STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and ITS CHAPTER 512, Charging Party, v. OFFICE OF KERN COUNTY SUPERINTENDENT OF SCHOOLS, Respondent.	)	Case Nos. LA-CE-1895 LA-CE-1987
	)	PERB Decision No. 533
OFFICE OF KERN COUNTY SUPERINTENDENT OF SCHOOLS, Employer, and SUPERINTENDENT OF SCHOOLS CLASSIFIED ASSOCIATION, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and ITS CHAPTER 512, Employee Organization.	)	October 31, 1985 Case No. LA-D-143

Appearances: Harry J. Gibbons, Jr., for the California School Employees Association and its Chapter 512; Schools Legal Service by Frank J. Fekete, Dwaine L. Chambers and Carl B. A. Lange for Office of Kern County Superintendent of Schools.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: The Office of Kern County Superintendent of Schools excepts to the attached proposed decision finding

that it violated section 3543.5(a) and (d) of the Educational Employment Relations Act (Gov. Code section 3540 et seq.) when, prior to a representation election, it threatened the voting employees with economic reprisals and loss of benefits if the California School Employees Association were chosen as the employees' exclusive representative, and when it expressed a preference for another organization, namely the Superintendent of Schools Classified Association.

The Public Employment Relations Board has considered the exceptions to the proposed decision and order and, except as the order is modified herein, affirms the proposed decision and issues the following:

ORDER

Upon the entire record in this case, it is hereby ORDERED that the Office of Kern County Superintendent of Schools shall CEASE AND DESIST FROM:

1. Interfering with its employees' exercise of a free choice in an election to choose an exclusive representative for the purpose of representation in their relations with their employer by threatening the employees with loss of benefits resulting from a claimed need to "bargain from scratch," with the likelihood that the employees will have to bear the cost of some benefits not otherwise provided, with termination of the equal treatment with certificated employees now accorded the voting employees, and with economic loss resulting from the imposition by the California School Employees Association (CSEA) of service fees and union dues.

2. Encouraging the employees to join another organization, namely the Superintendent of Schools Classified Association (SOSCA), in preference to CSEA by demonstrating its preference for dealing with SOSCA and by predicting a better working relationship with SOSCA.

It is further ORDERED that:

1. The representation election conducted on March 28, 1984 is set aside and the results thereof are nullified; and

2. A new representation election shall be conducted by the Los Angeles regional director.

It is further ORDERED that the Office of Kern County Superintendent of Schools TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notices attached as Appendices A and B hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that these Notices are not reduced in size, defaced, altered or covered by any material.

2. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his instructions.

Member Morgenstern joined in this Decision. Chairperson Hesse's concurrence and dissent begins on page 4.

Hesse, concurring and dissenting: I concur with the majority in the finding that the Kern County Superintendent of Schools (Superintendent) did show preference for SOSCA over CSEA, and encouraged these classified employees to vote for SOSCA. Such encouragement is in violation of Government Code section 3543.5(d). Insofar as the Board has previously held that the proper remedy for such a violation is to order a new election,[1] I agree that the election held on March 28, 1984, must be set aside and a new election be conducted. I further urge that such election be conducted at the earliest reasonable moment. I also agree with the majority decision to not characterize the "letter of intent" as "anti-union literature."

I respectfully dissent, however, from the majority's summary affirmance of the proposed decision. While the law regarding "employer free speech" is correctly stated, I do not concur with the characterization of the content of the Superintendent's speeches, the application of the law and, thereby, the conclusions regarding those speeches.

In the instant case, the Superintendent spoke to different groups of classified employees in three sessions. At each meeting, the Superintendent began the speech with a historical "overview" of labor relations with the school employee associations. Then he discussed the decertification effort of

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[1]Clovis Unified School District (1984) PERB Decision No. 389; Sacramento City Unified School District (1982) PERB Decision No. 214.

SOSCA and the upcoming representation election. During the last portion of a prepared speech, he discussed CSEA's intent to execute a "rigid" contract and that SOSCA wished to "retain the flexibility" the parties then enjoyed. Following the speech, the Superintendent and the employer's legal counsel responded to questions from the employees concerning agency fees and the impact of employees' negotiating strategy on fringe benefits.

Contrary to the proposed decision, the Superintendent did not imply that "fringe benefits would automatically be reduced, rigidity would automatically be imposed, [or that], if the union insisted, agency shop would be the rule" if CSEA won the election. Instead, the Superintendent stated that "if the exclusive representative pushed for the adoption of a formal bargaining contract, such hard line negotiations . . . would cause us in [his] opinion to lose the flexibility" that existed. He also indicated that he believed that the local unit leadership would lose control and be replaced by the state leadership. He recited an incident that occurred when an employee of the state CSEA office disrupted a local meeting, as the basis for the local leadership proposition. He then explained that if the District was required to engage in hard line negotiations, it could not start with the "very best offer," but would have to start with something less so the District would have room to negotiate. After the Superintendent's prepared speech and in response to a question

from the audience, the Superintendent and legal counsel made an attempt to explain agency shop and the implementation of agency fees. The Superintendent stated that CSEA's original contract proposal contained an agency shop provision but that it had been withdrawn. In response to a question, the legal counsel said:

> The person up front asked some questions on — well, isn't it true that there really won't be an agency fee unless [the Superintendent] agrees upon it. That's true, but I don't think you should get the impression that [the Superintendent] can pick and choose which parts of the collective bargaining agreement he will accept and which ones he will not. When you're talking about a package, and both sides have to agree on the total package. So [the Superintendent] can't say I will not allow the agency fee. . . .
>
> Only the union and he can agree on the total package whether or not there will be an agency fee provision in that, it can only be determined after months of collective bargaining.

Thus, the legal counsel inferred that the Superintendent had some, but not total, control over agency fees.

Courts have found the following statements as predictions of possibilities or probabilities to be protected: present and future wage levels would be subject to collective bargaining should the union win the election (NLRB v. TRW-Semiconductors, Inc. (9th Cir. 1967) 387 P.2d 753); bargaining would have to begin from the zero point (Bendix Corp. v. NLRB (6th Cir. 1968) 400 F.2d 141); unionization would create greater rigidity in personnel relationships (NLRB v. Golub Corp. (2d Cir. 1967) 388 F.2d 921).

In the seminal case involving employer free speech, NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 405], the United States Supreme Court held employers enjoyed the First Amendment right of free speech and afforded protection to non-coercive communications. In NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481], the United States Supreme Court analyzed the parameters of employer free speech. Again, basing such right on First Amendment principles, the court held:

> Thus, an employer is free to communicate to his employees any of his general views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise events he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . As stated elsewhere, an employer is free only to tell "what he reasonably believes will the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own violition [sic]. Id., 395 US at 618 [71 LRRM at 2497] (Citations omitted.)

In NLRB v. Lenkurt Electric Co. (9th Cir. 1971) 438 F.2d 482 [76 LRRM 2625], the Court of Appeals reviewed statements made by the plant manager two weeks prior to a representation

election[2] and found the statements to be within the

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[2]The court made the following findings:

> [The manager], Linka suggested that if the employees were to unionize, it was possible that a more strict regimentation of working hours would be implemented. He explained that under the present working conditions, company policy with respect to coffee breaks, lunch hours and conversation while working had been fairly casual in the printing department, while in the unionized departments of the plant the employees were strictly controlled as to coffee breaks, lunch hours and general attention to their labors. Linka further explained that if these employees were unionized, and the basis of their compensation changed from monthly salary to the hourly rates which were the basis for compensation of other union employees in the plant, a more strict observance of working time would probably result. These observations were based largely on Linka's own observations when other employees in the plant were unionized and had gone to an hourly basis of compensation.
>
> Linka further suggested that working conditions might be made more difficult by unionization because the Company might seek to reduce operating costs by using less expensive paper stock in the printing department. He explained that while the employees usually worked with "premium stock" paper, that if it were necessary to reduce costs he would probably introduce lower quality stock, which might cause more problems for the operators of the various machines.
>
> In the course of the meetings, Linka also stated that sick leave and other fringe benefits, particularly the company's policy of providing working smocks and laundry service to the employees, might be changed by unionization. (Emphasis added.) (Id., at p. 2627.)

protection of the First Amendment and section 8(c) of the National Labor Relations Act.

While EERA does not contain free expression language similar to section 8(c) of the NLRA, in a prior case, the Board indicated that "such a guarantee is implied" in the EERA. (Muroc Unified School District (1978) PERB Decision No. 80.) Later, in Rio Hondo Community College District (1980) PERB Decision No. 128, the Board held that public school employers are entitled to express their opinions regarding employee associations, unless the statements contain threats and interfere with the employees' free exercise of EERA rights.

The Superintendent's speeches described the realities of hard bargaining. In a hard bargaining situation, if the union's wage demands are high, an employer may be required to make financial cuts elsewhere in order to reach agreement. The employer may reduce the expenditures for insurance premiums and increase employee insurance premium contributions to accommodate a wage demand. In a different situation (in a less "charged" atmosphere) the employer can guarantee that it will continue to fully fund fringe benefits, because it has more flexibility to make adjustments to its salary proposals. While the statements may put contract negotiations in a harsh light, I do not find that the statements rise to the level of being a threat. That the speech was critical of CSEA's position does not mean that it is unprotected. (Rio Hondo Community College District, supra.)

Further, no recognition has been given to the timing — these speeches occurred three weeks prior to the election. Similar statements have been found to still be protected even though the statements were made to employees only two weeks prior (Lenkurt, supra) and one week prior to the elections. (International Filling Co. (1984) 271 NLRB No. 213 [117 LRRM 1252].) Three weeks was plenty of time for CSEA to respond to the Superintendent's statements.

The majority finds these speeches contained threats and interfered with the employees' exercise of protected rights. When compared with similar statements that courts have found acceptable, I find the Superintendent's remarks did not constitute threats or interfere with protected rights. Indeed, by this decision today, the majority is interfering with the employer's right of free speech.

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 Cases LA-CE-1895 and 1987 California School Employees Association and its Chapter 512 v. Office of Kern County Superintendent of Schools, in which all parties had the right to participate, it has been found that the Office of Kern County Superintendent of Schools violated section 3543.5(a) and (d) of the Educational Employment Relations Act by interfering with the employees' right to freely choose their exclusive representative. As a result of this conduct, we have been ordered to post this Notice and we will abide by the following. We will:

CEASE AND DESIST FROM:

1. Encouraging employees to join a particular organization, specifically, the Superintendent of Schools Classified Association, in preference to another, specifically, the California School Employees Association and its Chapter 512.

