STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILMAR TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1918
v.	)	PERB Decision No. 1371
WILMAR UNION ELEMENTARY SCHOOL DISTRICT,	)	February 9, 2000
Respondent.	)	

Appearances: California Teachers Association by Diane Ross, Attorney, for Wilmar Teachers Association, CTA/NEA; School and College Legal Services by Scott N. Kivel and Margaret M. Merchat, Attorneys, for Wilmar Union Elementary School District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Wilmar Union Elementary School District (District) to a proposed decision by a PERB administrative law judge (ALJ). In the proposed decision, the ALJ concluded that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by interfering with the right of employees

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

to participate in the activities of the Wilmar Teachers Association, CTA/NEA (WTA), and by interfering with WTA's right of access and right to represent employees in their employment relations with the District.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and exhibits, and the filings of the parties. Based on the following discussion, the Board reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint.

FINDINGS OF FACT

WTA is an employee organization within the meaning of EERA section 3540.1(d) and the exclusive representative of an appropriate unit of the District's certificated employees within the meaning of EERA section 3540.1(e). The District is an employer within the meaning of EERA section 3540.1(k).

The District consists of one elementary school, Wilson School, and has an average daily attendance of approximately 250 students. Wilson School has nine teachers, seven of whom are WTA members.

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

Since at least January 1992, the District has had a policy-concerning the political activities of employees. The policy provides:

> The Governing Board believes that district employees have an obligation to prevent the improper use of school time, materials or facilities for political campaign purposes. The Superintendent/principal shall provide administrative regulations concerning political activities on school property.
>
> The Board respects the right of school employees to engage in political activities on their own time. Like other citizens, they have the right to use the school for meetings under the Civic Center Act. Such use shall in no way interfere with the use of the facilities for school purposes.
>
> When engaging in political activities, employees shall make it clear that they are acting as individuals and not as representatives of the district.

Also, since at least January 1992, the District has maintained an administrative regulation entitled "Political Activities of Employees" stating, in relevant part:

> Under no circumstances shall district employees:
>
> 1. Conduct political activities on school property during duty hours.
>
> 2. Solicit campaign support or contributions on school property during duty hours.
>
> 3. Use school equipment for the reproduction of campaign materials.
>
> 4. Post or distribute campaign materials on school property.
>
> 5. Disseminate campaign materials through the district mail service or place them in staff mailboxes.

6. Permit the use of students to write, address or distribute campaign materials.

Prior to 1996, WTA and the District operated under a stable bargaining relationship. In 1996, however, contract negotiations were not going smoothly and WTA felt that certain actions taken by the District favored the teachers who were not WTA members. Some teachers felt intimidated by members of the District's Board of Trustees (Trustees) who entered classrooms, observed teachers and took notes before leaving.

WTA decided to become active in the 1996 election for the District's Trustees with the goal of electing individuals WTA considered to be more responsive to its needs and concerns. WTA interviewed all candidates and decided to endorse Bill Edwards (Edwards), Lisa Gravesen (Gravesen) and Renee Rivera (Rivera). WTA decided not to endorse incumbent Lynn Mumaw (Mumaw). Incumbent Drusella West did not seek re-election.

When the Trustees became aware that WTA intended to endorse candidates in the upcoming election, they became concerned about possible political activity on school grounds. Randell Cheek (Cheek), then Trustee president, testified that because some students knew candidates, were children of candidates, or were neighbors of candidates, the Trustees were concerned that political activity on school grounds concerning the election might upset those students. The Trustees believed that political activities on campus in general would be inappropriate.

WTA appointed sixth grade teacher Kathleen Anderson (Anderson) as head of its political effort involving the

election. As one of WTA's campaign activities, Anderson attached a two-by-eight-foot sign to the lumber rack of her truck. The sign indicated in block letters that Edwards, Gravesen and Rivera were endorsed by the WTA and urged people to vote. On October 11, 1996,[2] Anderson drove her truck carrying the campaign sign to the Wilson School and parked it in her regular space in the school parking lot. Anderson testified that the purpose of displaying the sign was to visibly portray WTA's unity and common goal, to make a statement to the Trustees and the community, and to influence voters.

The sign on Anderson's truck was visible to students through the window of her sixth grade classroom. Children of Mumaw, Gravesen and Rivera were in Anderson's class. It was common knowledge among parents and students that the truck with the sign was owned by Anderson. Anderson's truck could also be seen from other locations in the school, including the Office of Superintendent/Principal, Lee Oliphant (Oliphant), but not from other classrooms.

Trustee Cheek was present at Wilson School on the morning of October 11 to drop off his son. He was approached by six parents who vociferously communicated their views that the sign on Anderson's truck constituted inappropriate campaigning on school grounds. The District's actions in response to Anderson's sign were influenced by these parent complaints.

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[2]Unless otherwise noted, all dates refer to 1996.

Cheek and fellow Trustee Carol Mungle (Mungle) testified that both the size of the sign and its location in the parking lot caused concern. Mungle testified that she would have been less concerned if the truck had been parked at the far end of the parking lot where it would not have been visible to students in Anderson's classroom. One reason Cheek objected to Anderson's sign was because it was close to the school and easily visible to students.

After viewing Anderson's sign from Oliphant's office and discussing the matter with her and the District's legal counsel, Cheek concluded that the sign violated District policy. Oliphant gave Anderson a copy of the administrative regulation cited above, and instructed her to remove the sign from her truck or move the truck off of school property.

Also on October 11, a memorandum from the Trustees was placed in teacher mailboxes, restating the administrative regulation pertaining to political activities of employees and calling for compliance with the policy. During the lunch break, Anderson removed her truck from school property.

Kristina Hoffman (Hoffman) is a parent with two children who attend Wilson School. A few days after seeing the sign on Anderson's truck and discussing the incident with her, Hoffman attached a similar sign to the back of her pickup truck. Hoffman's sign was six feet long and two feet high. It urged voters to elect Edwards, Gravesen and Rivera, but made no

reference to WTA. Her intent in displaying the sign was to make a political statement to voters.

During the three weeks prior to the November election, Hoffman parked her truck in the Wilson School parking lot from approximately 9:00 a.m. to 11:30 a.m. on Tuesdays and from approximately 10:00 a.m. to 12:00 p.m. on Fridays while she worked as a classroom volunteer. She also used her truck to drive students on a field trip and to drop off and pick up her children on a regular basis.

While parked in the Wilson School lot, Hoffman's truck was visible from Anderson's classroom at times, depending on where it was located in the lot. Her truck was also visible at times from Oliphant's office, which has a window facing the parking lot. Cheek saw Hoffman's truck parked in the lot within a few days after Anderson had been told to remove her truck. Cheek received a complaint from a parent about Hoffman's truck. He responded that Hoffman's truck was not owned by a staff person, and that the District had no authority to regulate parent conduct. The District had not adopted a policy concerning the political activities of nonemployees on school property. Cheek also felt that the sign on Hoffman's truck was not as objectionable as Anderson's because it usually was parked at the opposite end of the parking lot from where Anderson's truck had been parked. No action was taken with respect to Hoffman's truck.

On October 16, WTA wrote to Oliphant and the Trustees asserting that the District's restrictions on employee political

activity were unconstitutional. Specifically, WTA asserted that school employees have the right to express their political viewpoints to each other on school property, and that a school district may not prohibit employees from wearing political buttons on school grounds during noninstructional time, citing L.A. Teachers Union v. L.A. City Bd. of Ed. (1969) 71 Cal.2d 551 [78 Cal.Rptr. 723] (L.A. Teachers) and California Teachers Assn. v. Governing Board (1996) 45 Cal.App.4th 1383 [53 Cal.Rptr.2d 474] (San Diego).

In response to WTA's complaint, the District issued an October 25 memorandum to employees indicating that it had reviewed its policy concerning employee political activities "in light of a recent decision by the Court of Appeal," an apparent reference to the San Diego case cited by WTA. The District indicated that it had amended its policy, stating:

> Staff members may distribute campaign materials to each other either in person or by depositing them in the staff mail boxes. Such delivery may not interfere with the delivery of the instructional program. Staff may also wear campaign buttons during non-instructional duties provided that they are not visible to children.[3]

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[3]On May 21, 1997, the District again amended its policy concerning political activities of employees. The policy provides:

> Pursuant to Education Code section 7055 the District does have the authority to restrict political activities during work hours and on school property. Further, the District has a right and duty to dissociate itself from political controversy. More specifically, students have a right to attend school in an atmosphere free of political controversy and

During the course of a typical school day, teachers encounter students at various locations outside their classrooms. Anderson, for example, is required to arrive thirty minutes prior to the start of classes and uses that time as preparation time. She remains after classes to assist students crossing Bodega Highway adjacent to the school. She encounters students during these periods, as well as during the recess and lunch periods. Teachers also encounter students in the Wilson School parking lot as they are dropped off and picked up by their parents, or arrive at school on foot.

Wilson School has a staff lunchroom where teachers eat lunch and take breaks. The lunchroom contains teacher mailboxes. Students sometimes enter the lunchroom to pick up supplies, copy documents, or contact teachers for miscellaneous reasons. Also, the lunchroom is converted to a classroom almost daily for

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> the District has the authority to regulate what is presented in the classroom and in other instructional settings to ensure an instructional setting free of political controversy. To that end the following is recognized:
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> 1. School employees have the right to express to each other their respective political viewpoints on school property.
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> 2. Such expression however shall not take place during instructional settings and/or curricular activities.
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> 3. Political advocacy shall not occur during instructional settings nor be in the presence of instructional and or curricular activities.

special classes or projects, but not during teacher lunch and break periods.

Trustees, teachers and parents testified regarding their concern for the child of a candidate not endorsed by WTA who was in Anderson's classroom on October 11. Prior to October 1996, WTA members discussed the potential consequences if campaign signs were displayed on vehicles parked in the Wilson School parking lot. WTA members specifically discussed the potential impact of such signs on children whose parents were candidates. WTA concluded that such campaign activity was appropriate if kept out of the classroom. In this connection, WTA assumed that candidates would explain the nature of political campaigns to their children. During the course of the Trustees election campaign, signs endorsing various candidates were widely displayed throughout the community, including on streets adjacent to Wilson School.

At about the time of the incident involving the sign on Anderson's truck, WTA was in the process of printing campaign buttons in the shape and size of a business card. Like the sign on Anderson's truck, the buttons indicated WTA's endorsement of Edwards, Gravesen and Rivera, and urged people to vote. However, the buttons were never worn. Pending the outcome of WTA's objection to the District's political activity restrictions, WTA decided to forego using the buttons as part of its campaign. As indicated above, the District issued a revised policy on

October 25. That policy permitted teachers to wear campaign buttons during noninstructional duties, provided they were not visible to children.

