

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA MONICA UNIFIED SCHOOL DISTRICT)
AND SANTA MONICA COMMUNITY COLLEGE DISTRICT,)

Employers,)

and)

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)
CHAPTER 36,)

Employee Organization,)

and)

SERVICE EMPLOYEES INTERNATIONAL UNION,)
LOCAL 660,)

Employee Organization.)

Case Nos. LA-R-29
LA-R-30
LA-R-176

PERB Decision No. 52

May, 24, 1978

Appearances: Charles L. Morrone, Attorney, for California School Employees Association, Chapter 36; Robert A. Siegel, Attorney, (O'Melveny & Myers), for Santa Monica Unified School District and Santa Monica Community College District; and Howard Z. Rosen, Attorney (Geffner & Satzman), for Service Employees International Union, Local 660.

Before Cossack Twohey and Gonzales, Members.¹

OPINION

On October 11, 1977, Hearing Officer Kenneth A. Perea issued the attached Proposed Decision. Thereafter, California School Employees Association, Chapter 36 (CSEA) filed exceptions.

I have considered the record as a whole and the attached Proposed Decision in light of the exceptions filed and affirm the rulings, findings and conclusions of the Hearing Officer only to the extent consistent with this Opinion.

¹ Chairman Gluck took no part in the deliberations on this matter.

FACTS

Pursuant to a consent election agreement, an election was held in an operations-support services unit on March 31, 1977. Following the election, CSEA filed timely objections to the conduct of the election.

As more fully set forth in the Hearing Officer's Proposed Decision, four of the six objections, and the ones to which CSEA has filed exceptions to the Proposed Decision, stem from a meeting held by employee relations specialist Peter Sweers on March 24, 1977 at the Santa Monica Unified School District's board room.

Briefly, the facts surrounding that meeting are as follows. Employee relations specialist Sweers, informed that classified managers were unsure as to whether they were included in the operations-support negotiating unit, requested supervisors Meyers and Ontiveros to notify the excluded employees of a meeting to clarify the issue. It appears that those persons excluded in the consent election agreement from the negotiating unit--including supervising head gardeners, supervising head custodians, senior head custodians and junior head custodians--were notified of the meeting by written notice. Other employees who were included in the negotiating unit--including gardeners, junior head gardeners and intermediate head gardeners--heard of the meeting by word of mouth and attended on their own initiative. Approximately 25-30 people attended the meeting, some of whom arrived late.

Employee relations specialist Sweers opened the meeting by stating that he assumed all present belonged to the excluded classifications of senior, intermediate and junior custodians.

Intermediate head gardener Loch, the only intermediate head gardener present at the meeting at this time,² asked if the exclusion applied to his classification as well. Sweers said that it did, thinking Loch had said his classification was head gardener.³ Intermediate head gardeners are included in the unit, while senior head gardeners are excluded. Sweers then read the definitions of supervisors and management employees contained in the EERA and stated that the assembled employees would not be eligible to vote in the upcoming election. Several employees asked why they had been excluded from the unit and specifically if CSEA had agreed to their exclusion. While the testimony is conflicting as to whether or not Sweers explained that the employer, CSEA and SEIU had all agreed to the exclusions, Sweers did specifically state that CSEA had so agreed.

The meeting was adjourned at approximately 4:00 p.m. At the end of the meeting several employees had questions regarding their exclusion from the unit, subsequent representation, wages and fringe benefits. Sweers told those assembled to look at the posted EERB notice⁴ to determine if they were eligible to vote and to

²/ Three other intermediate head gardeners subsequently arrived at the meeting.

³/ It is unnecessary to resolve whether Loch in fact referred to himself as an intermediate head gardener rather than head gardener. We note, however, that at the hearing held in this matter Loch referred to himself as a "head gardener" and that junior head custodian Featherstone testified without contradiction that it is common for employees in the district to call senior, junior and intermediate gardeners "head gardeners."

⁴/The EERB notice containing, among other things, a description of the negotiating unit, had been posted prior to this meeting, on about March 14, 1977.

contact the District's supervisor of operations Meyers on the other matters. Unbeknownst to Sweers, Meyers was to be out of town until after the election. One intermediate head gardener present, Rodriguez, did in fact consult the EERB notice and did vote. Loch, the only other intermediate head gardener who testified, neither consulted the election notice, read the campaign literature mailed to him, nor voted.

Immediately following the meeting senior head custodian Fizz asked the assembled employees if they were interested in getting more information and in having a meeting with supervisor of operations Meyers and CSEA. All agreed to this. Thereupon, Fizz called CSEA president Alexander and "told her...what Mr. Sweers had said CSEA had [done]...." Alexander agreed to a meeting. On the following morning Fizz called Meyers, who said that he could not attend such a meeting because he was going to be away. Fizz then called Alexander and told her that Meyers was unavailable and "...there would be no logic that I could see to meet with CSEA and they have what they have to say and Mr. Meyers couldn't say anything...."

