

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA MONICA COLLEGE PART-TIME)
FACULTY ASSOCIATION, CTA/NEA,)
)
Charging Party,) Case Nos. LA-CE-41
v.) LA-CE-57
)
SANTA MONICA COMMUNITY COLLEGE)
DISTRICT,) PERB Decision No. 103
)
Respondent;)
)
September 21, 1979
)
SANTA MONICA COLLEGE FACULTY)
ASSOCIATION,)
)
Intervenor.)
)

Appearances: Robert M. Dohrmann and Howard M. Knee, Attorneys (Schwartz, Steinsapir, Dohrmann & Krepack) for Santa Monica College Part-Time Faculty Association CTA/NEA; Lee T. Paterson, Attorney (Paterson & Taggart) for Santa Monica Community College District; Walter C. Appling, Attorney (Richman & Garrett) for Santa Monica College Faculty Association.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

This case involves two charges filed by the Santa Monica College Part-Time Faculty Association, CTA/NEA (hereafter UFA)¹ against the Santa Monica Community College District (hereafter District). The first charge, as amended, alleged

¹After this charge was filed, the charging party changed its name to Santa Monica College United Faculty Association.

that the District violated sections 3543.5(a), (b), (c), and (d) of the Educational Employment Relations Act² in that it:

1. Refused to release information concerning a reduction in staff to enable charging party to represent its members;
2. Conducted surveillance of a meeting held by UFA;
3. Interfered with and dominated UFA by demanding that California Teachers Association revoke UFA's charter;
4. Encouraged membership in another employee organization;
5. Undermined the majority's support of UFA, by discriminatorily granting a pay raise to employees represented by another employee organization while denying such a raise to employees represented by UFA;

²The Educational Employment Relations Act (hereafter EERA) is codified at Government Code section 3540, et seq. All statutory references are to the Government Code unless otherwise indicated.

Section 3543.5 provides in pertinent part:

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.
- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
- (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or

6. Refused to meet and negotiate in good faith by conditioning a salary increase on a waiver of rights to collective negotiations.

7. Made false reports to employees on the status of negotiations with UFA.

The second charge alleged that the District violated section 3543.5(a) by refusing to rehire James Shaw in September of 1976.

The charges were consolidated and a hearing was held before an Educational Employment Relations Board³ hearing officer. The hearing officer's recommended decision dismissed all aspects of the charges except those relating to the granting of a salary raise. The hearing officer found that the District granted a pay raise to full-time employees and failed to grant a pay raise to part-time employees because UFA refused to waive the right to negotiate collectively over wages for the 1976-77 year. He held that this action had the "natural and probable consequence" of encouraging membership in another employee organization and of discouraging membership in UFA in violation of section 3543.5(d). As a proposed remedy, the hearing officer ordered the District to cease and desist from encouraging

other support to it, or in any way encourage employees to join any organization in preference to another.

³The Educational Employment Relations Board was renamed the Public Employment Relations Board (hereafter PERB or Board) effective January 1, 1978.

membership in other organizations in preference to the UFA and to post copies of that order at each campus and work site for 60 calendar days.

The following issues are raised by exceptions to the recommended decision taken by both parties;

1. Did the District violate section 3543.5(b) by its failure to provide UFA with information relative to the layoff of certificated employees?

2. Did the District violate section 3543.5(a) by granting salary increases to full-time employees but withholding increases for part-time employees?

3. Did the District violate section 3543.5(d) by granting salary increases to full-time employees but withholding increases for part-time employees?

4. Is the charge that the District violated section 3543.5(a) in dismissing James Shaw barred by the six month statute of limitation period prescribed in section 3541.5(a)?⁴

⁴Section 3541.5(a) states in pertinent part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

(1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge....

5. Does PERB have the authority to rule on the validity of SB 1471?⁵

6. For the violations of the EERA found in this case, what are the appropriate remedies?

FACTS

I. Representation History

The Santa Monica College Faculty Senate was established in 1968 to provide the administration with policy recommendations from the full-time faculty. The Santa Monica College Faculty Association (hereafter Association), operated as an arm of the Senate, with the same slate of officers. With the advent of the EERA, the Senate and the Association separated. Part-time faculty were not included in either the Senate or the Association.

This exclusion led to the creation of the Santa Monica College Part-Time Faculty Association in 1975.

UFA filed a representation petition for a unit to include all part- and full-time faculty on May 21, 1976. This unit was estimated to total 790 faculty. UFA's petition was accompanied by proof of support of 450 persons, of whom 196 were members of the UFA.

⁵Stats. 1976, Ch. 421. This amended the EERA. Among other things, it changed the operative date from July 1, 1976, to April 1, 1976, of provisions specifying unlawful practices and authorizing the filing of unfair labor practice charges within six months of occurrence.

The Association intervened on June 11 both in a smaller unit of "contract" instructors (excluding part-time faculty) and in the overall unit for which UFA petitioned. It showed 30 percent support in these units.

The District responded to these petitions on June 14 by doubting the appropriateness of a combined full- and part-time unit and contesting the majority showing of the UFA.

The parties executed a consent election agreement on November 16, 1977. A representation hearing was held to determine whether department chairpersons would be in the unit. A final consent election agreement was signed on December 9, 1977.

The stipulated unit included all certificated instructors, counselors, librarians, nurses, and psychologists and excluded persons employed as summer session instructors, community service instructors, long-term substitutes, short-term substitutes, and part-time faculty who have taught for less than three semesters out of the last six.

An election was held on March 16, 1978. The Association was certified as the exclusive representative on June 14, 1978, after the UFA withdrew its objections to the election. The objections which were withdrawn did not relate to conduct which is the subject of the charges at issue here.

II. Charged Conduct

A. Refusal to Furnish Information

In early 1976, UFA became aware that the District planned to reduce course offerings and to lay off a number of certificated staff members. This plan was a result of a new state limit on community college growth. Beginning on March 29, 1976, UFA requested information from District administrators pertaining to the anticipated layoff of part-time instructors. Following the receipt of termination letters by 144 part-time faculty, UFA made additional requests for information. Among the information requested were the criteria used to determine what courses would be deleted and which faculty would not be rehired. UFA additionally requested a list of those who were terminated, along with data on their past service and class loads. UFA's position in these letters was that the information was needed to determine whether to pursue administrative and legal remedies for its members.

The District responded by supplying information on the extent of anticipated loss in average daily attendance and other state support. The District referred the request for the criteria to its legal counsel. It did not disclose its criteria until the hearing in the present case. The District also refused to release the names of terminated faculty and the other personnel information that UFA requested. It stated that since it was concerned about the privacy of the persons involved, it

would release the material only if it was requested "directly by and released to individual faculty members."

UFA filed a lawsuit against the District on August 2, 1976, seeking to establish that certain part-time teachers were tenured. It subpoenaed the information it had earlier requested from the District in connection with the suit.

B. Discriminatory Salary Raise

The Board of Trustees authorized its Deputy Superintendent-President Dr. Moore to enter into salary discussions with both employee organizations in the spring of 1976. On June 17, the organizations were requested to prepare salary proposals for both full- and part-time instructors for presentation at a special meeting of the board on June 21.

On June 21, both UFA and the Association made presentations to the board. UFA's proposal apparently only pertained to part-time employees. Subsequently, the board in executive session authorized Moore to offer a salary increase of approximately 8 percent to each organization if they agreed to waive the right to collective negotiations on matters of compensation for the next year.

On June 23, Moore made this offer to Ms. Drummond, a representative of UFA. He offered the same raise to the Association.

Moore met again with Drummond on June 25. He urged that UFA accept the District's offer and waive "compensation collective

bargaining for the year 1976-77." Drummond said that the executive committee planned to meet on the following day. Moore emphasized that UFA should respond before the next board meeting, scheduled for June 28.

Before the June 28 meeting, UFA rejected the District's offer. The letter questioned whether the Board's offer met the public notice requirements⁶ of the Winton Act (Ed. Code sections 13080-13090, repealed July 1, 1976), and indicated that the UFA executive committee was prepared to continue negotiating on salaries and working conditions throughout the summer. The letter concluded:

We were available throughout the spring to meet and confer in good faith with representatives selected by the board of trustees on salaries and working conditions; regrettably, you have chosen to raise these matters during summer recess rendering consultation with faculty regarding your proposals virtually impossible. Again, may we reiterate our willingness to meet and confer throughout the summer with ratification of any agreements to occur at the beginning of the fall term. To insure fairness, we suggest that such meeting and conferring involve representatives of all other employee organizations representing the faculty.

Unlike UFA, the Association accepted the board's offer and signed a waiver of its right to collective negotiations. At the board meeting, the board approved the offered raise for full-time faculty only. It accepted Moore's recommendation to take

⁶Winton Act, Education Code section 13089, repealed after July 1, 1976.

no action with respect to a salary increase for part-time faculty. The board left open its offer to UFA until midnight of June 30 and instructed Moore to meet with the UFA to try to obtain their agreement.

Moore met with the UFA's executive committee on both June 29 and 30, stating that he was not negotiating with them, but merely was explaining the board offer. The UFA executive committee was opposed to the raise because they thought it insufficient and because the committee did not believe it had the authority under the organization's constitution to enter into any agreement with the District without ratification by the membership. In addition, the executive committee maintained that it was without power to take action on behalf of all part-time faculty, since only 196 part-time instructors were members of the organization.

Moore urged that the committee poll its membership by telephone. The committee refused to do so. The meeting ended without agreement.

Following the expiration of the board's offer, Moore wrote a memo on July 2 to the "Santa Monica College Community" summarizing the board's actions. The memo was distributed to all faculty and to the press. The memo noted the action taken with respect to full-time faculty and stated that the board made

the same offer to part-time faculty and the UFA. The memo concluded:

At 2:10 p.m., June 30, 1976 the Part-Time Faculty Association's Executive Committee ended two days of discussions by stating that the offer from the Board was not worth the effort to take to their members. The Board's representative indicated that the offer was open, per instructions, until midnight, but the executive committee of the Part-Time Faculty Association refused the Board's offer to all 600 part-time employees of the college district. The significance of this decision is that the pay rate for part-time employees will continue at \$14.75 per hour rather than change to \$16.00 per hour effective September 1, 1976.

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The Board wishing in good faith to improve working conditions prior to the July 1 collective bargaining date, made its settlement with the full-time faculty and tendered its offer to the Part-Time Faculty Association which was not accepted. [Emphasis added.]

The record is in conflict as to whether the executive committee stated that the offer was not worth taking to the UFA membership. The hearing officer did not resolve this conflict.

C. Filing of the Charge Concerning Shaw's Dismissal

James Shaw, a part-time instructor in the District, received a letter from the District on May 14, 1976, which stated in part that, "This is to inform you that you will not be offered a teaching position for the fall semester of 1976." At that time he had some suspicion that he was being singled out because of his activities on behalf of UFA.

In the fall, Shaw attempted to determine whether any instructor with less seniority had been retained by looking at the schedule of classes. The charge concerning his dismissal was filed January 10, 1977.

The charge is resolved below on the basis that it was not timely filed under section 3541.5(a). The facts underlying Shaw's discharge therefore need not be addressed.

DISCUSSION

I. The Retroactivity of the EERA

Most of the conduct alleged in UFA's charge occurred prior to July 1, 1976. The District argues that SB 1471⁷ is potentially unconstitutional; that its application may therefore result in a denial of its rights and cause it injury; and that PERB "has an obligation to rule on the issue [of its] validity...."

The California Constitution, Article III, section 3.5 (effective June 1978) renders PERB powerless to refuse to enforce a provision of the EERA or to determine its constitutionality. That provision states:

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

⁷Stats. 1976, ch. 521, ante at fn. 5.

that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

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

[Emphasis added.]

For these reasons, the District's objection on this issue is rejected.

II. Refusal to Furnish Information

The hearing officer dismissed this aspect of the charge because UFA was not the exclusive representative at the time of the charged conduct. He found that under San Dieguito Unified School District (9/2/77) EERB decision No. 22, the employer is not required to consult with a nonexclusive employee organization with regard to matters affecting its members.

Analogizing to federal labor precedent which holds that the duty of an employer to furnish information arises from its duty to bargain with an exclusive representative,⁸ the hearing officer reasoned that since the employer was under no duty to consult, it was also under no duty to furnish information.

