STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TURLOCK TEACHERS ASSOCIATION, Charging Party, v. TURLOCK JOINT ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2003-E PERB Decision No. 1490 July 17, 2002

Appearances: California Teachers Association by Priscilla Winslow, Attorney, for Turlock Teachers Association; Currier & Hudson by Richard J. Currier, Attorney, for Turlock Joint Elementary School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Turlock Teachers Association (TTA) and the Turlock Joint Elementary School District (District) from an administrative law judge's (ALJ) proposed decision dismissing the TTA's unfair practice charge. The charge alleged that the District violated the Educational Employment Relations Act (EERA) [1] by prohibiting teachers represented by the TTA from wearing a button produced by the TTA in support of its bargaining demands and which referenced the contention that the District's teachers were no longer number one in compensation during instructional times or in other instructional settings.

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

The Board disagrees with the ALJ's finding that the wearing of a button in support of bargaining which advertises that the District's teachers were no longer number one in compensation is "political activity" prohibited by the Education Code. On that basis, the Board reverses the ALJ's proposed decision and finds that the District interfered with employee rights guaranteed by EERA in violation of Section 3543.5(a) and (b)[2] by prohibiting the wearing of the button at issue.

FINDINGS OF FACT

In the spring of 2000, the parties were engaged in negotiations on a successor agreement to one that had expired in June 1999. According to TTA Organizing Chairperson, Charles Warren Conrad (Conrad), negotiations were "extremely slow." The parties had met at least 20 times. Sometime in May 2000, TTA set out to increase the visibility of its bargaining demands and the solidarity and support of its membership. As part of this effort, TTA developed a program to have teachers wear lapel buttons. Most teachers in the bargaining unit represented by TTA wore the buttons. They did so to show and build their solidarity with one

[2] EERA section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

another, communicate their support for TTA, and express their concerns regarding certain bargaining issues, as detailed below. TTA's activities also included a letter writing campaign to the superintendent and the board of trustees, letters to the newspapers, talks with parents, distribution of informational flyers, rallies, attendance at board meetings, contacts with radio stations and "work to rule."

The button, a white, round badge about 2-1/4 inches in diameter, bore a burnt orange circle around the perimeter, with "Turlock Schools" printed in the circle at the top. There was a burnt orange slash in the circle crossing the figure "#1" inside the circle. Also in the circle was handwritten "TTA".[3] The circle also had the numbers 9, 11 and 14 around the bottom. The face of the button was intended to convey TTA's contention that the District had slipped from number one in teacher salaries in Stanislaus County to number 14, a subject at issue in bargaining. TTA witnesses testified consistently that the purpose of wearing the buttons was to foster communication between members, build solidarity, and express the collective opinion of unit members to the District about TTA's bargaining demands.

A teacher from each of eight schools testified that he or she wore the button in the classroom. The teachers said they heard of no complaints from parents. None considered the buttons disruptive. The purpose of wearing the buttons continuously was to build solidarity, let the administration know the teachers were unified, publicize their demands, and avoid the inconvenience and worry of taking the buttons off and putting them back on. Two teachers testified that there was no message intended for the students.

[3] At some point, new buttons were acquired and distributed to teachers that were the same as the one described above, except that they had "CTA/NEA" inside the circle instead of "TTA."

On June 1, 2000, Assistant Superintendent Bob Stammerjohan (Stammerjohan) wrote to Donna Crist, TTA president. He stated:

> It has been brought to my attention that teachers are engaging in political activity during times when they are directly engaging in instructional activities with students. Although teachers certainly have the right of free speech, there are restrictions which are recognized by the courts. For example, teachers must refrain from engaging in political advocacy with students during instructional activities. Teachers must not wear political buttons, including buttons covering union political activities, during instructional times or during other instructional settings. They also must not display political posters in their classrooms during instructional times or during other instructional settings. The recently published decision of California Teachers Association v. Governing Board of San Diego Unified School District (1996) 45 Cal. App. 4th 1383, clearly supports these limited restrictions.
>
> As public employees, we all enjoy freedom of speech, but we must not engage in political advocacy when students are present during instructional activities. Students are present to learn the adopted curriculum, and not be subjected to unrelated political activity.
>
> Your prompt cooperation in informing your members of these restrictions would be appreciated. If you desire any additional clarification, please do not hesitate to check with me at any time. (Underlining added.)

During this general time period, Conrad was told by his vice-principal to remove the button while he was teaching.

The parties reached settlement of a collective bargaining agreement on June 21, 2000.

