



STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD

RIO HONDO COLLEGE FACULTY ASSOCIATION,	)	
	)	
Charging Party,	)	
	)	Case No. LA-CE-126
and	)	
	)	
RIO HONDO COMMUNITY COLLEGE DISTRICT,	)	PERB Decision No. 128
	)	
Respondent.	)	
	)	May 19, 1980

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Appearances: Robert M. Dohrmann, Attorney (Schwartz, Steinsapir, Dohrmann & Krepack) for Rio Hondo College Faculty Association; John J. Wagner, Attorney (Wagner & Wagner) for Rio Hondo Community College District.

Before: Gluck, Chairperson; Gonzales and Moore, Members.

PROCEDURAL HISTORY

On May 23, 1977, the Rio Hondo College Faculty Association (hereafter Association) filed an unfair practice charge against the Rio Hondo Community College District (hereafter District) alleging that the District violated sections 3543, 3543.1(a) and 3543.5(a) and (b) of the Educational Employment Relations Act (hereafter EERA or Act).<sup>1</sup> The Association's charge

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<sup>1</sup>The Educational Employment Relations Act is codified at section 3540 et seq. of the Government Code. Unless otherwise indicated, all statutory references are to the Government Code.

Section 3543 provides:

Public school employees shall have the right to form, join, and participate in the

referred to the District's unilateral adoption of a released time policy on March 16, 1977 and the District's issuance of communications on December 6, 1976 and April 14, 1977.

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activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Section 3543.1(a) provides:

Employee organizations shall have the right to represent their members in their

At the hearing held on September 14, 1977, the hearing officer granted the District's motion to dismiss the Association's allegation concerning the adoption of the released time policy based on the Association's non-exclusive representation status and the Board's decision in San Dieguito Union High School District (9/2/77) EERB Decision No. 22.2 Subsequent to the hearing on the remaining allegations, the Association sought to amend its charge by striking the

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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. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Section 3543.5(a) and (b) provides:

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.

<sup>2</sup>Prior to January 1, 1978, the Public Employment Relations Board (hereafter PERB or Board) was named the Educational Employment Relations Board.

reference to section 3543.5(b) and adding section 3543.5(d) to its unfair practice charge.<sup>3</sup> The hearing officer granted the Association's request in his proposed decision issued on August 3, 1978. He also dismissed, on the merits, the two remaining allegations of the Association's unfair practice charge.

The Association took exception to the hearing officer's proposed decision and his earlier decision to grant the District's motion to dismiss the portion of the charge relating to the released time policy.

FACTS

In February 1975, the California Teachers Association (hereafter CTA) filed a lawsuit against the District on behalf of part-time instructors employed by the District. The lawsuit sought reclassification of part-time instructors to regular permanent status and requested that part-time employees be compensated at a pro rata rate of the full-time salary scale including four years retroactive application of this pay scale.

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<sup>3</sup>Section 3543.5(d) provides:

It shall be unlawful for a public school employer to:

. . . . .

(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.

On February 9, 1976, Assistant Superintendent Don Jenkins wrote a letter to department chairpersons at the college in which he discussed his views with regard to the implications of the pending lawsuit.<sup>4</sup> Jenkins asserted that if the plaintiffs prevailed, the result would be that full-time instructors would lose their overload and extra pay assignments and that future salaries, supplies, personnel resources and maintenance operations would also be affected. Jenkins concluded by noting that the District as well as full-time instructors had much to lose by the lawsuit and strongly urged the department chairpersons to discuss the lawsuit with their faculty members and to suggest to them that they review their position with the faculty leadership that initiated the action.

On December 6, 1976, Jenkins issued another letter which is specifically referenced in the instant unfair practice charge. The letter was addressed to "Deans, Directors, Department Chairpersons" and was in regard to the "Part-Time/Full-Time Issue." The letter stated:

It is interesting to note that full-time faculty members are beginning to awaken to the implications of C.T.A.'s efforts to equate "part-timers" to "full-timers."

Now that the "crunch" has come to Rio Hondo, perhaps our full-time faculty may become

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<sup>4</sup>This letter is not a part of the instant unfair practice charge but is related to events that follow and is therefore presented in the factual summary.

more interested in some of the concerns I expressed to you in a memo dated February 9, 1976. The time has come, I believe, for other "leaders" of the faculty to make their interests known - but, I am neither in the position to do this, nor do I know how to cause it to happen. Do you have any ideas?

Attached to Jenkins' memorandum was a two-page letter to the editor of the "California Professor" written by a full-time faculty member at Long Beach City College and CTA member, Donald Drury. The letter was critical of CTA's involvement in the part-time faculty lawsuit and the attempts to include part-time employees in the same bargaining unit as full-time instructors. Drury stated that if part-time employees were re-classified as other than temporary employees, they would acquire retroactively calculated tenure which would cause more recently hired full-time instructors to be out-ranked. He implored full-time faculty members to "be honest about this, search their souls, and try to estimate the practical limits of CTA's benevolence (and their own) toward part-time colleagues."

Although addressed to management employees only, the Jenkins' letter and the Drury attachment appeared in the mailboxes of full-time instructors.<sup>5</sup> The hearing officer

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<sup>5</sup>Bert Davis, president of the Association at the time the Jenkins' letter issued, testified that he received the letter in his department mailbox. He also testified that in conversations with other faculty members, the Jenkins' letter

found that evidence was lacking as to how or on whose authority this communication was distributed to full-time faculty members. Nonetheless, based on a preponderance of evidence elicited at the hearing he concluded that someone from the District's management team distributed the memorandum. In support of this conclusion, the hearing officer noted that Jenkins' request for ideas on how to cause other faculty leaders to make their interests known could easily have been understood by the management team as suggesting that Drury's letter be circulated to the faculty.

