

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN SWETT EDUCATION ASSOCIATION,)	
CTA/NEA,)	
)	
Charging Party,)	Case No. SF-CE-53
)	
v.)	PERB Decision No.188
)	
JOHN SWETT UNIFIED SCHOOL DISTRICT,)	December 21, 1981
)	
Respondent.)	
)	

Appearances: Charles O. Triebel, Jr., Attorney for John Swett Education Association, CTA/NEA; Gregory L. Quintana, Attorney (Murphy and Appenrodt) for witness John O'Dwyer; Jon A. Hudak, Attorney (Breon, Galgani and Godino) for John Swett Unified School District.

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

DECISION

The instant case comes before the Public Employment Relations Board (hereafter Board or PERB) on exceptions taken by the John Swett Unified School District (hereafter District) to the proposed hearing officer's decision.¹ In that decision, the hearing officer determined that the John Swett Education Association, CTA/NEA (hereafter Association) sustained its charge that the District violated

¹As discussed more fully below, the "exceptions" to the proposed decision as submitted by the representative of witness John O'Dwyer are not considered by the Board in this decision.

subsection 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act) and dismissed the Association's allegations with regard to subsections 3543.5(b) and (d).² The Association, as charging party, did not submit exceptions to the hearing officer's dismissal of those portions of the allegations regarding subsections 3543.5(b) or (d). We therefore make no ruling on these charges. The Board has reviewed the record and concludes that the hearing officer's procedural history and findings of fact as set forth in the proposed decision, attached hereto, are free from prejudicial

²The EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated.

Subsections 3543.5(a), (b) and (d) provide:

It shall be unlawful for a public school employer to:

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

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

(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.

error and are adopted by the Board itself.³ Further, we affirm the hearing officer's conclusions of law as modified below.

DISCUSSION

At the outset, the Board addresses the District's assertion that the Association' unfair practice charge is barred by subsection 3541.5(a) of the Act which provides in pertinent part:

The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
. . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. . . .

³In so doing, we reject the District's exceptions to the extent that they lodge objections to the hearing officer's credibility determinations.

The District argues in its exceptions that the gravamen of the Association's charge, that the District discriminated against John O'Dwyer because of his exercise of rights guaranteed by the Act, is covered by the parties' negotiated agreement and subject to binding arbitration.⁴ Therefore, pursuant to subsection 3541.5(a), the District asserts that the Board should not entertain the instant charge but should defer to the grievance apparatus. We disagree. We find that the language of subsection 3541.5(a)(2) does not require deferral if provisions of the negotiated agreement do not cover the matter at issue. In this case, the Association charged that the District's conduct deprived it, the employee organization, of rights granted by the Act and that the District dominated and interfered with the formation or administration of the Association. We find nothing in the parties' agreement which

⁴The parties' negotiated agreement was not admitted as evidence in the administrative hearing below. However, PERB may take official notice of its records. Mendocino Community College District (11/4/80) PERB Decision No. 144; Antelope Valley Community College District (7/18/79) PERB Decision No. 97. PERB rule 32120, codified at California Administrative Code, title 8, section 31000 et seq., requires in pertinent part:

Each employer entering into a written agreement or memorandum of understanding with an exclusive representative pursuant to the EERA . . . shall file an executed copy of the agreement and any amendments thereto with the regional office within 60 days after execution of the agreement, memorandum or amendment.

provides contractual protections parallel to the employee organization's asserted rights.⁵ Thus, were the Board to defer the entire matter to the arbitration procedure, the District's conduct with respect to the alleged incursions on the Association's rights would be beyond the scope of the arbitration agreement and without remedy. We are unwilling to demand that the Association forfeit its statutory protections. Alternatively, we are unwilling to force the charging party to bifurcate the alleged violations and to engage in duplicative and overlapping proceedings through both the arbitration and unfair practice routes. Thus, for the reasons expressed above, we reject the District's contention that the hearing officer erroneously failed to defer the instant charge to arbitration.

The District has also lodged an objection to the hearing officer's conclusion that it violated subsection 3543.5(a) of the Act. It submits that the discussions between O'Dwyer and Norman Davis, principal at Hillcrest Elementary School, with regard to the Association-sponsored faculty poll was proper speech-related conduct devoid of anti-union animus and legitimized by substantial business justifications.

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89 the Board set forth its test with regard to alleged

⁵While the District in its exceptions takes the position that the Association itself lacks standing to avail itself of the contractual grievance procedure, we do not base our decision on the deferral issue on that assertion.

violations of subsection 3543.5(a) of the Act. Where, as here, the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted by EERA, a prima facie case is demonstrated. In this case, the Board affirms the hearing officer's determination that the District's conduct, generated by O'Dwyer's compilation and dissemination of the faculty poll and communication to the Department of Education, harmed O'Dwyer by interfering with his right to engage in protected organizational activity on the Association's behalf.

Having determined that an employee has been harmed by the employer's conduct, the Carlsbad test envisions a balancing of competing interests when the harm to the employee is slight and if the employer's conduct is based on operational necessity. In this case, the employer argues that the conversations between O'Dwyer and Davis were justified as problem-solving discussions within an educational institution. While the Board acknowledges the fact that the Association poll O'Dwyer prepared created some dissention among the faculty about which the District was properly concerned, various statements made by Davis, when taken together, go beyond the bounds permitted by operational necessity. These statements were made during the meeting initiated by Davis on Thursday afternoon. Among the statements cited by the hearing officer are Davis' comment that O'Dwyer should write a moderating letter to the state, that

O'Dwyer's resignation as a member of the Association's representative council was "not enough," that O'Dwyer could not "make a mess and walk away from it," that Davis had "never lost a case" as a grievance representative of the Oakland Federation of Teachers and that O'Dwyer's tardiness might be less tolerated if O'Dwyer were uncooperative. As the hearing officer found, these statements carry a coercive meaning when viewed in their overall context. As directed by the Carlsbad test, we find from the entire record that the primary effect of the discussion was to coerce and intimidate O'Dwyer because of his organizational activity rather than to engage in a legitimate problem-solving conversation.⁶

In affirming the finding of a violation of subsection 3543.5(a), we likewise reject the District's argument that the employer's action was permissible as speech-related conduct. In Rio Hondo Community College District (5/19/80) PERB Decision No. 128, the Board found that the public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. Such free speech protection,

⁶Having concluded that the District failed to demonstrate sufficient operational necessity to justify even slight harm to the employee, it is unnecessary to discuss the portion of the Carlsbad test which requires a showing that the inherently destructive harm visited on the employee is excused by circumstances beyond the employer's control as to which no alternative course of action was available.

however, is not without limits. Borrowing from the standards developed by the National Labor Relations Board (hereafter NLRB), this Board determined that an employer's speech which contains a threat of reprisal or force or promise of benefit loses its protection and will be viewed as strong evidence of conduct prohibited by section 3543.5 of the EERA. (Rio Hondo, supra, at p. 20.)

The hearing officer's decision, while it predated the Board's decision in Rio Hondo, nevertheless relied on the same NLRB precedent which the Board subsequently adopted and concluded that the statements made to O'Dwyer constituted implied threats and carried a coercive meaning. We therefore affirm the hearing officer's conclusion, consistent with our position in Rio Hondo, that the District's speech-related conduct lost its protection and interfered with O'Dwyer's rights guaranteed by the Act in violation of subsection 3543.5(a).