On October 31, WTA filed the instant unfair practice charge alleging that the District interfered with individual employee and WTA rights to engage in the activities of an employee organization by prohibiting union members from posting union-sponsored campaign signs on their vehicles while parked in the school parking lot, and by prohibiting union members from wearing union-sponsored campaign buttons which could be visible to children, including during noninstructional time.

On December 30, the PERB Office of the General Counsel issued a complaint alleging that the District interfered with protected rights in violation of EERA section 3543.5(a) and (b) when it ordered Anderson to remove the campaign sign from her truck or move the truck off of school property; and when it issued the October 25 policy prohibiting employees from wearing campaign buttons during noninstructional time if they might be visible to students.

On June 2, 1997, the ALJ granted WTA's motion to amend the complaint. The amendment added the allegation that by ordering Anderson to remove the campaign sign from her truck or remove it from school property, the District discriminated against her for her protected conduct. The amendment also added the allegation that by allowing Hoffman to park her vehicle on school property displaying a similar campaign sign, the District discriminated

against bargaining unit members and interfered with their protected rights. These actions were allegedly in violation of EERA section 3543.5(a) and (b).

DISCUSSION

PERB Jurisdiction

Among the District's responses to the complaint is the argument that this case involves a dispute over the District's authority under the Education Code to regulate political activities of employees. That authority is derived from the following Education Code sections:

> 7050. The Legislature finds that political activities of school employees are of significant statewide concern. The provisions of this article shall supersede all provisions on this subject in any city, county, or city and county charter as well as in the general law of this state.
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> 7052. Except as otherwise provided in this article, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a local agency.
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> 7054. (a) No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.
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> 7055. The governing body of each local agency may establish rules and regulations on the following:
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> (a) Officers and employees engaging in political activity during working hours.
>
> (b) Political activities on the premises of the local agency.

The District contends that the express terms of Education Code section 7050 supersede the EERA and thereby divest PERB of jurisdiction in this case.

As the expert administrative agency established by the Legislature to administer collective bargaining in California's public education systems, PERB has exclusive initial jurisdiction over conduct that arguably violates EERA. (EERA sec. 3541.5; San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d l [154 Cal.Rptr. 893]; El Rancho Unified School Dist, v. National Education Assn. (1983) 33 Cal.3d 946 [192 Cal.Rptr. 123]; San Jose Teachers Assn. v. Superior Court (1985) 38 Cal.3d 839 [215 Cal.Rptr. 250] vac. on other grounds 475 U.S. 1063.) While PERB may not enforce the Education Code, the Board may interpret the Education Code to carry out its duty to administer EERA. (San Bernardino City Unified School District (1989) PERB Decision No. 723; Whisman Elementary School District (1991) PERB Decision No. 868; Barstow Unified School District (1997) PERB Decision No. 1138b.) When allegedly unlawful conduct arguably implicates both the Education Code and EERA, the Board may determine whether the action constitutes an unfair practice. (Oxnard School District (Gorcey and Tripp) (1988) PERB Decision No. 667.) In such cases, the Board seeks an interpretation that harmonizes the purposes underlying EERA with the Education Code provisions. (San Mateo City School Dist, v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo).)

The Education Code sections cited above clearly indicate that their provisions supersede the provisions found "in the general law of the state." Education Code section 7055 provides that a school district governing board may regulate the political activity of employees during working hours, and political activities on the premises of the district. However, these Education Code provisions do not lead to the conclusion that PERB is without jurisdiction to consider an unfair practice charge alleging unlawful interference with EERA rights which may involve political activities of employees. Instead, under the precedent cited above, PERB is charged with the exclusive initial jurisdiction to consider the alleged unfair practice while harmonizing the purposes of EERA with those of the Education Code provisions. Those include the EERA purpose of promoting improved employer-employee relations in California schools through a system of collective bargaining (EERA sec. 3540), and the Education Code purpose of dissociating California schools from political controversy (Education Code sec. 7050 et seq.).

Consequently, the District's assertion that pursuant to Education Code section 7050 PERB is without jurisdiction to consider WTA's charge that the District's conduct violated EERA, is rejected.

In a related argument, the District asserts that this case involves a dispute over constitutional free speech rights, and accordingly, is beyond PERB's purview and jurisdiction. It is well settled that PERB may construe EERA in light of

constitutional precedent. (Cumero v. Public Employment Relations Bd. (1989) 49 Cal.3d 575, 583 [262 Cal.Rptr. 46]; Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 at p. 16 (Richmond/Simi Valley).) The mere fact that constitutional rights may be implicated or have some bearing on this dispute is not in and of itself sufficient to divest PERB of jurisdiction to consider WTA's allegations that the District's conduct violated EERA.

Accordingly, the Board must consider WTA's allegations involving the District's conduct involving the display of Anderson's campaign sign, and the October 25 policy concerning the wearing of political buttons by employees.

Campaign Sign Allegations

WTA asserts that the District's actions with regard to the campaign sign on Anderson's truck unlawfully interfered with EERA-protected rights. To establish unlawful interference, the charging party must show that the employer's conduct tends to or does result in harm to protected employee rights. If the harm is slight and the employer's conduct is justified based on operational necessity, the competing interests of the employer and employee are balanced to resolve the charge. If the harm is inherently destructive of protected employee rights, the employer's conduct is excused only by showing that it resulted from circumstances beyond the employer's control and no alternative course of action was available. (Carlsbad Unified School District (1979) PERB Decision No. 89, at pp. 10-11

(Carlsbad); see also Novato Unified School District (1982) PERB Decision No. 210.)

EERA gives employees the right to participate in employee organization activities (EERA sec. 3543), and gives employee organizations the right to represent their members with public school employers (EERA sec. 3543.1(a)). Subject to reasonable regulation, employee organizations also have the right of access to areas in which employees work, and the right to use bulletin boards, mailboxes and other means of communication. (EERA sec. 3543.1(b).) These rights are provided to employees and employee organizations for the purpose of representation in matters of employer-employee relations. WTA alleges that the District's conduct with regard to the campaign sign unlawfully interfered with these rights.

Consideration of WTA's allegation begins with an examination of the conduct at issue in this case. Anderson and WTA displayed a large campaign sign on her private vehicle parked in the Wilson School parking lot. The sign communicated WTA's political support of certain candidates in the election for the District's Board of Trustees. It is apparent that a large sign attached to a vehicle and parked in a school parking lot will communicate its message to all who observe it. As Anderson testified, the sign was intended to influence voters and make a statement to the Trustees and the community. This fact is critical in considering the allegation of interference with EERA-protected rights. The sign displayed by Anderson and WTA was part of a political

campaign to influence voters in the upcoming school board election. The campaign sign was not simply a communication between employees and their employee organization at the worksite.

The Board has determined that some political activities of employees and employee organizations constitute conduct protected by the statutes administered by PERB. In Richmond/Simi Valley, the Board observed:

> School employees and employee organizations have a right to communicate at the worksite, free from employer restriction, about specific terms and conditions of employment as well as matters of more general political, social or economic concern to employees. [At p. 24.]

And in San Ramon Valley Unified School District (1982) PERB Decision No. 254, the Board found the employer's refusal to distribute a union newsletter through the internal mail system because the newsletter included a political message concerning a statewide ballot initiative to be unlawful. These cases confirm that the rights of employees and employee organizations to communicate with each other at the worksite include the right to communicate with each other concerning political issues.

Private sector cases also recognize these rights. In Eastex, Incorporated v. National Labor Relations Board (1978) 437 U.S. 556 [98 S.Ct. 2505] (Eastex), the United States Supreme Court found a union's distribution of a newsletter to employees which urged political action to be protected conduct under the National Labor Relations Act (NLRA). But there are limits to

these rights described in these cases as well. For example, the court in Eastex, at pp. 567-568, held that the relationship between the political activity and the employment relationship could be so attenuated as to lose its protection. And in Local 174, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Labor Relations Board (1981) 645 F.2d 1151 [207 App.D.C. 226], the National Labor Relations Board found no protection for political activity which was not sufficiently related to the employment interests of employees.

The cases in which political communication has been found to be protected conduct have typically involved internal communication between employees, or between employees and their employee organization, and have often involved use of a union newsletter or employer internal mail system. None of these cases, however, involves conduct similar to the instant case, in which an employee and employee organization displayed a large sign on the employer's premises as part of a political campaign to influence voters in an upcoming election for public office. The Board is aware of no case in which a similar type of political campaign activity has been found to be protected under either the EERA or the NLRA. Accordingly, the Board concludes that the display by Anderson and WTA of the large political campaign sign in the Wilson School parking lot was not EERA-protected conduct either as employee participation in an employee organization, or employee organization representation of employees.

But even assuming for purposes of applying the Board's Carlsbad standard, that the display of the campaign sign involved protected activity, unlawful interference with EERA-protected rights has not been established in this case. Any harm which resulted from the District's action prohibiting the display of the campaign sign by Anderson and WTA was slight. Anderson was instructed to remove the sign from the vehicle or move it off of school property, but she and WTA retained the ability to display the campaign sign on her vehicle anywhere other than on school property. Also, since all seven WTA members worked at Wilson School, communication between them and WTA on the subject of support for certain candidates in the school board election did not require or rely upon the display of the large campaign sign on school grounds. Furthermore, following WTA's complaint about the District's action, the District issued an October 25 memorandum which recognized the right of employees to distribute campaign materials to each other at school.

Under Carlsbad, if the harm to protected rights is slight, the Board examines the employer's conduct to determine if it was justified based on operational necessity. There is ample justification here. As noted above, when a case presents conduct implicating both EERA and the Education Code, the Board seeks an interpretation which is consistent with the purposes of their provisions. (San Mateo.) The purpose of Education Code section 7050 et seq. is to insulate schools from involvement in political controversy. Consequently, Education Code section 7054(a)

prohibits the use of school district property to support or defeat any candidate for election to a school board. And Education Code section 7055(a) provides that school boards may establish rules governing the political activities of employees during working hours. In fact, the District had maintained a policy since at least January 1992 designed to prevent its involvement in political campaigns. Clearly, there is strong justification for action by the District to prohibit employees from displaying large political campaign signs on school property such as the one on Anderson's truck.