The evidence establishes that Bert Davis, president of the Association at the time the Jenkins' letter appeared, interpreted the letter to be a direct attack on him because he had been, by his own admission, instrumental in initiating the CTA lawsuit. Soon after the letter was distributed, the record

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was referenced and that two instructors told him that they had received the letter in their mailboxes. George Craven, a counselor at Rio Hondo Community College, testified that he had received the Jenkins' letter in his mailbox in the administration building. Craven also testified that he spoke to four other employees who told him that they had received the Jenkins' letter in their mailboxes. While Davis' and Craven's testimony regarding their conversations with other employees is hearsay, PERB's rule 32176 permits hearsay evidence to be used in unfair practice cases for the purpose of supplementing or explaining other evidence. The Board therefore concludes that the hearing officer did not err in concluding that the Jenkins' letter was distributed in the mailboxes of employees not a part of the management team to whom the letter was addressed.

indicates that some faculty members expressed concerns about the advisability of pursuing the lawsuit.

Jenkins testified at the hearing that he intended only to communicate the facts to faculty members and did not seek to oust Davis from his position in the Association. The hearing officer concluded that Jenkins possessed more than a desire to acquaint the full-time faculty members with the facts. He concluded that Jenkins "most definitely wanted to arouse them into pressuring the Association's leadership to drop the lawsuit." He also found, however, no evidence that Jenkins directly threatened or coerced Davis in any manner because of the filing of the lawsuit nor any evidence that the District threatened reprisals against employees or made promises of benefits to employees if CTA withdrew the lawsuit.

The second communication specifically cited in the Association's unfair practice charge is a letter written by Leonard Grandy, district superintendent, dated April 14, 1977. The Grandy letter concerned Davis' response to a Memorandum of Understanding (hereafter MOU) executed by the District and the Association on June 30, 1976. Item E of the MOU required that the Association present a written report to the District on or before April 1, 1977, including recommendations concerning a procedure for awarding annual differentiated salary increments

and recommendations concerning methods of increasing Weekly Student Contact Hours.<sup>6</sup>

On March 22, 1977, Davis submitted a response to the MOU provisions.<sup>7</sup> On March 30, 1977, Davis met with Grandy

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<sup>6</sup>Item E of the MOU provides:

1. Within the existing salary schedule parameters, provide a procedure for awarding annual differentiated salary increments, based on performance at at least three levels, with a view toward adoption for implementation on July 1, 1977.
2. Prepare a report recommending methods of increasing the Weekly Student Contact Hours (WSCH) for faculty by considering, among other methods, the increase in class size and increasing the number of hours of teaching, with a view toward adoption for implementation on July 1, 1977.

<sup>7</sup>Davis stated the following with respect to Item E(1) of the MOU:

1. That the salary schedule reflect remuneration for meeting and preparing for scheduled classes, and office hours only.
2. That additional differential increments based on participation in the following three levels: Institutional service, departmental service and student and community service. ie: College and inter-district committees, departmental committees, sponsorship of clubs, community lectures, mini courses, etc.

Davis stated the following with respect to Item E(2):

The formula for computing weekly student contact hours (WSCH) is a simple one.

briefly and gave him a document which accused the District of circumventing the rights of employees by demanding that they give up their bargaining rights for the 1976-1977 school year as a condition for receiving increases in the salary schedule. On March 31, 1977, Davis sent a memorandum to the District's Board of Trustees which read as follows:

So that there will be no misunderstanding, I would like to clarify the previous report submitted in compliance with the Memorandum of Understanding.

1. The report was not intended to give the impression that the concept is supported by or acceptable to the Faculty. In fact, the Faculty Association has not voted on whether or not to embrace the report. The Association merely voted to

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Divide the number of student class hours by the number of full time teaching equivalents.

With the formula of

$$\frac{\text{Number of student class hours}}{\text{Number of full time equivalents}} = \text{WSCH}$$

To increase the quotient (WSCH), the District has had to increase the dividend (the number of students), or reduce the divisor (the number of full-time equivalents).

At this time, due to declining enrollment, we cannot increase the number of students. Neither, due to restrictions in the Education Code, can we reduce the number of FTE.

It would appear that this item is impossible to comply with due to too many unknown factors.

send the report to the Board in compliance with the provisions of the Memorandum of Understanding.

2. The fact that the Academic Senate has voted to oppose the concept, might be viewed as an indicator that such a concept has little or no support among the Faculty.
3. Be advised, that any effort by the Board of Trustees to implement any merit or differential salary schedule without meaningful, good faith negotiations and approval by a majority of the bargaining unit, will result in the immediate filing of an "Unfair Labor Practice" with the Educational Employment Relations Board.

The record does not establish what specific events, if any, precipitated Davis' March 30th or 31st communications.

The Grandy document of April 14, 1977, which was distributed to all faculty members, included a letter addressed to Davis in which Grandy expressed disappointment over the input received in response to Item E of the MOU. In part, the letter stated:

Our lofty expectations of meaningful input were dashed when I received your March 22, 1977, memorandum (a copy is attached for your convenience - Exhibit II). Not only did you fail to give any meaningful suggestions, you gave none at all. Your reasoning for zero suggestions, or recommendations, is cited in your last sentence wherein you say:

"It would appear that this item is impossible to comply with due to too many unknown factors."

The question I feel compelled to ask at this point, Bert, is: If the Faculty Association, and you in particular, do not know what standards you consider fair, how do you expect the Governing Board to make that judgment? Do you expect the Governing Board to, by some ethereal process, to "know" the "unknown factors" you cite as a reason for failing in your commitment under the Memorandum?