Finally, the Board declines to review a submission labeled "exceptions" to the hearing officer's decision from the attorney representative of O'Dwyer. PERB rule 32300⁷ only permits a "party" to submit exceptions to a proposed hearing

⁷PERB rule 32300 provides in pertinent part:

(a) A party may file with the Board itself an original and four copies of a statement of exceptions to a Board agent's proposed decision

officer's decision. Because the Association, and not O'Dwyer, is the charging party, we will not consider the substance of the objections filed on O'Dwyer's behalf.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the John Swett Unified School District has violated subsection 3543.5(a) of the Educational Relations Employment Act. It is hereby ORDERED that the District and its representatives shall:

(1) CEASE AND DESIST FROM:

(a) In any manner imposing or threatening to impose reprisals on, interfering with, restraining or coercing John O'Dwyer or any other employees because of their exercise of rights guaranteed by the EERA;

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

(a) Within five (5) workdays of date of service of this Decision, post copies of the Notice as set forth and attached hereto in the Appendix at its headquarters office and in each school in conspicuous locations where notices to employees are customarily posted. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps should be taken to insure that said Notices are not reduced in size, altered, defaced or covered by any other materials; and

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

It is further Ordered that the alleged violations of subsections 3543.5(b) and (d) are DISMISSED.

By: Barbara D. Moore, Member John W. Jaeger, Member)

Member Tovar concurring:

I concur.

Irene Tovar, Member _____

Chairperson Gluck's concurrence begins on page 11.

Harry Gluck, Chairperson, concurring:

Upon balancing the employer's asserted operational need against the harm done to O'Dwyer's rights, I concur in the hearing officer's finding that the District's conduct, considered in its entirety, was imbued with the threat of reprisal, interfered with O'Dwyer's exercise of statutory rights, and violated section 3543.5(a).

The majority has not addressed, substantively, the District's exception to the hearing officer's ruling which barred the District from raising PERB's deferral obligation during the hearing. The District contends that section 3541.5(a) imposes a jurisdictional limitation on PERB and that a party cannot be held to have waived its claim because it was raised in an untimely fashion. Although, as the majority points out, one is not necessary in this case, a ruling on this exception would serve as a desirable clarification of relevant procedural requirements for the future.

~~Harry Gluck, Chairperson~~

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. SF-CE-53,
John Swett Education Association, CTA/NEA v. John Swett Unified
School District, in which both parties had the right to
participate, it has been found that the John Swett Unified
School District violated subsection 3543.5(a) of the
Educational Employment Relations Act (EERA) by restraining,
coercing, threatening to impose reprisals on, and interfering
with John O'Dwyer because of his exercise of rights under the
EERA. As a result of this conduct, we have been ordered to
post this Notice and we will abide by the following:

We will not restrain, coerce, threaten, or otherwise
interfer with John O'Dwyer or other employees because of their
exercise of rights under the EERA.

John Swett Unified School District

By: _____
Authorized Agent of the District

Dated: _____

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOHN SWETT EDUCATION ASSOCIATION,)	
CTA/NEA,)	
)	
Charging Party,)	
)	
vs.)	Unfair Practice
)	Case No. SF-CE-53
JOHN SWETT UNIFIED SCHOOL DISTRICT,)	
)	PROPOSED DECISION
Respondent.)	(12/29/78)

Appearances: Donald P. McCullum, Robert W. Johnson, and Charles Triebel, Attorneys for John Swett Education Association, CTA/NEA; Gregory L. Quintana, Attorney (Murphy and Appenrodt), special counsel for witness John O'Dwyer; John Hudak, Attorney (Breon, Galgani and Godino) for John Swett Unified School District.

Before Jeff Sloan, Hearing Officer.

PROCEDURAL HISTORY

On January 22, 1977, the John Swett Education Association, CTA/NEA (hereafter JSEA or the Association) filed an unfair practice charge against the John Swett Unified School District (hereafter District), alleging violations of sections 3543 and

3543.1(a) of the Educational Employment Relations Act (hereafter, EERA or Act).¹ The charge alleged that Norman Davis, principal of Hillcrest Elementary School, threatened and coerced John O'Dwyer in connection with a JSEA-authorized survey of teachers.

¹The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise noted.

Section 3543 states:

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, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer....

Section 3543.1(a) states:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer....

On February 17, 1977 the District answered the charge, admitting that O'Dwyer prepared the survey in question but denying all other allegations of the charge.

The parties waived the holding of an informal conference, and a formal hearing was held before Hearing Officer Angela Pickett-Evans on May 19, May 31, June 10, June 16, July 12, September 20, and September 21, 1977. The charging party amended the charge at the beginning of the formal hearing to allege violations of sections 3543.5(a), (b) and (d) of the Act.² The parties stipulated that the JSEA was an employee organization and that the District was a public school employer within the meaning of the EERA.

On approximately January 8, 1978, the general counsel informed the parties that he intended to assign the case for decision to another hearing officer because Ms. Pickett-Evans

²Section 3543.5(a), (b) and (d) states:

It shall be unlawful for a public school employer to:

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

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

.....
(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.

no longer was employed by the Public Employment Relations Board (hereafter PERB). Both parties objected to substitution of the hearing officer. The general counsel overruled those objections, and JSEA appealed. PERB itself sustained the general counsel's denial of JSEA's objections in Fremont Unified School District & John Swett Unified School District (4/5/78) PERB Order No. Ad-28.

A further hearing for the resolution of credibility issues was held before this hearing officer on May 23, 1978, in the San Francisco regional office of PERB. All parties were given the full opportunity to examine and cross-examine witnesses in areas where the record showed testimonial conflict.

ISSUES

The case presents the following issues:

1. Whether the District threatened to impose reprisals, restrained, coerced, or interfered with O'Dwyer because of his exercise of rights guaranteed by the EERA, thereby violating section 3543.5(a).
2. Whether the District denied to JSEA rights guaranteed by the EERA, thereby violating section 3543.5(b).
3. Whether the District dominated or interfered with the formation or administration of JSEA, thereby violating section 3543.5(d).

FINDINGS OF FACT

Background

The John Swett Unified School District, located in Contra Costa County, has an average daily attendance of 1,936. California State Department of Education, California Public School Directory (1978). It is comprised of four schools--John Swett High School, Carquinez Elementary School, Garretson Heights Elementary School and Hillcrest Elementary School. Hillcrest Elementary School, the location of the alleged unfair practice in the instant case, is an elementary school located in Rodeo staffed by approximately 25 teachers. On May 9, 1976, the District voluntarily recognized JSEA as the exclusive representative of its certificated employees.

The Hillcrest Early Childhood Education Program

The educational program at Hillcrest Elementary School includes a comprehensive state- and federally-funded project known informally as the Early Childhood Education (ECE) Program, or the "Project." The Project contains three components--the federally-funded Title I Program, serving children who score below the 50th percentile in certain educational areas; the Early Childhood Education Program; and the State Education for Disadvantaged Youth Program. The Program at Hillcrest utilizes five specialists who work with students in different educational areas, e.g., research, media and language arts. A number of teachers' aides also are employed through the Program.

