STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY), Respondent.	)	Case No. S-CE-4-S
CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA, GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS, Respondent.	)	Case No. S-CE-19-S PERB Decision No. 174-S September 21, 1981
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA, GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS, Respondent.	)	Case No. S-CE-18-S

Appearances: Russell L. Richeda, Attorneys (Carroll, Burdick & McDonough) for the California Department of Forestry Employees' Association and the California Correctional Officers Association; Barbara T. Stuart, Attorney for the Governor's Office of Employee Relations, (now Department of Personnel Administration).

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

DECISION

Both charging parties, the California Department of Forestry Employees Association (hereafter CDFEA) and the California Correctional Officers Association (hereafter CCOA), as well as the respondents, State of California, Department of Forestry (hereafter CDF) and the Governor's Office of Employee Relations (hereafter GOER), filed exceptions to the attached hearing officer's proposed decision which found the respondents violated sections 3519(a), (b) and (d) of the State Employer-Employee Relations Act (hereafter SEERA).[1] In his findings, the hearing

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[1] SEERA is codified as Government Code section 3512 et seq. All further statutory references are to the Government Code unless otherwise noted. Section 3519 reads in pertinent 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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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.

officer determined that the regulations issued by CDF[2] and GOER[3] restricting supervisors' participation in pre-election

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[2]CDFEA challenged the following four subdivisions of Section 2173.3 of CDF's Manual of Instructions (hereafter Manual):

> Pre-Election Conduct
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> During the election period, managers and supervisors should exercise care to avoid committing unfair practices. In addition to the guidelines which have been outlined in the Unfair Labor Practices section, managers/supervisors should give attention to the following:
>
> A. Do not support one organization in preference to another or take any advocacy role in the election.
>
> B. Avoid the appearance of supporting a particular organization through bumper stickers or other means.
>
> . . . . . .
>
> D. Avoid criticism of any employee organization, verbal or written.
>
> E. Do not attend any rank and file employee organization meetings.

In charging parties' brief to the hearing officer, they volunteered that many of their concerns with respect to the Manual were satisfied by the settlement agreement in Case No. S-CE-5-S. However, as they did not waive their objections to the Manual, the legality of all four subdivisions will be considered by the Board.

[3]Both CDFEA and CCOA challenge the following nine subsections of the Guide to Pre-Election Conduct for State Managerial and Supervisory Employees (hereafter Guide):

> A. Maintaining a Position on Neutrality
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> Management employees (including

activities during nonworking periods away from the work locations: deny nonsupervisory employees their right to a free flow of communication from supervisors who belong to the same

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supervisors) must maintain a position of neutrality during the pre-election period and avoid actions which indicate support or opposition to an employee organization, such as:

1. Displaying emblems, ashtrays, or other insignia on State property which signify a particular employee organization.

2. Displaying employee organization bumper stickers on State cars or on private vehicles parked on State property.

3. Attending organizing rallies and meetings scheduled to recruit rank-and-file employees or solicit contract demands.

B. Communicating with Employees

You may answer general questions regarding SEERA and the process for its implementation. However:

1. If additional information is requested, refer the employee to your departmental Employee Relations Officer.

2. Refer Employees with questions about specific employee organizations to that organization for answers.

3. Avoid remarks which imply that employee organizations in general or that a specific employee

organization; deny employee organizations the right to represent their members by hindering supervisors from performing as office holders; and require internal restructuring of employee organizations which have supervisors as members, respectively. As explained below, the Public Employee Relations Board (hereafter PERB or the Board) reverses that decision.

PROCEDURAL HISTORY AND FACTS

The procedural history and findings of fact of the hearing officer are free from prejudicial error and are adopted as the findings of the Board itself.

DISCUSSION

Charging parties allege that the Manual and Guide violate the right of rank-and-file employees to join and participate in

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> organization is detrimental to the best interests of the employee.
>
> 4. Do not discuss employee organizing activities, project the results of bargaining or compare employee organizations.
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> . . . . . .
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> 7. Do not monitor the activities of employees to determine their support for employee organizations.
>
> 8. Do not question employees about their or others' attitudes towards, or membership in, employee organizations.

activities of employee organizations as provided for under section 35154 and the rights of an employee organization to represent its members as provided for under section 3515.5.[5] In essence, charging parties argue that rank-and-file employees have a right to receive information from supervisors concerning the rank-and-file election campaign and employee organizations have a right to use their supervisory members to disseminate such information to rank-and-file employees.

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[4]Section 3515 reads:

> 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.

[5]Section 3515.5 reads:

> 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

In State of California, Department of Forestry (3/25/80) PERB Decision No. 119-S, this Board, reversing a hearing officer's dismissal of charges based on the restrictions imposed on supervisors by the Manual, held at page 12:

> [i]f the right of rank-and-file employees to belong to the same employee organizations as supervisors and their right to elect supervisors to offices in those organizations is to have meaning, they must have the right to freely exchange information and ideas regarding those organizations with all members, including supervisors.

This right of rank-and-file employees is not an unfettered one, as the Board explained on page 13 of the same decision:

> [t]he right of rank-and-file employees to the participation of supervisory members in their employee organizations must be balanced against the duty of the state employer to protect itself against unfair practice charges.

The Board, in balancing these competing interests, notes that the Guide and the Manual apply only to the period preceding the SEERA elections. It is the Board's intention that these elections be conducted in an environment which is

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> 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.

conducive to the casting of a free and uncoerced vote by employees. The environment should also allow for the greatest possible interchange of information consistent with protection of the rights of all participants.

As the State employer may be held responsible for the actions of supervisors acting within their actual or apparent authority (see Antelope Valley Community College District (7/18/79) PERB Decision No. 97), it:

> . . . has a legitimate interest in regulating, within permissible boundaries, the actions and conduct of its supervisory employees by restricting supervisors from holding themselves out as spokespersons for the state while engaged in organizational activity and by disavowing improper conduct or action by supervisors to the extent that such activity may be viewed as authorized by the state employer. (Citation omitted) State of California, Department of Forestry, supra, at page 14.

It is often a difficult task to determine during the sensitive pre-election period when a supervisor crosses the line separating legal discussion with a subordinate and illegal coercion of the rank-and-file employee. It is the respondent's position that the Manual and Guide are the least intrusive means of protecting itself from the unfair practices which arise when supervisors cross the line.

The employee organizations argue that, although supervisors constitute a minority of their membership, they play an extraordinarily important role in guiding their respective

organizations through the pre-election period. This role, is however, one which could be performed by rank-and-file employees. Although the supervisory members of the charging parties possibly possess greater knowledge, with regard to their respective work places and employee organizations, their small numbers in comparison to each organization's overall membership belie a finding of such extraordinary value to the organization and its rank-and-file employees.

