STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE TRIAL ATTORNEYS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF TRANSPORTATION, and GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS, Respondents.	)	Case No. S-CE-2-S PERB Decision No. 159b-S July 7, 1981

Appearances: Elias D. Bardis and Ronald W. Beals, Attorneys for State Trial Attorneys Association; Barbara T. Stuart and Stephanie Sakai, Attorneys for State of California, Governor's Office of Employee Relations and California Department of Transportation.

Before Gluck, Chairperson; Jaeger, Moore and Tovar, Members.

DECISION

Both the State Trial Attorneys Association (hereafter STAA) and the respondents, the Governor's Office of Employee Relations (hereafter GOER) and California Department of Transportation (hereafter Caltrans) have filed exceptions to the hearing officer's decision which found both the Caltrans memorandum of August 1, 1978 and the GOER memorandum of September 5, 1978 to be in violation of sections 3519(a), (b), and (d) of the State Employer-Employee Relations Act

(hereafter SEERA).[1] These findings were based on determinations that the memoranda, which limited use of the state's internal mail system: were vague, uncertain, ambiguous and chilled communication between employees; violated rights of employee organizations to communicate with their members or prospective members in an effort to organize and represent employees; and denied employee organizations equal access, respectively. For the reasons that follow, the Public Employment Relations Board (hereafter PERB or the Board) affirms in part, and reverses in part, that decision.

FACTS

The facts of this case arose during the time period surrounding July 1, 1978, the date SEERA became effective. SEERA provides that the approximately 140,000 civil service employees of the State of California may select employee organizations to be their exclusive representatives in appropriate units which the PERB was empowered to determine. Pursuant to PERB's administrative regulation 41010(a),[2] any employee organization seeking to file a petition to determine such an appropriate unit was required to file its petition

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[1]SEERA is codified at Government Code section 3512 et seq. All statutory references are to the Government Code unless otherwise noted.

[2]PERB administrative regulations are located in the California Administrative Code, title 8, section 31000 et seq. Hereafter, PERB's administrative regulations will be referred to as PERB Rules.

before August 31, 1978. Such petition was to be supported by authorizations of at least 30 percent of the employees in the proposed unit.[3]

One employee organization involved in gathering support for its petition was STAA, which until then had represented Caltrans attorneys who worked in the legal offices located in Sacramento, San Francisco, Los Angeles, and San Diego. In an effort to organize other attorneys employed by the state, STAA worked with another employee organization, the Association of California State Attorneys (hereafter ACSA), to compile a mailing list of the almost 2,000 state attorneys and administrative law judges. ACSA used the list of names and business addresses for at least three mailings and then turned the list over to STAA in May 1978. STAA then sent three separate mailings to the names on the list over the next two months. Approximately five percent of each of these mailings was returned although no evidence was presented during the hearings which attributed these returned mailers to a refusal by the state to deliver them. During July 1978, STAA had an artist prepare, at a cost of approximately $300, a prototype for a mailer which was to have been sent in August 1978.

As a result of the mailings, STAA obtained approximately 300 authorizations which fell short of the approximately 495

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[3]PERB Rule 41010(b)(3)(C).

needed to petition for a statewide unit of attorneys. As an alternative, STAA petitioned for a unit of Caltrans attorneys only and consequently participated fully in the SEERA unit determination hearings. In addition, STAA had a sufficient number of authorizations to intervene and appear on the ballot in the Statewide Attorney and Hearing Officer Unit which PERB found appropriate.[4] In the Matter of: Unit Determination for State of California (11/7/79) PERB Decision No. 110-S.

Some time prior to August 1, 1978, the State Employees Trades Council (hereafter SETC) also mailed approximately 3,500 letters to Caltrans employees throughout the state. Receipt of this mail caused supervisors to raise the question of whether it should be delivered. Caltrans' administration, relying on section VII C. 3 of the Caltrans procedure manual, Administration of Employer-Employee Relations Policies and

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[4]PERB Rule 41230(a) provides:

> Within 30 days following service of notice of a valid request to conduct an election in any unit determined by the Board to be appropriate any employee organization, whether or not a party to the unit hearing, may file an original and three copies of an intervention to appear on the ballot. The intervention shall be filed at the Sacramento Regional Office on forms provided by the Board. The intervention shall be accompanied by proof of support of at least 10 percent of the state employees in the appropriate unit.

Procedures No. P75-40,[5] and possibly the guidelines of the Office of Employee Relations,[6] issued the following memorandum with blind carbon copies sent to the employee

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[5]Section VII. SPECIFIC DEPARTMENT

C. Use of State-owned Equipment
An employee, employee who is an organizational representative, or employee organization:

3. Will not be allowed to use the State's or Caltrans' mail distribution system for their publications.

[6]These guidelines provide in pertinent part:

B. Access to Work Locations

* * *

Distribution

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1. With regard to the distribution and posting of employee organization material, employee organizations should be provided with a reasonable opportunity to communicate with their members and other State employees.

* * *

2. . . . A reasonable alternative should be provided where work area access is denied.

* * *

5. The State mail service should not be utilized for distribution of employee organization mail unless there is no other method of distributing material.

organizations which represented Caltrans employees, including STAA:

MEMORANDUM Date: August 1, 1978

To: District Directors of Transportation
Division Chiefs
Assistant Directors
Deputy Directors

From: Department of Transportation
Division of Administrative Services

Personal Mail

It has been Caltrans policy to not permit the distribution of personal mail to individual employees through the State and Caltrans mail systems.

It has recently come to our attention that an employee organization has attempted to distribute, in volume, employee organization literature to Caltrans employees by utilizing the U.S. Postal Service mails and Caltrans mailing address with the expectation that Caltrans would distribute the mail to designated individual employees.

In the past, when we have been aware of such volume personal mailings, we have returned the mail to the sender as undeliverable. It will be our practice to continue doing this in the future.

The purpose of our policy, which applies equally to private individuals, businesses and employee organizations who have not received an official State business sanction, is to minimize unnecessary expense to the State in terms of distribution costs.

We are not censors and are not expected to review each piece of mail that is received. However, when it is obvious that we are receiving mail which is not related to State business, then we are obligated to return it to the post office.

> Please remind your organization mail receipt and distribution unit and your managers of the need to be aware of this policy. If you have any questions about individual cases, please contact Len Allenbaugh (482-3305) in Headquarters Business Management.
>
> /s/ G. V. Hood
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> G. V. Hood, Chief
> Division of Administrative Services

After issuance of the memorandum, the San Francisco District Office of Caltrans returned as nondeliverable approximately 100 mailers to SETC. The employee organization protested to the GOER. During the discussions which followed, GOER informed SETC and STAA that the state had no obligation to distribute nonbusiness mail, including that from employee organizations, but it indicated a willingness to reach alternatives to mail delivery and, accordingly, explored various possibilities with the organizations. As a result of the discussions, the SETC mailers were delivered to Caltrans administration which had the material distributed. STAA made no attempts after issuance of the memorandum on August 1, 1978 to contact state attorneys by mailing to their business addresses.

Following the discussions with SETC and STAA, GOER issued a memorandum which was sent on September 27, 1978 to employee organizations registered with GOER, including STAA. The memorandum reads as follows:

MEMORANDUM

To: All Employee Relations Officers

Date: September 5, 1978

Subject: Employee Organization Use of State Mail Service

From: Governor's Office
Office of Employee Relations
/s/ Allen Paul Goldstein
Allen Paul Goldstein, Deputy Director

The following policy is intended to clarify the guideline concerning the use of the State mail service by employee organizations found on page 3 of the Employer-Employee Relations Guidelines (April 1978):

> "The State mail service should not be utilized for the distribution of employee organization mail unless there is no other method of distributing material."

"State mail service" refers to the internal distribution and handling of mail by employees of state agencies and departments. This includes the handling of mail which enters the system via the Federal Postal Service.

MASS OR VOLUME MAILINGS

Departments are encouraged to establish reasonable procedures for the distribution of mass or volume mailings or other distributions which arrive at a work site via either first class or bulk rate U.S. mail. Such procedures may differ from the department's policy concerning distribution of individual items of personal mail.

If a department determines that the sorting, distribution or handling of volume mailings, not related to state business, would create an added expense or impact on the efficiency of its internal mail delivery, such mail should be placed in a central location at the work site for pick up by employees or their representatives during non-work time.

Volume or mass mailings from employee organizations may be placed in a container marked "Employee Organization Mail". The container should be placed in a location which would assure employee access. A representative of the employee organization may also pick up the mailing and take responsibility for its delivery to the individual addressee during non-work time. (Non-work time means lunch periods, regularly scheduled rest periods and time before and after work.)

The employee organization may also use such pick up containers for material delivered through sources other than U.S. mail. Departments should consult with the employee organization about location of mail containers and related matters. Alternate procedures that reflect the problems of particular departments or work locations and/or agreements on volume or frequency of such distributions may be feasible. However, such procedures and/or arrangements must be reasonable, equally applied to all employee organizations and be of no additional cost to the State.

PERSONAL MAIL

Departments are under no obligation to deliver any "personal mail" to individual employees. "Personal mail" is mail which is not related to the conduct of State business (e.g., employee organization material, personal letters, business solicitations, or billings). Federal Postal Regulations (Postal Service Manual Part 154.41) provide that delivery of personal mail addressed to a business, public agency, etc., is complete when the mail is accepted at the work address. There is no requirement to insure further delivery of such mail to the individual to whom the mail is addressed.

If there are any questions concerning this policy, please call the Office of Employee Relations at (916) 445-1574 or ATSS 485-1574.

DISCUSSION

Since September 1978, PERB has adopted administrative regulations for the administration of SEERA. The Board notes PERB Rule 41280 which requires inter alia the application of PERB Rule 32726 which states that the employer must file with the regional director, and serve on each employee organization appearing on the ballot, a list of eligible employees and their home mailing addresses.

At present, a number of state employees have asked GOER not to release their home addresses to the employee organizations. GOER has informed the employee organizations that it will not release these employees' home addresses but will deliver mail for these employees to their business address.[7] GOER argues that access to these names and addresses make the instant case moot. An issue before the Board becomes moot when the essential nature of the complaint is lost due to some superseding conduct of the parties. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. A simple

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[7]These facts do not appear in the record. However, an administrative agency may take official notice of its records. Anderson v. Board of Dental Examiners (1915) 27 Cal.App. 336, 338 [149 P. 1006, 1007]; California Administrative Agency Practice (Cont. Ed. Bar 1970) Hearing Procedures, section 3.34, p. 167. Such information was filed with PERB in the form of stipulations which were part of the record. In the Matter of: Request for Reconsideration and Supplemental Decision and Order, Unit Determination for the State of California (3/20/81) PERB Decision No. 110d-S.

cessation of the illegal conduct does not necessarily terminate the underlying controversy. The party asserting the mootness argument must also demonstrate that there is no reasonable expectation that the wrongful conduct will be repeated.[8]

In the instant matter, the Board has no evidence that GOER is incapable in the future of refusing to deliver mail which was sent to these employees' business addresses. In addition, the public's interest is served when cases which clarify the parties' rights and obligations under a new law, such as SEERA, are decided based on the underlying issues.[9] Accordingly, we find the instant matter not to be moot.

The primary question raised by this case is whether denial of use of the state's internal mail system violates sections 3519(a), (b), and (d)[10] by unlawfully limiting charging party's access to state employees.

The parameters of the right of access under SEERA were closely examined by PERB in State of California (California

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[8]Pittenger v. Home Savings & Loan Association (1958) 166 Cal.App.2d 32.

[9]United States v. W.T. Grant Co. (1953) 345 U.S. 629.

[10]Section 3519 provides in pertinent part:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

Department of Corrections).[11] In that case, the Board found that "a right of access is implicit in the purpose and intent of SEERA." Id. PERB Decision No. 127-S at p. 5. After examining rights of access under other statutes administered by the Board as well as federal case authority,[12] PERB concluded at page 8 that ". . . access to public property may be reasonably regulated under varied circumstances."