At the time the alleged unfair practice occurred in the

present case, Hillcrest was the only school in the District that had an ECE Program.

The Director of the Program is Hillcrest Principal Norman Davis. The Coordinator of the Program, Lorna Wiggins, was appointed by Davis. Wiggins also is a language arts specialist for the District.

The ECE Program at Hillcrest was beset by problems during the 1975-76 year which caused it to be given low ratings by Department of Education evaluators. Because of these low ratings, a state review team, known as the "Monitor and Review Team" (hereafter MAR Team), scheduled Hillcrest for an extensive review session in January 1977. Wiggins and Davis began preparing for the MAR Team visit at the beginning of the 1976-77 school year.

Members of the District Board of Education had not been inclined favorably toward the ECE Program for quite some time. They believed that the Program did not require sufficient classroom structure or discipline.

Poll Concerning the ECE Program

During the latter part of 1976, some teachers at Carquinez and Garretson Heights Elementary Schools discovered that their schools were being considered for an expanded ECE Program for the 1977-78 school year. These instructors were concerned about the possibility of expansion of the Program, because they were not aware of how the Program might affect their teaching methods and teaching loads.

Alice Dorman, a teacher at Garretson and a member of the Representative Council of the JSEA, brought the issue of ECE expansion before the JSEA on December 13, 1976. She stated at a meeting of the representative council³ that she wished to learn what effect the expanded Program would have on teachers' teaching methods and teaching loads.

A motion was made at that meeting that Hillcrest building representatives bring back information concerning how the Program was functioning. A general discussion ensued as to how to discover the information which Dorman was seeking. Juanita Kizer, a Hillcrest building representative, suggested that another Hillcrest representative, John O'Dwyer, conduct a poll of Hillcrest teachers addressing their feelings about the Program. Just before the conclusion of the meeting, a vote was taken on whether to conduct the poll. The motion carried that O'Dwyer conduct the poll.

On the evening of December 13, O'Dwyer composed the following poll:

³The representative council is the policy making body of the JSEA. According to JSEA bylaws, the representative council is composed of the four JSEA officers and a pro-rata number of "building representatives" from the four schools in the District. According to JSEA bylaws, the total number of representative council members was 15 during the time in question.

JSEA SURVEY--THE PROJECT

HILLCREST STAFF

I. WORK

a. Does the Project require extra time from the classroom teacher? () Yes () No

b. If yes, estimate how much per day.

c. Is the additional work asked by the Project adequately compensated for by the addition into the classroom of:

An aide () Yes () No

Materials () Yes () No

Specialists () Yes () No

Wednesday Release Time () Yes () No

II. CONTROL

a. Do you feel you know about and have a reasonable degree of control over the nature, content and activities of the project components?

() Yes () No

b. Do you feel that the budget allocations for the Project match the learning priorities of the classroom teachers?

() Yes () No

III. CHANGE

a. Does the Project require:

certain types of classroom organization (centers) () Yes () No

certain teaching methods (diagnostic/prescrip.) () Yes () No

certain ways of student grouping? (individ/small skill grp.) () Yes () No

IV. SUMMARY

a. Do you support, at Hillcrest, the continuation of the Project:

in its present form () Yes () No

with changes () Yes () No

b. Do you feel that the Project should be expanded next year to other schools in the district? () Yes () No

c. Will you "support" other faculties if they oppose the Project's expansion? () Yes () No

On or about December 14, 1976, O'Dwyer distributed copies of the poll to all Hillcrest teachers.

After a December 14 meeting of the representative council, O'Dwyer had a conversation with Patricia Williams, a teacher at Hillcrest. Williams asked O'Dwyer whether he felt that the poll was "slanted." O'Dwyer responded to the effect that he intended the poll to be "slanted."

Over the following 3 days, 22 individuals--18 classroom teachers and 4 specialists--completed the poll. O'Dwyer took home the responses to the poll on December 17, and tabulated them over the winter recess which spanned from December 18 to January 2.

Davis, the director of the Project, learned of the poll from Wiggins sometime in December. Wiggins also informed Davis that the poll might undermine the efforts of the Program staff, particularly in view of the upcoming MAR Team visit.⁴

⁴In addition to the fact that Wiggins told Davis that JSEA was conducting the poll, Davis testified that he knew that the poll and a subsequent letter written to the Department of Education both were official JSEA activities.

Dissemination of the Results of the Poll

On January 3, 1977, a meeting of the representative council took place at Carquinez Elementary School.⁵ O'Dwyer passed out his results of the poll and read his analysis of it:⁶

[T]he Hillcrest faculty does not like the Project as is (4 yes, 9 no), but would strongly support (12 yes, 3 no) the Project if significant changes were made. The Hillcrest faculty is unsure (6 yes, 7 no, 8 blank) about Project expansion, but would definitely support (15-2) other faculties if they oppose expansion of the Project to other schools. (Emphasis in original.)

No criticism, either of the poll or of the analysis written by O'Dwyer, was made during the meeting.

A discussion then occurred as to what to do with the results of the poll. O'Dwyer recommended that the information be sent to Davis and to the state evaluators who were in charge of overseeing the Project. The representative council voted to send such a letter.

Why JSEA decided to send the letter is unclear. Protracted negotiations toward reaching a collective negotiations agreement had been taking place during the time in question, and JSEA had been dissatisfied with the progress of

⁵As of January 1, the number of individuals on the representative council had diminished from 15 to 13. The record is unclear as to how many individuals attended this particular meeting. It is undisputed that Taksa, Louise Bevilaqua, Nickie Yost, Alice Dorman, Fred Swain, Kizer, and O'Dwyer were in attendance. While testimony did not indicate clearly whether Dan Marks was in attendance, one exhibit in evidence indicated that he was present. Kizer left before the conclusion of the meeting.

⁶The parenthetic responses indicate the answers provided by the individuals who completed the poll.

negotiations. In addition, JSEA had tendered a "no confidence" vote to the District superintendent during this time period, and had adopted a strategy of "passive resistance" toward the administration in which teachers effectively refused to meet with the administration concerning school-related issues.

On January 4, 1977 Hillcrest JSEA members held a meeting attended by approximately 12 persons. The agenda of the meeting included reports on the status of contract negotiations and on the poll. O'Dwyer distributed the poll and read his analysis of it. There was little other discussion about the poll at that meeting. There is no evidence that Hillcrest teachers were informed during this meeting of the representative council's decision to send the results of the poll to the state.

On January 5, O'Dwyer gave the JSEA president, Taksa, a draft of the letter that was to accompany the dispatch of the poll to Davis and the Department of Education. The letter was typed without alteration and was addressed to Davis with a copy to Claude Hanson, a State Department of Education official. The body of the letter stated:

JSEA requests that faculty representatives be scheduled to meet privately with the MAR Team in January. The purpose of the meeting would be to discuss faculty frustration with the ECE Program. ...

Between January 5 and January 14, packets containing the poll, analysis and letter apparently were distributed to some Hillcrest Elementary School teachers.

Davis received the poll, the analysis and the letter no later than January 6.