Balancing the several competing interests, the Board finds that enforcement of the Manual and Guide during the critical pre-election periods does not constitute a violation of SEERA. The Board rejects the distinction made by the hearing officer which struck down enforcement of the Guide and Manual away from the work location and off work time. The State employer's interest in remaining free from unfair practice charges is no less jeopardized by supervisors acting in violation of the Manual or Guide away from the work place than at the work place. A supervisor, well-known as such by employees, does not by reason of leaving the work site become a rank-and-file employee. The supervisory-subordinate relationship remains as does the possibility that an unfair practice will occur.

The Board therefore finds the Manual and the Guide to be legal limitations of supervisors' conduct during the critically sensitive period prior to the elections and dismisses the charges.

ORDER

Upon the foregoing decision and the entire record in this case, the Public Employment Relations Board ORDERS that: the unfair practice charges filed by the California Department of Forestry Employees Association and the California Correctional Officers Association against the State of California, Department of Forestry and Governor's Office of Employee Relations are DISMISSED.

By: John W. Jaeger, Member

Irene Tovar, Member

Harry Gluck, Chairman, concurring:

The issue here is not whether the State's "competing interests" justify a violation of the organizations' SEERA rights, but whether charging parties have a protected right to utilize supervisors as organizers of rank-and-file employees. I conclude that they do not.

Charging parties rely on section 3522.3 of the Act which authorizes supervisory employees to join and participate in employee organizations of their choice and on section 3518.7 which prohibits managerial and confidential employees from holding elective offices in that employee organization which also represents rank-and-file employees. By implication,

they argue, supervisors are permitted to hold office in such organizations and therefore cannot be restrained from performing organizational activities, including the organizing of rank-and-file employees.

Accepting arguendo the charging party's position that the statute's silence as to the supervisors' right to hold office is equivalent to permission to do so, the supervisors' right to participate in organizational activities must be considered in light of section 3522.2 which prohibits participation by supervisory employees in matters concerning rank-and-file employees and section 3522 which expressly excludes supervisors from coverage of the SEERA except as specifically authorized.[1]

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[1]Section 3522 reads:

> Except as provided by Sections 3522.1 to 3522.9, inclusive, supervisory employees shall not have the rights or be covered by any provision or definition established by this chapter.

Section 3522.2 reads:

> (a) Supervisory employees shall not participate in the handling of grievances on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in the handling of grievances on behalf of supervisory employees.
>
> (b) Supervisory employees shall not participate in meet and confer sessions on behalf of nonsupervisory employees. Nonsupervisory employees shall not

Sections 3522.4 and 3522.6[2] complete the circle by demonstrating that the inclusion of supervisors in the SEERA is designed to exclude them from its special provisions and

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participate in meet and confer sessions on behalf of supervisory employees.

(c) The prohibition in subdivisions (a) and (b) shall not be construed to apply to the paid staff of an employee organization.

(d) Supervisory employees shall not vote on questions of ratification or rejection of memorandums of understanding reached on behalf of nonsupervisory employees.

[2]Section 3522.4 reads:

Employee organizations shall have the right to represent their supervisory employee members in their employment relations, including grievances, with the employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of employees from membership. Nothing in this section shall prohibit any employee from appearing on his or her own behalf or through his or her chosen representative in his or her employment relations and grievances with the public employer.

Section 3522.6 reads:

Upon request, the state shall meet and confer with employee organizations representing supervisory employees. "Meet and confer" means that they shall consider as fully as the employer deems reasonable such presentations as are made by the employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action.

provide them with continued access to the rights they enjoyed vis-a-vis the State under SEERA's predecessor statute.[3]

Thus, it seems beyond dispute that the Legislature intended to include in the SEERA the well-established principle that the State, as the employer, is entitled to the undivided loyalty of its supervisory cadre in matters involving its relationship with rank-and-file employees.[4]

The apparent anomaly of permitting supervisors to belong to organizations of their choice (thus, including those with rank-and-file employee membership) while prohibiting their participation in rank-and-file organizing is not without federal parallel. Supervisors' continued membership in labor organizations is authorized by section 14(a) of the National Labor Relations Act and has been found not to constitute in and of itself grounds for an unfair labor practice charge[5] but their participation in the representation of nonsupervisory employees violates that Act.[6]

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[3]George Brown Act, Government Code Section 3525 et seq.

[4]See Fairfield-Suisun Unified School District (3/25/80) PERB Decision No. 121, where PERB found this principle applicable even under a statute (EERA) which permits supervisors to have bargaining units and negotiate in good faith.

[5]Nassau and Suffolk Contractors Assn. (1957) 118 NLRB 174 [40 LRRM 1146].

[6]NLRB v. Valentine Sugars, Inc (5th Cir. 1954) 211 F.2nd 317 [33 LRRM 2679]; Pangles Master Markets (1971) 190 NLRB 332

The State, as the employer, has an undeniable right to remain neutral in the face of organizational activity. It has a correlative right to require that its representatives--managerial and supervisory--observe and maintain that neutrality. For this reason I concur in that portion of the majority opinion which asserts the right of the State to protect itself from unfair practice charges. The danger to the State resulting from the participation of its supervisory personnel in rank-and-file organizing made the issuance of these rules reasonable, if not necessary, for

> an employer may properly be held responsible for interfering in the affairs of a union because of participation by his supervisors even though such participation was not expressly authorized or ratified.7

However, I do not find in State of California, Department of Forestry, supra, the meaning the majority seems to ascribe. Communications between supervisory and rank-and-file members of an employee organization encompass many activities other than the organizing involved here. It is beyond the reach of this decision to identify them. Suffice it to say that the State of California,Department of Forestry decision was not intended to

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[77 LRRM 1596]; University of Chicago Library (1973) 205 NLRB 220 [83 LRRM 1678].

7Plumbers Local 636 v. NLRB (1961) 287 F.2d 354, [17 LRRM 2457]; Also NLRB v. Park Edge Sheridan Meats, Inc. (1963) 323 F.2d 956 [54 LRRM 2411].

create rights not granted by the SEERA and that supervisors' involvement in rank-and-file organizing for representation is not a protected right to which charging parties may lay claim.

I concur in the dismissal of all charges.

Harry Gluck, Chairman

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY), Respondent.	)	Case No. S-CE-4-S S-CE-19-S
CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	Case No. S-CE-18-S PROPOSED DECISION (10/28/80)

Appearances: Ronald Yank and Russell L. Richeda, Attorneys (Carroll, Burdick & McDonough) for the California Department of Forestry Employees' Association and the California Correctional Officers Association; Barbara T. Stuart, Attorney for the Governor's Office of Employee Relations.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This case raises difficult questions concerning restrictions on supervisory participation in the pre-election campaign for exclusive representatives under the State Employer

Employee Relations Act (hereafter SEERA). A number of employees whom the state has designated as supervisors are members and high-ranking officers in the two employee organizations which filed these charges. The organizations challenge guidelines issued by the Governor's Office of Employee Relations (hereafter GOER or State) which they contend to be in violation of SEERA.

