



conduct which, the Federation asserted, evidenced preferential treatment of the Teachers Association of Long Beach (hereafter

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et seq. Unless otherwise noted, all statutory references are to the Government Code.

The provisions of the EERA cited by the Federation are as follows.

Section 3543.5(a), (b) and (d) states:

It shall be unlawful for a public school employer to:

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

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

.....

(d) Dominate or interfere with the 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.

Section 3543.1(b) states:

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

Association) and unlawful discrimination against the Federation. The charge also challenged various rules adopted by the District to regulate the activities of employee organizations.

The Association requested permission to join the action and on October 24, 1977, the Public Employment Relations Board (hereafter Board or PERB) granted the request. Thereafter, pursuant to settlement negotiations, the parties reached an agreement which resulted in the withdrawal of the allegations concerning the District's preferential and discriminatory conduct and the Association's withdrawal as a party to the instant unfair practice charge. A hearing was held on October 26 and 27, 1977, concerning the Federation's challenge to the District's rules pertaining to employee organization activity. A PERB hearing officer rendered a proposed decision in this case on June 2, 1978, to which the District excepted. The Board itself has considered the Federation's allegations and has reviewed the entire record in the case. The hearing officer's findings of fact as contained in the proposed decision, attached hereto, are free from prejudicial error and are adopted by the Board itself.

#### DECISION

The issues raised by the instant unfair practice charge concern an employee organization's right of access as provided

by section 3543.1(b) of EERA, set forth supra. In that subsection, an employee organization is expressly granted the right of access at reasonable times to areas in which employees work, the right to the use of bulletin boards, mailboxes and other means of communication, subject to reasonable regulations, and the right to use institutional facilities at reasonable times. Therefore, as to each of the District's access rules challenged by the Federation's charge, the Board must determine whether the rule falls within the employer's right to establish "reasonable" regulations to implement the access procedure. In striking this balance, the Board has considered, as stated in Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99, that an employer's regulation of an organization's access rights is reasonable if it is consistent with the basic labor law principles set forth in EERA which are designed to insure effective and nondisruptive organizational communications. Each aspect of the Federation's challenge will be discussed separately.

A. Organizational Activity Outside of Duty Hours of the Workday<sup>2</sup>

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<sup>2</sup>The District's rule regarding organizational activity states, in pertinent part:

Employee Association Business--All activities concerning association business,

By its access rules promulgated in October 1976, the District sought to establish that all activities concerning association business<sup>3</sup> would be conducted outside of duty hours of the workday for the individuals involved. The District's coordinator of Employee Relations testified that duty time for teachers is synonymous with workday. The District's rules included a definition of workday which, combined with the rule on organizational activity, produced the result that all organizational activity was prohibited during the 20 minutes prior to the start of a teacher's first class and the 20 minutes after the completion of the teacher's last class.<sup>4</sup>

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as defined, shall be conducted outside duty hours of the workday for the individuals involved. All association business when on district property shall be conducted away from students and other non-employees. (Emphasis in original.)

<sup>3</sup>As defined in the District's rules, employee association business refers to "any activity related to recruitment of members, circulation of petitions, election campaigning, or other matters relating to unit determination hearings and exclusive representation elections."

<sup>4</sup>Specifically, the rules set forth the following definition of "workdays":

1. Teachers (includes Math/Reading Specialists)--Normally, the teacher's workday extends from 20 minutes before the first assigned period to 20 minutes after the last assigned period; including class,

The subject of organizational activity and the right of access under the National Labor Relations Act (hereafter NLRA) has been extensively considered by the National Labor Relations Board (hereafter NLRB) and the courts. The NLRA, however, does not specifically include a provision similar to section 3543.1(b) of EERA and these decisions have considered the propriety of an employer's rule concerning organizational activity in terms of resultant interference with employees' rights. Nevertheless, both section 3543.1(b) and the cases under the NLRA are directed to the same end: ensuring access

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conference, and preparation periods.

(Kindergarten teachers have the same workday as other elementary teachers. Elementary teacher-librarians work on a 7-hour day.) It also includes additional related service time such as after school and evening supervision of student body activities and other extra-curricular duties.

2. Other Employees--All other regular full time employees have an eight-hour day, exclusive of a lunch period.

3. Nutrition and Lunch--No part of the duty-free nutrition and lunch periods (except for passing time supervision of students when assigned) is considered to be duty time.

4. Child Development Center and Other Part-time Employees--Meetings for these employees may be arranged at work sites so long as they do not conflict with the individual employee's duty time and do not disrupt the work function of employees still on duty.

of employee organizations to employees. Therefore, the Board has considered applicable labor law precedent in determining whether the employer's rule concerning organizational activity is reasonable and therefore permissible under the EERA. (See Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616-17 [116 Cal.Rptr. 507; 87 LRRM 2453]; and Richmond/Simi, supra, at p. 16.)

In Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620], the Supreme Court adopted the presumption that a rule prohibiting union solicitation by employees outside working time was an unreasonable impediment to self organization. Subsequent decisions in this area have attempted to accommodate the employees' rights to freely participate in the activities of employee organizations with the right of the employer to maintain order and discipline. (NLRB v. Babcock & Wilcox, Co. (1956) 351 U.S. 105 [38 LRRM 2001].) In striking this adjustment, the Board established in Stoddard Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110] a distinction between distribution of literature and solicitation. Restrictions on employee solicitation during nonworking time and restrictions on distribution during nonworking time and in nonworking areas are violative of section 8(a)(1) of the NLRA<sup>5</sup> unless the

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<sup>5</sup>Section 8(a)(1) of the NLRA provides:

It shall be an unfair labor practice for an employer --  
(1) to interfere with, restrain, or coerce

employer justifies the rules by a showing of special circumstances which make the rule necessary to maintain production or discipline. (Also, see Okaloosa-Walton Jr. College v. PERC (Fla. Dist. Ct. App. 1979) 372 So.2d 1378 [102 LRRM 2419].)

In this case, however, the District's regulation of employee association business does not distinguish solicitation from distribution. Rather, the record reveals that the District sought to prohibit both types of organizational activities directed at employees during the two twenty-minute periods. Therefore, as applied to solicitation and distribution in nonworking areas, the propriety of the District's rule depends on whether the 20-minute period before and after classroom duties is determined to be nonworking time.

In seeking to accurately characterize the two twenty-minute periods, the Board is not persuaded by the District's argument that because teachers are required to be present at school during this time it is preparation time rather than free, nonworking time. While the Board acknowledges that a component

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employees in the exercise of the rights  
guaranteed in section 7;

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of a teacher's job duties includes preparation time, the record does not demonstrate that the two twenty-minute periods are expressly and/or uniformly reserved for preparation time. In fact, it reveals that the majority of teachers do not work during these times. The mere possibility that an instructor could do his/her classroom or other preparation during this time, or might in individual circumstances have duties assigned by school administrators during this time, does not support a conclusion, that, under normal circumstances, the 20-minute periods are working time for all or most employees. Thus, to the extent that the District's ban on organizational activity prohibited solicitation and distribution efforts directed at teachers who were not assigned work during the 20-minute periods before and after classes and who were in nonworking areas, the rule is unreasonable. (Essex International, Inc. (1974) 211 NLRB 749 [86 LRRM 1411].)

Similarly, the Board adopts the hearing officer's conclusion that, as to organizational activities directed at instructional aides, the District's rule was unlawfully applied.<sup>6</sup> On its face, the District's 20-minute rule is

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<sup>6</sup>The Board considered and rejects the District's argument, as set forth in its exceptions, that it was not advised that application of the organizational activity rule to the work schedule of instructional aides was under submission to the hearing officer, and that it was thereby denied due process of law. To the contrary, the substance of the

inapplicable to the instructional aides since they are not required to report to work 20 minutes before their assignments nor required to remain at the school 20 minutes after their assignment. The record also reveals that the instructional aides were not afforded lunch breaks or uniformly granted rest periods. Thus, implementation of the District's organizational activity rule as interpreted by the District effectively precluded employee organization representatives' access to these employees because the instructional aides were not granted the nonworking periods of time during which the rule permitted organizational activity. The Board, therefore, affirms the hearing officer's determination that the District violated section 3543.5(b) of the Act by denying the Federation its right of access to nonworking employees occupying nonworking areas.

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Federation's charge, both as set forth in its unfair practice charge and as addressed at the hearing, clearly established that the rule and its application was challenged. Federation witness Ribar provided ample testimony as to the specific problems confronted during her attempts to organize instructional aides. The District was afforded full opportunity to cross-examine Ribar and, in fact, questioned its own witness, Marmion, about the application of the organizational activity rule to instructional aides. Having fully and fairly been heard on the issue, the District's due process argument is rejected. (See Santa Clara Unified School District (9/26/79) PERB Decision No. 104 and cases cited therein at pages 18 and 19.)

## B. Distribution of Literature During Non-Duty Hours<sup>7</sup>

The Federation also challenged the District's rule which restricted the employees' right to distribute literature to their "non-duty" hours and restricted the nonemployee

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<sup>7</sup>The District's rule regulating the distribution of literature provides:

### 1. Site Mailboxes and Bulletin

Boards--Association representatives who are employees of the district may distribute materials to employees during the employees' non-duty hours or may place materials in employee mailboxes. Also, materials may be posted on employee bulletin boards designated for associations. Association representatives who are not district employees may distribute materials in mailboxes during hours when schools and offices are regularly open and may distribute materials to district employees during the district employees' non-duty time.