The question of access in the instant case involves the distribution of union literature through the internal mail system of the state. Distribution of literature may involve an intrusion upon the employer's interest in maintaining order and

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> . . . . . .
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

[11] (5/5/80) PERB Decision No. 127-S.

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

discipline. Stoddard-Quirk Manufacturing Co. (1962) 138 NLRB 615, 620 [51 LRRM 111]. Limitation of such distribution, however, intrudes upon the organizational rights of employees. Id., 138 NLRB 615. The Board is persuaded that a balance of these conflicting rights and a determination of what is reasonable regulation of access in this case should be made in light of the test utilized by the U.S. Supreme Court in NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001]. The Court in that case sought to accommodate the organizational rights of employees with the property rights of the employer"[13] . . . with as little destruction of one as is consistent with the maintenance of the other." Id., 351 U.S. at p. 112. The result was a rule prohibiting nonemployee distribution of union literature on company property ". . . if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." Id., 351 U.S. at p. 112.

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[13]The Board is aware of the substantial differences between the property interests of the public employer and the private employer. Although the public employer may not have property rights as such, it ". . . may reasonably regulate access to public property where necessary to assure the safety of its employees, wards and facilities and the efficient operation of its official business." (Footnote omitted.) State of California, (California Department of Corrections) (5/5/80) PERB Decision No. 127-S, p. 8.

The Board believes that this test properly balances the state employer's interests in maintaining efficiency of operations and the employees' interest in receiving information from employee organizations. If the employee organization can demonstrate that the usual channels of communication with the employees in question are either ineffective or unreasonably difficult to utilize, the state employer's rule against delivery of literature through the internal mail system would have to yield to the extent necessary to permit the employees to receive the information.

The memorandum issued by Caltrans on August 1, 1978 instructed various supervisory personnel in that agency not to permit delivery of personal mail to employees. This blanket ban was qualified by a reminder that the agency was not to act as a censor but only to return to the post office any mail that was obviously not related to state business. This policy did not differ in any meaningful way from the policy in effect prior to August 1, 1978.

Before such a policy of nondelivery of personal mail rises to a violation of SEERA, charging party must demonstrate that the usual channels of communication were either ineffective or unreasonably difficult to use or that the policy was discriminatory on its face or as applied. The record is barren of such proof. The only related testimony was from John Sullivan, a representative of STAA, who merely asserted that the U.S. mail is the only efficient method by which the

organization could communicate with its membership. There was no compelling evidence showing that alternative methods of presenting their message, such as bulletin boards, oral solicitation or other forms of literature distribution, were either ineffective or unreasonably difficult for STAA to utilize, nor was there any demonstration that the memorandum was discriminatory. The mere announcement by Caltrans through the memorandum that a policy already in effect would be enforced in the future does not constitute discriminatory conduct. Budget Rent A Car Systems, Inc. 237 NLRB 1294 [99 LRRM 1374] 1978. The Board is unable, from such a sparse set of facts, to find the Caltrans memorandum of August 1, 1978 in violation of SEERA.

On September 5, 1978, GOER issued its own memorandum to the employee relations officers of the state. Copies of this memorandum were also sent shortly thereafter to STAA and other employee organizations. The subject of this memorandum was employee organization use of state mail service. Although the document does contain information concerning the handling of nonemployee-organization personal mail, the purpose was to clarify the use of the state mail service by employee organizations. As such, it reiterates the policy that: "The State mail service should not be utilized for the distribution of employee organization mail unless there is no other method of distributing material." The memorandum does not require the

various state agencies and departments to treat personal mail unrelated to employee organizations in this same way.

The NLRB has found that otherwise valid no-solicitation rules will violate employees' organizational rights if the rules are discriminatory either in scope or application. State Chemical Co. 166 NLRB 455, NLRB v. Olympic Medical Corp. (9th Cir. 1979) [102 LRRM 2904]. As the GOER memorandum requires different treatment of employee organization mail than of other forms of personal mail, it is discriminatory on its face and impinges on the rights of employees. In determining whether conduct violates section 3519(a), the Board determines per Carlsbad[14] whether it slightly harms or is inherently destructive of employees' rights. Such conduct can be justified if the employer demonstrates operational necessity or circumstances beyond the employer's control and inability to proceed in any other manner respectively. GOER has failed here to provide even evidence of operational necessity. Even assuming that the delivery of personal mail would present some burden to the state's operations, there was no evidence presented which justifies treating employee organization mail differently than other personal mail. In fact, testimony indicated that the bin system initiated by the memorandum was

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[14](1/30/79) PERB Decision No. 89. The Board decided to apply the decision in Carlsbad Unified School District in determining whether violations of 3519(a) have occurred in State of California (California Department of Corrections) (5/5/80) PERB Decision No. 127-S.

not based on a prior feasibility study and would result in increased cost to the state. Accordingly, the balance must be tipped in favor of employees' rights and the GOER memorandum of September 5, 1978 is a violation of section 3519(a).

Charging party also alleges this memorandum violated section 3519(b) as it denied STAA rights guaranteed to it by SEERA, specifically, the organization's right to communicate with its members and potential members provided for by sections 3512[15] and 3515.5.[16]

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[15]3512. PURPOSE OF CHAPTER

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employee-employer relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by such organizations in their employment relations with the state.
>
> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.

[16]3515.5. RIGHT OF EMPLOYEE ORGANIZATIONS TO REPRESENT MEMBERS: EXCLUSIVE REPRESENTATION: RESTRICTIONS

As discussed above, this Board has found a right of access implicit in the purpose and intent of SEERA. This right of access includes the right of employee organizations to communicate with employees and their members at the work facility. State of California (California Department of Corrections), supra (5/5/80) PERB Decision No. 127-S at p. 5.

This organizational right of access is subject, however, to parameters imposed by the Board. In this case, the Board finds that the GOER memorandum discriminates against employee organizations and that such is an unlawful limitation of employee organizations' rights provided by section 3519(b).

The hearing officer found that both the August 1, 1978 and the September 5, 1978 memoranda also violated section 3519(d) based on his speculation as to their effect on employee

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

organizations. The Board rejects this finding as there is no evidence that Caltrans, through the August 1, 1978 memorandum, or GOER, through the September 5, 1978 memorandum, dominated or interfered with the formation or administration of any employee organization; nor does the record indicate that the memoranda encouraged employees to join one organization in preference to another. The Board therefore concludes that STAA did not support its allegations that Caltrans or GOER violated section 3519(d).

The hearing officer also determined that the remedy should include an award of $300 to STAA for preparation of the newsletter prototype. This determination was based on the finding that there was no alternative use of the newsletter after issuance of the August 1 memorandum. However, the STAA representative in charge of the newsletter mailing testified that he had not even explored alternative means of distribution. It is clear, therefore, that charging party made no effort to mitigate its loss. The award of $300 under such circumstances is inappropriate.

Without adopting his rationale, the Board agrees with the hearing officer's conclusion that an award of attorneys' fees is inappropriate in this case. The total conduct of GOER in formulating and issuing the memorandum as well as modifying its position on access does not justify attorneys' fees. It is

therefore unnecessary to articulate at this time the circumstances under which the Board, in some future case, might find attorneys' fees to be recoverable in an unfair practice case.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the State of California through the Governor's Office of Employee Relations shall:

1. CEASE AND DESIST FROM:

a. Interfering with the right of employees granted by section 3515 through its September 5, 1978, memorandum by discriminatorily denying delivery of employee organization mail to employees' work sites;

b. Denying employee organizations their rights granted by section 3515.5 by discriminatorily denying delivery of their mail to employees' work sites.

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

a. Withdraw and rescind the September 5, 1978, memorandum;

b. Prepare and mail copies of this Decision, Order and Notice to each individual and organization which received copies of the Governor's Office of Employee Relations Memorandum dated September 5, 1978;

c. Post at each state office to which the September 5,1978, memorandum was sent, immediately upon receipt thereof, 10 copies of the Notice attached as an appendix hereto. Such notices shall be placed in locations where notices to employees are customarily placed and shall be maintained for a period of 30 consecutive days from the date of posting. Reasonable steps shall be taken to insure that the posted notices are not altered, defaced or covered by any other material.

d. Notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, within 20 days of the date of this Decision, of the action it has taken to comply with this Order.

IT IS FURTHER ORDERED that the charge alleging a violation of section 3519(d) related to the issuance of Governor's Office of Employee Relations memorandum dated September 5, and the unfair practice charges filed by the State Trial Attorneys Association based on the issuance of the California Department of Transportation memorandum dated August 1, 1978, are hereby DISMISSED.

By: John W. Jaeger, Member

Harry Gluck, Chairperson

Barbara D. Moore, Member

Irene Tovar, Member

APPENDIX: Notice

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

On September 5, 1978 the Governor's Office of Employee Relations (GOER) issued a memorandum to all employee relations officers on the subject of Employee Organization Use of State Mail Service. This memorandum was subsequently sent to all employee organizations registered with GOER. On October 10, 1978 the State Trial Attorneys Association, an employee organization, amended a previously filed unfair practice charge to include allegations that this memorandum violated the State Employer-Employee Relations Act (SEERA). A formal hearing on these allegations, in which all parties had the right to participate, was conducted by a Public Employment Relations Board (PERB) hearing officer who issued a proposed decision which was appealed to the Board. On July 7, 1981, the Board itself found that the State of California through the Governor's Office of Employee Relations violated SEERA through its September 5, 1978 memorandum by interfering with the rights of employees by discriminatorily denying delivery of employee organization mail to the employees' work sites. This action also denied employee organizations their rights granted by section 3515.5 of SEERA. As a result of this conduct, we have been ordered to post this notice. We will also abide by the following:

(a) WE WILL CEASE AND DESIST FROM:

1. Interfering with the right of employees granted by section 3515 through its September 5, 1978 memorandum by discriminatorily denying delivery of employee organization mail to employees' work sites;

2. Denying employee organizations their right granted by section 3515.5 by discriminatorily denying delivery of their mail to employees' work sites;

(b) WE WILL withdraw and rescind the September 5, 1978 memorandum, prepare and mail copies of the Public Employment Relations Board Decision, Order, and this Notice to each individual and organization which received copies of the GOER Memorandum dated September 5, 1978.

STATE OF CALIFORNIA
GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS
(Now functioning as the Department of Personnel Administration)

By: _____
Director

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.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE TRIAL ATTORNEYS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF TRANSPORTATION, Respondent.	Unfair Practice Case No. S-CE-2-S PROPOSED DECISION (2/22/80)

Appearances: Elias Bardis, Attorney for State Trial Attorneys Association in association with John L. Sullivan, Esq.; Barbara Stuart, Esq., State of California, Governor's Office of Employee Relations and California Department of Transportation.

Before Stephen H. Naiman, Hearing Officer.

I. STATEMENT OF THE CASE

The unfair practice charge in this matter was filed on August 9, 1978, alleging violation of section 3519(d) of the State Employer Employee Relations Act,[1] (hereafter SEERA or Act). The charge alleges that the California Department of Transportation (hereafter Caltrans) and the State of California represented by the Governor's Office of Employee

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[1]The State Employer Employee Relations Act is found at Government Code section 3512, et seq. Hereafter, all references will be to the Government Code unless otherwise indicated.

Relations (hereafter State or GOER) violated certain sections of the Government Code, State Constitution, federal Constitution and federal law by issuing a memorandum on August 1, 1978 which stated that employee organization mail would not be distributed to employees but, rather, returned to the sender.

On or about September 6, 1978, the Governor's Office of Employee Relations filed an answer and affirmative defense which admitted the issuance of the memorandum and the policy against the delivery of certain personal mail to individual employees. Further, the answer admitted that "where it is obvious that mail from employee organizations is not related to State business, such mail is deemed to be personal mail, and Caltrans does not deliver such mail to individual Caltrans employees." The answer denied any violation of State and federal constitutions and statutes.

An informal conference was scheduled for September 8, 1978 and a second informal conference scheduled for September 20, 1978 in Sacramento, California.

