

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EAST WHITTIER EDUCATION ASSOCIATION,

Charging Party,

v.

EAST WHITTIER SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4264-E

PERB Decision No. 1727

December 21, 2004

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for East Whittier Education Association; Munger, Tolles & Olson by Alan V. Friedman and Carolyn Hoecker Luedtke, Attorneys, for East Whittier School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the East Whittier School District (District) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA)¹ by adopting a policy prohibiting the wearing of certain union buttons in instructional settings.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the District's exceptions and the response of the East Whittier Education Association (Association). The Board declines to adopt the ALJ's proposed decision as it cites to Turlock Joint Elementary School District (2002) PERB Decision No. 1490 (Turlock T), which has since

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

been overturned by the Court of Appeal. However, as discussed in the decision below, the Board agrees with the ALJ's ultimate conclusion that the District violated EERA.

PROCEDURAL HISTORY

In this case, the Association alleges that the District unlawfully interfered with employee rights by adopting a policy limiting the wearing of union buttons. The Association filed the unfair practice charge at bar on February 2, 2001. PERB's General Counsel's office issued a complaint on May 18, 2001, to which the District filed an answer on June 7, 2001, denying any violation of law.

PERB held an informal settlement conference on August 30, 2001. The case was placed in abeyance for several months, until the Association requested that it be removed from abeyance. PERB ultimately held a formal hearing on March 10 and March 11, 2003. With the receipt of the final post-hearing brief on June 5, 2003, the case was submitted for decision.² On June 16, 2003, the ALJ issued his proposed decision finding that the District violated EERA.

After issuance of the proposed decision the District filed timely exceptions. The parties then requested that the Board stay this matter pending the Court of Appeal's decision in the challenge to Turlock I. The Court of Appeal eventually overturned Turlock I in a published decision. Subsequently, the California Supreme Court declined to grant review, but ordered that the Court of Appeal decision be de-published. As a result, the Board later issued Turlock Joint Elementary School District (2004) PERB Decision No. 1490a (Turlock ID which vacated Turlock I and summarily dismissed the complaint against the district without discussion.

²With its post-hearing reply brief, the Association also filed a "request for judicial notice" of a brief in another PERB case. The Board affirms the ALJ's denial of that request as untimely.

As a final decision had been reached in Turlock II, this matter was removed from abeyance. Briefs were then filed by the parties. The Board on its own motion requested oral argument which was heard on August 25, 2004.

FINDINGS OF FACT

The District is a public school employer under EERA. The District has ten elementary schools, grades K-5, and three middle schools, grades 6-8. The Association is an employee organization under EERA and is the exclusive representative of an appropriate unit of the District's certificated employees, including teachers, nurses and psychologists.

The basic facts of this case are fairly simple. The PERB complaint alleges, in part:

On or about January 8, 2001, Respondent [the District] adopted Policy 4142 and Administrative Regulation 4142 prohibiting employees from wearing in the presence of students any signs, buttons or other objects favoring or opposing any matter that is the subject of negotiations between the District and the exclusive bargaining representative.

In its answer, the District admits this allegation.

Policy 4142 states:

COMMUNICATIONS/CONTACTS

It shall be the policy of the Board of Education that all matters related to collective bargaining negotiations shall be kept out of the classroom and other instructional areas in the presence of students by both the exclusive bargaining representatives and the District.

Administrative Regulation 4142 states:

COMMUNICATIONS/CONTACTS

District employees shall not initiate any discussion with students in any District classroom or in other instructional areas that are related to collective bargaining negotiations between the District and the exclusive bargaining representatives. District employees shall not wear or otherwise display in the classroom or in other

instructional areas in the presence of students, any signs, buttons or other objects that favor or oppose any matter that is the subject of negotiations between the District and the exclusive bargaining representatives.

The District Board of Education (District Board) approved the policy and regulation at a regular meeting on January 8, 2001, over the objections of the Association.