2. Conditions--Materials distributed or posted must be properly identified as to source and must not be distributed in such a way as to interfere with classroom instruction, regular district routines, or conditions of cleanliness or safety. Notices should be posted for no more than 15 workdays and must not include campaign material related to municipal, state, or national elections; statements or other written material containing implications of a derogatory or unprofessional nature relating to any person; statements that will be disruptive to the site operation; or discussion of personnel problems or grievances with reference to specific cases. Materials that do not meet these regulations will be withdrawn from circulation until such time as corrections are made.

representative's right to distribute literature to employees during the employees' "non-duty" hours. The Board is in agreement with and hereby affirms the hearing officer's decision that the rule is impermissible to the extent that it fails to distinguish actual working time from periods during the workday when employees are free from duties. This failure is critical because cases arising under the NLRA have established that a private sector employer may not prohibit the distribution of literature to nonworking employees in nonworking areas.<sup>8</sup> (Essex International, supra; Stoddard Quirk Mfg. Co., supra; Groendyke Transport, Inc. v. NLRB (10th Cir. 1976) 530 F.2d 137 [91 LRRM 2405].) The Board finds that the application of this principle to the public school employer is amply justified by the need to insure reasonable avenues of communication to employees. This finding is likewise consistent with and in furtherance of the Legislature's intent, as evidenced by the inclusion of section 3543.1(b), set forth

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<sup>8</sup>While not applicable to the instant case, an exception to this general rule permits an employer to impose greater restrictions on solicitation and distribution in certain employment environments such as retail department stores and hospitals where the potential for interference with the employer's operation is caused by the presence of customers or patients. (May Dept. Stores Co. (1944) 59 NLRB 976 [15 LRRM 173], enforced as modified, (8th Cir. 1946) 154 F.2d 533 [17 LRRM 985]; Beth Israel Hospital v. NLRB (1978) 437 U.S. 483 [98 LRRM 2727].)

supra, to expressly grant employee organizations the right of access to and communication with employees.

The Board concludes that in this case, the District's rule regarding distribution of literature is unreasonable because it does not clearly permit nonworking employees to distribute material to other nonworking employees or to receive organization material in nonworking areas.

In addition to the impermissible restriction suggested by the ambiguous language of the rule, the application of the rule to instructional aides exposes an equally serious impediment to an employee organization's right of access. The fact that instructional aides did not have personal mailboxes effectively obstructed the organizer's efforts to disseminate literature to these employees. As the facts in this case amply demonstrate, the concept of reasonable access must necessarily include some form of reasonable accommodation to the particular employment conditions and circumstances relevant to instructional aides and other significant groups of employees in the district. As applied to the organizational efforts aimed at instructional aides, the District's rule imposed nearly insurmountable obstacles and thwarted efforts to provide these employees with

organizational literature which is essential to the free exercise of organizational rights.<sup>9</sup>

### C. Identification Cards<sup>10</sup>

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<sup>9</sup>With specific regard to the organization's right of access to instructional aides, the Board notes that certain school administrators attempted to accommodate the District's mailbox rule, set forth supra, to the fact that instructional aides did not have personal mailboxes assigned. For example, in some schools, the employee organization representative was instructed to leave materials near the aides' sign-in book or to place the materials in the mailboxes of the regular teachers in hopes that they would be passed on to the aides. In other schools, the representative was permitted only to leave the materials with the principal's secretary. In one such school, the representative left the materials with the secretary and later that day returned to the school and observed the secretary removing the materials from beneath the counter. Based on the fact that only some schools afforded alternatives and that such alternatives did not uniformly or adequately provide for actual distribution to the instructional aides, we find that the District's efforts resulted in an ineffective means of access and imposed substantial burdens on the employee organization's right to communicate with employees.

<sup>10</sup>The District's rule regarding identification cards provides:

Identification of Representatives of  
Non-Verified Employee Associations

1. When an association wishes to pursue employment matters with employees but does not have any district employees as members and/or has not applied for recognition as a verified association, its representative must apply to the district's Office of Employee Relations (Board of Education Building, 701 Locust Ave.) for approved identification cards and/or verified association status.
2. Upon proper presentation of credentials, such representative of an association will

The Federation's unfair practice charge challenges the District's rule which requires that all employee organization representatives who are visiting at a site where they are not employed by the district must obtain an identification card issued by the District Office of Employee Relations. In reviewing the identification card requirement, the Board recognizes that it is clearly within the public school employer's legitimate authority to require that unknown visitors to its school sites identify themselves to school administrators. It is noted that the District's rule also requires that school visitors sign in at the main office and state their business and their whereabouts while on campus. In the Board's view, compliance with this portion of the rule

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be issued identification cards without delay and will be authorized access to district sites for the purpose of arranging meetings with employees.

The District's rule defines a verified association as:

. . . any employee association which wishes to be acknowledged or has been acknowledged by the Board of Education for the purpose of representing members and of qualifying for dues deduction privileges prior to the selection of an exclusive representative.

Those who represent verified associations including district employees and non-employees will be issued identification cards by the Office of Employee Relations to be used in making contracts to district schools and offices.

adequately protects the employer's interest in monitoring on-site visitors. A visiting employee organization representative may legitimately be required to identify him/herself to school administrators; however, the District's rule appears to demand a specific method of identification which is different from the procedure required of other school visitors. The Board finds, therefore, that the District's rule is unreasonable because it discriminates against union representatives by requiring, without justification, a visitor identification procedure more onerous than is normally required of other visitors. Moreover, because only the employer can supply an organization representative with an acceptable form of identification, the rule demands that union organizers must provide the employer with advance notice of its visiting representatives and invites the possibility that administrative delays will further obstruct access rights.<sup>11</sup> The Federation has demonstrated that, in this fashion, the rule interferes with its ability to effectively utilize the assistance of organizers whose availability is sporadic and unpredictable. The rule is therefore unreasonable in that it unnecessarily

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<sup>11</sup>While the record does not conclusively establish that administrative delays actually occurred, the Board notes that the possibility for delays is inherent in the rule's requirement demanding administrative processing of the identification cards.

restricts the Federation's ability to exercise its right of access. The District's legitimate purposes can be met without such broad intrusion into the Federation's organizational rights. For the reasons set forth above, the Board finds that the District's identification card rule unlawfully interferes with the employee organizations' right of access to employees.

D. Three Person Conversation and Prior Arrangement Rules<sup>12</sup>

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<sup>12</sup>The District's rules concerning the three person limitation and prior arrangement requirement provide in pertinent part:

Approved Association Activities by Employees

The following activities may be conducted by employees who work at a site during non-duty hours as established and understood by the site manager or supervisor and the affected employee(s):

. . . . .

B. Communicating on association business matters with not more than three employees on an informal basis in lounges, workrooms, lunchrooms, or other areas where employees ordinarily gather.

NOTE: Employees engaged in such conversations shall refrain from disrupting or interfering with other district employees who are otherwise engaged and who do not wish to be a party to the discussion on association matters. Where a discussion between individuals becomes a small group meeting, arrangements must be made for an

The District's rules regarding on-site meetings with employees provide that an employee organization representative may meet informally with no more than three employees at a time

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alternate meeting place as per section V., paragraph D. of this bulletin.)

. . . . .

Organizing Activity by Employee Associations

A. Identification of Representatives of Verified Associations

1. Site Employee as Representative--Where an employee assigned to work at the site is also the verified association's representative, he/she shall make advance arrangements with the appropriate site manager or supervisor on all matters related to this bulletin. Arrangements shall be made sufficiently in advance to allow site managers time to study requests.

2. Non-site Employee or Verified Association Staff Employee as Representative--Where the association representative who wishes to implement sections of this bulletin is not an employee as the site, he/she shall make arrangements in advance and shall officially identify himself/herself as per paragraph C below.

. . . . .

D. Facilities Arrangements

1. Association or Personal Business with Individual Employees--An association representative who is not employed at the site may meet privately with up to three individual employees during non-duty hours in a lounge, workroom, lunchroom, or other similar area so long as the conversation

and that the District will provide rooms for meetings with four or more employees. The rules require that representatives who do not work on the campus where the meeting takes place must make arrangements for both types of meetings one day in advance and on-campus representatives must make arrangements one day in advance for meetings with four or more employees. The Board finds that the organization's right of access which extends to nonworking employees in nonworking areas cannot be subjected to an artificial limitation based on the number of employees with whom the representative meets. While an employer may properly prohibit organizational activity which is disruptive of school functions or the educational environment, the instant rule is

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will not disrupt or interfere with others. The lounge or other area may be specified by the site manager or supervisor.

2. Association Business with Groups of Employees--When it is anticipated that association business is to be conducted informally or formally with a group of four or more employees, room arrangements must be made at least one day in advance of the meeting. The request for access must be made to the site manager or supervisor and shall include the specific date, time, and size of a facility requested. The principal or office head will evaluate the request and normally authorize use of the facilities while mindful of the district's need to balance fairly the rights of all employees, of other associations, and of the district itself. Failure to make arrangements in advance shall be grounds for prohibiting any such meetings at the site.

unreasonable because it assumes without factual basis that all discussions with more than three employees necessarily assume a disruptive quality. Moreover, when the District's rule limiting informal discussions to three persons is considered together with the rule which permits, under normal circumstances, only two representatives per school site,<sup>13</sup> an employee organization can optimally hope to reach only six employees at any one time. Thus, these rules may in fact increase the likelihood of so called "disruption" which the District seeks to control by causing the organization representative to have to make repeated visits to certain school sites in order to communicate with employees. Therefore, when viewed in their entirety, the District's rules lack reasonable justification and are plainly seen as an attempt to unlawfully limit an organization's right of access to employees.

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<sup>13</sup>In its unfair practice charge, the Federation alleged that the District unreasonably interfered with its right of access by promulgating a rule which states "Normally, no more than two representatives from the same association will be permitted at a site for a single visit." The hearing officer concluded that, absent evidence concerning inflexible application of this rule, it was not an unreasonable regulation of access rights. The Federation did not object to the hearing officer's decision as to the two person limitation. Therefore this issue is not before the Board, and we have not considered the propriety of this regulation.