The Carlsbad standard requires the competing interests of the employer and employee to be balanced to resolve this dispute. WTA points to L.A. Teachers and San Diego to demonstrate that the interests of employees outweigh those of the employer with regard to the type of political activities involved here. But a closer review of those cases reveals that they do not lend support to WTA's assertion. In L.A. Teachers, the court held that teachers do not surrender their constitutional rights at the schoolhouse gate. Specifically, the court ruled that teachers have the constitutional right to circulate among themselves a petition urging political action, provided it is done in areas such as lunchrooms and faculty rooms, apart from students and classes, during non-duty periods. The San Diego court balanced this constitutional right against a school district's power under the Education Code to regulate the political activities of its employees. In striking that balance, the court noted that a

district's authority to regulate political speech is much greater if members of the public might reasonably perceive it to bear the imprimatur of the school. (Hazelwood School District v. Kuhlmeier (1989) 484 U.S. 260, 270, 217 [98 L.Ed.2d 592] (Kuhlmeier).) A school retains the authority to ban speech which might be perceived as anything other than neutral on matters of political controversy. (Id.) Thus, the San Diego court sought to determine "under what circumstances political activity by the district's employees falls within a district's power to dissociate itself from political controversy."

With regard to the classroom and other instructional activities of employees, the San Diego court held that a district has the power and authority to restrict political activity by employees in those settings. Turning to noninstructional settings, the court noted that under L.A. Teachers school employees have the right to express their political views to each other on school property. The court in San Diego concluded:

> . . . the school's ban on political advocacy cannot be enforced in noninstructional settings. [At p. 1392.]

But in reaching this conclusion, the court emphasized that it applied to employees' expression in noninstructional settings of their political viewpoints to each other. It pointedly did not encompass the expression of political views to others. The court stated:

> The relationship between coemployees has none of the elements of power and influence which exist between elementary and secondary school students and their instructors. Thus when

> teachers and other district employees express their political views to each other, there is very little risk their views will be unduly influential and thereby implicitly attributed to the school district. [Id.]

Conversely, when school district employees express their political views to students or nonemployees on school property, there is a much greater risk that those views will be attributed to the school district, thereby implicating the district's right to dissociate itself from political controversy by regulating that employee conduct.

Returning to the facts of this case, Anderson and WTA displayed on school property a large political campaign sign intended to influence voters in the upcoming school board election. Clearly, this was not an expression by employees to each other in a noninstructional setting of their political viewpoints of the type described by the San Diego court. The District received several complaints from parents concerned that the display of the sign constituted an inappropriate political activity on school grounds. The District was also concerned because of the nature of the teacher-student relationship between Anderson and her sixth grade class. Under these circumstances, the District's action to prohibit the display of the sign appears consistent with the court's description of the District's authority to restrict employee conduct in order to dissociate itself from political controversy. As the court noted, the District has the authority to ban speech which might be perceived

as anything other than neutral on matters of political controversy. (Kuhlmeier.)

Balancing the competing interests at work here, it is clear that these important interests of the District vastly outweigh any interest of Anderson and WTA which arguably would be served by the display of a large political campaign sign on school property. Therefore, the Board concludes that, by prohibiting Anderson and WTA from displaying the political campaign sign on school grounds, the District did not unlawfully interfere with Anderson's EERA-protected right to participate in an employee organization, or WTA's right to represent employees, and the allegations that it did so are dismissed.

The June 2, 1997, amendment to the complaint in this case added the allegation that the District's conduct with regard to Anderson's campaign sign also constituted unlawful discrimination. To establish unlawful discrimination, the charging party must show that the employee engaged in protected activity of which the employer was aware, and that the employer took adverse action against the employee because of that protected activity. (Novato.) As noted above, the display by Anderson and WTA of the large political campaign sign in the Wilson School parking lot was not EERA-protected conduct. Moreover, WTA acknowledges in its response to the District's exceptions that it did not present an argument in support of an EERA violation based on a theory of discrimination. Accordingly, this allegation is also dismissed.

It has also been alleged that the District violated EERA by interfering with WTA's rights of access and communication when it ordered the removal of the campaign sign. According to this allegation, the campaign sign constituted a form of communication between WTA and employees on a matter of general interest. While it is clear that the campaign sign was displayed primarily to influence voters, it arguably also communicated its message to employees. Accordingly, the Board will consider this allegation.

EERA provides employee organizations with the right of access to employees at work and the right to use bulletin boards, mailboxes and other means to communicate with them, subject to reasonable regulation (EERA sec. 3543.1(b)). However, the right to utilize "other means of communication" does not provide an employee organization with access to every possible means of communication. (Regents of University of California v. Public Employment Relations Bd. (1986) 177 Cal.App.3d 648 [223 Cal.Rptr. 127] (Regents).[4])

The instant case involves a medium not typically utilized by an employee organization, or the District for that matter, to communicate - a large sign displayed on a truck parked in a school parking lot. In order to determine that such an unusual medium is an EERA-protected "other means of communication" it must be shown that the usual means of communication available to

[4]This case was decided under the Higher Education Employer-Employee Relations Act (HEERA) which is codified at Government Code section 3560 et seq. HEERA section 3568 provides employee organizations with access and communication rights which are nearly identical to those included in EERA section 3543.1(b).

the employee organization are ineffective or unreasonably difficult. (Sierra Sands Unified School District (1993) PERB Decision No. 977 (Sierra Sands).) Clearly, that has not been shown here. Wilson School staff have use of a lunchroom which contains teacher mailboxes. The October 25 memorandum sent by the District to employees stated that they could "distribute campaign materials to each other either in person or by depositing them in the staff mail boxes." Given these facts, and the fact that all WTA members were employed at Wilson School, the Board concludes that it has not been shown that the usual means available to WTA to communicate with employees were either ineffective or unreasonably difficult. Therefore, the medium which was used by WTA - the display of a large sign on a truck in the school parking lot - was not an EERA-protected other means of communication.

The Board has also held that an employee organization can gain access rights which would not otherwise be available when the employer's policy denying access is discriminatory on its face or as applied. (Sierra Sands.) The policy in effect on October 11, when Anderson displayed the campaign sign at Wilson School, regulated the political activities of District employees on school property. The District's administrative regulation prohibited employees from posting or distributing campaign materials on school property. The District, on October 25, amended the policy to indicate that employees could distribute campaign materials directly to each other or through use of staff

mailboxes, provided there was no interference with the instructional program. It does not appear that these policies are discriminatory as written.

However, after Anderson was directed to remove the campaign sign from District property, Hoffman, a parent volunteer, displayed a similar sign on her vehicle parked at Wilson School. No action was taken by the District with respect to Hoffman's campaign sign. The Board must determine whether the District's failure to prohibit Hoffman from displaying a campaign sign constitutes a discriminatory application of its policy pursuant to Sierra Sands.

The District had no policy specifically addressing political activities by nonemployees on school grounds. The record contains no indication that the District applied the policy regarding employee political activity inconsistently. Also, the District did not discriminate based on the viewpoint expressed in the sign being displayed, since both Anderson's and Hoffman's signs indicated support for the same school board candidates. The primary reason Hoffman was not instructed by the District to remove the campaign sign was that she was a parent volunteer and not a District employee, and the District was either uncertain of its authority or unwilling to exercise it with respect to a parent volunteer. Given the District's authority under Education Code section 7055(b) to regulate political activities on its premises, it may have been incorrect if it believed that it could not order Hoffman to remove the sign. But departures from a

legitimate policy do not necessarily constitute discriminatory application preventing the employer from enforcing that policy. (Serv-Air Inc. v. NLRB (10th Cir. 1968) 395 F.2d 557 [67 LRRM 2337]; and INS v. FLRA. et al. (1987) 855 F.2d 1454 [129 LRRM 2256]; Regents.) Consequently, the District's inaction with regard to Hoffman's campaign sign does not constitute discriminatory application of a policy as described in Sierra Sands. and does not result in WTA obtaining access rights otherwise not available to it.

The Board concludes that the District did not interfere with WTA's rights to access and communicate with employees, guaranteed by EERA section 3543.l(b), when it ordered Anderson to remove the campaign sign from school property.

The June 2, 1997, amendment to the complaint in this case added the allegation that the District unlawfully discriminated against bargaining unit members and interfered with EERA-protected rights when it allowed Hoffman to park her truck carrying a political campaign sign on school property. As noted above, WTA did not present arguments in support of these alleged violations. Therefore, WTA has not met its burden under the Board's Carlsbad and Novato standards and this allegation is also dismissed.

Campaign Button Allegation

It is also alleged that the policy described in the District's October 25 memorandum unlawfully interfered with the EERA-protected right to wear campaign buttons.

As noted, employees and employee organizations have the right to communicate with each other at the worksite about matters of general concern, including political matters. (L.A. Teachers: Richmond/Simi Valley.) The District also has the authority under the Education Code to act to dissociate itself from political controversy. In San Diego, the court examined the limits on that authority with regards to the wearing of political buttons by employees. The court summarized its ruling:

> We find the district has the power to prevent its employees from wearing political buttons in its classrooms and when they are otherwise engaged in providing instruction to the district's students. On the other hand we find the district has no such power when its employees are not engaged in instructional activities.

Considering the Board's policy in light of the court's ruling, it is concluded that EERA protects the right of employees to communicate with each other at the worksite on matters of general concern by wearing political buttons when they are not engaged in instructional activities.[5]

The District's October 25 memorandum states the following policy concerning political buttons:

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[5]The Board does not conclude that this right is unlimited. As noted below, there may be circumstances in which "the elements of power and influence" between teachers and students, noted by the San Diego court, are present in noninstructional settings. Also, there may be circumstances in which members of the public might reasonably perceive the wearing of political buttons by employees engaged in noninstructional duties to bear the imprimatur of the school. These circumstances could arguably implicate the district's authority to regulate the employee conduct. However, since such circumstances are not presented by this case, the Board need not address this issue.

> Staff may also wear campaign buttons during non-instructional duties provided that they are not visible to children.

WTA alleges that this policy amounts to an unlawful blanket ban on the wearing of political buttons because there are virtually no circumstances in which a button would not possibly be visible to children at Wilson School during teacher noninstructional time. For example, WTA asserts that students enter the Wilson School employee lunchroom, and political buttons being worn by teachers during their noninstructional time in that room would be visible to those students and banned by the policy.

It should be noted that the San Diego court in the passage cited above does not appear to regard instructional activities to include only those which occur in the classroom. However, the court does not discuss or define activities outside the classroom during which employees "are otherwise engaged in providing instruction" and during which a school district has the authority to prohibit the wearing of political buttons. Therefore, the determination of whether non-classroom duties involve instructional or noninstructional activities must be made on a case-by-case basis.

Under the Board's standard for determining unlawful interference, the charging party bears the burden of demonstrating that the employer's conduct tends to or does result in harm to protected employee rights. (Carlsbad.) In this case, WTA was printing campaign buttons indicating its endorsement of certain school board candidates at the time of the campaign sign

incident discussed above. WTA objected to the District's action concerning the campaign sign and decided not to use the political buttons pending the outcome of that objection. Based on these facts, the Board must determine whether it has been demonstrated that the District's October 25 policy harmed or tended to harm EERA-protected rights.

