

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RICHMOND FEDERATION OF TEACHERS,)
)
Charging Party,)
)
v.) Case No. SF-CE-22
)
RICHMOND UNIFIED SCHOOL DISTRICT,)
)
Respondent.) PERB Decision No. 99
)
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)
August 1, 1979
SIMI EDUCATORS ASSOCIATION/CTA/NEA,)
)
Charging Party,)
)
v.) Case No. LA-CE-48
)
SIMI VALLEY UNIFIED SCHOOL DISTRICT,)
)
Respondent.)
)
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Appearances: Stewart Weinberg, Attorney (Van Bourg, Allen, Weinberg and Roger) for Richmond Federation of Teachers; W. W. Snodgrass for Richmond Unified School District; Charles R. Gustafson, Attorney for Simi Educators Association/CTA/NEA; George J. Hawkins, for Simi Valley Unified School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

In each of the two cases we have consolidated for this decision, a school district denied an employee organization

access to its internal mail delivery system because of the content of a document presented for distribution. The employee organizations claim that access to the mail system is permitted by that portion of section 3543.1(b) of the Educational Employment Relations Act (hereafter EERA) that authorizes use of "institutional bulletin boards, mailboxes, and other means of communication."¹ The employee organizations also claim that the districts' policies governing use of the mail systems are not "reasonable" regulations within the meaning of the statute. Both districts maintain that their regulations are reasonable and that the content of the documents justified district refusal to allow use of the mail systems. In Richmond, which we affirm, the hearing officer found that the District's action was an unfair practice, violating the employee organization's right of access. In Simi Valley, which

¹Section 3543.1(b) states:

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.

we reverse, the hearing officer found that use of the mail system was not one of the "other means of communication" contemplated by the statute.

FACTS

Certain facts are common to both districts. Long-standing administrative practice had permitted employee organization use of the internal district mail systems. Employee organizations would deliver bundled material to a central location for subsequent drop-off at scattered school sites. A district official approved the document submitted by the organization prior to actual distribution. The material was delivered at each school site to the organization's on-site representative, who placed it in individual employee mailboxes.

In the Richmond case, on October 18, 1976, the Richmond Federation of Teachers (hereafter Federation or RFT) brought its weekly union newsletter to the central office for mail system distribution. The Federation was involved in a pre-election organizational campaign with the competing Association of Richmond Educators. Three days later, when the newsletter had still not been distributed, the Federation president contacted the District superintendent. The Federation was informed that the newsletter would not be distributed because of a misstatement of fact: that non-management employees received a \$34 per month raise, rather

than the correct figure of \$37. The RFT official offered to print a correction in the next weekly issue, but this offer was rejected by the District. The following week the Federation on its own distributed 2,000 copies of the newsletter, along with a correction sheet attached by the RFT's on-site representative before the document was placed in the teachers' mailboxes.

After the District's denial of access to the mail system the Federation filed an unfair practice charge with PERB alleging that the District unreasonably denied access to the school mail system, with the effect of restraining the Federation "from communicating with RFT members and all other teachers of the District on matters of employment relations within the scope of the Act." Additionally, by implication, RFT challenges the continuing application of the underlying administrative practice of the District. The superintendent's action denying use of the mail system was supposedly based on authority provided by this administrative practice, adopted in 1973 after consultation with the Contra Costa County Counsel.² The administrative guideline, however, has no

²A February 23, 1973 memorandum on "Distribution of Organizational Materials" from the District's then Superintendent of Schools, W.W. Snodgrass, to all principals in the District sets forth the practice in existence at all times relevant to the issue herein. The memorandum consists of the following series of questions which had been submitted to the Office of the County Counsel of Contra Costa County, and the answers thereto:

provision restricting distribution of a "misstatement of fact" or authorizing the District to demand a correction. A second reason for prohibiting mail system distribution was set forth by the District in its answer to the unfair practice charge. The District contended that correction of the proffered newsletter was reasonably required because "this misinformation if disseminated through the newsletter could have led to

(Footnote 2 cont.)

"1. What is the criteria governing association publications which could not appropriately be sent through the school mail?

Ans. a) Publications advocating/advising/suggesting non-compliance with the California Education Code and/or board rules and regulations.

b) Publications containing materials obviously political in nature.

2. What restrictions are placed on material to be inserted in teachers' mailboxes?

Ans. See 1.a) above.

b) Materials to be submitted to the principal prior to distribution. This submission is not to be used as a prior restraint or censorship.

3. Do these restrictions, if any, apply to material delivered to building representatives through a means other than school mail?

Ans. See 1.a) and 2.b) above.

4. What restrictions, if any, exist regarding the distribution of teacher association publications in the teachers' room during the duty free lunch time?

Ans. See 1.a) and 2.b) above."

unwarranted employee discontent and disruptive demonstration." At the hearing on this charge, the District did not introduce any evidence in support of this claim. As a third argument to this Board, the District contends that its regulation is reasonable and was properly applied in this case.

The specific facts in Simi Valley are similar. On December 2, 1976, the Simi Educator's Association (hereafter Association or SEA) delivered 800 to 1,000 copies of a leaflet for distribution through the internal district mail system. The flyer, entitled "Binding Arbitration--or Board Policies?" was a one-page statement of the Association's reasons for proposing binding arbitration as the final step in the school's grievance procedure. An SEA survey showed that this issue was a high priority for Association members in pending negotiations with the employer. One paragraph of the leaflet paraphrased the opposition of a District board member:

Alright, if we must have collective bargaining, we can see to it that it is as ineffective as possible by leaving all contractual interpretations solely in the hands of the board.

After the leaflet was submitted, District officials wavered over their decision for a few days but eventually refused to distribute the document, claiming that it violated a portion of its administrative policy that prohibited distribution of

materials that "malign" an individual.³ Within several days thereafter, the Association itself distributed the leaflet to its school site representatives for placement in

³The Simi Valley administrative policy in effect at the time the unfair practice proceeding arose, states:

1. Communications from employee organizations which are intended for distribution shall be submitted to the Office of the Associate Superintendent.

3. The district will allow the use of the mail distribution system, including the individual mailboxes at school sites, for distribution of appropriate approved material.
4. Materials submitted for posting or for distribution in the mailboxes shall be confined to such matters as announcements of organizational meetings, social functions, nomination and election of officers, factual informational bulletins dealing with the progress or results of negotiations, and any other material authorized by the Associate Superintendent.
5. No advertising, controversial, derogatory, or material which maligns or attacks individuals shall be submitted. . . .

There should be no distribution of political or partisan nature. . . .

6. The organization submitting material assumes responsibility for complete compliance with the spirit and intent of the provisions of this regulation. Should the school district believe that material presented is not in accordance with the spirit and intent of this regulation, such material shall be returned to the

teacher mailboxes.

The Association has charged that the District's denial of access "constitute[d] an attempt by respondent to impose or threaten to impose reprisals on employees and to restrain and coerce employees because of their exercise of rights guaranteed by section 3543.1(b)" of EERA, and "an attempt to dominate and interfere with the administration of the charging party."⁴

(Footnote 3 cont.)

organization submitting it with a notification of the reason for belief that the material is not in accordance with the spirit and intent of this regulation.

7. Any violation of this regulation shall entitle the school district to cancel immediately the provisions of this regulation.

⁴These allegations are based on Government Code section 3543.5(a) and (d) cited below. The decision of the hearing officer in this case concluded that there was no evidence of violations of those sections. He therefore treated the charge as one arising under section 3543.5(b). In pertinent part, section 3543.5 states:

It shall be unlawful for a public school employer to:

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

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

(d) Dominate or interfere with the

SEA also challenges the continuing application of the underlying administrative policy. In answer to the unfair practice charge filed by the Association, the District stated that the document was also rejected because the flyer was not written about a permissible subject for mail system materials, was "controversial" and "derogatory," and was political action, all in violation of the aforementioned administrative policy. At the hearing in this case, the District did not offer any evidence in support of its characterization of the document other than the leaflet itself. Additionally, the District did not offer any rebuttal to Association claims that on other occasions Association publications contained criticisms of individuals that were at least as strong as in this case; nevertheless, those publications were distributed through the district mail system.

DISCUSSION

A. EMPLOYEE ORGANIZATION USE OF SCHOOL MAIL SYSTEMS IS AUTHORIZED BY SECTION 3543.1(b).

As a threshold matter, PERB finds the Legislature intended to include use of internal school mail systems as one of the

(Footnote 4 cont.)

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.

employee organization access rights authorized by section 3543.1(b) of EERA.

It has been a longstanding practice of the Richmond and Simi Valley districts and public school employers throughout the state to make mail systems available for employee organizations. See 45 Ops. Atty.Gen. 138 (1965). The practice has been widespread for two principal reasons: effective communication between employee organizations and their members is essential for productive employer-employee relations; and, mail systems are perhaps the most efficient and non-disruptive means of communication available to employees and their representatives. EERA was enacted to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California" (sec. 3540), and the terms of section 3543.1(b) show that the Legislature desired effective communications to play a part in the overall statutory design. It would be anomalous, at best, to hold that section 3543.1(b) intended to exclude the use of a medium of communication that has been widely established over a period of time and has proven to be effective, efficient and non-disruptive.

PERB's view that the Legislature did not intend to limit communication to only those means expressly itemized in the statute is supported by interpretation of an analogous provision of the Meyers-Miliias-Brown Act (Gov. Code sec. 3500

et seq.), which permits access to bulletin boards and other means of communication. (Sec. 3507.) The Attorney General found that mail systems were included within "other means of communication" under the statute. 45 Ops.Atty.Gen. 138, supra. The hearing officer in Simi Valley decided, however, that the Attorney General's conclusion concerning section 3507 has reached because the only means of communication specified in that statute were official bulletin boards, thereby apparently requiring that another nondisruptive medium of communication be read into the statutory scheme. He reasoned that since section 3545.1(b) provides for the use of mailboxes in addition to bulletin boards, a "means of nondisruptive communication is assured and the question is merely one of convenience to employee organizations." In our view, the fact that section 3543.1(b) includes mailboxes in the list of means of communication does not logically lead to the inference that the use of mail systems was intended to be withdrawn.

Nor do we agree with the same hearing officer's conclusion that it would be contrary to legislative intent to impose an obligation on the employer to assist "actively"--as opposed to "passively"--an employee organization in communicating with its members. The hearing officer held that the specific requirements of section 3543.1(b) impose a "passive" obligation on public school employers, i.e., the obligation not to interfere with an organization's use of bulletin boards,

meeting facilities, and mailboxes. He further held that unlike section 3507, section 3543.1(b) specifically granted to employee organizations the use of school mailboxes. He concluded that since an additional passive means of communication was assured through the EERA, it would be inconsistent with legislative intent to require public school employers actively to assist an employee organization to communicate with its members.