The first charge in this sequence was filed on September 22, 1979 by the California Department of Forestry Employees Association (hereafter CDFEA or Forestry Employees Association). This charge alleges that the Department of Forestry in May of 1978 had amended its personnel manual so as to "drastically" curtail the rights of supervisors to participate in the election process. The charge also alleges that CDFEA is harmed as an organization because it is "deprived of an important means of demonstrating the range and nature of its membership." Finally, the charge alleges that "rank and file employees are directly harmed" by the policy change because it deprives them of their "traditional communication channel for learning the preferences and rationales of their supervisors concerning employee organizations." The Forestry Employees Association alleges that the new policy amounts to a

violation of Government Code section 3519(a), (b) and (d)[1] and sections 3522.3,[2] 3522.4,[3] and 3522.8.[4]

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[1]Government Code section 3519 provides:

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

[2]Unless otherwise indicated, all references are to the Government Code. Section 3522.3 provides:

> Supervisory 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 supervisory employee-employer relations as set forth in Section 3522.6. Supervisory employees also shall 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

On September 11, 1978, a hearing officer for the Public Employment Relations Board (hereafter PERB or Board) dismissed the charge. The hearing officer found that the PERB lacks jurisdiction to resolve through the unfair practice provisions of the SEERA a charge that the policy interfered with the right of supervisors to form and participate in the activities of employee organizations in violation of sections 3519(a), 3522.3, 3522.4 and 3522.8. The hearing officer also dismissed the allegation that the policy interfered with the rights of

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> employment relations with the public employer.

[3]Government Code section 3522.4 provides:

> Employee organizations shall have the right to represent their supervisory employee members in their employment relations, including grievances, with the employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of employees from membership. Nothing in this section shall prohibit any employee from appearing on his or her own behalf or through his or her chosen representative in his or her employment relations and grievances with the public employer.

[4]Government Code section 3522.8 provides:

> The state employer and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

rank-and-file employees[5] by depriving them of the opportunity to learn the preferences and rationales of their supervisors.

With regard to the allegation that by limiting the participation of supervisors the State had infringed upon CDFEA's rights under section 3515.5,[6] the hearing officer concluded that CDFEA has no right to have supervisory members participate in an organizing campaign directed at nonsupervisory employees.

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[5]Government Code section 3515 provides:

> 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.

[6]Government Code section 3515.5 provides:

> 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

CDFEA excepted to all portions of the dismissal except the determination that the policy did not have the effect of interfering with the internal affairs of CDFEA in violation of section 3519(d). On March 25, 1980, the PERB issued Decision No. 119-S which upheld part and reversed part of the dismissal. The PERB upheld dismissal of that portion of the charge alleging that the State had interfered with the rights of supervisors to form and participate in the activities of employee organizations in violation of sections 3519(a), 3522.3, 3522.4 and 3522.8. However, insofar as the charge pertained to alleged violations of the rights of nonsupervisors the PERB reversed the dismissal. The PERB ordered a hearing on the allegation that the policy violated section 3519(a) and 3519(b) with regard to the rights of nonsupervisors and the employee organization. Because the dismissal of the alleged violation of section 3519(d) was not appealed, the PERB did not pass on the correctness of that decision.

A settlement conference was conducted in this matter on April 21, 1980, but it was not successful. On April 28, 1980

> employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

the Forestry Employees Association filed a second charge, Case No. S-CE-19-S, alleging new violations of section 3519(a) and (b) through promulgation by the State in January 1980 of a "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees." Also on April 28, 1980, the California Correctional Officers Association (hereafter Correctional Officers Association or CCOA) filed charge S-CE-18-S which contains allegations essentially identical to those found in the Forestry Employees Association's charge, S-CE-19-S.

Through a stipulation by the parties, all three cases were consolidated for hearing on May 1 and 2, 1980. At the hearing, the State made a general denial of the allegations in S-CE-18-S and S-CE-19-S. The State earlier had denied the allegations in charge S-CE-4-S. Also at the hearing, the two employee organizations amended charges S-CE-18-S and S-CE-19-S to add the allegation that the State's alleged conduct also amounted to a violation of section 3519(d).

The final briefs in these matters were received on September 24, 1980 and the matter was submitted for decision.

FINDINGS OF FACT

Two related but separate policies concerning pre-election conduct are under attack in these charges. The first of these policies was put into effect at the State Department of Forestry in May of 1978. That policy, incorporated as section

2173.3 of the Department of Forestry Manual of Instructions,[7] placed certain restrictions on the pre-election conduct of

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[7]Section 2173.3 of the Department of Forestry's May 1978 directive reads as follows:

> Pre-Election Conduct
>
> During the election period, managers and supervisors should exercise care to avoid committing unfair practices. In addition to the guidelines which have been outlined in the Unfair Labor Practices section, managers/supervisors should give attention to the following:
>
> A. Do not support one organization in preference to another or take any advocacy role in the election.
>
> B. Avoid the appearance of supporting a particular organization through bumper stickers or other means.
>
> C. Do not go into the polling area during elections unless authorized to do so.
>
> D. Avoid criticism of any employee organization, verbal or written.
>
> E. Do not attend any rank and file employee organization meetings.
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> F. Do not monitor who attends employee organization meetings.
>
> G. Assure that any restrictions (time, access, etc.) placed on organizational representatives are reasonable and equitable and based upon legitimate management needs.
>
> H. Afford all organizations fair and equitable treatment. [Emphasis in original.]
>
> I. Continue to counsel or discipline employees for job-related reasons.

supervisors. Specifically, CDFEA attacks the portions of the policy which give the following instruction to departmental managers and supervisors:

> A. Do not support one organization in preference to another or take any advocacy role in the election.
>
> B. Avoid the appearance of supporting a particular organization through bumper stickers or other means.
>
> .....
>
> D. Avoid criticism of any employee organization, verbal or written.
>
> E. Do not attend any rank and file employee organization meetings.

In January of 1980, the Governor's Office of Employee Relations issued a four-page document entitled "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees" (hereafter Guide).[8] Unlike the previous policy,

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> J. Cooperate fully with agents of PERB. Section 3514 of SEERA states:
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> 'Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than one thousand dollars ($1,000).'