2. Interfering with the employees' exercise of a free choice in an election to choose an exclusive representative for the purpose of representation in their relations with the Office of Kern County Superintendent of Schools by threatening the employees in the event that the California School Employees Association should be elected as the exclusive representative of the classified employees with:

a) loss of benefits and the likelihood that the employees will have to bear the cost of some benefits not otherwise provided, and,

b) the loss of treatment equal to that afforded the certificated employees, and

c) economic loss resulting from the imposition of service fees and union dues by the California School Employees Association.

Dated:_____ OFFICE OF KERN COUNTY
SUPERINTENDENT OF SCHOOLS

By_____
Authorized Representative

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

APPENDIX B

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 Cases No. LA-CE-1895 and 1987, California School Employees Association and its Chapter 512 v. Office of Kern County Superintendent of Schools, in which all the parties had the right to participate, it has been found that the Office of Kern County Superintendent of Schools denied employees the opportunity to exercise free choice in the representation election held on March 28, 1984.

The Public Employment Relations Board has, therefore, ordered that the results of that election be declared invalid and a new election shall be conducted by the Los Angeles regional director of the Public Employment Relations Board.

Dated _____ OFFICE OF KERN COUNTY
SUPERINTENDENT OF SCHOOLS

By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (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

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #512, Charging Party, v. OFFICE OF KERN COUNTY SUPERINTENDENT OF SCHOOLS, Respondent.	Unfair Practice Case Nos. LA-CE-1895 LA-CE-1987
OFFICE OF KERN COUNTY SUPERINTENDENT OF SCHOOLS, Employer, and SUPERINTENDENT OF SCHOOLS CLASSIFIED ASSOCIATION, Employee Organization, and CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Employee Organization.	Representation Case No. LA-D-143 PROPOSED DECISION (1/31/85)

Appearances; Harry J. Gibbons, Jr., Attorney for the California School Employees Association and its Chapter #512, Frank J. Fekete, Attorney, Carl B. Lange, III (Schools Legal Service), for Office of Kern County Superintendent of Schools, and Bob Meadows, President, for the Superintendent of Schools Classified Association.

Before Barbara E. Miller, Administrative Law Judge.

I. PROCEDURAL HISTORY

LA-CE-1895

On December 14, 1983, the California School Employees Association and its Chapter #512 (hereinafter Charging Party or CSEA) filed an Unfair Practice Charge against the Office of the Kern County Superintendent of Schools (hereinafter Respondent, Office or Employer). In its charge, CSEA alleged various violations of sections 3543.5(a), (b), and (d) of the Educational Employment Relations Act.[1] Pursuant to the practices and procedures of of the Public Employment Relations

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[1]The Educational Employment Relations Act is codified beginning at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references are to the Government Code.

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

> 3543.5. UNLAWFUL PRACTICES: EMPLOYER
>
> 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.

Board (hereinafter PERB or Board) the case was assigned to a representative from the Office of the General Counsel for purposes of investigation. Thereafter, CSEA amended its Charge and on February 10, 1984, a Complaint was issued.

The Complaint alleges that the Respondent, acting through one of its supervisors, interfered with and/or coerced specifically mentioned bargaining unit employees by circulating a "letter of concern" and by urging employees to sign that letter of concern which casts aspersions on CSEA.

After issuance of the Complaint, the Respondent filed an Answer denying the allegations. Thereafter, an informal conference was scheduled and conducted. When the parties were unable to resolve their differences, the matter was scheduled for formal hearing.

Prior to commencement of the formal hearing, CSEA sought to amend the Complaint to incorporate allegations relating to Respondent's conduct prior to a decertification election. Subsequently, at the request of PERB, the Charging Party withdrew its request to amend the Complaint in the instant case and instead filed a different unfair practice charge identified as Case No. LA-CE-1987. In the interest of efficiency, the current case was taken off calendar.

Ultimately, the current case was consolidated with Case No. LA-CE-1987 and Case No. LA-D-143 (R-746) for the purpose of formal hearing and decision. A pre-hearing conference was

scheduled and held via telephone conference call on July 9, 1984, and a formal hearing was conducted on July 17, 18, and 19, 1984, in Bakersfield, California. During the course of the formal hearing, based upon the evidence presented, the Complaint in Case No. LA-CE-1895 was amended by the undersigned and served upon the parties who were given an opportunity to respond to the allegations contained therein.

At the close of the formal hearing it was agreed that the parties would file simultaneous briefs which were timely filed and received on September 7 and September 11, 1984. Thereafter, at the direction of the undersigned, each party was given an opportunity to respond to the issues and arguments raised in the brief of its adversary. Reply briefs were timely filed on October 1, 1984, at which time the case was submitted for proposed decision.

LA-CE-1987

On May 14, 1984, CSEA filed an unfair practice charge against the Office alleging violations of sections 3543.5(a), 3543.5(b), and 3543.5(d). As background information, the charge alleged that on or about November 29, 1983, an organization entitled Superintendent of Schools Classified Association (hereinafter SOSCA) filed a petition with the PERB seeking to decertify CSEA.[2] Thereafter, on or about March 7,

[2]The [2] The decertification petition began circulating on or about November 29, 1983, but was not filed with the PERB until December 30, 1983.

1984, the Superintendent conducted a meeting for all employees at which time he spoke against CSEA and urged employees to vote for SOSCA. An investigation was conducted in conjunction with the investigation of Case No. LA-D-143 involving objections to the election, and on May 30, 1984, a Complaint issued.

On June 21, 1984, the Respondent filed its Answer variously admitting and denying the allegations set forth in the Complaint. In its Answer, the Respondent specifically alleged that the Superintendent was exercising his right of free speech, but in any event, at no time did he show preference for one organization over another. Moreover, the Respondent alleged that the Superintendent had made his speech long before the decertification election and that CSEA had ample time to refute any alleged misstatements of fact made by the Superintendent.

On or about June 28, 1984, CSEA filed a proposed amendment to its unfair practice charge alleging that the Superintendent made not one but three speeches to employees at which time he showed preference for SOSCA. The proposed amendment further alleged that Bob Meadows and Kathy Freeman, both SOSCA activists and organizers, were supervisory employees within the meaning of the EERA. At the pre-hearing conference conducted on July 9, 1984, the Charging Party was advised that its proposed amendment was deficient in several respects and, thereafter, the Charging Party filed a proposed second

amendment wherein it alleged additional facts amplifying the allegations set forth on June 28. On July 11, 1984, the proposed amendment was accepted and incorporated by reference into the Complaint.

In conjunction with Case No. LA-CE-1895, the hearing was conducted on July 17, 18, and 19, 1984, and the case was ultimately submitted for proposed decision on October 1, 1984.

Case No. LA-D-143 (R-746)

The decertification election in which SOSCA received a majority of votes was conducted on March 28, 1984. Thereafter, on April 6, 1984, CSEA filed objections to the results of the election alleging that the employer's conduct prior to the election interfered with the employees' rights to freely choose a representative. The only conduct complained of was the Superintendent's speech to employees on March 7, 1984. In conjunction with Unfair Practice Charge No. LA-CE-1987, an investigation was conducted and the Board agent determined that a hearing should be held on the merits of the objections. The case was heard on July 16, 17, and 18, 1984 in Bakersfield, California and on October 1, 1984 it was submitted for proposed decision.

II. FINDINGS OF FACT

The California School Employees Association (CSEA) is an employee organization and the Office of Kern County Superintendent of Schools is an employer as those terms are defined in the EERA. The Office of Kern County Superintendent

of Schools employs approximately 650 individuals, 340 of whom serve in classified positions. The administrative offices of the Respondent are primarily located at 5801 Sundale Avenue in Bakersfield in what are commonly referred to as Building A (the Main Building) and Building B. There are approximately 200 work stations in Building A, more than one-half of which are staffed by classified employees in clerical positions. Building B is a smaller facility containing three or four departments including special education, legal services and migrant education. Approximately five miles from Buildings A and B is the School Service Center which is composed of three parts: the Warehouse, the Transportation Building, and the Maintenance Building. Approximately one-half mile from the School Service Center is the Blair Learning Center, wherein some office employees, cafeteria employees, and instructional aides are employed. In general, the Respondent's jurisdiction covers a large geographic area, and on occasion, classroom facilities have been separated by as much as 120 miles. Written communications such as interoffice mail, staff mail and United States Mail are delivered, usually on a daily basis, to the various work stations of the Respondent.

On September 13, 1976, CSEA was voluntarily recognized by the Respondent as the exclusive representative of a unit comprised of classified employees of the Office. As of the

date of these unfair practice proceedings, no collective bargaining agreement had been executed by the parties.[3] Prior to the events outlined in this proceeding, CSEA had never sought to negotiate such an agreement.

The record reflects that SOSCA is an employee organization as that term is defined in the EERA and that SOSCA was formed on or about November 29, 1983. On December 30, 1983, SOSCA filed a decertification petition with the PERB and on January 23, 1984, a Regional Representative determined that the decertification petition was timely filed and the proof of support was sufficient pursuant to the requirements of section 32770(b)(2) of the California Administrative Code, title 8, part III. SOSCA, CSEA, and the Office entered into a consent election agreement and a predominately on-site decertification election was conducted on March 28, 1984. The tally of ballots from that election reflects that there were 336 eligible voters in the representation unit: 161 voted for SOSCA, 96 voted for CSEA, 10 cast votes for no representation, and there were eight (8) challenged ballots.

LA-CE-1895

Origination of Letter of Concern

Sometime during the fall of 1983, the leadership and membership of CSEA Chapter No. 512 voted to draft a proposed collective bargaining agreement and determined that the

[3]By stipulation of the parties.

agreement would be presented at a CSEA meeting to be conducted on November 17, 1983. All classified employees, whether or not members of CSEA, were urged to attend that meeting.

Tina Pesante is a classified employee of the Office of Kern County Superintendent of Schools and serves in the position of Account Clerk II; she has been employed by the Respondent for 13 years. According to her testimony, from her perspective, CSEA never had a strong position in the Office and had never really made a contribution vis a vis the benefits afforded Office employees. Pesante was definitely opposed to CSEA's attempt to negotiate a collective bargaining contract with the Office.

Along with several colleagues, she determined that a letter should be written to CSEA expressing her sentiments and the letter should be circulated to determine if others shared her views. Basically, she discussed the matter with friends during her coffee breaks. Thereafter, on or about November 16, 1983, she and Mary Simms, an Account Clerk III, sat down and composed a letter.

Simms typed up the letter, referred to in these proceedings as "the letter of concern" which, despite its length, is set forth in its entirety, because of its message:

> Employees of the Kern County Superintendent of Schools Office receive benefits equal, if not superior to, any other public agency in the State. These benefits are paid by the

Kern County Superintendent of Schools Office with no contributions from employees. Unlike most school districts, we have not been placed in a position of negotiating increased costs for the benefits we receive.

We have always had a very close working relationship with Dr. Richardson and Dr. Blanton in regard to employee/employer matters.