This interpretation is artificial and ignores several "active" contributions actually required of the employer under EERA, including making payroll dues deductions (sec. 3543.1(d)), providing meeting rooms (sec. 3543.1(b)) and employee organizer access to workplace sites (sec. 3543.1(b)), and giving release time without loss of pay to employee representatives (sec. 3543.1(c)). In addition, other "active" duties may be the subject of negotiations. Nor does this Board view "active" assistance as necessarily synonymous with unlawful assistance. See Duquesne University (1972) 198 NLRB 891 [81 LRRM 1091].

Finally, we note that it would not be necessary for the Legislature to authorize "other means of communication" which are totally under the control of an employee organization and external to District access or operations. It is thus apparent that some internal means of communication other than mailboxes and bulletin boards were contemplated. While PERB does not now

consider or enumerate every "other means of communication" intended by section 3543.1(b), we hold that at a minimum District mail systems are covered by this section.

PERB's finding that section 3543.1(b) authorizes organizational access to school mail systems is not limited to those situations where past practice by the District has "opened the forum," as suggested by the hearing officer in Richmond. She found that the District was barred from unreasonably withdrawing use of the mail system having once extended access to employee organizations, relying on Danskin v. San Diego Unified School District (1946) 28 Cal. 2d 536. But this Board concludes that a "past practice" limitation would be contrary to legislative intent. The statute does not restrict organizational access to any communication medium on the basis of past practice, but simply permits use of "other means of communication" with only the qualification that access be subject to "reasonable regulation."⁵

B. THE POLICIES AND ACTIONS OF THE DISTRICTS WERE NOT "REASONABLE REGULATION" OF THE SCHOOL MAIL SYSTEM WITHIN THE TERMS OF SECTION 3543.1(b).

⁵The Board's conclusion that certain communication rights are fundamental under EERA is analogous to the NLRB rule invalidating even express collective bargaining agreement waivers by a union of distribution and solicitation rights of employees. NLRB v. Magnavox Co. (1974) 415 U.S. 322. Here, as in Magnavox, certain organizational prerogatives are a central part of the statutory design and are not dependent on past practice, waiver, or other conditional event.

The districts' main line of defense is that denial of access to the school mail systems was within their power under section 3543.1(b) to permit use of the mail system subject to "reasonable regulation." Each district also maintains that its underlying administrative policy governing use of the mail system distribution by employee organizations is a reasonable regulation. PERB concludes, however, that the district policies on their face, and as applied in this case, are unreasonable. For this reason, the unfair practice charges should be sustained.⁶

⁶As a final defense, the Simi Valley District has made a post-hearing claim that federal postal service regulations prohibit employee organization use of school mail systems. See the "Private Express Statutes," 18 U.S.C. sec. 1693-1699, 1724 and 39 U.S.C. secs. 901-906. These statutes give the Postal Service a monopoly over mail distribution, subject to specific exceptions. Also see "Substantive Regulations Related to the Private Express Statutes," 39 C.F.R. 310 and 320. PERB is empowered to interpret and enforce the provisions of EERA, not federal law. Whether there is conflict between the two is a matter for a different tribunal. Indeed, the California Constitution expressly prohibits PERB from declaring part of EERA to be unenforceable or unconstitutional. Article III, section 3.5 provides:

An administrative agency, including an administrative agency created by the constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

1. The limits of "reasonable regulation."

District limits on access rights granted to employee organizations by section 3543.1(b) are to be consistent with statutory labor law principles set forth in EERA. Within this labor policy design, effective and non-disruptive organizational communications are an important aspect of employee rights "to form, join, and participate" in employee groups (section 3543), by serving as necessary links between employees and their representatives. Without adequate communications, these employee rights at the workplace would be largely empty or subject to employer whim and domination. In turn, employees and their representatives might be forced to pursue unscheduled, disruptive and even secretive means of communication, hardly benefiting schools in this State.

We believe that section 3543.1(b) was a legislative step to guard against such harmful possibilities and to insure that employee organizational communications would be relatively unhampered. The section thereby fosters the major objectives

(Footnote 6 cont.)

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal regulations prohibit the enforcement of such a statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or regulations.

of EERA "to promote the improvement of personnel management and employer-employee relations" through the enhancement of employees' freedom to choose if and by whom they want to be represented. (Sec. 3540.) Since EERA section 3543.1(b) is designed to protect employee organizations' ability to communicate freely with employees, it is appropriate to consider cases dealing with employees' ability to communicate among themselves. Accordingly, we are guided both by precedent from private sector federal labor law (Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793),⁷ and by public employee expression cases based on constitutional law where, in contrast to this proceeding, a statutory basis for rights of employee expression did not exist (Los Angeles Teachers Union v. Los Angeles City Board of Education (1969) 71 Cal.2d 551).

In Republic Aviation, the Supreme Court affirmed a finding of the National Labor Relations Board that an employer's rule banning solicitation of members on company premises during the employee's own time was contrary to "the right of employees to organize for mutual aid without employer interference." Id.,

⁷This Board may use federal labor law precedent where applicable to public sector labor issues. See Sweetwater Union High School District (5/22/78) EERB Decision No. 4 (The Public Employment Relations Board was previously known as the Educational Employment Relations Board, or EERB). Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 611.

324 U.S. at 798. The court quoted an earlier NLRB case with approval:

. . . time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline. Id., 324 U.S. at 803, n. 10, quoting Peyton Packing Company (1943) 49 NLRB 828, 843-844 [12 LRRM 183].

The NLRB has also specifically addressed employer concerns that property and management interests under certain circumstances must yield to employee rights to distribute literature:

The distinguishing characteristic of literature. . . is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. . . .

. . . Granted that the distribution of union literature, even when it is limited to nonworking areas, is an intrusion upon an employer's acknowledged property rights, we believe that this limited intrusion is warranted if we are to accord a commensurate recognition to the statutory right of employees to utilize this organizational

technique. Stoddard-Quirk Manufacturing Co.
(1962) 138 NLRB 615, 620 [51 LRRM 111].

Our additional reference to public employee expression law leads us to a line of cases that extend constitutional protection to the speech rights of both employees and students in the public schools. Tinker v. Des Moines Independent Community School District (1969) 393 U.S. 503, 506; Pickering v. Board of Education (1968) 391 U.S. 563. These rights have been construed in California to protect concerted employee petitioning activity during non-working time (Los Angeles Teachers Union, supra, 71 Cal.2d 551), to compel reinstatement of a terminated employee who distributed a leaflet to fellow workers (California School Employees Association v. Foothill Community College District (1975) 52 Cal.App.3d 150), and to invalidate the transfer of a teacher who criticized school policies (Adcock v. Board of Education (1973) 10 Cal.3d 68). And, the California Supreme Court has expressly affirmed that the workplace during off-duty hours is "the most effective forum" for communication among employees. Los Angeles Teachers Union, supra, 71 Cal.2d at 760.

These cases, decided prior to the implementation of EERA, have set forth certain principles governing the limits of school district restrictions on employee expression. In particular, regulation must strike "a balance between the interest 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." Pickering v. Board of Education, supra, 391 U.S. at 568, cited in Los Angeles Teachers Union, supra, 71 Cal.2d at 558. Regulation is considered reasonable only where the restricted speech is likely to cause "substantial disruption of or material interference with school activities." Tinker v. Des Moines, supra, 393 U.S. at 514, cited in Los Angeles Teachers Union, supra, 71 Cal.2d at 559.

On the basis of our understanding of the statutory purposes of EERA, in conjunction with our review of analogous principles of labor and constitutional law, we conclude that school employer regulation under section 3543.1(b) should be narrowly drawn to cover the time, place and manner of the activity, without impinging on the content unless it presents a substantial threat to peaceful school operations.⁸ The

⁸One commentator has observed that judicial decisions in public employee expression cases have adopted presumptions similar to those applied in the private sector:

Under this approach, it is presumptively unreasonable for a public employer to restrict speech outside the workplace, speech at the workplace during nonworking hours, and silent symbolic speech at the workplace during working hours.

Lynd, "Employee Speech in the Private and Public Workplace: Two Doctrines or One?", 1 Industrial Relations Law Journal 711

employer's interest in regulating speech conduct on campus is fully protected, under section 3543.1(b), by narrow guidelines and by the deterrent threat posed by the possibility of subsequent punishment for unprotected behavior. Pittsburg Unified School District (2/10/78) PERB Decision No. 47.

2. The district regulations are unreasonably vague and overbroad.

Given the Board's finding on the scope of section 3543.1(b) authorizing use of mail systems, the employee organizations here made a prima facie showing that they were denied their statutory rights. The burden then was upon the districts to show that their conduct denying access to the mail systems was within the statutory exception to that right, namely "reasonable regulation." This allocation of proof is consistent with administrative practice requiring the charging party to prove its case by a preponderance of the evidence. (Cal. Admin. Code, tit. 8, sec. 35027.) If the districts' regulations are not reasonable, the regulations must fail

(Footnote 8 cont.)

at 753 (1977). The same commentator suggests that organizational speech and distribution rights enjoyed by private sector employees have a constitutional origin as do comparable rights of public employees, and are not simply the result of administrative accommodation of differing employer-employee interests. Id. at 713-715. Because of our reliance on statutory interpretation of rights under EERA, the Board does not reach this constitutional issue.

because of their conflict with an act of the Legislature, Bright v. Los Angeles Unified School District (1976) 18 Cal. 3d 450, 459, citing Morris v. Williams (1967) 67 Cal. 2d 733, 737, and the employee organizations' charges should be sustained.

The Richmond District did not meet its burden of justification. The District's regulation--apparently an administrative policy never formally adopted by the governing board--prohibits publications "advocating/advising/suggesting non-compliance with the California Education Code and/or board rules and regulation." (Ante, n. 2.) These sweeping terms could obviously apply in situations having no relationship to interference with on-the-job performance. The Richmond administration's ban on materials that are "obviously political in nature" is also too vague and uncertain for the precision necessary in this area of regulation. Even the District representative at the hearing admitted that there are no guidelines for determination of this standard.⁹ A third

⁹The following cross-examination by Federation counsel of former Superintendent W.W. Snodgrass offers a clear example of the dangers of vague and overbroad regulations:

Q. Now, the second part, (b), provides: "Publications containing materials obviously political in nature." Could you define for us what the phrase "obviously political in nature" means?

A. Well, the reference to political here, insofar as the intent of this bulletin is concerned, was that it be politics either of

problem with the Richmond regulation is the failure to offer any special interest of the employer that justifies why a prior

(Footnote 9 cont.)

a -- at any particular level. It could be Federal down to School District level. It could be internal politics between two organizations who were in a sense vieing [sic] for superiority or membership or a particular position. That in our reference would be political in nature.

Q. And would it also refer to documents which urge the -- the recall of the School Board? Would that be political in nature?

A. Yes.

Q. Or which urge the candidacy of an individual for School Board?

A. Yes.

Q. Or documents which urge the termination of employment of the superintendent or any other administrator of the District? Would that be political?