The District asserts that its rule was designed to protect against the disruption visited on employees who do not wish to hear from organization representatives. While the District may legitimately promulgate rules to prohibit disruptive conduct, the EERA does not establish the public school employer as the guardian of the employees' undisputed right to refrain from participating in the activities of an employee organization.<sup>14</sup> By specifically granting employee organizations the right of access, the statute clearly recognizes the essential need to communicate with and approach those nonworking employees whom organizations seek to represent. By characterizing such communications as disruptive, the District ignores the fact that the employee organization's access right must necessarily include the initial right to address nonworking employees some of whom may elect to extricate themselves from further organizational attempts. In balancing the right of access of organizations and the right of individual employees to participate or refrain from participating in organizational activities, the Board finds the latter right is adequately protected in that disinterested employees are not a captive audience and may

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<sup>14</sup>The EERA provides in section 3543 that public school employees shall have the right "to refuse to join or participate in the activities of employee organizations."

simply leave the nonworking areas or otherwise ignore the organizational activities.

The Board finds that the District's rule is reasonable and it may legitimately require that one day advance notice be given in order for an employee organization to secure the use of rooms not normally used by nonworking employees. However, to the extent that the District's rule appears to require that all meetings with four or more employees be conducted at such pre-arranged facilities, the regulation is unreasonable. The Board recognizes, of course, that in certain settings, unlike lounges, lunchrooms or other nonworking areas, large gatherings of employees may be disruptive of the educational process unless they are conducted in appropriate facilities, for which advance notice is generally required. However, absent the nonavailability of appropriate facilities or a showing of probable disruption of school functions, there is no justification for the District's rule which has the result of denying an employee organization the right to use such facilities for organizational activity conducted during nonworking hours.

Consistent with the foregoing discussion, the Board finds that the Federation's right of access, as guaranteed by section 3543.1(b) of EERA, was subjected to unreasonable regulation by the District's rules in violation of section 3543.5(b) of EERA. Additionally, it is concluded that the District's rules

likewise interfered with the rights of employees to participate in the activities of an employee organization and deprived the employees access to the organizational efforts and communications of the Federation representatives. The Board finds that the rationale proffered by the District in support of its rules fails to evidence operational necessity or conduct based on circumstances beyond the employer's control where no alternative course of action was available. (Carlsbad Unified School District (1/30/79) PERB Decision No. 89.) Therefore, consistent with the holding in San Francisco Community College District (10/12/79) PERB Decision No. 105, we find that the District's rules concurrently contravened section 3543.5(a) of the Act. The Board affirms the hearing officer's conclusion that the facts fail to demonstrate a violation of section 3543.5(d) 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 Long Beach Unified School District:

1. Cease and desist from adopting and applying rules and regulations which unreasonably interfere with employee organizations' rights of access;

2. Post copies of the attached notice marked "Appendix" at all school sites and in all other work locations where notices

to employees customarily are placed for a period of 30 workdays. Copies of this notice, after being duly signed by the superintendent of the District, shall be posted immediately after receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material; and

3. Notify the appropriate regional director of the Public Employment Relations Board, in writing, within 20 days from the date of this Decision, of what steps the District has taken to comply herewith.

This Order shall become effective immediately upon service of a true copy thereof on the District.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

Member Raymond J. Gonzales' dissent begins on page 26.

Appendix: Notice

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

After a hearing in Case No. LA-CE-171, in which all parties had the right to participate, it has been found that the Long Beach Unified School District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act by adopting and applying rules and regulations which unreasonably interfered with employee organizations' rights of access to employees as granted by section 3543.1(b) of the Act. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

We will not apply or in the future adopt any rule or regulation which will unreasonably interfere with employee organizations' access rights.

LONG BEACH UNIFIED SCHOOL DISTRICT

By: \_\_\_\_\_  
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.



Raymond J. Gonzales, Member, dissenting in part:

While I concur in the majority's decision that certain rules imposed by the District unreasonably restrict employee organization access under section 3543.1(b), I find that other rules struck down by the majority reasonably accommodate the access rights of employee organizations with the rights of the District to maintain discipline.

A. The twenty-minute rule.

Section 3543.1(b) gives employee organizations the right of access at reasonable times to areas in which employees work. I agree with the majority's interpretation of "reasonable times" to mean nonwork time. It would indeed be unreasonable to allow employee organization representatives the right to interrupt employees during worktime.

But I cannot agree with the majority's interpretation of nonwork time. Nonwork time is time allocated for employees' personal use, for relaxing or eating. It is not time when employees should be, but are not, working. The majority, however, apparently believes that nonwork time is time when employees are not in fact working, regardless of their actual assignment. This is clearly demonstrated by the majority's decision giving employee organizations a right of access to teachers during two twenty-minute preparation periods.

Preparation time is worktime under the majority's ruling in San Mateo City School District (5/20/80) PERB Decision No. 129:

As a requirement of the teaching "job," preparation time is a component of the teachers' employment obligation in the same sense as are classroom instruction and other mandated duties . . . .

But preparation, unlike classroom instruction, is a relatively unstructured activity; even what appear to be casual conversations may in fact be work-related discussions. Thus it is difficult to monitor teacher activity during time allocated to preparation and districts have generally not attempted to do so. As a result, teachers in Long Beach have apparently been using the preparation time before and after classes for other purposes.

Because some teachers do not work during preparation time, the majority finds that at least 40 minutes of the time provided by the District for preparation is nonworking time in which teachers are entitled to engage in organizational activities. That the District intends this 40 minutes to be working time is apparently irrelevant; according to the majority, the fact that some teachers choose not to work means that the time is not worktime after all, that the District is instead providing 40 minutes a day of additional paid break-time.<sup>1</sup>

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<sup>1</sup>The majority notes that the two twenty-minute periods are not expressly reserved for preparation time. This creates an interesting presumption: time during the workday, unless specifically allocated to a particular work activity, is nonwork time. A much more reasonable presumption is that time during the workday which has not been designated as breaktime or lunchtime is worktime to be used for work activities.

This blurring of the distinction between working and nonworking time could affect teachers in several ways. First, there is the impact on those teachers who actually prepare during the time allocated for preparation. Under the majority rule, any teacher in a nonworking area is subject to solicitation during the 20-minute periods before and after classes. Lounges are considered strictly nonworking areas by the majority;<sup>2</sup> therefore, any teacher using the lounge to prepare for classes, as many do,<sup>3</sup> may be interrupted and encouraged to stop working and discuss organizational issues. Thus, the majority not only sanctions the use of preparation time as nonworking time but also sanctions interference with those employees who choose to work during the 20-minute preparation period before and after classes.

Second, there will undoubtedly be an impact on the negotiation of preparation time.<sup>4</sup> Districts may be reluctant

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<sup>2</sup>Majority opinion, p. 22, ante.

<sup>3</sup>Teachers may choose to work in faculty lounges instead of their classrooms for many reasons, including smoking privileges and freedom from student interruptions. K-12 teachers do not normally have offices.

<sup>4</sup>In San Mateo, supra, PERB Decision No. 129, the majority found that preparation time is negotiable. I dissented, arguing that preparation is a professional responsibility, that negotiations on such an idiosyncratic matter are impractical, and that finding preparation time negotiable would have an enormous impact on educational policy considerations.

to agree to additional preparation time when that time can so easily become nonworking time available for organizational activities under the majority's direction in this case.

Third, the decision is likely to have an impact on the day-to-day activities of teachers. Teachers will not gain additional time for organizational activities; what they will gain is additional direct supervision. If teachers have been abusing the time allotted for preparation by using it for personal purposes and union activities, districts are unlikely to officially sanction this abuse by allowing employee organization access. They are much more likely to attempt to stop the abuse by supervising teachers to ensure that they are actually working during preparation time.

B. Distribution of literature.

I agree with the majority that literature can be distributed to employees during nonworking time in nonworking areas. I disagree with the majority's contradictory opinion to the extent that it considers the 20-minute periods before and after classes to be nonworking time. I further disagree with the implied finding that the District must go beyond the statutory requirements of allowing access to instructional aides during their nonworking time or the use of institutional bulletin boards, mailboxes, and other means of communication by affirmatively creating a new means of communication with those employees.

The majority finds that "[t]he fact that instructional aides did not have personal mailboxes effectively obstructed the organizer's efforts to disseminate literature to these employees." (Maj. opn., ante, p. 13) Further, in a footnote, the majority states:

Based on the fact that only some schools afforded alternatives and that such alternatives did not uniformly or adequately provide for actual distribution to the instructional aides, we find that the District's efforts resulted in an ineffective means of access and imposed substantial burdens on the employee organization's right to communicate with employees. (Maj. opn., ante, p. 14)

Thus, the majority apparently requires the District to do more than provide access to instructional aides. Indeed, since the solution of placing materials near the aides' sign-in books was considered inadequate (see Maj. opn., ante, fn. 9, p. 14), the majority is apparently ordering the District to actively help employee organizations distribute materials to aides. This goes far beyond what section 3543.1(b) requires and even beyond the requirements of the majority's decision in Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99.

In those cases, the mail systems already existed and the districts only had to allow employee organizations to use them. Here, the majority is apparently requiring the District to create some new means of communication with aides not for

District use but specifically for the use of employee organizations. While I do not believe that districts should unreasonably hinder employee organization access to employees during nonworking time, neither do I believe that they must actively aid employee organizations in their organizational efforts. As I stated in my dissent in Richmond/Simi:

The specific requirements of section 3543.1(b) oblige school districts to do no more than provide access to work areas, bulletin boards and mailboxes. Providing access to work areas or meeting rooms requires little or no involvement of district personnel; the public school employer must merely refrain from interfering with an employee organization's right to communicate with employees. By contrast, transporting and distributing organizational material does require such involvement . . . . Clearly, there is a difference between permitting access to inanimate district resources and requiring the district to provide personnel to assist employee organizations in the distribution of their organizational materials.  
(pp. 34-35.)

Even the majority should recognize some distinction between allowing the use of existing means of communication and requiring the creation of additional means. Yet this decision indicates that the majority does not respect this distinction; if a district does not have an adequate communications system, it must be improved for the benefit of employee organizations. I find it difficult to believe that the Legislature intended such a subsidy to employee organizations.

