:
>
> 1. For the purposes of mediation pursuant to Government Code sections 3548 et seq., Ms. Jennine [sic] Rhoten will receive release time at all times mediation occurs during regular working hours.
>
> 2. Either Ms. Rita Kelly or Ms. Rosalee Wilson will receive release time commencing no earlier than 11:40 a.m. on any day mediation is in process.
>
> Concomitant with number 2 above, the individual not receiving release time will take over the teaching duties of the other by combining the classes. At those time [sic] mediation occurs outside of normal working hours both individuals may participate in the mediation session.

Release Time for Mrs. Rhoten

Mediation sessions were held on April 19, 20, 21, and 26 and May 3, 1977, all beginning at 9:00 a.m. On each of these days an all-day substitute was retained to teach Mrs. Rhoten's class. This substitute worked for Mrs. Rhoten approximately 8 1/2 days during the 1975-76 school year and 15 days through May 3 of the 1976-77 school year.

On the days of the first three mediation sessions, Mrs. Rhoten came to school with her regular carpool at 8:00 a.m. She went to the board room, where the Association's representatives were to meet during mediation, and set up coffee and tea. She also had discussions with some of the other teachers and generally prepared for mediation. Mrs. Rhoten did not go to her classroom to consult with the substitute; nor did she go to the preparation room to prepare for her classes for subsequent days. Superintendent Fischer did not see Mrs. Rhoten preparing coffee in the board room and did not know whether or not she consulted with the substitute or used the preparation room.

On April 26, Mrs. Rhoten did not come to school with the carpool. She drove herself and arrived at school at approximately 8:45 a.m., after stopping at the bakery to purchase pastries for the Association's representatives involved in the mediation session. Mr. Fischer did not see her arriving at school. The mediation session ended about 1:30 p.m. Mrs. Rhoten did not take a lunch break. She went home and did not return that day.

May 3 Incident Involving Mrs. Rhoten

On May 3, Mrs. Rhoten again arrived at school between 8:45 and 9:00 a.m. Mr. Fischer saw Mrs. Rhoten arrive from his office window. The mediation session ended at about 2:30 p.m., with the Association requesting the mediator to recommend factfinding, which he did. Immediately after the mediation session ended, Mr. Fischer called Mrs. Rhoten into his office to discuss what he considered to be a late arrival that day. Later that day, Mr. Fischer wrote Mrs. Rhoten this letter:

> The District Superintendent requested that Mrs. Rhoten report to work at the regular hour, 8:00 a.m., during impasse negotiations in order to keep her substitute teacher abreast of the instruction for the day. Mrs. Rhoten stated she was not obligated to report at 8:00 a.m. on impasse negotiations days because the negotiations did not begin until 9:00 a.m. Mr. Fischer advised Mrs. Rhoten that she had no authority from the School Board or the Superintendent to report one hour late for work. Mrs. Rhoten said she would take the matter up with the school board. Mr. Fischer cautioned Mrs. Rhoten that any more late arrivals would cause a letter to be placed in her personnel file and she would be docked one hours [sic] pay.

What the letter does not reflect is that after these statements were made, Mrs. Rhoten told Mr. Fischer that she was not going to stay and listen to him tell her that, and she walked out of his office.

A copy of this letter was placed in Mrs. Rhoten's personnel file.

At the hearing Mr. Fischer added that Mrs. Rhoten could have used the time between 8:00 and 9:00 a.m. in the

preparation room to prepare for her classes for subsequent days. The room has xerox, ditto and thermofax machines, paper, typewriters, chairs and a table. Most of the teachers use the preparation room during this time period. Mrs. Rhoten testified that she would also require access to her classroom in order to properly prepare for her classes. She also stated that there is no District policy regarding what teachers should do between 8:00 and 9:00 a.m. Mrs. Rhoten also testified that she knew of no instance where a teacher was required to meet with the substitute on days when the teacher is released from classroom duties for other assignments; the lesson plans which are left for the substitute are sufficient. The testimony of these witnesses on these points was unrebutted, and is found to be credible.