Between the March 24 meeting and the election both Fizz, a 19 year CSEA member, and another excluded employee, junior head custodian Featherstone, a 10 year CSEA member, talked to other employees included in the unit. Both expressed their dissatisfaction with being excluded from the unit and their disenchantment with CSEA.

The tally of ballots reveals that of the approximately 260 eligible voters, 105 cast ballots for SEIU, 86 for CSEA, and five

for no representation. There were five challenged and two void ballots.

Discussion

The Board specified the grounds for objections in its rules and regulations. Rule 33590 states

33590. Grounds of Objections: Objections shall be entertained by the Board only on the following grounds:

(a) The conduct complained of is tantamount to an unfair practice as defined in Article 4 of the Act; or

(b) Serious irregularity in the conduct of the election.

CSEA contends that the conduct described above was both an unfair practice within the meaning of Sections 3543.5(b) and 3543.5(d) of the EERA and constituted serious irregularity in the conduct of the election.; I find no merit in these allegations.

I.

The gravamen of CSEA's argument of unfair practices hinges on allegations of conduct violative of Section 3543.5(d). This section provides that it shall be an unfair practice for an employer to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." CSEA contends that, the District violated this section by (1) interfering with its election campaign and therefore interfering with its administration, and (2) encouraging employees to join SEIU in preference to CSEA.

i The purpose of a provision such as Section 3543.5(d) is to assure that an organization purporting to act on behalf of

employees in the negotiating relationship has wholehearted devotion and single-minded loyalty to the interests of the employees it represents.⁵ CSEA does not state with any specificity how this basic purpose has been circumvented by the employer in this case. It would appear, however, that CSEA advances two arguments as to how the employer interfered with its election campaign and hence its administration: First, some rank-and-file employees were confused about their eligibility to vote because of employee relations specialist Sweers' remarks at the March 24 meeting; and second, two agreed-upon supervisory or managerial employees expressed their disenchantment with CSEA and their exclusion from the negotiating unit to rank-and-file employees.

An employer is free to address the issues raised by a pending election with its employees, let alone its supervisors and managers, provided no promises of benefits, threats of retaliation or otherwise coercive statements are made.⁶ An employer is even free to express antipathy toward an employee organization.⁷ In the instant

⁵ See Hotpoint Division, General Electric Company, 128 NLRB 788, 47 LRRM 1421 (1960); Duquesne University of the Holy Ghost, 198 NLRB 891, 81 LRRM 1091 (1972).

⁶ NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRRM 405 (1941).

⁷ See The Bailey Company, 75 NLRB 941, "21 LRRM 1112" (1948), in which the National Labor Relations Board concluded, "We do not... predicate our unfair labor practice finding upon the statements contained in the circulars and notices distributed by the respondent [employer], for although they clearly indicated respondent's antipathy toward the Union and its leaders..., they appear to be only such expressions of opinion as are protected by the constitutional guarantee of free speech." at p. 942.

case the employer merely informed those assembled that some classifications were excluded from the negotiating unit and ineligible to vote. It would be difficult to find a more innocuous and less coercive topic than a recitation of those classifications excluded, by agreement of all the parties, from the negotiating unit. Nor does the inadvertent statement that one included classification was excluded warrant a contrary conclusion. In fact, when it became apparent that there remained some confusion about which classifications were included in and which excluded from the negotiating unit, employee relations specialist Sweers admonished those in doubt to check the official posted election notice. The fact that some eligible employees did not heed this advice and sought no clarification from either the official election notice or either of the two competing employee organizations is certainly, in these circumstances, not attributable to the employer.

; I also find no merit to the assertion that the employer interfered with the administration of CSEA because of the statements of disenchantment with CSEA made by two agreed-upon supervisory or managerial employees. In the normal course of events the presumption is that an employer acts through agents, among whom are its supervisory and managerial employees, and is therefore responsible for their conduct on the basis of common law rules of agency. However, acts of supervisors and managerial employees should not be viewed in a vacuum but must be considered in the context of

the surrounding circumstances⁸. The danger to be avoided is the

⁸NLRB v. Brown Co., 160 F.2d 449, 455, 19 LRRM 2444 (1st Cir. 1947); Nassau and Suffolk Contractors' Association, Inc., 118 NLRB 174, 182, 40 LRRM 1146 (1957).

belief of rank-and-file employees that the employer encouraged, authorized, or ratified the activities of supervisors and management in such a manner as to lead the employees reasonably to believe that they were acting on behalf of the employer.⁹