A. Well, I -- I would question that.

Q. You don't know. Is that your answer?

A. I know that the intent didn't have reference to an employee of the District, but more to something to do with an election situation.

Q. But in your opinion, it definitely would apply to a document which refers to inter-district -- I'm sorry, intra-district politics between organizations, the Richmond Association of Educators -- what is it? Association of Richmond Educators, I'm sorry, ARE, and the AFT affiliate, the Charging Party herein?

restraint may be applied to material to be distributed through the mail system, although the same material may nevertheless be placed in school mailboxes--as occurred in this case. Finally, the Richmond administrative policy suffers throughout from an absence of clear standards and procedures, thereby leaving

(Footnote 9 cont.)

A. Yes.

Q. And it's the responsibility, or was in October of 1976, the responsibility of the superintendent to review these documents to determine whether in his opinion the subject matter or content is political by whatever criteria or standards he determines constitute political.

A. Correct.

Q. Are there any guidelines that have been published generally to determine what constitutes materials obviously political in nature?

A. No.

Q. Are there any guidelines which indicate what constitutes advocating, advising or suggesting non-compliance with the Education Code, or board rules and regulations?

A. No.

Q. Are those solely dependent upon the opinion of the individual who is doing the reviewing?

A. I think in any case it would be a subjective judgment.

(Reporter's Transcript, pp. 33-35.)

unfettered the discretion of school administrators. Cf. Staub v. Baxley, (1958) 355 U.S. 313, 322-324 and cases cited therein.

The Simi Valley policy fares no better when scrutinized. The regulation would bar "controversial" or "derogatory" publications, or material which "maligins or attacks individuals" without offering any precise guideline related to substantial impairment of school operations. The "government has no interest preventing the sort of disharmony which inevitably results from the mere expression of controversial ideas." Los Angeles Teachers Union, supra, 71 Cal.2d at 561; California School Employees Association v. Foothill Community College District, supra, 52 Cal.App.3d at 158. And, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines, supra, 393 U.S. at 508.

The scope of the Simi Valley prohibition on distribution of material "of political or partisan nature" also suffers from overbreadth and indefinite application. 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. Eastex v. NLRB (1978) 437 U.S. 556. This communication right is further transgressed by that portion of the Simi Valley policy that limits publication topics to "organizational meetings, social

functions, nomination and election of officers, factual informational bulletins dealing with the progress or results of negotiations." As in the Richmond case, the enforcement of all of these limitations is improperly left to the unrestricted control of school administrators.

Additionally, assuming for argument that section 3543.1(b) permits prior restraints of employee organization communications, the Simi Valley and Richmond policies before this Board make no effort to provide standards tied to imminent unlawful conduct, or to establish speedy review of administration censorship. Cf. Baughman v. Freienmuth (4th Cir. 1972) 478 F.2d 1345; also see Freedman v. Maryland (1965) 380 U.S. 51, 58-60. The policies are an open-ended invitation to district interference with effective and timely employee communications. Additionally, the policies could permit employer domination over the affairs of employee organizations, contrary to section 3543.5(d).

Nor, in any event, does this Board believe that EERA permits prior restraints against off-duty employee organization written communications through the mails. Bright v. Los Angeles Unified School District, supra, 18 Cal.3d 450. The term "regulation," in the context of this case, is not equivalent to prohibition en toto, as the statute here contemplates a system of access allowed--subject to regulation--not a system of access denied. This view of

legislative intent is supported by sound reason. It is nearly certain that communications distributed through the mail systems would not inspire immediate violent conduct by readers or substantially impair any essential school function.¹⁰ As we have already noted (ante, p. 12), to the extent a document does breach requirements of school employee discipline or operations, punishment after distribution constitutes an adequate deterrent to organizational misconduct (see Pittsburg Unified School District, supra, PERB Decision No. 47), and narrowly drafted time, place and manner guidelines for distribution will reduce the possibility of communications disrupting the peaceful operation of the schools.

3. The district actions were unreasonable applications of their own policies.

Whatever the merits of the districts' administrative policies governing organizational distribution through their mail systems, the actions taken in each case were unreasonable restraint on use of the systems even by their own standards.

¹⁰In Braxton v. Municipal Court (1973) 10 Cal.3d 138, 149 the court stated:

. . . peaceful activity such as leafletting and canvassing enjoy broad protection under the First Amendment; those forms of "speech-conduct" are rarely "incompatible" with classes, research, or the administrative functions of an educational institution.

The Richmond District's main reason to deny distribution--the alleged misstatement of fact--was not even within the terms of its own policy. Certainly, the error by the organization was easily corrected (as it was). And, no evidence was introduced indicating any potential for the "disruptive demonstration" or "unwarranted employee discontent" alleged by the District.

The Simi Valley suppression was also totally unjustified by the terms of its own policy. The document was not shown, in any way, to be "political or partisan." Nor did the District try to prove that the Association's description of the board member's position on collective bargaining was inaccurate, derogatory or maligning. Indeed, the District did not even rebut SEA's claim that similar, previous criticisms of District officials had been distributed through the school mail system without restraint. The Simi Valley action offers fine illustration of why proscription of speech that is critical of public school officials should not be dependent on selective subjective impressions but should only be permitted in cases of actual malice or reckless disregard for truth. Cf. Pickering v. Board of Education, supra, 391 U.S. at 583; New York Times v. Sullivan (1964) 376 U.S. 254, 280, cited with approval in Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 65. In Pickering a school teacher was publicly critical of school board handling of revenue raising. The teacher's discharge

because of this criticism was disapproved by the Supreme Court. As the Court reasoned,

the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Pickering v. Board of Education, supra, 391 U.S. at 571.

The Simi Valley administration committed the same error in this case.

In the final analysis, the districts' delivery bans on organizational materials were entirely unwarranted. The arbitrary nature of the districts' actions is revealed in their decisions to permit the document to be placed in teacher mailboxes, provided the organizations carried out the distribution, without offering any valid school interest to justify the distinction.¹¹ Moreover, when called upon to present evidence in support of their actions at the time the unfair practice charges were heard, neither district made any offer regarding substantial interference with school operations.

¹¹The existence of an alternative means of distribution does not absolve the districts of responsibility: ". . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State (1939) 308 U.S. 147, 163. The facts in these cases also show that district denial of means of distribution resulted in several days delay and burden upon the employee organizations.

4. Unfair practice violations by the districts.

In each case the employee organization charged the district with violating section 3543.5(b) by denying "employee organizations rights guaranteed to them by EERA"; specifically, the right to use "other means of communication" provided by section 3543.1(b). For the reasons already set forth, we find a violation of employee organization rights in these cases.

A different question is raised by the organizational claims that the districts interfered with, restrained or coerced employees in the exercise of their rights guaranteed by EERA, in violation of section 3543.5(a). Such rights include "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Sec. 3543.) In both cases, employees prepared and distributed the organizational publication or document, and the material at issue involved matters obviously covered by the term "employer-employee relations." The hearing officer in Richmond upheld the "(b)" charge but dismissed the "(a)" allegation, following the Board's decision in San Diegueto Union High School District (9/2/77) EERB Decision No. 22, by finding that there was no "intent" to interfere with employee rights and that interference was not the "natural and probable consequence" of District action. Since the date of the hearing officer's proposed decision, this Board has issued Carlsbad

Unified School District (1/30/79) PERB Decision No. 89, holding that proof of unlawful motivation is not necessarily needed to sustain every "(a)" violation, but that a sufficient prima facie showing may be made by demonstrating that the "employer's conduct tends to or does result in some harm to employee rights." Id. at 10.

Some harm did occur in these cases as a result of district obstructions. In Richmond, communication relevant to the possible subject matter of an organizational campaign was disrupted. In Simi Valley, communication relevant to the substance of negotiations was suppressed. A district may defend against a prima facie case by proving operational necessity or, in some cases, conduct based on circumstances beyond the employer's control where no alternative course of action was available. Id., at 10-11. The facts introduced by the districts, however, satisfy neither of these tests, and interference, restraint or coercion in violation of section 3543.5(a) is found.

On the other hand, PERB makes no finding, as apparently alleged in Simi Valley, that the District dominated or interfered with the administration of the Association in violation of section 3543.5(d). There is no evidence in the record that the employer attempted to exert its control over the employee organization in order to bend it to the employer's will; nor is there evidence of employer interference by

undermining support of the labor organization as an entity, separate from any specific rights guaranteed by section 3543.1(b). See Duquesne University, supra.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in these cases, it is hereby ORDERED that the proposed decision of the hearing officer upon the charge filed by the Richmond Federation of Teachers is affirmed, as modified herein, and that the proposed decision of the hearing officer upon the charge filed by the Simi Valley Educators Association is reversed.

It is FURTHER ORDERED that the Richmond Unified School District and the Simi Valley Unified School District shall cease and desist from unreasonably denying by their written administrative or other policies with the right of employee organizations pursuant to section 3543.1(b) of the Educational Employment Relations Act to use the district mail system for the purpose of communication with employees of the districts; and, that said districts shall also cease and desist from interfering with the right of employees pursuant to section 3543 to communicate with one another.

FURTHER, the Public Employment Relations Board ORDERS that each district shall:

1. Prepare and post copies of this Order at each of its school sites for 20 working days, in conspicuous places,

including all locations where notices to employees are customarily placed;

2. Notify the San Francisco and Los Angeles Regional Directors, as appropriate for each district, of the action it has taken to comply with this Order.

IT IS FURTHER ORDERED that the remaining alleged violation of section 3543.5(d) in Simi Valley is hereby dismissed.

By: Harry Gluck, Chairperson Barbara Moore, Member

The dissent of Board Member Raymond J. Gonzales begins on page 33.

Raymond J. Gonzales, Member, dissenting:

The Educational Employment Relations Act (hereinafter EERA or Act) was enacted, as the majority correctly points out, to "promote personnel management and employer-employee relations within the public school systems in the State of California." Government Code section 3540. Today's decision, however, far from achieving this objective, can only lead to recurring friction between the public school employer and employee organizations in that district management has now been charged with a most uncommon and difficult task, completely incongruous with its role as management vis-a-vis labor. Contrary to the statute's requirement that the public school employer provide employee organizations merely access to certain means of communication in order to facilitate exchange of information between such organizations and public school employees, the majority reads into the language of section 3543.1(b) a command that the public school employer actively assist the employee organizations in their effort to communicate with the employees, even if such communication is inconsistent or adverse to the position of the public school employer in the context of labor-management relations. A greater conflict of roles could scarcely be imagined, especially when one considers the high standard which the majority has adopted to determine whether or not a communication may appropriately be censored

--- "unless it presents a substantial threat to peaceful school operations."¹ Under such a standard, a public school employer would have no choice but to assist the employee organization in distributing materials which contain misstatements of fact or which are arguably defamatory. I must respectfully disagree with my colleagues; I fail to see how stability of employer-employee relations is fostered by such a loose interpretation and application of the law.