I for one, being first a teacher and educator, recognize the necessity for enlightened decision making which must of necessity, in our society, have significant input from those affected. The Memorandum of June 30, 1976, is the vehicle at hand to accomplish this input. Your fellow members of the Association, as well as other certificated members of this institution, including myself, have relied upon the Memorandum to assist our elected officials carry out the duties of their offices in a manner which will result in a faculty, satisfied that their desires have been considered, motivated to provide the greatest educational program consistent with available resources.

I urgently request the Association to submit within the next 30 days the information called for in the Memorandum. To do less will not necessarily stop the Board from acting, as they must by law, but it could lead to implementation of policies affecting our teachers which are not in the best interests of us all. This, to me, would be abhorrent (sic). No amount of "Monday morning quarterbacking" after the Board acts will suffice for positive, constructive suggestions of which, I am sure, you are capable.

With regard to this portion of the letter, the hearing officer concluded that Grandy was not threatening to adopt policies which would have an adverse effect on employees as a

reprisal for the MOU response provided by Davis. Rather, the hearing officer concluded that Grandy was expressing his concern for and urgently requesting the need for more meaningful input which Grandy viewed as valuable to decisionmaking involving issues of educational significance.

The second portion of Grandy's letter to Davis concerned the two memoranda from Davis, described above, which accused the District of circumventing employees' rights and which advised that the Association would utilize the unfair practice procedures of EERA. In this portion of the letter, Grandy states in part:

By making such unfounded assertions, having no basis in fact, leads me to question the bonafidness (sic) of your stated position and if, in fact, you are not lending every effort to introduce an inflamatory issue designed only to cause a permanent rupture in a faculty-administration-board relationship. In short, your assertion that in developing the Memorandum of Understanding of last year, the Board was attempting to circumvent the faculty's rights is rejected, out of hand.

On the other issue, your threat to file unfair labor charges if the Board proceeds to implement the Memorandum of Understanding, I would encourage you, at a time prior to the election by the faculty of an exclusive bargaining agent, to consult widely among your peers before taking this far-reaching and profoundly explosive step. It is increasingly coming to my attention that numerous members of the faculty, like myself and many others, are becoming uncomfortable with the confrontive and adversary climate that is being fostered among faculty, administration and Board by reason of these tactics. Faculty members are becoming disenchanted with the superimposing of an industrial model of collective bargaining upon a faculty who historically has espoused the more productive collegial atmosphere in

resolving relationships among the various segments of the college. These concerned faculty members have told me that they fail to see that the underlying goal of Rio Hondo College, viz, to provide quality education for all students, will be enhanced by relegating all faculty members to a mode alien to California community colleges.

I am sending copies of this memo to all faculty members as an appeal to them directly to help me change the course of events which has taken an inordinant unproductive amount of time. It has proven most divisive among all elements on campus. It has not enhanced one iota the academic effectiveness of Rio Hondo College nor staff morale, nor the image of the faculty, staff and college in the eyes of this community.

A continuation of this demoralizing conduct can only retard the educational effectiveness of this fine institution. I must, therefore, urge all concerned to take positive steps to a return to consistent, rational, reliable Faculty Association representation that has been traditionally the hallmark of the Rio Hondo College Faculty Association.

Attached to Grandy's letter to Davis and distributed therewith were copies of the MOU, Davis' response to Item E dated March 22nd and the two other communications from Davis dated March 30th and 31st.

The hearing officer found that shortly after the Grandy letter was distributed, Davis' ability as Association president was criticized and that Association members in attendance at an Association faculty meeting in May 1977 threatened to stop participating in the organization unless it made amends with the District. He also found, however, that no evidence was presented as to any direct promise of benefits or threat of reprisals by the District if the faculty took any action in response to Grandy's letter.

DECISION

A. The District's Released Time Policy

The Association alleges that the District committed an unfair practice by unilaterally adopting its released time policy in March 1977 without affording the Association an opportunity to negotiate or at least consult with the employer. The Association also claims that, based on the Board's decision in Magnolia School District (6/27/77) EERB Decision No. 19, the provisions of the policy<sup>8</sup> fail to satisfy the "reasonable" released time requirements of section 3543.1(c) of the EERA<sup>9</sup> because the policy is inflexible. For the reasons set forth below, the Board affirms the hearing officer's dismissal of that portion of the Association's unfair practice charge which concerns the District's released time policy.

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<sup>8</sup>The District's released time policy provided that the following grant of hours "shall be deemed reasonable each fiscal year:"

Released time from classroom instruction	108 hours
Released time from other than classroom assignments	108 hours
Total released time from assigned duties	216 hours

The adopted policy also provided that the allocated hours could "be distributed among members of the unit's bargaining team at the unit's discretion."

<sup>9</sup>Section 3543.1(c) of the EERA provides:

A reasonable number of representatives of an exclusive representative shall have the

In April 1976, prior to the enactment of the released time policy, the Association requested recognition as the exclusive representative of the certificated employees in the District. However, the Board takes official notice of the fact that subsequent to the Association's request for recognition, the District contested the inclusion of the part-time faculty members in the unit sought. Thereafter, in Rio Hondo Community College District (1/25/79) PERB Decision No. 87, the Board ordered an election to be conducted in the unit which was composed of all full-time, part-time and summer school teachers. The Association was certified as the exclusive representative in June 1979. Thus, as the Association concedes, at the time the released time policy was enacted, neither the Association nor any other employee organization had attained the status of exclusive representative of the certificated employees.