In the instant case, CSEA did sign the consent election agreement excluding the two classifications of these employees, among others, from the negotiating unit. Absent CSEA's agreement on the unit composition, a unit determination hearing would have been held which may have resulted in their inclusion in the negotiating unit. CSEA was therefore in a very real sense responsible for the exclusion of these two employees from the rank-and-file unit. Furthermore, CSEA had ample opportunity prior to the election to explain to these and other employees why it had agreed to their exclusion. It chose not to do so, even though informed of the confusion a week prior to the election. The mere articulation of dissatisfaction with the treatment received from an employee organization by persons who had themselves been members for many years does not, itself, constitute either explicit or implicit interference with the administration of the organization. Under the circumstances, and absent any evidence that the employer knew of Fizz' and Featherstone's comments, let alone encouraged, authorized, or ratified their activities, it is unrealistic to conclude that the rank-and-file employees to whom they were made would reasonably believe that the comments were anything other than the personal

⁹Nassau and Suffolk Contractors' Association, Inc., supra.

opinions of Fizz and Featherstone about their treatment by an organization of which they had been members for many years.

Finally, CSEA offered no evidence that Fizz, Featherstone or anyone else encouraged any employees to support, much less join, SEIU instead of CSEA. In fact, there was no evidence that Fizz or Featherstone even mentioned SEIU when complaining about their perceived abandonment by CSEA. Their expressions of dissatisfaction, alone, hardly constitute either implicit or explicit support for another, rival organization.¹⁰

For the reasons set forth above, I conclude that the employer engaged in no conduct violative of Section 3543.5(d).

CSEA further asserts that the District violated Section 3543.5(b) of the EERA. This section provides that it shall be an unfair practice for an employer to "[d]eny to employee organizations rights guaranteed to them by this chapter." CSEA contends that its "right" to conduct an election campaign was abridged by the same events which I have found not to constitute a violation of Section 3543.5(d).

I agree that an employee organization is entitled to wage an election campaign. I do not here decide whether interference with a campaign which does not otherwise violate any other section of the EERA may violate Section 3543.5(b) because I fail to see how any of the conduct complained of prevented CSEA from waging whatever campaign it chose. Inherent in the whole notion of an

¹⁰ Compare Goshen Litho, Inc., 196 NLRB 977, 80 LRRM 1829 (1972), enfd, cas mod. 476 F.2d 662, 83 LRRM 2001 (1973).

election campaign is communication with eligible voters. Fizz, an excluded employee, called CSEA president Alexander and told her what had happened at the March 24 meeting. While the record is not exactly clear as to what Fizz told Alexander, it would appear that he at least told her that the employer had said his classification and that of Featherstone had been excluded from the negotiating unit. There is no evidence that CSEA attempted to contact Fizz, Featherstone or any employee to discuss the exclusions from the negotiating unit.¹¹ It is hardly incumbent on an employer either to alert an employee organization of disenchantment with it among employees or to arrange for a meeting for the employee organization to explain its views.¹² In fact, to do so could constitute a violation of Section 3543.5(d). Accordingly, I conclude that the employer engaged in no conduct violative of Section 3543.5(b).

II.

CSEA contends that the previously described conduct constitutes a serious irregularity in the conduct of the election because it had the effect of either discouraging employees from voting all together or encouraging employees to vote for SEIU in preference to CSEA. I disagree.

¹¹The record is totally devoid of any evidence about the election campaign. It is, therefore, impossible to determine whether the composition of the negotiating unit was elsewhere discussed.

¹²
(1956).

-NLRB v Babcock & Wilcox Co., 351 U.S. 1

In Tamalpais Union High School District,¹³ the Board's first case involving objections to the conduct of an election, we concluded that neither poll-monitoring, the presence of television cameras for brief periods during the balloting, nor reproduction and marking of the sample election ballot, alone or in combination, constituted serious irregularity. We also established a two-pronged test for determining whether voter participation in the election had been discouraged: (1) direct evidence that voter participation was discouraged or (2) the conduct complained of had the natural and probable effect of discouraging voter participation.

In the instant case one eligible employee, intermediate head gardener Loch, did not vote because he felt he was ineligible as a result of District employee relations specialist Sweers' remarks at the March 24 meeting. However, I do not view this as sufficient to warrant setting aside the election.

While an employer is not free to create confusion about voter eligibility either deliberately or inadvertently, neither are employees excused from their responsibility for being informed about pertinent election issues. In fact, Rule 33590 was promulgated limiting the grounds on which objections to the conduct of an election would be entertained on the assumption that in most circumstances employees... have the ability to inform themselves about election issues and are capable of making mature judgments.¹⁴ In all of the circumstances present here, particularly

¹³EERB Decision No. 1, 1 PERC 1, July 20, 1976.

¹⁴See Shopping Kart Food Market, Inc., 228 NLRB No. 190, 94 LRRM 1705 (1977).

the firm admonition of Sweers to employees to check the official EERB Notice to determine if they were eligible to vote, the amount of time available to permit any employee confused about eligibility to ascertain his true status, the fact that at least one other employee in the same classification as Loch who was also present at the meeting did vote, and the fact that even had Loch voted and voted for CSEA the outcome of the election would not have been affected, Loch's failure to vote does not constitute serious irregularity.