Active-Passive Analysis

The majority refuses to accept the distinction between permitting access to bulletin boards, mailboxes, work areas, and meeting rooms on the one hand, and requiring school districts to transport and distribute employee organization material on the other. The distinction between "active" and "passive" obligations, they claim, is artificial. I disagree. The specific requirements of section 3543.1(b) oblige school districts to do no more than provide access to work areas, bulletin boards and mailboxes. Providing access to work areas or meeting rooms requires little or no involvement of district

¹Maj. Opn. at 17. The majority apparently adopts that standard developed by the courts pertaining to the validity of government regulation of speech by teachers and students which requires the party having the burden of proof to demonstrate facts which can lead one to predict "substantial disruption of or material interference with school activities." Tinker v. Des Moines Independent Community School Dist. (1969) 393 U.S. 503, 514; L.A. Teachers Union v. L.A. City Bd. of Ed. (1969) 71 Cal.2d 555, 563.

personnel; the public school employer must merely refrain from interfering with an employee organization's right to communicate with employees. By contrast, transporting and distributing organizational material does require such involvement. Indeed, school districts may now be required to provide additional transportation service to various schools and expend other district resources which they would otherwise not have had to expend, but for the Board's holding in this case. Clearly, there is a difference between permitting access to inanimate district resources and requiring the district to provide personnel to assist employee organizations in the distribution of their organizational material.

The majority's rejection of the active-passive distinction, originally articulated by the hearing officer in Simi Valley Unified School District ((8/26/77) LA-CE-48), may have also opened the flood gates to the unreasonable and blatant abuse of the educational institutions of this state by employee organizations. If, as the majority claims, there is no distinction in the Act between active and passive obligations, what is to prevent an employee organization from demanding that district personnel type, duplicate, and distribute organizational material, or that the district post organizational notices on the bulletin boards? These functions, like the transporting of intra-district

organizational mail, impose similar active obligations on the district in furthering communication between employee organizations and employees.

By focusing almost exclusively on the reasonableness of the Districts' regulations and failing to set definitional parameters on the phrase "other means of communication," the majority neglects the Districts' real need for certainty in determining what constitutes a "means of communication." My colleagues have essentially offered public school employers a hit-or-miss proposition. They have placed school districts in the precarious position of either acceding to the employee organization's demands for assistance at the districts' expense,² which itself has the potential for a section 3543.5(d) charge,³ or bearing the risk of committing an

²The districts face a political expense in their continued dealings with their employees and employee organizations, while the taxpayers are being asked to absorb a financial expense to subsidize an employee organization activity.

³Section 3543.5(d) provides:

It shall be unlawful for a public school employer to:

.....

Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

unfair practice under section 3543.5(b). Their reliance on Constitutional law principles to fortify a resolution of these cases hardly disposes of the real issue for precedential purposes. The question of whether or not written organizational material can be so inspiring as to cause a substantial threat to peaceful school operations is bogus. Rather, the task this Board faces, and one which the majority fails to effectively address, is to devise a test which will insure that employee organizations can effectively communicate with employees without compromising the public school employer's role as a party in the context of employer-employee relations. I believe the active-passive distinction accomplishes this; the majority offers nothing.

Textual Analysis

The Meyers - Miliias-Brown Act (hereinafter MMBA)⁴, a precursor to EERA, contains a provision, section 3507, which provides, in part, that employee organizations shall enjoy the "use of official bulletin boards and other means of communication." This provision, as the majority points out, was construed by the Attorney General in 1965 to include the right of an employee organization to use a District's mail system. (1965) 45 Ops. Atty. Gen. 138. The majority cites the opinion of the Attorney General to support the conclusion that

⁴Government Code section 3500 et seq.

the words "other means of communication" in section 3543.1(b) can fairly be interpreted to include a district's mail system. They fail to attach any significance to the inclusion of the term "mailboxes" in the more recent provision. They state:

"In our view, the fact that section 3543.1(b) includes mailboxes in the list of the means of communication does not logically lead to the inference that the use of mail systems was intended to be withdrawn".⁵

While reference to the opinion of the Attorney General is appropriate in an effort to construe the language at issue, wholesale reliance upon it is not. Its value, at most, is only for comparative purposes. Rather, in the absence of any legislative history to help this Board construe the language of section 3543.1(b), resort to such extrinsic aids as commonly accepted principles of statutory construction, which the majority fails to do, is the more reliable course.

For example, one principle requires the Board to presume that the Legislature is aware of construction given its enactments ⁶ and that any amendments to such enactments reflect an intent to alter such construction.⁷ Thus, it must

⁵Maj. Opn. at 10.

⁶Meyer v. Board of Trustees (1961) 195 Cal App 2d 420, 432.

⁷Judson Steel Corp. v. Workers Comp. App. Bd. (1978) 22 Cal. 3d 658, 666; Palos Verdes Faculty Association v. Palos Verdes Peninsula Unified School District (1978) 21 Cal. 3d. 65.

be presumed that the Legislature was aware of the Attorney General's opinion construing the phrase "other means of communication" contained in section 3507 of the MMBA, and that had it wished for a similar construction to apply when it adopted the language of section 3543.1(b), it could have incorporated without change the language of section 3507.⁸ But, by adding the term "mailboxes" in section 3543.1(b), the Legislature in effect, reflected an intent to divorce itself from the construction given the MMBA provision and to limit employee organizations to use of the mailboxes in the public school context.

Another principle of statutory construction that the majority has failed to consider is the rule of ejusdem generis which provides that where words of a general nature in a statute follows an enumeration of words of specific nature, the general words will take on the nature of those specifically mentioned.⁹ In section 3543.1(b) the general words "other means of communication" follow the specifically enumerated

⁸The fact that section 3543.1(b) of the Educational Employment Relations Act is not technically an amendment to section 3507 of the Meyers-Milias-Brown Act does not invalidate the application of this principle of statutory construction, since both provisions obviously have the same overall purpose, to insure that employee organizations can effectively communicate with employees.

⁹People v. Prince (1976) 55 Cal App. 3d Supp. 19, 32,; Black's Law Dictionary (4th ed.) p. 608.

words "work areas," "bulletin boards," and "mailboxes." It must be noted that the specifically enumerated words in this section relate to subjects of a completely different nature than "mail systems," which require the involvement of district personnel in order to have any functional significance.

In my opinion, the majority has taken the words "other means of communication" out of context and interpreted those words without reference to the passive nature of the language immediately preceding it. The general words "other means of communication" cannot, consistent with the principle of ejusdem generis, be interpreted to include the use of a district's mail system.

Finally, by construing section 3543.1(b) as they have, the majority has reduced the words "mailboxes" to mere surplusage and attributed to the Legislature the commission of a meaningless act. If the phrase "other means of communication" were intended to include mail system, why would the Legislature have specifically listed the term "mailboxes" which is an integral part of a district's mail distribution system? The Legislature could have just as easily used the term mail system and thereby accomplish its purpose.

The Legislature should not be presumed to have committed an idle act.¹⁰ If possible, significance should be given to

¹⁰Meyer v. Workmans Comp. (1973) 10, Cal 3d 222, 230.

every word, phrase, sentence and part of an act in pursuance of the legislative purpose.¹¹ In my opinion, the word "mailboxes" was included in section 3543.1(b) to restrict an employee organization's use of the mail system. For the Board to read into a statute something which the Legislature has conspicuously excluded is a clearly beyond its authority.

On the basis of the foregoing, I cannot find the districts' refusal to provide access to their mail system to be an unfair labor practice. Further, since in my view, the use of the mail system is not a right guaranteed by the EERA, it is unnecessary to consider the "reasonableness" of the District's regulations. Moreover, questions of constitutionality are more appropriately left to the judiciary.

Raymond J. Gonzales, Member

¹¹Select Base Materials v. Board of Equal. (1959) 51 Cal. 2d. 640, 645.

District's certificated employees. The charge further claims that the purported unreasonable denial of access had the effect of restraining the Federation "from communicating with RFT members and all other teachers of the District on matters of employment relations within the scope of the Act."³ Finally, the Federation alleges that "each week the Superintendent makes an administrative decision 'to pass' or not to pass our Newsletter . . . The Superintendent's action, which may be repeated at any time, is an unreasonable interference. There is no School Governing Board adopted policy on this matter."

In its November 16, 1976 answer to the charge, the District denies that it violated Government Code Sections 3543.5(a), (b), and 3543.1(b), asserting that the Federation's October 18, 1976 Newsletter had been temporarily withheld from the school mail system, pending a correction by the Federation of an admitted inaccuracy relating to a Board approved cost of living salary increase. The District's response also states that the misinformation "if disseminated through the newsletter could have led to unwarranted discontent and disruptive demonstration." Finally, the District concludes that by conditioning the use of the school mail system on the Federation's correction of a misstatement of fact, the District had simply imposed a reasonable regulation on the use of the school mail system.

³Act or EERA refers to the Educational Employment Relations Act, Chapter 961, 1975 statutes.

An informal conference on this matter was held on March 3, 1977. The parties were not able to reach agreement. In a March 8, 1977 letter⁴ to the EERB hearing officer who conducted the informal conference, the District set forth the following additional arguments to buttress its contention that it had not violated Sections 3543.5(a), (b) and 3543.1(b):

- "2. The Board of Education's policy granting the privilege of the use of the school mail to employee organizations in no way violates any right guaranteed by the Federal Constitution.
3. The Rodda Act, Section 3543.1(b), does not authorize the use of school mail by employee organizations."

A formal hearing was conducted at the EERB San Francisco Regional Office by an EERB hearing officer on May 10, 1977.

ISSUE PRESENTED

Having extended the use of its school mail delivery to employee organizations, did the District's denial of use of the school mail for the distribution of the Federation's October 18, 1976 newsletter until a typographical error contained therein was corrected in a fashion acceptable to the District, constitute a violation of Section 3543.1(b), Section 3543.5(a), or Section 3543.5(b)?

⁴This letter is one of several documents contained in the case file in this matter. At the hearing, the hearing officer took official notice of this letter and other contents of the file, after the parties had been given an opportunity to inspect the file and to object to any document subject to official notice.

FINDINGS OF FACT

The Richmond Unified School District is located in Contra Costa County, and has an average daily attendance of approximately 35,788.⁵ There are 62 school sites on which are distributed 49 elementary schools, six junior high schools, six high schools, one adult school, and one continuation school.⁶ The exclusive representative of the District's certificated employees is the Association of Richmond Educators, CTA/NEA.

The Richmond Federation of Teachers is an employee organization within the meaning of Section 3540.1(d).⁷ The Federation disseminates information to the District's certificated employees through its formal publication, the Richmond Federation of Teachers Local 866 Newsletter. The newsletter is published weekly and has been in existence for 30 years. Ordinarily, the Federation's newsletter is distributed to each of the District's

⁵Annual Report, Financial Transactions Concerning School Districts of California, Fiscal Year 1975-76, published by the State Controller, State of California.