As set forth in the EERA, reasonable periods of released time must be afforded to a reasonable number of "representatives of an exclusive representative." (Emphasis added.) Thus, at the time the released time policy was promulgated by the District in March 1977, it in fact created

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right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

no viable released time provision since there was no exclusive representative to whom the provisions would apply. An employee organization, which may or may not become the exclusive representative in the future, has no right to meet and negotiate or to consult with the employer as to a released time policy which can only become effective after an exclusive representative is chosen. To grant an employee organization the right to negotiate or even to consult with an employer about a released time policy prior to its certification as the exclusive representative could result in the anomalous situation of permitting a bilaterally-created released time policy to be applied to an employee organization other than the one which participated in the formulization of that policy. Therefore, the Board concludes that the District's unilateral "adoption" of the released time policy violated no right of the Association maintained as of March 1977. In affirming the hearing officer's dismissal of the Charging Party's allegation regarding the District's released time policy, we make no finding as to the acceptability of the specific provisions of the policy.<sup>10</sup>

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<sup>10</sup>Member Gonzales does not intend this decision to rule on whether release time is a negotiable matter within the scope of representation and disassociates himself from any discussion reaching this issue.

## B. The Jenkins and Grandy Letters

With respect to the Association's allegations concerning the two written communications made by the District, the Board affirms the conclusions reached by the hearing officer that the specified communications did not violate the unfair practice provisions of EERA. In reaching this decision, the Board has considered the free speech provision found in section 8(c) of the National Labor Relations Act (hereafter NLRA) which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

This section was added to the NLRA in 1947 as part of the Taft-Hartley Amendments. However, even prior to the amendments, in NLRB v. Federbush Co., Inc. (2nd Cir. 1941) 121 F.2d 954 [8 LRRM 531], Judge Learned Hand attempted to balance the employer's free speech privilege, which he deemed is necessary for the purpose of enabling informed judgments, against the employee's right to be free from employer communications which "persuade" by coercion. In NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 405], the United States Supreme Court acknowledged the employer's free speech right and afforded protection to employer's communications which are noncoercive on their face and

noncoercive when considered as a part of the total course of conduct in which the employer engaged.

While this Board is aware that the EERA contains no provision paralleling section 8(c) of the NLRA, we find that a public school employer is nonetheless entitled to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. It is unreasonable to assume that the Legislature, by its omission, intended to restrict the public school employer from disseminating any views regarding the employment relationship once an employee organization appeared on the scene. Rather, as was noted by this Board in Muroc Unified School District (12/15/78) PERB Decision No. 80, the employer's right to freely express its views, arguments or opinions is impliedly established by the fact that the employer is prohibited only from engaging in negotiations with persons or groups other than the exclusive representative. While the protection afforded the employer's speech is not without limits, it must necessarily include both favorable and critical speech regarding a union's position provided the communication is not used as a means of violating the Act. (See Antelope Valley Community College District (7/18/79) PERB Decision No. 97.)

Thus, based on the benefit derived from facilitating the free flow of opinions and views, the Board has determined that

certain types of employer speech will be protected and hereby adopts a standard by which such speech will be analyzed which conforms to the express protection set forth in section 8(c) of the NLRA. The Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA.<sup>11</sup>

Under this standard, the Board finds that both the Jenkins and the Grandy letters were permissible expressions of the District's position relevant to matters of legitimate employer concern and contained no threat of reprisal or force or promise of benefit. In reaching this decision, the Board has assessed the propriety of the employer's speech in light of the impact that such communication had or was likely to have on the reader who, as an employee, may be more susceptible to intimidation or receptive to the coercive import of the employer's message. (See Sinclair Co. (1967) 164 NLRB No. 49 [65 LRRM 1087], aff'd

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<sup>11</sup>We note that under certain circumstances, an employer's direct communication with employees may escape protection if it evidences an employer's attempt to bypass the exclusive representative. (Safeway Trails, Inc. (1977) 233 NLRB No. 171 [96 LRRM 1614]; The Proctor & Gamble Manufacturing Company (1966) 160 NLRB 334 [62 LRRM 1617].) In this case, however, since no exclusive representative was in place at the time the Jenkins or Grandy letter issued, the employer's communications are not analysed in that regard.

sub nom., NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481].) Even assuming, without deciding, that as the hearing officer found, management was responsible for the distribution of the Jenkins letter to full-time faculty members, the letter itself is not violative of the Act. It criticized the CTA lawsuit and, based on the arguments contained therein, sought to persuade District employees to convince the Association to withdraw the civil action. The document cannot, however, be read to contain a threat of reprisal or force directed at employees should they disagree with the District's position and/or choose to continue to support maintenance of the lawsuit. Likewise, the Jenkins letter offers no promise of benefit to employees who, persuaded by the arguments, seek to alter the course of the Association's litigation. The Jenkins letter expressed the employer's opinion regarding the adverse effects of the lawsuit and the benefits to be gained by its withdrawal. As the hearing officer found, the Jenkins' letter referred to events which were demonstrably predictable results of the lawsuit and not effects within the District's control.<sup>12</sup>

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<sup>12</sup>In his analysis, the hearing officer relies on the Supreme Court opinion in NLRB v. Gissel Packing Co., supra, which provides that during periods prior to a union election, an employer is permitted to state reasonable predictions of the effect that unionization will have on the company if the predictions are based on objective facts and demonstrably probable consequences but may not convey threats of retaliation

Similarly, the document prepared and distributed by Grandy permissibly comments on the District's dissatisfaction with Davis' response to the MOU and, more generally, its dissatisfaction with Davis' conduct which, according to Grandy, adversely affected the cooperative relationship which the Association and the District had previously enjoyed. The Grandy letter urges that District employees and the Association provide input as to the issues addressed in the MOU. In light of the standard set forth above, the Board has examined particular portions of Grandy's letter which the Association argues are unprotected. One such portion concerns Grandy's comment that the failure to submit the information required by the MOU "could lead to implementation of policies affecting our teachers which are not in the best interest of us all." The Association argued that this statement contains a veiled threat. In assessing the employer's speech in order to determine if it contains an implied improper threat, the Board is guided by the decision in NLRB v. American Tube Bending Co., Inc. (2nd Cir 1943) 134 F2d 993 [12 LRRM 615], cert. denied,

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which the employer may initiate and are unrelated to economic necessities. Since the Jenkins letter was issued approximately 29 months prior to the representation election, the Board is not convinced that the factual circumstances in Rio Hondo should be analyzed in accordance with the Gissel test which relates to pre-election situations. Even assuming the applicability of this test, however, we find the Jenkins communication to be a reasonable prediction and therefore permissible.