[8]The relevant portion of the January 1980 Guide reads as follows:

> A. Maintaining a Position of Neutrality

the January 1980 Guide applied to managerial and supervisory employees throughout the state service, and not just those in the Department of Forestry. The Guide asserts that management

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> Management employees [including supervisors] must maintain a position of neutrality during the pre-election period and avoid actions which indicate support or opposition to an employee organization, such as:
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> 1. Displaying emblems, ashtrays, or other insignia on State property which signify a particular employee organization.
>
> 2. Displaying employee organization bumper stickers on State cars or on private vehicles parked on State property.
>
> 3. Attending organizing rallies and meetings scheduled to recruit rank-and-file employees or solicit contract demands.
>
> 4. Inconsistently applying the rules regarding access and use of State time.
>
> 5. Unequal treatment of competing employee organizations.
>
> B. Communicating with Employees
>
> You may answer general questions regarding SEERA and the process for its implementation. However:
>
> 1. If additional information is requested, refer the employee to your departmental Employee Relations Officer.
>
> 2. Refer employees with questions about specific employee organizations to that organization for answers.
>
> 3. Avoid remarks which imply that employee organizations in general or that a specific employee organization is detrimental to the best interests of the employee.

and supervisory employees "must maintain a position of neutrality during the pre-election period and avoid actions which indicate support or opposition to an employee organization." The policy then gives a series of examples of conduct inconsistent with the required neutrality. Specifically, the Forestry Employees Association and the Correctional Officers Association object to the instruction that they avoid activities such as:

> 4. Do not discuss employee organizing activities, project the results of bargaining or compare employee organizations.
>
> 5. Do not threaten employees with the loss of benefits for supporting employee organizations.
>
> 6. Do not tell employees that they will be better taken care of by management if they do not support employee organizations.
>
> 7. Do not monitor the activities of employees to determine their support for employee orgnizations.
>
> 8. Do not question employees about their or others' attitudes towards, or membership in, employee orgnizations.
>
> 9. Do not imply that management knows who is recruiting, signing authorization cards or supporting which employee organization.
>
> 10. Do continue to counsel or discipline employees for job-related reasons.

A-1. Displaying emblems, ashtrays, or other insignia on State property which signify a particular employee organization.

A-2. Displaying employee organization bumper stickers on State cars or on private vehicles parked on State property.

A-3. Attending organizing rallies and meetings scheduled to recruit rank-and-file employees or solicit contract demands.

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The January 1980 Guide states that managerial and supervisory employees may answer general questions regarding SEERA and the process for its implementation. However, it adds these cautions to which the two employee organizations object:

B-1. If additional information is requested, refer the employee to your departmental Employee Relations Officer.

B-2. Refer Employees with questions about specific employee organizations to that organization for answers.

B-3. Avoid remarks which imply that employee organizations in general or that a specific employee organization is detrimental to the best interests of the employee.

B-4. Do not discuss employee organizing activities, project the results of bargaining or compare employee organizations.

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B-7. Do not monitor the activities of employees to determine their support for employee organizations.

B-8. Do not question employees about their or others' attitudes towards, or membership in, employee organizations.

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Except for clauses A-1 and A-2 of the 1980 GOER Guide, nothing in either policy states whether the restrictions are to apply only during working hours or during both working and nonworking times. Likewise, neither policy is specific about whether it pertains the same to nonworking areas as it does to working areas. On March 18, 1980, Marty Morgenstern, director of the Governor's Office of Employee Relations, issued a clarification to the January 1980 Guide.[9] The clarification,

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[9]The full text of the March 18, 1980 clarification reads as follows:

Clarification of Guide
to Pre-Election Conduct

In January 1980, the Governor's Office of Employee Relations issued the Guide to Pre-Election Conduct for State Managerial and Supervisory Employees. This clarification is issued after discussions with concerned employee organizations. The Guide is intended to keep management in a neutral posture with respect to the upcoming representation elections, to prohibit managers and supervisor from using their position or authority to influence the votes of rank-and-file employees, and to restate certain basic obligations and responsibilities that members of the management team are expected to abide by.

It should be noted that under SEERA, "Supervisory employees shall have the right to form, join and participate in the

which appeared in the form of a memorandum addressed to State managerial and supervisory employees, explains that in some situations it may be difficult to judge whether the policy has been violated. The memorandum explains that individual acts must be considered in their context and judged accordingly.

> activities of employee organizations of their own choosing for the purpose of representation on all matters of supervisory employee-employer relations. . . ." This right, however, does not extend to nonsupervisory employer-employee matters.
>
> In implementing the Guide, it is necessary to avoid violating supervisors' rights. For example, with respect to Page 1 of the Guide, paragraphs 1.A. 1 and 2, a supervisor may maintain that in wearing a button, she/he is merely asserting the rights to belong to an employee organization and influence other supervisors, and that there is no intention or likelihood that rank-and-file employees will be influenced. Situations like this can be difficult to judge.
>
> Here are some factors you will have to consider. Is the button (ash tray, etc.) a long-honored tradition with this person or did it appear just before the election? Is the item unusually obvious, or does the supervisor call attention to it, especially in the presence of subordinates? Has a rank-and-file employee complained? Discussion with the employee involved, consultation with your Employee Relations Officer and careful informed judgments should result in fair and predictable implementation of this policy.
>
> Similar concerns arise with respect to employee organization meetings. Attendance

The March 1980 clarification was sent to the employee relations officers of the various departments of state government with the instruction that copies of the document be distributed to individual supervisors and managers.

> at a meeting that discusses general organizational business is a right that goes with membership. A supervisory grievance training seminar or a discussion or training session related to benefits available to supervisors is not disallowed or discouraged. In some gatherings, matters relating strictly to rank-and-filers, i.e., the elections or negotiations for a Memorandum of Understanding, may be incidentally touched upon. This is often unavoidable and should not be considered a violation of the Guide. However, where a meeting is primarily designed to deal with the rank-and-file representation elections or with activities directly relating to a Menorandum [sic] of Understanding for rank-and-filers, supervisors are expected not to attend.
>
> Section B of page 1 deals with communications. The main thrust here is on the job, but in some ways, its impact may go beyond the work location. A supervisor who authors a signed article for an employee organization's publication is within his/her rights when the article reasonably relates to supervisory employer-employee relations or even when the general business, goals and accomplishments of the organization are discussed. But an article relating to an exclusively rank-and-file representation matter is not permissible. For example, if an article is a blatant attempt to win the votes of rank-and-file employees for a particular organization in a representation election campaign, the supervisor is clearly not exercising the right to engage in supervisory employer-employee relations, but

The two organizations[10] which brought these unfair practice charges have a number of members whom the State claims to be supervisors. The Forestry Employees Association has about 3,000 members of whom between one-third and 40 percent have been designated as supervisory employees by the State. About 12.5 percent of the membership of the Correctional Officers Association is comprised of persons whom the State claims to be supervisory. The charging parties are contesting many of these supervisory designations in unit proceedings now before the PERB.

Persons in high-ranking leadership positions of both organizations are in job classifications which the State claims as supervisory. The statewide president of the Forestry Employees Association is Victor C. Weaver who is a fire

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> rather is interfering in a rank-and-file matter.
>
> We hope this lends some clarity to this matter. We recognize that confusing or borderline situations may arise. When they do, consult your Employee Relations Officer. She/he will contact this office if necessary. The goal is to be reasonable, cautious and consistent, especially during this important and relatively short pre-election period. Only your cooperation will make this possible.
> [Emphasis in original.]