Whether or not the employer is obligated to consult with a nonexclusive representative under EERA, is a question separate

⁸See Curtiss-Wright Corp. v. NLRB (3rd Cir. 1965) 347 F.2d 61 [59 LRRM 2433].

and distinct from the issue of whether an employer has a duty to furnish information upon request of the nonexclusive representative, so that the nonexclusive representative is able to determine if a valid grievance exists, and to represent its members in that grievance. Without responding to the former question, this board determines that, prior to the time an exclusive representative is selected, the right of the nonexclusive representative to present grievances encompasses the right to obtain the information it needs from the employer to evaluate those grievances on behalf of its members.

On its face, section 3543.1(a)⁹ specifically grants nonexclusive employee organizations a right to represent their members "in their employment relations with the public school employer" until such time as an exclusive representative is recognized or certified.

The scope of the term "employment relations" has not yet been resolved by PERB. However, the processing of a grievance

⁹Section 3543.1(a) states in pertinent part:

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

on behalf of employees clearly constitutes a matter of "employment relations." Mount Diablo Unified School District, Santa Ana Unified School District, and Capistrano Unified School District (12/30/77) supra, PERB decision No. 44, at page 13. In the present case, UFA desired information from the District in order to determine whether to pursue administrative remedies within the District. Pursuit of administrative remedies is sufficiently similar to processing grievances to bring this case within the Mount Diablo rule, thus within the authorized area of "employment relations."

A nonexclusive representative's right to present grievances would be meaningless if the employer were under no duty to provide information it possesses and which is relevant to the evaluation and/or processing of the grievance. Accordingly, a necessary corollary to the duty of the employer to engage in such grievance resolution is the duty to furnish information necessary for the nonexclusive representative to provide effective representation. In the present case, UFA had a right to represent its members, including a right to the data and information in the employer's possession concerning the employer's proposed layoffs. Among such information was the criteria used by the District to determine whom to lay off. The District's refusal to provide such information to UFA constituted a denial of UFA's right to represent its members provided by section 3543.1(a).

The National Labor Relation Act (29 U.S.C. 151, et seq.) contains no provision which mandates an employer to recognize or adjust grievances of a nonexclusive representative comparable to EERA section 3543.1(a). Therefore, the federal labor precedent upon which the hearing officer based his analysis is inapplicable to the circumstances underlying the District's failure to furnish the requested information. Based on the foregoing, the hearing officer's failure to find that the District's actions violated section 3543.5(b) is reversed.

Discriminatory Salary Raise

As a (d) violation. The hearing officer determined that the "basic thrust" of this aspect of the charge was an allegation that the District violated section 3543.5(d). He found that the District's grant of a salary raise to full-time instructors but not to part-time instructors "had a disparate and adverse impact on that segment of the faculty which formed the natural constituency of the United Faculty Association."¹⁰ Concluding that this action had the "natural and probable consequence" of encouraging membership in another organization, San Dieguito Union High School District (9/2/77) supra, EERB Decision No. 22, the hearing officer held that the District's action violated section 3543.5(d).

¹⁰Santa Monica College Part-Time Faculty Assn. v. Santa Monica Community College District (10/27/77) Hearing Officer's Recommended Decision, at p. 32.

As an (a) violation. However, the hearing officer declined to find that the District's action also discriminated against and interfered with employees in violation of section 3543.5(a).

In Oceanside-Carlsbad Unified School District (1/30/79) PERB Decision No. 89, PERB established a single standard and test for all alleged violations of section 3543.5(a). PERB held where there is a nexus between the employer's acts and the exercise of employee rights, a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct, the competing interests of the parties are balanced and the issue resolved accordingly. If the employer's acts are inherently destructive of employee rights; however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record.

In the present case, the District increased the wages of full-time employees because the Association agreed to waive collective negotiation rights on salaries, while it declined to increase part-time employees' wages because UFA refused to waive such rights. This constituted discrimination. The District also circulated a memorandum to the college community and the press, placing the onus for such action on UFA. This conduct

resulted in at least "slight harm" to the rights of employees. The EERA guarantees public school employees the right to form, join and participate in the activities of the organization of their choice. (Secs. 3540, 3543.) It gives them the right to be represented by the employee organization of their choice. (Secs. 3540, 3543.) The District's conduct in this case was both discriminatory and harmful to these rights.

In the present case, the District contends that its actions were lawfully taken because (1) the failure to grant a wage increase to part-time instructors was due to UFA's refusal to waive collective negotiation rights for its members; (2) the same salary offer was made to all employees, and when that offer was made,

. . . there was at least a reasonable possibility that separate units would have been created for part-time and full-time faculty.

The District's first rationale is less of a valid justification than it is an acknowledgment of wrongdoing. The District candidly acknowledges that it treated part-time employees differently than full-time employees because UFA refused to surrender one of the most basic rights contained in the EERA. This explanation evidences an impermissible motive--to discriminate on the basis of a refusal to waive rights guaranteed by the EERA--rather than on operational need.

It is difficult to grasp the rationale of the second claimed justification for the District's act. That the creating of two negotiating units was reasonably foreseeable does not explain why the District failed to increase the wages of part-time instructors commensurately with the increase it gave full-time instructors. In any event, this rationale ignores that the District offered pay raises at the outset to both groups of employees. It ignores that the District declined to pay an increase to part-time employees only because it was unable to exact a waiver of compensation negotiating rights from UFA for the 1977-78 year. It also ignores that the District circulated a memorandum to employees and the press stating that UFA was responsible for the District's decision not to increase the wages of part-time employees. The District's second justification, like its first, fails to establish "operational necessity."

Interference. PERB further finds that the District's action constituted interference with the exercise of employee rights guaranteed by section 3543 to "join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" or "to refuse to join or participate. . .".

The District conditioned a salary increase on a waiver of the employees' basic statutory right to collective negotiations. In the face of the employees' refusal to waive

such rights, the District carried through its implied threats to impose reprisals on the employees by denying them the wage increases. This implied promise to give raises based on the waiver of rights and subsequent retaliatory denial of raises by the District clearly interfered with, restrained and coerced employees because of their exercise of rights guaranteed by EERA, in violation of 3543.4(a). Requiring employees to give up employee organizational activities as a condition to receiving a pay increase tends to have a discouraging effect on both present and future protected activity. Such interference is "inherently destructive" of employee rights. See NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465].

Further, over the objection of UFA, the District implicitly appointed UFA as the representative of all part-time employees. It also effectively appointed the Association as the representative of all full-time employees. Upon UFA's rejection of the District's offer, the District failed to increase the wages of all part-time instructors. Section 3543.1(a) gives nonexclusive employee organizations the right to represent their members.¹¹ In failing to increase the wages of non-UFA members because of UFA's refusal to waive the rights of its members, the District interfered with the right of those

¹¹The text to section 3543.1(a) is set forth at footnote 9, ante.

individuals not to participate in the activities of employee organizations.

Encouraging Employees to Join One Employee Organization in Preference to Another

PERB upholds the hearing officer's conclusion that the District's conduct violated section 3543.5(d) of the EERA. The hearing officer found that the statutory language of section 3543.5(d) was apparently based on section 8(a)(3) of the NLRA, which makes it unlawful for an employer,

by discrimination in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . [29 U.S.C. sec. 158(a)(3).]

The hearing officer held that the District violated section 3543.5(d) on the basis that the "natural and probable consequence" of the employer's action was to discourage membership in UFA. San Dieguito Unified School District (9/2/77) supra, EERB Decision No. 22. PERB affirms the ultimate finding of a violation, but for the reasons that follow.

We think the provisions of section 8(a)(3) and 3543.5(d) are substantially different. Section 8(a)(3) outlaws certain discriminatory conduct whose purpose is to encourage or discourage membership in any labor organization. If this specific motive is not established, a violation of the section

will not generally be found.¹² Section 3543.5(d), in pertinent part, simply states:

It shall be unlawful for a public school employer to:
· · · · ·
· · · in any way encourage employees to join any organization in preference to another.
[Emphasis added.]

This section imposes on employers an unqualified requirement of strict neutrality. There is no indication in the statutory language that the Legislature meant to prohibit only those acts which were intended to impact on the employees' free choice. The simple threshold test of section 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other.

PERB disagrees with the District's contention that finding a violation of section 3543.5(d) depends upon proof that the employees actually changed membership as a result of the employer's acts. The word "encourage" connotes nothing more than stimulus, favor or being conducive to a particular result. Who among us can claim that we have achieved every goal toward which we have been encouraged, or that we have not suffered disappointments despite the encouragement we have received?

In the present case, the District's discriminatory failure to grant a wage increase to part-time employees in addition to

¹²Radio Officers' Union v. NLRB (1954) 347 U.S. 17 [33 LRRM 2417].

its memo assessing blame against UFA for the employer's actions, clearly would have tended to discourage employees from joining UFA and to encourage employees to join another employee organization. The District failed to give an 8 percent wage increase to part-time instructors and blamed UFA for its action in a statement that was distributed to the college community and the press. These actions clearly would tend to undermine employee confidence in UFA and to discourage their membership in it. The District's conduct has already been found not to be based on legitimate operational necessity and therefore violated section 3543.5(d).

III. Filing of the Charge Concerning Shaw's Dismissal

The hearing officer correctly concluded that the charge alleging discriminatory discharge of James Shaw was not timely filed within the six month statute of limitations provided in section 3541.5(a)(1).¹³

¹³Section 3541.5(a)(1) 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. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an

Under the NLRA, a charge concerning a dismissal is timely only when filed within six months of the effective date of the discharge. See California School of Professional Psychology (1977) 227 NLRB 1657 [95 LRRM 1032]; Colorflo Decorator Products, Inc. (1977) 228 NLRB No. 23 [94 LRRM 1554].

Shaw's termination date was the end of the spring semester in the middle of June. The charge was filed on January 10, 1977, or approximately seven months following the termination. The charge, therefore, was not timely filed, and the charge relating to Shaw's dismissal is dismissed.

UFA makes one novel argument in an attempt to save this charge. It states that the statute of limitations in section 3541.5(a)(1) should be deemed modified by the provision in Senate Bill 1471¹⁴ allowing charges to be filed beginning on its enactment July 1, 1976. This argument is contrary to the clear wording of section 3541.5(a), which itself was not amended by SB 1471. In implementing SB 1471, the Legislature sought not to extend the date for filing charges, but rather to allow

unfair practice charge, except that the board shall not do either of the following:
(1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge[.]

¹⁴See footnote 5, ante.

charges to be filed respecting conduct occurring on or after April 1, 1976.

UFA also contends that Shaw's lack of knowledge of the criteria used by the District in determining whom to dismiss should extend the filing period. PERB does not foreclose the possibility that in extraordinary circumstances where fundamental equitable principles are involved, a charge may be considered timely even when filed later than six months after the effective date of a discharge. Nothing in this case, however, justifies a departure from the general rule. Shaw was an active member of UFA. When he learned of the District's plan to terminate him, he suspected that he was being singled out because of his organizational activities. Under these facts, Shaw was obliged to file a charge within six months from the date of his discharge.

Dr. Moore's July 2 Memo

In support of its charge that the District violated section 3543.5(d) of EERA, UFA cites portions of the July 2 memo sent by Dr. Moore to the "Santa Monica College Community."¹⁵

¹⁵The July 2 memo stated, in pertinent part:

At 2:10 p.m., June 30, 1976 the Part-Time Faculty Association's Executive Committee ended two days of discussions by stating that the offer from the Board was not worth the effort to take to their members. The Board's representative indicated that the offer was open, per instructions, until

UFA contends that the memo contains inaccurate statements about UFA, in that it appears to suggest UFA turned down an offer of the District to all 600 part-time faculty members, rather than stating UFA declined the offer only on behalf of its own members.

Even accepting, arguendo, UFA's interpretation of the memo it does not support a separate violation of EERA. At most, such evidence would only support the overall conduct engaged in by the District, upon which the Board has heretofore based its findings that the District is in violation of 3543.5(a) and (d). Therefore, the Board makes no separate finding as to the July 2 memo.