(1943) 320 U.S. 768 [13 LRRM 850]. In that case, Judge Learned Hand, again prior to the addition of section 8(c), noted that the decisionmaker must determine which of the two elements of an employer's communication predominates:

On the one hand, it is an expression of his own beliefs and an attempt to persuade his employees to accept them; on the other, it is an indication of his feelings which his hearers may believe will take a form inimical to those of them whom he does not succeed in convincing.

Based on this analysis, the Board does not view Grandy's statement as a threat because the implementation of policies "not in the best interest of us all" to which he refers is a prediction of a plausible result of the Association's failure to provide information necessary to developing policies which would be responsive to the teachers' needs. Thus, when considered in the context of the entire memorandum and in light of the totality of the surrounding circumstances, we are in agreement with the hearing officer's conclusion that this comment is more reasonably viewed as an expression of Grandy's view that the need for input on the MOU item was valuable to sound decisionmaking rather than as an attempt to force agreement.

The Board has also carefully considered that portion of the Grandy letter which concerned Davis' intention of filing an unfair practice charge to prevent possible conduct which Davis claimed would be an unpermitted unilateral change. An

employer's communication is unprotected if it interferes with or discourages an employee or an employee organization from exercising its right to utilize the unfair practice procedures created by the EERA. In the Board's view, there is a fine line between such interference and protected speech. In the instant case, however, we view the Grandy letter as being within the free speech protection. While it cautions against the deleterious effect which results from unfounded unfair practice allegations, the Board finds no language in the Grandy letter which threatens employees who do not concur with Grandy's opinion or which promises to afford benefits to those employees who think or act in conformity with his positions. Thus, while the Board intends no encouragement or tolerance of employer brinkmanship, we must conclude that the Grandy letter does not attempt to cause the organization or the employees to forego applicable statutory protections in violation of section 3543.5(a).

Finally, the Board has examined that portion of the Grandy letter in which he appeals to all faculty members in order to help "change the course of events" and urges that all concerned "take positive steps to a return to consistent, rational, reliable Faculty Association representation . . . ." In order to afford appropriate protection to the fundamental principle of free speech, the Board has striven to strike the delicate and often elusive balance between employer's speech which

evinces unlawful threats or coercion and permissible, if earnest, persuasion. Clear distinctions are shadowed because attempts to persuade and convince listeners to adopt a particular point of view are likely to include pleas to take action necessary to facilitate that view and to effectuate the proposed position. In this case, Grandy believed that the conduct of the Association leadership resulted in a demoralized atmosphere at the college. Since the above-cited portions of the Grandy letter contain no threat of reprisal or force or promise of benefit, the Board finds that Grandy's letter was a permissible plea to employees to act on and implement an Association policy in conformity with the point of view which Grandy espoused.<sup>13</sup>

Therefore, with regard for the recognized benefits to be gained by allowing the full and free exchange of opinions, and, in the absence of coercive speech or any conduct which, together with the employer's speech, would contravene the Act's unfair practice provisions, the Board dismisses the Association's charge. In doing so, we find that the public school employer's speech is protected unless it contains threats of reprisals or force or promises benefits. The

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<sup>13</sup>For this reason, the hearing officer's findings which suggest that the Grandy letter may have affected the tenure of Association leadership are not dispositive of the propriety of Grandy's communication.

Jenkins and Grandy letters convey no such communication and are therefore not violative of the unfair practice provisions of the Act.

ORDER

Based on the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the unfair practice charge asserted against the Rio Hondo Community College District be DISMISSED.

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By: Barbara D. Moore, Member

~~Raymond J. Gonzales~~, Member

Harry Gluck, Chairperson, concurring:

I concur in the result reached by the majority and am in substantial agreement with its rationale. There are reservations, however.

I am not prepared to join in the formulation of an absolute rule defining the limits of employer free speech, at least not in a rule which exonerates all speech except that containing a threat of force or promise of benefit. For example, it is conceivable that under certain circumstances employer speech may be free of such explicit character and yet so impliedly intimidating or coercive as to interfere with the exercise of

employee rights. Further, it should be made clear that even under the majority rule, an employer is not necessarily insulated by ambiguous remarks or by comments that employees are free to act as they wish. Cf. NLRB v. Roselyn Bakeries, Inc. (7th Cir. 1971) 471 F2d 165 [81 LRRM 2875]; NLRB v. Raytheon Co. (9th Cir. 1971) 445 F2d 272 [77 LRRM 2726]; Raley's, Inc. (1978) 236 NLRB 971 [98 LRRM 1381].

I would issue an additional caveat. Employers should not understand the majority's rule of law as more than a test of unlawful conduct. Employer communications which are not illegal may, nevertheless, be sufficiently improper to support objections to the outcome of a representation election. See, e.g., Dal-Tex Optical Co. (1962) 137 NLRB 1782 [50 LRRM 1489]. This point, though not necessarily raised in the case before the Board, should be made in light of footnote 11 on page 20. I would also suggest that speech, unlawful when uttered, is not purified by the fact that it preceded a representation election by 29--or any other number--of months, an inference which can be drawn from the wording of the last sentence of footnote 11.