CSEA also argues that Sweers statements at the March 24 meeting "created...a hostile atmosphere against CSEA while CSEA was attempting to conduct an election campaign" with the result that employees were discouraged from voting and/or employees were encouraged to vote for SEIU in preference to CSEA. Since there was no evidence that Sweers at any time expressed any opinion about CSEA, CSEA apparently considers the expressions of disenchantment by senior head custodian Fizz and junior head custodian Featherstone as evidence of a hostile atmosphere. The fact of the matter is that CSEA did agree to exclude the job classifications of Fizz and Featherstone from the rank-and-file unit. Apparently CSEA reached this decision without consulting Fizz or Featherstone. While Fizz and Featherstone, and possibly other long-term CSEA members belonging to excluded classifications, may have misinterpreted CSEA's decision, the obligation to explain the decision and mitigate any negative impact on eligible voters rests with CSEA, not the employer. Finally, as elsewhere noted, there is no evidence that Fizz or Featherstone coupled their expressions of

dissatisfaction with CSEA with any expressions of opinion about SEIU. I find no serious irregularity sufficient to set aside the election.

Accordingly, CSEA's objections to the conduct of the election are overruled. Inasmuch as SEIU has received a majority of the valid votes cast, it shall be certified as the exclusive representative of the employees in the operations-support services unit described in the consent election agreement.

ORDER

It is hereby ordered that

(1) CSEA's objections are overruled.

(2) Service Employees International Union, Local 660, is certified as the exclusive negotiating representative of the employees described in the consent election agreement.

By: Jerilou Cossack Twohey, Member 

Raymond J. Gonzales, Member, concurring.

I concur in the above Order. This case presents issues that should be resolved in deliberations by all three Board members. By concurring separately in the result, I leave the Board free to consider these issues in future cases while giving the parties a final decision on the facts in this case.

Raymond J. Gonzales, Member 

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of)	
)	
SANTA MONICA UNIFIED SCHOOL DISTRICT)	
AND SANTA MONICA COMMUNITY COLLEGE)	Case Nos. LA-R-29
DISTRICT,)	LA-R-30
)	LA-R-176
Employer,)	
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and)	
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CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)	
CHAPTER 36,)	
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and)	
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SERVICE EMPLOYEES INTERNATIONAL UNION,)	
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Appearances: Charles L. Marrone, Attorney, for California School Employees Association; Howard Z. Rosen, Attorney (Geffner & Satzman), for Service Employees International Union, Local 660; Robert A. Siegel, Attorney (O'Melveny & Myers), for Santa Monica Unified School District.

Before Kenneth A. Perea, Hearing Officer.

STATEMENT OF THE CASE

On March 31, 1977, an election was conducted by the Los Angeles office of the Educational Employment Relations Board (EERB) pursuant to a consent election agreement for employees of the Santa Monica Unified School District and Santa Monica Community College District (Employer) employed in the operations-support services unit. The majority of the employees who participated in the election

selected Service Employees International Union, Local 660, (SEIU) as their exclusive bargaining representative.¹

Thereafter, California School Employees Association (CSEA), a party to the election, filed timely Objections to the Election alleging that certain pre-election conduct of the Employer was tantamount to an unfair labor practice and also constituted a serious irregularity in the conduct of the election warranting the Los Angeles Regional Office of the EERB to set aside the election and conduct a second election.

In its objections dated April 5, 1977, CSEA alleged seven separate objections.

1. CSEA alleges that on March 24, 1977 the Employer's employee relations officer, Peter C. Sweers, had a meeting in which both management and negotiating unit

¹The tally of ballots signed by the parties shows the following results:

Approximate number of eligible voters.	<u>260</u>
Void ballots.	<u>2</u>
Votes cast for <u>Local 660 SEIU - AFL-CIO</u>	<u>105</u>
Votes cast for <u>California School Employees Assoc. & its Santa Monica Chapter No. 36</u>	<u>86</u>
Votes cast for <u>-</u>	<u>0</u>
Votes cast for no representation.	<u>5</u>
Valid votes counted	<u>196</u>
Challenged ballots.	<u>5</u>
Valid votes counted plus challenged ballots.	<u>201</u>

employees were present, in which he responded to a question from a senior head custodian as to why senior head custodians had been removed from the negotiating unit by stating that CSEA was responsible for removing senior head custodians from the negotiating unit. CSEA alleged that a senior head custodian was upset with CSEA due to Sweers' response in that Sweers' response constituted a ". . . denial of CSEA's rights to conduct an election campaign without unwarranted interference from [the] employer, and being tantamount to encouraging employees to select another employee organization in preference to CSEA."