The Remedy

Back pay. The hearing officer refused to order back pay for the employees denied the salary raise, citing Porter Co. v. NLRB (1970) 397 U.S. 99 [73 LRRM 25611] and Ex-Cell-O Corp. (1970)

midnight, but the executive committee of the Part-Time Faculty Association refused the Board's offer to all 600 part-time employees of the college district. The significance of this decision is that the pay rate for part-time employees will continue at \$14.75 per hour rather than change to \$16.00 per hour effective September 1, 1976.

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The Board wishing in good faith to improve working conditions prior to the July 1 collective bargaining date, made its settlement with the full-time faculty and tendered its offer to the Part-Time Faculty Association which was not accepted.

185 NLRB 107 [74 LRRM 17401]. In Porter, the U.S. Supreme Court held that the NLRB could not order a party to incorporate into a collective bargaining agreement a specific provision to which that party has not agreed. Subsequent to this decision, the NLRB in Ex-Cell-O Corp. followed Porter by refusing to order compensation to employees where the employer refused to bargain in order to challenge certification. Neither Porter nor Ex-Cell-O Corp. relates to the present case, however. Here, the sole issue is whether the District should be required to make the employees whole for losses suffered as the result of the District's unlawful discriminatory act. This issue has no relation to the propriety of ordering that a substantive benefit be implemented as part of a collective negotiations agreement or in place of one.

The NLRB customarily orders that back pay be awarded to employees in appropriate cases where discrimination has occurred.¹⁶ For example, in Florida Steel Corp. (1975) 220

¹⁶See section 10(c) of the NLRA, which states in part:

If upon the preponderance of the evidence taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of this act.

NLRB 1201 [90 LRRM 1329], enforced per curiam (7th Cir. 1976) 538 F.2d 324 [92 LRRM 3424] the NLRB ordered and the court enforced a back pay order where the company had granted benefits to all its plants but those in which union activity was taking place. Similarly, in NLRB v. Darling & Co. (7th Cir. 1970) 420 F.2d 63 [73 LRRM 2117], enforcing (1968) 170 NLRB 1068 [68 LRRM 1415] the court enforced an NLRB order requiring back pay when the employer denied severance and vacation pay to the members of one union while granting it to the members of other unions, where a member of the first union independently had filed charges against the employer.

In addition, the NLRB customarily orders interest to be paid in addition to the back pay in order to return the employees to the position they would have occupied but for the violation.

The EERA gives PERB the authority to "take such action and make such determinations in respect of such [unfair practice] charges or alleged violations as the board deems necessary to effectuate the policies of this chapter." (Sec. 3541.3(i).) In addition, PERB is empowered to "issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter." Section 3541.5(c). The United States Supreme Court has interpreted the identical phrasing of the NLRA, section 10(c) as being merely an

example of the NLRB's power, and has held that back pay appropriately may be ordered even where reinstatement is not appropriate. See Radio Officers' Union v. NLRB (1954) supra, 347 U.S. 17 [33 LRRM 2417, 2432]; Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 [8 LRRM 439].

In the present case, all part-time employees were unlawfully discriminated against in being denied an approximately 8 percent wage increase given all full-time employees. This disparate treatment of part-time employees violated sections 3543.5(a) and (d) of the EERA. Section 3541.5(c), therefore, empowers PERB to compensate part-time instructors for the loss of pay suffered by them because of the District's actions. Employees must be compensated for the amount of pay actually lost because of the District's failure to grant them a wage increase of \$1.25 per hour, plus 7 percent interest per annum, the standard rate of interest assessed by California courts. See Sanders v. City of Los Angeles (1970) 3 C.3d 252, 261-263.

Should the District fail to comply with PERB's order with respect to back pay, the charging party may petition PERB to order a compliance hearing to determine the amount of back pay due affected individuals.

Mailing and Posting of Notice. The hearing officer refused to include in the order personal delivery of a notice of violation to the part-time employees affected by the District's action. PERB finds that personal delivery is necessary to

effectuate the purposes and policies of the EERA. It is possible that many of the part-time instructors who taught in the District during the 1976-77 year no longer are teaching there, and every individual eligible for the above back pay award must be notified of this decision. Personal delivery also is necessary to counterbalance the effect of the District's delivery to each part-time employee of the July 2 memo from the District which announced the discriminatory action and blamed it on the UFA.

In addition to personal delivery, the District shall post the appended notice in the locations designated in the order.

ORDER

Upon the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that the Santa Monica Community College District, Board of Trustees, superintendent, and representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their organizational rights, by threatening to or conditioning salary increases on the waiver of statutory rights, or by withholding salary increases because of the exercise of such rights;

2. Encouraging employees to join any employee organization in preference to another;

3. Interfering with the right of employees to join or not join an employee organization of their choice;

4. Denying to employee organizations information needed to represent their members.

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

1. Prepare and post copies of this Order and the attached notice within seven calendar days following receipt at each of its campuses and work sites for sixty (60) calendar days in conspicuous places, including all locations where notices to certificated employees are customarily posted;

2. Distribute to each part-time employee as of September 1, 1976 a copy of this Order;

3. Pay to each part-time employee as of September 1, 1976 the \$1.25 per hour increase in salary discriminatorily denied them for the 1976-1977 school year and remedy in like manner any effects of this discrimination continuing through the 1977-1978 school year.

4. Pay in addition to the amount specified in 3., above, seven (7) percent interest per annum on the amount owing to each employee, measured from September 1, 1976 to the time payment is made.

5. At the end of the posting period notify the Los Angeles Regional Director of the Public Employment Relations Board of the action it has taken to comply with this order.¹⁷

All other charges filed by the Santa Monica College United Faculty Association against the Santa Monica Community College District contained in case numbers LA-CE-41 and LA-CE-57 are hereby dismissed.

By: Harry^v Gluck, Chairperson

Barbara D. Moore, Member

Raymond J. Gonzales, dissenting in part and concurring in part:

I. The District's Grant of a Salary Raise Only to Full-Time Employees

I concur in the majority's decision to find that the District's action in granting a salary raise to full-time employees and not to part-time employees constituted a violation of section 3543.5(a). As the majority decision notes, the District's conduct was discriminatory to the rights of employees. It also interfered with employee rights, as set forth in the

¹⁷Should the District fail to comply with PERB's Order with respect to back pay, the charging party may petition PERB to order a compliance hearing to determine the amount of back pay due affected individuals.

APPENDIX

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

After a hearing in which all parties had the right to participate, it has been found that the Santa Monica Community College District violated the Educational Employment Relations Act by discriminatorily denying a salary increase unless a waiver of rights guaranteed by statute was made, and by refusing to furnish information to the Santa Monica College United Faculty Association that was necessary for the Association to represent its members. As a result of this conduct, we have been ordered to post and mail this notice and we will abide by the following:

WE WILL NOT discriminate against employees by refusing to grant them salary increases on the basis of organizational activity.

WE WILL NOT encourage or discourage membership in any employee organization.

WE WILL NOT interfere with the exercise of rights guaranteed by the Educational Employment Relations Act.

WE WILL pay back wages due to part-time certificated employees because of our discriminatory refusal to raise their wages commensurately with those of full-time certificated employees.

Santa Monica Community College District

By: Superintendent

Dated:

This is an official notice. It must remain posted for 60 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

majority decision. Since the District's purported reasons for its conduct do not constitute a legitimate and substantial justification, intent on the part of the District to discriminate and interfere can be inferred and a violation of section 3543.5(a) found. I make no judgment as to whether the District's conduct merits the label of being "inherently destructive." Since the District did not offer any justification in the first instance, it is unnecessary to so determine the District's conduct. See Carlsbad Unified School District (1/30/79) PERB Decision No. 89, concurring opinion.

I disagree with that portion of the Board Order requiring the District to cease and desist from imposing or threatening to impose reprisals on employees and restraining or coercing employees because of the exercise of their organizational rights. The District's grant of a salary raise only to full-time employees is cast as an issue in terms of discrimination and interference with employee rights. Although they make passing reference to such findings in the text, the majority offer no articulated rationale supporting them; their cease and desist order on these points is totally inappropriate.

II. The District's "Discouragement" of Membership in UFA

I also agree with the majority that the District violated section 3543.5(d). I concur in the decision that a showing of employer intent is not necessary in proving a violation of this section. The majority appear to intend to adopt a balancing test in determining whether section 3543.5(d) has been violated since the decision mentions the finding that the District's

conduct was not based on "legitimate operational necessity." To me, this implies, given the majority's holding in Carlsbad, that if a district had a good reason for its action, the district's interest would be balanced against the harm to employees caused by the district's conduct. I agree with this test, for the reasons put forth by the majority in Carlsbad: district management has certain obligatory duties and responsibilities, and inherent managerial interests coexist with employee rights. In order to reconcile the two, a balancing test is appropriate.

However, the majority opinion seems to indicate that a finding that the District's behavior tended to discourage membership in UFA would be sufficient to find a violation of section 3543.5(d). I disagree. The section clearly refers only to encouraging employees to join any organization in preference to another; discouragement is not mentioned. In other words, to find a violation of this section, there must be rival employee organizations and some showing of district conduct which seems to favor one organization over another. In this case, it is quite likely that the District's action tended to encourage membership in the Association in preference to UFA; therefore, I would find a violation of section 3543.5(d).

III. Other Findings

I concur in the Board's decision that the District must provide UFA the information requested, that part-time employees are entitled to compensation for the amount of pay lost because of the District's discriminatory conduct, and that UFA's charge

alleging discriminatory discharge of James Shaw was not timely filed. I agree with the notice; similarly, I agree with the order, except as noted above.

Raymond J. González, Member

EDUCATIONAL EMPLOYMENT RELATIONS BOARD
OF THE STATE OF CALIFORNIA

| | | |
|--------------------------------|---|-----------------------------|
| In the Matter of |) | |
| SANTA MONICA COLLEGE PART-TIME |) | |
| FACULTY ASSOCIATION, |) | Unfair Practice |
| |) | Case Nos. LA-CE-41 |
| vs. |) | LA-CE-57 |
| Charging Party, |) | |
| |) | |
| SANTA MONICA COMMUNITY COLLEGE |) | |
| DISTRICT, |) | |
| |) | |
| Respondent; |) | <u>RECOMMENDED DECISION</u> |
| |) | (10/27/77) |
| SANTA MONICA COLLEGE FACULTY |) | |
| ASSOCIATION, |) | |
| |) | |
| Intervenor. |) | |

Appearances: Robert M. Dohrmann and Howard M. Knee, (Schwartz, Steinsapir, Dohrmann & Krepack), for Santa Monica College Part-Time Faculty Association; Lee T. Paterson and Susan M. Crockett (Paterson & Taggart), for Santa Monica Community College District; Walter C. Appling (Richman & Garrett), for Santa Monica College Faculty Association.

Before Franklin Silver, Hearing Officer.

PROCEDURAL HISTORY

On November 15, 1976, the Santa Monica College Part-Time Faculty Association¹ filed an unfair practice charge (No. LA-CE-41) against the Santa Monica Community College District containing the following allegations:

¹Thereafter, the charging party changed its name to Santa Monica College United Faculty Association. At times herein the charging party will be referred to as United Faculty Association.

1. On or about June 3, 1976, the Respondent, in writing, refused to release information to the Charging Party necessary for it to properly represent its members. Such information related to curtailment and/or reduction in certificated staff.

2. Respondent interfered with, restrained and/or coerced employees on or about May 14, 1976, when Respondent, via management representative Frank Little, conducted surveillance of a meeting of Charging Party.

3. On or about May 20, 1976, Respondent, by and through James D'Angelo, a management representative, attempted to dominate and/or interfere with the formation and/or administration of Charging Party by demanding that California Teachers Association, the parent body of Charging Party, revoke Charging Party's charter.

4. On and after May 18, 1976, Respondent has, by and through James D'Angelo and others, encouraged employees to join organizations other than Charging Party in preference to Charging Party.

5. On or about June 17, 1976 through and including the present, Respondent has both failed and refused to meet and negotiate in good faith with Charging Party in that it performed the following acts.

a. On or about June 23, 1976 and on several occasions thereafter, Respondent conditioned its salary negotiations and/or offers upon a mandatory waiver of rights to collective bargaining on and after July 1, 1976 on the part of Charging Party.

b. On or about July 12 and 17, Respondent refused to meet and negotiate in good faith with Charging Party with respect to salaries.