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Harry Gluck, Chairperson

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA

In the Matter of:	)	
	)	
RIO HONDO FACULTY ASSOCIATION,	)	Unfair Practice
	)	Case No. LA-CE-126
Charging Party,	)	
	)	PROPOSED DECISION
v.	)	
	)	(8-3-78)
RIO HONDO COMMUNITY COLLEGE DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

Appearances: Robert M. Dohrmann, Attorney (Schwartz, Steinsapir, Dohrmann and Krepack) for Rio Hondo Faculty Association; John J. Wagner, Attorney (Wagner and Wagner) for Rio Hondo Community College District.

Before David Schlossberg, Hearing Officer.

PROCEDURAL HISTORY

On May 23, 1977, the Rio Hondo Faculty Association (hereafter Association) filed an unfair practice charge against the Rio Hondo Community College District (hereafter District). The Association alleged that the District violated sections 3543, 3543.1(a) and 3543.5(a) and (b) of the Educational Employment Relations Act (hereafter EERA)<sup>1</sup> by:

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<sup>1</sup>Government Code section 3540 et seq. Unless otherwise indicated, all citations are to the Government Code.

1. Attempting to induce certificated employees to abandon support of the Association through the issuance of written communications on December 6, 1976 and April 14, 1977; and

2. Unilaterally adopting policies on March 16, 1977 regarding released time.

On June 10, 1977, the District filed its answer and a motion to dismiss.

An informal conference was held on July 21, 1977, and the hearing was held on September 14, 1977, at the Los Angeles Regional Office of the Public Employment Relations Board (hereafter PERB).<sup>2</sup>

At the hearing, the District's motion to dismiss was granted with respect to the allegation pertaining to the unilateral adoption of personnel policies. The ruling was based on the parties' stipulation that the Association had not yet been certified or recognized as the exclusive representative and on the authority of San Dieguito Faculty Association v. San Dieguito Union High School District (9/2/77) EERB Decision No. 22.

In its opening posthearing brief, the Association requested permission to amend the charge by striking the reference to section 3543.5(b) and substituting section 3543.5(d). The

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<sup>2</sup>Prior to January 1, 1978, the PERB was named the Educational Employment Relations Board.

District did not object to this request in its responsive brief. This request is hereby granted.<sup>3</sup>

#### FINDINGS OF FACT

##### Background

The parties stipulated that the Association is an employee organization within the meaning of the EERA.

Sometime about February 1975, the Association filed a lawsuit against the District on behalf of the part-time instructors employed by the District. The suit sought reclassification of the part-time instructors from temporary to contract (probationary) or regular (permanent) status and pro-rata pay, including four years of retroactivity.

Don L. Jenkins has been the vice president of academic affairs and assistant superintendent of the college since about June 1975. At the hearing he indicated that he was and still is philosophically opposed to full parity for part-time instructors. On February 9, 1976, Mr. Jenkins wrote a memorandum to department chairpersons which pointed out some of the implications on the District's fiscal and employment practices if the lawsuit were successful. The memo indicated

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<sup>3</sup>The request is essentially one to amend the pleadings to conform to the proof. Such amendments are liberally recognized by California courts. See Witkin, California Procedure (2d ed.) at page 2631 et seq.

that full-time instructors could lose their overload and other "extra pay" assignments, and that future salaries, supplies, personnel policies and plant maintenance could also be affected. Mr. Jenkins concluded by noting that full-time instructors, as well as the District, had much to lose, and strongly urging the department chairpersons to discuss the matter with the faculty and suggest that they review their position with the faculty leadership which had promulgated the lawsuit.

Following the issuance of this memo, the situation involving the part-time instructors became a controversial issue on campus.

In May 1976, the Association filed a petition to be recognized as the exclusive representative of the certificated employees, including part-time instructors. The District opposed the inclusion of part-time instructors. The final resolution of this petition is pending before the PERB itself.

The Jenkins Memorandum of December 6, 1976

On December 6, 1976, Mr. Jenkins prepared the following memorandum:

TO: Deans, Directors, Department Chairpersons  
FROM: Don L. Jenkins  
SUBJECT: PART-TIME/FULL-TIME ISSUE  
(Donald Drury Letter-attached)

It is interesting to note that full-time faculty members are beginning to awaken to the implications of C.T.A.'s efforts to equate "part-timers" to "full-timers."

Now that the "crunch" has come to Rio Hondo, perhaps our full-time faculty may become more interested in some of the concerns I expressed to you in a memo dated February 9, 1976. The time has come, I believe, for other "leaders" of the faculty to make their interests known--but, I am neither in the position to do this, nor do I know how to cause it to happen. Do you have any ideas?

Attached to this memo was a two-page letter written by one Donald Drury, a full-time faculty member at Long Beach City College, to the editor, "The California Professor." The letter is critical of the California Teachers Association (hereafter CTA) for seeking the inclusion of part-time instructors at various colleges and for initiating legal efforts to force school districts to classify part-time instructors as other than temporary employees. Mr. Drury notes that if part-timers were classified as other than temporary employees, they would presumably acquire some sort of tenure. He states that if such a ruling were made retroactive to the date of first employment by the public school employer, long-time part-time instructors would immediately "out-rank" many presently tenured, full-time instructors. He implies that when the "crunch" comes--a stated reference to some emergency of declining budget and/or enrollment necessitating staff reductions--some full-timers would lose their positions to part-timers having greater seniority. He implores full-time instructors to be honest about this, search their souls, and try to estimate the practical effects of CTA's benevolence (and their own) toward part-time colleagues.

Mr. Jenkins' memo and the attachment appeared in the school mailboxes of several full-time faculty members on about December 10, 1976. At the hearing, Mr. Jenkins denied having authorized distribution to persons other than deans, directors and department chairpersons, all of whom he characterized as members of the "management team." Although the evidence does not establish exactly how or on whose authority this communication was distributed to the full-time faculty, should the communication constitute a violation of the EERA, the preponderance of the evidence requires a finding that someone from the District's "management team" distributed the memo to the faculty. Many members of the "management team" have keys to the mailroom. Mr. Jenkins had previously expressed his sentiments on the part-timer issue. His request for ideas on how to cause other "leaders" of the faculty to make their interests known could easily be understood by the "management team" as suggesting that Mr. Drury's letter be circulated to the faculty. Thus, contrary to the District's argument in its posthearing brief, the evidence is sufficient to conclude that the District distributed the memo to those faculty members who received it.