Before January of 1977, the contact between O'Dwyer and Davis had not been of an antagonistic nature. Davis may have been partially responsible for O'Dwyer's gaining employment at Hillcrest Elementary School, since he advised the individual responsible for hiring that O'Dwyer's qualifications merited him an interview. In addition, Davis' informal evaluations of O'Dwyer apparently rated him highly.

Initial Responses to the Poll and Letter

After receiving the poll, analysis and letter, Davis called Taksa and asked him about them. Taksa responded that he knew little about the substantive issues underlying the poll, and said that O'Dwyer was responsible for devising the poll and the letter. During that conversation, Davis said that he would not arrange a separate meeting between the MAR Team and the JSEA.

On January 10, Davis and Wiggins compiled the schedule for the MAR Team visit. Although private sessions were set between teachers and the MAR Team, there was no time arranged for a meeting between the JSEA and the Team.

Later, Davis shared the letter with Wiggins. He asked Wiggins to attend a meeting he intended to call between himself and members of the representative council.

Wiggins spoke alone with O'Dwyer concerning the poll on two occasions during the first two weeks in January. During the first conversation, which occurred on about January 6, she

asked O'Dwyer to allow her to see the teachers' responses to the poll. O'Dwyer complied with that request. A few days later, she told O'Dwyer that she disagreed with his analysis of the poll.

Soon after the poll results were distributed, Isabel Schneider, the media specialist and librarian at Hillcrest, approached Davis to discuss the January 5 letter. Pearl Simberg, a guidance specialist at Hillcrest, entered the room while the conversation was in progress. Schneider said that the execution of the poll and letter had been "undemocratic," and that she considered these activities to have been "unwarranted." She also said that the letter had been an "extreme result" of the poll, that she had not been aware that JSEA had been contemplating sending a letter to the Department of Education in the name of the JSEA, that such had been done without her consent, and that none of the teachers with whom she had spoken knew anything about the survey.⁷ She and Simberg also stated that O'Dwyer's action was "so extreme that it could even warrant a reprimand." She "in no way" suggested that O'Dwyer actually should be reprimanded, however.

⁷Schneider had received a copy of the poll during the week before Christmas. At that time, she told Davis that in her opinion the poll was "divisive," "slanted," and "not constructive to the school." Schneider had been in contact with O'Dwyer during the previous year in connection with another poll devised by O'Dwyer. Schneider also was highly critical of O'Dwyer's manner of compiling the earlier poll.

Schneider apparently was unaware of the representative council meetings of December 14 and January 3 in which the poll, analysis and letter were discussed. Although she testified that she had been to "all meetings" that concerned the poll, the record shows that she in fact had not attended the above representative council meetings. The meetings to which she referred were held after the first week of January.

During the week of January 10, most Hillcrest staff members were aware that the poll results and January 5 letter had been sent to the Department of Education. Approximately five staff members, predominately the specialists whose jobs relied on continuation of the Program, were said to have been "stirred up" by the letter.⁸ They considered the letter and the poll to have been unauthorized and inaccurate expressions of the views of Hillcrest staff members, and felt that the letter had jeopardized the Program unnecessarily.

Meetings During the Week of January 10

Apart from discussing the poll and letter with the Program specialists, Davis apparently took no other action concerning those matters until January 10.⁹ At approximately 1 p.m. on

⁸Those five staff members were Evangeline Freenor, Cathy Cantrell, Isabel Schneider, Pearl Simburg and a Ms. Phillips.

⁹The gist of this case is whether certain meetings were held during the week of January 10, and whether Davis impliedly coerced O'Dwyer in the course of those meetings. Testimony is in conflict as to the exact dates on which Davis and O'Dwyer met during this week. The hearing officer credits O'Dwyer's testimony with respect to the sequence of meetings, since his recollection was detailed and consistent. O'Dwyer's testimony with respect to these facts is corroborated by a "diary" that he wrote during the month of January 1977.

that date,¹⁰ Davis and O'Dwyer briefly met. Davis stated that he had received information that the poll results had "leaked" to members of the board of education and to parents. Davis also stated that the poll might jeopardize the ECE Program, and that it was a "mistake" to have conducted the poll in the manner in which it was done. O'Dwyer was "pleased" at that point that Davis was paying attention to the concerns of teachers.

On January 11, a meeting occurred between Davis, O'Dwyer and Boscacci.¹¹ Boscacci is a Hillcrest teacher who is a member of JSEA. Boscacci initiated this meeting after visiting Davis in his office. Davis appeared "upset" to Boscacci during this visit. Davis expressed concern about the impact that the poll might have on the state's evaluation of the Project. Boscacci said that he would ask O'Dwyer to come to Davis' office to "straighten things out." Boscacci then approached O'Dwyer, and O'Dwyer agreed to meet with Davis and Boscacci.

At the meeting in Davis' office, O'Dwyer suggested the idea of composing a second poll to solve the problem posed by the

¹⁰The record is in conflict with respect to whether Davis and O'Dwyer met alone at this time. As noted ante, the hearing officer finds that O'Dwyer's recollection of the facts is accurate. While Boscacci's testimony corroborated Davis' testimony, Boscacci's memory for detail was very poor, and no weight is given to this particular testimony for this reason.

¹¹Davis testified that he met with O'Dwyer and Boscacci on this date, but that such a meeting was a "follow up" meeting to the January 10 meeting which he claimed had occurred. For the reasons set forth ante, this testimony is not credited.

first one. This idea never was implemented. Davis asked O'Dwyer why he took the poll, and O'Dwyer responded that the representative council had asked him to do so. Davis suggested either having a faculty meeting or a meeting with the representative council.

O'Dwyer felt "uncomfortable" during this meeting, although he did not express that feeling at that time. He felt that he was being "singled out" and that "maybe some trouble was brewing." O'Dwyer believed that Davis was attempting to "isolate" him and deal with the issue of the poll as a problem stemming from the action of an individual rather than from the JSEA. Rumors existed in the District that the administration previously had taken discriminatory actions against members of the JSEA due to their organizational activities.

Davis testified that he did not intend to threaten O'Dwyer during this or any later meeting.

While Boscacci was present at most of the meetings concerning the poll, his perceptions are given little weight.¹²

On or about January 11, O'Dwyer had a conversation with media specialist Isabel Schneider. He told her that he had been "bewildered" by the negative responses of some staff members to his actions concerning the poll. Schneider said that she felt that his conduct with respect to the poll and

¹²Boscacci recollected virtually nothing of the substance of these meetings. Although he testified in effect that he participated in these meetings to safeguard against threats, his testimony and demeanor showed that he was in large part inattentive during these discussions.

letter had been "unprofessional, undemocratic and divisive." O'Dwyer said that he had not expected the staff to respond adversely to his activities, and asked Schneider for advice. She told him that:

... if he could not account for the responses which his actions elicited, ... he [should] withdraw from political or organizing activity until such a date when he could understand the ... relationship between what he did and what type of responses he elicited.

On Wednesday, January 12, at 4 p.m., Davis convened a meeting between himself, O'Dwyer, Juanita Kizer, Wiggins and Patricia Williams (a Hillcrest teacher). The meeting was considered by most of its participants to have been a "problem-solving" session. They discussed the impact that the poll and letter had on the specialists.