[10]The parties stipulated that both the California Department of Forestry Employees Association and the California Correctional Officers Association are employee organizations as that term is defined in Government Code section 3513(a).

captain, one of the classifications now being contested before the PERB. The vice president, the treasurer and seven members of the organization's eight-member board of directors are all in positions which the State claims as supervisory. The Correctional Officers Association also has persons designated as supervisors among its top leadership although to a lesser degree than the Forestry Employees Association. At the time the January 1980 Guide was issued by the Office of Employee Relations, three members of the CCOA's 17-member state governing board worked in job classifications designated as supervisory by the State. In January, approximately 18 of CCOA's 130 chapter officers held job classifications the State considers to be supervisory.

Persons designated as supervisory have a pervasive influence within the Forestry Employees Association. There are no prohibitions in the association's rules against persons in supervisory classifications running for office, holding office or participating in discussions at meetings. The association has a three-tiered organizational structure, the lowest level being the local chapters. The chapter boundaries basically follow county lines in California. The chapters are grouped into eight regions. Both local chapters and regions have a president, vice president, treasurer and a secretary. At the highest level is the statewide board of directors. Persons in supervisory classifications hold office at all structural

levels of the Forestry Employees Association.

Because of the nature and organization of work within the Department of Forestry, the rank-and-file employees have a close working and personal relationship with the employees the State has designated as supervisory. Firefighters work long shifts, sometimes 48 hours, sometimes 72 hours and sometimes 84 hours. On these shifts, the supervisors and subordinates live and work together for several days. On a long shift, the working hours are 8:00 a.m. to 5:00 p.m., but the firefighters must remain in the station during the nonworking periods so that they can respond to any emergencies. Many fire stations are isolated, some as remote as 80 miles from the nearest paved road. The evening hours are spent in personal recreation and conversation including discussion about job problems and organizational activities.

Persons designated as supervisory have a significant role in the operation of the Correctional Officers Association albeit somewhat less pervasive than the role of supervisors in the Forestry Employees Association. There are no prohibitions in CCOA rules against persons in supervisory classifications running for office, holding office or participating in discussions at meetings. CCOA has members at institutions operated by both the Department of Corrections and the California Youth Authority. There is a local chapter at each of the State's 12 prisons and at four institutions operated by

the Youth Authority. At each chapter there is a board of directors, a president and vice president. Each chapter president also serves on the statewide board of directors. At several chapters, CCOA publishes newsletters to its members. The organization also has some committees which operate on a statewide basis.

Persons who have been designated as supervisors in the two departments share a number of common concerns with their rank-and-file subordinates. All employees of the Department of Corrections have a common concern about safety conditions and the CCOA has found it difficult to treat issues relating to safety separately for supervisory and rank-and-file members. Similarly, all employees of the Department of Forestry have a common concern about protective equipment, particularly boots. The Forestry Employees Association has made an extensive study of footwear for wildland fire fighting in which persons designated as supervisors have particpated fully. Association President Weaver testified that the State pre-election conduct Guide will inhibit future projects which involve supervisors with nonsupervisors in meetings about something which could become a negotiating proposal.

Meetings conducted by both employee organizations tend to be wide-open with no restrictions on the subject of discussion. Both CCOA and CDFEA permit members to raise subjects for general discussion from the floor. Although it is

possible to call a meeting to deal with a single subject, witnesses for the two organizations credibly testified that it is not possible at typical meetings to prohibit discussion about potential bargaining demands.

The restrictions in the January 1980 Guide have affected the manner in which the two organizations are conducting their campaigns to become exclusive representatives. Supervisory members and officers of both organizations are unable to answer questions asked about the organizations by new employees. For CDFEA the January 1980 Guide means that its elected officers who have been designated as supervisors cannot answer organization-related questions from rank-and-file firefighters during the nonworking hours they spend together in the fire stations. For CCOA the January 1980 Guide means that its elected officers who have been designated as supervisors cannot participate in after-work recruiting activities in pizza parlors where prospective members are often taken.

Witnesses for both charging parties credibly testified that nonsupervisory employees often ask supervisors who are organizational officers questions about their respective organizations. These questions are asked during non-duty hours and away from the place of employment as well as at the place of employment. Because of the Guide, the organizational officers feel inhibited about answering these questions. Supervisors who are organizational officers are inhibited also

from initiating discussions about their organizations or campaigning on behalf of the organizations which they serve as officers.

Supervisors have a particular credibility with newer employees. For the most part, they tend to be older and have more years of experience in working for their departments. The Department of Corrections is a paramilitary department where employees wear uniforms with clearly visible insignia of rank. As is characteristic of a paramilitary group, there is a considerable respect for authority within the Department of Corrections and subordinate employees show respect for persons in higher rank. The Department of Forestry also requires its employees to wear uniforms during their working hours.

Since May of 1978 when the Department of Forestry published its regulations about pre-election conduct, CDFEA's supervisory members have restricted activities in support of their organization. Some have decided not to place CDFEA bumper stickers on their personal automobiles and have ceased attending meetings of that organization. The restriction on the activities of supervisory members of CDFEA has cut off the flow of certain information to nonsupervisory employees of the department. In a statement introduced as evidence at the hearing, Pat Russell, a nonsupervisory employee in the Department of Forestry, made the following observation:

> It is important to me, in deciding which employee organization I will vote for in the SEERA elections, to know who the members of the various employee organizations are, how long they have been members, why they became members, and the kind of expertise and experience they possess which would be useful to the organization in carrying out its goals. Therefore it is important to me to know the opinions of employees who are in job classifications of Ranger I and above concerning the advantages and disadvantages of various employee organizations. I believe that section 2173.3 will prevent me from knowing this information.

Beginning with the issuance of the pre-election Guide in January of 1980, the Correctional Officers Association also has been affected by the State restrictions on the activities of supervisors. In the time between January and the hearing in May, CCOA has received resignations from 10 of its chapter officers who are in supervisory classifications. One supervisory member resigned his position on CCOA's statewide board of directors.