During the recent money shortage situation, not one classified employee was laid off or fired. This is contrary to the common practice of school districts. Classified employees are more easily and quickly dismissed than certificated employees. In the recent reduction of positions in the office due to financial difficulties, no more classified positions were reduced than certificated positions.

CSEA, Chapter 512 is asking that its members draft a collective bargaining agreement proposal to be presented to the administration. Since the law and the merit system provide specific and detailed guidelines on employee rights, it is assumed that a collective bargaining agreement proposal would cover potential salary increases and fringe benefits.

While the merit system is sometimes hard to understand and sometimes hard to implement, it does provide more protection for employees than any other negotiated contract in the schools system.

Since our office currently possesses one of the best fringe benefit programs for employees, would it not be extremely harmful to re-negotiate these benefits. By re-negotiating a "good thing", employees could find themselves faced with the possibility of paying all or a part of increased premium costs.

CSEA has never contributed a thing toward building the tremendous job security we presently have, toward building the

> competitive salary schedule we presently have, nor the tremendous fringe benefits we presently have.
>
> There is an old saying: "If it is not broken, don't fix it." The only possible thing that classified employees could gain from changing our present policies of representation for employees is confrontation, conflict, controversy and divisiveness with the possibility that we could become the big loosers [sic] in the end.
>
> It is not right that a few (40) employees should take it upon themselves to change what is so important to so many with less than three days notice and without giving the other approximately 300 classified employees a chance to express their views.

Simms brought the letter to work with her the next day, distributed one of several copies to Pesante and, apparently due to a fairly effective communication or "gossip" network, various members of the bargaining unit knew of the letter's existence and either picked up copies from Pesante or Simms, or, although the record is not entirely clear, perhaps received a copy through interoffice mail. At the end of the day, copies were returned to either Pesante or Simms who took them to the CSEA meeting that evening.

Alan Hall and Distribution of the Letter

Alan Hall is employed by the Respondent as the Supervisor of Maintenance and Operations. He has been in that position since June 16, 1980, and supervises between 20 to 22 employees. There is an employee lounge in the Maintenance and

Operations Building and ordinarily, each morning before beginning work, Hall and the employees he supervises meet and discuss work orders; some employees also congregate in the lounge during lunch and break time and frequently they again meet in the evening.

On and before the morning of November 17, 1983, the employees discussed the fact that a letter would be arriving concerning the quality of CSEA's representation and its proposed collective bargaining agreement. Although the testimony is not entirely clear, it is found that on previous occasions, Alan Hall did participate in discussions regarding CSEA as the exclusive representative of the classified employees. In at least one of those meetings, Hall expressed his opinion that there should be "an alternative" to CSEA.[4]

According to the testimony of Duane Haskins, on the morning of November 17, 1983, Mr. Hall and other employees were engaged in a discussion regarding the letter that would be coming about CSEA. Haskins indicated that when it arrived, he would appreciate it if Hall would bring it out to his work location at the Blair Learning Center. Hall agreed. Hall testified

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[4]Hall testified that he liked to consider himself one of the "boys" and it is found that camaraderie with his subordinates was something he valued highly. Accordingly, it is not surprising that, notwithstanding his supervisory status, prior to the filing of the instant case, he freely engaged in conversations touching upon subjects of concern to rank and file members of the bargaining unit.

that he was not certain when or how the letter of concern arrived, although he recalled seeing it on a table in the lounge.

When first examined, Hall indicated that he did not read the letter. Sometime thereafter, however, he admitted that he did read the letter, and when a copy of the letter was produced pursuant to a subpoena duces tecum, it was revealed that Alan Hall's signature was the first signature following the text of the letter. Other employees, such as John Rowe, Gregory Fullmer, and Wayne Roberts, had also signed the document. Fullmer and Rowe were called as witnesses for the Charging Party. As with other witnesses, they were unable to be precise as to when and under what circumstances they had signed the letter of concern and when and under what circumstances they had signed the subsequently circulated decertification petition. Rowe did testify that with one document, Alan Hall brought it into the room and said words to the effect, "here it is, read it and sign it if you want."[5] Fullmer did not recall if Hall was present when he signed the letter of concern

[5]Rowe thought that the document carried in by Hall was the decertification petition. It is found, however, that the document was the letter of concern. Rowe said that after the document he signed left the maintenance division, it was taken over to the warehouse. The signatures following those of the maintenance workers on the letter of concern are indeed those of warehouse workers. Whereas, the decertification petition which Rowe signed does not contain signatures of any warehouse workers whose signatures appear on a different petition entirely.

and he was not questioned as to whether Hall might have brought it into the room; he just recalls it being there.

Apparently, sometime after those employees signed the document, Hall, during working hours, drove out to the Blair Learning Center. He and Haskins both testified that he needed to check on a sprinkler valve problem. In accordance with Duane Haskins[1] request that he be given an opportunity to review the letter of concern, Hall gave the document to Haskins and asked him if he wanted to read it and if he wanted to sign it. After reading the document, Haskins did in fact sign it. Haskins, upon questioning by the undersigned, specifically testified that he was not on a break when he received and signed the document.

During Hall's visit to the Blair Learning Center, two other employees, Allen Garbett and Robert Salazar, were also present. When Hall came up to speak with Haskins, Garbett and Salazar also approached. Hall inquired as to whether or not they wanted to read the letter and when they responded that they were CSEA members and were not interested, they were told to return to work and asked if they didn't have something to do.[6]

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[6]Hall testified that he asked Garbett and Salazar if they didn't have something to do before they were asked if they wanted to read the letter. Haskins' testimony only references the inquiry as to whether the employees wanted to read the letter. Although it might be argued that Hall's testimony is uncontroverted, it is inherently difficult to accept his

Based upon the testimony of John Rowe and the placement of signatures on the letter of concern, it appears that after the document circulated in the maintenance division, it was taken over to the warehouse. Kathaleen (Kathy) Freeman testified that she received the document in interoffice mail, signed it, and passed it on to a woman who works in close proximity, Jenna Davis. In light of the testimony proffered by the authors of the document, it only circulated for one day. Accordingly, Freeman's testimony that she received it in interoffice mail from Tina Pesante, which is delivered only once daily, is somewhat discounted.[7] There is no evidence, however, that Alan Hall was either directly or indirectly involved in the movement of the letter of concern from the maintenance division over to the warehouse.

Nevertheless, it is found that Alan Hall knew that the letter of concern was at the warehouse. Mark Underwood, who

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(6 Cont'd)testimony that he ordered them back to work and then asked them if they wanted to read the letter. In any event, a credibility determination is not essential since Hall admitted that even though they were on work time, if they wanted to read and/or sign the letter, he would have given them the opportunity to do so.

[7]Generally, Freeman's testimony regarding the letter of concern is discredited. In addition to stating she received it in interoffice mail, she testified that Davis and Laddaga signed it after she did and there were only three signatures on the document when she personally returned it to Building A at the end of the workday. The record reflects, however, that Davis did not sign the document signed by Freeman and that there were probably at least ten signatures on the document when Freeman turned it in.

worked under Hall's supervision for three and one-half years, testified that while he was doing some work on the north side of the warehouse, getting ready to take his break, Alan Hall told Underwood and Joe Riehl[8] to stop by Kathy Freeman's office because "she had something up there that she wanted [us] to look at."

Underwood signed the document and noticed others who had signed before him, but he testified that he really did not read the letter of concern. Underwood described himself as the only CSEA supporter in the maintenance unit and he did not want to be the odd-man-out with either Alan Hall, with whom he did not have a good relationship, or his other co-workers.

The only other testimony which touched upon Alan Hall's involvement in the circulation or promotion of the letter of concern was offered by Joyce Bussell. Bussell, whose immediate supervisor is Alan Hall, works in Building A, not in an office in the maintenance facility. Bussell testified that sometime in January she was called into the office of the Director of Research and Development, Dr. Jack Stanton. Bussell testified that Hall was present and that Stanton handed her a document and asked her to read it. She said she would not sign something like that without talking to CSEA and,

[8]This name incorrectly appears as Rieho in the transcript.

according to her testimony, by her tone it was clear that she did not wish to discuss the matter further.

When called to testify, Stanton himself stated he did not recall any such incident taking place, although the phrase "if it is not broken, don't fix it," from the letter of concern looked familiar. The testimony of Bussell, however, is credited. She could not identify with precision the document given to her by Stantion. However, she testified that the document did not contain the word "decertified" and that she simply reached the conclusion that that was the intention of the authors of the document. That description is more consistent with the letter of concern. Moreover, Bussell testified that Stanton had approached her, after she was subpoenaed to testify at the unfair practice hearing, and had told her that the document she had been shown was a letter of concern and not a petition.

Case No. LA-CE-1987 and Case No. LA-D-143

Events Following Circulation of the Letter of Concern

By the end of the day on November 17, 1983, numerous copies of the letter of concern, with signatures, were returned to either Mary Simms or Tina Pesante. Simms, Pesante, and other interested individuals attended the CSEA meeting scheduled for that evening. The authors and supporters of the letter of concern attempted to present copies of the letter and

signatures to CSEA, but the leadership refused to accept their presentation.

Thereafter, the authors of the letter of concern wanted to talk about the substance of CSEA's contract proposal. Tina Pesante testified that Jeffrey Heinz, a CSEA field representative, first spoke in generalities but then began reading the specific provisions of the contract. For reasons which were not set forth, Pesante and her colleagues left the CSEA meeting early. The following day, however, they received and reviewed a copy of the contract proposal, and, in Pesante's opinion, Heinz had left out relevant specifics contained in the contract.

Pesante testified that she was dissatisfied with the way she and her associates had been treated at the CSEA meeting. Her sentiments were echoed by other witnesses. Accordingly, their initial reaction was to launch a campaign to get rid of CSEA. Sometime thereafter, she and her colleagues re-evaluated the situation and decided that CSEA should be replaced by something. Accordingly, the Superintendent of Schools Classified Association, or SOSCA, was formed. In summary, the employees disenchanted with CSEA attended a CSEA meeting on November 17, 1983. On November 18, 1983, they spoke to representatives from PERB about decertifying CSEA and sometime thereafter, during the next week, SOSCA was formed.