Furthermore, this may require an expenditure of tax monies that could be construed as a gift of public funds.

C. Three-Person Conversation and Prior Arrangement Rules

The District's rule providing that an employee organization representative may meet informally with up to three employees in lounges, lunchrooms, or similar areas is a reasonable attempt to retain the character of those areas as places where all teachers can work or relax free from student interruption. The majority's decision, on the other hand, would allow employee organizations to appropriate these areas for their organizational activities, since it sanctions the use of lounges and lunchrooms for large gatherings of employees:

The Board recognizes, of course, that in certain settings unlike lounges, lunchrooms or other nonworking areas, large gatherings of employees may be disruptive of the educational process unless they are conducted in appropriate facilities, for which advance notice is generally required. (Maj. opn. at p. 22, emphasis added.)

While I agree with the majority that the employer is not the statutorily-appointed guardian of the right of employees to refrain from participating in the activities of employee organizations, I also believe that a district has a responsibility to ensure that areas provided for the use of all teachers remain available to all teachers and are not taken over by any particular faction. The District's rule does this, without denying employee organization representatives the right

to approach all nonworking teachers individually to ascertain their interest in further organizational communication. If a teacher is interested in hearing more about the organization, the representative can solicit that teacher's attendance at a meeting in another room, without disturbing the activities of those employees who may at the time not be interested in the organization's meeting.<sup>5</sup>

While the majority acknowledges that not all employees may be interested in the activities of an employee organization, its concern for those uninterested teachers who wish to relax in nonworking areas is minimal: they can "simply leave the nonworking areas or otherwise ignore the organizational activities." Needless to say, the majority does not explain where these displaced teachers can go to take their breaks or eat their lunches, or how it is possible to ignore a large gathering of employees in a room that may be smaller than a classroom.

I find the District's solution to the problem of balancing the access rights of employee organizations with the rights of individual employees to be much more reasonable. Employee organization representatives can meet with small groups of teachers in lounges, lunchrooms, or other nonworking areas. If

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<sup>5</sup>Thus, two representatives can reach far more than six employees during a period of nonworking time; the majority exaggerates the limitations imposed by the District's rules.

they wish to address a larger group, they can make arrangements to use a classroom or other appropriate facility.

The District, of course, must exercise good faith in making facilities available; it should not assign employee organizations to inconvenient locations unless there are no alternatives.<sup>6</sup> However, if the District does act in good faith, its three-person rule maintains lounges and other nonworking areas as places available to all teachers while allowing reasonable access to employee organizations under section 3543.1(b).

The District's rule requiring advance notice to secure a room for a large meeting is reasonable. But to the extent the rules require advance notice by off-campus organizers seeking to approach individual teachers or meet with small groups during nonworking time, they impose an unreasonable restriction on employee organization access.

Finally, I believe the majority fails to address an important aspect of section 3543.1(b). This section differs

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<sup>6</sup>There was some evidence in the record that one organizer had difficulties in obtaining rooms to meet with aides. The hearing officer did not address the issue of whether the advance notice rule was being applied in an unreasonable manner, and I do not reach that issue here except to note that the District should not use reasonable rules (requiring employee organization meetings to take place in areas not normally used by nonworking employees) to unreasonably restrict access (by being "unable" to find available rooms or finding rooms only in inconvenient locations).

significantly from the rules developed by the NLRB to govern union solicitation and distribution of literature in the private sector in that it allows nonemployees the right to come onto the work site to organize employees.<sup>7</sup> This additional factor changes the dynamics of on-site organizing, and, I believe, underlies many of the District's rules in this case.

The majority apparently adopts the private sector view that an accommodation must be reached between the employees' right to organize and the employer's right to maintain discipline:

[The Board must adjust] the undisputed rights of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee.

Republic Aviation Corp v. NLRB (1945)  
324 U.S. 793, 798 [16 LRRM 620].

Yet the majority evidences no sensitivity to the EERA's more liberal access rule, which, by allowing outside organizers onto the work site, may raise additional employer disciplinary concerns that may necessitate a balancing of rights different than that reached in the private sector. For example, the District, despite knowledge that many teachers do not work

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<sup>7</sup>Compare section 3543.1(b) with NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 200].

during the twenty minutes before classes, may have chosen not to make an issue of that practice. Turning a blind eye to teachers talking among themselves is, however, very different than sanctioning the use of the time for organizational activities by allowing access to outside organizers. The latter, it seems to me, has a far more disruptive effect on discipline.

Another example is the three-person conversation rule. Teachers normally have conversations among themselves in nonwork areas; such conversations can hardly be considered disruptive. But the presence of outsiders changes the dynamics of the situation: an outside organizational representative has a limited amount of time to persuade as many people as possible to join the organization. Naturally, that person's tactics are going to differ from the tactics of on-site employees who see each other every day and have regular opportunities to solicit support on a one-to-one basis. The outsider may try to address as many people at one time as possible, thereby monopolizing the nonwork area. The District's rule seeks to avoid this, not by preventing nondisruptive solicitations of small groups of employees, but by requiring that more disruptive organizational techniques take place in a separate area.

I believe that this Board, in determining whether employer regulations are reasonable, must consider the interests of all participants in the organizational process--organizations,

employees, and the employer--and seek to reach an accommodation among them. The majority in this case is highly sensitive to the interests of employee organizations but demonstrates much less concern for the equally legitimate interests of uninterested employees and the District. While this is hardly surprising, given previous decisions by the majority, I nevertheless feel compelled once again to indicate my concern for the direction this Board is taking.

~~Raymond J. Gonzales, Member~~

PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA

LONG BEACH FEDERATION OF TEACHERS, )	
LOCAL 1263, AFT, AFL-CIO, )	
Charging Party, )	Unfair Practice
v. )	Case No. LA-CE-171
LONG BEACH UNIFIED SCHOOL DISTRICT, )	
Respondent. )	<u>PROPOSED DECISION</u>
	(6/2/78)

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Appearances: Henry R. Fenton, Attorney (Levy, Koszdin, Goldschmid and Sroloff) for Long Beach Federation of Teachers Local 1263, AFT, AFL-CIO; Ted R. Huebner, Attorney (McLaughlin and Irvin) for Long Beach Unified School District.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

This case involves a challenge to the legality of various rules adopted by a school district to regulate the on-campus activities of employee organizations. The rules have a particular impact on the ability of organizations to gain access to employees in order to solicit members.

On August 24, 1977, the Long Beach Federation of Teachers, Local 1263, AFT, AFL-CIO,<sup>1</sup> filed an unfair practice charge against the Long Beach Unified School District.<sup>2</sup> The charge

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<sup>1</sup>Hereafter the Long Beach Federation of Teachers, Local 1263, AFT, AFL-CIO, will be referred to as the "Federation."

<sup>2</sup>Hereafter the Long Beach Unified School District will be referred to as the "District."

in essence alleges that the District violated Government Code sections 3543.5(a), 3543.5(b), 3543.5(d)<sup>3</sup> and 3543.1(b)<sup>4</sup> by:

1) Conducting secret and exclusive negotiations with and giving preferential treatment to the Teachers Association of Long Beach at a time when there was no exclusive representative;

2) Rejecting a one-month leave of absence sought by a Federation member in order to work for the Federation while granting a reduced schedule to an officer of the Teachers Association of Long Beach;

3) Enforcing a leave policy which fixed the maximum amount of leave time for employee organization business in relation to the number of members in the organization, thereby

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<sup>3</sup>Government Code section 3543.5 reads 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.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

<sup>4</sup>Government Code section 3543.1(b) reads as follows:

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

discriminating against the Federation because of its smaller membership;

4) Enforcing an organizational activity policy which illegally restricted the Federation's ability to solicit members.

On September 23, 1977, the District answered the charge specifically denying each accusation of illegal conduct and alleging that the policies it had adopted were lawful. The parties held a settlement conference on September 27, 1977 but were unable to resolve the dispute. On October 5, 1977, the District made a motion to dismiss the charge. On October 11, 1977, the Teachers Association of Long Beach applied to join the action as a party and the request was granted on October 24, 1977. Prior to the start of the formal hearing on October 26, 1977, the parties again entered settlement negotiations and reached an agreement which led to a withdrawal of the first three allegations listed in the original charge. As a result of the agreement, the Teachers Association of Long Beach withdrew from participation at the hearing. The hearing was conducted in Los Angeles on October 26 and 27, 1977. The respondent's October 5 motion to dismiss and another oral motion to dismiss made at the hearing were both taken under submission for disposition in the written decision.

## FINDINGS OF FACT

The Long Beach Unified School District is located in the city of Long Beach. The District has 54 elementary schools, 14 junior high schools, five regular senior high schools, one combination junior-senior high school and a continuation high school. These various schools occupy approximately 75 separate sites. In addition, the District has a number of child development centers, about five or six of which are located on sites separate from any other school. It is approximately eight miles between the Long Beach schools which are the farthest apart.

There are 59,000 students, some 2,500 teachers and approximately 1,000 teacher aides within the District. At the time of the hearing, the Teachers Association of Long Beach had approximately 1,800 members and the Federation had between 225 and 250 members. Because of its large size, the Teachers Association had members at all District schools although there were some schools at which it had no building representative. The Federation had members in all the high schools and all but one of the junior high schools but there were many schools in which it had no members.

On October 1, 1976, the District promulgated a series of administrative regulations which are the subject of the present action. The regulations were issued in a bulletin from William H. Marmion, coordinator of employee relations, to all District management and supervisory employees and to all employee

organizations. The regulations set forth District rules relating to on-campus activities by employee organizations. Regulations relating to employee organizational activity had been in existence within the District since 1965 when they were drawn up following passage of the Winton Act.<sup>5</sup>

Mr. Marmion testified that upon enactment of the Educational Employment Relations Act<sup>6</sup> he was requested by the District superintendent to revise and update the regulations. Early drafts of the revision were prepared in the fall of 1975 and the spring of 1976. A final draft was circulated among employee organizations for comment in September of 1976.