For several reasons, the Board finds that there is insufficient evidence to conclude that the District's action harmed or tended to harm EERA-protected rights. First, the October 25 policy does not appear to represent a blanket ban because by its own terms it acknowledges the right of employees to wear political buttons during noninstructional time in an apparent reference to the San Diego decision. Second, the practical application of the arguably objectionable portion of the policy stating that buttons may be worn "provided that they are not visible to children" is simply not clear. For example, it could be assumed that the policy would be applied to prohibit teachers from wearing campaign buttons in their classrooms prior to the beginning of class as students were assembling in the room. However, whether the policy would be applied to prohibit the wearing of campaign buttons during lunchtime in the employee lunchroom because students might periodically have reason to enter that room is not clear. Third, while the policy concerning political activities by employees which the District adopted in May 1997 is not at issue here, the Board notes that it again acknowledges the right of employees to express their political

viewpoints to each other provided they are not "presented in the classroom and in other instructional settings." Since there are no facts relating to the actual application of the District's October 25 policy, the case-by-case determination of whether it interfered with employees' right to communicate with each other by wearing political buttons in noninstructional settings must be based on conjecture and speculation. Under these circumstances, the Board finds that there is insufficient evidence to conclude that the District's policy, which advises employees that they may wear political buttons in noninstructional settings, harmed or tended to harm EERA-protected rights. Therefore, the allegation that the policy constitutes unlawful interference in violation of EERA section 3543.5(a) and (b) must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-1918 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Amador's concurrence begins on page 32.
Member Dyer's concurrence and dissent begins on page 51.

AMADOR, Member, concurring: I concur with the result of Chairman Caffrey's and Member Dyer's opinions; I too would dismiss the unfair practice charge. However, my analysis differs from theirs. I would dismiss this charge for two reasons. The first is that, for the allegations that properly fall within the Public Employment Relations Board's (PERB or Board) jurisdiction, the Wilmar Teachers Association, CTA/NEA (WTA) has not proven a key element of its prima facie interference case; namely, it has failed to show that it was engaged in an activity that is protected by the Educational Employment Relations Act (EERA) at the time in question. Secondly, I am of the opinion that the Wilmar Union Elementary School District's (District) actions were justified under case law and the Education Code, and therefore dismissal is appropriate.

BACKGROUND

The District consists of one elementary school, Wilson School, which has an average daily attendance of approximately 250 students. Wilson School has nine teachers, seven of whom were members of the WTA at the time in question.

During the course of a typical school day at Wilson School, teachers and students see each other frequently at various locations, both in the classrooms and elsewhere. For example, they often see each other before and after class, and a teacher assists students in crossing Bodega Highway adjacent to the school. Teachers also encounter students during recess and lunch periods, as well as in the parking lot as they arrive at or leave

school. Wilson School has a lunchroom where teachers eat lunch and take breaks. The lunchroom contains teacher mailboxes. Students sometimes enter the lunchroom to pick up supplies, copy documents, or contact teachers for miscellaneous reasons. Also, the lunchroom is converted into a classroom almost daily for special classes or projects.

At the time of the events in question, Kathleen Anderson (Anderson) was a sixth-grade teacher at Wilson School. The WTA decided to become active in the November 1996[1] local school board election and it appointed Anderson to head its organizing effort. As one of the WTA's campaign activities, Anderson attached a large sign (approximately two feet by eight feet) to the lumber rack of her pickup truck. The sign indicated in block letters that three named candidates[2] were "ENDORSED BY WILMAR TEACHERS ASSOCIATION," and urged people to "VOTE NOV. 5."

At that time, the District had a policy and a regulation in place regarding political activities by employees.[3] There

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[1]Unless otherwise noted, all dates refer to 1996.

[2]The WTA endorsed candidates Bill Edwards (Edwards), Lisa Gravesen (Gravesen) and Renee Rivera (Rivera).

[3]The policy in effect on the date of the challenged conduct provided:

> The Governing Board believes that district employees have an obligation to prevent the improper use of school time, materials or facilities for political campaign purposes. The Superintendent/principal shall provide administrative regulations concerning political activities on school property.

is no dispute that this policy and regulation applied to all employees, including Anderson.

On October 11, Anderson drove her truck to Wilson School and parked it in the school parking lot in a location where the sign was plainly visible from her classroom and other parts of the school.[4] She testified that the purpose of the sign was to provide "a visible thing for [WTA members] to know that we were united, we were working for a common goal," and also to send a statement to the school board, to the community, and to influence voters.

After viewing the sign and discussing the matter with the District's legal counsel, Randell Cheek (Cheek), the president of the school board, concluded that the sign violated District

> The Board respects the right of school employees to engage in political activities on their own time. Like other citizens, they have the right to use the school for meetings under the Civic Center Act. Such use shall in no way interfere with the use of the facilities for school purposes.
>
> When engaging in political activities, employees shall make it clear that they are acting as individuals and not as representatives of the district.

[4]Three school board candidates had children in Anderson's class. The WTA only endorsed parents of two of those three children.

policy.[5] At about 10:30 a.m., Superintendent/Principal Lee Oliphant (Oliphant) asked Anderson to step into the hall and handed her a copy of a six-point regulation which implemented the District's policy.[6] Oliphant informed Anderson that she had to either remove the sign from her truck or move the truck from school property. During the lunch break, Anderson removed her truck from District property.[7]

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[5]Trustee Cheek testified at the administrative hearing in this matter that the board decided political activities on campus would be inappropriate. Because some students knew candidates, were children of candidates, or were neighbors of candidates, the board was concerned that political activity surrounding the election might upset them. Cheek testified that "We weren't wanting any leaflets or anything large on campus that would distract from the educational process."

[6]This regulation provided:

> Under no circumstances shall district employees:
>
> 1. Conduct political activities on school property during duty hours.
>
> 2. Solicit campaign support or contributions on school property during duty hours.
>
> 3. Use school equipment for the reproduction of campaign materials.
>
> 4. Post or distribute campaign materials on school property.
>
> 5. Disseminate campaign materials through the district mail service or place them in staff mailboxes.
>
> 6. Permit the use of students to write, address or distribute campaign materials. (Emphasis added.)

[7]That same date, a memo from Cheek was placed in teacher mailboxes. The memo restated the regulation pertaining to political activities of employees and called for full compliance.

During this timeframe, the WTA was in the process of printing campaign buttons in the shape and size of a business card. The buttons also indicated that WTA endorsed Edwards, Gravesen and Rivera for the school board, and urged readers of the button to vote. However, the buttons were never worn.[8]

Procedural Background

The WTA filed an unfair practice charge on October 31, alleging that the District's policies and conduct interfered with protected rights.[9] Following a formal hearing, the ALJ rendered a proposed decision on October 22, 1997, in which he found that the District violated EERA with regard to both the truck sign allegation and the campaign button allegation. The case comes before the Board on exceptions filed by the District.

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[8]Shortly after the Anderson truck sign incident, the WTA lodged a formal objection. Anderson said the WTA deferred using the buttons as part of its campaign "until we found out what we could and could not do."

[9]Three days before the formal hearing, the WTA moved to amend the complaint to add a discrimination allegation based on the District's failure to order a parent volunteer to move her truck sign. The PERB administrative law judge (ALJ) granted the motion, but stated that he did not consider the discrimination theory in his proposed decision because the WTA did not argue in its brief for an independent violation on that ground. However, the ALJ did consider evidence regarding the parent's truck in connection with the WTA's interference theory.

The net effect of this series of events is that the discrimination claim has been abandoned and is not before the Board on appeal. The only legal theory that is before the Board for consideration is WTA's interference cause of action.

DISCUSSION

Scope of PERB Jurisdiction

This case presents a broad range of legal issues, including some which are not ordinarily found in an unfair labor practice charge before this Board. Resolution of the case requires the Board to carefully identify which issues are properly within its statutory jurisdiction and refrain from deciding those issues which are more appropriately addressed elsewhere. PERB does not issue advisory opinions.

It is well established that PERB has exclusive original jurisdiction over conduct that arguably violates EERA. (EERA sec. 3541.5;[10] San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893] (San Diego TA); El Rancho Unified School District v. National Education Association (1983) 33 Cal.3d 946, 953-960 [192 Cal.Rptr. 123] (El Rancho USD); Barstow Unified School District (1997) PERB Decision No. 1138b (Barstow), p. 13 [District did not violate EERA by contracting out pupil transportation services because that action was lawful under the Education Code.].)

It is readily apparent that certain aspects of the WTA's charge do not fall under the Board's jurisdiction. The Board

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[10]EERA section 3541.5 provides, in part, that:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

assumes initial jurisdiction only over those allegations that clearly assert that the District violated EERA.

Although the Association's charge contains numerous allegations arising under EERA, the District argues that PERB is the improper forum for this dispute. The District's position is that the Board lacks the authority to resolve the dispute because Education Code section 7055 expressly permits the District's conduct.[11] The District argues that disputes involving the Education Code are more properly addressed in other forums.

Considering both parties' arguments, there is a tension between the scope of the Education Code and that of the EERA. This tension has jurisdictional implications for the Board, an issue which has been addressed in a handful of prior cases. Although PERB may not enforce the Education Code, it may interpret the Education Code to carry out its duty to administer EERA. (Barstow at p. 13, citing San Bernardino City Unified School District (1989) PERB Decision No. 723; Whisman Elementary School District (1991) PERB Decision No. 868.) Although a school employer may lawfully exercise Education Code rights, it may not do so in a manner which violates EERA. When a violation of an

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[11]That section provides that:

> The governing body of each local agency may establish rules and regulations on the following:
>
> (a) Officers and employees engaging in political activity during working hours.
>
> (b) Political activities on the premises of the local agency.

EERA-protected right is alleged, PERB will assert jurisdiction over the alleged EERA violation. (McFarland Unified School District (1990) PERB Decision No. 786 (McFarland USD) [although an employer may choose not to reelect a probationary teacher under the Education Code, it may not exercise that right for reasons unlawful under EERA].)

Applying these principles, this case is more easily resolved by use of a two-part approach. First, because the charge contains allegations that the District violated the EERA, the Board takes initial jurisdiction to answer the threshold question of whether the WTA was engaged in conduct that is protected by EERA when the District took the actions at issue here. (EERA sec. 3541.5; San Diego TA; El Rancho USD; Barstow.) If not, the Board's analysis ends and dismissal is required because further review would exceed the boundaries of our jurisdiction. If, on the other hand, the WTA is found to have engaged in conduct that is protected by EERA, the Board retains jurisdiction over the merits of the dispute, regardless of purported Education Code violations. (Barstow.)