May 6 Carpool Incident Involving Mrs. Rhoten

On May 6, 1977, Mrs. Rhoten drove the carpool to school. The exact time of arrival was disputed at the hearing. Mrs. Rhoten stated that they arrived at 8:05 a.m. Mr. Fischer stated that he saw the carpool arrive 15 minutes late and that he was aware that Mrs. Rhoten was the driver.

Later that day Mr. Fischer wrote Mrs. Rhoten the following letter and placed a copy of it in her personnel file:

> I have spoken to you several times about coming to work late in the morning. This morning, May 6, 1977, you were late again. It would be appreciated if you make every effort to be at school by 8:00 a.m. in the future. If you anticipate being late please let the District know.

At the hearing Mr. Fischer stated he sent a letter to Mrs. Rhoten but not to the other teachers because Mrs. Rhoten was the driver and it was her responsibility to get the others to school on time. He made no attempt to inquire why the carpool was late. He stated that it was the teachers' responsibility to come to him and explain why they were late.

Mr. Fischer testified that when there was an infraction of the rules or policy, it was his usual procedure to speak to the teacher about the matter first and write a note to keep in his desk drawer. A repeat violation would result in a letter to the teacher, a copy of which would be placed in the teacher's personnel file.

Only three incidents were presented at the hearing regarding previous communications between Mr. Fischer and teachers about tardiness. On April 9, 1976, in response to complaints from a board member, Mr. Fischer asked Mrs. Rhoten if she and others would make an effort to be at school on time. At the hearing Mr. Fischer stated that the reason he spoke to Mrs. Rhoten was that she was the teacher representative. The second incident occurred in January 1977, when Mr. Fischer addressed a notice to the entire staff requesting them to leave home a few minutes earlier in order to avoid being late because of the fog. The third incident concerned the May 3 conversation which Mr. Fischer had with Mrs. Rhoten.

Mr. Fischer testified he considered a letter in a teacher's file to be a form of disciplinary action, but he considered the May 3 and 6 letters to Mrs. Rhoten merely to be warning letters.

The Dispute Involving Mrs. Wilson

The dispute concerning Mrs. Wilson arises because she attended the May 3 mediation session all day rather than beginning at 11:40 a.m.

Pursuant to the March 7 agreement, Mrs. Wilson had attended the first four mediation sessions beginning at 11:40 a.m., with Mrs. Kelly taking her class in the afternoons. A couple of weeks prior to the May 3 mediation session, Mrs. Wilson and Mrs. Kelly had planned a joint field trip for May 3. They learned of the May 3 mediation day only on the preceding Friday or Monday. Mr. Fischer had been aware of the scheduled field trip but he did not remember it when he agreed to the mediation session.

The field trip was to Mayfair Market in Bakersfield in the morning, then to a nearby park for lunch, and then to Smith's Bakery in Bakersfield in the afternoon. This is a field trip which Mrs. Kelly had made on two or three other occasions, and Mrs. Wilson once before.

Upon learning of the conflict between the field trip and the mediation session, Mrs. Rhoten, Mrs. Wilson and Mrs. Kelly discussed among themselves the various options. One alternative discussed was for both Mrs. Wilson and Mrs. Kelly to go on the field trip and not attend the mediation session. A second alternative discussed was that Mrs. Wilson would not go on the field trip and would instead attend the mediation session the entire day. The teachers believed that there would be adequate supervision of the children, as Mrs. Kelly would be

accompanied by her instructional aide and the bus driver. The teachers also rejected the possibility of canceling the field trip, since they felt that it would not be fair to the children to do so. They consciously made a decision not to bring the matter up to Mr. Fischer because 1) they felt he should have known of the conflict and it was up to him to do something about it and 2) they felt certain Mr. Fischer would deliberately make both Mrs. Wilson and Mrs. Kelly go on the field trip.