Although no witness could be precise about the timing of the events described above, the testimony is uncontroverted that a meeting was held at the house of Kathy Freeman to discuss employee opposition to CSEA and a meeting was conducted with Mary Simms, Tina Pesante, and Bob Meadows at Patriot's Park to discuss the decertification petition. After those various meetings, Mary Simms, Tina Pesante, and Diane Steward, composed the decertification petition and circulated it throughout the District. Several weeks thereafter, a decertification petition was circulated with a cover letter which bore the signature of Bob Meadows, Mary Simms, Tina Pesante, and others. The cover letter, apparently sent to all employees, set forth the tenor of the decertification campaign. The basic arguments set forth in the cover letter may be summarized as follows:

1. Of the approximately 300 eligible employees of the Office, only 40 are CSEA members and only a two-thirds majority of those members is required to determine the fate of Office employees;

2. In the past, the Superintendent has provided benefits to Office employees at no cost. If the benefits are to be negotiated, it will result in increased costs to employees;

3. Office employees have fringe benefits "equal, if not superior to, any other public agency in the state." If CSEA

can be prevented from negotiating a contract, the employees would continue to receive (a) medical coverage for employee and family members; (b) dental coverage for employee and family members; (c) vision coverage for employee and family members; (d) $50.00 life insurance policy for each employee; and (5) two non-discretionary personal necessity days per year for each employee;

4. The Office has not laid off any employees as was the practice in other school districts;

5. The merit system provides adequate protection and the employees do not need a negotiated contract;

6. SOSCA would represent all employees in the Office; and

7. CSEA charges $11.00-$14.00 per month and only $.50 remains at the local level.

The items listed above continued to be issues throughout the decertification campaign, although SOSCA did expand upon its position and indicated that if SOSCA became the exclusive representative of "all" employees, the expense to each employee would be $5.00 per year and would be collected "for local expenses only." Moreover, SOSCA indicated that the Superintendent had been open and fair with his employees and that it was important to keep communication lines open.

In its campaign literature, CSEA questioned the experience of the SOSCA leadership and highlighted the fine benefits which employees were able to receive if they were members of CSEA.

Those benefits included, but were not limited to, an accidental death insurance policy, on the job liability coverage for every member, voluntary insurance programs at group rates, criminal attorney reimbursement, and off-the-job legal advice and referrals. CSEA also highlighted the "fact" that CSEA had been responsible for the legislation set forth in the Education Code which directly governs and protects classified employees. Moreover, CSEA emphasized that it had the experience and the legal expertise to fully and adequately represent members in the bargaining unit, whereas SOSCA lacked that expertise or experience.

In the midst of the election campaign, SOSCA notified all classified employees that a meeting would be held on February 7, 1984 at 5:15 in Respondent's board room for the purpose of discussing the progress of the decertification process and also in order to discuss by-laws of SOSCA and the election of representatives from a number of employee groupings. Participation from all groups of employees was encouraged.

The SOSCA meeting was convened as scheduled. It was attended by Joe Vargas, a regional representative from CSEA. As the meeting was about to begin, Vargas was asked to leave and did so. A new CSEA field representative, however, Joel Baldwin, stayed and represented that he was an employee of the District. According to a letter from Vargas dated February 10,

1983,[9] and testimony of witnesses at the meeting, as a result of Baldwin's presence and his comments, the meeting was totally disrupted. Baldwin apparently failed to disengage from debate even when asked to do so by local leadership of CSEA. In his letter, Vargas indicated that the local CSEA chapter was in control and would not tolerate such behavior in the future.

The incident involving Joel Baldwin bothered some managers and some rank and file employees. For example, after the February 7 SOSCA meeting, Mary Simms, an organizer and officer of SOSCA, met with Kelly Blanton, Associate Superintendent, and complained of Baldwin's conduct. Simms, however, could recall no specific reactions made by Blanton to her complaints. The Superintendent was also "concerned" about the February 7 SOSCA meeting which had been brought to his attention via the Office's unofficial communications network or grapevine.

In a letter to Fran Kreiling, then Regional Director of the Los Angeles Regional Office of the PERB, the Superintendent indicated that he had received reports from a number of classified employees which had been verified by his own investigation. He indicated that he was outraged by Mr. Baldwin's false representations and that he would "not tolerate any person attempting for any reason to impersonate a member of my staff." The Superintendent further indicated as follows:

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[9]The letter from Vargas was written to members of CSEA and classified employees.

> It is obvious to me that Mr. Baldwin's conduct was directly related to the pending decertification process and must be attributed to the statewide union which employs him.

Moreover, the Superintendent requested advice from the Regional Director as to what action, if any, his office could take with respect to Mr. Baldwin's conduct. In other words, the Superintendent inquired whether or not the action was protected under the EERA and whether or not an unfair labor practice charge could be filed against Mr. Baldwin and his employer, CSEA. Copies of the Superintendent's letter were sent to representatives of CSEA and SOSCA.

The Superintendent's Speeches

On March 7, 1984, the Superintendent spoke to a group of assembled employees at 8:15 a.m. in the Office's board room. He again spoke to an assembled group of employees on that day at 10:25 a.m. at the Blair Learning Center. A similar speech was made to a different group of employees on March 8, 1984, again in the Office's board room. All employees were required to attend one of the three meetings. In his testimony, the Superintendent was uncertain as to what type of transportation had been provided for those employees working in outlying areas.

According to the Superintendent, he had an outline of his speech at each presentation and he gave approximately the same speech three different times. Each speech was followed by a question and answer session at which time the Superintendent's

legal counsel, Frank J. Fekete, and other management personnel were available to respond to inquiries from the employees. The purpose of the meeting was to discuss the question of "classified employee union representation for bargaining purposes." In each speech, the Superintendent attempted to give the attendees an overview or a historical perspective.

In that segment of his speech, the Superintendent summarized that the Rodda Act had been passed in 1976 and that thereafter the District had recognized CSEA as the exclusive bargaining representative for classified employees and CTA as the exclusive representative for certificated employees. From 1976 until the time of his speech, the Superintendent indicated that his office had an informal negotiating relationship with each of the two employee organizations representing the Respondent's employees. Two or three times a year, the representatives of the respective groups would meet with management and salary adjustments and benefits would be worked out on an informal basis.

The Superintendent then recounted that CSEA indicated that it was going to seek a formal contract and that in response some employees had expressed their opposition. Nevertheless, CSEA had pursued its desire to have a formal contract and in fact its initial proposal was being processed through the sunshining provisions of the Act at the time of his speech.

The Superintendent then noted that Office employees who were opposed to CSEA's proposal had formed another union and indicated that they did not want CSEA to represent them. He identified the organization as SOSCA and indicated that they had been successful in acquiring the requisite number of signatures to call for a decertification election. The Superintendent continued his speech explaining what the procedures would be for the election, how employees would be transported and the fact that certain employees would receive mail ballots.

In each of his speeches, the Superintendent then shifted to a description of the nature of the relationship his office had had with employee organizations up to then. He stated:

> [U]p to now, we have met the administration and employee groups on a regular basis with both CTA representatives and CSEA representatives to discuss salary adjustments and employee benefits. Out of those meetings, over the years have come the benefits which we now enjoy. Now historically, we have made salary adjustments and have provided benefits in the same manner to all groups of employees. We have not made the distinction between certificated or classified, between supervisory or management or confidential. We have offered the same salary adjustments, the same fringe benefits to all employees. We've treated them all equally. Our relationships, like this, have been essentially the same for the 25 years that I've been working for the Office of the Kern County Superintendent of Schools . . . . And I have to say in all those negotiations and meetings and working relationships, most of the major proposals for salary adjustments, for fringe benefits have come from either the administration or CTA.

> Now regardless of the election outcome, I will continue to deal with CTA and with management the same as we have in the past. This election concerns only classified employees and the relationship we have with them. Now the manner in which I am able to deal with classified employees will be determined by how you vote in the election, meaning classified employee's. (Emphasis added.)

The Superintendent then indicated that he was going to shift the focus of his speech and stated:

> Now up to this point, I've been trying to relate factual things to you. Beginning now I'm going to start expressing some of my own personal opinions as well as add some more facts. I am emphasizing my right of free speech by the law to say what I think, please understand that I am not attempting to impose my views on you in any way. I am sharing with you. I have no wish to interfere with your right to vote as you choose to vote, I am also responding to a number of questions that have been asked me over and over the last few weeks, what do you think about all this. One thing I think is that I will not permit anyone, either group, to gain advantage by using false or misleading information.
>
> . . . .
>
> Now, no one in a supervisory, administrative or management position can coerce you to vote in any manner. I do not believe that any of our supervisors have tried to do this. But I have asked them specifically to not use their supervisory position in any way to influence anybody in a classified position to vote in a particular way.[10]

[10]The Superintendent testified that early in 1984, after the filing of Case No. LA-CE-1895, he conducted meetings with most supervisory and management employees and told them that although he didn't believe Hall had done anything inappropriate, they should be cautious.

The Superintendent then went on to describe the three alternatives that would appear on the ballot: no representation; CSEA; or SOSCA. With respect to "no representation," the Superintendent was quite negative. He indicated that management would have no one group with which to deal and that opposing groups would continue to vie for leadership and for the right of exclusive representation. He stated "I believe that we would have continued confusion and dissension, some of which we are experiencing right now."

On the other hand, the Superintendent indicated that a vote for CSEA would retain CSEA as the exclusive representative and, based upon what he had seen and heard, CSEA would continue to "push" for a collective bargaining agreement. He stated that a collective bargaining agreement proposal would require hardline negotiations and would result in the loss of flexibility and the destruction of the former relationship that his office had shared with the classified employees. "That relationship would be replaced with a rigid contract." The Superintendent went on to indicate that local control of the employee organization would be lost and local leadership would be replaced by CSEA's state leadership. In describing what he meant by a loss of control, the Superintendent noted that he had talked to the Union's chapter president who had tried to assure him that nothing would change but then he had gone and read the contract and he noted:

> I can't believe that she has read that proposal thoroughly and she thinks it does not change anything. Because the contract calls for a radical restructuring of the relationship between the administration and classified employees, and it calls for a radical change, which in my opinion, would be detrimental to both sides.

As a second example of the loss of local control, the Superintendent told the assembled employees about the meeting which Joel Baldwin had allegedly disrupted. The Superintendent quoted certain sections of Vargas[1] letter to all classified employees, but failed to quote or relate that Vargas had indicated that the local leadership would determine what role, if any, Baldwin played in the future.

Finally, in this segment of his speech, the Superintendent described his understanding of what a vote for SOSCA would mean. He stated as follows:

> [T]his is all based on what I have heard and what I have seen and what I have experienced. A vote for SOSCA would be to retain the flexibility that we have enjoy[ed] to retain the ability to treat all groups the same, to retain local employee control of the bargaining unit. I know all of the local leaders of SOSCA and as you probably know them too, and you know what their values are, what their ideals are and they are all local, they are not from San Jose, they're not from Fresno, they're from Kern County.

At that point, in each of his speeches, the Superintendent added some brief comments on the state of his health and then he proceeded to take questions from those in attendance.