The background of the policy and regulation is not in dispute. On August 31, 2000, the collective bargaining agreement between the Association and the District expired before the parties finished bargaining a successor agreement. One of the Association's bargaining goals was a salary increase of at least 10 percent, as had been achieved in some other school districts. In early October 2000, some Association members wore buttons to work that stated in part, "It's Double Digit Time!"

These "Double Digit" buttons came to the attention of Larry Bobst (Bobst), the District's assistant superintendent of personnel. Bobst then worked with the District's attorney to draft the policy and regulation. Bobst testified there were two reasons for the policy and regulation:

Well, the concern, again, as administrative team, Superintendent and myself, really two issues and two reasons for the policy. One was to protect instructional time. It's only natural that students would ask questions and be distracted by the buttons. We were trying to limit the distraction to students and keep them focused on the curriculum that is required. The state has a curriculum. The Board of Education has adopted a curriculum. The teachers need to instruct in that. We wanted to minimize any interference in the classroom with any distractions dealing with discussing buttons, discussing union issues. We wanted to avoid that. That was one reason.

Bobst continued:

The second reason was to protect the sensitivities of students. The buttons could lead to confusion, distraction on the part of students, not knowing whether or not their teacher was angry,

upset, concerned. Were they going to leave? Were they going to go on strike? Put students in a position where they were uncertain and could be confused and anxious about their teacher. We wanted to avoid that. Basically, what we were trying to accomplish was to keep negotiations out of the classroom and instructional time.
(R.T., vol. I, p. 48.)

The policy and regulation went before the District Board for a first reading on November 13, 2000.

At the second reading, the District Board meeting of November 27, 2000, the Association urged the District Board to table the policy and regulation. According to the minutes, the Association president told the District Board that "the proposed policy infringes on teachers' rights of free speech and their rights to show unity." The District Board agreed to table the matter for additional discussion at the meeting on January 8, 2001.

According to the minutes of the January 8 District Board meeting, the Association showed District Board members a new button being worn by teachers stating "Teachers are a Priority." The District Board agreed that the policy and regulation would not prohibit the wearing of this "Priority" button, because "the single intent of the policy is only to keep collective bargaining issues out of the classroom." At a previous meeting, a District Board member explained that she "has no problem . . . with teachers wearing buttons to show solidarity and unity, but she believes it is inappropriate to wear buttons that advertise the collective bargaining process." She and other District Board members expressed the view that bargaining-related buttons could distract students and prompt inappropriate discussions. The District Board unanimously approved the policy and regulation.

The Association also regarded the "Priority" button as bargaining-related: its bargaining updates to its members featured such headlines as "Teachers Not a Priority . . . Yet"

and "Make Teachers a Priority!" The District nonetheless permitted them to be worn in the classroom since it did not regard the buttons as bargaining-related. When Bobst was asked at the hearing whether buttons stating "It's Pay-Back Time" would be bargaining-related, he said he would need more information. Therefore, the District's distinction between buttons with bargaining-related issues and other types of union buttons is not perfectly clear.

Under the policy and regulation, even bargaining-related buttons could still be worn except "in the classroom or in other instructional areas in the presence of students." Such buttons thus could be worn in hallways, offices and lounges, and before, after or between class periods. The Association President, Kelly Sunada (Sunada), testified as to how many times a day she would have to put on or take off a bargaining-related button in order to maximize her exercise of rights under the policy and regulation:

Well, let's see, that would be two first period, between first and second, take it off first period, put it on after, during the break time, take it off after the break time, then at the end of second period put it back on during the break time, and take it off. I'd keep it on from nutrition, come back from nutrition to third period, take it off, between third and fourth put it back on. I'm lost. Fourth period take it off. Put it back on for lunch. Take it off before fifth, put it back on between fifth and sixth. Take it off sixth period, put it back on after school.
(R.T., vol. II, p. 60.)

She doubted that many Association members would be willing to do this.

In the District, there is usually just one certificated unit member at a time in a classroom or other instructional area in the presence of students. There are exceptions, however. Some kindergarten teachers, for example, share the same classroom at least part of the day. Nurses, psychologists, teacher-trainers and special education teachers spend some time in classrooms with other unit members. Teachers may also be in the same instructional areas for assemblies, field trips and physical education periods.