6. On or about July 2, 1976, Respondent, through Deputy Superintendent Moore, in writing, interfered with the administration of Charging Party and encouraged employees to join other organization(s) in preference to it by untruthfully reporting the status of Respondent's negotiations with Charging Party.²

It was alleged generally that the above conduct violated Sections 3543.5(a), (b), (c), and (d)³ of the Educational Employment Relations Act (EERA).

The District filed an answer denying that it committed any unfair practices. At the same time the District filed a motion to dismiss (1) all charges relating to conduct which occurred prior to July 1, 1976 on the grounds that the unfair practice provisions of the EERA became effective on that date and cannot be applied retrospectively, and (2) all charges alleging refusal to meet and negotiate on the grounds that the charging party was not alleged to be, and was not, an exclusive representative with whom the District was required to negotiate. Thereafter, the District filed a motion to dismiss paragraph 2 of the charge on the grounds

²At the hearing, the allegation in paragraph 5(b) of the charge that there was a refusal to meet and negotiate on July 17 was amended to conform with the evidence that the conduct occurred on July 19.

³All statutory references herein are to the Government Code unless otherwise noted.

Section 3543.5 provides in part as follows:

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.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

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

that the alleged misconduct occurred outside the six-month limitations period for the filing of unfair practice charges.

On February 22, 1977 the United Faculty Association filed an amendment to its charge, alleging that the charge was filed within six months of the conduct alleged in paragraph 2. Paragraph 5 of the charge was amended to read:

On or about June 17, 1976 through and including the present, the Respondent has, by virtue of the foregoing acts and those alleged hereinafter, engaged in multiple and pervasive unfair practices with the intent of undermining the majority support of employees of the Respondent in an appropriate unit, which majority was established and proven to Respondent on and after May 21, 1976. In addition, Respondent performed the following acts:

- a. (Unchanged from original charge)
- b. (Unchanged from original charge)
- c. On or about June 30, 1976, Respondent interfered with the administration of the Charging Party and encouraged employees to join another organization in preference to it and discriminatorily granting to employees represented by the other organization a larger pay increase than that offered to certificated employees represented by the Charging Party.

At the hearing in this matter, the District again moved to dismiss paragraph 2 on the basis of the statute of limitations, and 5(b) on the basis of the failure to allege that the charging party was exclusive representative. The District also renewed its motion to dismiss all charges based on conduct which occurred prior to July 1, 1976. Rulings on these motions were reserved at the time of hearing and are included in this recommended decision.

It has been the position of the United Faculty Association that paragraph 5, as amended, alleges a violation

of Section 3543.5(c) in that under federal precedent⁴ and a previous EERB hearing officer's decision which has become final,⁵ the charges, if proven, would entitle the United Faculty Association to an order that the District bargain with it as an exclusive representative.

Prior to the hearing, the Santa Monica College Faculty Association⁶ was allowed to intervene in this matter on the basis of its status as a competing employee organization in the representation matter pending with respect to certificated employees of the District (Case No. LA-R-743).

On January 10, 1977, a second charge was filed against the District by the United Faculty Association (Case No. LA-CE-57). This charge alleged that the District refused to rehire James Shaw in September of 1976 because of his organizational activities for the charging party during the previous school year. The District denied the charge and moved to dismiss on the grounds that Mr. Shaw was informed on May 14, 1976 that he would not be offered a teaching position for the fall semester, and that the notice of termination was given more than six months before the filing of the charge. The motion to dismiss was renewed at the hearing, and a ruling was reserved. The motion to dismiss is determined in accordance with this recommended decision.

An informal conference was held on both charges, and since no settlement was reached, the charges were set for formal hearing. This matter was heard in Los Angeles on May 2-4, 1977.

⁴NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

⁵California School Employees Association v. Tustin Unified School District, EERB Decision No. HO-U-2, March 16, 1977. (Case No. LA-CE-25).

⁶At times the intervenor will be referred to herein as simply the Faculty Association (as opposed to the United Faculty Association).

ISSUES

1. Whether conduct which occurred prior to July 1, 1976 may be the basis of unfair practices;
2. Whether the allegations of the unfair practice charges may support a bargaining order remedy;
3. Whether the District improperly refused to release information to the United Faculty Association on June 3, 1976;
4. Whether the allegation of illegal surveillance which occurred on May 14, 1976 is barred by the statute of limitations, and, if not, whether Frank Little, acting as an agent of the District, conducted illegal surveillance on that date;
5. Whether James D'Angelo, acting as an agent of the District, has interfered with the administration of or discouraged membership in the United Faculty Association;
6. Whether the District encouraged membership in another organization in preference to the United Faculty Association in connection with the salary discussions which occurred in June and July of 1976;
7. Whether the charge that James Shaw was the subject of a discriminatory termination is barred by the statute of limitations, and, if not, whether there was a discriminatory termination of employment;
8. What remedy, if any, is appropriate.

DISCUSSION

A. Retrospective application of the unfair practice provisions of the EERA.

Initially it is necessary to consider the District's motion to dismiss all charges based on conduct which occurred prior to July 1, 1976. The District contends that the unfair practice provisions of the EERA may not be applied retrospectively, in that at the time the conduct occurred the Legislature had not yet implemented those provisions. In San Dieguito Faculty Association v. San Dieguito Union High School District, EERB Decision No. 22 (September 2, 1977), the EERB characterized a similar contention as a challenge to the constitutionality of Senate Bill 1471,⁷ which, effective July 10, 1976, amended the EERA to make the unfair practice provisions operative on April 1, 1976, rather than July 1 as originally enacted. Relying on Hand v. Board of Examiners In Veterinary Medicine, 66 Cal.App.3d 605, 618-620 (1977), the EERB concluded that as a statutory agency it lacked authority to find SB 1471 unconstitutional. Therefore, as in San Dieguito, the District's contention is rejected and the motion to dismiss is denied.

B. The propriety of a bargaining order under the allegations of the unfair practice charges.

The charging party has raised an additional issue which affects the legal posture of several of its allegations and which therefore can most conveniently be considered at the outset. In the amendment to LA-CE-41, filed February 22, the United Faculty Association charged that the District had "engaged in multiple and pervasive unfair practices with the intent of undermining the majority support of employees of the Respondent in an appropriate unit, which majority was established and proven to Respondent on and after May 21, 1976." On the basis of this allegation, the United Faculty Association has asked that the District be ordered to bargain with it as

⁷Chapter 421 of the Statutes of 1976.

the exclusive representative of the unit petitioned for. In addition, the United Faculty Association has argued that it has properly relied on Section 3543.5(c) in making certain of its allegations, in that under the circumstances of this case the District was, at the time the alleged misconduct occurred, obligated to negotiate with the United Faculty Association as exclusive representative, even though no exclusive representative had been formally recognized or certified.

The contentions of the United Faculty Association are grounded on the United States Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969). In that case, the Court found that it was appropriate to order an employer to bargain with a union where the company had rejected a request for recognition based upon authorization cards of a majority of employees in an appropriate unit while at the same time committing serious unfair labor practices that tended to undermine the union's majority, making a fair election unlikely. In reaching that conclusion, the Court first decided that a certification election is not necessary to establish a duty to bargain, and that recognition of a union as exclusive representative is proper where the union presents "convincing evidence of majority support." Thus, as a precondition to a bargaining order, it ordinarily must be found that the employer at some point could have properly granted voluntary recognition to the union, and that its failure to do so while at the same time committing serious unfair labor practices supports the comparatively extreme remedy of a bargaining order.

A second doctrine of federal labor law is also relevant to the present circumstances. Under the Midwest Piping doctrine,⁸ an employer illegally contributes support

⁸See, Midwest Piping Co., Inc., 63 NLRB 1060, 17 LRRM 40 (1945).

to a labor organization by granting recognition to one of two or more competing unions pending determination of the "question of representation" by the NLRB. There is no statutory definition of what constitutes a question of representation in the federal labor law, and this issue has been litigated repeatedly in determining whether a recognition was valid.⁹ In contrast, however, the EERA is explicit as to when the existence of competing organizations raises a question of representation. Article 5 of the EERA (Sections 3544 et seq.) sets forth the basis and procedure for establishing representative status.¹⁰

⁹See cases cited in Morris, ed., The Developing Labor Law (B.N.A., 1971), pp. 142-146, and its cumulative supplement for 1971-1975 (B.N.A., 1976), pp. 81-85.

¹⁰The relevant provisions are as follow:

3544. An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative or the employees....

3544.1 The public school employer shall grant a request for recognition filed pursuant to Section 3544 unless:

(a) The public school employer desires that representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer shall notify the board, which shall conduct a representation election pursuant to Section 3544.7...

(b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. If the claim is evidenced

(con't)

An employee organization must first file a request for recognition accompanied by proof of majority support. Under Section 3544.1(b), another employee organization may file within 15 workdays a competing claim of representation for the same unit originally requested, and if "the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Section 3544.7. . . ." (Emphasis added.) The use of the term "question of representation" by the Legislature cannot be considered accidental in view of the established usage of that term under federal labor law. It must be concluded that the Legislature intended by its use of that term that an employer is precluded from granting recognition to an organization claiming majority status where another organization presents proof of at least 30 percent support in the same unit. In a case where a question of representation exists, it follows that the precondition for a bargaining order under Gissel, i.e., that at one point the employer could have properly granted voluntary recognition, has not been established.¹¹

¹⁰ (con't) by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Section 3544.7....

¹¹ The District claims that there can never be a bargaining order under the EERA because Section 3544.1(a) gives the employer an unqualified right to deny recognition and request an election. That there is such an unqualified right is not altogether clear since the Court in Gissel rejected a similar argument based on Section 9(c)(1)(B) of the National Labor Relations Act, as amended. 29 U.S.C. 159(c)(1)(B); see, 71 LRRM at 2490. Because of the conclusions reached, it is not necessary to determine this question.

It should be noted that there is another serious question with regard to the propriety of a bargaining order in this case. The request for recognition submitted by the United Faculty Association was for a unit of all certificated employees, excluding management, supervisory and confidential
(con't)

The record in this case demonstrates that the United Faculty Association presented a request for recognition accompanied by evidence of majority support, and that the Faculty Association thereafter filed a competing claim of representation for the same unit accompanied by evidence of at least 30 percent support. Therefore, a question of representation is deemed to exist under the provisions of the EERA, and the employer is and has been precluded from granting recognition to the United Faculty Association even though it presented evidence of majority support. For this reason, the request for a bargaining order is rejected.

C. Factual background of the charges.

These charges arise in the context of a very unusual organizational history. Prior to 1970, what is now Santa Monica Community College was a part of the Santa Monica Unified School District, and faculty members who belonged to the California Teachers Association did so through membership in the Santa Monica Classroom Teachers Association. The Faculty Senate was established for full-time teachers at the college in 1968 for the purpose of providing the administration with faculty recommendations on various aspects of college policy. The Santa Monica College Faculty Association at that time operated as an arm of the Faculty Senate, and all officers of the Senate held equivalent positions in the Faculty

¹¹ (con't) employees. The employer, in responding to the request, questioned the appropriateness of such a unit. Under Los Rios Community College District, EERB Decision No. 18 (June 19, 1977), it would appear that the unit requested was inappropriate in that it included even those part-time instructors who had not taught "the equivalent of three or more semesters during the last six semesters inclusive." Ibid. at p. 12. Therefore, it would appear that another precondition for a bargaining order has not been established.

Association under a joint constitution. In 1970, the Community College District was established as a separate entity, but the Faculty Association did not apply for a separate CTA charter. Rather, the Faculty Association simply remained an arm of the Faculty Senate, and faculty members who belonged to CTA continued to be provided with CTA services apparently through a loose affiliation with the Santa Monica Classroom Teachers Association.