Although the questions differed somewhat in each presentation made by the Superintendent, some common threads can be discerned in each of the question and answer sessions. For example, in each session a question was asked which led the Superintendent to respond that the District would have to engage in hardline negotiations. In explaining that position, the Superintendent indicated that he could not go into negotiations with his best offer, that he did not know where negotiations would end up, and, accordingly, there would be no guarantees that employees would reach the benefit level under contract negotiations that they might reach if matters were left to the informal and flexible process then in place. In his second speech on March 7, 1984, the Superintendent stated:

> Now I think the last part of your question had to do with where would be if we go - if we go into contract negotiations, where would be in relationship to that with which we already have. I think we wouldn't go back to ground zero. On the other hand, the office would make a counter proposal and I can guarantee it is not going to be as good as - we can't start out in negotiations - we can't start with our very best offer and go up from there. We have to start out low and negotiate up from there. In hard-line negotiations we don't really have a choice and so I would have to say - if we do get into a contract with any of our crew that we would have to start with less than what we now have as a counter-proposal and negotiate from there. (Emphasis added.)

During that same speech, another representative of management, not identified on the transcripts or identifiable

on the tape recordings in evidence, stated that if those in attendance had read the newspapers they would know that in other districts where there is bargaining with an exclusive representative, employees no longer get increased insurance premiums picked up automatically.

During that same session, the Superintendent was asked if there was a possibility that employees might have to pay for their benefits if SOSCA were elected. The Superintendent responded as follows:

> I can't flatly say no - there's no possibility that would ever happen. But I want to assure you that unless we have some kind of a major catastrophe come along, the answer is no you wouldn't have to pay for benefits. Now that's not to say that someday our fiscal situation wouldn't be such that we'd have to say that - well under anybody, you might have to pay part or something like that. But the way things are going right now, the answer is no. (Emphasis added.)

When immediately asked another question about benefit levels, the Superintendent reiterated that he could not make the same statement on behalf of CSEA because with CSEA they would be working under a rigid collective bargaining agreement.

Another point underscored in all the question and answer sessions was that if they had formal negotiations, as required by CSEA, CSEA would bring in outside negotiators and the District would be compelled to hire an outside negotiator. The Superintendent indicated that he would not want to do that, but

he would be obligated to do so under the system being pursued by CSEA.

In one session, the Superintendent stated:

> [I]ts up to the members of any of the unions to be sure that their representative convey their opinions and their feelings to management in any kind of discussion and I would say that it would be the responsibilities of the members to convey to SOSCA what their feelings are, what they want them to represent and then SOSCA would do that in their discussions with us. The concern I have is that with CSEA so often those representatives might come from San Jose or Fresno and you might not have had the opportunity to impress them with your feelings and your concerns.

The question of agency fees or organizational security arrangements was also brought up by those in attendance in each session. During each question and answer session, employees were told that an agency fee had been in CSEA's original proposal but that it had been withdrawn. They were also told that it could be put back in. In one speech, the second, employees were told by Mr. Fekete, counsel for the Office, that the Superintendent could not control whether or not there would be an agency fee. Mr. Fekete indicated that the Superintendent would be presented with a package and that the Office couldn't go through and indicate what provisions it didn't like and wouldn't agree to; it had to accept a bargaining package.

At no point in any of the speeches or question and answer sessions do either the transcripts of the tape recordings

reflect that the employees were adequately told about the rules governing organizational security provisions. On occasion, they were told that management had to agree to include an organizational security provision, but that information was clouded by the information provided by the Office's attorney regarding bargaining "packages." At no point were employees told that the Office could require severance of the organizational security provisions from the remainder of the other contract proposals and a separate vote "by all members of the appropriate bargaining unit" [Section 3546(a)].

At the formal hearing the Superintendent was called to testify and indicated that the transcripts entered into evidence as Joint Exhibits I - IV were reasonably accurate reflections of what had transpired at each of the three meetings he had held. The Superintendent further testified that staff meetings with all employees were called three or four times a year, as needed. The Superintendent further testified that he had held his position for seven years and had been with the District for 25 and the statements made in his speech were based on his personal observations after dealing with CSEA and CTA and after reviewing the CSEA and SOSCA campaign literature which regularly came across his desk. There can be no dispute, based upon the information in SOSCA's campaign literature and the Superintendent's speeches that the Superintendent's speeches did in fact mirror the arguments

being raised by SOSCA and the positions he attributed to CSEA were an accurate reflection of its bargaining posture.

Duties and Responsibilities of Kathy Freeman

Kathy Freeman is employed by the Respondent in the position of Warehouse Supervisor and Property Management Technician. The class specifications for that position define it as follows:

> Under general direction, maintains fiscal control and accounting of warehouse store stock, all office property and equipment and supervises the warehouse operation. Maintains perpetual inventory system and performs inventory control duties including record keeping, location printouts and on-site physical inventories for all special schools and classes and administration.

The distinguishing characteristics of the position are "record keeping, organizing, and supervisory abilities to assure full efficiency in the acquisition, storage and delivery of educational material." Two other employees work in the warehouse, Jenna Davis and Rudy Laddaga. In her testimony, Freeman was uncertain, but she believed that Davis was an Account Clerk. Laddaga is a Warehouse Worker.[11]

According to Evron Barber, the Director of Internal Business Services for Respondent, "Jenna Davis is the inventory clerk for the assets of the County Superintendent,

[11]The Charge and the Complaint allege only that Freeman has supervisory responsibilities vis a vis Laddaga. Jenna Davis is not mentioned. Nevertheless, evidence was presented regarding her relationship to both employees and a finding will be made in that regard.

meaning the equipment that is designated as capitol assets." According to Barber, he assigns work to Jenna Davis. According to Freeman, she does not assign work to Davis and Davis[1] schedule is basically fixed by a rotation system. In other words, Davis goes to school sites or particular classrooms and verifies inventory and since it is impossible to visit each classroom every year, she rotates between programs or school sites.

Freeman does not tell Davis where to go on a particular day, but Davis does give Freeman a routing slip indicating where she can be located on any given day. With respect to performance evaluations, Barber testified that Freeman does prepare an initial record of Davis[1] performance and that Freeman then meets with Barber to discuss her impressions of the evaluation. There are times, however, when Barber meets with Davis personally while she is performing her duties with respect to inventory for which she is responsible and he is able to evaluate her performance on a first hand basis. On occasion, Barber disagrees with Freeman's evaluation and changes the recommended rating from those put down by Freeman. He testified that his input is always necessary before the final evaluation is completed and that he makes the determination as to what will be in each of the boxes of the evaluation form.

Rudy Laddaga works in the warehouse and receives all materials, stores those materials and leaves the warehouse to deliver those materials to various school or administrative sites. According to Freeman, Laddaga's schedule, where he is working and when, is determined by the work that comes in. She did testify, however, that he does call her if he is going to be sick and, theoretically, would check with her before taking accumulated vacation time. When Laddaga apparently had a problem with absenteeism, Barber talked to him, not Freeman. Freeman was included in Laddaga's initial employment interview, but she was told that the reason for including her in the screening process was that she would be working alone with a man at the warehouse and they wanted her to feel comfortable. In terms of Laddaga's personnel evaluation, Barber testified that the system used is somewhat the same as that used for Jenna Davis but he has even more contact with Laddaga and is in a better position to personally evaluate his performance.

The Duties and Responsibilities of Bob Meadows

Bob Meadows holds a position in the classification of Computer Operator, Supervisor. The class specifications for that position define it as follows:

> Under direction, to be responsible for planning and coordinating the work of the computer operations department; to supervise personnel; and to do related work as required.

Prior to attaining the position of Computer Operator, Supervisor, Meadows testified that he was a Computer Operator and that the change from one job classification to another did not entail a change in his duties and responsibilities. Mr. Meadows testified that he was transferred from the position of Computer Operator to the position of Computer Operator, Supervisor so that he could be placed on a salary level comparable to that of the programming staff. When the position of Computer Operator, Supervisor was created some seven or eight years ago, Meadows could not even recall if he had any personnel to supervise.

Essentially, Meadows testified that he supervises work and not personnel. He indicated that work load priorities and priorities for particular job tasks were established prior to the time he attained the position of Computer Operator, Supervisor and that he and a person who now works with him as a computer operator, Susan Yursik, understand those priorities and work things out together.

Meadows testified that he played no role in the hiring of Susan Yursik. Moreover, he testified that he had no authority with respect to transfers, suspensions, layoffs, recalls or promotions. In addition, he testified that on one occasion he did recommend that she be promoted to the position of junior programmer and he discussed it with his supervisor, Randy

Freeman, Director of Data Processing, but someone else was selected for the position.

Freeman described Meadows as one of three key people in his 15 person computer department. Freeman identifies a key person as one who is most senior in a particular area, either programming, operations or data entry, or a person in whom Freeman has the most confidence. In terms of the evaluation of employee work performance, Freeman testified that he usually consults with the key person in a given area, but he considers himself responsible for the evaluation. His discussion is ordinarily brief, somewhat informal and he fills out the final evaluation form. Freeman indicated that on five or six occasions he has disagreed with his key people about the evaluation and that his own determination prevails. Moreover, Freeman testified that he is in a position to evaluate the work of Susan Yursik. He has contact with her daily and can observe her work from outside his office. Although Freeman testified that he is not at the worksite from 5:00 p.m. to 6:30 p.m. when Susan Yursik is working, Mr. Meadows is not present during that time frame either.

Respondent's Role in Circulating the Decertification Petition

In its post-hearing brief, CSEA argues that it is entitled to a ruling in its favor on the Unalleged charge that management and supervisory employees participated in the circulation and promotion of the decertification petition in favor of SOSCA and against CSEA.

Neither the amended Charge/Complaint in LA-CE-1985 nor the amended Charge/Complaint in LA-CE-1897 makes reference to an alleged role of supervisory or management employees in the formulation and circulation of the decertification petition. At several times during the course of the formal hearing, because it was not alleged, the undersigned interrupted the Charging Party, and indicated that its questioning was delving into the matter of the origination and circulation of the decertification petition which was not properly an issue in the proceedings then pending. In other words, inquiry into certain areas was curtailed because, given the scope of the Complaints, the questions were not relevant.

At no time during the course of the formal hearing did the Charging Party seek to amend the charges and the Complaints to allege that Respondent had a role in the circulation of the decertification petition. Given the Charging Party's failure to move for an amendment, and given the pronouncements of the undersigned regarding the scope of the hearing, the Respondent reasonably saw no need to "refute" the innuendo raised by the Charging Party's case. Accordingly, consideration of an amendment at this point in the proceedings would unduly prejudice the Respondent and consequently, the Unalleged charge will not be considered.[11]

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[11]See Santa Clara Unified School District (9/26/79) PERB Decision No. 104. In accord, San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

III. ISSUES

1. Did Allen Hall's involvement in circulation of the letter of concern violate the provisions of section 3543.5(a), (b), or (d)?