On October 10, 1978, the charge was amended to add additional allegations of misconduct centering around the issuance of a memorandum from the Governor's Office of Employee Relations dated September 5, 1978 and distributed to certain employee organizations on September 27, 1978. The memorandum set forth a policy indicating that State mail service should

not be utilized to distribute employee organizational mail. Further, the memorandum authorized departments to develop alternatives to distribution of employee mail based upon their individual needs.

On or about November 30, 1978, the Governor's Office of Employee Relations filed an amended answer to the charge which admitted that two memoranda were issued on August 1, 1978 and September 5, 1978 and denied the remaining allegations of the amended charge.

A formal hearing took place on November 16, 17, 20, 21, 27 and 28, 1978. At that formal hearing, the charge was amended on the record to allege violations of section 3519(a) and (b) as well as violations of section 3519(d). The amendment was received without objection and it is deemed to be denied.

The parties were permitted to file simultaneous opening briefs and reply briefs, the last of which was filed on or about May 7, 1979. Thereafter, by letter dated August 14, 1979, counsel for charging party directed attention of the Hearing Officer to the Public Employment Relations Board's (hereafter PERB or Board) decision in Richmond Federation of Teachers v. Richmond Unified School District and Simi Educators Association, CTA/NEA v. Simi Valley Unified School District (8/1/79) PERB Decision No. 99.

II. FINDINGS OF FACT

A. Statutory Setting

The facts of this case substantially occur during the incipient stages of the State Employer-Employee Relations Act which became effective July 1, 1978.[2] By its terms, SEERA is designed to promote communication between the State and its employees. SEERA provides a mechanism for employee representation by organizations of their own choosing and provides the means for resolving disputes regarding certain matters affecting the employment of State employees.[3]

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[2]Prior to the effective date of SEERA, employer-employee relations between the State and its employees were governed, inter alia, by the George Brown Act, Government Code sections 3525 through 3536; California State Personnel Board Rules 543-545; Executive Order 71-3 and Executive Order B-7-75, of which the hearing officer takes judicial notice.

[3]Specifically, SEERA's purposes are set forth at Government Code section 3512 as follows:

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

Included within the Act's coverage were almost all 200,000 persons employed by the State of California through its civil service system. The Act provides that the State employees may select an employee organization to be their exclusive representative in units found to be appropriate by the Public Employment Relations Board.[4]

After adopting Rules and Regulations[5] pursuant to section 3520.5(b), the Board was faced with the task of determining appropriate units and providing for election of an exclusive representative in those units.

Employee organizations seeking to represent State employees were required to file petitions with PERB on or before August 31, 1978. The petitions indicated the unit sought to be represented and were required to be supported by authorizations

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[4]Public Employment Relations Board, previously known as the Educational Employment Relations Board, was charged initially with overseeing and enforcing the provisions of the Educational Employment Relations Act found at Government Code section 3540 et seq. (hereafter EERA). Pursuant to the provisions of the legislation enacting SEERA and subsequently, the Higher Education Employer-Employee Relations Act, Government Code section 3560 et seq. (hereafter HEERA), PERB was charged with enforcing three acts governing these three areas of public employment relations.

[5]The Rules and Regulations relating to EERA, SEERA and HEERA are found in the California Administrative Code, title 8, section 31000 et seq. In implementing SEERA, PERB specifically adopted sections 41000-41270. Hereafter, PERB's administrative regulations will be referred to as "PERB Rules and Regulations section _____."

for representation of at least 30 percent of the persons in the unit alleged to be appropriate.[6] Thereafter, the GOER was permitted time to set forth a position as to what constituted appropriate units in which to group the employees covered by SEERA.[7] The Board established a three-phase process in which to determine appropriate units under SEERA. In phase I, the procedures for the entire representation hearing were set forth and any procedural problems were resolved. During phase II, testimony was presented by approximately 36 labor organizations, including STAA and the GOER, as to the placement in appropriate units of the various classifications of employees in State service.[8]

At the conclusion of phase II, 27,000 pages of testimony had been amassed. On November 7, 1979, PERB issued a decision which found appropriate 20 statewide units of employees.[9] Included within the 20 units was a separate unit of attorneys

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[6]Rules and Regulations section 40110, section 41010(b)(3)(A)(B) and (C).

[7]Rules and Regulations section 41100.

[8]The criteria which PERB uses in determining appropriate units is set forth in section 3521 of the Government Code.

[9]In the Matter of Unit Determination for the State of California pursuant to Chapter 1159 of the Statutes of 1977 (State Employer-Employee Relations Act) (11/7/79) PERB Decision No. 110-S.

and hearing officers which would be comprised of approximately 1,900 persons.[10]

B. Charging Party State Trial Attorneys Association Develops as an In-House Union of Attorneys of the Respondent California Department of Transportation.

In 1972, the 109 or so attorney-State employees of the California Department of Transportation formed an employee organization known as "State Trial Attorneys Association."[11] During the seven years of its existence, STAA has been active in representing its membership in the courts, before the State Personnel Board, the Governor's Office and the Legislature. Previously registered as an employee organization pursuant to State Personnel Board Rules, STAA has had success in obtaining pay increases and reducing inequities which existed in State service relating to lawyers employed by Caltrans and other State agencies.

STAA's activities are determined by union officials in Sacramento who are assisted by seven directors: two in Sacramento, two in San Francisco, two in Los Angeles and

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[10]Employees of the Public Employment Relations Board and other agencies were excluded by statute from this unit.

[11]The parties have stipulated that STAA is an "Employee organization" within the meaning of section 3513(a) of SEERA and that the California Department of Transportation (Caltrans) is a department of the Agency of Business and Transportation of the State of California and employs "State employees" within the meaning of section 3513(c) of SEERA.

one in San Diego. Over the years, STAA has variously advocated a statewide bargaining unit comprised only of attorneys employed by the State of California.

Caltrans employs approximately 15,000 persons throughout the State of California. These employees are divided between the headquarters office in Sacramento, which employs 2,500 persons, and 11 other district offices which employ 150 to 1450 persons in various locations of Caltrans throughout the State.[12] Within the 11 district offices, there are 300 maintenance stations with 30 to 50 employees and field construction sites with approximately 1,000-1,500 employees.

Caltrans' 109 attorneys are employed in the four legal offices in Sacramento, San Francisco, Los Angeles or San Diego.[13]

C. STAA Unsuccessfully Attempts to Solicit Authorizations to Represent a Unit Comprised Solely of State Attorneys.

The Directors of STAA geared up for an organizational campaign when it became clear that SEERA would become law.

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[12]The location of district offices and number of employees in each are as follows: Eureka (490); Redding (550); Marysville (1,000); San Francisco (2,900); Stockton (750); Bishop (300); San Luis Obispo (480); San Bernardino (870); Los Angeles (2,800); Fresno (600); San Diego (990).

[13]The number of attorneys in the legal offices is: Sacramento (50); San Francisco (25), Los Angeles (30); San Diego (4).

Having advocated, as early as 1975, separate units for State-employed attorneys and hearing officers, STAA began its campaign to represent the almost 1,650 State attorneys throughout California. Joining resources with another labor organization, Association of California State Attorneys (hereafter ACSA), the two organizations attempted to put together a mailing list consisting of almost 2,000 names of State attorneys and administrative law judges.[14]

In March 1978, STAA objected to access policies formulated by the GOER and set out in its Employer-Employee Relations Guidelines dated April 1, 1978. STAA insisted that the only feasible way it could communicate with State attorneys in locations throughout the State was by mail. Thus, STAA obtained from the State Controller a computer printout of the names of State attorneys and sought to obtain their business address. After meeting with some difficulty determining the location of various agency departments, STAA turned the list over to ACSA for completion. ACSA, which had attorneys in most State departments, was able to complete the list with much clerical effort. Both organizations found it extremely difficult to find the business addresses of State employees

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[14]The joint list was developed and utilized by both employee organizations, since ACSA sought a unit of both State attorneys and administrative law judges and STAA was prepared to request such a unit if it were found to be appropriate.

since the computer printout only gave the county in which the employees were employed. Based upon the difficulty in obtaining business addresses, STAA concluded it would be much more difficult to obtain home addresses based solely upon an employee's name and county of employment.[15]

ACSA did not readily turn the list over to STAA but took advantage of its possession to send out three mailings and at least one authorization card solicitation before giving the list to STAA in May 1978, some three months after it had been completed.

In the last days of May 1978, STAA used the list of names and business addresses of State attorneys and administrative law judges to mail four pages of organizational materials and an authorization for representation to 1,962 persons on the list. This mailing was sent through the United States mails by bulk mailing permit to employees at their business addresses at the cost of almost $550, which included copying, labeling, folding, stuffing, zip-code sorting and postage.

In the same manner, on or about June 5, 1978, STAA sent a second mailing to 1,950 persons on the STAA-ACSA list at a cost of $663. This mailing consisted of approximately 17 pages of

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[15]The State treats home addresses and telephone numbers as confidential and will not release this information. See footnote 24 and text at pp. 18-19, infra.

printed campaign materials plus another authorization card. From these two mailings of 3,912 envelopes, approximately 200 were not delivered and were returned to STAA at the cost of 25¢ per envelope.[16] Of the 200 returned envelopes, approximately 100 bore incorrect addresses and only 12 were returned from Caltrans. The record does not establish why the remaining 100 envelopes, ostensibly correctly addressed, were returned. Some were returned because the addressees had moved or died.[17] The first two mailings yielded STAA 278 authorization cards, of which approximately 100 came from Caltrans attorneys.

In late June and early July, STAA sent out a third mailing to the approximately 2,000 persons on the mailing list. The cost of the mailing was $1,150[18] and approximately 100 letters were returned. The record is devoid of any evidence why these letters were returned.

Finally, on July 10, 1978, STAA sent four bulk mailings to each Caltrans legal office. These mailings contained

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[16]STAA paid to have the envelopes returned so that it could obtain address corrections and update its mailing list.

[17]Charging party saved no envelopes and, thus, one can only speculate why 100 of the envelopes were returned to STAA and from what departments in State service they were returned.

[18]Any variations in cost appear to result from the amount of work done by the copy-mailing service. In the case of each of the three mailings, the postage costs were approximately the same: under $200, including the cost of the permit.

organizational materials for use in solicitation of other attorneys known to STAA members. STAA was thus able to obtain an additional 25 to 30 authorization cards for a total of slightly more than 300.

In order to petition for a Statewide unit of attorneys, STAA would have been required to obtain 495 authorization cards, or 30 percent of the unit petitioned for.[19] Having fallen short of the requisite number of cards to petition for a

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[19]PERB Rules and Regulations provide in relevant part:

41010. Petitions to Determine An Appropriate Unit.

(a) An employee organization may file a petition to determine an appropriate unit not later than August 31, 1978.

(b) An original and three copies of the petition shall be filed at the Sacramento Regional Office. A copy of the petition shall be concurrently served upon the Governor or his designated representative. The petition shall contain the following information:

(1) The name, telephone number and address of the employee organization filing the petition and the name, address and telephone number of the agent to be contacted;

(2) The date the petition is submitted;

(3) For each unit petitioned for;

(A) a description of the grouping of proposed employment classes to be included in the unit including schematic codes and class codes as defined in "Pay Scales in California State Civil Service." Each employment class shall include the geographic or department location if other than a statewide class is proposed;

(B) The approximate number of employees in the proposed unit;

(C) An accompanying declaration executed by the authorized agent of the employee organization under penalty of perjury stating that the employee organization possesses to the best of its knowledge and belief, as of the date of filing the petition, proof of support of at least 30 percent of the state employees in the unit proposed. The proof of support shall be maintained by petitioner and made available for inspection during normal working hours by the Board.

unit of attorneys, STAA filed a petition for a unit of Caltrans attorneys only. By virtue of this petition, STAA participated in phase II of the SEERA hearings and was able to make all arguments concerning the appropriateness of a unit of Caltrans attorneys or any other attorney unit. The 300 authorization cards will permit STAA to intervene as a participant in the Statewide Attorney and Hearing Officer unit which PERB has found to be appropriate and which contains approximately 1,900 persons.[20] (See In the Matter of: Unit Determination for the State of California, supra, PERB Decision 110-S, at pp. 17-21; see also PERB Rules & Regulations section 41210(d). supra, at footnote 19.)