Separate from the events underlying the charge herein, in the fall of 2000, teachers were provided with and wore other buttons that said "No on Prop 38," a school voucher initiative on the November 2000 ballot. The board of trustees had adopted a position against the initiative. Stammerjohan stated, in testimony credited by the ALJ, that he saw Conrad

wearing this button at an administration-sponsored social just before school started, and that he told Conrad the button was inappropriate for the classroom.[4]

DISCUSSION

Under EERA section 3543, employees have the "right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

Under EERA section 3543.1(b) employee organizations 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.

This case calls upon the Board to analyze employees' rights under EERA to participate in the activities of their employee organizations for the purpose of representation on a matter of employer-employee relations and the statutory access right in light of the restrictions on political activities contained in the Education Code.

Section 7050 of the Education Code provides as follows:

> The Legislature finds that political activities of school employees are of significant statewide concern. The provisions of this article shall supersede all provisions on this subject in any city, county, or city and county charter as well as in the general law of this state.

Education Code section 7051 defines agencies to which the chapter applies and includes school districts.

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[4] The Prop. 38 button was not mentioned in the unfair practice charge at issue here and the District's conduct relative to that button is not the basis of any unfair practice charge presented for consideration before the Board in this matter.

Education Code section 7052 provides:

> Except as otherwise provided in this article, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a local agency.

Education Code section 7055 provides that the governing body of each school district may establish rules and regulations regarding: (a) officers and employees engaging in political activity during working hours, and (b) political activities on the premises of the district.

TTA argued before the ALJ that wearing buttons or insignia in the workplace is protected activity, citing State of California (Department of Parks and Recreation) (1993) PERB Decision No. 1026-S (Parks). In that case, arising under the Dills Act,[5] the employer had banned the wearing of all union buttons. PERB noted that the National Labor Relations Board had prohibited the wearing of union insignia when safety, discipline or effect on the employer has been shown. As no showing was made by the state regarding issues of safety, discipline or effect on the employer, the Board held in Parks that the ban was in violation of the Dills Act. TTA argued that the case should be analyzed under the Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad) test for interference with protected activity, as used in Parks.[6]

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[5] The Dills Act is codified at Government Code section 3512, et seq.

[6] At the hearing, in its opening statement to the ALJ, TTA challenged the District to present evidence of special circumstances justifying a ban on the buttons: "PERB has held in [Parks] that the burden lies with the employer to demonstrate such special circumstances that would justify a ban on the wearing of union buttons in the work place. ¶ In this case, the employer will not be able to carry such a burden." The District was therefore on notice of the Parks decision and the relevance of evidence of special circumstances, yet failed to proffer such evidence.

The District argued that Parks did not control and that the ban was justified under two later cases, California Teachers Assn. v. Governing Board (1996) 45 Cal.App.4th 1383 [53 Cal.Rptr.2d 474] (San Diego) and Wilmar Union Elementary School District (2000) PERB Decision No. 1371 (Wilmar). The District contended that Parks, a Dills Act case involving union insignia designed to identify the new exclusive representative and to assist in identifying union stewards on the job sites, is inapplicable to an EERA case involving teachers wearing buttons in front of students in the classroom.

The ALJ noted that, in San Diego, the court ruled under Education Code section 7055 that a school district may regulate employee political activity such as wearing political buttons during working hours without interfering with state or federal constitutional rights. In San Diego the court upheld the district's ban against teachers wearing political buttons in an instructional setting in order to disassociate itself from matters of political controversy.

In Wilmar the Board dismissed an unfair practice charge in which a district ordered a teacher and union representative to remove her pickup truck from the school parking lot because the truck displayed a large sign advocating named candidates for the board of trustees. Visible to students, the sign indicated that these candidates were endorsed by the union. In that case, the district also adopted a policy indicating that staff could wear campaign buttons while performing non-instructional duties, provided that the buttons were not visible to children.

TTA contended that San Diego and Wilmar were both inapposite because, unlike in the instant case, the written expression in those cases related to votes in electoral campaigns, which falls within the legitimate scope of the authority Section 7055 grants to employers to regulate expression.

In the instant case, the ALJ ruled that Education Code section 7055 is not limited to activity related to candidates for office or positions on initiatives, but also involves "political activities" during working hours and "political activities" on school premises. He noted that "Webster's Third International Dictionary" defines "political" as "of or relating to government, a government, or the conduct of government affairs." Relying on that definition, the ALJ reasoned that, since the District board of trustees is a government entity, wearing buttons to affect the District's positions at the bargaining table was an activity "of or relating to" a government. Accordingly, he reasoned, wearing the buttons constituted "political activity" within the meaning of Education Code section 7055. Consistent with this definition of political activity, he found the San Diego case dispositive.

The ALJ also noted that, while there is no single consensus for the Board's holding in Wilmar, each of the Board members cited San Diego. He concluded that, under that precedent, the District was empowered to restrict the teachers from wearing the buttons in the classroom.[7]

Both parties filed exceptions to the ALJ's proposed decision.