Sunada advised teachers to respond to student questions about buttons by saying that "it was a teacher thing," dismissing the subject, and getting back to the lesson. The District doubted such a response would be effective, but there is some evidence it may have been. Sunada testified that during a passing period between classes, when she was wearing the "Double Digit" button, a middle school student commented that "all the teachers are wearing those, huh?" Her response was "yeah, I guess so," and that ended the discussion. No other student commented to her about the "Double Digit" button. A kindergarten teacher who also wore the button testified that none of her students asked about or commented on the button.

Charles Royce, Principal of Granada Middle School in East Whittier City School District, testified that during the transition to a nutrition period he entered an alternative learning center classroom and saw a "Double Digit" button on the desk. A student approached the desk and asked the teacher, "What's that?" The teacher responded, "Don't worry about it. Go sit down." The teacher put the button away, and the conversation ended.

Jose Chavira, Assistant Principal for East Whittier Middle School, testified to a more significant student response to the "Double Digit" button. He testified that during lunchtime, nutrition and passing periods some nine or ten students asked him what the button meant and if the teachers were going on strike. He answered that the teachers were not going on strike and that negotiations were taking place, but the students seemed unsatisfied. Because students were talking about the button as they came out of classrooms during passing periods, he said he would "assume that possibly some of this discussion had taken place in the classroom."

Both the Association and the District had some other experience with bargaining-related buttons. In the spring of 2000, Sunada had worn a button supporting negotiations to reinstate a planning period. During a passing period, a student asked, "Why are the teachers

wearing those buttons and marching in front of the school?" She replied that it was "an activity that teachers were doing," and the conversation ended.

Also in 2000, a button stating "A Fair Contract Now" had been worn by some of the District's classified employees, including instructional aides. Josephine Sanders, Principal at Ceres Elementary School in East Whittier City School District, testified that a student going to the cafeteria had asked her why she was "being so mean to our teachers," referring to the instructional aides wearing the buttons. She told him she would not discuss it and he should get back in line, but he asked the question again. The principal testified:

He was very concerned. He had a kind of an anxiety look. His little eyebrows were frowned.
(R.T., vol. I, p. 167.)

She thought that "[o]bviously . . . some discussion had already taken place in the classroom about negotiation." She spoke to Assistant Superintendent Bobst about the "Fair Contract" button, but he decided "not to make an issue of it and jeopardize the [pending] contract" with the classified employees union. The principal also took no action.

The District has various policies to minimize classroom interruptions and distractions, but one could not describe them as "zero-tolerance" policies. According to Bobst, teachers may wear T-shirts that say "[a]nything that is not vulgar, that is not profane, [and] that does not deal with negotiations." With District approval, teachers may distribute flyers about community group activities. There may be parties for holidays and birthdays, and there are "fun days" when students are encouraged to wear special colors, "crazy hats" or even pajamas to school.

DISCUSSION

Employees Have a Protected Right to Wear Union Buttons

It is well-settled under the statutes administered by PERB that employees have a protected right to wear union buttons at the workplace. (State of California (Department of Parks and Recreation) (1993) PERB Decision No. 1026-S (Parks); see also, State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.)³ In Parks, a unanimous decision, Member Carlyle set forth the simple rule that, "the wearing of union buttons is a protected right, absent special circumstances." (Parks at p. 4.) The rule set forth in Parks was not created out of whole cloth, but rather necessitated by the statutory language of the statutes administered by PERB and by national public policy. (See EERA secs. 3543 and 3543.1(b); Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620] (Republic Aviation); see also, Pay'N Save Corp. v. NLRB (9th Cir. 1981) 641 F.2d 697 [106 LRRM 3040] (Pay'N Save); NLRB v. Harrah's Club (9th Cir. 1964) 337 F.2d 177 [57 LRRM 2198].)