The difficulty which the Guide would present for CCOA became apparent shortly after it was issued. In the February 1980 issue of "The Granite," a publication for the CCOA chapter at Folsom Prison, correctional sergeant Don Novey wrote an editorial criticizing the California State Employees Association and the Teamsters and recommending a vote for CCOA

in the forthcoming representation elections.[11] Novey, who was editor at the time he wrote the editorial, holds the civil service position of correctional sergeant, a position considered supervisory by the Department of Corrections. Following publication of the article, Mr. Novey was instructed

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[11]The disputed editorial reads as follows:

ELECTIONS

> An election for your representation is forthcoming. There are three organizations seeking victory in the Collective Bargaining process. Unfortunately, CSEA and the Teamsters display little or no leadership. The following is indicative:
>
> Remember when CSEA, during picketing action (April 1978) at Folsom pulled out and left their local President, Rick Martin, high and dry? Rick has, and will continue to be, involved in employee rights (Rick is now serving on your local CCOA Board of Directors).
>
> Remember when CCOA had supposedly sold you out on the pay issue? Well, would you now prefer the 16.8% pay, or the now existing 2.3% less each month?
>
> Why is it CCOA has published monthly minutes, meetings each month, and outfront representation?
>
> CSEA supports Jerry Brown's "idea" of moving CDC/CYA directly under his auspices (your local CCOA considers this "idea" a slow death for employees rights).
>
> CSEA has averaged 350-400 members lost each and every month recently -- and they speak of CCOA (January 1980, a loss of 358).

by his supervisors not to continue as editor of "The Granite." Subsequently, CCOA challenged in superior court the directive that Mr. Novey resign as editor. In settlement of that case, the parties agreed that Mr. Novey could continue as editor of the newsletter pending a resolution of the present unfair practice charges.

The author of the January 1980 Guide, Marty Morgenstern, testified that the restriction on activities by supervisors was necessary to further the development of a management team, to avoid management domination in the election, and to protect the rights of employees. Mr. Morgenstern testified at length about the necessity for the State to have a management team, i.e., a group of employees which "owes its first allegiance to management." It is the responsibility of this management team, he testified, to protect the interests of the public during the negotiating process. He said that the rules were necessary because some supervisors had shown a greater loyalty to labor organizations than to management.

Representatives of two other employee organizations testified that the prohibition against campaign activities by

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> Your CCOA representation prints its opinions locally and does not depend on downtown for leadership -- like CSEA. In conclusion, would you want to be a car salesperson (Teamsters), a secretary (CSEA [69,000 of their membership]) or an Officer. Then I suggest you give CCOA your first consideration.

supervisors does not hinder their activities. Indeed, both Mac Proctor of the Service Employees International Union and Bill McLeod of the California State Employees Association stated that it was preferable to have the ban in effect. Mr. McLeod testified that CSEA restructured itself in order to separate supervisory members from its subunits which contain nonsupervisors.

LEGAL ISSUES

1. Whether the State Department of Forestry, by the promulgation in May 1978 of Regulation 2173.3, has violated Government Code section 3519(a) and/or (b).

2. Whether the State, by the promulgation in January 1980 of the "Guide to Pre-Election Conduct," has violated Government Code section 3519(a), (b) and/or (d).

CONCLUSIONS OF LAW

Section 3519(a)

Under section 3519(a), it is unlawful for the State to impose or threaten reprisals or to discriminate, interfere with or coerce employees because of their exercise of protected rights.[12] The protected rights with which the State may not interfere include the right to "form, join and participate" in

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[12]Government Code section 3519 is set forth in footnote no. 1, supra.

the activities of employee organizations.[13]

Initially, it is important to observe that the alleged violation under review here pertains only to the rights of persons who are not supervisors. The issue of whether the PERB can consider alleged violations of the rights of supervisors already has been resolved. The PERB twice has held that supervisors are not covered by the unfair practice provisions of the SEERA, concluding that any vindication of supervisors' rights must be through another forum. State of California, Department of Health (1/10/79) PERB Decision No. 86-S; State of California, Department of Forestry (3/25/80) PERB Decision No. 119-S. Thus, the State misses the point when it bases arguments on the assertion that "supervisory employee activities are protected by SEERA only to the degree the activities relate to supervisory labor relations." The issue here is whether by placing restrictions on supervisors the State has restrained, coerced or interfered with the rights of nonsupervisors. Arguments by the respondent that supervisors have only limited rights fail to deal with the encroachment on the rights of nonsupervisors and are thus irrelevant to the central contentions in this case.

The legal principles applicable in the present cases have been set out rather comprehensively in a series of PERB

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[13]The rights of state employees are listed in Government Code section 3515 which is set forth in footnote no. 5, supra.

decisions. In State of California, Department of Corrections (5/5/80) PERB Decision No. 127-S, the PERB adopted for cases involving section 3519(a) the rule of Carlsbad Unified School District (1/30/79) PERB Decision No. 89. Carlsbad, which arose under the Educational Employment Relations Act (Government Code section 3540 et seq.), establishes a detailed test for resolving cases involving alleged infringements upon protected rights.[14]

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[14]The Carlsbad test reads as follows:

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

Additional guidance is given in Department of Forestry, supra, in which the Board reversed the dismissal of one of the three cases consolidated in the present matter. In Department of Forestry, the Board concluded that the 1978 Department of Forestry regulations were in violation of the rights of rank-and-file employees because they inhibit the flow of information within the employee organization. The Board noted that the statute contains no prohibition against rank-and-file workers and supervisors belonging to the same employee organizations and there is no prohibition against supervisory employees holding office in those organizations.[15]

Assuming for the purpose of analysis that the allegations in Case No. S-CE-4-S were true, the PERB concluded that portions of the 1978 Department of Forestry policy constituted a prima facie violation of the statute. The Board noted, for example, that the first section of the policy[16] directs

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[15]Section 3518.7 places significant restrictions on managerial and confidential employees but excludes any reference to supervisory employees. It provides:

> Managerial employees and confidential employees shall be prohibited from holding elective office in an employee organization which also represents "state employees," as defined in subdivision (c) of Section 3513.

[16]The policy is set out in footnote no. 7, supra.

supervisors not to support one employee organization in preference to another.

> On its face this provision has the effect of inhibiting the flow of information between supervisory and rank and file members of CDFEA. This interferes with rank and file employees in the exercise of their SEERA rights in violation of section 3519(a).

This provision, the Board continued, also would "prevent a supervisory employee who was an elected officer of CDFEA from fully and effectively carrying out his or her duties and responsibilities." The effect of such a restriction, the Board wrote, would be a violation of section 3519(b).

Finally, the PERB in Long Beach Unified School District (5/28/80) PERB Decision No. 130 adopted federal precedent which invalidates certain restrictions on employee solicitation during nonworking time. Under these cases restrictions on employee solicitation during nonworking time and restrictions on distribution during nonworking time and in nonworking areas are violative of the statute unless the employer justifies the rules by a showing of special circumstances which make the rule necessary to maintain production or discipline.

In their respective briefs the charging parties and the respondent take absolutist positions. The charging parties contend that the 1978 and 1980 regulations are totally invalid.

The respondent contends that the 1978 and 1980 regulations are totally valid. Without addressing every point made in the lengthy briefs submitted by the parties, it is concluded that neither of their absolutist positions can prevail under PERB precedent. Both sides in this case have important interests which their opposing absolutist positions make no effort to protect.