[19](--Continued)

. . . . . .

(d) A petition to determine an appropriate unit of an employee organization shall not be considered complete or properly filed unless the requirements of this section and sections 41070 and 41080 have been timely met.

(e) A copy of the constitution, articles of incorporation and the bylaws of the employee organization, if any, shall be filed with the Sacramento Regional Office. To maintain standing as an employee organization before the Board, any amendments to the constitution, articles of incorporation and the bylaws, if any, shall be filed with the Sacramento Regional Office within thirty days of the effective date of the amendment.

When two or more employee organizations are acting as Joint Petitioners, Joint Election Requesters or Joint Election Intervenors, this requirement shall include a copy of their agreement to act as a joint entity, if any, together with a copy of the constitution, articles of incorporation and the bylaws, if any, of each participating employee organization.

[20]PERB Rules and Regulations provide:

41230. Intervention to Appear on Ballot.

(a) Within 30 days following service of notice of a valid request to conduct an election in any unit determined by the Board to be appropriate any employee organization, (Continued--)

During the time which ACSA used the same list as STAA, it obtained 600 authorizations from employees. STAA had no mailings returned after August 1, 1978 and there is no evidence in the record of the number of returns on ACSA's mailings, if any.

D. On August 1, 1978, after Receipt of a Large Mailing from an Employee Organization, Caltrans Issued a Memo Stating that Personal Mail in Volume would be Returned to the Sender.

1. Background and Policies

Sometime prior to August 1, 1978, the State Employees Trades Council (hereafter SETC) engaged in an organizational campaign not unlike the one pursued by STAA and ACSA. After obtaining a list of names of employees in the maintenance and trades facilities throughout the State from the comptroller, SETC, with great effort, obtained their business addresses. The union then mailed, postpaid, approximately 8,500 letters containing organizing material to all State trades and maintenance employees at their business address. SETC

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[20](--Continued)
whether or not a party to the unit hearing, may file an original and three copies of an intervention to appear on the ballot. The intervention shall be filed at the Sacramento Regional Office on forms provided by the Board. The intervention shall be accompanied by proof of support of at least 10 percent of the state employees in the appropriate unit.

(b) A copy of the intervention, exclusive of the showing of support, shall be concurrently served on the Governor or his designated representative.

specifically mailed approximately 3,500 of such letters to employees in the various districts of Caltrans. When the mailing of SETC materials to Caltrans was received at the San Francisco District Office, supervisors there contacted others in the Caltrans hierarchy for guidance as to the policy for distribution of these union organizing materials through the Caltrans mail distribution system.

The matter eventually reached Mr. Gil Hood, who is chief of the Division of Administrative Services. Hood, who reports to the Assistant Director for Administration of Legal Affairs of Caltrans, supervises five subdivisions within the agency. These are the Offices of Computer Systems; the Office of Personnel, Affirmative Action and Management Analysis; the Office of Employee Relations, Safety and Training; and the Office of Programs and Budgets. The mail operations of Caltrans are directed by the Office of Business Management. After having been advised that employee organization material had been received and having determined that its distribution would be inappropriate, Hood discussed the problem with Robert Negri, who is the Chief of Employee Relations Branch, within the Office of Employee Relations.[21]

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[21]Caltrans Policy and Procedures Manual provides that the duties of the Chief, Employee Relations Branch are:

IV. RESPONSIBILITIES:

Hood testified at the hearing that it was his belief that there was a longstanding policy in Caltrans against the delivery of personal mail. Further, Hood testified variously throughout the record that:

> A. It's our policy not to deliver it [personal mail] unless it will cost us money to identify what we shouldn't deliver. We're trying to find the easiest, the cheapest way to get the job done but following the principle that it's inappropriate if we can reasonably avoid it, delivering personal mail. In certain circumstances, it's just too costly to try to stop it. But it's still our intent that personal mail should not be delivered. (Emphasis added) (Tr. p. 476, lines 3 through 11)

When Hood was advised that he had no real written policy or practice in existence which would authorize return of either

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> 21(--Continued)
> Chief, Employee Relations Branch (ERB), Division of Administrative Services, Sacramento:
>
> The Chief, ERB is responsible for departmentwide coordination and administration of the following policies and procedures. This includes: (1) providing advice and assistance to Caltrans managers on such working conditions and employee relations (ER) matters as grievances, nepotism, employee rights, internal communication programs, Certificate of Appreciation program, alcoholism program, employee organization contacts, workhour variable scheduling; and (2) maintaining liaison with employee organizations on statewide and departmentwide issues. (At page 2712)

mailings from employee organizations and personal mail, he determined that such a policy should be developed. Negri was instructed to research and compile a written policy. Negri drafted the August 1, 1978 memo relying upon the Caltrans procedure manual entitled: Administration of Employer-Employee Relations Policies and Procedures No. P75-40 (hereafter P & P 75-40). Specificially, Negri relied upon Section VII C. 3:

> VII. SPECIFIC DEPARTMENT:
>
> * * *
>
> C. Use of State-Owned Equipment
>
> * * *
>
> An employee, employee who is an organizational representative, or employee organization:
>
> * * *
>
> 3. Will not be allowed to use the State's or Caltrans' mail distribution system for their publications.

In addition to this section, P and P 75-40 also contains other statements of policy to the effect that it is the department's policy "to encourage effective employer-employee relations within . . . " the department. Further, the manual states that the policies which provide the basic framework for employer-employee relations should be "uniformly applied to all employee organizations," reciting the employee rights section of the George Brown Act.[22]

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[22]The Act also gives the following rights to employee organizations:
(Continued--)

Caltrans' policies also provide that employee organizations and employees may solicit for membership in Caltrans' facilities outside of normal work hours. The policies deny employee organizations[23] the right to obtain

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[22](--Continued)
Employees have the right to organize or join employee organizations for the purpose of representation on all matters of Employer-Employee Relations. Employees also have the right to refuse membership and represent themselves on an individual basis. Employees will not be discriminated against, granted preferential treatment, or have equitable treatment withheld because of either membership or nonmembership in an employee organization (Gov. Code sec. 3527.)

[23]In addition to STAA, there are 17 employee organizations recognized pursuant to P and P 75-40 to represent Caltrans employees:

1. American Federation of State, County and Municipal Employees (AFSCME)
2. California Association of Educators
3. California Association of Planners
4. California League of Engineering and Allied Technical Employees (CLEATE)
5. California State Drawbridge Operators Association
6. California State Employee's Asian American Association
7. California State Employees Association (CSEA
8. Clerical and Allied Services Employees (CASE).
9. Professional Engineers in California Government (PECG)
10. Public Employees Service Association (PERA)
11. Service and Supply Employees Organization
12. State Association of Real Property Agents (SARPA)
13. State Employees Benefit Association, Inc.
14. State Employee's Trades Council
15. State Officers Supervisors Association
16. State Trial Attorneys
17. Union of State Employees, Local 411

Caltrans employees' home address and phone numbers as they are confidential.[24]

It is also likely that Negri referred to the guidelines of the Office of Employee Relations which were promulgated in April 1978. These guidelines state as follows:

> B. Access to Work Locations
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> * * *
>
> Distribution
>
> * * *
>
> 1. With regard to the distribution and posting of employee organization material, employee organizations should be provided with a reasonable opportunity to communicate with their members and other State employees.
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> * * *
>
> 2. . . . A reasonable alternative should be provided where work area access is denied.
>
> * * *
>
> 5. The State mail service should not be utilized for distribution of employee organization mail unless there is no other method of distributing material.

In addition, California Employer-Employee Relations Guidelines provide that until SEERA becomes effective, the George Brown Act governs employer-employee relations for State employees. The guidelines acknowledge the rights of employees set forth in the Brown Act, supra, footnote 22, and further provide that employee organizations shall have reasonable rights of access or where denied reasonable access alternatives

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[24]See State Personnel Board Rule 544(f).

shall be provided. In this regard, the guidelines provide that solicitation for membership can take place in the immediate work area on nonworking time or where work area access is denied for safety, security or potential disruption of work or other legitimate reasons, some alternate location on State premises shall be provided. The guidelines, like Caltrans policies, deny employee organizations the right to obtain State employees' home address and phone numbers.

2. The August 1, 1978 Memorandum

On August 1, 1978, Caltrans issued a memorandum to its supervisory staff with blind carbon copies to various unions representing Caltrans employees, including STAA.[25]

The memo of August 1, 1978 states:

> MEMORANDUM Date: August 1, 1978
>
> To: District Directors of Transportation
> Division Chiefs
> Assistant Directors
> Deputy Directors
>
> From: Department of Transportation
> Division of Administrative Services
>
> Personal Mail
>
> It has been Caltrans policy to not permit the distribution of personal mail to

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[25]The copy of the memo attached to respondent's September 6 answer shows blind carbon copies to "Goldstein - OLER, SETC, OSEA, Local 411, PECT, CLEATE, CASE, STA, SARFA, PESA, Cal. Assoc. of Education, CAP, District and Division Employee Relations Officers." The parties stipulated to the document as evidence of those who were sent copies of the memo.

individual employees through the State and Caltrans mail systems.

It has recently come to our attention that an employee organization has attempted to distribute, in volume, employee organization literature to Caltrans employees by utilizing the U.S. Postal service mails and Caltrans mailing address with the expectation that Caltrans would distribute the mail to designated individual employees.

In the past, when we have been aware of such volume personal mailings, we have returned the mail to the sender as undeliverable. It will be our practice to continue doing this in the future.

The purpose of our policy, which applies equally to private individuals, businesses and employee organizations who have not received an official State business sanction, is to minimize unnecessary expense to the State in terms of distribution costs.

We are not censors and are not expected to review each piece of mail that is received. However, when it is obvious that we are receiving mail which is not related to State business, then we are obligated to return it to the post office.

Please remind your organization mail receipt and distribution unit and your managers of the need to be aware of this policy. If you have questions about individual cases, please contact Len Allenbaugh (482-3305) in Headquarters Business Management.

/s/ G. V. Hood

G. V. Hood, Chief
Division of Administrative Services

E. Following the Issuance of the August 1, 1978 Memorandum, Caltrans Returns Approximately 100 SETC Solicitations to the Union and STAA Ceases Further Solicitation by Mail.

Following the promulgation of the August 1, 1978 memorandum, the San Francisco District Office of Caltrans returned approximately 100 mailings bundled together to SETC indicating that they were nondeliverable. The union immediately complained to the Governor's Office of Employee Relations and sought a clarification of the State's policy on receipt of union solicitation through the mails and subsequent delivery to employees at their business address.

Discussions ensued between SETC and also officials of STAA concerning the State's policy on delivery of union solicitations received through the United States Postal Service. The unions were told by the Governor's Office of Employee Relations that the State had no obligation to distribute nonbusiness mail, including union organization mail, and indeed had the right to return it. The State was prepared to reach alternatives for the delivery of mail and explored the possibilities with the associations. The outcome of the meetings was that the SETC mailing was returned to Negri for distribution and Negri saw to it that the 100 letters were distributed to Caltrans employees in San Francisco.

Based upon the issuance of the August 1 memorandum and the discussions which followed, STAA did not make any further

attempts to reach State attorneys by mailing organizational material to them at their business address. The upshot of the meeting was, as testified by State employee, John Sullivan, representative of STAA, "My understanding was that it [the Governor's policy] would be consistent with the Caltrans memo of August 1 which would prevent the use of State mails." (Tr. p. 817, lines 17 and 18)

From August 1 forward, no further mailings were made by STAA although STAA was prepared to issue another newsletter sometime in August 1978. The cost of preparing a prototype for this aborted mailing was $300.

F. GOER Issues Memorandum on September 5, 1978 to Clarify Employer-Employee Relations Guidelines Regarding use of the State Mail System.