Indeed, the rule set forth in Parks is nothing more than a carbon copy of the Republic Aviation standard utilized under the National Labor Relations Act (NLRA).⁴ In Republic Aviation, the United States Supreme Court affirmed the right of employees under the NLRA to wear union buttons in the workplace absent special circumstances. The rule set forth in Republic Aviation has now been the law of the land for almost 60 years.

³Indeed, neither party disputes this point of law.

⁴The NLRA is codified at 29 U.S.C. section 141, et seq. As EERA was modeled after the NLRA, it is appropriate to look to NLRA precedent for guidance in interpreting similar statutory language. (McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 311 [234 Cal.Rptr. 428].)

Special Circumstances

As mentioned above, the right to wear union buttons is not unlimited, but may be prohibited where special circumstances exist. As the ALJ noted in the proposed decision, the Board in Turlock I was not presented with the opportunity to define what constitutes "special circumstances." Thus, this case represents the Board's first opportunity to discuss this issue.

In the private sector, the National Labor Relations Board (NLRB) and the courts have recognized a variety of "special considerations". In Pay'N Save the court stated, in part:

The NLRB has found such special considerations, justifying a prohibition on wearing union insignia, in cases where the insignia could exacerbate employee dissension, jeopardize employee safety, or damage machinery or products. The courts have recognized additional 'special consideration' — distraction from work demanding great concentration and a need 'to project a certain type of image to the public' [Fns. omitted.]

Similarly, the ALJ noted that Turlock I cited safety, discipline and disruption as possible special circumstances.

Obviously, what constitutes a "special circumstance" depends on the setting, and "special circumstances" recognized in industrial settings may not be applicable in a classroom. For example, the wearing of union buttons will seldom jeopardize safety or damage machinery and/or products in school. Thus, what constitutes a "special circumstance" necessarily involves a balancing of the various interests.

On one hand, PERB must weigh the statutory rights of employees under EERA. Central to this consideration must be the maintenance of clear and open communication between the employer and employees. 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 a period of time, thereby promoting enhanced public service.

On the other hand, PERB must weigh the interests of the school district in educating its students in classrooms free of undue distraction and disruption. In this regard, the Board is cognizant of the cases, cited by the dissent, giving special treatment to classrooms in a variety of situations. While the Board is open to the possibility that certain instructional settings may constitute a per se special circumstance, the Board does not believe that "special circumstances" are inherent to all instructional settings. Instead, the Board holds that as a general rule the right to wear union buttons attaches in instructional settings as it does elsewhere.

That said, the Board would not characterize, as did the ALJ, the District's burden to demonstrate special circumstances as a heavy one. Rather, the District's burden is simply to demonstrate that a special circumstance exists. Here, of the five special circumstances or considerations listed in Pay'N Save (employee dissension, safety, property damage, distraction, and public image), the District in this case argues only that distraction is an issue. Certainly the Association's bargaining-related buttons were potentially one more distraction for students in the classroom. That distraction, however, must be compared with the kind of distraction that has been recognized as a special circumstance or consideration; and in this

case, with other distractions permitted or fostered by the District to enhance the sense of community among the students.

In Fabri-Tek, Inc. v. NLRB (8th Cir. 1965) 352 F.2d 577 [60 LRRM 2376] (Fabri-Tek), the "distraction" case cited in Pay'N Save, the employer manufactured magnetic memory devices by hand. These devices were "extraordinarily complex" and had to "operate perfectly." The court summarized the evidence as follows:

Without going into greater detail, it must be conceded the record indicates very clearly that a high degree of concentration is required on the part of the employees and that distractions of any kind might very well lead to inefficiency, work slowdown and costly errors.

The Board can also envision a classroom setting where a highly focused environment must be maintained. However, in the present case the District has not shown that the classroom work at issue requires such a high degree of concentration, or that one more distraction could have dire consequences. Further, the District has not demonstrated that any of its students are particularly susceptible to distraction, which might justify banning buttons as to those students. Finally, the Board takes notice that the record establishes that the District permits other articles of clothing and activities which are as distracting, if not more, than the buttons at issue.⁵ Accordingly, the Board finds that the District has not established distraction as a special circumstance justifying its policy and regulation.