The morning of the field trip, as the children were getting on the bus to go on the field trip, Mrs. Wilson and Mrs. Kelly decided that Mrs. Wilson should remain behind so that Mrs. Wilson could provide moral support for Mrs. Rhoten during mediation.

Mrs. Wilson participated in the mediation session beginning at 9:00 a.m. Mr. Fischer was subsequently apprised of this fact by the mediator. After the mediation session, Mr. Fischer called Mrs. Wilson into his office. Their conversation occurred just after Mrs. Rhoten left Mr. Fischer's office following the discussion about Mrs. Rhoten's allegedly late arrival that morning.

Mr. Fischer told Mrs. Wilson that she should have gone on the field trip with her class. He explained that she should have been there to answer any questions her students had. Mrs. Wilson responded that Mrs. Kelly was quite capable of answering their questions.

Later that day Mr. Fischer wrote Mrs. Wilson the following letter and placed a copy of it in her personnel file:

> The District Superintendent requested Mrs. Wilson to accompany her children on all field trips she schedules in the future. The superintendent felt that her children needed their teacher present to carry out the pre-planning done, answer questions asked by the children, and to better be able to condut [sic] the follow-up discussion after the field trip. In the opinion of the superintendent, Mrs. Wilson's primary responsibility is to her students. All other matters including contract negotiations of all kinds are secondary.
>
> In this respect Mrs. Wilson's presence for the entire day of impasse negotiations on May 3, 1977 was in violation of the agreement reached at the E.E.R.B. office in Los Angeles in March 1977.

Based on Mr. Fischer's unrebutted testimony, it is found that there is a school board policy requiring a teacher to accompany his or her class on a field trip. However, contrary to Mr. Fischer's additional testimony, it is also found that Mr. Fischer was aware of one occasion when a teacher took not only her own class, but also another teacher's class on a field trip.

The evidence fails to establish that teachers were more or less free to make decisions about field trip arrangements among themselves without consulting the superintendent, notwithstanding the implication in Mrs. Wilson's testimony to the contrary.

Hearing Officer's Findings Regarding Mr. Fischer's Motives

As explained below at pp. 17-20, Mr. Fischer had reason to be concerned with Mrs. Rhoten's failure to appear at school at 8:00 a.m. on mediation days and the failure of Mrs. Rhoten, Mrs. Wilson and Mrs. Kelly to discuss with him the conflict between the mediation session and the field trip. Nevertheless, the hearing officer also concludes that Mr. Fischer would not have orally reprimanded Mrs. Rhoten and Mrs. Wilson and would not have sent them the letters if they had not been involved in organizational activities on behalf of the Association. This finding is based on the following analysis of several aspects of the oral and documentary evidence.

First, Mr. Fischer explained that the reason he sent Mrs. Rhoten the letter when the carpool arrived late on May 6, without sending similar letters to the other carpool members, was that he held the driver responsible unless the driver took the initiative to offer an explanation absolving him or herself from culpability. However, the evidence establishes that prior to May 6, 1977, Mr. Fischer had treated the problem of tardiness as a common problem among all teachers. In April 1976, the superintendent asked Mrs. Rhoten if she and others would make an effort to be at school on time. He testified that he spoke with Mrs. Rhoten because she was the teacher representative, not because she in particular had a tardiness problem. In January 1977, Mr. Fischer addressed a notice to the entire staff.

Furthermore, Mr. Fischer recognizes that the driver may not have been at fault and he recognizes that a letter placed in the personnel file does constitute a form of disciplinary action. It is difficult to believe that he would therefore presume that the driver was responsible and then take the more drastic action of placing a letter in the personnel file without first inquiring about the cause of the late arrival.