On September 5, 1978, the Governor's Office issued a memorandum which attempted to clarify the Employer-Employee Relations Guidelines of April 1978. The record shows that this memorandum resulted from the events which led up to the issuance of the August 1, 1978 memorandum of Caltrans and the subsequent rejection of certain mailings by SETC as well as meetings with representatives of SETC and STAA. The memorandum stated as follows:

MEMORANDUM

To: All Employee Relations Officers

Date: September 5, 1978

Subject: Employee Organization Use of State Mail Service

From: Governor's Office
Office of Employee Relations
/s/ Allen Paul Goldstein
Allen Paul Goldstein, Deputy Director

The following policy is intended to clarify the guideline concerning the use of the State mail service by employee organizations found on page 3 of the Employer-Employee Relations Guidelines (April 1978):

> "The State mail service should not be utilized for the distribution of employee organization mail unless there is no other method of distributing material."

"State mail service" refers to the internal distribution and handling of mail by employees of state agencies and departments. This includes the handling of mail which enters the system via the Federal Postal Service.

MASS OR VOLUME MAILINGS

Departments are encouraged to establish reasonable procedures for the distribution of mass or volume mailings or other distributions which arrive at a work site via either first class or bulk rate U.S. mail. Such procedures may differ from the department's policy concerning distribution of individual items of personal mail.

If a department determines that the sorting, distribution or handling of volume mailings, not related to state business, would create an added expense or impact on the efficiency of its internal mail delivery, such mail

should be placed in a central location at the work site for pick up by employees or their representatives during non-work time.

Volume or mass mailings from employee organizations may be placed in a container marked "Employee Organization Mail". The container should be placed in a location which would assure employee access. A representative of the employee organization may also pick up the mailing and take responsibility for its delivery to the individual addressee during non-work time. (Non-work time means lunch periods, regularly scheduled rest periods and time before and after work.)

The employee organization may also use such pick up containers for material delivered through sources other than U.S. mail. Departments should consult with the employee organization about location of mail containers and related matters. Alternate procedures that reflect the problems of particular departments or work locations and/or agreements on volume or frequency of such distributions may be feasible. However, such procedures and/or arrangements must be reasonable, equally applied to all employee organizations and be of no additional cost to the State.

PERSONAL MAIL

Departments are under no obligation to deliver any "personal mail" to individual employees. "Personal mail" is mail which is not related to the conduct of State business (e.g., employee organization material, personal letters, business solicitations, or billings). Federal Postal Regulations (Postal Service Manual Part 154.41) provide that delivery of personal mail addressed to a business, public agency, etc., is complete when the mail is accepted at the work address. There is no requirement to insure further delivery of such mail to the individual to whom the mail is addressed.

> If there are any questions concerning this policy, please call the Office of Employee Relations at (916) 445-1574 or ATSS 485-1574.

The purported author of the memorandum, Alan Paul Goldstein, Deputy Director of GOER, testified as to the purpose and policies which underlay the memorandum of September 5, 1978. That testimony shows that while the State seemed concerned about the increased volume mailing that would be attendant to SEERA organizational activity, state officials were concerned as well about equal treatment and advantages that certain employee organizations might have by specific rights to utilize or initiate communications through the State mail system itself.

Goldstein testified as follows:

> WITNESS: Well, I think probably the best characterization of that is in the paragraph which says departments are encouraged to establish reasonable procedures for the distribution of mass or volume mailings or other distribution which are at their work site, via first class or bulk rate U.S. mail. The intent was in establishing those procedures to be conscious of additional cost to the State, the delivery of mail which is nonbusiness related, and/or impact on the efficiency of the mail deliveries. And the sole purpose here, the major thrust of this policy relates to the cost of delivery of mail, be if it's from an employee organization, be it from an advertiser, be it from anybody else. We went further in this policy in attempting to be equitable to the employee organizations and consider the special circumstances of an organizing time period where employee organizations were attempting to increase their communication and made a provision in this that where there was a cost in delivery that an alternative method be established, which is not to send the mail back but to provide for access to the mail that's delivered at the work site. We're under no obligation

to do that. In fact, we could send mail back if we wanted to. The consideration was basically a cost consideration.

Q. (By Ms. Stuart) How does the discretion granted to the various departments relate to what you just stated?

A. Okay. The discretion to the departments, the departments, we felt, could best ascertain whether or not there's a cost at their particular operational setting. The departments in State service, the physical set-up of those departments in the field are different. The Department of Health, a hospital configuration, is different from a maintenance station configuration. And so we have to rely on our operation people to make a determination as to whether or not an increased volume of mail or a special delivery of mail would impact their regular service, cause an additional cost to that department. And the only people we can rely on are the people at the operational site to make those kinds of determinations. That's what this policy says to the departments, whether it, regarding employee organization mail or any other mail. If a mail delivery is made from point A to point B and the addition of a letter to that carrier or that clerk or whoever is delivering that mail, provides no additional cost, it doesn't impact a delivery, we're not telling the department that they have to do anything about that. Where a department says to deliver 500 letters to a special location in a hospital ground would impact their delivery or cause a cost, we're saying then you don't have to deliver that. What you do with that mail is you put it in a place where it's accessable to either the employee or a representative of an employee organization if that's the persons, or the body that's mailing it, an attempt to accommodate, make a special effort to accommodate employee organizations because of the type of environment that we were in.

Q. Were the guidelines which are Respondent's Exhibit B, and the September 5 memo which is Joint Exhibit 1 developed in relation to the State Employer-Employee Relations Act which became effective on July 1, 1978?

A. Yes, they are.

Q. What is their relationship to that law?

A. Well, I think the principle relationship is the one that I've already mentioned, that's the spirit of the law in terms of allowing employees and employee organizations the opportunity to represent employees and to communicate with employees. We feel that this policy in the guidelines, the entire guideline was set up, be it the issue on mail or access or any of the other provisions of the guidelines, with that spirit in mind, an attempt not to impede the ability of an employee organization to communicate with its members but to balance that ability with the need for the State to continue to operate in an efficient manner and a cost that's appropriate, in terms of not spending the State funds to organize for the employee organizations but to go as far as we possibly could to not impede the employee organization's ability. And based on commentary from other employee organizations and we seem to be moved, have moved in that direction. (Transcript p. 887, line 8, through p. 889, line 18.)

On September 27, 1978, the memorandum dated September 5 was sent to employee organizations that had registered with the Governor's Office. The evidence establishes that STAA also received a copy of the memorandum. Thereafter, in October 1979, the unfair practice charges in this case were amended to add allegations concerning this new memorandum. To date the August 1 memorandum remains in effect, it has never been rescinded. The only alternatives which appeared to be available other than mailing to employees at their State address would be to establish a bin system.

G. Practices Concerning Delivery of Personal Mail Before and After August 1, 1978 and September 5, 1978.

In Caltrans, it is apparent that employees have always and still receive personal mail of all kinds on an individual basis. The record is replete with evidence showing that all types of personal mail, including solicitations by an employee benefit organization within Caltrans has been and still is received by the employees at their business address and at their work stations. Some of this mail may indeed be initiated through the State mail system itself. Other mailings come from the United States Postal Service and are distributed through the State mail system. The practices have not changed at Caltrans and at headquarters all employees are receiving personal mail at their business address. Throughout the State, the evidence would show similarly that except for the Department of Developmental Services, employees variously receive personal mail at their business address. With regard to volume of bulk mailings which are identifiable, such personal mail may on occasion be returned to the sender. However, there is only evidence of one instance of where a volume mailing was returned and that was a sales solicitation for the Encyclopedia Brittanica.

III. ISSUES

1. Whether the promulgation and issuance of a written policy on August 1, 1978 which directed departments of Caltrans to return all personal mail addressed to employees at their

business address violated section 3519(a), (b) or (d) of the State Employer Employee Relations Act or other applicable law.

2. Whether the promulgation and issuance of a written policy on September 5, 1978 by GOER suggesting that State agencies covered by SEERA should in their discretion establish a central container system for personal and employee organizational mail addressed to State employees at their business address violated Section 3519(a), (b) or (d) of the State Employer-Employee Relations Act or other applicable law.[26]

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[26]In its responsive brief filed simultaneously with GOER, STAA argues, for the first time, that there has been a violation of section 3519(c). This argument is disregarded since the charge has never been amended to include any allegation of misconduct under this section of SEERA and to permit argument on this issue would violate California Administrative Code sections 32615 and 32655 would deprive GOER of due process.

IV. CONCLUSIONS OF LAW

A. The Limitations on the Use of the State Mail Distribution System Embodied in the Memoranda of August 1, 1978 and September 5, 1978, Violate Employee's Rights Set Forth in Section 3515 of SEERA.

1. The Positions of the Parties

As found above, the Caltrans memorandum of August 1, 1978 and the GOER memorandum of September 5, 1978 both restrict the distribution of employee organizational mail sent via United States postal service to State employees at their business address. Charging party contends that the restrictions on access to State employees by mail unlawfully limits employee rights protected by SEERA as well as rights protected by state and federal statutes and constitutions. GOER on behalf of itself and Caltrans contends that the restrictions on use of the State mail system are permissible limitations which the State may impose in order to carry out its governmental function and are consistent with past policies and practices.

2. The Rights of State Employees under SEERA

Section 3519 provides in relevant part:

> It shall be unlawful for the state to:
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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.[27]

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[27]Section 3543.5(a) of EERA and section 3571 of HEERA are identical in language to this section of SEERA.

Employee rights guaranteed by SEERA are:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (h) of Section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.[28] (Gov. Code section 3515; emphasis supplied.)

While there is little State precedent on the issue of unfair practices under SEERA, PERB has had occasion recently to interpret the parallel sections of the EERA relating to

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[28]Similarly EERA provides in relevant part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer . . . . (Gov. Code section 3543.)

See also Government Code section 3565 for the rights of higher education employees.

employee rights in the context of a no-solicitation rule that barred use of the school mail system. (See Richmond Federation of Teachers v. Richmond Unified School District and Simi Educators Association CTA/NEA v. Simi Valley Unified School District (8/1/79) PERB Decision No. 99.) In Richmond and Simi, PERB found unfair practices had been committed when two school districts denied the use of the school mail system to employees and employee organizations. Although the Richmond-Simi decision devoted substantial portions of its analysis to the question of whether the employer's conduct violated employee organization rights, at the end of its decision, PERB confronted the question of whether denial of access to a school's mail system was a denial of protected employee rights. (Id. at pp. 29-31.)

PERB found that "[a] different question is raised by the organizational claims that the districts interfered with, restrained or coerced employees in the exercise of their rights guaranteed by the EERA . . . ." (Id. at p. 29.) PERB held that the rights of employees protected by the EERA were the rights 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. The Board went on to find that denial of access to the employer's internal mail system causes some harm to employee rights under EERA. Having made such a finding, PERB held that

absent the respondent's showing its conduct was a result of operational necessity or circumstances beyond its control, the conduct constituted interference, restraint or coercion in violation of section 3543.5(a) of the EERA. (See Carlsbad Unified School District (1/30/79 PERB Decision No. 89, at pp. 10-11; Richmond, supra, at p. 29-30.)

3. Supporting Federal and State Precedent

PERB's holding in Richmond-Simi that a denial of access to employees violates certain rights under the State EERA is consistent with and supported by longstanding precedent under the NLRA.[29] The provisions of the National Labor Relations Act give employees similar rights and protections to those provided by EERA and SEERA. Thus, section 7 of the NLRA provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities . . . .

Section 8(a) of the National Labor Relations Act provides in relevant part that:

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[29]PERB may use federal labor law precedent where applicable to the public sector labor law issues. (Sweetwater Union High School District (5/22/78) EERB Decision No. 4 (PERB was previously known as the Educational Employment Relations Board, or EERB). Also, see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 611.)