The bulletin begins with a recitation of the applicable sections of the EERA followed by a statement of intent which provides in part as follows:

. . . The primary purpose of these regulations is to preserve a work climate in the district that will enable instructional and support service staffs to accomplish the job tasks for which they have been employed . . .

In general, the bulletin sets forth these restrictions which are under attack by the Federation:

1) A prohibition against all soliciting and other organizational activities during duty hours which, in the case of teachers, includes the 20 minutes prior to a teacher's first assigned class and the 20 minutes after the last assigned class;

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<sup>5</sup> Former Education Code sec. 13080 et seq.

<sup>6</sup> Government Code sec. 3540 et seq.

2) A requirement that all organizers who do not work at a particular campus receive an identification card from the District Office of Employer Relations prior to visiting a campus on organizational business;

3) A prohibition against a visit by more than two representatives of an organization to a particular campus on a single occasion;

4) A prohibition against an organizational representative meeting with more than three employees at a time in a school work room, lounge, lunchroom or similar area;

5) A requirement that off-campus organizers register at least one day prior to visiting a school, and that all organizers register at least one day prior to conducting a meeting with four or more persons.

6) A prohibition against the distribution of materials to employees except under limited circumstances.

By the date of the hearing, the Federation had been involved in two organizing efforts which allegedly were hampered by the District policy. In the spring of 1977 there was an organizing effort from March through June which was aimed at instructional aides. In the fall of 1977, the Federation conducted another organizing effort aimed at teachers in the District's child development centers.

The various rules in the District policy work together and in some measure it is difficult to discuss them separately. Nevertheless, it seems clear that the rule which consistently

presented the most difficulty for the Federation was the prohibition against solicitation during the workday. The rule reads as follows:

Employee Association Business---All activities concerning association business, as defined, shall be conducted outside [emphasis in original] duty hours of the workday for the individuals involved. All association business when on district property shall be conducted away from students and other non-employees. (Example: No association business shall be conducted during such events as PTA or Advisory Council meetings, Open Houses, etc., or in the presence of VIPS or other non-employees.)

As applied to teachers, the rule is a good deal more expansive than a mere prohibition against organizational activity during the hours of preparation and instruction. Mr. Marmion testified that "duty" time for teachers means the same as "workday."<sup>7</sup> The rule is not limited solely to work

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<sup>7</sup>The District policy defines the term "workdays" as follows:

Teachers (includes Math/Reading Specialists)--Normally, the teacher's workday extends from 20 minutes before the first assigned period to 20 minutes after the last assigned period; including class, conference, and preparation periods. [Emphasis in original.] (Kindergarten teachers have the same workday as other elementary teachers. Elementary teacher-librarians work a 7-hour day.) It also includes additional related service time such as after school and evening supervision of student body activities and other extra-curricular duties.

Other Employees--All other regular full time employees have an eight-hour day, exclusive of a lunch period.

Nutrition and Lunch--No part of the duty-free nutrition and lunch periods (except for passing time supervision of students when assigned) is considered to be duty time.

Child Development Center and Other Part-time Employees--Meetings for these employees may be arranged at work sites so long as they do not conflict with the individual employee's duty time and do not disrupt the work function of employees still on duty.

hours. No organizational activity is allowed during the 20 minutes prior to the start of a teacher's first class and the 20 minutes after the completion of a teacher's last class.

The 20-minute restriction removed from Federation organizers two of the time periods when teachers are most accessible. Under District policy, teachers are required to be at school 20 minutes prior to the start of their first class and to remain at school until 20 minutes after the completion of their last class. During the two time periods, teachers can be assigned various duties and some teachers are required to supervise students just before and just after the school day.

The decision on whether to assign duties during those two 20-minute periods is left to the discretion of local school administrators. It is clear that many, if not most, teachers have no assigned duties during the two 20-minute periods. It was the uncontradicted testimony that at the high schools, it is relatively rare for a teacher to have duties assigned during the 20 minutes either before or after school. At the junior high schools, a small percentage of the faculty on a rotating basis is assigned to watch students outside and at the bus lines. Even at the elementary school level, according to uncontradicted testimony, there always are a number of teachers in the teacher's lounge until just before the start of class. During the time after school, there occasionally is a faculty meeting which teachers must attend but it also is common that many teachers leave school before the 20 minutes has elapsed.

According to the testimony, the teachers' parking lot at Long Beach Polytechnic High School is more than half empty by the time 20 minutes have elapsed after school.

The problem presented by the rule was illustrated by an experience of Robert Ciriello, a District teacher who took a brief leave of absence to organize for the Federation. He said he went one day to the Carver Elementary School to speak to teachers. He arrived prior to the start of the school day but was not permitted to go immediately to the lounge, even though it was earlier than the 20-minute prohibition period. He said the principal detained him until she could call the District headquarters and verify that it was all right for him to speak. Mr. Ciriello said the verification process took about 10 minutes which put him close to the 20-minute prohibition period. The principal escorted him to the lounge, announced that he was from the Federation and said that anybody who wanted to leave could do so. She then stood nearby while he spoke to teachers individually and cut him off in mid-sentence when it became 20 minutes prior to the start of the first class.

Although on its face the 20-minute rule applies only to teachers, it also hampered efforts of a Federation organizer to talk to instructional aides. The organizer, Barbara Ribar, was a former instructional aide who tried to solicit members for the Federation from March through June of 1977. She testified that she consistently was told that the 20-minute

rule applied to instructional aides. This made personal contact with aides most difficult. The aides typically work 15 hours a week. Many of them are college students whose work hours are scheduled around their classes. Some aides work in the morning, some in the middle of the day and others in the late afternoon. Unlike teachers, aides are not required to be present 20 minutes before their first class or remain until 20 minutes after their last class. As a result, many of them did not arrive until five minutes early.

Aides do not have a lunch period and Ms. Ribar said she was prevented from talking to them during recess, even if they had no duties during this time. For the most part, therefore, aides were unavailable to her.

The 20-minute rule was not applied to teachers in the child development centers and Federation organizers were allowed to meet with them just before or just after work, during lunch or while teachers were on a 15-minute break.

The District's identification card rule requires an outside representative of an employee organization to produce a District-issued identification card before conducting organizational activities at a school or other work site. The rule provides as follows:

When an association wishes to pursue employment matters with employees but does not have any district employees as members and/or has not applied for recognition as a verified association, its representative must apply to the district's Office of Employee Relations (Board of Education Building, 701 Locust Ave.)

for approved identification cards and/or verified association status.<sup>8</sup>

Upon proper presentation of credentials, such representative of an association will be issued identification cards without delay and will be authorized access to district sites for the purpose of arranging meetings with employees.

Any person from a verified or non-verified association who is not an employee assigned to a district site being visited must present a proper identification card as issued by the Office of Employee Relations to the respective manager or supervisor.

Such persons will be required to sign in at the main office, state their business and where they can be reached, and sign out upon the completion of the visit. Normally, no more than two representatives from the same association will be permitted at a site for a single visit.

Federation representatives without identification cards encountered substantial delays. Ms. Ribar visited about 25 schools prior to receiving her card and was delayed about 15 to 25 minutes at each school while school officials telephoned

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<sup>8</sup>As used in the District rules, a "verified" organization is defined as:

. . . any employee association which wished to be acknowledged by the Board of Education for the purpose of representing members and of qualifying for dues deduction privileges prior to the selection of an exclusive representative. Those who represent verified associations including district employees and non-employees will be issued identification cards by the Office of Employee Relations to be used in making contacts to district schools and offices.

the District office to get approval for her visit.<sup>9</sup> This problem of delays limited the Federation's flexibility in deciding how to use workers who suddenly became available but who did not have identification cards.

Mr. Marmion testified that the purpose of the identification card is to control access to school grounds by outsiders. He said that any visitor to a school site is expected to report to the office and state the purpose of the visit. Persons who fail to do so are subject to removal from school property. Moreover, he said, a person carrying a District-issued employee organization card has been advised about the contents of the District regulations. He said the relationship between school managers and organization representatives goes more smoothly if the representatives know the content of the regulations.

The restriction on the number of organization representatives who can visit a school site at any one occasion presents a problem for the Federation at large schools. The Federation's president, Mr. King, testified that the number of teachers at individual school sites ranges from eight to about 120. He said that at the high schools and other larger sites there are a number of lounges and various places where teachers go to eat.

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<sup>9</sup>There is a conflict in the evidence about why it took so long for Ms. Ribar to receive an identification card. However, in order to decide the issues presented in this case it is not necessary to determine whether Ms. Ribar's card was held up because the Federation failed to apply for it or the District failed to issue it.

Two organizers simply cannot contact persons spread all over a campus during a half-hour lunch period. Mr. Marmion testified that it might be possible to have more than two organizers on a site, depending on the circumstances. He said that would have to be worked out in consultation with the principal of the site. However, he said, the Federation had never asked to use more than two organizers at a school.

The District's three-person conversation rule and its prior room arrangement rule are interwoven. The regulations, which appear in Section V-D of the bulletin, read as follows:

Association or Personal Business with Individual Employees-- An association representative who is not employed at the site may meet privately with up to three individual employees during non-duty hours in a lounge, workroom, lunchroom, or other similar area so long as the conversation will not disrupt or interfere with others. The lounge or other area may be specified by the site manager or supervisor.

Association Business with Groups of Employees-- When it is anticipated that association business is to be conducted informally or formally with a group of four or more employees, room arrangements must be made at least one day in advance of the meeting. The request for access must be made to the site manager or supervisor and shall include the specific date, time, and size of a facility requested. The principal or office head will evaluate the request and normally authorize use of facilities while mindful of the district's need to balance fairly the rights of all employees, of other associations, and of the district itself. Failure to make arrangements in advance shall be grounds for prohibiting any such meetings at the site.