⁵Indeed, as noted in the facts, the District permitted both bargaining and non-bargaining related buttons in the classroom. Although not specifically at issue here, the Board notes that historically, bargaining related activity, including buttons, have been accorded more protection than non-bargaining related activity.

Objective Test

In reaching this finding, the Board has not considered any evidence of actual disruption. The Board agrees with the District that actual disruption should not be required to demonstrate the special circumstance of distraction or disruption. Rather, the test must be an objective one based on an examination of the buttons at issue. Such a requirement is necessitated by the Board's desire to avoid pulling students and other third parties into unfair practice proceedings. Thus, the Board holds that in determining whether special circumstances exist, great care should be taken by the ALJ and the parties to avoid eliciting testimony, whether direct or through hearsay evidence, from students. Along these lines, the Board will similarly frown upon the introduction of expert witnesses.

Instead, the Board holds that where it is alleged that a button is distracting or disruptive, an objective examination of the button should take place. Buttons that contain profanity, incite violence, or which disparage specific individuals will always meet the special circumstances test. Otherwise, the trier of fact must examine the button in its given context to determine whether an objectively reasonable person would find it unduly distracting or disruptive. In determining whether a button is unduly distracting or disruptive, the trier of fact should consider both PERB precedent and private sector cases under the NLRA, as the ALJ did in analyzing Fabri-Tek. The trier of fact should also compare the buttons to other distractions prohibited or allowed by the employer.

After conducting such an analysis, the Board concludes that the District has failed to establish special circumstances to justify its policy and regulation with regard to bargaining-

related buttons. The Board therefore concludes that the prohibition of bargaining-related buttons violates EERA section 3543.5(a) and (b).⁶

The Wearing of the Unions Buttons At Issue Here Is Not Political Activity

Next, the Board must address an argument advanced by the District after the Court of Appeal issued its since de-published opinion overturning Turlock I. That argument is that school districts may ban union buttons under Education Code 7055 as "political activity."

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.

As it stated in Turlock I, the Board does not agree that the wearing of union buttons is "political" activity within the meaning of Education Code section 7055. When examined in light of adjacent statutory provisions and the purposes of EERA, the scope of the definition of "political activities" 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.

⁶The issue of whether the First Amendment permits the District to ban certain buttons based solely on content is not properly before the Board.

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].)

Supporting this view of the scope of the definition is California Teachers Assn. v. Governing Board of San Diego Unified School District (1996) 45 Cal. App. 4th 1383 [53 Cal.Rptr.2d 474] (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. 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.)

Similarly, the Board finds another cited case, Wilmar Union Elementary School District (2000) PERB Decision No. 1371 (Wilmar), distinguishable from this one. 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 support for the Association and/or its bargaining demands; 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. In this case, unlike San Diego and Wilmar, the collective-bargaining-related speech on the buttons is clearly not attributable to the District.

As noted above, 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:

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.

As the Education Code does not mandate an expansive statutory definition of political activity, the Board will not expand the definition through its case law in any way that would disrupt these important purposes of EERA. Accordingly, the Board rejects the District's contention that the buttons at issue can be considered "political activity" within the meaning of Education Code section 7055.⁷

⁷Indeed, under the District's interpretation, 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." Thus, 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

REMEDY

EERA section 3541.5(c) gives PERB:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter [EERA].

In the present case, the District has been found to have violated EERA section 3543.5(a) and (b) by prohibiting certificated employees from wearing buttons related to collective bargaining in instructional areas while students are present. It is therefore appropriate to direct the District to cease and desist from such conduct.

In its post-hearing brief, the Association argues that the District should also be directed to rescind the entire policy and regulation. This remedy, however, would exceed the scope of the violation. As previously noted, the Association does not argue that the policy and regulation violated EERA in banning bargaining-related classroom discussions or classroom signs. Although the District may choose to modify or rescind the policy and regulation altogether, it should also have the option of revising the policy and regulation so as not to prohibit bargaining-related buttons.