Part-time faculty members were not included in either the Faculty Senate or the Faculty Association. In December of 1974, however, the Senate established an ad hoc committee to investigate and make recommendations with respect to the problems of part-time faculty members. This committee established on-going communication with certain part-time teachers. Out of these activities, there was established a momentum among part-time instructors to establish their own organization, and in the fall of 1975 the Part-Time Faculty Association (later to become the United Faculty Association) was created with its own officers, constitution, and by-laws. Shortly thereafter, the Part-Time Faculty Association applied for and was granted a separate CTA charter. This created a controversy on the campus as to whether a separate part-time association should gain status as a CTA affiliate, and various communications occurred between faculty members and representatives of CTA in an effort to resolve the dispute. In addition, there were several attempts among part-time and full-time faculty members to find a basis for consolidating the two associations into a single association, but these attempts failed. Specific aspects of this dispute between the two associations are dealt with more fully below in connection with specific charges.

On May 21, 1976, the United Faculty Association filed a request for recognition for a unit of all certificated employees of the District, excluding management, supervisory and confidential employees. The proposed unit was estimated to total 790 employees, and evidence of support of a majority of these employees was submitted along with the request for recognition. On June 11, the Faculty Association intervened with evidence of at least thirty percent support. The District, on June 14, filed a response with the Los Angeles Regional Office of the EERB doubting the appropriateness of a combined part-time/full-time bargaining unit and in addition contesting the majority showing of the United Faculty Association. This representation matter is still pending before the EERB.

On June 18, 1976, the Faculty Association formally adopted a constitution separate from that of the Faculty Senate providing for separately elected officers.

D. The charge that the District refused to furnish information.

1. Findings of fact.

On March 29, 1976, Rose B. Drummond, President of the United Faculty Association wrote to Dr. Richard L. Moore, President/Superintendent of the District, asking for certain information pertaining to the anticipated layoff of numerous part-time instructors. Moore was asked to give the extent of anticipated loss in average daily attendance and cutbacks in state support as well as the criteria to be used in determining course curtailment and reduction of certificated staff. Moore responded to the first part of the request but stated that the question concerning criteria for possible reduction in certificated staff had been referred to legal counsel for advisement, and that after receiving a response he would make the information available.

On May 24 Drummond again wrote to Moore, this time stating that since the previous correspondence the United Faculty Association had been made aware of the dismissal of 142 part-time faculty members. Drummond wrote, "Once again, may we request that you notify us of the criteria by which these Faculty members were selected so that we may ascertain whether or not their legal rights have been upheld."

At the hearing it was established that there were actually 144 part-time faculty members who were notified by letters dated May 14 that they would not be offered teaching positions for the following fall semester. These letters were signed by Herbert E. Roney, Dean of Continuing Education. On May 27 Drummond wrote to Roney asking for a list of part-time faculty members who received the May 14 dismissal letter and the dates of service and class loads of those faculty members during the last three year period.

On June 3, Dr. Moore responded to Ms. Drummond's letters of May 24 and 27 stating, ". . . we are very concerned about the privacy of those faculty members involved and will not release the information asked for unless that information is requested directly by and released to individual faculty members."

Ms. Drummond testified that she had requested the information for the purpose of knowing "whether or not any of these faculty members fall within our interpretation of the Ed. Code, 13337.5."¹² It was her testimony that this was in connection with litigation that was "pending" at the time. Actually, the lawsuit which sought to establish tenure rights for certain part-time teachers was not filed until August 2. Although witnesses for the District were also confused as to whether the lawsuit had actually been filed earlier, they testified credibly that they were aware that such a suit was being prepared. In fact, the information requested by Drummond was later subpoenaed in connection with the lawsuit.

¹² Education Code Section 13337.5 has been reenacted substantially without change as Section 87482 of the Reorganized Education Code, effective April 30, 1977.

2. Conclusions of law.

Under federal precedent, the duty of an employer to bargain with an exclusive representative includes the corollary duty to supply, upon request, sufficient information to allow the union to properly perform its statutory duties as bargaining agent. Eg., Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 59 LRRM 2433 (3rd Cir., 1965). It has previously been concluded (see, part B, supra) that the United Faculty Association cannot make a valid claim to be exclusive representative while an unresolved question of representation exists, based on the competing claim of the Faculty Association. Therefore, if the District was under a duty to release the requested information, it must be based upon Section 3543.5(b) (which makes it unlawful to deny employee organizations rights guaranteed by the EERA) and 3543.1(a) (which gives employee organizations the "right to represent their members" in the absence of an exclusive representative).

In San Dieguito Faculty Association v. San Dieguito Union High School District, supra, the EERB recognized only a very limited scope to the rights granted to employee organization pending determination of an exclusive representative. Specifically, it was found that under such circumstances an employer may, but is not required to, consult with an employee organization. It follows that if an employer is under no duty to consult with a non-exclusive representative, there is no corollary duty to furnish information. Therefore, the charge contained in paragraph 1 of LA-CE-41 must be dismissed.

Because this charge is dismissed, it is unnecessary to consider the District's argument that the information requested was not related to matters within the scope of representation (see Section 3543.2), or to consider whether an employer must supply information requested in relation to litigation rather than negotiations.

E. The charge of illegal surveillance.

1. The statute of limitations.

On November 15, 1976 the United Faculty Association filed the charge alleging, inter alia, that Frank Little, a management representative, conducted surveillance of an organizational meeting on the previous May 14. The charge was filed six months and one day after the alleged misconduct, and the District moved to dismiss this allegation on the basis of Section 3541.5(a)(1). The charging party contends that since November 14 was a Sunday, under Code of Civil Procedure Section 12¹³ the filing of the charge on the following Monday was within the six-month statute of limitations. The District contends without citation that the filing of an unfair practice charge with the EERB is not covered by Section 12 and that the limitations period for the filing of unfair practice charges must be computed strictly without allowing an extension for the fact that the final day of the period falls on a holiday. Section 12 on its face, however, applies to "any act provided by law." Quite clearly, the filing of an unfair practice charge is such an act. Therefore, the charge was properly filed within the statute of limitations and the District's motion to dismiss is denied.

2. Findings of fact.

On May 14 a meeting was held to discuss a common approach to negotiations with the District by the United Faculty Association and the Faculty Association/Senate.

¹³

Code of Civil Procedure Section 12 states:

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.

(At this point there was no clear delineation between the Faculty Association and the Senate since the Faculty Association did not adopt its separate constitution until June 18.) Although the record is somewhat vague on this point, it appears that Rose Drummond extended invitations to three specific full-time faculty members to attend the United Faculty Association executive committee meetings scheduled for May 4. In fact, however, eight full-time instructors came to the meeting, and when the eight walked in together various members of the executive committee reacted strongly against the presence of such a large group of full-time instructors. It appears that the full-time instructors, most or all of whom had been active on the ad hoc committee of the Faculty Senate looking into the problems of part-time faculty, reasonably believed that this was an open meeting and were unaware that invitations had been extended only to three individuals. When the part-time instructors objected to the presence of eight full-time instructors, the full-time instructors reacted by getting up to leave en masse. Finally the matter was resolved by allowing all the full-time instructors to stay but with only three of them having the right to speak. After such an auspicious beginning, the meeting quickly deteriorated to total disagreement over the substance of a common approach to negotiations. At the end of this discussion, the full-time instructors left and the executive committee continued with its own meeting.

Two of the full-time faculty members who attended this meeting were James D'Angelo and Frank Little. Neither one had been specifically invited by Rose Drummond. D'Angelo was at the time president of the Faculty Association/Senate. He had previously been present by invitation at least twice at organizational meetings of the United Faculty Association.

D'Angelo asked Little to come to the meeting also, since Little had been very active as a member of the Senate ad hoc committee on part-time faculty. Little was a full-time instructor in the business department. He has not been designated as management or supervisory, and his duties are simply those of a full-time instructor. However, since Little spends one evening a week at the college and has his office next to that of part-time instructors, he has tended to act as a conduit between part-timers and the administration. At one time, Little attended a meeting of the United Faculty Association and, in order to be able to speak, he paid one dollar yearly dues to the organization. He is the only full-time faculty member to have joined the United Faculty Association.

James Shaw was one of the members of the United Faculty Association executive committee present at the May 14 meeting. Approximately fifteen minutes after the full-time instructors left the meeting, Shaw left the meeting briefly to go to the Instructional Materials Center. As he was turning a corner on his way to the Center, he saw Little and D'Angelo in conversation with James Fugle, Assistant Superintendent of Instruction for the District. Shaw testified that Little was speaking and that as Shaw first saw the group Little was saying, "Well, Shaw is articulate and . . ." At that point the group noticed Shaw and the conversation stopped. Fugle and Little both said "Hi" to Shaw, and Shaw returned the greeting and continued on his way down a staircase.

All three of the participants in the conversation testified at the hearing and none of them had any specific recollection of it. Little in particular testified that he was so "agitated" by the meeting with the part-time faculty members, he would have told nearly anybody he might have seen after the meeting what had taken place. He testified that if he had run across Fugle, he would have told him. Both Fugle

and Little testified that Little had never been asked to attend the meeting and report to management about it, and there is no reason to disbelieve this testimony. Although, Shaw's testimony may well be accurate, the fact that the other individuals involved in the incident do not recall it taking place may be attributed to the fact that the incident was insignificant, and does not suggest a basis for discrediting the testimony.

3. Conclusions of law.

It is concluded that Frank Little attended the meeting of May 14 as a representative of the Faculty Association/Senate and as a member of the ad hoc committee on problems of the part-time faculty. He did not attend the meeting on behalf of management, and therefore the District cannot be held responsible in any way for his attendance. Therefore, it is unnecessary to discuss whether his actions might otherwise have amounted to improper surveillance.

The charge of surveillance in paragraph 2 of case number LA-CE-41 should be dismissed.

F. The charges of interference with the administration of and discouraging membership in the United Faculty Association.

1. Findings of fact.

On May 20, 1976, a letter signed by James D'Angelo as president of the Santa Monica College Faculty Association was mailed to Stephen H. Edwards, Jr., President of the California Teachers Association. The letter stated as follows:

This is to notify you of our request that the California Teachers Association revoke the charter recently issued to Chapter 1037, Santa Monica College Part-Time Faculty Association. The CTA action of recognizing another CTA chapter on this campus is a clear, substantive and unacceptable violation of major Association policies. This action has, moreover, created confusion,

bitterness, and factionalism among and between contract and hourly faculty members of Santa Monica College. The net result of this is to impede seriously and, perhaps, destroy any chance of a CTA chapter becoming the exclusive bargaining agent of the certificated staff of Santa Monica College.

Mr. D'Angelo is co-ordinator of evening services at the college. He is in charge of counseling and related matters for the evening program. On May 10, 1976, the Board of Trustees acted to designate all co-ordinators (with two exceptions) management, effective July 1. D'Angelo testified that for some time prior to the Board action he and other co-ordinators had assumed that they would be named management, although he was not specifically aware that the Board had acted at the time he signed the May 20 letter. During a casual, joking conversation with several part-time instructors in the college mail room in April, he declined when asked if he wanted to sign an authorization card for the United Faculty Association, and he told them that he was probably going to be designated management anyway.

Until June 18, 1976, D'Angelo was president of both the Faculty Association and the Faculty Senate. It will be recalled that during this period the two entities operated under a single constitution with a single set of officers. In addition, there was no clear delineation of functions between the Faculty Association and the Senate, and with the passage of the EERA there was no clear understanding that the Senate could continue to operate but that the right to meet and negotiate with the employer would be reserved to an exclusive representative.¹⁴ Gradually, full-time faculty members perceived the necessity for separating the functions of the

¹⁴See Section 3540.

Faculty Association and the Senate, although the two entities continued to be closely associated in their minds.

During the spring a committee of the Faculty Association was formed in response to the implementation of the EERA and the organization of the United Faculty Association. In early May Mr. D'Angelo in his role as president of the Faculty Association chaired a meeting to consider a strategy for responding to the organizing campaign of the United Faculty Association. D'Angelo testified that he merely chaired the meeting and that Nancy Cattell was the chief advocate for the committee's point of view that the full-time faculty would have to actively seek support for the Faculty Association if they wanted to avoid being placed in the position of simply having to join the part-time instructors in the United Faculty Association. D'Angelo was supportive of this position. Thereafter, the committee wrote the May 20 letter to CTA which was signed by D'Angelo as president of the Faculty Association.¹⁵ The committee also began an organizing campaign on behalf of the Faculty Association which culminated in that organization's intervention in the contest to represent the District's certificated employees.