In these actions, the charging parties dispute four provisions of the 1978 Department of Forestry rules and nine provisions of the 1980 rules issued by the Governor's Office of Employee Relations. It is not necessary to consider each of the 13 disputed rules separately because the principles which apply produce a consistent result throughout. It is concluded that the rules are lawful insofar as they pertain to the activities of supervisors at the work place. The rules are unlawful insofar as they pertain to the activities of supervisors away from the work place during nonworking periods. The reasons for this conclusion can be illustrated by consideration of the first section of the 1978 Department of Forestry policy. That policy provides as follows:

> A. Do not support one organization in preference to another or take any advocacy role in the election.

As applied to working time in work locations, the legitimacy of this rule can hardly be disputed. When they are working, rank-and-file employees have no need of any information

from supervisors about supervisory preferences among employee organizations. When they are at work and in work locations, supervisors are representatives of the state employer and the State has a substantial interest in keeping them from taking advocacy roles in an election for exclusive representative. Indeed, the State would be at substantial peril of committing an unfair practice if it permitted on-duty supervisors to engage in advocacy for a particular employee organization. See Antelope Valley Community College District (7/18/79) PERB Decision No. 97. Insofar as the rule applies to working time and work locations, it is valid.

However, application of the principles in Carlsbad Unified School District, supra, produce a different result with regard to enforcement of the rule away from the work location during nonworking periods. As part of their right to participate in the actions of employee organizations, State rank-and-file workers have the right to communications from other organization members and from the persons they have elected to run those organizations. Rank-and-file workers, as part of their right to participate in the activities of employee organizations, have the right to have their elected officers take an advocacy role on behalf of the organizations they have been elected to lead. In the case of the Forestry Employees Association, the evidence is clear that a number of persons whom the State claims as supervisory have been elected to

leadership roles. A State prohibition against advocacy of CDFEA by these persons while on their own time and away from State premises is inherently destructive of employee rights. To say that Victor Weaver, whom forestry employees have lawfully elected as the president of CDFEA, may not support or advocate CDFEA while on his own time is devastating to the rights of the employees who have elected him as president of their organization. If a president may not advocate the organization which he leads, his value as president is minimal at best.

Because the State has not demonstrated that the prohibition against supervisory advocacy of a particular employee organization during nonworking time and in nonworking locations was due to circumstances beyond its control, it is concluded that rule as so applied is invalid.

There is a third environment in which the rule also may be applied. It is in those situations where a supervisor is not engaged in work but is present at a work location. In the Department of Forestry supervisors and rank-and-file workers spend many hours together at the work location when they have no assigned tasks. The most obvious example is the time after 5:00 p.m. when the forestry crews remain at the fire station for the evening and night so that they may quickly respond to an emergency. During these hours, supervisors and subordinates are free to watch television or engage in whatever recreational

pursuits they desire.

Under the guidelines set forth in Long Beach Unified School District, supra, the ordinary rule for these periods would be that employees could engage in union solicitation. Thus, one might expect that if supervisors could lawfully engage in union activities during nonworking hours when away from the work place, they also could engage in such activities during nonworking periods while they were at the work place.

However, in this situation the effect of the rules on the rights of rank-and-file employees is minimal. While there would be some interference with the right of rank-and-file employees to have communication with supervisory members of their organization, the interference is not substantial. Supervisors who are employee organization officers would still be able to communicate with their members in activities away from work. By contrast, the State has a substantial interest in preventing supervisors from advocating support for a particular employee organization in the work place. Even if the supervisors and the employees with whom they are communicating are both on a break, the supervisory-subordinate relationship remains. In the work place, a supervisor remains a supervisor at all times and as such wears the cloke of the employer's authority. The State has a significant interest in preventing persons vested with its authority from advocating a particular employee organization.

For these reasons, it is concluded that the State may prohibit supervisory advocacy of a particular employee organization during all times at the work place, including periods in which the supervisors are not working.

Although no effort will be made to discuss each of the remaining 12 rules under dispute, a few comments are necessary about particular rules. The prohibition against employee organization bumper stickers, emblems, ashtrays and insignia on State property would be open to serious attack if applied to rank-and-file workers. In most situations, the wearing of union buttons and other insignia while at work is a protected activity. See generally, Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620], and De Vilbiss Co. (1953) 102 NLRB 1317 [31 LRRM 1374]. However, this right is limited and will be balanced in a particular situation against the right of the employer to manage the business in an orderly manner. Thus, the wearing of insignia can be banned in special circumstances. See generally, Standard Fittings Co. (1961) 133 NLRB 928 [48 LRRM 1808]; Floridan Hotel of Tampa, Inc. (1962) 137 NLRB 1484 [50 LRRM 1433], enf. as mod. (5th Cir., 1963) 318 F.2d 545 [53 LRRM 2420]; May Dept. Stores Co. (1969) 174 NLRB 109 [70 LRRM 1307].

In the present case, there are special circumstances. Here, the persons who are banned from wearing union insignia are supervisors at the work place. As supervisors, they are

cloaked with the authority of their employer, the State, which is required by statute to be impartial between employee organizations. If supervisors could display insignia of support for a particular organization on State property, the State would not be maintaining its required impartiality. Thus, once again, a balancing of the competing interests requires a determination that insofar as the rule pertains to the work place, it is lawful. Because sections A-1 and A-2 of the 1980 Guide on their face pertain only to the work place, they are lawful.

With respect to the prohibition against supervisory attendance at meetings "scheduled to recruit rank-and-file employees or solicit contract demands," the State asserts that the rule is consistent with the requirements of SEERA. Section 3522.2[17] provides that supervisory employees shall not

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[17]Government Code section 3522.2 provides:

> (a) Supervisory employees shall not participate in the handling of grievances on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in the handling of grievances on behalf of supervisory employees.
>
> (b) Supervisory employees shall not participate in meet and confer sessions on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in meet and confer sessions on behalf of supervisory employees.

participate in the handling of grievances nor in meet and confer sessions which pertain to nonsupervisory employees. Insofar as supervisory employees attend meetings away from the work place during nonworking hours, the State may not restrict their participation. Such restriction, as is clear in Department of Forestry, supra, denies the right of nonsupervisory employees to the free flow of communication from the supervisory employees who belong to the same organization. Moreover, the prohibition against participation by supervisory employees in meetings scheduled to solicit contract demands goes beyond the requirements of section 3522.2.[18] That section does not ban supervisory employees from all participation in discussions or employee meetings about negotiating proposals. It merely states that supervisory employees may not participate in meet and confer sessions regarding the proposals of nonsupervisory employees.

One other argument offered by the State must be addressed. Woven throughout the brief submitted by the Office of Employee

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> (c) The prohibition in subdivisions (a) and (b) shall not be construed to apply to the paid staff of an employee organization.
>
> (d) Supervisory employees shall not vote on questions of ratification or rejection of memorandums of understanding reached on behalf of nonsupervisory employees.