In this case, as in every interference case before the Board, in order to prevail the charging party must first establish a prima facie case demonstrating that the employer's conduct tends to or does result in some harm to employee rights protected under the EERA. (Carlsbad Unified School District (1979) PERB Decision No. 89; see also, Novato Unified School District (1982) PERB Decision No. 210.) The WTA and Anderson

assert that they engaged in conduct that is protected by EERA sections 3543.5(a) and (b), and by section 3543.1(b).[12]

It is well established that public employees, acting in their private capacity, possess various non-EERA based rights to engage in numerous forms of political activity. (See, e.g., Labor Code section 1101;[13] Article I, sec. 2(a) California Constitution;[14] 1st Amendment, U.S. Constitution.[15]) The

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[12]Section 3543.1(b) provides:

> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

[13]Labor Code section 1101 provides that:

> No employer shall make, adopt, or enforce any rule, regulation, or policy:
>
> (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
>
> (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

[14]Article I, sec. 2(a) provides, in part, that:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

[15]The First Amendment provides that:

Education Code also contains statutes specifically designed to address political activities of school district employees and officers. (See Part 5, Chapter 1, Art. 2, Education Code sections 7050-7057, added by Stats.1977, c. 36, section 396.5, operative April 30, 1977.) The article begins with this general statement of legislative intent:

> The Legislature finds that political activities of school employees are of significant statewide concern. The provisions of this article shall supersede all provisions on this subject in any city, county, or city and county charter as well as in the general law of this state.[16]

The Education Code gives broad protection to the political activities of school officers and employees. Education Code section 7052 provides that:

> Except as otherwise provided in this article, or as necessary to meet requirements of

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

[16]In 1995 the legislature further amended several of the sections within this article, and made the following clarification:

> [I]t is not the intent of the Legislature . . . to restrict the political activities of officers or employees of a school district . . . except as provided in [this article] or as may be necessary to meet specified requirements of federal law. . . . The right of speech of any member of a governing board of a school district . . . or any employee thereof is in no manner affected by this act. (Section 1 of Stats.1995, c. 879 (S.B. 82).)

> federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a local agency.

Other Education Code sections in that article impose clear limitations on political activities by those persons.[17] In addition to regulating the form of permissible political activity, the legislature also restricts the timing of such activity. Certain political activities, such as fundraising, may be completely banned during working hours.[18]

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[17]It should be noted that the Education Code places restrictions on the political activity of school district management as well as employees. Although Education Code section 7055 provides broad authority for a school district to regulate the political activity of employees during working hours, Education Code section 7054 provides that:

> (a) No school district . . . funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate. . . .

[18]See Education Code section 7056, which provides that:

> (a) [The] soliciting or receiving [by school district officers or employees of] political funds or contributions to promote the support or defeat of a ballot measure that would affect the rate of pay, hours of work, retirement, civil service, or other working conditions of officers or employees of the local agency . . . [is] prohibited during working hours. . . .
>
> (b) Nothing in this section shall be construed to prohibit any recognized employee organization or its officers, agents, and representatives from soliciting or receiving political funds or contributions from employee members to promote the support or defeat of any ballot measure on school district property . . . during nonworking time. As used in this subdivision.

Although these non-EERA rights should not be ignored in our analysis, the scope of those rights is not at issue here. As in all interference cases brought under the EERA, this unfair practice charge requires us to answer a different, narrower question: whether the District interfered with rights guaranteed to the WTA and Anderson by the EERA.

Here, Anderson and the WTA both claim that one purpose of her truck sign was to exercise rights under EERA section 3543.l(b), and that the District interfered with those rights. That section provides, in pertinent part, that:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

The District responds that any such rights were outweighed by its duty to guarantee students a politically neutral school environment.

The WTA is correct in noting that EERA section 3543.l(b) guarantees employee organizations a right to communicate information to their members under certain circumstances. PERB

> 'nonworking time' means time outside an employee's working hours, whether before or after school or during the employee's luncheon period or other scheduled work intermittency during the schoolday. [Emphasis added.]

has reviewed numerous unfair practice charges involving attempts by public employees or employee organizations to exercise those rights.[19]

In the case at bar, the total number of fellow union members with whom the WTA and Anderson purportedly sought to communicate was six persons, all of whom were employed at the same small school and who saw each other frequently. Comparing these facts to those prior cases in which PERB has recognized the existence of rights arising from EERA section 3543.1(b), I am simply not persuaded that this case falls under the protection afforded by that statute.

In a separate argument, the WTA alleges, and Anderson testified, that a secondary purpose for the campaign sign was to influence voters in the community regarding the school board election. As discussed above, although other laws may protect the WTA in its attempt to achieve this goal, such a right is not found in the EERA or any other statute under PERB's jurisdiction. Specifically, PERB has never held that the EERA guarantees employee organizations or employees the right to communicate campaign endorsements to the general public, when that communication occurs on school property during the workday. The

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[19]See, e.g., Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99, in which the Board held that a school district could not lawfully alter its longstanding practice of permitting the employee organization access to the District's internal mail system for union newsletters. The Board held that this denial of access constituted an unreasonable regulation within the meaning of EERA section 3543.Kb). (Id. at p. 14).

result is that the WTA's interference allegations must be dismissed because they lack a key element -- a showing of conduct protected under the EERA.

Although this case is appropriately dismissed on EERA grounds, case law also supports dismissing this charge. In California Teachers Assn. v. Governing Board of San Diego Unified School District (1996) 45 Cal.App.4th 1383 [53 Cal.Rptr.2d 474] (CTA), the association brought a writ of mandate in state court, challenging a school district's policy that prevented its employees from wearing political buttons at work sites during work hours. The court began by stating that Education Code section 7055 plainly gives school districts the power to restrict political speech during working hours. (Id. at p. 1387.) However, this power is not unfettered. The court noted that:

> [U]nder our Constitution (t)eachers like others, have the right to speak freely and effectively on public questions . . . [t]hey do not "shed" these rights "at the schoolhouse gate." (L.A. Teachers Union v. L.A. City Bd. of Ed. (1969) 71 Cal.2d 551, 557-558 [78 Cal.Rptr. 723, 455 P.2d 827] (L.A. Teachers).) Thus in considering the district's policy, 'we must strike "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."' [CTA at p. 1387; citations omitted.]

The court's rationale is worth noting:

> In this intimate and deferential environment, public school authorities may reasonably conclude it is not possible to both permit instructors to engage in classroom political advocacy and at the same time successfully

> dissociate the school from such advocacy. In short the very attributes of a successful teacher/student relationship make it reasonable for school authorities to conclude the only practical means of dissociating a school from political controversy is to prohibit teachers from engaging in political advocacy during instructional activities. (Id. at p. 1390; emphasis added.)

The CTA case is useful in analyzing the case at bar because it establishes an important point. According to that case, a school district has the express authority, pursuant to Education Code section 7055, to restrict or even to prohibit employees and officers from engaging in certain forms of political activity during working hours on school premises.

Because of the factual similarity between the CTA case and the case at bar, it is appropriate to use it as a guide in determining whether an unfair labor practice occurred. If the District's conduct is justified under the Education Code and/or appellate case law, it would be extremely inappropriate for this Board to find that an EERA violation occurred.

Using the approach of the CTA case, therefore, the first question is whether the WTA's political activity occurred during instructional activities. If so, according to the limitations of our jurisdiction, dismissal is appropriate unless the WTA can prove that the means chosen by the District to exercise its Education Code rights violated EERA. (McFarland USD.)

Truck Sign

The truck sign clearly constitutes a form of political advocacy, easily identifiable with an employee organization that

represents public school employees. The sign is a prominent, publicly displayed political endorsement of named candidates in a pending school board election.

Bearing in mind the CTA court's emphasis on the unique nature of the elementary school environment, it is difficult to imagine a much more "intimate" school setting than Wilson School. The school community consists of approximately 250 elementary school students, a handful of staff, and a few members of management. Children of school board candidates are also students of WTA members. On a campus with less than a dozen teachers, it is not unreasonable to conclude that students may identify a teacher's vehicle with its driver.

Deciding whether a given form of political advocacy falls within the CTA court's "instructional activity" zone must occur on a case-by-case basis. Instruction, like learning, is an experience that is not limited to the four physical walls of a classroom nor limited to a teacher's lesson plan for a particular day. Other events that occur during a given day may also serve to furnish instructional opportunities.

To conclude that a sign is outside the instructional zone because it is physically located on the other side of a pane of glass is an oversimplification of the CTA case and misses the point of the court's rationale. To preserve the unique student-teacher relationship, the court's holding plainly permits a total ban on a particular form of political advocacy by employees in the instructional zone. Here, the District did not seek to

impose a total ban on the substantive message the WTA sought to convey. It merely prohibited the exercise of one form of political advocacy in a given setting at a particular time.

In considering the specific facts here, the District could reasonably conclude that the truck sign, posted on school property during the work day, was an impermissible expression of political advocacy which occurred in an instructional setting. The District was free to completely prohibit its display. The WTA has not shown that the means selected by the District violated any EERA-based rights, and dismissal is appropriate.[20],[21]

Campaign Buttons

WTA also challenges a District policy which permitted wearing "campaign buttons during non-instructional duties provided they are not visible to children." Although WTA does not allege that the District actually prohibited any person from wearing a button, the same principles discussed above should be applied to determine whether the District's policy is unlawful on its face.

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[20]It is not relevant whether students actually noticed Anderson's sign or whether disruption actually occurred. Nothing in Education Code 7055 or the CTA case requires districts to make such a showing as a precondition to regulation.

[21]It should be noted that the District's conduct did not curtail the ability of Anderson or WTA to engage in other forms of political advocacy in other settings. Nor did the District's conduct affect WTA's ability to utilize alternate, equally meaningful, forms of access to its employees.

As the CTA court noted, school districts spend considerable resources to create trust, obedience and admiration for teachers among the pupils. (See CTA at p. 1390.) In view of that unique environment, the court held that school districts may lawfully restrict employees from engaging in this form of political advocacy in instructional settings.

Wilson School exemplifies the type of tightly-knit educational community described in CTA. Young students regularly encounter their teachers throughout the school day. In such a setting, the line between "instructional" and "noninstructional" areas or activities is easily blurred. In a close case, it is appropriate to heed the CTA court's strongly-worded caution against permitting political advocacy by school employees to impair the unique relationship between teacher and young students. As with the truck sign, it is reasonable to conclude that the District's button policy constitutes a reasonable attempt to apply the instructional activity limitation articulated in the CTA case. I conclude that the District was free to promulgate a regulation which prohibits the wearing of buttons in this manner. WTA has not provided facts which show that the means chosen by the District violated any EERA-based rights. Accordingly, this allegation is also dismissed.