Notices of Meetings-- The association shall prepare and post notices of meetings involving association business matters so that all employees may be aware of them.

In a memorandum dated October 22, 1976 to all principals and office heads, Mr. Marmion clarified the prior arrangement rule to cover both informal meetings with up to three employees and the more formal meetings with groups of four or more. Thus, an off-campus representative must make arrangements at least one day in advance in order to meet with employees either privately, in groups of up to three or in large meetings. Organizers who work on campus have slightly more flexibility. They apparently can meet on an informal basis with groups of up to three employees without prior registration. However, even on-campus representatives must make advance registration if they want to speak to four or more employees.<sup>10</sup>

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<sup>10</sup>In his testimony, Mr. Marmion cited Section IV-B of the bulletin as authority for this requirement. It provides as follows:

IV. Approved Association Activities by Employees

The following activities may be conducted by employees who work at a site during non-duty hours as established and understood by the site manager or supervisor and the affected employee(s):

\* \* \*

- B. Communicating on association business matters with not more than three employees on an informal basis in lounges, workrooms, lunchrooms, or other areas where employees ordinarily gather.

NOTE: Employees engaged in such conversations shall refrain from disrupting or interfering with other district employees who are otherwise engaged and who do not wish to be a party to the discussion on association matters. Where a discussion between individuals becomes a small group meeting, arrangements must be made for an alternate meeting place as per section V., paragraph D. of this bulletin. [Section V-D is reproduced above.]

The purpose of the three-person conversation rule, according to Mr. Marmion, is to prevent disruption of employees who are not interested in listening to the organizer. Under the rule, organizers who wish to speak to larger groups are required to register in advance for a separate facility where they can speak and not disrupt those who do not wish to listen. The prior registration rule has presented various problems for Federation organizers. It was the consistent experience of Federation organizers that a meeting room could not be secured by simply making a telephone call a day in advance. There was frequently a difficulty in reaching a person at the school who could authorize a room. Often, the school simply did not have an extra room.

Ms. Ribar contacted 70 schools during her efforts to organize the instructional aides. At every school she was told she could not talk to the aides without advance arrangements and although she never called with fewer than three days notice she was able to secure a meeting room in only three schools. At Franklin Junior High School she contacted the principal five times and five times was told there was no room available and if one became available he would not know until 15 minutes before she wanted to meet with the aides. At one of the three schools where she was successful, access to the room was hampered by a detour caused by the painting of the doors. At another school she was placed in a bungalow in a remote part of the campus. At the third school she placed leaflets announcing her

meeting in the mailboxes of two teachers but they were never distributed and no aides attended the meeting.

Aside from the problem of getting a room, the entire process of advance registration presented a serious handicap to the Federation's ability to make rapid decisions on the use of available organizing help. Mr. King testified that the decision about where to send various persons often could not be made in advance because it depended upon what had happened the day before. Yet with the advance registration rule, the Federation was committed to make prior registration or be barred from a campus.

The District's rule on the use of mailboxes and bulletin boards provides as follows:

Site Mailboxes and Bulletin Boards-- Association representatives who are employees of the district may distribute materials to employees during the employees' non-duty hours or may place materials in employee mailboxes. Also, materials may be posted on employee bulletin boards designed for associations. Association representatives who are not district employees may distribute materials in mailboxes during hours when schools and offices are regularly open and may distribute materials to district employees during the district employees' non-duty time.

Conditions-- Materials distributed or posted must be properly identified as to source and must not be distributed in such a way as to interfere with classroom instruction, regular district routines, or conditions of cleanliness or safety. Notices should be posted for no more than 15 workdays and must not include campaign material related to municipal, state, or national elections; statements or other written material containing implications of a derogatory or unprofessional nature relating to any person; statements that will be disruptive to the site operation; or discussion of personnel problems or grievances with reference to specific cases. Materials that do not meet these regulations will be withdrawn from circulation until such time as corrections are made.

The Federation encountered a considerable amount of difficulty in attempting to distribute literature to the instructional aides. Ms. Ribar testified that some principals tried to prevent her from distributing literature to aides during the 20 minutes immediately prior to the start of an aide's day. She said she was told she could distribute literature to aides only by leaving it in the school office. Because aides do not have mailboxes, there was no convenient place she could leave Federation materials. At some schools she was allowed to put materials in the mailboxes of teachers who used instructional aides on the hope that the teachers would then pass the material onto the aides. About one-fourth of the schools had books where aides were required to sign in each day. At those schools, she left the literature by the sign-in books. At other schools, she had to leave the literature with the principal's secretary. Ms. Ribar testified that she left literature on the office counter at the Burnett Elementary School. When she returned to the school two hours later she saw the secretary removing the literature from beneath the counter just as she arrived. She testified that at Lincoln School the principal would not allow distribution of the literature because he was not sure it had been approved by the District.

Mr. Marmion testified that he had given verbal directives to the principals that literature for the aides could be placed either in the mailboxes of the teachers who worked with aides or on the office counter near the sign-in sheets for aides. He said he received no complaints from the Federation about difficulties in distributing the literature or in obtaining meeting rooms.

## LEGAL ISSUES

Whether either by adoption or implementation of the regulations the District has:

1) Violated Government Code section 3543.5(b) by denying the Federation rights guaranteed to it by the EERA?

2) Violated Government Code section 3543.5(a) by imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees or otherwise interfere with, restrain or coerce employees because of their exercise of rights guaranteed by the EERA?

3) Violated Government Code section 3543.5(d) by dominating or interfering with the Federation or contributing financial or other support to an employee organization or encouraging employees to join any organization in preference to another?

## CONCLUSIONS OF LAW

Initially, it should be noted that the Federation does not attack -- and this proposed decision does not consider -- all the provisions of the October 1, 1976 bulletin. In the case of some of the rules, it is not the wording but the application which is under attack.

Under Government Code section 3543.1(b),<sup>11</sup> the Federation has the right of access to areas in which employees work and the right to use various means of communication with employees. This right of access is limited to "reasonable times" and the code section gives the District the right to write "reasonable" regulations to implement the access procedure.

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<sup>11</sup>See footnote No. 4, supra.

If the Federation has requested access to District employees at "reasonable times" and the District has refused, the District will have denied the Federation a right guaranteed to it by the EERA, thereby violating Government Code section 3543.5(b).<sup>12</sup> Similarly, if the District has adopted an access regulation which is unreasonable, the District will have violated the EERA.

The Public Employment Relations Board has yet to consider the meaning of "reasonable time" and "reasonable regulation" in a case. However, a considerable body of precedent about employee organization access has developed under the National Labor Relations Act. Under the federal law, employees have the right to join and participate in the activities of labor organizations.<sup>13</sup> It is an unfair labor practice for an employer to interfere with, restrain or coerce employees in their exercise of this right or to discourage membership in any labor organization.<sup>14</sup> Under these

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<sup>12</sup>See footnote No. 3, supra.

<sup>13</sup>In Section 7, the National Labor Relations Act provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

<sup>14</sup>Section 8(a) of the NLRA provides, in part, as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided That. . . .

provisions in the federal law, the National Labor Relations Board and the federal courts have found it unlawful for an employer to adopt blanket restrictions against employee organizational activity.

It is clear under federal precedent that an employer generally can prohibit solicitation for union membership during the hours employees actually are working. But the employer ordinarily may not prohibit union solicitation during such nonworking times as rest breaks and lunch. Employer rules which apply only to nonworking periods are presumed valid while rules which apply to both working and nonworking hours are presumed invalid. Peyton Packing Co. (1943) 49 NLRB 828 [12 LRRM 183] enf'd. 142 F.2d 1009 (5th C.A.) [14 LRRM 792] as cited by the United States Supreme Court in Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].<sup>15</sup>

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<sup>15</sup>Quoting from Peyton Packing, the Supreme Court wrote in Republic Aviation:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

In more recent decisions, the NLRB has refined the presumptions to distinguish cleanly between employer rules which prohibit solicitation during "working hours" and those which prohibit solicitation during "working time." In Essex International, Inc. (1974) 211 NLRB 749 [86 LRRM 1411] the board held that the term "working hours" generally is understood to mean the entire period of time between when an employee begins and completes a shift. Because a rule prohibiting solicitation during "working hours" would extend the ban through lunch and rest periods, it is presumed illegal. The board held that the term "working time" generally is understood to mean only that portion of a shift when an employee actually is working. Because a rule prohibiting solicitation during "working time" would exclude lunch and rest periods, it is presumed legal. See e.g., Groendyke Transport, Inc. (1974) 211 NLRB 921 [86 LRRM 1636] enf'd. 530 F.2d 139 (10th C.A.) [91 LRRM 2405].

Where an employer's no solicitation rule is presumptively invalid, the employer bears the burden of producing evidence to demonstrate that the rule is necessary to maintain order, discipline and production. Walton Manufacturing Company (1960) 126 NLRB 697 [45 LRRM 1370] enf'd. 289 F.2d 177 (5th C.A.) [47 LRRM 2794]. See also the partial dissent of Member Fanning in Tri-County Medical Center (1976) 222 NLRB 1089 [91 LRRM 1323 at 1325].

In addition to lunch and rest periods, employees also are entitled to engage in organizational activity during the time they spend on the company's property prior to the start of a work

shift and following the completion of a shift. Employer rules which prohibit solicitation during these time periods are presumed to be invalid and an employer with such rules must produce justification or be found in violation of the federal law. John Ascuaga's Nuggett (1977) 230 NLRB No. 43 [95 LRRM 1298]; Contra Costa Times (1977) 228 No. 71 [96 LRRM 1019]; Barney's Club, Inc. (1976) 227 NLRB No. 74 [94 LRRM 1444]; Blue Cross (1975) 219 NLRB 1 [90 LRRM 1063].