A second factor reflecting on Mr. Fischer's motives is the content of the letter which he sent to Mrs. Wilson concerning her attendance at the May 3 mediation session. In the letter Mr. Fischer states that Mrs. Wilson should have gone on the field trip in order to carry-out the pre-planning, to answer the students' questions and to be better able to conduct the follow-up discussions. Yet, Mr. Fischer also makes reference to the March 7 release time agreement and states that Mrs. Wilson's attendance at the mediation session for the entire day was in violation of that agreement. The implication is that it would have been all right for Mrs. Wilson to leave the field trip so that she could be back at school by 11:40 a.m. If the true reason for requiring Mrs. Wilson's attendance on the field trip were the stated needs of the students, these needs would have continued past 11:40 a.m.

Furthermore, it is significant that Mr. Fischer did not make reference in his letter to the school board policy he testified about at the hearing regarding teachers' attendance on field trips. Rather, he emphasized that contract negotiations of all kinds were of secondary importance.

Finally, although there was only one occasion where a teacher took another teacher's class on a field trip since the time Mr. Fischer became superintendent, the incident is of some probative value in reaching the conclusion that Mr. Fischer discriminated against Mrs. Wilson.

All things considered, therefore, it appears that Mr. Fischer's displeasure over Mrs. Wilson's attendance all day at the May 3 mediation session was generated by her participation in organizational activities rather than concern for the needs of her students.

A third factor which greatly influences the hearing officer's determination about Mr. Fischer's motives is the conversation which he had with Mrs. Rhoten following the May 3 mediation session and the content of the letter he subsequently sent her. Mr. Fischer emphasized the need for Mrs. Rhoten to be at school at 8:00 a.m. so that she could consult with her substitute. The explanation by Mr. Fischer to Mrs. Rhoten was pretextual. The substitute had worked for Mrs. Rhoten approximately 15 days during the 1976-77 school year (through May 3, 1977)--presumably, she was quite familiar with Mrs. Rhoten's students and the textbooks. Based on unrebutted testimony, it has been found that on days when teachers were released for other assignments, they had not been required to meet with their substitutes and that the lesson plans which are left for the substitute teacher are sufficient to prepare the substitute for the day.

It is noted that Mr. Fischer made no mention during the conversation of the fact that Mrs. Rhoten could have used the time from 8:00 to 9:00 a.m. to prepare for subsequent days, which would be a legitimate reason for expecting Mrs. Rhoten to report to work at 8:00 a.m. Similarly, Mr. Fischer did not comment in his letter about the impropriety of Mrs. Rhoten's walking out of his meeting with her. Since these reasons were not the bases of the oral reprimand and letter, they cannot now be considered as having any bearing on Fischer's motives.

The last important factor reflecting on Mr. Fischer's motives is his testimony that it was his usual procedure to write an informal note and keep it in his desk drawer when an employee violated a rule or policy. There was no such informal note presented at the hearing which was directed specifically to Mrs. Rhoten prior to May 3, 1977 about her tardiness; the May 3 occurrence was the first such incident. Yet, the May 3 letter was placed in Mrs. Rhoten's personnel file, even though the letter itself implies that only subsequent late arrivals would cause a letter to be placed in her personnel file.

All these factors lead to the conclusion that Mr. Fischer would not have orally reprimanded Mrs. Rhoten and Mrs. Wilson or have written the May 3 letters to Mrs. Rhoten and Mrs. Wilson or the May 6 letter to Mrs. Rhoten if they had not been engaging in organizational activities on behalf of the Association.

This conclusion is reached without reliance on the evidence which the Association contends establishes a past practice on the part of the District of not enforcing teacher work hours

on days when teachers had an all-day substitute in their classrooms.

The evidence regarding Mrs. Rhoten and other teachers not returning to school following "Right to Read" meetings is not relevant. There is a significant difference between a teacher who fails to return to school in the afternoon for the last portion of the day, and one who does not report to school at 8:00 a.m. when it is necessary to be there at 9:00 a.m. anyway. This is especially true for Mrs. Rhoten, since she would have been able to use the hour before the students arrived to prepare for subsequent days' classes, something which she testified she could not do in the late afternoon because of the lack of access to her classroom until the students left at 3:25 p.m.