At this meeting, Wiggins did a substantial amount of the talking. She said, among other things, that the staff "shouldn't be airing its dirty linen in public," i.e., that it was inappropriate for O'Dwyer to have sent the letter without giving the staff an opportunity to correct the problem internally.

Davis commented that the poll was a "poor public relations move." Davis also stated words to the effect that the poll had been "negatively biased" and "insidious." Wiggins and Kizer both suggested that the investigation into the poll be dropped, and that the results of the poll be used to improve the Project for the coming year.

During the meeting, the poll was referred to as "slanted" by some of those present.

Also during the meeting, Davis introduced the idea of sending a second, explanatory letter to the state. Davis apparently had conceived of a letter which would indicate that the poll reflected a "negative climate" at Hillcrest which was due to protracted contract negotiations, that the submission of the poll bypassed the administrative process, and that the administration had given assurances that the issues raised by the poll would be addressed. According to Davis, O'Dwyer agreed during the course of the meeting to write such a letter. O'Dwyer did not agree to do so, and the record shows no reasonable basis for Davis to have held a belief to the contrary.

The individuals who participated in the meeting had mixed reactions with respect to its tenor. Williams did not perceive any threats directed at O'Dwyer, although she testified that she was "confused" during the meeting since she had not been fully aware of the issues which it involved. Kizer testified that while the atmosphere of the meeting was "tense," no "name-calling" occurred. Kizer did not feel that O'Dwyer had been "singled out" during the meeting, and to her recollection the issue of who wrote the poll was not raised. O'Dwyer appeared "tense" and "edgy" to Kizer.

The Critical Events

After the 4 p.m. meeting broke up, Davis, O'Dwyer and Boscacci continued to meet.¹³ During the meeting, Davis indicated that the staff was reacting adversely to the poll and the dispatch of the January 5 letter to the Department of Education. Davis stated that he believed that the poll was "negatively biased," and that some staff members had felt "duped and misled" by the poll. Davis also stated that while he "tended to deal in issues and not personalities, the Board [of Education] was vindictive."¹⁴ The context in which this was uttered is unclear. Davis apparently clarified this statement by stating that he "would have no part" in any vindictive action taken by the board.

Davis also said that the specialists considered O'Dwyer's conduct to have been "unprofessional," and that some individuals thought that O'Dwyer's actions warranted his dismissal. There is no evidence that any staff member advocated O'Dwyer's dismissal. When asked by O'Dwyer whether he shared those views, Davis said, "Of course not."

Toward the conclusion of the meeting, Elliott Steinberg--a parent of one of O'Dwyer's students who had come to Hillcrest to speak with O'Dwyer--knocked on the door of Davis' office.

¹³Neither Davis nor Boscacci recalled the occurrence of a second Wednesday meeting. O'Dwyer had a specific and detailed recollection of these events, and he testified credibly with respect to them.

¹⁴Davis testified inconsistently with respect to whether he made this statement. Based on the demeanors of the witnesses, O'Dwyer's recollection of this event is credited.

He saw Davis and O'Dwyer within the office. Both appeared "very unhappy" to Steinberg.

After the second meeting on January 12, O'Dwyer called Taksa. He told Taksa that "his ass was being fried" by Davis, and that he was afraid that retaliatory action was going to be taken against him, either through a transfer or a decision not to grant him tenure.¹⁵ Taksa told O'Dwyer to do something "sensible" and to be cautious. After the conversation, O'Dwyer wrote a letter to Taksa in which he resigned from his position on the representative council. The letter stated in part:

This fall when I was elected a faculty representative from Hillcrest, I accepted with some reluctance. As I indicated in my first Representative Council meeting, my reluctance was based in the concern that the position might be construed as combative with the Administration; in short, that it might be a hassle. Other members ... counselled me that this was unlikely....

It was in this capacity that I constructed the poll of December 14, 1976.... Results were tabulated and distributed with cursory analysis to the JSEA membership. At a later Representative Council meeting (January 3, 1977), it was agreed, as you recall, that copies be sent to the Project Director and the Director of Elementary Field Services, Region III, as a formal means of initiating discussions investigating the need for Project changes based on teacher perspective.

Without the knowledge or intent of the JSEA leadership, however, copies of the poll results apparently made their way into the

¹⁵The decision to grant tenure to O'Dwyer effectively had been made in December of 1976. O'Dwyer had not been informed of that fact during the time in question.

public domain--specifically, the Governing Board--where they have been used as an example of continuing faculty dissatisfaction with the Project in general (rather than as answers to specific concerns). Consequently, the pressures of this controversy have come to rest with me as the instrument of JSEA leadership in this matter.

It is obvious that, assurances aside, the position of Hillcrest faculty representative has indeed become a time-consuming anxiety; in short, a hassle. With this in mind, I am no longer willing to continue in this position and hereby resign as faculty representative from Hillcrest.

Sincerely,

/s/John P. O'Dwyer

cc: N. Davis

O'Dwyer also called Kizer on January 12. He told her that he was feeling pressure from the teaching staff as well as Davis.

On the following day, O'Dwyer placed the original of the letter in Taksa's mailbox at John Swett High School, and placed a copy of it in Davis' mailbox at Hillcrest.

On January 13, Davis initiated another discussion by going to O'Dwyer's classroom. The meeting lasted about one hour. Davis and O'Dwyer apparently discussed recent events concerning the poll and letter as well as "areas of education." Davis also said that he would "drop" the matter of the poll until after the MAR Team visit scheduled for January 19 and 20.¹⁶

¹⁶Davis essentially denied making this statement. The hearing officer declines to credit his testimony.

At some point in the meeting, Davis repeated the criticisms that staff members had of the poll and letter. During the discussion, O'Dwyer told Davis that he had resigned in order to "get out of [Davis'] road." Davis responded, "That's not enough, John." He then stated words to the effect that "you can't make a mess and walk away from it." Davis also stated that he wanted O'Dwyer to write a second, explanatory letter to the state.¹⁷ Davis also made reference to his previous status as the grievance chairperson for the Oakland Federation of Teachers. He told O'Dwyer that he had "never lost a case." O'Dwyer testified that he interpreted this as a veiled threat. During this meeting, Davis also asked, "What should I do about people who come in late?"¹⁸ O'Dwyer apparently was in the habit of arriving late to school functions.

On the evening of January 13, O'Dwyer called Taksa, Kizer and Bevilacqua, advising them of his conversations with

¹⁷Davis denied, although not consistently, that he said that O'Dwyer's resignation was "not enough." He also denied that he told O'Dwyer to write a moderating letter to the state. The hearing officer declines to credit this testimony. At the initial hearing in this case, Davis testified that he did not state that resignation was "not enough." At the rehearing, he initially testified that he in fact made this statement in the context of a more general statement that O'Dwyer should continue to participate in "problem-solving" with respect to the problem at hand. He later denied having made the statement. These inconsistencies cast a cloud over Davis' testimony in this area. In addition, Davis' demeanor in testifying was unconvincing in these areas in particular. In addition, Davis wanted O'Dwyer to send a letter to the state. Davis accordingly had an obvious motive for making these statements.