Even though the employer ordinarily cannot prohibit employees from soliciting their fellow workers during nonworking periods, the employer may be able to restrict the solicitation to nonworking areas. Meir & Frank Co. (1950) 89 NLRB 1016 [26 LRRM 1081]; May Department Stores (1944) 59 NLRB 976 [15 LRRM 173] enforced as modified 154 F.2d 533 [17 LRRM 985]. If the solicitation is accompanied by the distribution of literature, federal precedent frequently supports an employer's requirement that the activity be conducted in a nonworking area. In Stoddard-Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110] the NLRB sustained a rule which prohibited distribution of literature in working areas even during nonworking time. The NLRB reasoned that the distribution of literature reasonably could be thought to create a littering hazard. This reasoning has been followed in a number of more recent cases. Bankers Club, Inc. (1975) 218 NLRB 22 [89 LRRM 1812]; Seng Co. (1974) 210 NLRB 936 [86 LRRM 1372]; McDonald's Corp. (1973) 205 NLRB 404 [84 LRRM 1316]; but compare McBride's of Naylor Rd. (1977) 229 NLRB No. 120 [95 LRRM 1196].

While federal precedent protects employee organizers who solicit during nonworking hours in nonworking areas, nonemployee organizers have far fewer rights. Employers validly may post their property against nonemployee distribution of literature if reasonable alternative channels of communication are available and the employer does not discriminate against the union by allowing other distribution. NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001].

Under precedent from both the California Supreme Court and the PERB, it is appropriate that the Long Beach access regulations be analyzed in light of these federal decisions. Fire Fighters Union v. City of Vallejo (1974) 12 C.3d 608 [116 Cal.Rptr. 507]; Pajaro Valley Education Association (5/22/78) PERB Decision No. 51; Sweetwater Union High School District (11/23/76) EERB Decision No. 4.

#### The Prohibition Against Duty-Hour Solicitation

The District rule provides that "all activities concerning association business . . . shall be conducted outside duty hours of the workday for the individuals involved."

In its attack on the rule, the Federation relies heavily on NLRB and federal court precedent. The Federation argues that while on its face the rule would appear to prohibit organizational activities only during working periods, the prohibition in practice extends beyond that. The Federation notes that in application the prohibition includes the 20 minutes before a teacher's first class and the 20 minutes after a teacher's last class. The Federation notes that while all teachers are required to be present during those time periods, most teachers have no assigned duties during those periods. Many employees spend that time in lounges or doing

what they wish. Relying on Essex International, supra, 211 NLRB 749, and related cases, the Federation argues that the District has applied the rule to cover nonworking periods and it therefore is invalid.

The District argues that the 20-minute periods are working time for teachers and a ban on organizational activity during that time is lawful under the federal precedent. The District reasons that the length of time teachers must be present on campus prior to school in order to prepare for class is a matter of discretion for the board of education, citing as authority, Robinson v. Sacramento City Unified School District (1966) 245 Cal.App.2d [53 Cal.Rptr. 781] and Warner v. City of Los Angeles (1965) 231 Cal.App.2d 904 [42 Cal.Rptr. 502].

It should be noted that the Federation makes no attack on the District's rule that teachers must report to school 20 minutes prior to their first class and remain until 20 minutes after their last class. The dispute in the present case does not involve the discretion or flexibility of the District in determining such matters. The dispute is about whether the District can prohibit employee organization activity during those two 20-minute periods, if it can be shown that the periods are nonworking time.

On its face, as the Federation suggests, the policy seems to be in conformity with federal precedent. But its application has been too broad. It is undisputed that the policy is used to ban all solicitation efforts during the 20 minutes before a

teacher's first class and the 20 minutes following the last class. Clearly, some teachers are working during the two 20-minute periods and the policy properly may be applied to them. Teachers who are on yard duty or bus patrol, or who are in their classrooms preparing for students, are working and the District may lawfully ban efforts to solicit them. However, there is uncontradicted evidence that a number of teachers spend all or part of the two 20-minute periods in the teacher lounges, drinking coffee and conversing with each other. Plainly, those teachers in the lounge are not working. The very nature of spending time in the lounge suggests that the teachers so occupied are on a rest break. The rule is unreasonable insofar as it prohibits efforts to conduct organizational activity among teachers who are not working and who are in nonworking areas during the 20-minute periods before and after school.

In the case of the instructional aides, the rule has been applied to prevent efforts to contact them during their rest breaks and during the 20-minute periods before and after their workday. Instructional aides are not required to be present at school 20 minutes before their first class and they are not required to remain at school until 20 minutes after their last class. It is not reasonable, under NLRB precedent, for the District to ban organizational activity at times completely outside an employee's workday.

It is concluded, therefore, that the Federation had a right of access to District teachers who were not working and

who were in nonworking areas during the 20 minutes before their first class and the 20 minutes after their last class. In addition, the Federation had a right of access to all instructional aides who were present at school before or after their work shift and to those instructional aides who had rest breaks during the day. Because the District employed the 20-minute rule to deny the Federation access to nonworking employees, the District is found to be in violation of Government Code section 3543.5(b).

The Federation does not challenge the prohibition against organizational activity in the presence of students and non-employees and the legality of that rule is not considered in this proposed decision.

#### The Identification Card Rule

Under the District policy, Federation organizers who do not work at a particular campus must have a District-issued identification card in order to conduct organizational business on that campus.

The Federation argues that the identification card rule constitutes "a direct restriction upon solicitation during nonworking hours" and is therefore invalid under Republic Aviation Corp., supra, 324 U.S. 793. The Federation reasons that the District's interest in identifying persons who arrive on the campus can be achieved satisfactorily by requiring an organizer to provide any valid identification.

The District argues that to require an identification card for non-site employees "not only is rational by the dictates of common sense [but] it would be a dereliction of duty for the District not to do so." The District argues that it is entrusted with the responsibility for the proper and safe administration of its schools and it would be irrational to suggest it improper for a school to require a stranger to register at the office.

Under NLRB v. Babcock and Wilcox Co., supra, 351 U.S. 111, a nonemployee organizer has no automatic right of access to an employer's property. However, California law is different because Government Code section 3543.1(b) provides that an employee organization has the right of access to a school. In Government Code section 3540.1(d) the term "employee organization" is defined to "include any person such an organization authorizes to act on its behalf."<sup>16</sup> Without doubt, an off-campus organizer, including a nonemployee, fits within this definition. Thus, Federation representatives have a statutory right of access to school grounds.

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<sup>16</sup>Government Code section 3540.1(d) provides as follows:

3540.1. As used in this chapter:

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

But there are competing considerations. The District has the statutory obligation to protect students and to insure that strangers not disrupt school premises. School authorities are given considerable power to exclude persons who have no legitimate business on school grounds<sup>17</sup> and it is a misdemeanor for a person who has been requested to leave a school to refuse to do so.<sup>18</sup>

It is not unreasonable, therefore, that employee organization representatives be required to identify themselves when they enter a school and to produce documentation of their identity. However, as the Federation argues, the District's "interest in identifying organizers for the union can be achieved just as easily by requiring any valid identification when the organizer arrives on the school premises . . ." The problem with the District's process is that it contains inherent delays. Some period of time must pass between when application is made and a District-issued identification card is received. Because of this built-in delay, the Federation is not able to use the services of an organizer who might become suddenly available but who has no District-issued identification card.

The District can protect its interests by insisting that Federation organizers produce satisfactory identification before going onto a school campus. For example, the combination of a driver's license and a Federation identification card should be sufficient to satisfactorily demonstrate the identity of any Federation

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<sup>17</sup>See Education Code sections 32211 and 44810.

<sup>18</sup>See Penal Code section 626.8.

organizer. By requiring such a combination of documents, the District could meet its need to keep strangers off a school ground and the Federation could meet its need of obtaining access to employees without delay. If the District desires, it could continue to offer a special identification card for organization representatives who wish it. But a requirement that all organization representatives have such a card is an impediment to the Federation which satisfies no District need that cannot be met with less difficulty for the organization.

It is concluded that the requirement that an employee organization representative have a District-issued identification card inhibits the access of an employee organization to a school facility. The identification card requirement is therefore found to be in violation of Government Code section 3543.5(b).

#### The Limitation on Organization Representatives

The District rule provides that "normally, no more than two representatives from the same association will be permitted at a site for a single visit."

According to the evidence, the limitation of two organizers presents a problem at large schools which have as many as 120 faculty members. At the hearing, the District indicated that it might be possible for more than two organizers to visit a large school, depending on the circumstances.

The Federation argues that the limitation to two organizers lacks the flexibility which is required by the PERB in Magnolia

Educators Association v. Magnolia School District (6/27/77)

EERB Decision No. 19. The Federation contends that the regulation is a continuing violation which has a cooling effect upon the rights of the Federation to engage in organizational activities.

The District describes the Federation's contentions as "make weight" and argues that Magnolia is inapplicable because it relates to release time. Moreover, the District observes that the regulation provides that "normally" only two representatives will be allowed because in a small school two representatives could handle the task. However, the District continues, there is clear evidence the District would be flexible in allowing more than two representatives on a larger school site.

Government Code section 3543.1(b) assures employee organizations of the right of access to school facilities "at reasonable times" subject to "reasonable regulation" by the employer. Both parties have reasonable competing interests in any limitation on the number of employee organization representatives who visit a campus. The employee organization wants to put enough organizers on the campus to reach all of the teachers in the time available. The District wants to prevent any disruption of its educational program which could be caused when a large number of outsiders descend on a campus to engage in organizing.

In actual practice, the parties do not appear far apart on this matter. The Federation's only complaint about the rule is its application to the high schools and large schools,

generally. The District agrees there is room for flexibility at the larger schools. On its face, the rule is not unreasonable. It sets the two-organizer limitation as the "normal" restriction. The implication on the face of the rule is that in some circumstances the District will allow more than two organizers. In testimony at the hearing, the District stated that the rule is flexible. There is no evidence about how the rule actually is implemented because the Federation never asked to have more than two organizers on a particular campus at one time.