CONCLUSION

Although this case raises interesting and controversial issues regarding employees' rights to engage in political activity at the workplace, my analysis is limited to the issues

which fall under the statutory jurisdiction of the Public Employment Relations Board. The Board's first obligation in this case is to answer the threshold question of whether WTA and Anderson engaged in any rights protected by the EERA. I conclude that no such right exists in current law, and I decline to extend the law to create a new right.

In my view, the CTA case requires this Board to acknowledge and accord adequate weight to the unique nature of the public elementary school environment in considering whether an EERA violation occurred at Wilson School. Bearing that in mind, I conclude that the District's actions were justified by that case and by the Education Code, and dismissal of WTA's charge is appropriate.

The remaining questions raised by this case must be resolved another day in another forum.

DYER, Member, concurring and dissenting: I am unpersuaded that the Board's instant decision has any precedential value, or that it provides any guidance to the parties in this matter. My colleagues appear to agree that: (1) there is no protected right under the Educational Employment Relations Act (EERA),[1] regarding the display of the Anderson campaign sign, and (2) the Wilmar Union Elementary School District (District) policy regarding political buttons did not harm any EERA protected rights. However, as I view their decisions, they have reached these conclusions by vastly disparate routes. I therefore concur in my colleagues' decisions only insofar as they find that the District did not violate the EERA when it restricted the communication or speech rights of the Wilmar Teachers Association, CTA/NEA (WTA). I dissent from the majority of their findings, as set forth below. I specifically dissent from their finding that the employee communications at issue here are not protected under the EERA.

This case is before the Public Employment Relations Board (PERB or Board) on appeal by the District of a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the District interfered with rights guaranteed by EERA section 3543.5(a) and (b)[2] when it: (1) precluded the WTA from

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

[2]Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school

displaying an association-sponsored campaign sign during school hours on elementary school property in a location which was visible to students; and (2) prohibited WTA members from wearing association-sponsored campaign buttons on school property either in instructional areas, or if the buttons were visible to children.

WTA's claim sounds in the provisions of EERA section 3543.l(b).[3] The District in turn argues that Education Code section 7055[4] expressly permits it to prohibit employees and

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employer to do any of the following:

> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[3]EERA section 3543.1(b) states:

> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter. [Emphasis added.]

[4]Education Code section 7055 provides:

> The governing body of each local agency may establish rules and regulations on the following:

employee organizations from engaging in the types of political activity at issue in this case.

The ALJ rendered a proposed decision in which he found that the District violated EERA with regard to both the campaign sign allegation and the campaign button allegation.

After reviewing the entire record, including the ALJ's proposed decision, the District's exceptions and WTA's response, I would reverse the proposed decision and dismiss the unfair practice charge.

BACKGROUND

Factual Background

WTA is an employee organization within the meaning of EERA section 3540.1(d), and is the exclusive representative of an appropriate unit of the District's certificated employees within the meaning of EERA section 3540.1(e). The District is an employer within the meaning of section 3540.l(k).[5]

(a) Officers and employees engaging in political activity during working hours.

(b) Political activities on the premises of the local agency.

[5]EERA section 3540.1 states, in pertinent part:

As used in this chapter:

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

The District is a small educational community. It consists of one elementary school, Wilson School, with an average daily attendance of about 250 students. Wilson School has nine teachers, seven of whom belonged to WTA. Classes at the Wilson School are for kindergarten through sixth grade.

Due to the size of the Wilson School, teachers and students often see each other, both in and out of the classroom, throughout the school day. A teacher assists students in crossing a highway adjacent to the school. Teachers often encounter students during recess and lunch periods, as well as in the parking lot as they arrive at or leave school. Wilson School has a lunchroom where teachers eat lunch and take breaks. The lunchroom contains teacher mailboxes. Students sometimes enter the lunchroom to pick up supplies, to copy documents, or to contact teachers for various reasons. The lunchroom is converted to a classroom almost daily for special classes or projects.

Although WTA, for the most part, always had a good working relationship with the District, at the time in question its working relationship with the District was beginning to fall apart. WTA believed that some teachers were being treated

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> (e) 'Exclusive representative' means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.
>
> (k) 'Public school employer' or 'employer' means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

unfairly. School board members were entering their classrooms, observing teachers and taking notes, which made the teachers feel intimidated. It was perceived that monetary considerations were being given to non-WTA teachers that were not extended to WTA members. The District was reluctant to allow additional instructional aides to assist the teachers. The WTA felt that it needed a more positive environment, and it wanted to get a school board that it could work with. As a result, WTA decided to become active in the November, 1996[6] local school board election. WTA had never previously been involved in a school board election.

At this time Kathleen Anderson (Anderson) was a sixth-grade teacher at Wilson School, and a member of WTA. Anderson was selected to head WTA's organizing effort. She helped WTA find new candidates to run for the school board elections. She placed WTA campaign signs around the community. As one of WTA's campaign activities, Anderson attached a large sign (approximately two feet by eight feet) to the side of her pick-up truck. The sign indicated in block letters that three named candidates[7] were "ENDORSED BY WILMAR TEACHERS ASSOCIATION," and urged people to "VOTE NOV. 5."

In January of 1992, long before the incidents which gave

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[6]Unless otherwise noted, all dates refer to 1996.

[7]WTA endorsed candidates Bill Edwards (Edwards), Lisa Gravesen (Gravesen) and Renee Rivera (Rivera).

rise to the instant charge, the District had adopted a policy[8] and regulations[9] regarding political activities by its employees.

[8]The policy in effect on the date of the challenged conduct provided:

> The Governing Board believes that district employees have an obligation to prevent the improper use of school time, materials or facilities for political campaign purposes. The Superintendent/principal shall provide administrative regulations concerning political activities on school property.
>
> The Board respects the right of school employees to engage in political activities on their own time. Like other citizens, they have the right to use the school for meetings under the Civic Center Act. Such use shall in no way interfere with the use of the facilities for school purposes.
>
> When engaging in political activities, employees shall make it clear that they are acting as individuals and not as representatives of the district.

[9]These regulations provided:

> Under no circumstances shall district employees:
>
> 1. Conduct political activities on school property during duty hours.
>
> 2. Solicit campaign support or contributions on school property during duty hours.
>
> 3. Use school equipment for the reproduction of campaign materials.
>
> 4. Post or distribute campaign materials on school property.
>
> 5. Disseminate campaign materials through the district mail service or place them in staff mailboxes.
>
> 6. Permit the use of students to write, address or distribute campaign materials.

It was undisputed below that these policies and regulations applied to all District employees, including Anderson.

The above facts set the stage for the events which precipitated the unfair practice charge currently before the Board: the District's refusal to allow Anderson to park her truck, with its accompanying sign, on the school parking lot in an area where it was visible to the young students attending class, and the District's limiting the wearing of campaign buttons by teachers to times when they were in non-instructional settings, and/or when they would not be visible to children.

On October 11, Anderson drove her truck, with its campaign sign, to Wilson School and parked in the school parking lot. The sign on her truck could be seen both from her classroom and from other parts of the school.[10] After seeing the sign and discussing the matter with the District's legal counsel, school board President Randell Cheek (Cheek), concluded that the sign violated the January, 1992 District policy. At about 10:30 a.m. on October 11, Superintendent/Principal Lee Oliphant (Oliphant) asked Anderson to step into the hall and handed her a copy of the six point regulation which implemented the District's policy. Oliphant told Anderson that she must either remove the sign from her truck or move the truck from school property. During the lunch break, Anderson removed her truck from school property as

[10]Three school board candidates had children in Anderson's class. WTA only endorsed parents of two of those three children.

requested.[11]

Kristina Hoffman (Hoffman) was a parent volunteer with two children who attend Wilson School. A few days after seeing the sign on Anderson's truck, and after hearing about the incident between Anderson, Oliphant and Cheek, Hoffman attached a hand painted sign to the side of her pickup truck. Hoffman's sign was six feet long and two feet high. It urged voters to elect Edwards, Gravesen and Rivera, but made no reference to WTA, or to the date of the upcoming election. Her intent in displaying the sign was to make a political statement to voters.

During the three weeks prior to the November election, Hoffman parked her truck in the Wilson School parking lot from about 9:00 a.m. to 11:30 a.m. on Tuesdays and from about 10:00 a.m. to 12:00 p.m. on Fridays while she worked as a classroom volunteer. She also used her truck to drive students on a three hour field trip to a pumpkin patch, and to drop off and pick up her children at school on a regular basis.

Cheek saw Hoffman's truck parked in the lot within a few days after Anderson had been told to remove her vehicle. Upon receiving a complaint from a parent about Hoffman's truck, he responded that the truck did not belong to a District employee, and that the District had no authority to regulate parent

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[n]That same date, a memo from Cheek was placed in teacher mailboxes. The memo restated the regulation pertaining to political activities of employees and called for full compliance.

conduct.[12] No action was taken with respect to Hoffman's truck.

At about the same time as the Anderson and Hoffman incidents, WTA began printing campaign buttons in the shape and size of a business card. Like the campaign sign on Anderson's truck, the buttons indicated that WTA endorsed Edwards, Gravesen and Rivera, and urged people to vote. The buttons were never worn. Shortly after the Anderson sign incident, WTA lodged a formal objection to the District's policies. Anderson testified WTA deferred using the buttons as part of its campaign "until we found out what we could and could not do."

Procedural Background

On October 31, WTA filed an unfair practice charge alleging that the District's policies and conduct interfered with protected rights.[13] The District's position was that it had

[12]President Cheek gave inconsistent testimony on this point at the administrative hearing. He repeated the claim that the District had no authority to regulate parent conduct. He additionally stated that he felt Hoffman's truck was not "intrusive" because it was parked at the opposite end of the parking lot from where Anderson's truck was parked.

However, Cheek also testified that although there had never been a District policy regulating political activities of non-employees on campus, there was no impediment to the board adopting such a policy. Cheek further stated that, formal policies aside, Superintendent Oliphant had the general authority to regulate activity at the Wilson School to maintain order and discipline.

[13]Three days before the formal hearing, WTA moved to amend the complaint to add a discrimination claim based on the District's failure to order Hoffman to move her campaign sign. The ALJ granted the motion, but stated that he did not consider the discrimination theory in his proposed decision because WTA did not argue in its post-hearing brief for an independent violation on that ground. However, the ALJ did consider evidence regarding the parent's truck in connection with WTA's

authority under the Education Code to regulate political activities on school property, and that it neither exceeded this authority, nor violated EERA.

At the hearing before the ALJ, WTA argued that placing a campaign sign on Anderson's truck was protected under EERA as an organizing strategy related to collective bargaining and other representational matters. Anderson testified at the hearing that:

> The importance [of the sign] to the Union was that it was a very visible thing for us to know that we were united, we were working for a common goal, that, . . . life wasn't quite as bad as we thought it was. It gave us hope, it gave us that, the strength to move on.