⁶1977 California Public School Directory, published by the California State Department of Education.

⁷Section 3540.1(d) provides:

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

At the hearing, both parties stipulated that the Federation is an employee organization within the meaning of the Act.

62 school sites by truck via the District's school mail delivery system. Approval by the District's Superintendent of Schools is an absolute prerequisite for placement of employee organizational materials in the District's mail delivery system. Such approval comprises one aspect of a District-wide administrative practice which governs the distribution of employee organizational material. Under this practice which has been reduced to writing⁸ and which was

⁸A February 23, 1973 memorandum on "Distribution of Organizational Materials" from the District's then Superintendent of Schools, W. W. Snodgrass, to all principals in the District sets forth the practice in existence at all times relevant to the issue herein. The memorandum consists of the following series of questions which had been submitted to the Office of the County Counsel of Contra Costa County, and the answers thereto:

"1. What is the criteria governing association publications which could not appropriately be sent through the school mail?

Ans. a) Publications advocating / advising / suggesting non-compliance with the California Education Code and/or board rules and regulations.

b) Publications containing materials obviously political in nature.

2. What restrictions are placed on material to be inserted in teachers' mailboxes?

Ans. See 1.a) above.

b) Materials to be submitted to the principal prior to distribution. This submission is not to be used as a prior restraint or censorship.

3. Do these restrictions, if any, apply to material delivered to building representatives through a means other than school mail?

Ans. See 1. a) and 2.b) above.

4. What restrictions, if any, exist regarding the distribution of teacher association publications in the teachers' room during the duty free lunch time?

Ans. See 1.a) and 2.b) above."

distributed to employee organizations and principals, there are two categories of employee organization material which may be excluded from the District's school mail delivery: "a) Publications advocating / advising / suggesting non-compliance with the California Education Code and/or board rules and regulations," and "b) Publications containing materials obviously political in nature."

The Federation's October 18, 1976 newsletter was not approved for distribution through the school mail by the District's Superintendent of Schools due to a misstatement of fact contained in the publication and, as a consequence, Federation members themselves delivered the 2,000 copies of that edition of the newsletter to the District's schools. The October 25, 1976 edition of the Federation newsletter was approved for distribution by means of the school mail delivery system and therefore was delivered to the school sites by truck.

When an employee organization seeks to use the District's mail delivery system for the distribution of organizational materials, the following sequence of events occurs. The materials sought to be distributed are taken to the mailroom located in the basement of the District's administration building where they are deposited with a District employee. Copies of the materials are left at the office of the District's Superintendent of Schools. The superintendent reviews the materials and either approves or disapproves them for distribution via the District mail systems. If the materials are approved the superintendent calls the mailroom

employee, authorizing placement of the materials in boxes which are picked up the following day for delivery to the District's schools. With respect to the Federation newsletter, the final sequence in the distribution process occurs after copies are delivered to the school sites. Bundles of enough newsletters for all certificated employees at a particular school site are placed in the mailbox of the Federation's building representative for that school. The building representative then distributes a copy of the newsletter to the mailbox of each certificated employee at the school.

The October 18, 1976 Federation Newsletter

The Federation's October 18, 1976 newsletter is an official Federation document which was prepared by a Federation member and Federation employees. Two thousand copies were prepared for distribution to all the District's certificated employees. The anticipated mode of distribution for nearly all 2,000 copies was the school mail system.

On the afternoon of Monday, October 18, 1976, pursuant to instructions from the Federation's President, Geoff Chandler, the 2,000 copies of the newsletter were deposited with the mailroom employee at the District Administration building. Copies were also delivered to the office of the Superintendent of Schools, Dr. Richard W. Lovette, for his review.

When the newsletter had not been distributed to school sites by Thursday, October 21, 1976, Geoff Chandler placed a telephone call to Dr. Lovette to ascertain why delivery had not

been effected. The stated reason for the delay was that the Newsletter was not acceptable for distribution because it contained a misstatement of fact -- an article entitled "!!!KICKED AGAIN!!!" claimed that the District had adopted a salary schedule which gave a \$34 a month raise to non-management employees when in fact the correct figure was \$37. Mr. Chandler explained to Dr. Lovette that the error was a typographical error and suggested the remedy of placing a retraction as to the incorrect figure in the following week's newsletter. This proffered remedy was deemed unacceptable by Dr. Lovette, who proposed instead that a correction sheet be attached to each copy of the newsletter in order to render the erroneous document acceptable for distribution via the District's mail system.

An erratum sheet was in fact prepared by the Federation⁹ in order to correct the misinformation contained in the newsletter. All 2,000 copies of the newsletter were retrieved from the District's mailroom and taken to the Federation's office. From the Federation's office Federation building representatives were dispatched to the District's school sites with bundles of newsletters and erratum sheets for ultimate distribution to the certificated employees.

⁹The erratum sheet reads in part as follows:

"Line 3 of paragraph 1 of the attached Newsletter should read \$37 instead of \$34. Because of this typographical error the Newsletter could not be distributed through the school mail. Dr Lovette said that only truthful material may go thru the school mail. Hm-m-m! Sorry for this unnecessary delay. Newsletter Editor"

DISCUSSION

I. Section 3543.1(b)

- A. Section 3543.1(b) Which Confers Upon Employee Organizations the Right to Use Various Means of Communication, Subject to Reasonable Regulation, Must be Read in the Light of Constitutional Standards Which Safeguard the Freedoms of Speech and Press.

Section 2 of Article I of the California Constitution provides that "[a] law may not restrain or abridge liberty of speech or press." The First Amendment of the United States Constitution prohibits Congressional abridgement of speech and press, while the Due Process Clause of the Fourteenth Amendment makes state action which abridges speech or press a violation of the Federal Constitution. Near vs. Minnesota, 238 U.S. 697, 707 (1931).

It is well settled that the means employed to disseminate speech fall within the ambit of constitutional protection. Wollam vs. Palm Springs, 59 C.2d 276 (1963); Weaver vs. Jordan, 64 C.2d 235 (1966); Sokol vs. Public Utilities Commission, 65 C.2d 247 (1966).

Section 3543.1(b) is a state law which confers upon employee organizations the right to use certain means of speech dissemination, and at the same time provides for the reasonable regulation of such use.¹⁰ Since it is clear that constitutional

¹⁰Section 3543.1(b) provides as follows:

"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."

safeguards of speech extend to the means of communicating speech, and since it is likewise clear that both the California Constitution and the Federal Constitution prohibit a state law from abridging speech or press, it is axiomatic that when the California Legislature enacted Section 3543.1(b), it contemplated that "reasonable regulation" of the use of institutional bulletin boards, mailboxes, and other means of communication, as well as the subject matter encompassed by the phrase "other means of communication" would necessarily be consistent with constitutional standards. Absent this constitutional safeguarding of the paraphernalia which the Legislature deemed necessary to facilitate communication with employees, freedoms of speech, press and assembly would be rendered inoperative in the context of public school employer-employee relations in the State of California. And such a result would be anomalous to the principle that citizens are entitled to First Amendment protections despite the fact that they are public employees. This principle as applied to public school employees is reflected in the pronouncement of the United States Supreme Court in Healy vs. James, 408 U.S. 169, 180 (1972), that,

". . . state colleges and universities are not enclaves immune from the sweep of the First Amendment. 'It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' Tinker vs. Des Moines Independent School District, 393 U.S. 503, 506 . . . (1969)."

See also Los Angeles Teachers Union vs. Los Angeles City Board of Education, 71 C.2d 551 (1969), and Fort vs. Civil Service Commission, 61 C.2d 331 (1964).

- B. Because the District Granted Use of its School Mail Service to Employee Organizations within its Jurisdiction, The School Mail System in the Richmond Unified School District Became "Other Means of Communication" Within the Meaning of Section 3543.1(b).

In 1946, the California Supreme Court in Danskin vs. San Diego Unified School District, 28 C.2d 536 (1946), enunciated a vital precept of constitutional law, the "opening of the forum" principle. The proposition is simply that, once an entity opens a public forum for expression, members of the public are entitled to use that forum, and any conditions imposed on use must be consistent with constitutional protections of expression, irrespective of whether the entity was under a duty to open the forum in the first place.

"The state is under no duty to make school buildings available for public meetings. [citations omitted]. If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. [citations omitted]. Nor can it make the privilege of holding them dependent on conditions that would deprive members of the public their constitutional rights." At 545.

The efficacy of the opening of the forum principle has been unequivocally maintained by the Court for more than three decades. See Wirta vs. Alameda-Contra Costa Transit District, 68 C.2d 51, 55 (1967); Stanson vs. Mott, 17 C.3d 206, 219 (1976).

Because the opening of the forum concept is an integral aspect of the constitutional protection afforded speech, Section 3543.1(b) must, necessarily, encompass the dictates of this principle. Acknowledging this tenet, the practical question for resolution in the instant case is how does the opening of the forum principle interface with the Legislature's intent regarding the in-

terpretation of "other means of communication" under Section 3543.1(b)?

In enumerating the means of disseminating speech granted to employee organizations by Section 3543.1(b), the Legislature specifically designated institutional bulletin boards and mailboxes. But at the same time, the Legislature provided for "other means of communication," without limiting that phrase by identifying any specific means of speech dissemination, thus evidencing an intent that the clause should be elastic, capable of accommodating a situation such as the one presented by the case at hand. Where possible, each and every part of a section should be given meaning. "Other means of communication" should be construed in application to include items other than those expressly enumerated preceding it. Here, both the public school employer and the employee organizations within the District have established on a de facto basis through practice that the school mail system in the Richmond Unified School District constitutes "other means of communication." The opening of the forum concept requires that if the use of the District's school mail system is made available to all employee organizations in the District, such employee organizations including the Federation are entitled to use it, conditioned only by reasonable regulation of use, with "reasonable" being defined at least in part by constitutional standards. This means that the de facto arrangement between the parties regarding the school mails as "other means of communication" must be given de jure status under Section 3543.1(b).

Whether or not it is appropriate to require that a district involuntarily extend the use of certain of its facilities other than bulletin boards and mailboxes as enumerated in Section 3543.1(b), on the theory that to do so would require them to actively assist an employee organization to communicate with its members in a way they had not contemplated by the voluntary adoption of a practice or policy, need not be decided. The school board, exercising its discretion, adopted a practice that extended to the employee organization the use of its intra-district mail delivery system. Once so extended, its continuing involvement therein is passive in nature and comes within the scope of the "other means of communication" provision of the section and should not be denied in an individual case simply because the contents were contrary to the facts or the facts as perceived by the employer. This is particularly true as it relates to content communicating to employees the employee organization's point of view in relationship to matters dealing with negotiations between the parties.¹¹

- C. Withholding Use of the School Mail for the Distribution of the October 18, 1976 Federation Newsletter Pending a Prescribed Correction of a Typographical Error Contained Therein, Does Not Constitute Reasonable and Constitutional Regulation of the District's School Mail System.