Because the rule is reasonable on its face, a violation of the EERA could be found only if the rule were implemented in a manner that is not reasonable. By the date of the hearing, it had never been tested because the Federation had never attempted to place more than two organizers on a large campus. If the District were to apply the rule inflexibly so that it is never possible for an employee organization to have more than two organizers on a campus at one time, no matter what the circumstances, that likely would be a violation. However, there is no evidence of such inflexibility.

It is concluded, therefore, that the two-representative rule is reasonable and the District did not violate Government Code section 3543.5(b) by adopting it.

#### The Three-Person Conversation and Prior Arrangement Rules

The District's rule about the number of persons with whom an organizer can speak and the rule about advance registration for a facility are complicated and difficult to understand.

In essence, they provide as follows:

1) An organization representative meeting informally with employees in lounges, workrooms, lunchrooms and similar areas

may speak with no more than three employees at a time;

2) The District will provide a room or other facility, depending upon availability, to an employee organization representative who wishes to speak with four or more employees simultaneously;

3) Organization representatives who do not work on a particular campus must make arrangements at least one day in advance in order to speak with employees on that campus, regardless of whether the meeting is to be with small groups of up to three or larger groups of four or more in a prearranged facility;

4) Organization representatives who work on a campus must make arrangements at least one day in advance in order to speak to a group of four or more in a prearranged facility.

The Federation argues that the three-person conversation rule must fail under both PERB and federal precedent. Citing Magnolia, supra, EERB Decision No. 19, the Federation argues that the District's rule is inflexible and "does not take into account private conversations . . . which are in no way disruptive of the privacy . . . of other employees." Under federal precedent, the Federation continues, even a showing that conversations with four or more employees are necessarily noisy would not be sufficient justification for the rule. The Federation cites various NLRB cases involving solicitation rules at hospitals in support of this argument.<sup>19</sup>

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<sup>19</sup>The Supreme Court has granted certiorari in one of the hospital cases. NLRB v. Beth Israel Hospital, cert. granted 46 L.W. 3446, 3453. In NLRB v. Beth Israel Hospital the NLRB found invalid a hospital rule which prohibited solicitation and distribution of literature in patient areas.

The District contends that the three-person conversation rule is a legitimate restriction. The District argues that employees have the right to refuse to participate in organizational activities and the rule protects that right. The District argues that it has adopted regulations to protect teachers in faculty rooms and lunchrooms in accord with the requirements of the California Supreme Court. Los Angeles Teachers Union v. Los Angeles City Board of Education (1969) 71 Cal.2d 551 [78 Cal.Rptr. 723].<sup>20</sup>

As for the prior arrangement rule, the District argues that only Ms. Ribar had difficulty securing a room and the District attributes that difficulty to Ms. Ribar and not the policy. In those cases where rooms were not available, the District argues that it had no obligation to provide other arrangements.

By adoption and enforcement of these policies, the District seeks to vindicate its interest in protecting employees who do not wish to be bothered by organizational solicitations and to insure that the educational program is not disrupted. The Federation's competing interest is to obtain access to District employees in the easiest manner possible.

Almost without doubt, the District can adopt a regulation prohibiting meetings which are disruptive or which interfere with employees who do not wish to take part. Moreover, it is

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<sup>20</sup>As noted by the Federation in its reply brief, this case offers the District no solace. Indeed, the case might be read as a strong indication that the District's regulations violate the basic First Amendment rights of District employees.

almost without doubt that the District can require any organization to register in advance in order to use a District room or other facility for a large meeting. School facilities are for teaching and any other use must be scheduled around use for instruction.

But the rules which the District has adopted go far beyond those requirements. Under the District's approach, all organization representatives who do not work on a campus must give at least a one-day notice before appearing on campus. While advance notice is justifiable if an organization desires to obtain a room, no justification was given for why an organization must register in advance in order to meet quietly with employees who are on a rest break and in a nonworking area. Since no facilities are required, there is no scheduling problem which the District must try to solve. The rule simply stands as an impediment for an organization like the Federation which must rely heavily on visits by persons who do not work at a particular school site.

Likewise, there was scant justification given for why conversations are restricted to three employees at a time. It is not demonstrable that a conversation with four persons or five persons cannot be quiet and nondisruptive. It is legitimate to require that the organizing be nondisruptive. But the District's artificial restriction on conversations to a maximum of three employees at a time presents an unreasonable impediment to access.

It is concluded that the District's three-person conversation rule is an unreasonable limitation on an organization's access to employees. It further is concluded that the District's

one-day advance registration requirement for organizational representatives who do not work on a campus is an unreasonable limitation on an organization's access to employees.

However, it is concluded that the District may properly require advance registration by any organization desiring to have a District facility set aside for its exclusive use.

#### Restrictions on the Distribution of Literature

The District's rule on the distribution of literature allows employees to distribute materials during "non-duty" hours. Organization representatives who are not employees may distribute literature to employees during non-duty hours of the employees to whom they are distributing materials. Non-employees also may place materials in employee mailboxes at any time during business hours.

The Federation argues that regardless of the policy's wording, the District implemented the rule to block distribution of materials by Ms. Ribar to the instructional aides. The District responds that the failure in distribution of the materials lies with the Federation.

On its face, the rule presents some ambiguity. It is not clear whether the rule bans employee distribution of literature at all times during the work day or merely bans distribution during times when employees actually are working and permits it during rest breaks. Likewise, it is not clear whether non-employees are prohibited from distributing literature to employees at all times during the work day or just during those

times while employees are working.

Under Essex International, supra, 211 NLRB 749 and related cases, the District may not prohibit the distribution of literature in nonworking areas while employees are on rest breaks or at lunch. An employer may ban the distribution of literature during work times and, under some circumstances, may ban distribution at all times in work areas.

The evidence suggests that the rule was enforced so as to impede Ms. Ribar's distribution of literature at all times and all places. By the District's application of the 20-minute rule Ms. Ribar was precluded from directly distributing literature to aides at all but three campuses. On many campuses she was hindered in her efforts to place literature in locations where aides could receive it.

Because of the ambiguity in the wording of the rule and because of the manner in which it was enforced against Ms. Ribar, it is concluded the rule is an invalid restriction on an employee organization's right to distribute materials.

Alleged Violations of Government Code Sections 3543.5(a) and 3543.5(d)

In its original charge the Federation accused the District of violating Government Code sections 3543.5(a) and (d). These contentions were consistent with the allegations made by the Federation in that original charge.

However, prior to the start of the hearing the Federation withdrew the factual allegations which were consistent with

subsection (a) and (d) violations. In its briefs, the Federation argues that the District's conduct denied rights guaranteed by Government Code section 3543.1(b), the provision listing rights assured to employee organizations. This would be consistent with an argument that the District violated Government Code section 3543.5(b), the provision making it an unfair practice to deny an organization rights guaranteed to it under the EERA.

There is no evidence consistent with a violation of Government Code sections 3543.5(a) or 3543.5(d) and in its brief(s) the Federation does not discuss a theory for how the District's conduct might have been in violation of those sections. Therefore, it is concluded that the Federation has failed to prove any violation of Government Code sections 3543.5(a) and 3543.5(d). Accordingly, the allegation that these sections were violated is hereby dismissed.

#### THE REMEDY

It is appropriate that an order be issued to the District that it cease and desist from enforcing those regulations which are in violation of the Federation's right of access to employees. Such an order is in accord with Government Code section 3541.5(c) under which the PERB is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and 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.

It is clear that unless the District is directed to cease enforcement of certain of its rules, employee organizations will continue to have difficulty in gaining access to District employees.

It also is appropriate that the District be required to post a copy of this order. Posting of the order will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy. A posting requirement has been upheld in a California case involving the Agricultural Labor Relations Act, Pandol and Sons v. ALRB and UFW (1978) 77 Cal.App.3d 822. Posting orders of the NLRB also have been upheld by the United States Supreme Court, NLRB v. Empress Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]; Pennsylvania Greyhound Lines, Inc. v. NLRB (1938) 303 U.S. 261 [2 LRRM 600].

#### ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is found that the District has violated Government Code section 3543.5(b), and pursuant to Government Code section 3541.5(c) of the Educational Employment Relations Act it is hereby ordered that the Long Beach Unified School District, Board of Education, superintendent and representatives shall:

A. CEASE AND DESIST FROM:

1. Enforcing District regulations so as to prevent employee organizations from having access to employees and

conducting solicitation for membership or other organizational business during the time employees are present on District facilities but are not actually engaged in work, either before, during or after the work day;

2. Enforcing the District regulation which requires employee organization representatives to obtain District-issued identification cards in order to visit District facilities on organizational business;

3. Enforcing the District regulation which precludes employee organization representatives from speaking to more than three persons simultaneously in lounges, workrooms, lunchrooms and similar areas; except that the District may require that such conversations be conducted in a quiet and nondisruptive manner;

4. Enforcing the District regulation which requires an employee organization representative to register at least a day in advance to speak informally with employees in District lounges, workrooms, lunchrooms or similar areas; except that the District may require registration at least one day in advance where the representative seeks exclusive use of a District facility;

5. Enforcing District regulations so as to prevent employee organization representatives from distributing literature to employees during periods when the employees are on District facilities but are not actually working.

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

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

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

It is further ordered that:

1. The Federation's allegation that the District violated Government Code section 3543.5(b) by its adoption of the two-representatives-on-campus-at-a-time rule is hereby dismissed, and

2. The Federation's allegation that the District violated Government Code sections 3543.5(a) and 3543.5(d) by its adoption and implementation of the access rules is dismissed.

Pursuant to Title 8, California Administrative Code 32305, this proposed decision and order shall become final on June 27, 1978, unless a party files a timely statement of exceptions. See Title 8, California Administrative Code 32300.

Dated: June 2, 1978

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Ronald E. Blubaugh<sup>0</sup>  
Hearing Officer