2. CSEA realleged the statement attributed to Sweers in another objection and adds that a junior head custodian, Kenneth A. Ritter, heard Sweers¹ statement, and became disenchanted with CSEA. CSEA alleges that Sweers' statement constituted election interference which encouraged employees to select SEIU rather than CSEA.

3. CSEA, referring to the March 24, 1977 meeting in which Sweers made a pre-election statement, alleges that in response to the statement by an intermediate head gardener in which he identified himself as an intermediate head gardener, Sweers stated that he was in the same group with the custodians who were excluded from the negotiating unit. CSEA alleges that Sweers¹ statement caused the intermediate head gardener, Louis L. Loch, to believe that he was excluded from the negotiating unit and not to vote in the election.

4. CSEA alleges that during the March 24, 1977 meeting Jesus Rodriguez, an intermediate head gardener, was given the impression that he was excluded from the negotiating unit. CSEA alleges that this impression is attributable to the Employer in that the conduct of the Employer constitutes a denial of CSEA's right to conduct an election campaign without Employer interference, although the objection further states that Rodriguez did in fact vote in the election.

5. CSEA alleges that a negotiating unit employee, Jackie Gurrion, was approached by negotiating unit carpenters in the vicinity of the voting location who asked her

if she was going to vote for SEIU. CSEA contends that the polling location was under the control of the Employer and that the Employer had a duty to prohibit electioneering in the vicinity of the polling location, that it failed to do so, and that such breach of its duty constitutes a serious irregularity in the conduct of the election.

6. CSEA alleges that within ten working days prior to the date of the election, the Employer supplemented its list of eligible voters previously distributed to the parties in conformity with EERB Regulation 33530,² and that this distribution constitutes a serious irregularity in the conduct of the election.

7. In its final objection, CSEA incorporates by reference its previous six objections alleging that the Employer's pre-election conduct in March 1977 constituted a serious irregularity in the election which interfered with the right of CSEA to conduct an election campaign without unwarranted Employer interference.

A hearing on the objections herein was conducted on June 8 and 9, 1977. At the commencement of the hearing, SEIU moved to intervene as the real party in interest in that should the hearing officer or the Board sustain any or all of the objections and set aside the election, it would be SEIU which would be adversely affected as it had previously been selected by the employees as their exclusive negotiations representative. The hearing officer granted the motion to intervene, finding SEIU to be an interested party.

After both CSEA and the Employer had presented their cases in chief with respect to the objections, SEIU moved to dismiss Objections Nos. 4 and 5 on the basis that CSEA had not presented a prima facie case. The hearing officer denied SEIU's motion with respect to Objection No. 4 and granted the motion with respect to Objection No. 5.

² Calif. Admin. Code, Title 8, Section 33530.

ISSUES

1. Did the employer engage in unlawful pre-election conduct on March 24, 1977?
2. Did the employer fail to furnish the employee organizations with a timely list of eligible voters pursuant to Regulation 33530 which constituted a serious irregularity in the conduct of the election?

FINDINGS OF FACT

A. The Meeting of March 24, 1977

(1) Background

On February 28, 1977, the parties to this proceeding executed a Consent Election Agreement (Agreement), the terms of which they had arrived at during the course of, and in settlement of, a unit determination hearing in late 1976 before an EERB hearing officer. The Agreement provided for the March 31 election and for the exclusion from the unit in which the election was to be conducted (the operations/support services unit) of the following classes of employees, which the Agreement designates as "management employees within the meaning of Government Code Section 3540.1(g)": supervising head gardener, supervising head custodian, senior head custodian, intermediate head custodian and junior head custodian. The Agreement includes within the operations/support services unit, among other classifications, "Gardener, Junior Head" and "Gardener, Intermediate Head."

The Los Angeles Regional Office of the EERB prepared Notices of Election containing the inclusion and exclusion language of the Agreement. Mr. Peter Sweers, the District's employee relations specialist, caused these notices to be posted on or about March 14. Thereafter, Mr. Sweers received word from two senior managers, Mr. William Meyers and Mr. Richard Ontiveros, that some employees who had been designated as managers in the Consent Election Agreement were unsure as to whether

³The Agreement further states, however: "Approval of this Consent Election Agreement should not be interpreted to mean the Board would find the unit described herein to be an appropriate unit in a disputed case."

or not they were going to be allowed to vote. In order to clarify the situation for management-designated employees, Mr. Sweers decided to call a meeting for March 24, one week before the election. Mr. Sweers asked Mr. Meyers and Mr. Ontiveros to notify those employees who were excluded from the operations support services unit to attend the meeting. Mr. Sweers instructed them to have junior head custodians, intermediate head custodians, head custodians and head gardeners and those who had questions about being excluded from the unit to attend the meeting. Mr. Sweers testified that he did not know exactly how Mr. Meyers and Mr. Ontiveros notified the employees about the meeting. However, Theodore Fizz, a senior head custodian and Glenn Featherstone, a junior head custodian, both testified they received written notices of the meeting. Louis Loch, an intermediate head gardener, testified that he heard about the meeting from a custodian named Chuck. Jesus Rodriguez, another intermediate head gardener, heard from the District's head gardener. From this sparse evidence, the hearing officer infers that ineligible voters were summoned to the meeting in writing whereas the intermediate head gardeners present at the meeting (discussed below) were notified by word of mouth.