D'Angelo credibly testified that he was not specifically aware that the Board had already taken action to designate co-ordinators management when he signed the May 20 letter. He was aware, however, of the likelihood of that action on May 20, and in the first week of June he informed the Senate of the Board action, which resulted in a Senate vote to exclude co-ordinators from membership due to a perceived conflict with representation of faculty under the EERA.

¹⁵ The dispute with CTA over the validity of the charter issued to the United Faculty Association which was the subject of the May 20 letter remained unresolved at the time of hearing.

D'Angelo's term as president of the Faculty Association/Senate ended June 18, 1976. On that day, he presided at a retirement breakfast, at the end of which he turned over the gavel to the incoming president of the Senate, Norma Nyquist. D'Angelo left at that point, but the meeting continued. The faculty members present then adopted the separate constitution for the Faculty Association and elected a separate set of officers, headed by Nancy Cattell as president.

2. Conclusions of law.

The United Faculty Association contends that Mr. D'Angelo's signature on the May 20 letter to CTA and his participation in beginning stages of the Faculty Association's organizing effort are attributable to management and constitute violations of Section 3543.5(d).¹⁶ Thus, it is contended that the District interfered with the formation and administration of the United Faculty Association by demanding that CTA revoke its charter, and that the District, through D'Angelo, encouraged employees to join the Faculty Association in preference to the United Faculty Association.

The charging party takes a rather mechanical view of Mr. D'Angelo's obligations upon being designated management. It is contended that upon learning that he would be designated management, he was immediately obligated to resign as president of the Faculty Association and take no part in the representation campaign. This contention, however, ignores the context in which the events took place. Mr. D'Angelo was nearing the end of his term as president of the Faculty Association/Senate. In this role he had acted as a leader of the full-time faculty in discussing issues of importance to the faculty and in making recommendations to the administration, and he clearly was perceived by faculty members in that role rather than as a member of the administration. The May 20 letter was written by a committee of the Faculty Association and not solely by D'Angelo.

¹⁶See n. 3, supra.

He signed the letter in his capacity as president of the Faculty Association and not as a member of management.

It is not reasonable to conclude that D'Angelo should have immediately resigned his position as president and ceased to participate in the activities of the Faculty Association simply because he was designated management by the Board of Trustees, an action which was totally outside of his control. His actions upon learning of the Board action were in fact reasonable: he informed the Senate of the designation, and shortly thereafter completed his term as president and withdrew from any further participation in the Faculty Association or the Senate.

Paragraphs 3 and 4 of case number LA-CE-41, which are based on the activities of Mr. D'Angelo, should be dismissed because D'Angelo was at all relevant times acting solely in his established role as president of the Faculty Association and his actions cannot be imputed to the District.

G. The charges relating to salary discussions of June and July, 1976.

1. Findings of fact.

In the spring of 1976, Dr. Moore was authorized by the Board of Trustees to enter into salary discussions with employee organizations. Pursuant to this authority, he requested the United Faculty Association and the Faculty Association/Senate to make salary proposals for the upcoming school year. Dr. Moore had only a vague recollection of how or when these requests were communicated to the organizations, but he estimated the time to have been in May or early June. Rose Drummond, however, testified specifically that the request was first communicated to the United Faculty Association when James Fugle telephoned her at home on June 17, the last day of school. Because of her specific memory on this subject, the testimony of Ms. Drummond as to the date of the request is credited.

Mr. Fugle requested that the United Faculty Association prepare salary proposals for both full and part-time instructors. He stated that the proposals would be presented to the Board of Trustees, and that since there were two organizations competing to represent the faculty, to avoid unfair practices both organizations were being asked to present proposals. A special meeting of the Board for the presentation of the salary proposals was scheduled for June 21.

Both the United Faculty Association and the Faculty Association made salary proposals at a meeting of the Board of Trustees on June 21. Then the Board in executive session authorized Dr. Moore to make an offer to the organizations of an eight percent salary increase on condition that the organizations waive collective bargaining on matters of compensation for the next year.

On June 23 Moore called Drummond into his office and presented her with the offer authorized by the Board. Drummond told Moore that she would discuss the offer with the executive committee and get back to him as soon as possible. Moore indicated that Drummond should respond as soon as possible and told her that she could call him at home if necessary. It was Moore's position that agreement should be reached prior to June 30 "since the new collective bargaining bill had been passed, but had not come into force yet."

Two days later, on June 25, Ms. Drummond was on campus to do some errands, and Dr. Moore asked to see her. Drummond was in a hurry because of a doctor's appointment and had not planned to talk with Moore that day, but agreed to talk with him briefly. He asked if the executive committee had met yet and was told that they had not but that they planned to meet the next day, which was a Saturday. Moore emphasized that the organization should respond before the Board meeting scheduled for the following Monday, June 28, and he strongly urged that the organization accept the eight percent proposal and waive "compensation collective bargaining."

Drummond responded that the proposal sounded like an ultimatum.

The executive committee met the following day and developed a position in a letter which was presented to Dr. Moore on June 28. The letter questioned whether the Board's offer met the public notice requirements of the then-effective Winton Act, and indicated that the executive committee was prepared to continue negotiating on salaries and working conditions throughout the summer. The letter concluded:

We were available throughout the spring to meet and confer in good faith with representatives selected by the Board of Trustees on salaries and working conditions; regrettably, you have chosen to raise these matters during summer recess rendering consultation with faculty regarding your proposals virtually impossible. Again, may we reiterate our willingness to meet and confer throughout the summer with ratification of any agreements to occur at the beginning of the fall term. To ensure fairness, we suggest that such meeting and conferring involve representatives of all other employee organizations representing the faculty.

The Board of Trustees met on the evening of June 28 and considered the question of salaries for the next budget year. By that time, the leadership of the Faculty Senate had agreed to the Board's offer of an eight percent increase and had signed a waiver of their right to "compensation collective bargaining" for the year. Because of confusion over the separate status of the Faculty Association, a formal waiver from that organization was not obtained until June 30. However, with the effective consent of the Faculty Association to all terms of the Board's offer, the Board approved an eight percent salary increase for full-time faculty members.

Because the United Faculty Association had not agreed to the eight percent offer with a waiver of compensation collective bargaining, Dr. Moore recommended that the Board take no action with respect to a salary increase for part-time faculty. The Board accepted this recommendation but also directed that the offer should remain open until midnight of June 30. Moore was instructed to meet with the United Faculty Association to try to obtain their agreement to the Board's offer.

On the two days following the Board meeting, June 29 and 30, the executive committee of the United Faculty Association met with Moore and two other members of the administration to discuss the Board's salary proposal. The meetings lasted one and one half hours each day. The meetings were not negotiations, since, as Dr. Moore testified:

We went through several sessions over several days and part of the dialoguing was over the question whether or not I was empowered to change the Board's offer to in fact negotiate, and I explained that I was not empowered to do that. I was empowered to explain the Board's offer and I was present to do that.

The position of the executive committee with respect to the Board's proposal was that an eight percent increase to hourly instructors was not equivalent to eight percent for full-time contract instructors when actual teaching responsibilities were compared, and that if parity were to be maintained part-time instructors should get a twenty-six percent increase to match the eight percent increase given to full-time faculty members. Ms. Drummond testified that she called the eight percent offer "ludicrous."

In addition, the executive committee consistently maintained that it did not have the authority to enter into any agreement with the District without obtaining the ratification of the membership. At the meeting on June 30, the executive committee presented Dr. Moore with a "Policy Statement" which explained:

Under our constitution, the Bargaining Team is responsible to the Executive Committee, which in turn can only recommend, not ratify, policy; ratification properly rests with the membership. Therefore, we currently have no authority to sign any agreement which is binding on our membership, certainly not on the entire Part Time Faculty. (Emphasis added.)

Dr. Moore urged that the executive committee obtain the authority to agree to the District's proposal. He was informed that under the United Faculty Association by-laws it would take about two weeks to call a membership meeting, and that this was impossible anyway because this was summer vacation and many of the members were not available. Moore urged that the executive committee poll the membership by telephone. Moore testified that he offered the use of District telephones for this purpose, but Drummond testified that no such offer was made. The executive committee refused to poll its membership, and the meeting ended with no agreement. Moore offered to leave a phone number where he could be reached by midnight if the committee reconsidered its rejection of the Board's offer, but the committee did not reconsider its action. The Board's offer lapsed after June 30, and the part-time faculty received no salary increase for the 1976-77 school year.

On July 2, Dr. Moore wrote a memorandum to the Santa Monica College "community" in which he summarized the Board's actions with respect to salaries. The memorandum was distributed to full and part-time faculty and to the press. The memorandum states that the Board reached agreement with the leadership of the Faculty Senate for an eight percent salary increase subject to a written understanding that the subject of compensation for 1976-77 would not be reopened "under

collective bargaining." The memorandum stated that the same offer had been made to the Part-Time (United) Faculty Association and had remained open until midnight June 30. The memorandum concluded:

At 2:10 p.m., June 30, 1976 the Part-Time Faculty Association's Executive Committee ended two days of discussions by stating that the offer from the Board was not worth the effort to take to their members. The Board's representative indicated that the offer was open, per instructions, until midnight, but the executive committee of the Part-Time Faculty Association refused the Board's offer to all 600 part-time employees of the college district. The significance of this decision is that the pay rate for part-time employees will continue at \$14.75 per hour rather than change to \$16.00 per hour effective September 1, 1976.

Because both the Faculty Association and the Part-Time Faculty Association have requested exclusive representation for collective bargaining there are legal questions as to what will be the composition of the bargaining unit, and what organization if any will represent those employees in collective bargaining. The college district has requested that the newly formed Educational Employment Relations Board (EERB) resolve these questions. Legal counsel has advised the district that the Board should await the EERB ruling. The Board wishing in good faith to improve working conditions prior to the July 1 collective bargaining date, made its settlement with the full-time faculty and tendered its offer to the Part-Time Faculty Association which was not accepted. (Emphasis added.)

Whether members of the executive committee in fact stated that the Board's offer "was not worth the effort to take to their members" was disputed at the hearing. Neither Dr. Moore nor Benita Haley, who also represented the administration at the June 29 and 30 meetings specifically recalled

which member of the executive committee stated that the offer was not worth taking to the membership, but both were firm that such statements had been made. Ms. Drummond testified that she did not recall anyone on the executive committee using those exact words, but that,

I remember words to the effect that it was impossible for us to call our members. Dr. Moore suggested that each of us poll about 15 or 20 of our members on the phone and get back to him by midnight and we told him it would be an impossible task to do.

The reason the executive committee regarded the task as impossible was that their members were dispersed during the summer months. As noted above, the executive committee did regard the Board's offer as "ludicrous" and inequitable.

The evidence is clear that the executive committee informed Dr. Moore, both orally and in the June 30 "Policy Statement," that they only represented the members of the United Faculty Association during the salary discussions, and that even this representation was subject to ratification. The request for recognition submitted by the United Faculty Association listed 196 members and, in addition, listed 450 "non-members" who had signed authorization cards. The request for recognition, it will be remembered, identified a unit of all faculty members, both full and part-time, and was estimated to total 790 employees.

Representatives of the United Faculty Association appeared before the Board of Trustees at meetings on July 12 and 19. On July 12 James Shaw appeared to explain the executive committee's analysis of the inequities present in the Board's now-expired offer of an eight percent across-the-board increase. Shaw specifically stated that he was not demanding at this point that the Board meet and negotiate with the United Faculty Association, because no exclusive representative

had been certified and therefore the District could not meet and negotiate with his organization under the EERA. After Shaw's presentation, Dr. Moore told the Board that the District was advised by counsel that while the Board could act unilaterally prior to July 1, after that date any salary "conversations" might be unfair practices in terms of an attempt to influence an election.

On July 19 Rose Drummond addressed the Board with respect to the availability of faculty handbooks to part-time faculty and the disbursement of salary warrants. The Board's response again was that it could not discuss the matters with the United Faculty Association without running the risk of committing an unfair practice.