¹⁸Davis' testimony to the contrary is not credited.

Davis.¹⁹ They all reassured him that the poll in fact had been official JSEA business. O'Dwyer told Kizer that he thought the situation was "very serious" and that he felt that his job was at stake. He stated that Davis was threatening him. He also told Kizer that he was feeling pressure from other teachers. Bevilaqua perceived O'Dwyer as being "concerned and anxious" during their conversation.

During the evening of January 13, O'Dwyer prepared a letter intended to have the effect of removing him further from the dispute surrounding the poll. The letter was signed by Taksa and was placed in Davis' school mailbox by O'Dwyer on the following day. The letter requested Davis to address his concerns relative to the JSEA's actions to Taksa in writing. The letter concluded:

As the survey is a completed item of JSEA business, I believe that dealing with the matter on an individual basis would not be productive.

On that same day, O'Dwyer prepared a letter addressed to himself purportedly signed by Taksa. The letter stated that O'Dwyer should refrain from discussing the survey "until the controversy surrounding it has been resolved."

That same evening O'Dwyer prepared a "memorandum of understanding" for JSEA members. That memorandum, which later was signed by five JSEA members, stipulated that the survey had

¹⁹O'Dwyer also had conversed over the telephone with Kizer on two occasions during the week preceding this particular date. He was concerned about the impact that the controversy surrounding the poll and letter would have on him.

been undertaken as official JSEA business, and that the dispatch of the survey results to the state had been "accepted" after consideration of the idea at an open meeting of the JSEA representative council.

O'Dwyer placed the above three documents in Davis' mailbox at Hillcrest School on Friday morning.

That same day, Davis and O'Dwyer met again. They discussed only the subject of report cards, and did not discuss the controversy surrounding the poll and letter.²⁰

It is disputed whether Davis ever received the material that O'Dwyer placed in his mailbox. Since Davis' receipt of these documents is only peripherally relevant to the charge, the hearing officer finds it unnecessary to resolve this issue.

The Aftermath

In a staff bulletin dated February 7, 1977, Davis wrote a note concerning an upcoming staff meeting. His note, intended to be humorous, promised that "no harassment" would occur at that meeting.

In a bulletin of February 2, 1977, Davis composed a short literary piece, intended again to be humorous, in which he made light of fictitious accusations of harassment rendered by a staff member referred to as "BBB."

²⁰Davis testified that he told O'Dwyer on Friday that everything related to the poll and letter would be dropped and that the controversy "was ending here and now." O'Dwyer's testimony is credited, however, and the hearing officer finds that Davis and O'Dwyer only discussed the subject of report cards on Friday.

JSEA argued at the hearing in the present case that it should be granted money damages for the loss of O'Dwyer as a representative council member and for the payment of funds for CTA staff who were required to accomplish the work done by him. JSEA submitted no evidence indicating whether O'Dwyer eventually was replaced on the representative council by another teacher. No one receiving a salary from CTA took over O'Dwyer's responsibilities after he resigned from the council.

DISCUSSION AND CONCLUSIONS OF LAW

Alleged Violation of Section 3543.5(a)

The charging party argues that Davis' course of conduct toward O'Dwyer during the week of January 10 violated section 3543.5(a) of the EERA. Section 3543.5(a) makes it unlawful for a public school employer to:

[i]mpose 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.

In San Dieguito Union High School District (9/2/77) EERB Decision No. 22, the PERB held that in order to find a violation of section 3543.5(a), it was necessary to show that the employer intended to interfere with employee rights, or that the employer's conduct had the "natural and probable consequence" of interfering with employees' exercise of

their rights.²¹

To date, PERB has not had the opportunity to apply the San Dieguito test to speech-related conduct alleged to have constituted a threat of reprisal, restraint, coercion or interference.²² However, PERB takes cognizance of decisions of the National Labor Relations Board (hereafter NLRB) in analogous areas of law. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. The NLRB has developed a large body of precedents on this issue.

Section 3543.5(a) combines the language of the National Labor Relations Act (hereafter NLRA) sections 8(a)(1) and 8(a)(3). San Dieguito, supra. These sections state that it is unlawful for an employer:

(1) to interfere with, restrain or coerce employees in the exercise of the rights

²¹The charging party appears to maintain that the proper legal standard for evaluating an allegation of coercion is whether the allegedly coerced party felt coerced by the respondent's conduct. The subjective feelings of the complaining witness may be relevant to determining whether an act constitutes a violation of section 3543.5(a). However, under San Dieguito, they are not determinative. The hearing officer therefore declines to adopt this standard.

²²In Clovis Unified School District (8/7/78) PERB Decision No. 61, PERB adopted the findings of fact and conclusion of the hearing officer that speeches made to teachers by the superintendent of the District were not threatening and therefore did not violate section 3543.5(a).

guaranteed in Section 7;^[23]

(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....

Under the NLRA, the expression of an employer's opinion is protected, but only within certain limits. NLRB v. Virginia Electric and Power Co. (1941) 314 U.S. 469 [9 LRRM 405]. Those limits are exceeded when the employer's conduct is coercive in nature or carries with it a threat of reprisal or promise of benefit. TRW Semiconductors, Inc. (1966) 159 NLRB No. 43 [62 LRRM 1469]. A threat either may be made directly or may be implied by the circumstances surrounding an interrogation. See NLRB v. Harbison-Fischer Mfg. Co. (5th Cir. 1962) 304 F.2d 738 [50 LRRM 2478]. Whether conduct reaches the dimension of a threat or a coercion is not to be determined solely by the specific actions of the employer, but on the totality of the circumstances in which the conduct took place. Sinclair Co. (1967) 164 NLRB 261 [65 LRRM 1087], enfd. (1st Cir. 1968) 397 F.2d 157 [68 LRRM 2720]. And see NLRB v. Gissel Packing Co.

²³Section 7 states:

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 to engage in other concerted activities for the purpose of collective bargaining or for other mutual aid and protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

(1969) 395 U.S. 575 [71 LRRM 2481]; Wassau Steel Corp. v. NLRB (1967) 377 F.2d 369 [65 LRRM 2001]. This determination should "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co. (1969) supra, 395 U.S. 575 [71 LRRM 2481, 2497].

One prong of PERB's holding in San Dieguito, supra, states that interferences in employee activities must be shown to have been intentional in order to be prohibited by section 3543.5(a). Intent, however, may be inferred from circumstantial evidence (see NLRB v. Laney and Duke Co. (5th Cir. 1966) 369 F.2d 859 [63 LRRM 2552, 2557]), including the context in which particular statements are made (see NLRB v. Harbison-Fischer Mfg. Co. (5th Cir. 1962) supra, 304 F.2d 738 [50 LRRM 2478]).

The present case hinges on whether, in the totality of circumstances, Davis impliedly threatened, coerced or restrained O'Dwyer during the week of January 10 because of his exercise of EERA rights.²⁴ As the charging party states,

The major issue ... [revolves] around the timing, tenor and tone of Mr. Davis' statements in their actual context.

²⁴As a preliminary matter, it is noted that O'Dwyer's compilation and dissemination of the poll and his connection to the letter sent to the Department of Education were JSEA activities, and therefore were protected by sections 3540 and 3543 of the EERA. Ante, fn. 4.