TTA excepts to various conclusions reached by the ALJ. Inter alia, TTA claims that: (1) the ALJ erroneously interpreted the term "political" as used in the Education Code, leading him to wrongly conclude that the wearing of the buttons was "political"; (2) the ALJ wrongly applied San Diego to this case; (3) the ALJ mischaracterized Wilmar; and (4) the ALJ erred by failing to make a finding that the District tolerated the wearing of the "No on Proposition 38" buttons, whereas it banned TTA's bargaining-related buttons.

[7] The ALJ also rejected TTA's argument that the District, by failing to ban the wearing of the Proposition 38 buttons, belied an operational necessity defense. The ALJ found insufficient evidence that the District allowed teachers to wear "No on Proposition 38" buttons. In fact, he found evidence to the contrary, in that Stammerjohn admonished Conrad at a pre-school social that the "No on Proposition 38" button was not to be worn in the classroom.

The District also filed exceptions, stating that it agrees with the ALJ's decision, but excepts to the ALJ's statement that "resolution of what is meant by the word 'political' is critical to this case." The District concedes the term is "relevant," but offers additional grounds for dismissal of the complaint. Citing one member's opinion in Wilmar, it asserts that the wearing of union buttons in the classroom when only students are present has "no relationship" to protected activity under the EERA. Additionally, the District urges the Board to make an affirmative finding that dismissal is justified because TTA failed to meet its burden of proof of demonstrating that the employer's conduct tends to or does result in harm to protected employee rights (citing Carlsbad).

The Board finds that wearing the buttons at issue in this case was protected activity under EERA and that the Education Code did not grant the District the authority to override employees' statutorily protected right.

The wearing of union buttons is a protected right under EERA, absent special circumstances. This position is clearly supported by Board case law and private sector precedent.[8] The Board held in Parks that:

> The right to wear buttons is not unlimited and is subject to reasonable regulation. If special circumstances exist, then the employer may well be within its rights to limit or prohibit the wearing of buttons by employees.
> (Id. at p. 8.)

There is no evidence in the record in the instant case to indicate that any "special circumstances," such as safety, discipline, effect on the employer, or any "disruption," were

[8] (See Parks; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [89 L.Ed. 1372]; Pay'N Save Corp. v. NLRB (9th Cir. 1981) 641 F.2d 697 [106 LRRM 3040]; NLRB v. Harrah's Club (9th Cir. 1964) 337 F.2d 177 [57 LRRM 2198].)

caused by the union buttons.[9] Therefore, the protected right to engage in such protected activity under EERA remains intact.

Since there is no evidence of these "special circumstances" under EERA, we turn our attention to the Education Code.

Education Code section 7055 provides that:

> The governing body of each local agency may establish rules and regulations on the following:
>
> (a) Officers and employees engaging in political activity during working hours.
>
> (b) Political activities on the premises of the local agency.

The Board disagrees with the ALJ's conclusion that the wearing of these particular union buttons was "political" activity within the meaning of Education Code section 7055 and disagrees that San Diego controls the instant case.

In San Diego, the buttons worn by teachers urged a "no" vote on a statewide proposition concerning school vouchers. As such, the decision in San Diego correctly applied Education Code section 7054 which provides that no District funds, services, supplies or equipment shall be used to urge the support or defeat of any ballot measure or candidate. The issue before the court in San Diego was whether the Education Code helped the district "protect itself from the risk of having political views attributed to it by restricting political activities in curricular settings." (Id. at p. 1391.)

In the instant case, the ALJ reasoned that because the District board of trustees is a governmental entity, the wearing of union buttons supporting a bargaining position is an

[9] In its response to TTA's appeal, the District does not argue any of these factors (safety, discipline or disruption).

attempt to influence the board of trustees as a governmental entity and is therefore political activity. At page 10 of the proposed decision, the ALJ concluded:

> Clearly, the teacher's wearing of the button was in regard to the conduct of the board of trustees, a governmental entity, and thus, constituted "political activity" within the meaning of Education Code section 7055.

However, the ALJ also noted that the purpose of wearing the button was to cause the governing board of trustees to change its position at the bargaining table. This purpose, within the context of collective bargaining, is critical to the determination of this case.

When examined in light of adjacent statutory provisions and the purposes of EERA, the scope of the definition of "political activties" in Section 7055 cannot reasonably be construed so broadly as to encompass the exercise of concerted activity through the wearing of a button communicating employees' bargaining demands, expressing unity and support for the union, and building solidarity. Such a finding would fail to distinguish between the trustees' role as the employer under EERA and their activity as candidates for elected office or as incumbents seeking preservation of their offices or reelection.