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

The NLRB and the Supreme Court recognized early on that employee organization access to employees was necessary in order to secure to employees their section 7 rights to self-organization and to freely choose whether to join or not to join an employee organization. However, the Court and the NLRB have long attempted to work out an accord between the undisputed right of employees to self-organization and the rights of employers to maintain discipline in their establishments. (Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].) Thus, the NLRB and the courts seek to balance the interests of the employees in self-organization against the interests of the employer in managing a sound business operation. It is important to note that the balance struck is between management rights of an employer and employee organizational rights protected by the NLRA. (Cf. Peyton Packing Company (1943) 49 NLRB 828 [12 LRRM 183], enf'd (5th Cir.) 142 F.2d 1009 [14 LRRM 792].)

In striking this balance, the NLRB relies upon a series of presumptions which cause the shifting of the burden of proof, depending upon the nature of the facts of the particular case. In general, however, the board has held, and courts have enforced, a presumption that no-solicitation rules which prohibit solicitation of employees while they are working, is presumptively valid. To overcome the validity of the rule, it is incumbent upon the charging party to prove that the rule is excessive and that there are no alternative means to reach their fellow employees. Conversely the NLRB has presumed that restraints upon employees' solicitation of their fellow employees, when not working, are presumptively invalid. There, the burden of proof would shift to the respondent to show that managerial interests and operational necessity justified the enforcement of that rule. (Essex International, Inc. (1974) 211 NLRB 749 [86 LRRM 1411]. See also Groendyke Transport, Inc. (1974) 211 NLRB 921 [86 LRRM 1636], enf'd (10th Cir.) 530 F.2d 139 [91 LRRM 2405]; Walton Manufacturing Co. (1960) 126 NLRB 697 [45 LRRM 1370], enf'd (5th Cir.) 289 F.2d 177 [47 LRRM 2794].)

Some NLRB decisions also indicate that employees' organizing activities may be restricted not only to non-work time but to non-work areas when the activity involves distribution of campaign literature. In such cases there is a likelihood that the materials being distributed in the course

of the solicitation would lead to a littering hazard in a factory setting. (Stoddard-Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110]; see also Bankers Club, Inc. (1975) 218 NLRB 22 [89 LRRM 1812]; Seng Company (1974) 210 NLRB 936 [86 LRRM 1372].) However, the considerations are not the same in an office setting.

Despite these better known presumptions, the board and the courts have acknowledged that "formulation of generalized rules . . . must be undertaken with caution for, patently, differing fact situations call for differing accommodations." (NLRB v. Steelworkers of America, CIO (Nutone Inc.) (1958) 357 U.S. 357, 364; Stoddard-Quirk Mfg. Co., supra, 51 LRRM at 617.) Thus, traditional means of communication may not always be feasible to reach employees and the limits of reasonable regulation may depend upon the access alternatives available and the restrictions which such regulations place upon meaningful communication. (NLRB v. Magnavox Co. (1974) 415 U.S. 322, 326 [85 LRRM 2475]; Hudgens v. NLRB (1976) 424 U.S. 507 [91 LRRM 2489, 2499]; Hughes v. Superior Court (1950) 389 U.S. 460, 465 [26 LRRM 2072, 2073-2074]; Labor Board v. Babcock and Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001].)

The above analysis of case law indicates that regulation of employee access will be presumed unreasonable unless there is a likelihood that it will cause a substantial disruption to or interference with the employer's operations. Further, analysis

of the methods of communication is required to determine whether they adequately are designed to reach the employees of the employer. (Richmond Unified School District, PERB Decision No. 99 at p. 19; See and compare, ALRB v. Superior Court (1976) 16 Cal.3d 292, 406-408, 414.)

4. The August 1 Memorandum

The facts of the present case demonstrate unique circumstances which require examination and modification of rules of access traditionally presumed appropriate. As found above, organizing of State employees takes place statewide. In the case of the unit which STAA seeks to represent, 1650 State attorneys have been combined with State hearing officers to comprise an appropriate unit of almost 2,000 persons. These employees, as is the case with other State employees, work at State facilities in perhaps hundreds of locations within the borders of California.

STAA is an organization with membership in only four California cities: Sacramento, Los Angeles, San Francisco and San Diego. An on-site visit to other attorneys to enlist their support is difficult since State employees are so widely scattered. The only effective way to reach employees sought to be organized is by resort to a secondary means of communication, the United States mail. It has been found above that obtaining home addresses is not permitted by the State. For unions to attempt to independently locate State employees'

home addresses would be almost impossible in view of the evidence which shows that even locating business addresses of State employees is a time-consuming, inaccurate and overly burdensome task. Absent direct oral solicitation, the only viable alternative means of reaching State employees is by mail to their business address. (See Belcher Towing Co. (1978) 238 NLRB No. 63 [99 LRRM 1566, 1567] and cases cited therein; and compare ALRB v. Superior Court, supra, 16 Cal.3d at p. 408.)

While posting on a bulletin board might well reach some employees, there is no assurance that this is a reasonable alternate means of communication which will ensure employees' review of the voluminous materials which charging party mailed to each of the persons whom it sought to organize. (See NLRB v. Magnavox Co. supra 415 U.S. at 326.) The employees have a right to know who is soliciting their membership and they have a right to determine, based upon all of the facts, whether one organization can better suit their needs than another. The only way employees could hope to have all the information available would be to receive it in a direct fashion that would permit considered evaluation. No organization except one with representatives in every governmental facility could reach employees in order to solicit them on a one to one basis. Therefore, the only reasonable means of access to State

employees, so geographically widespread would be through the United States mails.

Caltrans and GOER argue that use of the State mail distribution system will result in an increased cost in terms of manpower and efficiency. While on its face, this argument has some appeal, there is no evidence in the record to substantiate these anticipated fears. It is clear that the mere anticipation of disruption to the State's operation is not sufficient justification to permit denial of the only viable means of access to State employees available to their fellow employees or employee organizations. (Richmond-Simi; supra, PERB Decision No. 99, at pp. 19-20; NLRB v. Magnavox Co.; supra, 415 U.S. at 326; Tinker v. Desmoines Independent School District (1969) 393 U.S. 503, 508 [21 L.Ed.2d 731].) In any case, the record in this matter reveals that it would cost the State more to sort out employee organizational mail than it would to distribute it to the employees.[30]

The policies of Caltrans later adopted by the GOER are based on the theory that if employee organizational activity causes the State to incur any cost, it may be prohibited. This is simply not the law.

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[30]Reserved to the section IV. A. 5., infra, is the discussion of whether placing organization mail in the bins would in any way be a reduction in cost to the State justifying such a prohibition as found in the September 5 memorandum.

Although it could be argued that use of the United States mails improperly requires the State to actively participate in or assist by distributing union mail to employees through the State internal mail system, this, in and of itself, would not constitute an improper burden upon the State. The Act is replete with obligations upon the State once an exclusive representative has been put in place. Furthermore, it is clear that there is no guarantee that when an employee relations law is established that the employer's duties remain the same or lessen. Indeed, laws recognize that employers' duties will increase in the face of a statutory obligation to treat with its employees and their representatives. (Richmond-Simi, supra, PERB Decision No. 99, at pp. 11 and 12.)

The State argues that if employee organizational mail is distributed to employees at their business address, it may result in their reading the mail during worktime. This concern can be obviated by a rule which would prohibit employees from reading union literature during work time. (See Pittsburg Unified School District (2/10/78) PERB Decision No. 47.) Such a prohibition would be consistent with the needs of the union to communicate with employees and yet the employer's concern that employees do their work as required.

Respondent argues that the rule embodied in the memorandum of August 1, 1978 is based upon pre-existing Caltrans' policies set forth in its employee relations manuals. Contrary to

respondent's suggestion, the memorandum was not based upon any existing policy at all. Indeed, it was devised out of whole cloth and then the policy was rationalized to support it. While the record indicates that the Caltrans Policy and Procedures Manual was referred to by the drafters of this memorandum, it is clear that they could not have found any support in those past policies. The policies of Caltrans formulated pursuant to the George Brown Act, by their terms provide for reasonable access to employees. (See 45 Ops.Cal.Atty.Gen. 136, 139 (1965).) While there is some mention that employee organizations may not use the Caltrans mail system for their publications, it is unclear that this would prohibit the distribution of employee organizational mail which had been properly postmarked and sent to employees first through the United States Post Office and then to their mailing address. At that point, Caltrans merely has the obligation to deliver the United States mail to the employees in question. The policy set forth in the manual more likely refers to the distribution of employee organization material initiated through the internal mail system of the department. The SETC official who testified in this case and whose organizational materials were returned to him, stated that, when employed by Caltrans he drafted the rule and that indeed that was precisely the intent.

Finally the State argues that this is an action brought by a labor organization and not by employees and therefore is not a violation of section 3519(a). It is clear that John Sullivan is both an employee of the State and representative of STAA. He testified throughout the record of his interest, as an employee as well as a union representative, in communicating with fellow employees. Further, STAA was, until it began its recruitment in May 1978, wholly comprised of Caltrans employees. Denial of employee rights is clearly an issue in this case. (See also, ALRB v. Superior Court, supra, 16 Cal.3d at 406, and cases previously cited which hold that denial of access to employees directly affects their right to self-organization.)

It is thus found that the memorandum of August 1, 1978 deprives State employees of their right to receive adequate information and be informed so that they can freely choose whether to join an employee organization. Further, the Caltrans memo deprives employees of the right to solicit fellow employees in order to convince them of the appropriateness of their respective positions concerning representation.

5. The Memorandum of September 5, 1978

The memorandum of the Governor's Office of Employee Relations issued on September 5, 1978 and disseminated to all employee organizations on or about Septmber 27, 1978, fares no better. Based upon the law discussed above, an analysis of the

memorandum of September 5, 1978 indicates that it, too, deprives employees of rights under SEERA. The September 5 memorandum instructs departments that, in their discretion, they may either distribute the mail or find alternatives to such distribution as exemplified by a central container system. The drafter of GOER's memorandum testified that each department would have to assess its individual needs and determine whether to distribute mail or to find an alternative means of containing and storing the mail to permit employees to pick the mail up.

The defects in this procedure are obvious. First, the memorandum is ambiguous on its face. It is not clear what mail will be distributed. While the policy is designed to permit each department to determine whether to distribute organizational mail according to its specific needs, this broad and varied departmental discretion lies at the heart of the memo's ambiguity. The memo is vague in that it contains no assurances that employees will be notified that mail is being held for them, that they will be free to pick up the mail, or that it will be stored in places where it can be picked up free from coercion by other employees or tampering by unknown persons with access to a public centralized container.

The ultimate result of the September 5 memo is to deter employees from communicating with other employees through the mails. No one is going to invest any large sums in a mail

campaign when the ultimate result may be that the mail will lie around in a storage place for long periods of time before the employees have a chance to read it. In an organizing campaign, timing is crucial. Further, the record shows that the costs of these mailings would be prohibitive if there was no certainty that the mailings would be delivered. Thus, while not requiring return of mail, the September 5 memorandum does in fact deter mail communication by the uncertainty created. The GOER policy has a chilling effect on any future attempts by employees to communicate with their fellow employees in this manner.

The State argues that the memorandum of September 5 is merely a reasonable accommodation of the interests of the State in not having its mail systems cluttered and the interests of employees in receiving organizational mail. As with Caltrans, the State argues that monetary costs and costs of disruption justify the policy.

Again, as with the August 1 memorandum, there is no evidence whatsoever on the record that the State has any realistic concern about costs of distribution of organizational mail. Rather, the State is merely basing the issuance of this memorandum on unfounded fears that distribution would be more costly. Indeed, the evidence shows that nondistribution of organizational mail costs the State much more. Every mailroom would have to sort the organizational mail so that it could be

placed in some other location for employee pickup. The proposed alternative to direct distribution would impose additional sorting procedures on State mailrooms. A separate location would have to be found and presumably policed or otherwise attended. Somehow, the existence of the mail would have to be communicated to the employees. All in all, the separation of personal mail and establishment of a container system could only result in greater cost to the State, more confusion to the employees and loss of the free access to information that would allow them to make a free choice in a bargaining representative.