2. Conclusions of law.

The facts outlined above relate to the allegations contained in paragraphs 5 and 6 of the unfair practice charge in case number LA-CE-41. As amended, paragraph 5 alleges that the employer "engaged in multiple and pervasive unfair practices with the intent of undermining the majority support" possessed by the charging party. Subparagraph (a) alleges that the District on June 23 and thereafter "conditioned its salary negotiations and/or offers upon a mandatory waiver of rights to collective bargaining on and after July 1. . . ." Subparagraph (b) alleges that on July 12 and 19 the District "refused to meet and negotiate in good faith. . . ." Subparagraph (c) alleges that on or about June 30 the District "interfered with the administration of the Charging Party and encouraged employees to join another organization in preference to it and discriminatorily granting (sic) to employees represented by the other organization a larger pay increase than that offered to certificated employees represented by the Charging Party." Paragraph 6 of the charge alleges that on July 2 Dr. Moore "interfered with the administration of the Charging Party and encouraged employees to join other organization(s)

in preference to it by untruthfully reporting the status of Respondent's negotiations with Charging Party."

At the hearing the District moved to dismiss paragraph 5(b) on the grounds that the United Faculty Association was not an exclusive representative on the dates alleged and that the District therefore was under no obligation to meet and negotiate with it. A ruling on the motion was reserved to consider the argument that the United Faculty Association was entitled to be treated as an exclusive representative under the rule of NLRB v. Gissel Packing Co., supra. As previously determined (see part B, supra), the District was precluded as a matter of law from negotiating with the United Faculty Association as an exclusive representative, and it therefore follows that paragraph 5(b) must be dismissed.¹⁷

It remains to consider paragraphs 5(a) and 5(c) which focus on the salary discussions culminating in the action of the Board of Trustees granting an eight percent increase to the full-time faculty and denying any increase to the part-time faculty, and paragraph 6 which deals with Dr. Moore's memorandum of July 2 publicizing the Board's action.

The events leading up to the Board of Trustees' action on salaries indicate that the District initiated a series of consultations with the two employee organizations competing to represent the District's certificated employees, but that, in fact, the consultations were no more than efforts to convince the organizations to acquiesce to the District's determination of a proper salary increase. The executive committee of the United Faculty Association placed the District's representatives on notice from the early stages of these consultations that it could not agree to the terms of the District's offer without ratification of its membership,

¹⁷ Moreover, the facts raise serious questions as to whether the United Faculty Association made a proper demand to meet and negotiate even assuming that the District was not precluded from granting such a demand.

and that ratification was impossible under the unreasonably short time limit placed on the offer. The United Faculty Association indicated its willingness to continue the consultations throughout the summer under a procedure which would allow both organizations full participation. The District, in its rush to take action on salaries before the unfair practice provisions of the EERA were to take effect on July 1, refused to consider the valid concerns of the United Faculty Association. The District never specified its fears with respect to the possibility of committing unfair practices if it were to wait until after July 1 to take action, but the position taken by the United Faculty Association with regard to the conditions for continuing consultations makes it evident that such fears were unjustified. Rather than considering the alternatives suggested by the United Faculty Association, the District took action on salaries which had a disparate and adverse impact on that segment of the faculty which formed the natural constituency of the United Faculty Association.

It is important to note that at no time, either legally or factually, did the United Faculty Association represent or purport to represent all part-time faculty members. In the absence of an exclusive representative the United Faculty Association, under Section 3543.1(a), had the right only to represent its members. Its membership, on the basis of documents submitted to the District in support of the request for recognition, totalled 196 part-time instructors. The District employed approximately 600 part-time instructors. Moreover, the unit for which the United Faculty Association had requested recognition included both full-time and part-time faculty members. In spite of these facts, the Board of Trustees on June 28 accepted Dr. Moore's recommendation to withhold salary increases for all part-time faculty members because the United Faculty Association had not consented to the terms of the Board's offer.

The basic thrust of the charge is that the District by its actions violated Section 3543.5(d) which makes it unlawful for an employer to "in any way encourage employees to join any organization in preference to another."¹⁸ This statutory language is apparently based on Section 8(a)(3) of the National Labor Relations Act (29 U.S.C. sec. 158(a)(3)) which makes it unlawful for an employer ". . . encourage or discourage membership in any labor organization."¹⁹

In San Dieguito, supra, the EERB considered the propriety of action taken by that district's board of trustees on June 30, 1976, with the expectation that the unfair practice provisions of the EERA would take effect on July 1. There, the charge was based on Section 3543.5(a), which the EERB noted contained elements of NLRA Sections 8(a)(3) and 8(a)(1). Relying to some extent on federal precedent interpreting Section 8(a)(3), the EERB concluded:

In order to find a violation of (Section 3543.5(a)), we would at a minimum have to conclude that the District's conduct was carried out with the intent to interfere with the rights of the employees to choose an exclusive representative, or that the District's conduct had the natural and probable consequence of interfering with the employees' exercise of their rights to choose an exclusive representative, notwithstanding the employer's intent or motivation."

¹⁸It is also alleged that the District interfered with the administration of the United Faculty Association. The facts do not allege any direct interference and no argument is made that very indirect interference, which arguably is present here, can be the basis for this type of charge. Therefore, this allegation is not addressed herein.

¹⁹Actually, Section 3543.5(d) is a hybrid between NLRA Sections 8(a)(2) and 8(a)(3), in that the language of Section 3543.5(d) with respect to domination or interference with the administration of an employee organization, or contributing financial or other support to it, is derived directly from NLRA Section 8(a)(2).

The statutory basis for the present charge is different than that considered in San Dieguito, although NLRA Section 8(a)(3) has some relevance to both cases. Nevertheless, because both cases involve the propriety of action taken by the respective governing boards in late June of 1976, and the timing in both cases was dictated by the fact that the unfair practice provisions of the EERA were to become effective on July 1, it is necessary to apply a similar standard of proof in the two cases.²⁰ Thus, it must be determined whether the District in the present case acted with improper intent or whether the natural and probable consequence of its actions was to encourage membership in another organization in preference to the United Faculty Association. It is concluded that the circumstances in the present case are sufficiently distinguishable from those in San Dieguito to require a determination that the District did engage in an unfair practice.

There is no direct evidence on the intent of the Board of Trustees in taking its action on salaries.²¹ Dr. Moore's recommendation to the Board on June 28 was that it grant the salary increase to full-time instructors because the Faculty Senate had agreed to all terms of the Board's offer, and that it take no action on salaries for part-time instructors because the United Faculty Association had not accepted the offer. That this was the basis of the Board's action is evidenced by Moore's July 2 memorandum. Thus, quite clearly the Board's action was a direct response to the failure of the United Faculty Association to accept the offer. Under the circumstances, the

²⁰It is not concluded that the standard of San Dieguito would necessarily apply to an alleged violation of Section 3543.5(d) in a different factual context.

²¹Normally the intent of local elected officials in taking legislative action is irrelevant to the validity of that action, which must be measured by its objective effect rather than the subjective motivation of the legislators, and the legislators are privileged from testifying as to their intent. County of Los Angeles v. Superior Court, 13 Cal.3d 721 (1975). Proof of intent, therefore, must come from the circumstances under which the action was taken.

District's demand that the United Faculty Association agree to its offer for all part-time employees prior to the June 30 deadline was unreasonable. Nevertheless, the action penalized those faculty members who formed the natural constituency of the United Faculty Association. From this it may be concluded that the action was motivated by animus against the United Faculty Association. San Dieguito, however, seems to require more than animus; under these circumstances it would require intent to encourage membership in another organization.²² Such specific intent cannot be inferred from these circumstances.

It is concluded, however, that the natural and probable consequence of the Board's action was to encourage membership in another organization. The circumstances of the Board's action on salaries, as communicated by Dr. Moore's July 2 memorandum, were such that it was made to appear that the United Faculty Association was to blame for the failure of the part-time instructors to receive a salary increase, while it was made to appear that the Faculty Association was to some degree responsible for the salary increase to be received by full-time instructors.²³ In reality, neither organization was responsible except in its acquiescence or failure to acquiesce to the Board's proposal. Under these circumstances, the granting of a salary increase only to full-time faculty members had the

²² In San Dieguito the EERB found no unlawful intent because it did not equate a desire to change District personnel policies before July 1 with an intent to encourage a "no representation" vote. Here there is more than an intent to act before July 1; there is union animus. As noted in the text, however, San Dieguito apparently requires more to establish unlawful intent.

²³ While the Faculty Association would appear to be the beneficiary of the Board's action, it is not found that the Faculty Association sought this boost to its organizational efforts or was a party to the Board's action.

natural tendency of discouraging membership in the United Faculty Association.²⁴ Therefore, the unfair practice charge stated in paragraphs 5(a) and 5(c) is sustained.

The allegations of paragraph 6, dealing with Dr. Moore's July 2 memorandum, do not form an independent basis for the finding of an unfair practice. Although the Board presumably knew that the basis of its actions would be communicated to the community, it is the Board's action which constitutes discouragement of membership in the United Faculty Association. It is argued that Moore's memorandum contains misrepresentations in that it states that the United Faculty Association executive committee regarded the Board's offer as "not worth the effort to take to their members" and that it had "refused the Board's offer to all 600 part-time employees of the college district." However, the charging party does not cite authority for the proposition that misrepresentations in themselves form the basis for an unfair practice,²⁵ and the NLRB recently retreated from its long-standing rule that a substantial misrepresentation timed to prevent

²⁴In San Dieguito, it was concluded that the adoption of revised personnel policies without the agreement of the Certificated Employees Council had the natural and probable consequence of placing an exclusive representative in a less desirable negotiating position during subsequent negotiations, but that this was insufficient to find that the District had engaged in an unfair practice. It was felt that the District's action might as easily encourage as discourage the selection of an exclusive representative.

The present case is different from San Dieguito in that here it is made to appear that the United Faculty Association was responsible for the unfavorable Board action, whereas in San Dieguito it was clear that the Board took full responsibility for its action. Moreover, here unlike San Dieguito, the Board's action had a disparate effect on that part of the faculty forming the natural constituency of a disfavored employee organization. Thus, the finding in San Dieguito does not control the determination in this case.

²⁵Normally speech, in itself, does not constitute an unfair labor practice if it contains no threat of reprisal or promise of benefit. 29 U.S.C. sec. 158(c); NLRB v. Gissel Packing Co., supra.

other parties from making an effective reply before an election constitutes a basis for invalidating the election. It is now felt that employees generally are capable of evaluating pre-election propoganda for what it is. Shopping Kart Food Market, 228 NLRB No. 190, 94 LRRM 1705 (1977). Therefore, assuming that the July 2 memorandum contained misrepresentations, this is not sufficient to find a separate unfair practice.

H. The charge of discriminatory dismissal of James Shaw.

1. Findings of fact.

James Shaw was originally hired by the District as a part-time instructor of psychology in September, 1974. He taught every semester from then until he was terminated after the spring semester of 1976. This included four semesters during regular academic years and one summer session. In each of the teaching periods he taught two sections of Psychology 1, "General Psychology," although his credential qualified him to teach other psychology courses as well.

Mr. Shaw was one of 144 part-time instructors who received letters dated May 14, 1976 from Herbert E. Roney, Dean of Continuing Education stating:

As you may know, the college must reduce its program offerings for the fall semester, 1976. This is to inform you that you will not be offered a teaching position for the fall semester of 1976.

Prior to his termination, Shaw made repeated inquiries of the administration with regard to the temporary status of part-time instructors. In February, 1976 Shaw wrote to Dr. Moore asking why he continued to be classified a temporary

employee when he was teaching in his fourth consecutive semester at the college. Shaw indicated in the letter that it seemed that District practices with regard to maintaining part-time instructors in temporary status were not in compliance with provisions of the Education Code, and he asked to be informed of the Education Code provisions which justified those practices. When Moore did not promptly reply to this letter, Shaw wrote a followup letter dated March 19 which indicated that a copy was being sent to Gene Huguenin of the California Higher Education Association/CTA.