While the term "political activities" is not specifically defined in the Education Code, sections 7050-7058, read in their entirety, clearly associate political activity with an election of a candidate or a ballot measure. Relevant to this conclusion is the report that the evident purposes of Education Code section 7054 is "to prevent partisan campaigning by a district." (84 Ops.Cal.Atty.Gen 52 (2001) citing [Sen. Appropriations Com., Rep. on Sen. Bill No. 82 (1995-1996 Reg. Sess.) as amended May 1, 1995, p. 1.].) The scope of the definition is also

illuminated in San Diego, where the prohibition on "political activity" of teachers in the classroom setting was limited to the election of a candidate or ballot measure or other activity of a partisan nature.[10]

Wilmar is also distinguishable from this case. There, the Wilmar teachers association created buttons shaped like business cards showing support for three candidates for the district board of trustees. Here, by contrast, the buttons communicated TTA's concerns about salary comparisons with other school districts in Stanislaus County in order to influence the District's position at the bargaining table, not to demonstrate support for or opposition to electoral candidates. Such communication facilitates the flow of information between teachers and the trustees regarding matters important to achievement of harmonious employer employee relations, consistent with the fundamental purposes of EERA.

A central purpose of EERA, as with all labor legislation at the state and federal levels, is to promote stable labor relations. A classic means of fostering such stability is by promoting clear and open communication between the parties during labor negotiations in an effort to achieve continuous public service throughout every step of the bargaining process. EERA section 3540 expressly states, in pertinent part:

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[10] The definition of "political activities" adopted by the ALJ was overly broad and was inconsistent with the statutory context within which the provision appears, with the purposes of EERA, and with the nature of public employee collective bargaining. Indeed, any speech regarding an issue in controversy between an employee organization and a public employer would involve a matter "of or relating to government, a government, or the conduct of government affairs," the definition of "political" derived by the ALJ from the Webster's Dictionary. Thus, under the ALJ's analysis, public employees – because they are public employees – could be barred from expressing their opinions on any matters related to collective bargaining, while private sector employees would not be so barred. This would be an ironic outcome, given that public employees enjoy constitutional speech protections in the workplace that private employees do not possess. (See, e.g., Kirchmann v. Lake Elsinore School Dist. (1997) 57 Cal.App.4th 595 [67 Cal. Rptr. 2d 268]; Waters v. Churchill (1993) 511 U.S. 661 [128 L.Ed 24 556].)

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

In furtherance of these purposes, it is important to assure that employees can freely voice their perspectives so that the parties can construct an agreement everyone may support. It is also important to assure that employers can ascertain the relative importance of their employees' concerns at the workplace, so that they can properly develop and weigh bargaining proposals during the process of negotiations. Such communication fosters the purpose of "improving employer-employee relations within the public schools" by ensuring that bargaining proposals are consistent with what the ratifying parties desire and will tolerate, and that the resulting contract will facilitate a stable relationship during its term. As the Education Code does not mandate an expansive statutory definition of political activity, we will not expand the definition through our case law in any way that would disrupt these important purposes of EERA.

Here, any influence cast by the buttons on the position of the members of the board of trustees would impact and assist them in their role as an employer during bargaining, rather than as candidates for election to such a board (which is not alleged).

In this case, the teachers would have a right to wear the union buttons unless "special circumstances" were established under EERA or they were found to violate the Education Code. However, the District did not argue or place any evidence in the record of any "special circumstances" under EERA. The Education Code bars only the special circumstance of

"political activity", which (as stated above) is not applicable to the employees' concerted activity of wearing the particular buttons at issue in this case.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Turlock Joint Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b). Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Prohibiting employees from wearing buttons expressing an opinion regarding a subject of collective bargaining between the employees' exclusive representative and the District as set forth in the decision of the Public Employment Relations Board (PERB) in this case;

2. Ordering employees to remove such buttons;

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

2. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of PERB in accordance with the director's instructions. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Turlock Teachers Association.

It is further Ordered that the proposed decision of the administrative law judge in Case No. SA-CE-2003-E is hereby REVERSED.

Members Baker and Whitehead joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-2003-E, Turlock Teachers Association v. Turlock Joint Elementary School District, in which all parties had the right to participate, it has been found that the Turlock Joint Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by prohibiting teachers represented by the Turlock Teachers Association (TTA) from wearing buttons expressing an opinion regarding a subject of collective bargaining between the employees' exclusive representative and the District as set forth in the decision of the Public Employment Relations Board (PERB or Board) in this case.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Prohibiting employees from wearing buttons expressing an opinion regarding a subject of collective bargaining between the employees' exclusive representative and the District as set forth in the decision of the Board in this case;

2. Ordering employees to remove such buttons;

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

2. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of PERB in accordance with the director's

instructions. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Turlock Teachers Association.

Dated: _____

TURLOCK JOINT ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.