The State argues that the September 5 memorandum was based upon preexisting policies. The guidelines adopted by the GOER were protested by STAA when they were issued in the spring of 1978. These guidelines, based upon the George Brown Act, generally provide that employees and their organizations will have the right of access to other employees. (See 45 Ops.Cal.Atty.Gen., supra.) It is doubtful that the SEERA changed that law. However, in any case, a fair reading of the guidelines indicates that they provide for full communication among State employees and their representatives and permit access even in work areas during non-work time.

The denial of a right to use the state mail system in the face of policies that provide substantial access to employees in their work area is inconsistent with the spirit of the

guidelines and the underlying statutes upon which they were based. Further denial of access to the mail system while permitting direct access to employees can result in discrimination between large and small employee organizations which are relegated to one means of access or another by virtue of their size.[31]

Lastly, the State argues that the September 5 memorandum supersedes the August 1, 1978 memorandum. Having found that the September 5 memorandum violates employee rights of access by chilling the communication by employees with their fellow employees, it is unnecessary to decide whether it did in fact supersede the August 1 memorandum. However, a fair reading of both indicates that they are probably still in effect.

The September 5, 1978, memorandum is vague, uncertain and ambiguous and chills free communication between employees of the State. For this reason its continued existence as a state policy relating to SEERA constitutes a violation of employee rights protected under section 3515 of SEERA. (See Richmond-Simi, supra, PERB Decision No. 99 at pp. 20-28.)

B. The Policies of Caltrans and the State of California Embodied in the Memoranda of August 1, 1978 and September 5, 1978 are Improper Regulation of Employee Organization Access Rights.

1. The Positions of the Parties

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[31]See discussion in Part IV C, infra.

Charging party argues that the memoranda issued by Caltrans and GOER violate its right of access to employees. Charging party contends that this is not only an employee right but an organizational right and also brings this action on behalf of STAA. Charging party contends that STAA, as an entity, has sustained injuries, and charging party claims damages for monetary loss incurred by STAA in its organizing efforts under SEERA.

The Respondent, GOER, takes the position that its conduct in regulating use of internal mail systems was reasonable and within the permissible bounds of state and federal law. GOER further argues that in this case there are no rights of access given to employee organizations similar to those rights found under EERA or HEERA.

2. The Access Rights of Employee Organizations under SEERA

In the statutory language of SEERA, there are no express employee organizational rights of reasonable access. While EERA and HEERA provide that employee organizations shall have reasonable rights of access to employees and the right to use bulletin boards, mail boxes and "other means of communication," SEERA is silent on these specific rights. (Compare Gov. Code secs. 3515.5 and 3515.6 with sec. 3543.1 (a) - (d)). SEERA expressly grants employee organizations a right to represent their members in employee relations with

the State. Further, SEERA gives these organizations the right to exclusive representation if selected as representative of an appropriate unit as well as the right to restrict membership and have membership dues deducted.[32]

SEERA, like its State law counterparts, EERA and HEERA, provides that it is unlawful to "deny employee organizations rights guaranteed to them by this chapter" (Gov. Code

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[32]SEERA sections 3515.5 and 3515.6 state:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state. (Gov. Code sec. 3515.5).
>
> All employee organizations shall have the right to have membership dues, initiation fees, insurance premiums, and general assessments deducted pursuant to Sections 1156, 1156.1, and 1156.2 until such time as an employee organization is recognized as the exclusive representative for employees in an appropriate unit, and then such deductions as to any employee in the negotiating unit shall not be permissible except to the exclusive representative. (Gov. Code sec. 3515.6)

sec. 3519(b)). Section 3519(d) provides that it is unlawful to interfere with the formation or administration of any employee organization. By making it unlawful to interfere with the formation or administration of an employee organization, the correlative of this wrong must indeed be the right to form or administer an employee organization. Inherent within the right to form an employee organization must therefore be the right to communicate with employees.

The NLRA has no provisions similar to section 3519(b) which makes it a violation of the Act to interfere with employee organization rights. Nor does the NLRA provide an express grant of any rights to employee organizations including the right of access found in EERA section 3543.1(b). Yet, the NLRB and courts have found rights of access for employee organizations implicit in the provisions of the NLRA. Under federal law, employee organizations' rights of access derive, in part, from the right of employees to form, join, and/or refrain from forming or joining a labor organization. It would make no sense to permit employees the right of enlightened free choice in choosing a labor organization and deny labor organizations the right of access so that employees can freely choose. Therefore, under the NLRA, employee organizations derive a right of access to employees in order to inform them of a labor organization's position in an organizing campaign.

Nor can the absence of an express right of access in SEERA lead to the conclusion that the Legislature intended to deny employee organizations any access rights. It must be assumed, and will be discussed below, that the Legislature was aware of the body of federal common law which gave employee organizations access rights to employees under the federal statute and, in addition, the Legislature must have been aware of the constitutional constraints upon limitations of free speech to employee organizations when they drafted SEERA. (See Tinker v. Des Moines, supra, 393 U.S. at 514; Pickering v. Board of Education (1968) 391 U.S. 563, 568 ; Los Angeles Teachers Union v. Los Angeles City Board of Education (1969) 71 Cal.2d 551, 559; and compare ALRB v. Superior Court, supra, 16 Cal.3d at 409, 412-413, 416-418.)

Therefore, it is concluded that the Legislature intended that employee organizations would have no fewer rights under SEERA than they would under basic common law principles and under the State and federal constitutions.[33] (Ibid. and ALRB v. Superior Court, supra, 16 Cal.3d at 418.)

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[33]It is not necessary to find a constitutional basis for employee organization rights here since there is a statutory right derived from common law principles. (Delaware Teachers Federation v. Board of Education (D. Del. 1971) 335 F.Supp. 385 [78 LRRM 2764]; Local 858 American Federation of Teachers v. School District No. 1, Denver, Colorado (D. Colo 1970) 314 F.Supp. 1069 [74 LRRM 2385].)

3. The Decision of PERB in Richmond-Simi

Consistent with the above analysis is the PERB decision in Richmond-Simi. There PERB found that the employee organizations had rights under 3543.1(b) to use the internal mail system of a school district since that right was provided in the statute by the clause "other means of communication." In Richmond it was contended that, inter alia, if the Legislature had meant other means of communication to cover the school mail systems, it would have specifically spelled out a right of access to that system. Further, it was argued that requiring an employer to open up its mail system would require the employer to actively participate in employee organizational activities. PERB reviewed the numerous arguments and the existing law. It concluded that the Legislature in providing a section of the EERA devoted to the right of access to employee organizations did not exhaust all the alternative ways in which an employee organization could have access. Rather, PERB found that the Legislature set down general guidelines and left it to the administrative agency to determine the extent to which employee organization access would be permitted. PERB concluded that employee organizations should have rights to means of access which will not be disruptive of the employer's activities. The specific rights of access need not be expressly spelled out in the

statute. (ALRB v. Superior Court, supra, 16 Cal.3d at 410-416, 417-419.)

PERB further found that public employers could reasonably regulate access so long as the regulation was clear, unambiguous, nondiscriminatory and subject to available alternative means of access. (See Richmond-Simi, supra, PERB Decision No. 99 at pp. 13-28 and Babcock and Wilcox Co., supra, 351 U.S. 105 [38 LRRM 2001].)

4. The State Unreasonably Attempts to Regulate Access to Employees Through the Mail System by the August 1, 1978 and September 5, 1978 Policy Memoranda.

Analyzing the facts of the instant case, it is found that there is no reasonable alternative to use of the State mail systems. Because employees are dispersed throughout the State and because organizations of varying size will seek to reach units of varying size in an attempt to organize those State employees in a statewide unit, there is no feasible way that face-to-face communication or hand billing in and around the employer's premises can be effected by many of the labor organizations seeking to organize under SEERA. Thus, the only reasonable means of communication with those employees is through the mails.

Both the August 1, 1978 and September 5, 1978 memoranda were premised upon the theory that the employee organizations have absolutely no right to use the internal mail systems of the State. PERB has held that reasonable regulation is not

equivalent to prohibition en toto. (Richmond-Simi, supra, PERB Decision No. 99 at p. 26.)

The August 1 attempt to regulate employee organization access is an absolute prohibition. It directs departments within Caltrans to return "personal mail and employee organizational mail in volume." It is clear that the August 1 regulation would have an impact only on employee organizational mail because that was the only volume mailing to which the focus of attention had turned in the summer of 1978. The mandate that the mail should not be distributed to employees but returned to the sender would serve to deter attempts by employee organizations to communicate by the expensive process of use of the United States mails and further would deprive employees of their rights to know what organizations were soliciting their membership and what those organizations had to offer them. Thus, the absolute prohibitions of the August 1, 1978 memorandum cannot in any way be construed to reasonable regulation of a right to communicate with employees.

The September 5 memorandum is equally restrictive. That memorandum was also issued in the face of a large employee organizational campaign and organizational mail was the only volume mailing which could be identified by the parties as one to which the focus of the attention of the mailroom would be directed. In addition, the September 5 memorandum is vague

and confusing in its terms. (See Richmond-Simi, supra, PERB Decision No. 99, at pp. 20-26.) The vagueness and uncertainty of the regulation points up its inherent defects. There is no way that employee organizations could determine by what standards departments would attempt to create a bin system and which departments would distribute the mail to the employees. The determination of how, when, and why a bin system should be established were left to the sole discretion of the numerous departments throughout the State of California. Thus, employee organizations seeking to organize on a statewide basis would have an insurmountable task of determining the discretion of each administrator in the departments employing employees sought to be regulated. (Ibid.)

Lastly, the State's attempt to regulate employee organizational access to the State mail system has been discriminatorily applied. As shown above, the only identifiable organizations upon which the impact of the memorandum of August 1 and September 5 would fall are employee organizations with large volume mailings. The focus currently is on these organizations and there indeed will be an attempt to subject them to the limitations of the memoranda if they are allowed to stand. There has been substantial testimony on the record that personal mail has always been delivered and still is being delivered to employees in the State service. The only exception to this is found by the Department of

Developmental Services which involves health care units. Even the limitations on access to employees in health care facilities are unduly restrictive in light of recent Supreme Court and federal court decisions expanding rights of access in health care institutions. (See Beth Israel Hospital v. NLRB (1978) 437 U.S. 483 [98 LRRM 2727]; NLRB v. St. Joseph Hospital (10th Cir., 1978) 587 F.2d 1060 [99 LRRM 3404, 3406].)

Thus, it is found that the memoranda of August 1, 1978 and September 5, 1978 improperly attempt to regulate rights of employee organizations to access to the State mail system. The memoranda violate rights of employee organizations to communicate with their members or prospective members in an effort to organize and represent employees under SEERA.

C. The Policies of Caltrans and the State Which Deter Employee Organizations From the Use of the Mails Fall Within the Statutory Proscriptions of Section 3519(d) of SEERA.

1. The Statutory Basis for the Right to be Free from Domination or Interference in the Formation or Administration of an Employee Organization.

Section 3519(d) makes it unlawful for the state to dominate or interfere with the formation or administration of any employee organization . . . or in any way encourage employees to join any organization in preference to another. This statutory restriction upon the State gives rise to a correlative right to employee organizations to form and administer their affairs free from State interference and to

obtain members without the State causing employees to prefer one organization over another.

Section 3515.5 of SEERA provides that employee organizations shall have the right to "represent their members in their employment relations with the state . . ." and the right to be exclusive representative of a majority of employees exercising their free choice for an appropriate unit. Section 3515.5 rights to represent members and to become an exclusive representative, coupled with the 3519(d) right of employee organizations to form and administer their organizations free from inteference and domination by the State must necessarily encompass the right to communicate with other employees in order to organize and assemble majority support in an appropriate unit.

As discussed above, the right to access is inherent in the rights of employees to form, join or refrain from forming or joining an employee organization. Similarly, the right of access must be given to employee organizations seeking to organize employees in order to form and administer their organizations under SEERA. (Cf. State of New York (Office of Employee Relations and Public Employee Federation) (1977) 10 NY PERB 3108, p. 3186.)

2. The August 1 and September 5 Memoranda Interfere with the Formation of Employee Organizations and Tend to Encourage Employees to Favor One Organization over Another.