Both the United States and the California Supreme Courts have held that in order for state regulation of speech-related

¹¹This view is in accordance with the Attorney General's Opinion interpreting the Brown Act, subsequently amended and designated the Meyers-Milias-Brown Act, that the District, having granted the use of the mail delivery system, may not limit its use unreasonably [see 45 Ops. Cal. Atty. Gen. 138, 139 (1965)].

rights to be reasonable, such regulation must provide constitutionally adequate safeguards of those First Amendment rights. In Healy vs. James, 408 U.S. 169 (1972), for example, the United States Supreme Court found a state college campus' regulation of student organizational conduct to be reasonable, because it was in conformity with First Amendment standards. In reaching its conclusion, the Court, in an opinion delivered by Justice Powell, reasoned as follows:

"The College's Statement of Rights, Freedoms and Responsibilities of Students contains, as we have seen, an explicit statement with respect to campus disruption. The regulation, carefully differentiating between advocacy and action, is a reasonable one . . . "

"As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action which is not." (At pp. 191-192; emphasis added.)

". . . A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to a reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed." At 193.

The California Supreme Court in Danskin vs. San Diego Unified School District, supra, held that a regulation was unconstitutional because it required proof of the political convictions and affiliations of individual and organizational applicants as a condition of being granted the use of public school buildings for purposes of speech and assembly. The Court stated that, "In the present case registration [alone] would be a reasonable requirement, facilitating the administration of meetings and imposing no censorship on the proponents." (Emphasis added.)

1. The burden is on the District to justify its exclusion of the Federation's October 18, 1976 newsletter from the school mail. Any prior restraint on expression carries with it a heavy presumption against its constitutionality. Bantam Books vs. Sullivan, 372 U.S. 58, 70 (1963); Wilson vs. Superior Court, 13 C.3d 652, 657 (1975). As a corollary to this principle, the entity which has imposed the prior restraint has a heavy burden of demonstrating the appropriateness of its action. Organization for a Better Austin vs. Keefe, 402 U.S. 415, 420 (1971); Healy vs. James, supra. In Healy, the United States Supreme Court reversed the judgment of the U.S. District Court, District of Connecticut, and the judgment of the Court of Appeals for the Second Circuit for the "fundamental errors of misplacing the burden of proof" and "discounting the existence of a cognizable First Amendment interest."

"The opinions below also assumed that petitioners had the burden of showing entitlement to recognition by the college . . . [p]etitioners . . . do question the view of the courts below that final rejection could rest on their failure to convince the administration that their organization was unaffiliated with the National SDS . . . [A]part from any particular issue, once petitioners had filed an application in conformity with the requirements, the burden was upon the College administration to justify its decision of rejection. [Citations omitted]. (408 U.S. at 281; emphasis added.)"

The rationale for this allocation of the burden of proof is based upon long standing principles, the first is commitment to a wide-open debate on public issues and to the "right to uninhibited comment on public issues." Wilson vs. Superior Court, supra, at 658; New York Times Co. vs. Sullivan, 376 U.S. 254, 279-280 (1964). Next, because of the commitment to wide-open debate on public issues, prior restraints on speech and publishing

have been deemed "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Association vs. Stuart, 427 U.S. 539 (1976). Thus the burden to justify imposition of the restraint is not minimized, even when the prior restraint is not a permanent prohibition on expression but rather is a temporary restraint which postpones or delays expression. (Ibid.)

The United States Supreme Court has taken cognizance of the fact that in the context of news reporting and commentary on current events, the damage of delay occasioned by even the temporary imposition of a prior restraint can be substantial. And the Court has also acknowledged the special characteristics of the educational /academic environment as they relate to the heightened need for protection of free expression against prior restraints.

In Nebraska Press Association vs. Stuart, supra, a unanimous Court held that an injunction issued by a Nebraska state trial judge and thereafter modified by the Nebraska Supreme Court was an unconstitutional prior restraint on publication. The injunction as modified restrained the news media from publishing or broadcasting certain information regarding the defendant in a mass murder trial, based on a finding that there existed a clear and present danger that pre-trial publicity would impair the defendant's right to a fair trial guaranteed by the Sixth Amendment of the United States Constitution. Commenting on the debilitating effect that prior restraints have on the media's function of bringing news to the public, the court stated that,

"Of course, the order at issue -- like the order requested in New York Times -- does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.

'We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purpose of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.' Miami Herald Publishing Co. vs. Tornillo, 418 U.S. 241, 259, 94 S. Ct. 2831, 2840, 41 L. Ed. 2d 730 (1974) (White J. concurring).

[Citation omitted]. As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly." (At 2803; emphasis added).

In Healy vs. James supra; a case emerging from the educational community, the Court noted that, "It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above." (at 281, emphasis added). The Court had earlier stated at 279 that,

"the precedents of this court leave no room for the view that because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools.' Shelton vs. Tucker, 364 U.S. 479, 487, 5 LEd 2d 231, 236, 81 S. Ct 247 (1960)." (Emphasis added.)

In allocating the burden of proof in the case at hand, it is clear that once the Federation established that it had complied with the District's requirements incident to use of the school mail for distribution of its October 18, 1976 newsletter, the burden shifted to the District to justify its exclusion of that document from the school mail, notwithstanding the requirement imposed by California Administrative Code, Title 8, Section 35027, that a charging party in an unfair practice case prove the case by a preponderance of the evidence in order to prevail. This result is mandated¹² by the First Amendment of the United States Constitution and by Section 2 of Article I of the California Constitution, a "protective provision more definitive and inclusive than the First Amendment." Wilson vs. Superior Court, supra, at 658 (emphasis added).

Reference to the facts in Healy wherein denial of campus recognition was held to be a prior restraint, confirms that the Federation established the threshold issue as to the imposition of a prior restraint. The petitioners in Healy in seeking official campus recognition for their local chapter of Students for a Democratic Society had complied with the prerequisite to such recognition by filing an application in conformity with the college's requirements. Here, the Federation established that it had complied with all prerequisites to having its October 18, 1976 newsletter

¹²Section 3541.3(g) authorizes the FERB to adopt rules and regulations to carry out the provisions and to effectuate the purposes and policies of the Act pursuant to Section 11371 et seq. Section 11374 provides in relevant part that "no regulation adopted is valid or effective unless consistent and not in conflict with the statute [to which the regulation relates]," (emphasis added). Finally, Section 3543.1(b) must be read in the light of constitutional protections afforded to speech and press which include the allocation of the burden of proof in prior restraint cases, as set forth in Healy.

placed in the school mail -- a Federation employee had deposited 2,000 copies of the newsletter with the District's mailroom employee and had delivered copies to the office of the superintendent for review.

The fact that the District only "temporarily" withheld the newsletter from the school mail pending a correction of the figure \$34 (which appeared in the newsletter) to \$37 (which was the actual monthly raise to non-management employees) does not make the denial of use of the school mail any less a prior restraint. In New York Times Co. vs. United States, 403 U.S. 713 (1971) and Nebraska Press Association, supra, the orders at issue did "not prohibit but only postpone[d] publication." Nonetheless, they were found to be unconstitutional prior restraints.

Further, the District's temporary withholding of use of the school mail for the distribution of the October 18, 1976 newsletter occasioned the kind of delay which the United States Supreme Court found in Nebraska Press Association to be supportive of the proposition that "[t]he damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events," at 2903; (emphasis added). The Federation Newsletter is the Federation's formal publication through which the Federation communicates with all of the District's certificated employees on the developing news regarding the District's employer-employee relations. The Newsletter is published weekly. The particular article which was the basis of the Newsletter's exclusion from the school mail -- "!!! KICKED AGAIN !!!" -- communicated news and commentary on current events in that it dealt with a recent District-

adopted salary schedule which gave a raise to non-management employees, and expressed an opinion thereon. Copies of the newsletter had been deposited for distribution by truck via the school mail on Monday, October 18, 1976, but it was not until Thursday of that week that the Federation was informed -- through a phone call initiated by the Federation -- that the newsletter had been deemed unacceptable for distribution via the school mail. When the proffered cure of a retraction of the typographical error in the next week's newsletter was rejected by the District, Federation members themselves delivered the 2,000 copies of the October 18, 1976 newsletter to 62 school sites, and apologized to all certificated employees for the delay.¹³ Further, since the Association of Richmond Educators is the exclusive representative of the District's certificated employees, and the Federation is in the shoes of the "loyal opposition" party, prompt reporting of the news by the Federation through its newsletter takes on greater significance.

2. The fact that the October 18, 1976 Federation newsletter contained a factual inaccuracy with respect to the amount of a monthly raise for the District's non-management employees does not constitute a constitutionally permissible basis for excluding the newsletter from the school mail. In Wilson vs. Superior Court, supra, the California Supreme Court held that, "the truth or falsity of a statement on a public issue is irrelevant to the question whether it should be repressed in advance of publication." At 658.

¹³ See the "Newsletter Editor"'s apology contained in the erratum sheet quoted at footnote 8, supra.

Wilson involved the issue of whether a court may constitutionally enjoin the publication of allegedly misleading and libelous statements made by a candidate for political office against an opponent. Wilson, a candidate for the office of Los Angeles County Assessor in the June 4, 1974 primary election, had distributed a newsletter which included reprints of portions of three newspaper articles, all of which related to the criminal bribery prosecution of the incumbent, Philip E. Watson. The contents of the newsletter are summarized as follows. It contained no mention of the incumbent's acquittal; two of the articles reprinted were undated, while the date appearing on the third article was blurred; and the newsletter closed with a solicitation for funds to prevent corruption and special interest control. On April 15, 1974, Watson filed a complaint for libel and slander, seeking damages and an injunction to restrain further publication of the newsletter. A temporary restraining order was issued that day enjoining Wilson from printing or distributing the newsletter or written or oral statements substantially similar to those in the newsletter. The judge issued the restraining order because he concluded that Wilson was not presenting a fair and factual picture to the voters, and that while Wilson had a right to state the truth, he did not have the right to present only a portion of the truth which might be misleading. On April 30, 1974, a preliminary injunction was issued against Wilson effective during the time the libel action was pending. The terms of the injunction were similar to those of the restraining order and

required that reprinted newspaper articles on the incumbent be presented in a "fair and balanced manner with a full presentation of the facts." The Supreme Court of California issued an alternative writ on May 31, 1974, prohibiting the Los Angeles Superior Court from enforcing the injunction.