2. Did the speeches of the Superintendent and his colleagues on March 7 and 8 violate the provisions of sections 3543.5(a), (b), and (d)?

3. Did the evidence establish that Kathy Freeman and Bob Meadows are supervisors as that term is defined in the EERA and, accordingly, did their conduct with respect to the formation and promotion of SOSCA violate the EERA? and

4. Did the Superintendent's speeches so affect the election process as to prevent the employees from exercising free choice?

IV. CONCLUSIONS OF LAW

A. Allen Hall and the Letter of Concern

1. Interference and Threats

There is no dispute that Hall, however innocently, made known his disapproval of certain CSEA activities. In addition to his statements, Hall signed the letter of concern and assisted in its circulation. On working time, he transported the letter of concern to Duane Haskins and gave him an opportunity to read it, review it and sign it. Moreover, during working hours, he invited Garbett and Salazar to review and sign the letter of concern and when they indicated that

they were CSEA members, they were ordered back to work. In addition, Hall directed two other employees, Joe Riehl and Mark Underwood to go to Kathy Freeman's office for the purpose of reading and reviewing, and possibly signing, the letter of concern. Finally, there is some evidence that Allen Hall was present when Joyce Bussell, his secretary, was called into Stanton's office and asked to read the letter of concern.

Allen Hall's involvement with the letter of concern presents two threshold legal questions, neither of which is easily resolved. The first question presented is whether the actions of Hall are attributable to the employer, the Office of the Kern County Superintendent of Schools. The second question is whether or not Hall's conduct, his endorsement of and his circulation of the letter of concern, crossed the line dividing protected speech and impermissible interference or coercion.

With respect to the first question, based upon the facts presented, it is concluded that Hall's actions are attributable to the Respondent. As noted by the PERB in Antelope Valley Community College District (7/18/79) PERB Decision No. 97:

> The law of agency has been consistently applied to the field of labor relations in the private sector, expressly to hold employers accountable for the acts of supervisors and management whether or not such acts are authorized by the employer. Id. at 9.

In that same decision, citing Broyhill Furniture Co. (1951) 94 NLRB 1452 [28 LRRM 1211], the Board noted that unlawful

actions of supervisors were attributable to an employer even when the supervisors had been instructed to refrain from interfering with the organizational activities of their employees. That finding was "predicated on the employer's failure to inform the employees of the restrictions placed on the supervisors." Id. at 11.

In the instant case, Hall was recognized as a supervisor and he used his supervisory position to facilitate the distribution or circulation of the letter of concern. He not only spoke casually with his subordinates about the existence of the letter of concern, he informed them it would be arriving. Moreover, by virtue of his supervisory status, he was free to go out to the Blair Learning Center and deliver the letter to Duane Haskins, admittedly on working time. In addition, he was prepared to give two other employees time off from work to review the letter and only admonished them for not performing their assigned duties when they expressed their lack of interest. Moreover, it is concluded that Hall's supervisory status had an impact on how Joe Riehl and Mark Underwood were going to spend their break time. They were directed to go to Kathy Freeman's office by their supervisor and they did so. Finally, in the circulation of the letter of concern, Hall was allied with other more high ranking management personnel. The testimony of Joyce Bussell is credited and it is found that Allen Hall and Dr. Jack Stanton, Director of Research and

Development, were present when Bussell was called into Stanton's administrative office and asked what she thought of the letter of concern. In short, although Hall might want to be considered "one of the boys" be was perceived by his subordinates as a representative of management who took an active role in the circulation of the letter.

Moreover, management perceived him as a representative of management as evidenced by his presence at a meeting conducted by the Superintendent early in January 1984 where supervisors were instructed not to interfere or take a position vis a vis CSEA or SOSCA. It is probably not insignificant that this meeting was called not long after the Charging Party filed an unfair practice charge against the Respondent naming Alan Hall. In fact, the Superintendent testified as follows:

> After it came to my attention that an unfair labor practice charge had been filed against the office and Mr. Hall, I called the, I called, I think it was three meetings, three different groups of management and supervisory employees together and told each of them essentially the same thing which I've, which is mentioned here in the talk and that was that while I did not believe the allegation that Mr. Hall had coerced to vote or to sign anything that I wanted everyone to be especially careful not to use their supervisory position to influence anyone's vote.

Although the Superintendent may certainly have been well-intended in calling his meetings, if Mr. Hall's conduct did violate the EERA, a meeting called by the Superintendent with supervisory and management employees only, is insufficient

to disavow the relationship between Hall and the employer. In Antelope Valley, supra, the Board set forth several factors which should be used in determining a school district's responsibility for the actions of its supervisors. In its analysis, the Board noted:

> Three sets of factors are considered in determining the District's responsibility for the designees' actions: (1) the spectrum of actions engaged in by designees which go well beyond the statutory right of self organization afforded supervisory personnel; (2) the open and notorious manner in which those actions were taken; (3) the fact that the District at no time, and particularly after the CSEA charge was filed, did anything to disabuse the widespread impression among classified employees that the designees indeed spoke for the District, which it could have done either by withdrawing the designations, by publicly acknowledging that the status of the designees was in dispute and that is a consequence of that dispute their actions were not authorized or ratified by the District, or by expressly disassociating itself from those actions in any manner. Id, at 14.

In the instant case, the Superintendent did nothing to communicate to employees that the actions of Hall were unauthorized and accordingly, not ratified by management. In failing to do so, employees continued to operate under the assumption that Hall's actions were those of the employer.

The question of whether the conduct of Respondent's supervisor constituted a violation of section 3543.5(a) is also resolved in the Charging Party's favor. Through the testimony

of its witnesses and in its brief, the Respondent argues against such a conclusion by highlighting the fact that the superintendent had advised supervisors not to coerce employees or influence their choices and, by further arguing that employees who did sign the letter of concern, did so voluntarily. In finding a violation of section 3543.5(a), however, actual interference or coercion need not be found. In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board established the test to be used in interference cases.[13] For a case such as this, the applicable test is set forth as follows:

> 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;
>
> Where the harm to 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. Id. at 10.

In the instant case, there really can be no dispute that the conduct engaged in by the supervisor of the Respondent's maintenance and operations division tended to interfere with

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[13]The Board's decision in Novato Unified School District (9/30/82) PERB Decision No. 210 sets forth the test to be used in cases alleging violation of section 3543.5(a) when discrimination and not "mere interference" is the issue. Novato did not modify the test in simple interference cases.

employee rights guaranteed under the EERA. A supervisor signed and circulated a letter which was extremely negative and disparaged the quality of CSEA representation. Moreover, the letter contained an implied threat of loss of benefits if CSEA and its supporters continued their "push" for a collective bargaining contract. In signing the letter of concern, the supervisor ratified and gave new meaning to that threat.

In its brief, the Respondent seems to argue that Hall's conduct in transporting the letter to Duane Haskins at the Blair Learning Center was insulated because Haskins wanted to see the letter and wanted to sign it. Even if that were the case, Garbett and Salazar did not ask to see the letter. However, they did see one of their co-workers being given time off work in order to read, review and sign the letter; whereas when they expressed no interest in signing the letter, they were ordered back to work. Similarly, employees such as Mark Underwood, who already felt that his relationship with his supervisor was poor and who did not want to do anything to further aggravate the situation, might feel constrained to sign a letter actively supported by that same supervisor. Such conduct by the supervisor, although admittedly not egregious, crosses over the line of a permissible expression of opinion. Given the content of the letter, given Hall's signature on the letter, and given his active role in both its distribution and the gathering of signatures, it is found that the employer

violated the Act. Under Carlsbad, this result is mandated for the employer advanced no justification for the conduct of its supervisors.

2. Alleged Denial of CSEA Rights and Alleged Domination or Interference

Without citation to authority, CSEA also alleges that Respondent's involvement in the endorsement and circulation of the letter of concern constituted a violation of section 3543.5(b) and section 3543.5(d). In support of its argument that the employer denied to CSEA rights guaranteed to it by the EERA, the Charging Party argues that the EERA guarantees it the right to represent its members toward the end of reaching a collective bargaining agreement. Since the letter of concern opposed a collective bargaining agreement, the Charging Party apparently takes the position that the letter of concern interfered with its right to communicate with employees regarding a collective bargaining agreement and therefore, the letter of concern interfered with rights guaranteed by the EERA.

The Charging Party's argument is not particularly logical or persuasive. The record simply does not support a conclusion that CSEA was denied any rights guaranteed to it by the EERA. Although Respondent's actions vis a vis the employees may have impaired CSEA's effectiveness, arguably that is always the case when a violation of section 3543.5(a) is alleged and found. The PERB has not found that violations of section 3543.5(a)

result in derivative violations of section 3543.5(b) and this case does not compel a different result. See Antelope Valley Community College District, supra, at 20; Novato Unified School District (9/30/82) PERB Decision No. 210 at 21.

Similarly, CSEA's argument that the Respondent violated section 3543.5(d) fails. The following paragraph from the Charging Party's brief is the only argument advanced in support of that contention.

> The formulation of initial collective bargaining proposals must be considered an internal administrative matter. Here, the employer sought to disrupt, and in fact disrupted the formulation of initial bargaining proposals, thereby violating Government Code section 3543.5, subdivision (d).

As a theoretical proposition, the Charging Party's argument may make some sense. However, its advancement in the instant proceeding is not persuasive nor supportive of the Charging Party's position. In the instant case, there is no evidence that the employer or agents of the employer participated in any fashion in the formulation of the letter of concern. Moreover, there is no evidence that the involvement of Allen Hall contributed "in fact" to disruption in the formulation of an initial bargaining proposal. Finally, in the instant case, the evidence supports the conclusion that CSEA had already formulated its initial bargaining proposal and CSEA itself solicited input from employees who had hitherto shown little or no interest in the activities of CSEA.

B. The Superintendent's Speeches

On March 7 and 8, 1984, the Superintendent and other high ranking members of his staff made three "captive audience" presentations to all employees of the District. Some of the information provided was factual, some was opinion, some was inaccurate or incomplete, and some of the statements made contained a threat that fringe benefits and perhaps other benefits, would be lost if CSEA won the election.

There is no evidence that the Superintendent gave direct support to SOSCA or that he directly or indirectly interfered with CSEA's ability to conduct its election campaign. Moreover, given that the speeches were made almost three weeks prior to the election, there is no evidence that CSEA was prevented from communicating with classified employees and refuting inaccurate information disseminated during the speeches or clarifying incomplete or ambiguous information provided during the speeches and the subsequent question and answer sessions. On the other hand, however, it is unlikely that CSEA could have taken any action to overcome the threats made by the Superintendent with respect to the loss of benefits if CSEA won the election.