She additionally testified that the purpose of the sign was to send a "statement to the Board, to the community that we, the teachers, endorsed these candidates." She went on to say:

> The statement was that we, the teachers, wanted the Board to hear some of the things we were saying and that the community needed to vote and get a Board that was representative of them. The present Board had four appointed members and one elected. And we felt the community needed to elect their own representation. [14]

Witness George Cassell (Cassell), an employee of the California Teachers Association (CTA) also testified at the hearing

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interference theory. I find, as WTA tacitly concedes by its failure to file an exception to the ALJ's proposed decision on this point, that the discrimination claim was abandoned by the WTA. Therefore, the sole legal theory before us is WTA's interference charge.

[14]Both of these claims were repeated by WTA in the charges filed with the Board.

that campaign signs and buttons at the school site were important internal factors to union members. Cassell stated that they:

> enforced their own actions that they were part of a group activity and that they weren't doing something on their own, that they wouldn't be threatened because they were the only one who was demonstrating on the issue.

Cassell also testified that the signs and buttons were intended to help influence voters in the community.[15]

The District in turn argued that it could lawfully restrict political speech in instructional settings if such speech could cause controversy, disrupt the educational environment, or compromise District neutrality. Cheek testified at the hearing that the District had determined that political activities on campus would be inappropriate. The District had vowed not to take a position regarding any candidate and did not want its young students exposed to political activity. Because some students knew candidates, were children of candidates, or were neighbors of candidates, the District had decided that political activity surrounding the election might upset them. Cheek testified that "We weren't wanting any leaflets or anything large on campus that would distract from the educational process." Cheek believed the sign would cause "major political unrest" among parents at the school.

Witness Drusella West was a former member of the school board who chose not to run in 1996. She testified at the hearing that

[15]Both the internal support claim and the community influence claims were repeated by WTA in its arguments before the Board.

this was "the first heated election or contested election," and that there was "tension all around" among parents, staff and teachers.

On October 22, 1997, the ALJ rendered a proposed decision in which he found that the District violated EERA with regard to both the campaign sign allegation and the campaign button allegation. The District filed exceptions, to which WTA responded.

DISCUSSION

The Scope of PERB's Jurisdiction

The District argues that PERB has no jurisdiction over this matter: (1) because the unfair practice charge constitutes a dispute over first amendment free speech rights, and (2) that the District has the authority, under Education Code sections 7050 et seq., to regulate political speech on the Wilson School campus. The District contends that these Education Code sections supersede the EERA, and thereby serve to divest PERB of jurisdiction in this matter.

I reject these contentions. PERB has jurisdiction over conduct which may constitute an unfair practice under EERA, even though the conduct involves rights which are the subject of other constitutional or statutory provisions. PERB has exclusive original jurisdiction over acts that are arguably protected or prohibited under the EERA. (EERA sec. 3541.5;[16] El Rancho Unified

[16]EERA section 3541.5 provides, in part, that:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate

School Dist, v. National Education Assn. (1983) 33 Cal.3d 946, 952-960 [192 Cal.Rptr. 123]; San Diego Teachers Assn, v. Superior Court (1979) 24 Cal.3d 1, 12-14 [154 Cal.Rptr. 893]; Barstow Unified School District (1997) PERB Decision No. 1138b (Barstow), at p. 13.)

I find that neither our federal or state constitutions, nor the Education Code, bar the exercise of PERB's jurisdiction in this case. To the contrary, I consider them to be in harmony with EERA, in that they assist us in discerning the respective rights and responsibilities of the parties under the statutes which PERB has been charged to interpret.

I find that PERB not only has the power to construe EERA in light of constitutional precedent (Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, 583 [262 Cal.Rptr. 46]; Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 (Richmond/Simi Valley), at p. 16), but that the Board, as an agency of the State of California, has a duty to harmonize the provisions of EERA with the basic charters of our liberty. (See United States Constitution, First Amendment;[17] United States Constitution, art. VI, cl. 2,[18]

> the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board.

[17]The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the government for a redress of grievances.

art. VI, cl. 3;[19] California Constitution Article I, sec. 2(a);[20] Cooper v. Aaron (1958) 358 U.S. 1, 18 [3 L.Ed.2d 5].)

The Board may also interpret the Education Code, when such an interpretation is necessary, to carry out its duty to administer EERA. (McFarland Unified School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 166 [279 Cal.Rptr. 26]; Barstow, at p. 13, citing San Bernardino City Unified School District (1989) PERB Decision No. 723; Whisman Elementary School District (1991) PERB Decision No. 868.)

In cases such as this, there is the potential for tension between the Education Code and EERA. In these instances, the Board should harmonize the purposes underlying EERA with the Education

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[18]Article VI, cl. 2 provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[19]Article VI, cl. 3 provides, in pertinent part:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath of affirmation, to support this Constitution.

[20]Article I, sec. 2(a) provides, in part:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

Code. (San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 865 [191 Cal.Rptr. 800]; Solano County Community College District (1982) PERB Decision No. 219, at pp. 12-16.)

Although an employer may lawfully exercise its rights under the Education Code, it may not do so in a manner which violates EERA. The provisions of the Education Code cannot be used as a shield to protect unfair practices. If it appears that the Education Code is being used in this fashion, PERB will assert jurisdiction over the alleged EERA violation. (McFarland Unified School District (1990) PERB Decision No. 786.)

In the instant case, the exercise of our jurisdiction is triggered by the following: (1) whether there is a right, under EERA, of the employee organization and its members to communicate with fellow District employees and/or with the general public; and (2) if so, whether the District exercised its management rights in a way that violates EERA.

Merits of the Unfair Practice Charge

To establish unlawful interference with protected rights, the charging party must first make a prima facie showing that the employer's conduct tends to or does result in some harm to employee rights protected under EERA. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); see also, Novato Unified School District (1982) PERB Decision No. 210.) Therefore, the threshold question is whether WTA was engaged in conduct that is protected by EERA section 3543.5(a) and (b) and by section

3543.l(b). If so, we must then address the question of whether the District violated any of those rights by exercising the authority vested in it by the EERA.[21]

In answering these questions, we must first look to the communication itself, to see if it is protected. If we determine that it is in fact a protected right, we must then decide if, because of the time, place, and manner of the communication, it can be properly restricted. (Richmond/Simi Valley, at p. 19.) In doing so we must be careful not confuse the communication, which guides us in deciding whether or not the activity is protected, with the place where the communication occurs, which guides us in deciding whether or not the activity can be restricted.

Anderson's Campaign Sign

"To be protected, employee activity must be in pursuit of lawful objectives and carried out in a proper manner." (Konocti Unified School District (1982) PERB Decision No. 217 (Konocti).) Here, WTA was engaged in a lawful objective, i.e., participation in the democratic election of members of its own school board. I find that the acts surrounding WTA's display of the sign on the school parking lot were not so "indefensible" as to fall outside the pale of protected activities under EERA. (NLRB v. Local Union No. 1229. International Brotherhood of Electrical Workers (1953) 346 U.S.

[21]The fact that the District had the ability to restrict certain types of communication in the school setting under Education Code section 7055 does not mean that the District lacked coextensive operational powers under EERA. As was previously explained, the existence of such dual statutory power vests the Board with jurisdiction to address this question.

464, 477 [98 L.Ed. 195] (NLRB v. Local Union No. 1229); Konocti, at p. 7; Elk Lumber Co. (1950) 91 NLRB 333, 336-337 [26 LRRM 1493].) To the contrary, Anderson's campaign sign conformed with the District's January, 1992, policy. The sign's disclaimer, "Endorsed by Wilmar Teacher's Association," clearly communicated that WTA was acting on its own behalf, and was not holding itself out as a "representative of the District." Furthermore, Anderson was respectful of the District's decision to ban her sign from campus. She did not contest the District's authority to do so, but rather complied with Oliphant's directive at the first available opportunity. Neither Anderson nor WTA displayed the sort of animus which is a hallmark of unprotected communication cases.[22]

I find that the right to display Anderson's campaign sign was a protected activity under EERA. The record indicates that the sign was intended to promote solidarity among District employees, and to communicate with the public at large. Clearly, WTA's political campaign grew out of its frustration with the existing school board. Anderson's sign was an integral part of WTA's attempt to improve the existing wages, hours and working conditions for the employees it represented by changing the character of the District's Board of Trustees. It would be contrary to logic to

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[22]See NLRB v. Local Union No. 1229 (employees distribution to the public of handbills which attacked the quality of employer's product constituted insubordination, disobedience, or disloyalty of an employee to his employer, and was an unprotected activity); Pittsburgh Unified School District (1978) PERB Decision No. 47 (libel of both management and non-management employees not protected conduct); Konocti. (conduct of bus driver who stopped his bus while transporting children to school and requested students to support possible strike action was not protected activity).

believe that WTA's political efforts were not directly related to its job as exclusive representative of the District's employees.

I find that the campaign sign clearly constituted an "other form of communication" under EERA section 3543.1(b). It was a prominent, publicly displayed political endorsement of named candidates in a pending school board election, and was easily identifiable with the employee organization that represented public school employees. I am unwilling to overturn the ALJ's credibility determination that the sign was intended to promote solidarity among district employees. My experience shows that, although political billboards may add converts to the cause, their primary effect is to buoy the faithful.

The sign was also intended as a communication with the public at large. I find that this did not remove it from the class of protected activities under EERA. I do not interpret EERA section 3543.l(b) as creating a distinction between "employee" communication and "public" communication. It only speaks of "communication." In the instant case I see no rational basis for finding that WTA's communication with its employees is protected, but that WTA's communication with the public is not protected.

In reaching this conclusion on union communications with the public, I am mindful of the words of the United States Supreme Court, which find that "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to . . . the operation of the schools . . . ." (Pickering v. Board of Education (1968) 391 U.S. 563, 572 [20 L.Ed.2d 811] (Pickering).)

The federal Supreme Court has additionally admonished us in cases such as this "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (Id. at 568, emphasis added; see also, Richmond/Simi Valley, at p. 19; Pittsburgh Unified School District v. CSEA (1985) 166 Cal.App.3d 875, 903 [213 Cal.Rptr. 34] (school employees association's dissemination of information concerning the facts of a labor dispute is within that area of free discussion that is guaranteed by the Constitution); Education Code sec. 7052.)[23] Having found that the communication under EERA, I proceed to the question of whether the District had the power to restrict the display of the sign on the Wilson School parking lot.