Bert Davis, at that time president of the Association, interpreted the memo to be a direct attack upon him for his part in bringing the lawsuit. Shortly after the memo was distributed, some of the faculty raised concerns about the

advisability of the lawsuit and others criticized Mr. Davis for pursuing it. However, there is no evidence that anyone canceled membership in the Association as a result of this memo.

At the hearing Mr. Jenkins stated that the faculty members with whom he had spoken had exhibited a lack of understanding of the implications of the lawsuit and that the purpose of his memo was to have the faculty made aware of the possible consequences. He denied wanting Mr. Davis ousted from his Association leadership position. He stated that his concern was for a united faculty to make a decision based on the facts, and that if after knowing the facts it chose to proceed with the lawsuit, then that was their choice and it was not going to hurt him or the institution.

This testimony is difficult to accept. In his February 9, 1976 memo, Mr. Jenkins emphatically expressed his concern about the adverse impact upon the District of a successful lawsuit on the part-timer issue and strongly urged the department chairpersons to discuss the matter with the faculty and suggested that they review their position with the faculty leadership. He had spoken with a "large number" of faculty about the lawsuit. He reiterated his concerns in the December 9, 1976 memo and asked for ideas how to cause other leaders of the faculty to make their positions known. All of this suggests something more than merely a desire to make the full-time instructors "aware of the facts." Rather, it is concluded that Mr. Jenkins most definitely wanted to arouse them into pressuring the Association's leadership to drop the lawsuit.

No evidence was presented, however, that Mr. Jenkins directly threatened Mr. Davis or directly coerced him in any manner because of the filing of the lawsuit. No evidence was presented that Mr. Jenkins or any other District employee threatened reprisals against employees if CTA failed to drop the lawsuit or promised any kind of benefit if CTA did drop the lawsuit.

#### The Grandy Letter of April 14, 1978

On June 30, 1976, the Association and the District executed a Memorandum of Understanding (hereafter MOU) resulting from the meet and confer process established by the Winton Act.<sup>4</sup> Leonard A. Grandy, the superintendent of the District, and Bert Davis were signatories of this agreement.

Item E. of the MOU provides that the Association would present a written report to the District on or before April 1, 1977, to include the following:

1. Within the existing salary schedule parameters, provide a procedure for awarding annual differentiated salary increments, based on performance at at least three levels, with a view toward adoption for implementation on July 1, 1977.
2. Prepare a report recommending methods of increasing the Weekly Student Contact Hours (WSCH) for faculty by considering, among other methods, the increase in class size and increasing the number of hours of teaching, with a view toward adoption for implementation on July 1, 1977.

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<sup>4</sup>See former Ed. Code secs. 13080-13090, repealed effective July 1, 1976.

On March 22, 1977, Mr. Davis addressed a memorandum to the Board of Trustees in compliance with the MOU relating to items E.1. and E.2. With respect to item E.1., the memo suggested the following:

1. That the salary schedule reflect remuneration for meeting and preparing for scheduled classes, and office hours only.
2. That additional differential increments based on participation in the following three levels: Institutional service, departmental service and student and community service. ie: College and inter-district committees, departmental committees, sponsorship of clubs, community lectures, mini courses, etc.

Mr. Davis' memo stated the following relating to item E.2.:

The formula for computing weekly student contact hours (WSCH) is a simple one. Divide the number of student class hours by the number of full time teaching equivalents.

With the formula of

$$\frac{\text{Number of student class hours}}{\text{Number of full time equivalents}} = \text{WSCH}$$

To increase the quotient (WSCH), the District has had to increase the dividend (the number of students), or reduce the divisor (the number of full-time equivalents).

At this time, due to declining enrollment, we cannot increase the number of students. Neither, due to restrictions in the Education Code, can we reduce the number of FTE.

It would appear that this item is impossible to comply with due to too many unknown factors.

On March 30, 1977, Mr. Davis gave Dr. Grandy a note which accused the District of circumventing the rights of the

employees by demanding that they give up their bargaining rights for 1976-77 as a condition for receiving increases on the salary schedule.

On March 31, 1977, Mr. Davis sent the Board of Trustees a memorandum indicating that his previous report on item E.1. was not intended to give the impression that the concept was supported by or acceptable to the faculty, but only that the Association had voted to send the report in compliance with the provisions of the MOU. The March 31 memo states that an unfair practice charge would be filed with the PERB if the District implemented any merit or differential salary schedule without meaningful good faith negotiations and approved by the negotiating unit.

On April 14, 1977, Dr. Grandy wrote a three-page letter to Mr. Davis. The first portion of the letter expressed his disappointment over the lack of meaningful input from the Association on Item E.2. The letter states, in part:

I urgently request the Association to submit within the next 30 days the information called for in the Memorandum. To do less will not necessarily stop the Board from acting, as they must by law, but it could lead to implementation of policies affecting our teachers which are not in the best interests of us all. This, to me, would be abhorrent [sic]. No amount of "Monday morning quarterbacking" after the Board acts will suffice for positive, constructive suggestions of which, I am sure, you are capable.

The Association interprets this to mean that if it did not submit "meaningful" suggestions, the Board might take reprisals

by adopting policies calling for (1) differential salary increments which would benefit some instructors and not others and (2) increased class size and number of teaching hours. However, when this paragraph is read in the context of the entire memo, it is clear that Dr. Grandy is not making any such veiled threat. Having previously expressed his opinion of the intrinsic value and positive results of involving the faculty and staff on matters of educational significance, Dr. Grandy simply is reiterating his concern for and urgently requesting meaningful input from the Association.