Admittedly, the question of whether the Superintendent's speeches violated the protections guaranteed by the EERA is not easily resolved. In Clovis Unified School District (7/2/84) PERB Decision No. 389, the employer had engaged in numerous

acts which the Board found interfered with employee rights and discouraged membership in one organization and preference for another. In the instant case, the the employer gave three speeches and the evidence did not establish participation in other unlawful acts. Nevertheless, the concepts relied on by the Board in Clovis, such as the "totality of the circumstances" and the "cumulative effect" of the conduct are still applicable; one must look at the totality of the speeches and question and answer sessions and the cumulative effect those presentations had on employees who were mandated to attend.

In resolving this difficult question, guidance is found in the decision of the United States Supreme Court in NLRB v. Gissell Packing Co. (1969) 395 US 575, 618 [71 LRRM 2481] In that case, the Court stated:

> Thus, an employer is free to communicate to his employees any of his general views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise events he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. . . . As stated elsewhere, an

> employer is free only to tell "what he reasonably believes will the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own violition. 395 US at 618 [71 LRRM at 2497] (Citations omitted.)

In NLRB v. Lenkurt Electric Co. (9th Cir. 1971) 438 F.2d 1102 [71 LRRM 2625], the Court of Appeals analyzed the decision of the Supreme Court in Gissell Packing Co., supra, and stated:

> We read this opinion as establishing two standards by which an employer's utterances may be objectionable. It appears clear that an employer may not make predictions which indicate that he will, of his own volition and for his own reasons, inflict adverse consequences upon his employees if the union is chosen. This would constitute a threat of retaliation. Also, an employer may not, in the absence of a factual basis therefor, predict adverse consequences arising from sources outside his volition and control. This would not be a retaliatory threat, but would be an improper restraint nevertheless. . . . Thus, an employer may not impliedly threaten retaliatory consequences within his control, nor may he, in an excess of imagination and under the guise of prediction, fabricate hobgoblin consequences outside his control which have no basis in objective fact. (Citations omitted.)

In Rio Hondo Community College District (5/19/80) PERB Decision No. 108, the PERB acknowledged that although there was no free speech proviso in the EERA, employers had rights analogous to those established by section 8(c) of the National Labor Relations Act and recognized by the NLRB and the Courts. In Rio Hondo, the Board concluded that a public school employer has the right,

> To express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate.

But the right of employer speech is not unlimited and,

> Speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection.

(See also, John Swett Unified School District (12/21/81) PERB Decision No. 188.) Thus, the speeches of the Superintendent and the question and answer sessions which followed each speech must be reviewed in accordance with the standards established by the NLRB and the PERB.

1. Interference.

Looking at the import of the entire presentation made by the Superintendent, it must be concluded that his speech tended to interfere with the exercise of employee rights guaranteed by section 3543 to "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" or "to refuse to join or participate . . ." The Superintendent made it clear that support for CSEA and its collective bargaining contract would result in a decline in benefits to employees irrespective of the District's ability to provide the same level of benefits. Essentially, the Superintendent was conditioning a continuation of fringe benefits on the waiver of the employees' basic statutory right

to collective bargaining. Such a practice was expressly prohibited by the Board in Santa Monica Community College District (9/21/79) PERB Decision No. 103. In Santa Monica, the Board held that:

> Requiring employees to give up employee organizational activities as a condition to receiving a pay increase tends to have a discouraging effect on both present and future protected activity. Such interference is "inherently destructive" of employee rights. Id. at 20.

As previously noted, in his speeches the Superintendent also emphasized that collective bargaining would, in and of itself, destroy flexibility and undermine the relationship between the Superintendent and his employees because he would be "forced" to bring in outsiders to act as negotiators. Again, the employer implied that the mere exercise of statutory rights guaranteed to employees and to CSEA would negatively impact on employees. In each facet of his presentation, the Superintendent implied that if CSEA continued to pursue a contract, and he believed it would, he would have no control over the results. Fringe benefits would automatically be reduced, rigidity would automatically be imposed, and, if the union insisted, agency shop would be the rule. Notwithstanding his original disclaimers, the comments of the Superintendent and his colleagues could reasonably be perceived as a threat of reprisal if CSEA won and a promise of benefit if CSEA lost and SOSCA won. All employees were required to attend the

Superintendent's presentation, the Superintendent was accompanied by top management personnel and by legal counsel, and the message delivered was not couched in the form of opinion but rather as a statement of fact.

Having determined that the Superintendent's speeches and the comments of other management employees constituted a threat to employees and tended to interfere with the exercise of protected rights, the burden shifts to the employer to show that its speech or its conduct was required by virtue of business necessity. No such justification was proffered in the hearing or in post-hearing briefs. Although the portion of the Superintendent's speeches which describe the election process and the District's experiences without collective bargaining were justified and permissible, once the Superintendent and his colleagues began describing the consequences of a CSEA victory, their speech was no longer protected. Those consequences do not inherently flow from a collective bargaining relationship and prevention of those consequences was something easily within the power of the Respondent. Accordingly, it is found that the conduct of the Superintendent and the speeches and question and answer sessions on March 7 and March 8, 1984 were not protected and they violated the rights guaranteed to employees under the EERA.

2. Encouraging Employees to Join One Employee Organization in Preference to Another

In several cases, the PERB has been called upon to determine whether or not an employer has violated section 3543.5(d), by "in any way encourag[ing] employees to join any organization in preference to another." In Santa Monica Community College District, supra, the Board analyzed that section of the Act and held:

> This section imposes on employers an unqualified requirement of strict neutrality. There is no indication in the statutory language that the Legislature meant to prohibit only those acts which were intended to impact on the employees free choice. The simple threshold test of section 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other.
>
> PERB disagrees with the District's contention that finding a violation of section 3543.5(d) depends upon proof that the employees actually changed membership as a result of the employer's acts. The word encourage connotes nothing more than stimulus, favor or being conducive to a particular result. Id. at 22 (Emphasis added.)

Although the Respondent's actions in the instant case are different from the actions of employers considered by the PERB in Clovis Unified School District, supra, Santa Monica Community College District, supra, and Sacramento City Unified School District (4/30/82) PERB Decision No. 214, they nevertheless crossed the line of permissible employer conduct.

The same actions which led to a finding of a violation of section 3543.5(a), in this case, require finding a violation of section 3543.5(d). In the instant case, the employer did not merely state that the election of CSEA would result in a reduction of fringe benefits, the employer specifically stated that unless there was a "major catastrophe" employees would not have to pay for their fringe benefits if SOSCA won the election. Moreover, the employer indicated that under SOSCA, local control of employee relations would be maintained, agency fees would not be required and monthly dues would be significantly reduced. Even though the Charging Party failed to establish that the Respondent dominated or controlled SOSCA, by his speeches, the employer actively campaigned for SOSCA and encouraged employees to abandon CSEA and support SOSCA. In so doing, it is found that the employer violated the Act.

3. Denial of Rights Guaranteed to CSEA

The record discloses no independent evidence that CSEA was denied any rights guaranteed by the EERA. As noted in the discussion of Case No. LA-CE-1895, the PERB has not yet determined that violations of section 3543.5(a) or 3543.5(d) constitute concurrent or derivative violations of section 3543.5(b). Nothing in the instant case compels establishment of a new rule of law and, accordingly, this aspect of the Charge/Complaint is dismissed.

C. Supervisory Status of Kathy Freeman and Bob Meadows

Since the filing of its proposed amendment and the actual amendment of the Complaint shortly before the commencement of the formal hearing, the Charging Party has argued that Kathy Freeman and Bob Meadows are supervisors as that term is defined in the EERA. Even though the position of Bob Meadows and Kathy Freeman were included in the unit CSEA sought to represent when it was voluntarily recognized in 1976, it now maintains that the positions are supervisory and inappropriately included in the unit. Accordingly, CSEA argues that any actions taken by Freeman and Meadows may be attributable to the employer and constitute unlawful interference. As an alternative, the Charging Party argues that supervisors are frequently included in bargaining units, particularly those which are voluntarily recognized. Citing numerous private sector authorities, the Charging Party argues as follows:

> [B]argaining unit supervisors are free to engage in union activities, including the circulation of decertification petitions, etc., so long as there is no evidence that the employer "encouraged, authorized, or ratified the conduct" or that the employer "acted in such a manner so as to lead employees reasonably to believe" that the supervisors were acting on behalf of management.

Continuing in that vein, the Charging Party maintains that the Superintendent ratified the conduct of Meadows and Freeman and led employees to believe that Meadows and Freeman were acting

on behalf of management when he stated, during the course of his speeches, that he knew the local leaders of SOSCA and he knew their values and ideals. The Charging Party argues that the Superintendent further ratified the conduct of Meadows and Freeman when he introduced Meadows to the employees assembled for his captive audience speech and yet failed to introduce the CSEA leadership.

It is unnecessary to reach the issue raised by the Charging Party and not yet considered by the PERB with respect to the permissible scope of conduct for supervisory employees included in a rank and file unit. That question need not be reached because the Charging Party has failed to establish that either Meadows or Freeman are supervisors as that term is defined in the EERA. Section 3540.l(m) defines a supervisory employee as follows:

> "Supervisory Employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Since the definition of supervisor is written in the disjunctive, the PERB has held that the performance of any one of the enumerated actions or the effective power to recommend

such action is sufficient to make an employee a supervisor within the meaning of the EERA. (Sweetwater Union High School District (11/23/76) EERB Decision No. 4.)[14] Notwithstanding the well established interpretation of the meaning of supervisory employee, Freeman and Meadows do not meet the standards.

The evidence failed to establish that either Freeman or Meadows perform any of the enumerated functions set forth in the definition of supervisory employee. Both Freeman and Meadows appear to have significant responsibilities overseeing work, but not personnel.

Freeman is responsible for the warehouse. Jenna Davis, who shares office space with Freeman, has completely different, not necessarily subordinate responsibilities. Although she keeps Freeman apprised of her comings and goings, her work is dictated by the needs of the Office and the questions of the auditors. The evidence did not establish that Freeman assigns any work to Davis. Although the evidence did establish that Freeman has input with respect to Davis' evaluation, the evidence did not establish that she effectively recommends the ultimate outcome of that evaluation process. In fact, Evron Barber specifically noted that he and Freeman have disagreed

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[14]When originally established, the PERB was entitled the Educational Employment Relations Board (EERB).

and the clear inference was that his evaluation prevails. Moreover, Barber indicated that he had opportunities to independently evaluate the work of Davis and his testimony was supported by that of Freeman who indicated that Davis is frequently out of the office working independently at a school site.