Following a recitation of cases on unconstitutional prior restraints as precedent, the Court in Wilson held that the preliminary injunction violated Wilson's rights to free expression under the United States Constitution, and "for an independent ground under the broader terms of the California Constitution." At 662; emphasis added. While making it clear that its holding did not imply approval of Wilson's "dubious" tactics the Court emphasized that "[t]he concept that a statement on a public issue may be suppressed because it is believed by a court to be untrue is entirely inconsistent with constitutional guarantees and raises the spectre of censorship in its most pernicious form." At 659.

The factual inaccuracy contained in the Federation's October 18, 1976 Newsletter is attributable to a typographical error -- \$34 instead of \$37. Wilson's Newsletter by contrast contained factual omissions of such a substantial nature -- as to dates of articles on the criminal prosecution of the incumbent and as to the ultimate acquittal of the incumbent -- that a Superior Court of Los Angeles County found that a complaint based on Wilson's newsletter stated a cause of action for libel and slander, which requires the

plaintiff to prove both falsity and actual malice (knowledge of the falsehood or reckless disregard for the truth).¹⁴

If the statements contained in the Wilson newsletter were afforded constitutional protection from prior restraint even though they were "not wholly true" and were "presented in a deceptive manner" (at 662), in part based on the rationale that "[t]he judiciary has been ever mindful of Thomas Jefferson's aphorism that 'error of opinion may be tolerated when reason is free to combat it,'" (Id.), there can be no doubt that the inadvertent and rather inconsequential misstatement of fact contained in the Federation's newsletter is entitled to the same protection.¹⁵

3. The District did not prove justification for excluding the newsletter from the school mail on the basis of its fear that a typographical error of a figure \$3 less than the correct amount of a monthly salary increase it had granted its non-management employees, "if disseminated through the newsletter could have led to unwarranted discontent and disruptive demonstration."

¹⁴New York Times Co. vs. Sullivan, 376 U.S. 254, 279-280 (1964) set this standard for a public official seeking to recover damages for defamation relating to his or her official conduct.

¹⁵It should also be recalled that the Federation's president offered to print a retraction as to the misstatement in the following week's newsletter -- an offer which was turned down by the District's Superintendent of Schools.

Although prior restraints bear a heavy burden against their constitutional validity, certain extraordinary circumstances justify the imposition of a prior restraint on speech. Wilson vs. Superior Court, supra; Nebraska Press Association vs. Stuart, supra; Healy vs. James, supra.

One such constitutionally permissible basis for restraining speech is the clear and present danger justification. Bridges vs. California 314 U.S. 252 (1941). To meet the clear and present danger test there must be a "reasonable ground to fear that serious evil will result if free speech is practiced and there must be reasonable ground to believe that the danger apprehended is imminent." Danskin, supra, at 544.

In Braxton vs. Municipal Court, 10 C. 3d 138 (1973), the California Supreme Court upheld the constitutionality of a statute imposing criminal liability on a person who willfully disrupted the orderly operation of a college or university and failed to depart when summarily banished by campus officials. The finding of constitutionality was based on the Court's narrowing of the statute to apply only to speech which constitutes "incitement to violence." At 150. Speech which merely "disrupts the tranquility of a campus or offends the tastes of school administrators or the public" was held to be constitutionally protected. At 146.

Further, mere "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker vs. Des Moines Independent School District, 393 U.S. 503, 508 (1969).

At the formal hearing the District did not present any evidence to substantiate its contention stated in its November 16, 1976, answer to the unfair practice charge, that the \$3 inaccuracy as to the salary increase "if disseminated through the newsletter could have led to unwarranted discontent and disruptive demonstration." Thus, in the absence of such evidence it must be concluded that the District's concern amounted to an undifferentiated fear or apprehension of disturbance which may not constitutionally justify a previous restraint on expression.¹⁶

¹⁶ It is significant to note that the article which contained the error was highly critical of the District's salary increase for non-management employees,

!!! KICKED AGAIN !!!

By now most of the school district's employees are aware of the action by the School Board at its meeting of October 13. By adopting a Salary Schedule that gave a \$34 a month raise to non-management employees and an average raise of \$62 a month to management employees, the district gave us a double turn of the knife.

The district claims that since its administrators do so much more work than do the non-management personnel that they are naturally deserving of a greater raise. The question was raised as to how else would we (the district) attract administrators if not through monetary advantages. I have not noted any shortages lately either in the schools or waiting to be hired.

Although the superintendent and the members of the Board claim to be sympathetic to the plight of the employees and their shrinking dollar, they have yet to show that they are not just talk but also a little action. Sorry, gentlemen, but your sympathy doesn't help at the supermarket.

It occurs to me that at a time when the morale in the district is so extremely low, the decision by the superintendent and the Board to arbitrarily adopt a Salary Schedule is like adding the proverbial straw to the camel's already breaking back.

(16. Continued)

The District claims that the employees really have gotten a 7.68% increase in salary and benefits. If you believe you got a 7.68% increase, try spending at the nearest Co-op or Safeway and see how far your check bounces. And if you believe that's all the district can afford then ask yourself why you work more days than last year, why you come back for "Back-to-School-Night" and why minimum days have been eliminated. And if you believe everything the district does is for the "good of the children" then ask yourself how well students do in overcrowded classrooms - classes where there seems to be no class size maximums.

I question too the District's respect for the bargaining process when after only two meetings with the various organizations it would adopt this sad Salary Schedule.

It has been mentioned in several ways and in several places that when an exclusive bargaining agent is selected and the district's employees "get their act together" situations like this will not happen. The collective bargaining law recently passed for public school employees is no guarantee of this whatsoever! To yell that we're helpless without an exclusive bargaining agent is merely one more cry to pass the buck.

Every year the employees of this or any school district let these actions pass without taking some risks of our own, we become more and more resigned to our fate as helpless human beings. With or without a bargaining agent, the responsibility lies with each of us.

- D. The District Violated Section 3543.1(b) in Excluding the Federation's October 18, 1976 Newsletter from the School Mail System Because the Exclusion Was Based on a Reason Which Is Constitutionally Impermissible.

II. Section 3543.5(a)

The Federation contends in its charge that the District's exclusion of the October 18, 1976 newsletter from the school mail had the effect of restraining the Federation "from communicating with RFT members and all other teachers of the District on matters of employment relations within the scope of the Act," and the superintendent's action constituted "an unreasonable interference."

The relevant portion of Section 3543.5(a) triggered by this charge against the District is: "It shall be unlawful for a public school employer to . . . interfere with [or] restrain . . . employees because of their exercise of rights guaranteed by this chapter."

In order to prevail in establishing a violation of Section 3543.5(a) the Federation must prove at minimum that the District excluded the Federation's Newsletter from the school mail with the intent of restraining or interfering with employees because of the exercise of their rights guaranteed by the Act, or that the District's exclusion of the Newsletter from the school mail had the natural and probable consequence of interfering with or restraining employees because of the exercise of rights guaranteed to employees under the Act. San Dieguito Faculty Association vs. San Dieguito Union High School District, EERB Decision No. 22, September, 1977, at page 14.

The Federation has not proven a violation of Section 3543.5(a). Section 3543.1(b) grants the right to use means of communication to "employee organizations" and not to "employees," and Section 3543.5(a) is concerned with the interference with or the restraint of the exercise of rights guaranteed to "employees." If the Federation in its charge or at the hearing had put into issue specific sections of the EERA from which rights guaranteed to "employees" derive and then proved that the District's violation of the Federation's rights under Section 3543.1(b) also interfered with or restrained "employees" in the exercise of their rights guaranteed by specifically designated sections of the EERA, there might be a legal basis for concluding that Section 3543.5(a) had been violated. Absent such pleading and correlative proof, such a conclusion of law is not justified.

In conclusion, it should be emphasized that the question not raised under the facts of this case is whether, absent the District's granting use of its mail system to employee organizations, employee organizations have a right to use the school mail under Section 3543.1(b). Since this issue has not been raised, it will not be addressed.

III. Section 3543.5(b)

Section 3543.5(b) makes it unlawful for a public school employer to deny employee organizations rights guaranteed them under the Act. As established earlier, the Federation, under the facts of this case, had a right guaranteed by Section 3543.1(b) to use the District's school mailboxes. By practice, "other means of communication" became distribution as discussed above.

When the District excluded the October 18, 1976 Federation newsletter from the school mail for a constitutionally impermissible reason, it violated the Federation's right to use the school mail subject only to "reasonable regulation." Thus, the District violated Section 3543.5(b).

REMEDY

The remedy provided herein is designed to effectuate the purposes of the EERA.¹⁷ The cease and desist order is to prohibit future acts on the part of the District or the administration which would impinge upon the rights of employees pursuant to Section 3541.5(c).

By posting, it is hoped that employees will learn of the unlawful nature of the action by the District and, with that knowledge, be able to exercise their employee organization's rights thereunder henceforth, thus effectuating the purpose of the EERA.¹⁸ The court affirmed a remedy to an unfair labor practice under the Agricultural Labor Relations Act¹⁹ wherein the

¹⁷Section 3541.5 reads: "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..." and Section 3541.3. "The board shall have all of the following powers and duties:... (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

¹⁸Based on federal law providing a similar structure of employer-employee relations, the LMRA, as amended, posting has been held to effectuate the purposes of that act. See Pennsylvania Greyhound Lines, Inc. v. NLRB, 1 LRRM 303 (1935). Enforced at 393 US 261, 2 LRRM 600 (1938), NLRB v. Empress Publishing Co. 312 US 426, 8 LRRM 415 (1941); Pandol & Sons v. ALRB and UFW, 5 Civ. 3446, February 21, 1978, Daily Journal Appellate Report, March 7, 1978.

¹⁹California Labor Code Section 1140, et seq.

employer was required to post, mail, and read a notice to employees. Because we are dealing with a public school employer with a relatively stable working force and bulletin boards where notices to employees are traditionally posted, such additional remedial steps are unnecessary in this case.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is found that:

1. The District did not violate Section 3543.5(a).
2. The District violated Section 3543.5(b) in denying rights guaranteed by Section 3543.1(b).

IT IS HEREBY ORDERED that the Richmond Unified School District, Board of Education, and the superintendent shall:

A. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Prepare and post at its headquarters office and in each school for twenty (20) working days in a conspicuous place at a location where notices to certificated employees are customarily posted, a copy of this Recommended Decision.

2. Cease and desist from denying employee organizations the use of the mail delivery system in similar factual situations in the future.

3. At the end of the posting period, notify the San Francisco Regional Director of the Public Employment Relations Board of the action it has taken to comply with this Order.

Pursuant to California Administrative Code, Title 8, Section 35029, this Recommended Decision shall become the final order on March 30, 1978 unless a party files a timely statement of exceptions. See California Administrative Code, Title 8, Section 35030.