(2) The Meeting

The meeting took place in the District's Board Room on March 24, 1977. Testimony regarding the number of employees who attended conflicted, the witnesses estimating between 20 and 30. Among these 20 to 30 employees were five intermediate head gardeners: Peter Felix, Bill Keerits (spelled in the record phonetically), Louis Loch, Jesus Rodriguez and a man named Joe whose last name Mr. Rodriguez, called as a witness by CSEA, could not pronounce. Mr. Sweers had called the meeting for 3:30 p.m., but arrived a few minutes late. When he arrived, Theodore Fizz was addressing the group. Sweers waited a few moments for a discussion between Fizz and the other employees to end. Then he interjected asking whether the conversation could be wrapped up quickly since they would have to be out of the room by 4:00 p.m. Fizz immediately yielded the floor.

Mr. Sweers opened the meeting by stating that he assumed that the employees present all belonged to excluded classifications of custodians such as senior custodians, intermediate custodians, and junior custodians. There is no evidence that he mentioned that one excluded class of gardener, supervising head gardener. This mention of classes of custodians led intermediate head gardener, Mr. Loch, to ask whether the exclusion applied to him, too. Mr. Sweers then asked Mr. Loch what his classification was. Mr. Sweers testified that Mr. Loch called himself a "head gardener." Mr. Loch's recollection was that he referred himself as "intermediate head gardener." Mr. Loch's recollection of details of this question and answer (although not necessarily of the whole meeting) seemed to the hearing officer much sharper and more detailed than Mr. Sweers. The hearing officer finds that Mr. Loch referred to himself as an intermediate head gardener. Mr. Sweers, however, believed that Mr. Loch had said "head gardener" and assumed that Mr. Loch was the supervising head gardener. To Mr. Loch's question, Mr. Sweers replied that the "same thing" (exclusion) applied to Mr. Loch. Mr. Loch further stated that he did not vote in the election, because he did not believe he was eligible to vote, based upon what he found out at the meeting, although prior to the meeting he believed that he was eligible. Mr. Jesus Rodriguez testified that he did vote. No party offered evidence regarding whether the other three intermediate head gardeners present at the meeting voted.

Mr. Sweers went on to read Section 3540.1(g) of the EERA, which defines "Management employee," to those assembled, and explained once again that the employees at the meeting would not be allowed to vote in the upcoming election.

At this point, several employees, including Mr. Fizz, asked for further explanation for the reason they had been excluded from the unit. According to Mr. Sweers' testimony, he responded that "two union" (CSEA and SEIU) and the Employer had agreed to the exclusions. Mr. Glen Featherstone, another employee-witness, recalls Mr. Sweers mentioning the negotiations. Mr. Fizz and possibly others then asked specifically whether CSEA had agreed to the arrangement. Mr. Sweers answered

that, yes, CSEA had agreed.

Mr. Fizz, on the other hand, remembered Mr. Sweers, "at the end of the meeting," saying that CSEA "put [the employees] in management." Similarly, Mr. Featherstone testified that he thought he remembered Mr. Sweers saying that certain of the employees at the meeting had been "separated from CSEA."

Some of the men at the meeting, Messrs. Fizz and Featherstone included, interpreted Mr. Sweers' answer to the specific question about CSEA's acquiescence in the exclusions to mean that CSEA had been solely responsible for them. The hearing officer finds that they did not reasonably do so.

Fizz and Featherstone became quite upset over what they took to be a betrayal by CSEA. Mr. Fizz related his version of what Mr. Sweers had said to nine eligible voters, all of which, as far as Mr. Fizz knew, voted in the election. He also contacted Ms. Etta Alexander, President of CSEA, Chapter 36, related his version of Mr. Sweers' statement to her, and tried to arrange a meeting to further discuss the truth of the statement. Mr. Featherstone related his dissatisfaction with CSEA to two fellow custodians who were eligible to vote and to various other employees who were not eligible.

At approximately 4:00 p.m. Mr. Sweers adjourned the meeting because other people were waiting to use the Board Room and because he had other appointments to keep. Mr. Fizz testified that at that time he still had questions in his mind regarding salary and fringe benefits, "and under that there was vacations and so forth." Before Sweers left, some employees asked him questions regarding what organization, if any, would represent the people in the meeting. Others asked questions regarding whether and when they would receive raises in wages, or additional fringe benefits. Mr. Sweers, on his way out of the meeting, referred the questions to William Meyers, supervisor of operations, who left town and was not available to speak with the employees before the election. Sweers referred them to Mr. Meyers because Sweers felt that Meyers, their immediate supervisor, "could better hear their concerns," on substantive questions of wages and fringe benefits.