[18]See footnote no. 17, supra.

Relations is the contention that the State must be able to develop a management team which will give its first loyalty to the State employer. Supervisors, the State asserts, must be an integral part of this management team. Thus, the restrictions upon the employee organization activity of supervisors are a legitimate response to the need for a management team.

There is abundant support for the basic principle that a public employer must be able to develop a management team. Some commentators have suggested that supervisors are an integral part of that management team. See generally, "The Practical Differences Between Public and Private Sector Collective Bargaining," by Lee Shaw and Theodore Clark (1972) 19 UCLA Law Review 867. The problem with this argument is that however valid the principle may be, the statute does not lend itself to the use the State would make of it. Whereas managerial and confidential employees are clearly removed from participation in the activities of employee organizations,[19] supervisory employees are given rights under the statute. The statutory scheme envisions an interrelationship between supervisory employees and nonsupervisory employees in the same organization. To achieve its goal of a management team, the State ignores the structure of the statute.

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[19]See footnote no. 15, supra.

For all of these reasons, it is concluded that the contested policies are lawful insofar as they pertain to activities at the work place but in violation of section 3519(a) insofar as they pertain to activities by supervisors during nonworking time away from the work place.

Section 3519(b)

Section 3519(b) makes it unlawful for the State to "deny to employee organizations rights guaranteed to them" by SEERA. Among the rights afforded to employee organizations is "the right to represent their members in their employment relations with the state."[20] In Department of Forestry, supra, the PERB concluded that the 1978 policy was in violation of section 3519(b) because it restricted the ability of an employee organization officer who was a supervisor to carry out his or her responsibilities. The policy thus had the effect of hindering the right of an employee organizaton to represent its members.

The contested portions of the January 1980 Guide have the same effect on employee organizations as the 1978 Department of Forestry policy. Insofar as the policy restricts the activities of supervisors during nonworking hours away from the work place it very significantly hinders the ability of the two

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[20]The rights of employee organizations are contained in Government Code section 3515.5 which is set forth in footnote no. 6, supra.

charging parties to represent their members. Both organizations have officers who are in job classifications designated by the State as supervisory. By restricting the off-duty activities of supervisors, the State has restricted the ability of the organizations in which the supervisors hold office to function.

It is concluded, therefore, that both the 1978 and 1980 policies are in violation of section 3519(b) because they pertain to activities of supervisors during non-working time away from the work place.

Section 3519(d)

Section 3519(d) makes it unlawful for the State to "dominate or interfere with the formation or administration of any employee organization." The charging parties contend that the January 1980 Guide has the effect of interfering with the manner in which they administer their respective organizations. Although the policy does not on its face pertain to the administration of any employee organization, it clearly has that effect. In its brief, the State argues that the problems which the Guide presents for the charging parties are caused by the internal structure of the two organizations. The State asserts that if the parties to collective bargaining wish it to work "they will ensure that the appropriate internal structural accommodations are made by employee organizations."

Plainly, CDFEA and CCOA cannot function effectively, if at all, under the provisions in the 1980 Guide without altering their organizational structures. If the provisions in the Guide are lawful, then it is of no legal significance that they might compel some internal restructuring of the two organizations. See generally, Department of Corrections, supra. If, as occurs here, the provisions are not lawful, then their effect on the administration of the two employee organizations is prohibited.

It is concluded, therefore, that the 1980 Guide is in violation of section 3519(d) because it interferes with the administration of an employee organization.

THE REMEDY

The charging parties in these cases seek an order enjoining implementation of the regulations, the posting of notices and the award of costs and reasonable attorneys fees.

Under Government Code section 3514.5(c), the PERB is given:

> . . . 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 appropriate that the State be directed to cease and desist from its unfair practices. It is also appropriate that the State be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized

agent of the State indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting will provide employees with notice that the State has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and announces the State's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

Finally, it is concluded that the award of legal fees is not appropriate in this case and they are denied. In Tiidee Products Inc. (1972) 194 NLRB 1234 [79 LRRM 1175] and 196 NLRB 158 [79 LRRM 1692], the NLRB held that legal fees could be awarded where the conduct of the respondent involved "clear and flagrant" violations of the law. It cannot be said that the two directives under attack in these cases constitute "clear and flagrant" violations of the law. There has been relatively little litigation so far about SEERA. Reasonable persons can differ about interpretations of the statute. The legal theories of the State in this case are not unfounded. There is no precedent for the award of legal fees in these circumstances.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code secton 3514.5(c) of the State Employer Employee Relations Act, it hereby is ordered that the State of California, the Department of Forestry and the Department of Corrections, and their respective agents shall:

A. CEASE AND DESIST FROM:

Enforcing subsections A, B, D and E of Section 2173.3 of the State Department of Forestry Manual, issued in May of 1978, and Sections A-3, B-1, B-2, B-3, B-4, B-7 and B-8 of the January 1980 "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees" insofar as they pertain to activities of supervisory employees during non-working hours away from the work place, and thereby violate Government Code section 3519(a), (b) and (d).

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

1. Within seven (7) calendar days of this decision becoming final, post a copy of the notice attached as Appendix A at all work locations where copies were distributed by the State of Section 2173.3 of the Department of Forestry Manual (issued in May of 1978) and the "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees," (issued in January of 1980). Such posting shall be maintained for a period of thirty (30) working days. Reasonable steps shall be

taken to insure that the notices are not altered, reduced in size, defaced or covered with any other material.

2. Notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, at the end of the posting period, of what steps the State 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 November 17, 1980 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 17, 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 PERB itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Dated: October 28, 1980

Ronald E. Blubaugh
Hearing Officer

Appendix A

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 Nos. S-CE-4-S, S-CE-19-S, and S-CE-18-S, California Department of Forestry Employees Association v. State of California and California Correctional Officers Association v. State of California, in which all parties had the right to participate, it has been found that the State of California 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 subsections A, B, D and E of Section 2173.3 of the State Department of Forestry Manual, issued in May of 1978, and Sections A-3, B-1, B-2, B-3, B-4, B-7 and B-8 of the January 1980 "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees" insofar as they pertain to activities of supervisory employees during non-working hours away from the work place, and thereby violate Government Code section 3519(a), (b) and (d).

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

1. Within seven (7) calendar days of this decision becoming final, post a copy of this notice at all work locations where copies were distributed by the State of Section 2173.3 of the Department of Forestry Manual (issued in May of 1978) and the "Guide to Pre-Election Conduct for State Managerial and Supervisory Employees" (issued in January of 1980). Such posting shall be maintained for a period of thirty (30) working days. Reasonable steps shall be taken to insure

that the notices are not altered, reduced in size, defaced or covered with any other material.

2. Notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, at the end of the posting period, of what steps the State has taken to comply with this order.

DATED:

STATE OF CALIFORNIA

By _____

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