The evidence regarding Mrs. Rhoten's hours and activities on the first four mediation days does not support the Association's contention, as the evidence fails to establish that Mr. Fischer was aware of them or sanctioned them.

ISSUE

Whether the District violated section 3543.5(a), (c) or (e) in sending Mrs. Rhoten the letters of May 3 and May 6, 1977 and Mrs. Wilson the letter of May 3, 1977 and placing them in their personnel files.

CONCLUSIONS OF LAW

Interpretation of March 7 Release Time Agreement

Since the greater part of the dispute between the parties involves, at least peripherally, the interpretation of the March 7 agreement regarding release time, it is appropriate to discuss this agreement at the outset.

The Association contends that a reasonable interpretation of the agreement, as supported by past practice in the District, is that Mrs. Rhoten was not required to report to school until 9:00 a.m. on days when mediation occurred. This interpretation is not supported by the plain meaning of the words used in the agreement.

The March 7 agreement provides that Mrs. Rhoten will receive release time "at all times mediation occurs during working hours." (Emphasis added.) It does not provide "Mrs. Rhoten will receive release time on all days when mediation occurs." The time mediation began was 9:00 a.m. By the terms of the agreement, therefore, Mrs. Rhoten was not released until 9:00 a.m.

Nor should it be inferred that Mrs. Rhoten would be entitled to any "extra" time to prepare for mediation. The PERB itself, in interpreting the release time provisions of section 3543.1(c)[6] stated in Burbank Teachers Association (8/21/78) PERB Decision No. 67, at p. 5:

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[6]See the bottom of the next page.

> Meeting and negotiating includes the time spent at the negotiating table. It includes mediation and factfinding, which are continuations of the negotiating process. It also includes caucusing, which is an integral part of the process. Meeting and negotiating does not include the time necessary to prepare for negotiations. . . .(Emphasis added.)

As explained at p. 16, the evidence of past practice is not helpful to the Association's case.

The second part of the March 7 agreement concerned the right of either Mrs. Wilson or Mrs. Kelly to attend the mediation sessions beginning at 11:40 a.m. The 11:40 a.m. time was obviously chosen because it represented a natural break during the day, i.e., that was the time when both these teachers began their lunch period. Thus, any interruption in the normal work day as the result of combining the two classes would occur in the afternoons only. It could hardly have been contemplated by the parties that the March 7 agreement would be applicable to the situation where either Mrs. Kelly or Mrs. Wilson, or both, was not in the building, such as on a field trip.

There being no prior agreement applicable to Mrs. Kelly's and Mrs. Wilson's situation on May 3, the appropriate course of

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[6]Section 3543.1(c) states:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

action would have been for the teachers to advise Mr. Fischer about the conflict and to request that Mrs. Wilson be released from the field trip in order to attend the mediation session. At that time the teachers and the superintendent could have discussed the various factors, such as:

(a) Whether Mrs. Kelly's previous experience on the same field trip would have enabled her to adequately carry out the pre-planning and answer the students' questions without Mrs. Wilson's assistance.

(b) Whether Mrs. Wilson's prior experience on the same field trip would have enabled her to conduct the follow-up discussions without attending the field trip on this occasion.

(c) Whether Mrs. Kelly, her instructional aide and the bus driver would have been sufficient supervision for the 17-20 students.

(d) The degree to which Mrs. Rhoten required the advice of a second teacher at this particular mediation session.

If Mr. Fischer had then denied the request for Mrs. Wilson to attend the mediation session all day, and the Association felt that it was an unreasonable denial in violation of section 3543.1(c), then the Association could have filed an unfair practice charge for that reason. Instead, the teachers, knowing that Mr. Fischer might want to require Mrs. Wilson to attend the field trip, deliberately refrained from advising him of the conflict. This action on their part was improper. As

superintendent, Mr. Fischer had the right and the responsibility to make the determination to resolve the conflict, regardless of how arbitrarily the teachers thought he would act.

The Alleged Violation of Section 3543.5(a)

Section 3543.5(a) 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.