Before the week of January 10, there is no evidence that Davis and O'Dwyer were in contact with respect to the poll or letter. Between mid-December and January 10, employees within the school, particularly the specialists, became aware of the poll and gradually became aware of the letter to the state. O'Dwyer was approached by some individuals who expressed their dissatisfaction with the poll. Davis discussed the poll with O'Dwyer because of the concerns expressed by the teaching staff.

Between Monday and Wednesday of that week, there is insufficient evidence from which to infer that Davis threatened or otherwise interfered with O'Dwyer. On Monday, they met by chance. They engaged in an amicable discussion with respect to the poll, notwithstanding the fact that Davis stated that the poll was a "mistake." O'Dwyer himself stated that he was "pleased" at that point about Davis' involvement.

They engaged in another discussion on Tuesday. O'Dwyer began to feel that Davis was singling him out at this time. There is virtually no evidence, however, establishing a reasonable basis for this feeling. The idea of meeting with respect to the poll was suggested by Boscacci, not Davis. Davis was understandably concerned about the specialists' misgivings over the poll. The president of JSEA himself told Davis that he should discuss the matter with O'Dwyer. O'Dwyer was a representative of JSEA. Under these facts, Davis clearly was justified in discussing the poll and letter with O'Dwyer. The record shows that Davis did not act improperly toward

O'Dwyer as of Tuesday.

On Wednesday, Davis met with Wiggins and some of the members of the representative council, including O'Dwyer. Davis expressed displeasure over the poll. Wiggins and Kizer suggested that the matter be dropped, and that the poll be made part of the "needs assessment" for the coming year. As the meeting progressed, Davis suggested that O'Dwyer write a letter to the Department of Education explaining Davis' view of the circumstances in which the original letter was written. The group did not adopt this suggestion. Some of those who attended the meeting felt that the atmosphere of the meeting was "tense." None perceived any threats.

After this meeting, Davis, Boscacci and O'Dwyer had another discussion. Davis reiterated the negative feelings about the poll and letter that had been expressed at previous meetings. He stated that some teachers thought that O'Dwyer should be dismissed--a notion not supported by the record. He thereafter assured O'Dwyer that he did not agree with that view. He also stated that some individuals thought O'Dwyer's actions had been "unprofessional." Davis also said that the board of education was "vindictive." Davis also clarified this statement by stating that he "would have no part" in any vindictive action taken by the board.

There is no doubt that these frank words created a tense atmosphere. Davis' statement that some instructors thought O'Dwyer should be dismissed could not have been taken lightly. His statement concerning the board's vindictiveness also was

somewhat ominous. However, Davis said that he did not feel that O'Dwyer should be dismissed. Further, the context of Davis' statement concerning board "vindictiveness" was unclear, and Davis said that he would have no part of any of the board's vindictive action. In addition, O'Dwyer's participation in these meetings was voluntary, and he never questioned the tenor of Davis' statements or expressed reservations about continuing the discussion. If the largely ambiguous statements made at this meeting constituted the entirety of the charging party's case, they would be insufficient to constitute threats.

Following this second Wednesday meeting, O'Dwyer expressed his fears to the president of JSEA. He then wrote a letter resigning from his position on the representative council.

That Davis allegedly forced O'Dwyer to resign is accorded great weight in the charging party's argument that Davis' actions violated section 3543.5(a). However, O'Dwyer felt pressure from the teaching staff as well as from Davis. Davis did not unduly pressure O'Dwyer during the Wednesday meeting or any other meeting that preceded it. O'Dwyer's letter of resignation stated that he was "hassled" by his JSEA position, and did not state that he had been threatened by Davis. The ECE specialists, on the other hand, were disturbed and threatened by the appearance of the poll and letter to the state so soon before the visit of the MAR Team. They complained loudly and angrily to Davis as well as to O'Dwyer. Wiggins voiced strong objections to O'Dwyer's actions. O'Dwyer told Kizer on two occasions that he had been feeling pressure

from the specialists. Schneider, whom O'Dwyer apparently respected, told O'Dwyer in no uncertain terms that he should resign. There can be no doubt that O'Dwyer was affected strongly by the intensity of the specialists' ire. Given that Davis' statements through Wednesday were not coercive in character, it is concluded that O'Dwyer resigned because of his inability to withstand the heat from his colleagues.

The meeting of Thursday afternoon remains to be evaluated. Davis initiated the meeting. He stated that he intended to drop the matter until after the MAR Team visited the school. He reiterated that O'Dwyer should write a moderating letter to the state. O'Dwyer said that he had resigned in order to "get out of the road." Davis said that O'Dwyer's resignation was "not enough." He also said that O'Dwyer could not "make a mess and walk away from it." He further stated that he had "never lost a case" as a grievance representative of the Oakland Federation of Teachers. Any of these statements, standing alone, might be innocuous. They carry a coercive meaning, however, when viewed in their overall context. While Davis never directly threatened O'Dwyer with transfer or denial of tenure, he implied that punitive action was within the realm of probability in the event that O'Dwyer did not do "enough" (i.e., to write a letter to the state) to ameliorate the effects of the poll and letter. He implied that the matter would be raised again after the MAR Team visit if O'Dwyer did not do "enough." He implied that O'Dwyer ultimately would be the loser in any skirmish with Davis. He implied that

O'Dwyer's more minor faults--e.g., tardiness--might be less tolerated if O'Dwyer were more uncooperative. He made all of these statements with full knowledge that as of that time O'Dwyer no longer was a spokesman for JSEA.

In context, these statements constituted implied threats. The timing of the statements and their unavoidable implications show that Davis intended to threaten O'Dwyer impliedly to force him to write an ameliorating letter to the state. The statements also interfered with O'Dwyer's right to participate or not to participate in the activities of JSEA. In addition, a reasonable person in Davis' position would have realized from all of the circumstances that the natural and probable consequence of these statements would have been to threaten reprisals, restrain, coerce, and interfere with O'Dwyer. The charging party accordingly has met its burden of proof under San Dieguito, supra.

The respondent argues that San Dieguito can be read to require that a balancing test be applied in this case to determine whether a violation of section 3543.5(a) has occurred.²⁵ Citing NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465], the respondent argues that the interest of the employer should be balanced against the degree of harm suffered by the employees, and that the outcome of the case should hinge on which interest is weightier. It argues

²⁵The respondent cites to the hearing officer decision in Carlsbad Union High School District (10/27/77) Case No. LA-CE-61, as authority for this proposition.

that "employees suffered no harm or even threat of harm with respect to evaluation, discipline, transfer or discharge...", and that all Davis did was to "discuss the matter several times with O'Dwyer...." It also argues that Davis had a "legitimate and substantial business justification" for engaging in discussions with O'Dwyer, because (1) several employees complained to Davis about O'Dwyer's actions; (2) the ECE Project was controversial, and was in danger of being abolished; (3) the letter from JSEA cast the Project in a "highly unfavorable light" just before the state inspection. Since no harm was suffered and a legitimate and substantial justification existed for Davis' conduct, it is argued, no violation of section 3543.5(a) should be found.