By a letter dated March 26, Benita Haley, Co-ordinator of Personnel Services, responded in a brief letter for Dr. Moore that the District regarded its practices to be in compliance with Education Code Section 13335. Shaw was dissatisfied with the response and in April he again wrote to Moore taking issue with the District's reliance on Section 13335 and very pointedly asking for legal justification of the District's practice of maintaining part-time instructors in temporary status. Shortly thereafter, Shaw wrote a similar letter to David E. Houtz, Chairman of the Board of Trustees. Both of these letters indicated that copies were being sent to Mr. Huguenin of CTA, and the letter to Mr. Houtz was written on stationery with the letterhead of the Part-Time (United) Faculty Association. Ms. Haley responded very briefly on April 20 for Dr. Moore, stating that Mr. Shaw's letter was being given consideration. Mr. Houtz responded on May 11 that the letter to him had been referred to county counsel and that Mr. Shaw's attorney should contact the county counsel's office. Various members of the administration testified that they were aware that a lawsuit

was being considered or prepared at this time to establish tenure rights for part-time instructors. Such a suit was filed against the District by CTA on August 2, 1976.

During the same time period that Shaw had the above correspondence with representatives of the District, the administration was planning cutbacks in its program in response to an anticipated reduction in state support. Beginning in March of 1976, members of the administration held a series of meetings to plan for the reduction in the college's program. The determination was made that there should be a major reduction in course offerings off-campus, but beyond that the specific classes to be eliminated were to be determined by the heads of the various divisions within the college. The division heads were instructed, however, that all layoffs should be determined strictly according to seniority without subjective evaluation of individual instructors. The reason for this was that the administration was aware of the likelihood of litigation relating to the layoffs and decided that reliance solely on seniority was the safest method for avoiding legal complications.

Psychology courses are offered by the Behavioral Sciences Department, which is part of the Humanities Division. Dr. Harold L. Cashin is dean of the Humanities Division and was responsible for determining reductions within that division. He was instructed to reduce the program by twenty percent, which meant cutting back from 750 to 600 sections. He used two criteria in making the initial determination as to which sections would be eliminated. First, the off-campus program was cut back substantially; second, general courses with many sections, including Psychology 1, were cut back because this could be done without eliminating the courses altogether. More specialized courses could not be cut back as easily.

Under the system established by Dr. Cashin, after the determination was made as to the specific sections to be eliminated, the instructors to be laid off were determined according to seniority on a course-by-course basis. Seniority was based upon the date that each part-time instructor began his or her most recent continuous service with the college. In case of a tie, seniority was to be determined by the last four digits in employees' social security numbers. For each course to be cut back, instructors were listed in order of declining seniority and the number of sections they had taught in previous semesters. Thus, if a person had previously taught two sections in a course, his or her name was listed twice at the appropriate level of seniority. Then sections were assigned by going down the list and circling the number of names to match the number of sections to be taught during the fall semester by part-time instructors.

Although credentialed part-time psychology instructors, including Shaw, were qualified to teach courses other than the ones they had previously taught, the decision was made to determine layoffs purely on a course-by-course basis rather than to consider an individual's ability to teach other courses. The reason for this, according to Cashin, was to make the system totally objective without giving any consideration to subjective evaluations.

For Psychology 1, there were to be eight sections assigned to part-time instructors for the fall semester. The previous spring there had been seventeen sections assigned to part-time instructors. The sections were assigned according to the system described above, and Shaw was the second most senior part-time instructor who was not assigned a section in

that course for the fall.²⁶ One full-time instructor, S.J. Terebinski, was assigned to teach a Psychology 1 section in addition to his full-time teaching load. This "overload" class was assigned because Terebinski was available, wanted to teach the class, and was regarded as an outstanding scholar by the college.

Shaw testified that there were several part-time instructors with less seniority than he who were retained to teach in the fall. Only three of these instructors,²⁷ however, taught psychology courses, and these were courses

²⁶The most senior part-time instructor in Psychology 1, G.M. Fleishman, had previously taught one section in that course and one section in Child Development 12. He was not assigned a Psychology 1 section for the fall, but he was assigned a section in Child Development 12.

There was one part-time instructor, A.E. Bishop, who had less seniority than Shaw and was erroneously assigned a Psychology 1 section, but that section was cancelled before classes began. A.E. Bishop was apparently assigned to teach sections in Psychology 14 and Sociology 12 in the fall, but there is no evidence that this individual lacked the requisite seniority in those courses, contrary to the contentions in the charging party's brief.

In its brief, the charging party argues that one of the part-time instructors who received a fall assignment to teach Psychology 1 actually had fewer consecutive semesters than Shaw because of a pregnancy leave and thus had less seniority than Shaw under Dr. Cashin's system. The evidence presented by the charging party on this point, however, is extremely weak and is clearly of a hearsay nature: Shaw testified that there was "some question" about Susan Artof's seniority because he thought that she had taken a year off due to pregnancy. In contrast to this evidence, the documents prepared by Cashin and presented at the hearing demonstrate a very orderly evaluation of seniority. Therefore, on this record it cannot be found that Susan Artof had less seniority than Shaw.

²⁷J.R. Kaplowitz, A.L. Mehler, and A.E. Bishop. (With respect to Bishop, see n. 26, supra.) Of these three, Bishop received the May 14 dismissal letter but was rehired for the fall. The other two were not among the 144 instructors who received dismissal letters.

other than Psychology 1. There was one part-time instructor, J.P. Walker, who was hired for the first time in the fall of 1976 and taught Psychology 2 after the seniority list for that course was exhausted. There were approximately 60 new hires among part-time instructors in the college as a whole for the fall, 1976 semester.

In short, the evidence requires a finding that the reduction of staff within the Behavioral Sciences Department was made according to the course-by-course seniority system set up by Dr. Cashin, and that there was no deviation in that system with respect to the termination of Mr. Shaw. Under that system, at least, there was no requirement that Shaw be considered for any course other than Psychology 1, for which he failed to qualify based on seniority.

Mr. Shaw was known to the college administration and to Dr. Cashin as an activist on behalf of the United Faculty Association. He was known to the administration because of his letters seeking to clarify the legal basis for maintaining part-time instructors in temporary status and because his leadership role in organizing the United Faculty Association and his position as vice-president of that organization were well-publicized through organizational bulletins which were available to the administration. Both Mr. Fugle and Dr. Cashin knew of Shaw, although they did not know him personally, because they were present at a meeting of part-time instructors at which Shaw spoke. Cashin did not as part of his responsibilities deal directly with employee organizations, but he testified that he knew Shaw was "active." In fact, Cashin sent a note to Shaw in March that he would be attending one of Shaw's classes. The purpose of the visit, according to Cashin, was to talk to Shaw because of Shaw's concern about the anticipated layoffs. The meeting, however, never occurred because that particular class was either cancelled or dismissed early.

With regard to the District's contention that the charge of discriminatory dismissal is barred by the statute of limitations the relevant facts are the following:

When Shaw received the May 14 termination letter he had some suspicion that he was being singled out because of his activities on behalf of the United Faculty Association. The United Faculty Association at that time attempted to obtain information from the District with respect to the criteria used in dismissing part-time instructors, but the District did not respond to this request. (See part D, supra.) During the summer, the United Faculty Association participated in the preparation of a lawsuit against the District seeking to establish tenure rights for part-time instructors. In the fall, 15 of the 144 part-time instructors who received the May 14 letters were rehired. Using the fall class schedule, Shaw attempted to learn whether any part-time instructors with less seniority than he had been retained. Three psychology teachers with less college seniority were teaching in the fall, and one of these was among the 15 part-time instructors who were rehired. It was not until the hearing in this matter that Shaw learned of the course-by-course seniority system utilized by the District.

At the outset of the hearing when the District renewed its motion to dismiss based on the statute of limitations, the United Faculty Association argued that it would be shown that the District had a practice of sending out dismissal letters in the spring, and then rehiring part-time instructors in the fall. Shaw's testimony established that there was no such practice. The United Faculty Association argues that Shaw's dismissal was unlawful by attacking the District's course-by-course seniority system. Clearly this system was established and applied to Shaw in the spring, outside the six-month limitations period, rather than the fall.

2. Conclusions of law.

The United Faculty Association cites federal precedent for the proposition that under the National Labor Relations Act, the six-month statute of limitations for issuance of unfair labor practice complaints does not bar a charge where the alleged illegal act occurred more than six months before the complaint issued but the charging party was unaware of the act until a point within the six-month period. See, Skippy Enterprises, Inc., 211 NLRB 222, 87 LRRM 1063 (1974); New York Telephone Co. v. NLRB, 520 F.2d 411, 89 LRRM 3028 (2d Cir., 1975); NLRB v. Colonial Press, Inc., 509 F.2d 850, 88 LRRM 2337 (8th Cir., 1975). These cases, however, are inapplicable because Shaw knew of the alleged illegal act on May 14; he simply did not know the District's criteria at that time. Indeed, he did not know the District's criteria at the time he filed the charge. There was no new act which might have put Shaw on notice that instructors who possibly had less seniority than he were retained to teach in the fall. Two of the three psychology teachers who may have had less college seniority than Shaw, but were nevertheless retained, never received the May 14 letter. Shaw's testimony does not indicate that he felt the charge should be filed because of the fact that some part-time instructors were rehired in the fall. Therefore, this case falls into the category where an unfair practice cannot be made out except by reliance on events occurring outside the six-month period, and for that reason the charge is barred. Local Lodge 1424, I.A.M., v. NLRB, 362 U.S. 411, 45 LRRM 3212 (1960).

Since this charge is barred by the statute of limitations, it is unnecessary to consider the merits. It is recommended that the charge alleging discriminatory dismissal of James Shaw (case number LA-CE-57) be dismissed.

I. The remedy.

Since the District has been found to have engaged in an unfair practice by the granting of salary increase to full-time faculty members while withholding an increase to the part-time faculty members under circumstances tending to discourage membership in the United Faculty Association, it is necessary to devise a remedy. The only remedy specifically requested by the United Faculty Association is a bargaining order. As previously discussed (see part B, supra), such a remedy is improper where a question of representation exists.

In cases involving a pre-election denial or grant of benefits, the NLRB normally issues a cease and desist order designed to dissipate the effects of the employer's unfair labor practices and to deter a repetition thereof, although there is a reluctance to require an employer to withdraw a benefit granted prior to an election. Eg. Stayer's Johnsonville Meats, Inc., 174 NLRB 693, 70 LRRM 1320 (1969). On the other hand, it cannot be ordered that an employer grant a specific benefit. Cf. H.K. Porter Co., v. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970); Ex-Cell-O Corp., 185 NLRB 107, 74 LRRM 1740 (1970).

In this case, the differential wage increase granted for the 1976-77 budget year cannot directly be remedied without unduly punishing the full-time faculty members who received the increase. Therefore, the recommended remedy only affects prospective salary increases, while at the same time informing the electorate that the denial of a salary increase to part-time faculty members for 1976-77 was solely the responsibility of the District and not that of the United Faculty Association.

It is to be noted that in San Dieguito, supra, the EERB recognized that a school employer has an option to consult with employee organizations prior to the selection

of an exclusive representative. This recommended order requires that if the option to consult is utilized, any consultation must be on a faculty-wide basis with the participation of both certificated employee organizations, and that no separate agreements should be reached with any organization with respect to any segment of the faculty.

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 Santa Monica Community College District, Board of Trustees, superintendent, and representatives shall:

A. CEASE AND DESIST FROM:

1. Encouraging membership in another organization in preference to the Santa Monica College United Faculty Association by granting a salary increase to full-time faculty members while denying a salary increase to part-time faculty members, except that nothing contained herein should be construed as requiring the Respondent to revoke any wage increase it has heretofore granted or as preventing the Respondent from consulting jointly with the Santa Monica College United Faculty Association and the Santa Monica College Faculty Association with respect to salary increases for all certificated employees of Respondent, excluding management, supervisory and confidential employees;

2. In any like or similar manner encouraging membership in another employee organization in preference to the Santa Monica College United Faculty Association.

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

1. Prepare and post copies of the order at each of its campuses and work sites for sixty (60) calendar days in conspicuous places, including all locations where notices to certificated employees are customarily posted.

2. At the end of the posting period, notify the Los Angeles Regional Director of the Educational Employment Relations Board of the action it has taken to comply with this order.

All other charges filed by the Santa Monica College United Faculty Association against the Santa Monica Community College District (case numbers LA-CE-41 and LA-CE-57) are dismissed.

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

Dated: October 27, 1977

Franklin Silver
Hearing Officer