The next portion of Dr. Grandy's letter criticizes Mr. Davis for accusing the District of circumventing the rights of the faculty. Dr. Grandy implies that Mr. Davis may be making an unfounded assertion in order to introduce an inflammatory issue designed only to cause a permanent rupture in the faculty-administration-board relationship. In the next paragraph, Dr. Grandy criticizes Mr. Davis for threatening to file an unfair practice charge and for fostering a confrontive and adversary climate among the faculty, administration and the Board of Trustees.

Dr. Grandy concludes his letter by stating:

I am sending copies of this memo to all faculty members directly to help me change the course of events which has taken an inordinant [sic] unproductive amount of time. It has proven most divisive among all elements on campus. It has not enhanced one iota the academic effectiveness of Rio Hondo College nor staff morale, nor the image of the faculty, staff and college in the eyes of this community.

A continuation of this demoralizing conduct can only retard the educational effectiveness of this fine institution. I must, therefore, urge all concerned to take positive steps to a return to consistent, rational, reliable Faculty Association representation that has been traditionally the hallmark of the Rio Hondo College Faculty Association.

Attached to this letter were copies of the MOU and Mr. Davis' communications of March 24, March 30 and March 31. At the hearing the District stipulated that it distributed copies of this entire package to the certificated employees.

Shortly after Dr. Grandy's letter was distributed, some faculty members commented to Mr. Davis that he was an ineffective president of the Association. At a faculty meeting held on about May 27, 1977, there was further criticism of Mr. Davis. Although the most vocal people were not members of the Association, there were some members who threatened to quit participating in the Association unless the Association made amends with the administration. However, there is no evidence that anyone canceled his membership in the Association. The reaction of the faculty to Dr. Grandy's letter was a factor in Mr. Davis' decision not to seek reelection as president of the Association.

No evidence was presented of any direct promise of benefits or threat of reprisals by the District if the faculty took any action in response to Dr. Grandy's letter.

ISSUES

Whether the District violated section 3543.5(a) or (d) by distributing to certificated employees copies of Mr. Jenkins' memo of December 6, 1976 and Dr. Grandy's letter of April 14, 1977.

CONCLUSIONS OF LAW

Section 3543.5(a) and (d) provides that 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.

.....

(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.

Both the District and the Association acknowledged in their posthearing briefs that section 8(c) of the Labor Management Relations Act, as amended (hereafter LMRA)<sup>5</sup> is applicable under the EERA. Section 8(c) states:

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<sup>5</sup>See 29 U.S.C. sec. 151 et seq.

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit. (Emphasis added.)

The hearing officer agrees that section 8(c) is applicable to this case, and since there is no disagreement on this point, the legal analysis leading to this conclusion will not be set out in this decision. The dispute in the matter at hand is directed to the specific question whether the Jenkins' memo of December 6, 1976 and the Grandy letter of April 14, 1977 involve threats of reprisals.

The test of whether a communication is a legitimate expression of views, argument or opinion, as opposed to an unlawful threat of reprisal is stated by the United States Supreme Court in NLRB v. Gissel Packing Co. (1969) 395 U.S. 575, 618 [71 LRRM 2481, 2497]:

He [the employer] may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. [Citations.] If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

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The Association contends that the Jenkins' memo and Mr. Drury's letter prophesy termination of full-time faculty members if CTA-affiliated employee organizations continued to pursue the protection of part-timers' rights. It further contends that this prediction exhibits no objective basis in fact.

This argument must fail. It is true that the Jenkins memo-Drury letter implies, should the lawsuit be successful, that some full-time instructors would be terminated ahead of some part-timers in the event of a staff reduction. However, it is clear that the communication addresses the possible legal ramifications which could occur--something beyond the control of the District--rather than volitional actions on the part of the District. The lawsuit filed by the Association sought retroactive reclassification of the part-timer instructors from temporary to probationary or regular status. Section 87743 of the Education Code provides that in the event of a staff reduction due to declining enrollment, the determining factor of which qualified contract employee(s) will be retained is seniority. Although the actual legal impact of a victorious lawsuit must be decided by the courts, it is at least a reasonable prediction on the part of the District to maintain that some full-time instructors would be terminated ahead of some part-timers. This communication was not unlawful.

The Association contends that the Grandy letter of April 14, 1977 contains an express threat to adopt policies

increasing the instructors' class size and number of hours of teaching and calling for differential salary increments which will benefit some instructors and not others if the Association did not submit input on these matters. However, it has been found above, at p. 11, that the District was not threatening to take reprisals if the Association failed to comply with the MOU, but was only emphasizing the need for employee input on these items. If the District planned on implementing such policies, there is no basis for concluding that such action was intended as a response to the Association's alleged failure to comply with the MOU rather than for legitimate management considerations.

Nothing in the Jenkins memo or Grandy letter indicates that there would be reprisals taken against or benefits made available to employees if they put pressure on the Association leadership to drop the lawsuit and comply with the MOU.

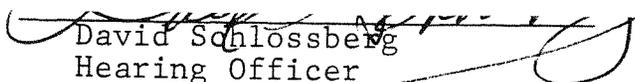
The District did not violate section 3543.5(a) or (d). Therefore, the unfair practice charge is dismissed.

PROPOSED ORDER

It is the Proposed Decision, based upon the above findings of fact and conclusions of law and the entire record of this case that the unfair practice charge filed by Rio Hondo Faculty Association is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final on August 25, 1978 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. See California Administrative Code, title 8, section 32300.

Dated: August 3, 1978

  
David Schlossberg  
Hearing Officer