B. The Eligibility List

The evidence is undisputed that the District timely submitted a list of employees in the operations support unit to the EERB, CSEA and SEIU at least ten working days prior to the election, pursuant to EERB Rule 33530. It is equally without dispute that the list as originally filed and served on the organizations was incomplete. The District supplemented the list by letters dated March 23 and March 25, 1977. The March 23 letter bears the name of one voter and that of March 25 the names of 12 voters, and a notation "BY HAND." No evidence indicates when the organizations received these letters. Mr. Sweers testified without contradiction, however, that he sent copies of the letters to the organizations, and that these omissions were the result of inadvertent clerical error. A letter correctly addressed and properly mailed is presumed to have been received. Evidence Code Section 641. CSEA having failed to put on evidence that it did not timely receive the letters, the hearing officer concludes that they were timely received.

Mr. Sweers further testified that representatives of both CSEA and SEIU contacted him to bring his attention to omissions on the list, although he could not recall which names or classifications had been brought to his attention by which organizations. This testimony is also uncontradicted and undisputed.

C. Statistical Evidence

CSEA presented evidence that the average voter turnout in 21 blue collar unit elections in which both CSEA and SEIU appeared on the ballot was 83.8 percent, whereas 71.5 percent of the eligible employees voted in the Santa Monica election. The hearing officer finds this to be true, but, as discussed below, there is no evidence, nor can one reasonably infer, that this lower-than-average turnout resulted from any of the conduct complained of.

CONCLUSIONS OF LAW

EERB Rule 33590 sets forth the only grounds upon which a hearing officer may find that an election should be set aside. Those grounds are:

- (a) The conduct complained of is tantamount to an unfair practice as defined in Article 4 of the Act; or
- (b) Serious irregularity in the conduct of the election.

The Board itself interpreted Rule 33590 in Tamalpais Union High School District, EERB Decision No. 1, September 20, 1976. The Board held:

In adopting Rule 30076 [presently Rule 33590] it was the intent of the EERB to overturn representation-election results only when conduct affecting the results of the election amounts to an unlawful practice under Article 4 of the Rodda Act or constitutes "serious irregularity in the conduct of the election." [Emphasis added.]

The Board further ruled in Tamalpais that:

In the absence of evidence that voters were discouraged from voting, we would sustain the Association's poll-monitoring and television-coverage objections only on finding that those events had the natural and probable effect of discouraging voter participation in the representation election.

Thus, before the EERB may overturn a representation election, the objecting party must prove the following elements:

Effect

- (1) Conduct occurred which affected the results of the election: This element may be established by (a) evidence showing that voters were actually discouraged from voting, or (b) evidence establishing that the conduct complained of had "the natural and probable effect of discouraging voter participation" in the representation election; and

Cause

- (2) That the conduct complained of amounts to an unlawful practice under Article 4 of the EERA or constitutes "serious irregularity in the conduct of the election."

It is apparent therefore that conduct which affected the results of an election is insufficient to overturn an election unless it also amounts to an unlawful practice or constitutes serious irregularity in the conduct of the election. Conversely, conduct which amounts to an unlawful practice or constitutes serious

irregularity in the conduct of the election is insufficient to overturn an election unless it also affected the results of the election.

We shall now examine the facts of the present case with the above requirements in mind.

With regard to sub-section (a) of Section 33590, CSEA, in its posthearing brief, postulates a right which it has in its capacity as an employee organization to carry on a representation election campaign without "unwarranted interference." This right arises, CSEA contends, by implication from Section 3541.3(c) of the EERA,⁴ since the EERB has the authority to conduct elections, and from Section 3543.5(d)⁵ because "[o]ne of the functions of an employee organization is to conduct representation elections." These rights exist, says CSEA, in addition to the rights of employees under Sections 3543 and 3543.5(a) to choose representatives without interference, restriction or coercion.

This distinction assumes greater proportions in light of San Dieguito Faculty Association v. San Dieguito Union High School District, EERB Decision No. 22, September 2, 1977. That decision established that the charging party in an unfair practice proceeding must show the respondent's unlawful motive in interfering with employee rights or at least that the respondent's conduct has the natural and probable consequence of so interfering. CSEA thus relies on sub-sections of Section 3543.5 which at least

⁴Section 3541.3(c) gives the EERB the power and/or duty: "[T]o arrange for and supervise representation elections, which shall be carried out by secret ballot elections, and certify the results of the elections."

⁵Section 3543.5(d) makes it an unfair practice to ". . . interfere with the . . . administration of any employee organization. . ."

arguably require no showing of motive.

It is also contended that the facts of this case represent a serious irregularity in the conduct of the election, in violation of sub-section (b) of Rule 33590.