The respondent's argument would be persuasive but for the fact that Davis went further than would have been appropriate and engaged in impliedly threatening and coercive conduct toward O'Dwyer. Davis may have been justified in engaging in non-coercive discussions with O'Dwyer over the poll and letter to the state. This is particularly true in light of O'Dwyer's position as a JSEA representative and in light of Taksa's reluctance to discuss the matter with Davis. But no "legitimate" justification existed for threatening O'Dwyer because of his exercise of EERA rights, and the harm to employee rights due to threats of reprisals and other unlawful acts is substantial.

Alleged Violation of Section 3543.5(b)

Section 3543.5(b) makes it illegal for public school

employers to deny to employee organizations rights guaranteed them by the EERA.

Section 3543.1(a) gives employee organizations the right to represent their members in their employment relations with public school employers. Section 3540.1(d) defines "employee organization" as:

... any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf. (Emphasis added.)

O'Dwyer acted as an agent of JSEA in writing the poll and letter. Whether or not all JSEA members approved of them, these activities constituted matters of "representation" contemplated by section 3543.1(a) of the EERA. It has been found that Davis threatened, restrained, coerced, and interfered with O'Dwyer in connection with these activities. However, Davis' actions on Thursday were the sine qua non of the violation of section 3543.5(a). O'Dwyer resigned from his position before the Thursday meeting. Davis knew during the Thursday meeting that O'Dwyer no longer represented JSEA. Accordingly, at the time that Davis violated O'Dwyer's rights, O'Dwyer was not acting as an agent of JSEA. JSEA's rights of representation accordingly were not impinged on by Davis' action. The alleged violation of section 3543.5(b) therefore is dismissed.

Alleged Violation of Section 3543.5(d)

Section 3543.5(d) of the Act states:

It shall be unlawful for a public school employer 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.

In Pittsburg Unified School District (2/10/78) PERB

Decision No. 47,²⁶ PERB held that section 3543.5(d) parallels section 8(a)(2) of the NLRA.²⁷ The NLRB has interpreted section 8(a)(2) to prevent employers from controlling employee organizations and to prevent employee organizations from becoming so dependent on the employer's favor that they cannot give wholehearted attention to the needs of employees; it also has interpreted section 8(a)(2) to prevent employer interference with the internal working of an employee organization. See Morris, The Developing Labor Law (1971), p. 135 et seq. The NLRB has held that section 8(a)(2) is violated when an employer engages in a competitive organizational

²⁶In Pittsburg, PERB itself summarily affirmed the rulings, findings and conclusions of the hearing officer decision in unfair practice case number SF-CE-52.

²⁷Section 8(a)(2) of the NLRA states:

It shall be an unfair labor practice for an employer ... to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

campaign (Jack Smith Beverages, Inc. (1951) 94 NLRB 1401 [28 LRRM 1199]); when supervisors participate in internal union affairs (Local 636, Plumbers v. NLRB (D.C. Cir. 1961) 287 F.2d 354 [47 LRRM 2457]); and when supervisors and executives maintain union membership and vote in internal union elections (Nassau and Suffolk Contractors Association (1957) 118 NLRB 174 [40 LRRM 1146]).

In the present case, the JSEA argues that Davis' actions toward O'Dwyer interfered with the administration of JSEA affairs, because the loss of O'Dwyer as a representative council member forced CTA to use its own staff to replace him. As a preliminary matter, the record does not show that CTA utilized its own staff to replace O'Dwyer. In any event, there is no evidence that the acts of Davis interfered with the inner workings of JSEA or its affiliates. For these reasons the alleged violation of section 3543.5(d) is dismissed.

The Appropriate Remedy

PERB has 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 reinstatement of employees with or without backpay, as will effectuate the policies of this chapter. (Section 3541.5(c).)

The charging party has requested that the remedies for the instant case include (a) an award of attorney's fees; (b) compensation for damages resulting from the loss of O'Dwyer's services and the increased workload that allegedly befell CTA; and (c) an order that the respondent cease and desist from

harassment of JSEA members.

Attorney's fees. To date, PERB has made no award of attorney's fees to parties prevailing on unfair practice charges. The NLRB has held that attorney's fees may be awarded to a charging party where the conduct of the respondent involved "clear and flagrant" violations of the law. Tiidee Products, Inc. (1972) 194 NLRB 1234 [79 LRRM 1175]; and see Tiidee Products, Inc. (known as "Tiidee II") (1972) 196 NLRB 158 [79 LRRM 1692]. A later NLRB case, Heck's, Inc. (1974) 215 NLRB 765 [88 LRRM 1049], held that litigation costs will not be assessed,

... notwithstanding that the respondent may be found to have engaged in "clearly aggravated and pervasive misconduct" or in the "flagrant repetition of conduct previously found unlawful," where the defenses raised by that respondent are "debatable" rather than "frivolous." (Emphasis added.)

The instant charges intimately involve the question of intent. There has been no strong direct evidence rendering the respondent clearly culpable. There is no evidence whatsoever that the defenses of the respondent have been "frivolous." The charging party's request for attorney's fees therefore is denied.

Compensatory damages. To permit an award of monetary damages, their occurrence must be established clearly and with certainty. See 4 Witkin, Summary of California Law (8th Ed.) 3140. In the present case, no one receiving a salary from CTA

took over O'Dwyer's responsibilities during the period after which he resigned from that body. No other damage resulting from Davis' actions was established. For these reasons, the fact of damages has not been established. JSEA's request for compensatory damages is denied.

Posting Notice of Violation. A requirement that the employer publicly post notice that it violated the EERA serves to inform employees of the disposition of this case and announces the readiness of the employer to comply with the order in this decision. See NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415, 420]. PERB itself authorized usage of the posting requirement in Placerville Union High School District (9/18/78) PERB Decision No. 69. The District accordingly is ordered in this case to post notices of violation under the terms set forth below.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ordered that the John Swett Unified School District, its board members, superintendent and agents shall:

A. CEASE AND DESIST FROM :

1. In any manner imposing or threatening to impose reprisals on, interfering with, restraining or coercing John O'Dwyer or other employees because of their exercise of rights guaranteed by the EERA;

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

1. Post copies of the Notice set forth in the Appendix, for 30 working days after this Proposed Order becomes final, at its headquarters office and in each school in conspicuous locations where notices to employees customarily are posted;

2. At the end of the posting period, notify the San Francisco Regional Director of the action it has taken to comply with this Order.

IT IS FURTHER ORDERED that the alleged violations of sections 3543.5(b) and (d) are dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on January 24, 1979 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters office in Sacramento before the close of business (5:00 p.m.) on January 22, 1979 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135). Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board

itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

* DATED: 12/29/78

Jeff Sloan
Hearing Officer

*The date of service is in the attached letter.

APPENDIX

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

After hearings in which all parties had the right to participate, it has been found that the John Swett Unified School District violated the Educational Employment Relations Act (EERA) by restraining, coercing, threatening to impose reprisals on, and interfering with John O'Dwyer because of his exercise of rights under the EERA. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT restrain, coerce, threaten, or otherwise interfere with John O'Dwyer or other employees because of their exercise of rights under the EERA.

John Swett Unified School District

By: Superintendent

Dated:

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