In Carlsbad, the Board found that in order to establish unlawful interference with a protected right, the charging party must first make a prima facie showing that the employer's conduct tends to or does result in some harm to employee rights. Where the harm to employee rights is slight and the employer offers a

[23]Education Code section 7052, which was chaptered, passed and signed concurrently with section 7055, upon which the District relies, reads:

> Except as otherwise provided in this article, or as necessary to meet requirements of federal law as it pertains to a particular employer or employee, no restrictions shall be placed on the political activities of any officer or employee of a local agency.

justification based on operational necessity, the competing interests are then balanced. Where the harm is inherently destructive of employee rights, the employer's conduct will constitute interference unless the employer can prove that his conduct resulted from circumstances beyond the employer's control and no alternative course of action was available.[24]

I find that WTA has made the requisite prima facie showing of some harm to employee rights under Carlsbad, namely its communication rights under EERA section 3543.1(b). I also find that the first test set forth in Carlsbad, where the harm to employee rights is slight, where the employer offers a justification based on operational necessity, and where the Board balances the interest of the parties, controls the facts of this case.[25]

In weighing the respective interests of the parties before us, I proceed from the premise that there is a unique nature to the elementary public school environment where, because of their youth,

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[M]The balancing test that we apply in Carlsbad is similar, if not identical, to the balancing tests applied by the appellate courts in weighing the free speech interests of the parties in public school cases. (Pickering, at p. 568; Hazelwood School District v. Kuhlmeier (1989) 484 U.S. 260, 273 [98 L.Ed.2d 592] (Hazelwood).)

[25]I find that this matter can be disposed of under the PERB's rule in Carlsbad. As a result, I do not address questions pertaining to the propriety of the District's policy in effect on October 11, or the regulations adopted to implement that policy. Nor do I address the policy of October 24, under which the campaign button charge was raised, or its successor policy, adopted after the 1996 election. Under Carlsbad, the District was empowered to restrict the communication rights of WTA in this setting with or without any policy, and even without recourse to the provisions of Education Code section 7055.

children are easily influenced. (See e.g., Hazelwood, at pp. 266-267; L.A. Teachers Union v. L.A. City Bd. of Ed. (1969) 71 Cal.2d 551, 558 [78 Cal.Rptr. 723] (L.A. Teachers); California Teachers Assn. v. Governing Board of San Diego Unified School District (1996) 45 Cal.App.4th 1383, 1390 [53 Cal.Rptr.2d 474] (San Diego).) There are perhaps few more unique and intimate school environments than that which exists at the Wilson School. The school community consists of approximately 250 elementary school students, a handful of staff, and a few members of management. Children of school board candidates are also students of WTA members. The children know the teachers. They know the cars that the teachers drive. On a campus of this size and composition, it is not unreasonable to conclude, as did the District, that the posting of such a sign on school grounds could be disruptive of the educational environment.[26]

After considering the specific physical details of the Wilson School setting, as well as the right of WTA to communicate its choices for the school board, and the right of the District to ensure a proper educational environment, I find that the District's ban on Anderson's sign was justified under EERA, based on

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[26]I find that whether students actually noticed Anderson's sign, or whether disruption actually occurred, does not control the propriety of the District's ban on political activity on campus. In my view, there is nothing in EERA which requires the District to wait for such a disruption to occur as a precondition to regulation. Here the school board made a rational finding, based upon its knowledge of the student body, its employees, and the community, that political activity would be disruptive of or materially interfere with school activities. (See L.A. Teachers, at p. 559.)

operational necessity. Here the harm to employee rights was slight. The District did not seek to impose a total ban on the substantive message WTA sought to convey. It merely prohibited the exercise of one form of political advocacy in a given setting. "Other means of communication" under EERA section 3543.1(b) does not mean "any and all means of communication." (Regents of the University of California v. Public Employment Relations Bd. (1986) 177 Cal.App.3d 648, 654 [223 Cal.Rptr. 127] (Regents); emphasis in original.)[27] Since the total number of fellow union members with whom Anderson sought to communicate was six persons, all of whom were employed at the same school, I find that any right that WTA might have had to display a campaign sign on campus was outweighed by the decision of the District that political activities on campus would be inappropriate. This is especially true in light of the fact that similar types and means of communication were available to WTA other than on school property. The District did not attempt to curtail the ability of WTA to engage in other forms of political advocacy in other settings. Nor did the District's conduct affect WTA's ability to utilize alternate, equally meaningful, forms of access to its employees.

With regard to union communications to the public, I find that

[27]In Regents, the Court of Appeal upheld the Board's interpretation of Higher Education Employer-Employee Relations Act section 3568, which contains statutory language virtually identical to that appearing in EERA section 3543.Kb). (Regents, at p. 654.) It thereafter found that the University's denial of a union request to hang a banner at a location reserved for official announcements on the UCLA campus was a "reasonable regulation" of the union's right to communicate with its members. (Id. at pp. 653-655.) So too is the case here.

the District's interests outweighed the slight interest of WTA here as well. In such a small community, most potential voters were already aware of the school board candidates who were endorsed by WTA. As witness Larry King testified at the administrative hearing, "It [would have been] impossible to drive your kid to school and for the kid not to see a sign that said that the Wilmar Teachers Association supported certain candidates." A large campaign sign on school grounds was unnecessary to further convey this message.

I find that whether the communication was intended for employees or whether it was intended for the public, or both, is of little consequence here. There could have been a hundred reasons for display of the campaign sign. Under the circumstances of this case, I find no justifiable reason which would have allowed WTA to place this campaign sign on the Wilson School parking lot.

Given the unique facts of this case, including the small size of the student body and faculty, and the close contact these two groups had with each other during the typical school day, my weighing of the respective interests under Carlsbad shows that the scales must invariably tip in favor of the District. I find that the District's action was a "reasonable restriction" of WTA's "other means of communication" under EERA section 3545.1(b). Here the District could reasonably conclude that the truck sign, posted on school property during the work day, was an unsettling and inappropriate expression of political advocacy in an instructional setting. (Cf. Hazelwood. at p. 270.) The District was thus within

its managerial prerogative to prohibit its display.

Hoffman's Campaign Sign

Nor does the fact that the District allowed Hoffman, the parent volunteer, to display her campaign sign on school grounds change my conclusion. The District was clearly wrong in adhering to President Cheek's assessment that the truck "was not owned by a staff person, and that the District had no authority to regulate parent conduct." The same inherent authority which enabled the District to ban WTA's sign also vested it with the power to regulate Hoffman's political activities. President Cheek himself testified at the hearing before the ALJ that although there had never been a District policy regulating political activities of non-employees on campus, there was no impediment to the board adopting such a policy. Cheek further stated that, formal policies aside, Principal Oliphant had the authority to regulate activity at the Wilson School to maintain order and discipline. (See Hazelwood. at pp. 266-267; Education Code sec. 7055(b).) The question that arises, therefore, is whether the District's disparate treatment of WTA and of Hoffman compels me to alter my analysis. I find that it does not.

In Regents, the union argued that because the University had permitted three nonofficial organizations to post banners in an official space, the University had lost its right to reserve the banner space for official communications only. (Id. at p. 656.) In rejecting this claim, the Court of Appeal found that "a certain number of exceptions to a rule do not necessarily show that the

rule is being applied in an improper discriminatory manner." (Ibid.: citations omitted.)[28]

The fact that the District in the instant case mistakenly failed to evict Hoffman's sign from the school grounds, as it had Anderson's, does not rise to a showing of an interference claim under EERA. (Regents, at p. 656.) Accordingly, I would dismiss this allegation.

Campaign Buttons

WTA also challenges the District's policy which permitted wearing "campaign buttons during non-instructional duties provided they are not visible to children" as constituting an unfair labor practice.

Although WTA does not allege that the District actually prohibited any person from wearing a button, I find that such a question is ripe for adjudication by the Board. I do not find it necessary that a teacher must violate what might seem to be a subjective regulation in order to vest the Board with the power to act.[29] I am unwilling to force teachers into a Hobson's choice of

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[28]I note that, in Regents. the Court ultimately decided this question on the basis of HEERA sections 3571 and 3571.3, which bar an employer from expressing a preference for one employee organization over another. (Regents, at pp. 656-657.)

[29]Assuming that Cheek's testimony at the administrative hearing reflected the District's position at the time in question, it may help to explain the teacher's source of uncertainty as to when and where the buttons could be worn. For example, Cheek gave a somewhat confusing explanation regarding what he considered to be curricular activities, when the buttons could be worn, and instructional activities, when they could not be worn. At one point he also testified that if a teacher was going to their car to get curriculum it would be curricular time, but if they were going to their car to get lunch, it was not curricular time.

either exercising their communication rights in an uncertain environment, or facing an unknown District response. (Cf. Pacific Gas and Electric Company v. Energy Resources Commission (1983) 461 U.S. 190, 201 [75 L.Ed.2d 752] (ripeness turns on the fitness of the issue for decision, and on the hardship to the parties caused by withholding consideration of the issue); Los Angeles Unified School District (1996) PERB Decision No. 1181; California State Employees Association (Darzins) PERB Decision No. 546-S (cases which hold that statutory period to file unfair practice charge commenced on the date that the conduct constituting the unfair practice was discovered, and not some later date when the legal significance of the conduct was discovered).)

As was the case with Anderson's campaign sign, I find this to be a protected activity under the EERA. I additionally find that the actions of WTA and its members did nothing to remove the protected status from this activity. WTA and its members showed consummate respect for the power of the District to restrict this type of communication. Even when the District informed the teachers under what circumstances the buttons could be worn, WTA refrained from displaying the buttons, in Anderson's words, "until we found out what we could and could not do."

Having reached these conclusions, I also find that any harm to employee rights which may have resulted from the District's limiting, but not prohibiting, the wearing of the buttons on campus was slight. I again apply the Carlsbad weighing process to determine whether the District's policy violates WTA's rights,

under EERA, to wear the campaign buttons on the campus of the Wilson School.

On the facts before us, I find that the District's button policy again constituted a reasonable attempt, based on operational necessity, to appropriately regulate the communication rights of WTA and its members. (Cf. San Diego, at pp. 1392-1393.) Contrary to WTA's claim, the prohibition did not constitute a total ban. Rather, I find that it imposed a reasonable restriction upon the teachers not to wear the buttons during instructional times, or at other times when students could see them. As was the case with Anderson's campaign sign, the District was within the scope of its authority in enforcing a regulation which restricted the wearing of buttons in this manner. WTA's target audience under EERA was the same as with Anderson's sign; all of the alternate means of communication, previously set forth, were available. Furthermore, as Cheek testified, the teachers were able to talk together, to give each other leaflets, to use the internal mail system to distribute information, and even to place bumper stickers on their cars to further their political goals. Accordingly, I would dismiss this allegation as well.

CONCLUSION

Our role is to determine whether the District exercised any of its prerogative rights in a manner that violated EERA. I find that it did not. Since WTA has not established the elements of an unlawful interference claim, I would dismiss the unfair practice charge and complaint in Case No. SF-CE-1918.