The placement of the letters in Mrs. Rhoten's and Mrs. Wilson's personnel files for unlawful reasons would constitute the kind of interference contemplated by section 3543.5(a). Such letters represent the first step in the disciplinary process and establish a foundation for future disciplinary actions.

The test for determining whether a public school employer has violated section 3543.5(a) has been set out in a recent PERB decision. In Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT v. Carlsbad Unified School District (1/30/79) PERB Decision No. 89, at pp. 10-11, the Board itself established these comprehensive guidelines:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

In this case the District may very well have had justification under paragraph 3 of the Carlsbad test to reprimand Mrs. Rhoten for failing to come to work at 8:00 a.m. and Mrs. Wilson for foregoing the field trip without first discussing the matter with Mr. Fischer. However, it is not necessary to address this question, because it has also been found that the superintendent would not have orally reprimanded the teachers or have written the letters to them and placed the letters in their personnel files but for the fact that they had been engaging in organizational activities on behalf of the Association. Therefore, under paragraph 5 of the Carlsbad test, the District has violated section 3543.5(a) of the EERA.

The alleged violations of section 3543.5(c) and (e)

Section 3543.5(c) provides that it is unlawful for a public school employer to refuse or fail to meet and negotiate in good faith with an exclusive representative, and section 3543.5(e)

provides that it is unlawful for a public school employer to refuse to participate in good faith in the impasse procedures established by the EERA.

The evidence does not establish that the District refused or failed either to meet and negotiate in good faith or to participate in good faith in the impasse procedures. Regular meeting and negotiating sessions had long since ended by the time these actions occurred. Therefore, there was no violation of section 3543.5(c).

The mediation sessions had also ended before the unlawful conduct took place. No evidence was presented that the subsequent factfinding process was somehow interfered with. This case does not involve an action on the part of the District to thwart effective representation by the Association during the impasse processes; the issues presented solely concern interference under subdivision (a) of section 3543.5.

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 and purposes of the EERA. In California School Employees Association, Chapter 658 v. Placerville Union School District (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. See also Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT v. Carlsbad Unified School District supra, (1/30/79) PERB Decision No. 89, at p.16, where the Board ordered posting of a notice for 30 consecutive days. 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 the May 3 letters to Mrs. Rhoten and Mrs. Wilson and the May 6 letter to Mrs. Rhoten be removed from their personnel files. 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 NLRB.

PROPOSED ORDER

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

A. CEASE AND DESIST FROM:

Interfering with the right of Jeannine Rhoten and Rosalee Wilson and all other employees to engage in activities protected by the EERA.

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

1. Remove from Jeannine Rhoten's personnel file the May 3, 1977 and May 6, 1977 letters from Mr. Fischer.

2. Remove from Rosalee Wilson's personnel file the May 3, 1977 letter from Mr. Fischer.

3. Post at all school sites, and all other work locations where notices to employees customarily are placed, effective the date on which this proposed decision becomes final, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive days. Reasonable steps shall be taken by the Belridge School District to insure that said notices are not altered, defaced or covered by any other material.

4. 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 allegations arising under section 3543.5(c) and 3543.5(e) are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 13, 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 April 11, 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: March 22, 1979

David Schlossberg
Hearing Officer

APPENDIX

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

After a hearing in which all parties had the right to participate, it has been found that the Belridge School District violated the Educational Employment Relations Act by interfering with employees because they had been engaging in activities on behalf of the Belridge Teachers Association, CTA/NEA. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

Cease and desist from interfering with employees because of their exercise of their right to join or not join an employee organization, to participate in the activities of an employee organization or to engage in organizing activities on behalf of an employee organization.

We will remove from Jeannine Rhoten's personnel file the May 3, 1977 and May 6, 1977 letters from Louis Fischer.

We will remove from Rosalee Wilson's personnel file the May 3 letter from Louis Fischer.

BELRIDGE SCHOOL DISTRICT

By: _____
Superintendent

Dated:

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