Similarly, the evidence does not establish that Freeman supervises Rudy Laddaga. Laddaga and his assignments for each day are determined by what materials come in and what materials have to be distributed. From the testimony, it appears that Freeman's relationship with the work orders for which Laddaga is responsible, is merely clerical in nature. Finally, Barber testified that he has frequent contacts with Laddaga and is in a position to independently evaluate his job performance. In short, there is no evidence that Freeman supervised either Davis or Laddaga. At best, she is a senior employee who supervises the warehouse operation, but not necessarily her co-workers.

The evidence also failed to establish that Bob Meadows is a supervisor. At best, he is a senior lead worker or a key person to whom Randy Freeman may look for input, but Meadows does not supervise personnel. As in the warehouse, the work of the computer operators seems to be governed by work orders generated elsewhere in the District. What work will be done, by when, and by whom, is governed by priorities established by

someone other than Meadows. The evidence established that Susan Yursik coordinates her work with Bob Meadows, but she does not report to him. Although Freeman looks to Meadows for input on Yursik's evaluation, Freeman conducts the evaluation and testified that he is in a position to independently evaluate her work. Although Freeman did not testify that he had ever disagreed with Meadows about a preliminary evaluation of Yursik, he had disagreed with similarly situated "key people" in other sections of the data processing division. In all instances, Freeman's judgment prevails.

In summary, the evidence regarding the duties and responsibilities of Freeman and Meadows was quite sparse and it is impossible to say whether or not, in fact, they perform the duties and responsibilities of supervisory employees. The question in this case is whether or not the Charging Party established that they were supervisory employees. In Regents of the University of California (3/8/83) PERB Decision No. 246b-H, the PERB stated that "the burden of proving an exclusionary claim rests with the party asserting it. Absent that burden being met, the employees in dispute are to be included in the unit." Although the Charging Party does not assert that Meadows and Freeman should be excluded from the unit as a result of this proceeding, the undersigned sees no reason why the burden of proof should be any different than in a unit determination proceeding.

Essentially, the nature of the positions held by Freeman and Meadows was described by the PERB in Regents of the University of California, supra. In that case, the Board noted:

> [E]mployees, despite titles, job descriptions and even duties, may be sufficiently invested with rank and file interests to warrant their inclusion in the bargaining unit. This will occur where control is demonstrated only over work processes as distinguished from personnel policies and practices.
>
> . . . . . .
>
> Employees with control over work processes are often called "lead" employees. These employees may also perform some supervisory personnel functions, although the bulk of their duties are substantially similar to those of their subordinates. Such employees may also be included in the unit. Their guidance to other employees is derived from greater experience, technical expertise and knowledge of the employer's missions and tasks.

Based upon the law and the evidence presented, it is found that the Charging Party failed to meet its burden of proof and Freeman and Meadows are not supervisors.

D. Objections to the Election

Pursuant to the Board's regulations, codified at section 32738, of title 8, part III of the California Administrative Code, objections to elections will be entertained by PERB only on the following grounds:

> (1) The conduct complained of interfered with the employees right to freely choose their representative or
>
> (2) Serious irregularity in the conduct of the election.

In the instant proceeding, only the ground set forth in subdivision (1) is relevant as there has been no allegation that any irregularity occurred in the conduct of the election. The Board's rule sets forth the circumstances under which objections to elections will be entertained. One must look to the Board's decisions to determine the circumstances under which an election will be set aside.

It has already been determined that the Respondent interfered with employee rights guaranteed by the EERA and encouraged employees to support SOSCA rather than CSEA. The question now presented, is whether that conduct also requires setting aside the election. The precise question to be determined is whether the Respondent's "conduct had a probable impact on the employees vote so that the election should be set aside." (Clovis Unified School District, supra, at 18.)

In the instant case, the evidence establishes that many employees were disenchanted with CSEA and were opposed to CSEA's attempts to negotiate a collective bargaining agreement with the Respondent prior to the filing of the decertification petition. Nevertheless, the PERB has repeatedly rejected arguments made by school employers that proof of an actual impact on employees votes is required to set aside an election. In Grenada Elementary School District (6/29/84) PERB Decision No. 387, the Board, in considering whether an unfair practice charge should block a decertification election, noted

that a proper focus for inquiry in election cases is not to investigate the reasons why a decertification petition was filed, but rather to determine whether the "alleged unlawful conduct would so affect the election process as to prevent the employees from exercising free choice." (Id. at 11.) (Emphasis added.)

In determining whether, objectively, the Superintendent's speeches would prevent the employees from exercising free choice, PERB ordinarily applies a totality of conduct test. (San Ramon Valley Unified School District, supra; Jefferson Elementary School District (6/10/81) PERB Decision No. 164.) In the instant case, the entire conduct was the speeches of the Superintendent. Nevertheless, it is found that those speeches would tend to interfere with employees free choice in an election.

The Superintendent clearly favored one employee organization over another, he gave misleading and incorrect information about the consequences of a CSEA victory, and he threatened employees with a loss of benefits if CSEA were to win the election. Essentially, employees were told that if CSEA won, their fringe benefit package would be in jeopardy and that barring a major catastrophe, a SOSCA victory would ensure that their fringe benefits remained intact. Recognizing that fringe benefits are of critical concern to employees, it must be concluded that the Superintendent's speeches, interfered

with the employees' opportunity to exercise their free choice in the election held on March 28, 1984. Moreover, looking at the totality of the speeches and the question and answer sessions, it must be remembered that the Superintendent and his colleagues did not merely threaten a loss of benefits. They promised employees that if CSEA won the election they would have to live under a rigid regime, they would have to endure the consequences of hardline negotiations, they would lose local control, and notwithstanding their wishes, they might be subjected to an agency shop provision. These were not adverse predictions on matters outside the employer's control, they were threats which undoubtedly interfered with the employees' free choice. Accordingly, CSEA's objections to the election are sustained.

V. REMEDY

In LA-CE-1895, it is appropriate to order the Office to cease and desist from taking actions which deny employees the statutory right to engage in protected activity and to further order the Office to cease and desist from actions which threaten to interfere with employees solely because they seek to engage in protected activity. Such an order is consistent with section 3541.5(c) of the Educational Employment Relations Act which gives PERB:

> . . . 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.

The cease and desist order in this case is necessary to ensure that employees will be guaranteed their statutory rights. Moreover, the order is necessary to ensure that the Office does not threaten, coerce, discriminate against or interfere with employees in the exercise of statutorily guaranteed rights.

It is also appropriate that the Office be required to post a notice incorporating the terms of these orders. The Notice should be subscribed by an authorized agent of the Office indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the Office has acted in an unlawful manner and it is being required to cease and desist from this activity. The notice effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the Office's readiness to comply with the ordered remedy. (See Placerville Union School District (9/18/78) PERB Decision No. 69.) Also, 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].

In Case No. LA-CE-1987, the Charging Party urges that in addition to the standard cease and desist orders and posting orders, the employer should be required to notify each classified employee of the decisions rendered by the PERB. Moreover, for LA-CE-1987 and LA-D-143, the Charging Party seeks an order invalidating the decertification petition in addition to an order setting aside the election.

With respect to personal notification, merit is found in the position of the Charging Party. The Superintendent, other high ranking officials and the Superintendent's attorney were present at the speeches complained of and found to be unfair practices. Since attendance at the meetings was mandatory, and since it has been found that it had a pervasive impact and a probable impact on the exercise of free choice in the decertification election, mere posting would not have a comparable impact. Accordingly, personal notification of the results of these two proceedings will be required. (See Santa Monica Community College District, supra.)

Based upon all the evidence presented, however, it cannot be found that the Charging Party is entitled to an order invalidating the decertification petition; in the instant case, such an order would not effectuate the purposes of the Act. The Charging Party argues that such an order is necessary because the Respondent contaminated the entire election process by assisting in the formation of SOSCA and the circulation of

the decertification proceeding. The Charging Party cites Sperry Rand Corp. (1962) 136 NLRB No. 45 [49 LRRM 1766] in support of the remedy it seeks. In Sperry Rand, however, it was found that the employer encouraged a supervisor to initiate and circulate the decertification petition. The evidence in the instant proceeding fails to support such a finding and, in fact, this issue was not a part of the proceedings. Accordingly, the remedy sought is inappropriate.

In summary, in Case No. LA-CE-1987, it is appropriate to issue a cease and desist order, a posting order and to require personal notification of each classified employee. It is also appropriate in Case No. LA-D-143 to require personal notification and to order that the election results be set aside and a new election be conducted by the Regional Director of the Los Angeles Regional Office of the Public Employment Relations Board.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in these cases, it is found that the Office of Kern County Superintendent of Schools violated subsection 3543.5(a) of the Educational Employment Relations Act when its supervisor of Maintenance and Operations participated in the circulation and promotion of a letter of concern. It is also found that the Kern County Superintendent of Schools violated subsections 3543.5(a) and (d) of the

Educational Employment Relations Act when the Superintendent gave three speeches at meetings employees were required to attend at which time the rights of employees were interfered with and threatened and at which time employees were threatened to join SOSCA rather than CSEA. It is further found that the objections to the election of March 28, 1984, filed by the California School Employees Association are sustained, consistent with the findings and conclusions in this proposed decision. Pursuant to subsection 3541.5(c) of the Government Code, it hereby is ORDERED that the Office of Kern County Superintendent of Schools, its governing Board and its representatives shall:

1. CEASE AND DESIST FROM:

A. Interfering with employee rights to form, join, and participate in the activities of employee organizations of their own choosing by interfering, restraining, or coercing employees because of the exercise of rights guaranteed by the Educational Employment Relations Act by openly promoting and circulating anti-union literature.

B. Interfering with the right of employees to participate in the protected activities of employee organizations by threatening to withhold benefits if employees choose to engage in such activities;

C. Showing favoritism toward the Superintendent of Schools Classified Association while a question concerning representation is pending by supporting the activities of that Association and by threatening to withhold benefits from employees who support the incumbent and rival Association, the California School Employees Association.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Within ten (10) workdays of service of the final decision in this matter post at all school sites and other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of the Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

B. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notices attached hereto as Appendices B and C. These Notices must be signed by an authorized agent of the Office, indicating that the Office will comply with the terms of these Orders. Such posting shall be maintained for a

period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notices are not reduced in size, altered, defaced or covered by any other material. In addition, the Notices attached hereto as Appendices B and C will be mailed to each classified employee employed by the Office within ten (10) workdays of the date this order becomes final.

IT IS FURTHER ORDERED that the results of the March 28, 1984 representation election shall be declared invalid and a new election shall be conducted by the Los Angeles Regional Director.

Upon issuance of a final decision, make written notification of the actions taken to comply with these orders to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

IT IS FURTHER ORDERED all other allegations of the charges and complaints are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 20, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and

supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on February 20, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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, section 32300 and 32305.

Dated: January 31, 1985

Barbara E. Miller
Administrative Law Judge