Dated: March 16, 1978

ANGELA PICKETT-EVANS
Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

In the Matter of)	
SIMI EDUCATORS ASSOCIATION/CTA/NEA,)	Unfair Practice
)	Case No. LA-CE-48
Charging Party,)	
vs.)	
SIMI VALLEY UNIFIED SCHOOL DISTRICT,)	<u>RECOMMENDED DECISION</u>
Respondent.)	(8/26/77)

Appearances: Charles R. Gustafson, Attorney, for Simi Educators Association/CTA/NEA; George J. Hawkins, for Simi Valley Unified School District.

Recommended decision by Franklin Silver, Hearing Officer.

STATEMENT OF THE CASE

On December 9, 1976, the Simi Educators Association/CTA/NEA filed an unfair practice charge against the Simi Valley Unified School District alleging that the District had refused to distribute to certificated employees an organizational document and that the refusal was based upon the content of the document. It was alleged that such action by the District constituted an attempt "to impose or threaten to impose reprisals on employees and to restrain and coerce employees because of their exercise of rights guaranteed by Government Code Section 3543.1(b) and an attempt to dominate and interfere with the

administration of charging party." ¹ The Association asked that the District be ordered to cease and desist from refusing to distribute organizational documents and from exercising any censorship or prior restraint on use of bulletin boards, mailboxes, or other means of communications.

In its answer, the District did not deny that it had in fact refused to distribute the document in question, but raised the affirmative defense that it had refused to distribute the document based upon a reasonable school board policy and administrative regulation which prohibits the distribution of certain categories of documents.

An informal conference was held on January 20, 1977, and since no settlement was reached, this matter was set for formal hearing. The hearing was conducted by hearing officer James Romo on March 2, 1977, at the Los Angeles Regional Office of the Educational Employment Relations Board.

Prior to the hearing the District submitted a written motion to dismiss on the grounds that the charge assumed that the District had refused to allow the distribution of the document in question when in fact the District had allowed the Association to place the document in teachers' mailboxes, and the Association had only been prevented from using the

¹ Hereafter, all statutory references will be to the Government Code unless otherwise noted.

The charges relating to reprisals and coercion apparently are based on Section 3543.5(a), and the charge relating to domination and interference apparently is based on Section 3543.5(d), although neither of these subsections is specifically alleged. There is no evidence, and the Association does not argue, that there was any actual reprisal, coercion, interference, or domination. Rather, the thrust of the charge would logically seem to relate to Section 3543.5(b) which makes it an unfair practice to "deny to employee organizations rights guaranteed to them by this chapter." Since all parties have participated in this matter with the understanding that the crucial issue is whether the Association had the right to have its document distributed by the District, this recommended decision will treat the charge as one arising under Section 3543.5(b).

District's mail distribution system. At the hearing the District renewed this motion to dismiss and raised an additional argument for dismissal: that under federal postal regulations the District is prohibited from allowing employee organizations to use its interschool mail system. The motion to dismiss was taken under submission and evidence was received on the circumstances giving rise to the charge.

FINDINGS OF FACT

The relevant facts in this case are entirely undisputed. On December 2, 1976, William Gordon, the executive Director of the Association, delivered 800 to 1,000 copies of a document to the District offices for distribution to teachers in the school mail delivery system. The document entitled "Binding Arbitration - Or Board Policies?" was a one-page, single-spaced statement of the Association's reasons for proposing binding arbitration as the final step in a contractual grievance procedure.² One paragraph of the document stated that a named board member for the District had actively opposed collective bargaining and the document paraphrased that board member's position as follows: "Alright, if we must have collective bargaining, we can see to it that it is as ineffective as possible by leaving all contractual interpretations solely in the hands of the board."

District administrators informed the Association that the document would not be distributed because it violated District administrative regulation 4135.1. That regulation is entitled "Organizational Communication (Certificated Personnel)" and states in part:

² According to EERB representation file, number LA-R-298, the Association was certified by the Regional Director as exclusive representative of a unit of certificated employees on November 22, 1976.

1. Communications from employee organizations which are intended for distribution shall be submitted to the Office of the Associate Superintendent.
- * * *
3. The district will allow the use of the mail distribution system, including the individual mailboxes at the school sites, for distribution of appropriate approved material.
 4. Materials submitted for posting or for distribution in the mailboxes shall be confined to such matters as announcements of organizational meetings, social functions, nomination and election of officers, factual informational bulletins dealing with the progress or results of negotiations, and any other material authorized by the Associate Superintendent.
 5. No advertising, controversial, derogatory, or material (sic) which maligns or attacks individuals shall be submitted.... There should be no distribution of political or partisan nature....
 6. The organization submitting material assumes responsibility for complete compliance with the spirit and intent of the provisions of this regulation. Should the school district believe that material presented is not in accordance with the spirit and intent of this regulation, such material shall be returned to the organization submitting it with a notification of the reason for belief that the material is not in accordance with the spirit and intent of this regulation.
 7. Any violation of the regulation shall entitle the school district to cancel immediately the provisions of this regulation.

In rejecting the Association's document, district administrators took the position that it maligned an individual board member in violation of section 5 of the administrative regulation. In its answer to the unfair practice charge, the District took the position further that the document was rejected because it was outside the categories listed in section 4 as being appropriate for distribution and was not approved, as

required by that section, by the associate superintendent; and further that the document was "controversial" and "derogatory" and constituted political action in violation of section 5, and that the Association failed to comply with the spirit and intent of the regulation in violation of section 6.

The Association has traditionally used the school mail system as its primary means of communicating with teachers in the district. To utilize the system, the Association delivers materials for teachers to the central district office in unsealed envelopes with copies for the administration. The District operates a regular delivery system for its materials and communications with school site personnel two or three times a week. The Association's material is ordinarily delivered to the 30 school sites along with the District's material. The Association's material, however, is not placed directly in individual teachers' mailboxes. Rather, it is delivered to the Association's building representatives who in turn place the material in mailboxes.

After the District rejected the December 2 document, the Association itself delivered the document to teachers along with an addendum stating that the District had refused to deliver the document in its regular mail system. The Association made the delivery by having its building representatives pick up copies at the Association's office and place them in teachers' mailboxes at the individual schools. The District did not interfere with the placement of the document in teachers' mailboxes.

ISSUES

Did the District violate the provisions of EERA Section 3543.1(b) by refusing to distribute the Association's organizational document on binding arbitration?

CONCLUSIONS OF LAW

EERA Section 3543.1(b) provides:

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.)

There is no question under the facts that the Association exercised its right to use teachers' mailboxes without interference from the District. Therefore, before considering whether the District improperly refused to distribute the bulletin from its central office to the Association's representatives at individual school sites, it must first be determined whether this type of distribution system comes within "other means of communication" as provided by the statute.³

It will be noted that the specific requirements of Section 3543.1(b) impose essentially passive obligations on school districts. Thus, for an employee organization to have access to work areas, bulletin boards, mailboxes, and meeting facilities, a district must do no more than refrain from interfering with the organization. The single nonspecific right established by the section is for the use of other means of communication. While it is not doubted that a mail distribution system such as that involved in this case is a means of communication, it would be inconsistent with the apparent intent of the statute to require that a district use its facilities and

³ One of the grounds for the District's motion to dismiss, upon which the hearing officer reserved ruling at the time of hearing, was that it had no obligation under Section 3543.1(b) beyond allowing the Association the use of mailboxes. The motion is therefore disposed of in accordance with the analysis of this decision.

employees to actively assist an employee organization to communicate with its members.⁴ Whether or not the bulletin involved in this case was one to which the District justifiably objected, it seems clear that a requirement of active assistance by school districts would create an unnecessary area of recurring friction when strongly-worded communications from employee organizations, which might otherwise be protected, are submitted to districts for distribution. Therefore, it is concluded that while the EERA does not necessarily prevent school districts from assisting employee organizations with the distribution of bulletins, a school mail distribution system such as the one in this case -- as distinguished from teachers' mailboxes -- does not come within the "other means of communication" to which employee organizations must have access under Section 3543.1(b).⁵

⁴ Although not controlling here, it is relevant that the analogous requirements on employers under private sector precedent are totally passive and far more restricted than those established by Section 3543.1(b). Thus, for example, private employers are not required by statute to allow non-employee union organizers access to their property if reasonable alternative means of communication are available (NLRB v. Babcock & Wilcox, 351 U.S. 105, 38 LRRM 2001 (1956)), and it may be evidence of an unfair labor practice for an employer to actively assist a union in its organizational activities. (Eg., Duquesne University of the Holy Ghost, 198 NLRB 891, 81 LRRM 1091 (1972)). Even the controversial "access rule" of the Agricultural Labor Relations Board does no more than prohibit employers from interfering with union organizing on company property during restricted periods of nonworking time. (See ALRB v. Superior Court, 16 C.3d 392 (1976)).

⁵ A previous hearing officer's recommended decision (Stockton Unified School District, Case No. S-CE-51) found an unfair practice where only the exclusive representative was allowed access to the school mail system. In that case, however, the district did not argue or present evidence that employee organizations could have access to teachers' mailboxes without going through the school mail distribution system.

Because the Association did not have a right established by the EERA to use the District's mail distribution system, it was not an unfair practice for the District to refuse to distribute the bulletin in this instance. The Association argues that the rejection of the bulletin was an impermissible prior restraint on speech within the meaning of the First Amendment. However, since the EERA does not require a district to distribute literature, the propriety of the District's action under the Constitution does not come within the cognizance of this agency.⁶

The District, on the other hand, relies heavily on federal statutes establishing a monopoly on mail distribution by the United States Postal Service as prohibiting it from continuing to carry mail for an employee organization. Although the Private Express Statutes (18 U.S.C. 1693 et seq. and 39 U.S.C. 901 et seq.) arguably affect such mail distribution by a school district, it is not necessary in this case to determine the effect of the federal statutes since it has been concluded that the District's mail distribution system falls outside the scope of the EERA.

⁶ The Association also cites an opinion of the Attorney General for the proposition that a district mail distribution system has been considered a means of communication available to employee organizations under previous statutes applicable to labor relations in school districts. (See 45 Ops. Atty. Gen. 138 (1965)).

That opinion stated that once the privilege of use of a school mail system has been granted to employee organizations, a district may not limit the use of the system to communication with members and must also allow communication with nonmembers. This conclusion was reached partially because mail is a medium well suited to non-disruptive communication. It must be noted, however, that the previous statutes provided only that employee organizations should have "use of official bulletin boards and other means of communication." The EERA specifically provides in addition for the use of mailboxes. Thus, a means of non-disruptive communication is assured, and the question here is merely one of convenience to employee organizations. The attorney general's opinion did not consider the use of mailboxes in isolation from the total mail distribution system, and for this and other reasons it is not convincing guidance for interpreting the EERA.

RECOMMENDED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code Section 3541.5(c), it is hereby ordered that the unfair practice charge filed by the Simi Educators Association against the Simi Valley Unified School District is dismissed.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become final on September 7, 1977, unless a party files a timely statement of exceptions. See, 8 Cal. Admin. Code sec. 35030.

Dated: August 26, 1977

Franklin Silver
Hearing Officer