CSEA's theories are, to say the least, novel and untested. For reasons which appear below, it will be unnecessary to rule on their legal sufficiency.

Sweers' Statement about CSEA

CSEA's objection regarding Sweers' statement about CSEA must fail for lack of evidence by CSEA that Sweers' statement amounts to an unlawful practice or constitutes serious irregularity in the conduct of the election.

The controversy regarding this statement was primarily factual. As indicated above, the hearing officer does not find that Mr. Sweers laid the sole responsibility for any exclusions from the negotiation unit at CSEA's doorstep, as CSEA alleged. An essentially accurate statement, made to an assembly composed primarily of management employees, regarding the history of relations between an employee and employee organizations does not, in the opinion of the hearing officer, amount to an "unwarranted interference" with an election, although it is unfortunate that some of those employees unreasonably misinterpreted the statement. With regard to Sub-section (b) it is concluded that such a statement to such an audience is not an "irregularity" at all. Certainly, CSEA presented no evidence, and cited no authority to show that this sort of address does not occur with regularity before elections.

Further, one should note that Sweers made his address a full week before the election. The hearing officer, therefore, concludes that the consideration of timing can aid in deciding whether a given "irregularity" is serious.

Theodore Fizz visited Etta Alexander of CSEA the day after the meeting with Mr. Sweers and gave her his interpretation of what Sweers had said. CSEA was, therefore, on notice of Sweers' statement six days before the election. There was

sufficient time to visit the employees who had attended the meeting, disabuse them of any misconceptions they might have had and thus halt the spread of any ill feelings against CSEA. It is, therefore, concluded that even if Sweers' statement amounted to an irregularity in the conduct of the election, that irregularity was not serious enough to warrant setting aside the election.

Sweers' Statement to Loch

CSEA's objections regarding Sweers' statement to Loch must fail for lack of CSEA showing that the conduct complained of affected the results of the election. A statement such as that which Mr. Sweers made regarding the eligibility to vote of a group of employees presents a more serious problem, since it tends to negate the EERB's process of informing voters of their eligibility. However, the record shows that only five intermediate head gardeners attended the meeting. Of those five, one (Rodriguez) voted and one (Loch) did not; no evidence appears as to the other three. Even assuming that these three, and Loch, had wanted to vote for CSEA, and did not vote because of Sweers' statement, Sweers only affected four voters by his conduct. CSEA received 86 votes in the election. An additional four votes would give CSEA a total of 90—not enough for a majority or to force a run-off.

CSEA's contention with regard to the statement of Mr. Sweers must thus fail for lack of a showing of a cognizable effect.

The Eligibility List

CSEA's objections regarding the eligibility list must fail for lack of CSEA's showing that any omission therefrom affected the results of the election. CSEA attacks the omissions from, and later additions to, the eligibility list only under sub-section (b) of Rule 33590. Rule 33530, providing for filing with the EERB and service on the parties of such a list, is similar to the rule adopted by the NLRB in Excelsior Underwear, Inc., 156 NLRB 1236, 1246, 61 LRRM 1217, (1966). The NLRB explained that it sought, by establishing the Excelsior rule, to give voters access to arguments in favor of union representation by giving employee organizations

access to the voters. The hearing officer concludes that the EERB had a similar motive in adopting Rule 33530. Since CSEA presented no evidence that the late receipt of 13 names in fact hampered its ability to contact those voters,⁶ the failure of the District to provide a complete list ten working days before the election must be examined in the light of the natural and probable effect of the late receipt on its ability to contact voters.

At the very least, CSEA had a day and a half to contact the omitted voters. CSEA was also on actual notice even before Sweers prepared the additions to the list that the District had omitted some names (see footnote 5 below). The hearing officer cannot infer from this state of events sufficient prejudice to CSEA's ability to communicate with voters to constitute a serious irregularity in the conduct of the election.

The Allegations regarding Kenneth Ritter

CSEA presented no evidence whatsoever to substantiate the objection that junior head custodian Ritter heard Sweers' statement and became disenchanted with CSEA. The allegation is therefore dismissed.

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On the contrary, it appears that CSEA knew of at least some of the eligible voters excluded from the list before receipt of the corrections, since Mr. Sweers testified that a representative of CSEA telephoned him and told him the list was defective.

PROPOSED ORDER

It is the Proposed Decision:

1. That the objections to the conduct of the election be DISMISSED,
and
2. That SEIU, Local 660, be certified as the exclusive representative of the unit described in the consent election agreement.

The parties have seven (7) calendar days from the receipt of this Proposed Decision in which to file exceptions in accordance with EERB Regulation 33380 (8 California Administrative Code 33380). If no party-files timely exceptions, this Proposed Decision will become a final order on October 24, 1977 and a Notice of Decision will issue from the Board.

Dated: October 11, 1977.

Kenneth A. Perea
Hearing Officer