It is found that the employee organizations have a right to communicate with State employees and the right includes reasonable access to employees. Because the units here are statewide, the only feasible way for employee organizations to reach every potential member is by use of the United States mails. Due to the unavailability of home addresses, which are confidential under State administrative policy and practice, employee organizations must use the business address to reach State employees by mail. The refusal of the State to distribute organizational mailings impacts upon the right of employee organizations to communicate with State employees and thus the right to form an organization.

Further, the restriction on distribution of mail throws the balance to larger employee organizations which have mechanisms for oral solicitation or other direct means of enlisting employee support. In this respect the State encourages employees to prefer one organization over another by virtue of the disparate access ability of a large organization over a small one which can only rely upon the mails. Conversely, the State's limitation of a restrictive rule to "bulk or volume" mailings might have a disparate impact favoring small organizing campaigns over large ones.

In either case, the result would be to encourage employees to prefer the organization whose means of access was not restricted by the Caltrans and GOER memoranda here in

question. (See Santa Monica College Part-Time Faculty Association CTA/NEA v. Santa Monica Community College District (1979) PERB Dec. No. 103 at pp. 23-23.) In both instances employee organizations would be improperly impeded in their attempts to form and administer organizations and to become the exclusive representative of their membership and of all employees in an appropriate statewide unit.

Thus, the denial of equal access to State employees via the United States Postal Service and State mail systems violates rights guaranteed by section 3519(d) of SEERA.[34]

D. The Unfair Practice Violations of SEERA

The above analysis shows that the memoranda of August 1 and September 5, 1978 have resulted in some harm to employee and employee organization rights, protected by SEERA. It is now appropriate to refer to PERB's Oceanside-Carlsbad decision which holds that an unfair practice violation will be sustained if evidence in the record establishes that an employer's conduct caused some harm to protected rights and the employer cannot justify his conduct by operational necessity or circumstances beyond his control, where no other

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[34]This analysis leaves open the extent to which the State may restrict employee organization access once an exclusive representative has been selected and during the contract bar. (See discussion at pp. 60 through 62 infra, and cases cited therein.)

alternative course of action was available. (Carlsbad Unified School District, supra, at pp. 10-11; Richmond-Simi, supra at p. 3.)

The State has shown no operational necessity which required the establishment of the policies articulated in the memoranda of August 1 and September 5. Indeed, as discussed above, the procedures by which the State sought to interrupt the distribution of mail would have proved more costly than to deliver employees' mail. The only justification for the policies was that officials of Caltrans and GOER had concerns about cost and efficiency which never were substantiated in fact. Thus, the memoranda promulgated by Caltrans on August 1, 1978 and by GOER on September 5, 1978 are found to violate employee rights pursuant to section 3519(a) of SEERA and employee organizations' rights pursuant to section 3519(b) and (d) of SEERA.

V. THE REMEDY

A. Employee Rights

Having found violation of employee and employee organizational rights, it is necessary to analyze the nature of injuries sustained in order to frame an appropriate remedy. The injury to employee rights can be remedied by ordering the State and Caltrans to cease and desist from the continued promulgation and enforcement of the rules and policies found in the memoranda of August 1, 1978 and

September 5, 1978 and any other policy or practice which prevents access of employees or employee organizations to employees at their business address during an organizational campaign. In fashioning a remedy, it is recalled that rights of access may change once an exclusive representative has been chosen. Thereafter, the ability to reach employees by alternate means may permit the State to restrict the use of its mail systems. Thus, a cease and desist order can appropriately be limited to granting access during an organizational campaign such as here, in the first instance, or during the window period prior to the expiration of a contract. (See Union Co. Regional Bd. of Education (1976) 2NJPER 50, 52, 53; State of New York and Public Employee Federation, supra, 10 NY PERB 3108.) This cease and desist order covering State and departmental policies as well as the memoranda in question is necessary since the respondent has relied on purported policies and practices to support a restriction on the right of access. The State should be ordered to cease giving effect to any policy or practice which would restrict access to employees through United States mail delivered to their business address. Such an order is in accord with Government Code section 3543.5(c) which provides that:

> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair

> practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It is also appropriate that the State should be required to post a copy of the Order. Posting will provide employees with notice that the State has acted in an unlawful manner and is being required to cease and desist from the activity. It effectuates the purposes of SEERA that employees be informed of the resolution of the controversy. A posting requirement has been upheld in a California case involving the Agricultural Labor Relations Act, Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587. Posting orders of the NLRB also have been upheld by the United States Supreme Court, NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]; Pennsylvania Greyhound Lines, Inc. v. NLRB (1938) 303 U.S. 261 [2 LRRM 600].

B. Employee Organizational Rights

1. Cease and Desist Order

Similarly, a cease and desist order will remedy, in part, the injury sustained by employee organizations who have been deterred from communication with employees by the actions of Caltrans and GOER. However, posting of notices at State facilities may not be as effective a method of reaching the various employee organizations as a direct mailing of a copy of the Order to each organization which received copies of the

memoranda of August 1 and/or September 5, 1978. This direct communication will assure the organizations, large or small, that they may freely have access to State employees by mailing materials to them at their business address and that these materials will be distributed through the State mail system upon receipt via the U.S. mails. (See Tidee Products, Inc. (1972) 194 NLRB No. 198 [79 LRRM 1175, 1178]; Hecks, Inc. (1971) 191 NLRB No. 146 [77 LRRM 1513].)

2. Cost of Postage and Reproduction of Organizational Material

In addition to the denial of the right to communicate with employees, STAA claims that it is entitled to reimbursement for the cost of three mailings between late May and early July 1978. The NLRB has allowed recovery of postage as an extraordinary remedy when an employer's unfair labor practice has interfered with organizational solicitations with a direct measurable cost to the organization. (See F. W. Woolworth Co. (1975) 216 NLRB No. 155 [88 LRRM 1516, 1517]; Paramount Plastic Fabricators, Inc. (1971) 190 NLRB 170 [77 LRRM 1089]; Creutz Plating Corporation (1968) 172 NLRB No. 1 [68 LRRM 1513].) This authority would permit the charging party to recover postage costs and other related expenses of solicitation if there were proof in the record of a nexus between mailings returned to STAA by any State department in furtherance of the policies which unlawfully denied

organizations or employees the right to use the State mail distribution system. However, there is no evidence to support an award of such damages since there is no showing that any of the three STAA mailings were unlawfully returned or in any way affected by the policies in question.

The record does establish that STAA incurred a $300 expense paid to an artist to prepare a prototype for a newsletter mailer which was never used because of the announcement of policies denying use of the State mail system to employee organizations on or after August 1, 1978. The newsletter was never used for its intended purposes and there is no apparent alternative use to which it could be put to mitigate the loss to STAA. Thus, it is appropriate to award STAA the $300 expended for preparation of a prototype organizational newsletter which could not be used because of State policies found to be unlawful.

3. Lost Dues

STAA asks $400,000 for dues it estimates would have been received if it had been able to obtain sufficient showing of interest to petition for a statewide attorney unit. Such a remedy on the facts of this case is unwarranted and, at best, speculative.

First, the evidence shows that STAA was unable to obtain a requisite 30 percent showing of interest after three unfettered solicitations by mail. The promulgation of the

policies of August 1, 1978 had no bearing on the earlier solicitations and only remote impact on any possible solicitations which might have been attempted between August 1, 1978 and August 31, 1978 when petitions for a unit had to be filed with PERB. The September 5 memorandum had no impact on any petitions for participation in the unit determination hearings. STAA participated in those hearings and was able to make any and all arguments in support of a statewide unit of attorneys.

In any case, no election has taken place to determine the exclusive representative of the unit of attorneys and hearing officers found to be appropriate. An award of anticipated dues as damages is inappropriate on this record. There is no nexus shown between the unlawful conduct and the obtaining of majority support as exclusive representative in an election which has not yet occurred.

4. Attorneys' Fees

STAA also seeks an award of attorney fees. There is no statutory authorization of attorneys' fees but courts have upheld an award of attorneys' fees when the prosecution or defense of an action is done for frivolous or malicious reasons or when the unlawful conduct constitutes a clear and flagrant violation of the law. (J. P. Stevens v. NLRB (4th

Cir., 1980) ____ F.2d ____ [103 LRRM 2221]; Tidee Products, Inc., supra, 79 LRRM at 1176-1178; Hecks (1974) 215 NLRB No. 142 [88 LRRM 1049, 1051-1052].)

There is no showing on the record that the policies of GOER and Caltrans were malicious or motivated by bad faith. Nor on this record can it be concluded that respondent had defended this action frivolously. (Ibid.) Absent such evidence, STAA is not entitled to attorneys' fees or other extraordinary relief in the form of punitive damages.

Finally, there is authority for an award of attorneys' fees in quasi-judicial proceedings under the "common fund" doctrine, where reparations are recovered on behalf of a group of interested parties which could be considered the "Public as a whole." (See Consumers Lobby Against Monopolies, et al. v. Public Utilities Commission, Pacific Telephone and Telegraph Co. and Toward Utility Rate Normalization v. Public Utilities Commission, Pacific Telephone and Telegraph Co. (1979) __ Cal.3d.)

Despite the fact there may be public benefit from a favorable adjudication of an unfair practice case, it would be an extreme extension of the above case law to find that a charging party prevailing in an unfair practice case contributes sufficiently to the public benefit to justify an award of attorneys' fees. Thus, there will be no award of attorneys' fees in this case.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is found that the State has violated Government Code section 3519(a), (b) and (d). Pursuant to Government Code section 3541.5(c), IT IS HEREBY ORDERED that the State of California and California Department of Transportation shall:

A. CEASE AND DESIST FROM:

Enforcing and maintaining terms of the memoranda of August 1, 1978 and September 5, 1978 and any policies which deny State employees or employee organizations access to employees via United States mails and their subsequent distribution through State departmental mail systems in order to solicit employees to join or not join organizations prior to certification of an exclusive representative. It is further ordered that the State shall permit use of the State mails for solicitation at such times as employee organizations may, in the future, appropriately seek to challenge the position of any organization hereafter certified as exclusive representative.

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

1. Pay STAA $300 for the cost of preparing a prototype mailer which could not be used because of the unlawful conduct here in question;

2. Within 15 days after this decision and order becomes final prepare and post copies of the Posting Notice attached as an appendix hereto at each of the State departments for twenty (20) working days, in conspicuous places including all locations where notices to employees are customarily placed. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material.

3. Prepare and mail copies of the Posting Notice to each employee organization registered with GOER as an "employee organization" within the meaning of section 3513(a) of SEERA.

4. At the end of the posting period, notify the Sacramento Regional Director in writing of the action it has taken to comply with this Order.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 13, 1980 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 March 13, 1980 in order to be timely filed. (See California Administrative Code, title 8,

part III, section 32135.) Any statement of exceptions and supporting brief must be served 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: February 22, 1980

Stephen H. Naiman
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 Unfair Practice Case No. S-CE-2-S, State Trial Attorneys Association v. State of California, California Department of Transportation, in which all parties had the right to participate, it has been found that the State of California and the California Department of Transportation violated the State Employer Employee Relations Act (Government Code section 3519(a), (b) and (d)).

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

A. CEASE AND DESIST FROM enforcing and maintaining terms of the memoranda of August 1, 1978 and September 5, 1978 and any policies which deny State employees or employee organizations access to employees via United States mails and their subsequent distribution through State, departmental mail systems in order to solicit employees to join or not join organizations prior to certification of an exclusive representative. It is further ordered that the State shall permit use of the State mails for solicitation at such times as employee organizations may, in the future, appropriately seek to challenge the position of any organization hereafter certified as exclusive representative.

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

1. Pay the State Trial Attorneys Association $300 for the cost of preparing a prototype mailer which could not be used because of the unlawful conduct here in question;

2. Prepare and mail copies of this posting notice to each employee organization registered with the Governor's Office of Employee Relations as an "employee organization" within the meaning of section 3513(a) of SEERA.

DATED:

STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF TRANSPORTATION

By_____

_____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR 20 WORKING DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.