It is also appropriate to direct the District to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates

constitutional speech protections in the workplace that private employees do not possess. (See, e.g., Kirchmann v. Lake Elsinore Unified 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].)

the purposes of EERA that employees be informed both of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the East Whittier School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by prohibiting certificated employees from wearing buttons related to collective bargaining in instructional areas while students are present.

Pursuant to EERA section 3541.5(c), it is hereby ordered that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Prohibiting employees from wearing buttons related to collective bargaining.

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

1. Rescind or revise Policy 4142 and Administrative Regulation 4142 so that they do not prohibit employees from wearing buttons related to collective bargaining.

2. Post copies of the Notice attached hereto as an Appendix at all locations where notices to certificated employees are customarily posted. The Notice must be signed by an authorized agent of the District, indicating the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on East Whittier Education Association.

Member Whitehead joined in this Decision.

Chairman Duncan's dissent begins on page 20.

DUNCAN, Chairman, dissenting: I strongly dissent. The unfair practice charge alleged that the East Whittier School District (District) has violated the Educational Employment Relations Act (EERA) by adopting a policy limiting the wearing of buttons related to collective bargaining while in the elementary classroom during instructional times.

After a complete review of the record and hearing oral argument presented by the parties, I believe we should find in this particular case that the policy is narrowly tailored and under the facts presented here the charge should be dismissed, based on the reasoning set forth below.

As the parties have presented the facts of this case, a confluence of two lines of cases has been created. The union button cases and the political button cases. There are many arguments that buttons related to collective bargaining are or are not political. Whether they are or not can turn on how one defines political.

A brief overview of these two lines of cases is appropriate before addressing the issues of this case.

History of Union Button Cases

In 1993, the Public Employment Relations Board (PERB or Board) set the enduring test applied in cases where the wearing of union buttons in the workplace is at issue. In State of California (Department of Parks and Recreation) (1993) PERB Decision No. 1026-S (Parks and Recreation), the Board found that the right to wear union buttons in the workplace is protected activity but is subject to reasonable regulation. Parks and Recreation cited and followed the Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad) test and added that if special circumstances exist, then the employer may well be allowed reasonable regulation.

The Carlsbad test is multi-pronged. In Carlsbad, the test for violations of EERA section 3 543 (a) was set forth:

1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

Turlock

On August 9, 2001, a PERB administrative law judge (ALJ), Gary Gallery (Gallery), issued his proposed decision in an unfair practice charge case filed by the Turlock Teachers Association (TTA) against the Turlock Joint Elementary School District. In that case, there was an ongoing negotiation between TTA and the district. The outstanding issues included peer assistance and review, binding arbitration, agency fee, salary and benefits. TTA resolved to begin an intense activity in the community to put pressure on the board of trustees to settle the dispute. As part of that campaign, buttons were created for the teachers to wear. The message of the buttons was to convey that Turlock teachers were no longer number one in salary in the county. The purpose of wearing them was to build solidarity among its members and to express the collective opinion of unit members to the district about bargaining demands.

The ALJ stated that teachers must not wear political buttons, including buttons covering union political activities, during class or in other instructional settings. He noted this view was

supported by California Teachers Association v. Governing Board of San Diego Unified School District (1996) 45 Cal.App.4th 1383 [53 Cal.Rptr.2d 474] (San Diego).¹

ALJ Gallery then looked at whether the prohibition in the Turlock policy violated a teacher's rights under EERA. TTA argued that the right to wear buttons in the workplace had long been protected activity and cited the Parks and Recreation case in support of that right. The ALJ, however, pointed out that in that case, PERB went further and said, "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." (ALJ Gallery proposed dec. at p. 3.) He also disagreed with TTA that the Education Code restrictions did not apply.

TTA believed that San Diego should not apply because EERA was not raised there. The ALJ found Wilmar Union Elementary School District (2000) PERB Decision No. 1371 (Wilmar)² controlling.

The purpose of wearing the button was to cause the governing board of trustees to change its position at the bargaining table. This goal was to be the result of showing solidarity

¹The court of appeal upheld the school district policy preventing teachers from wearing buttons related to a statewide initiative while they were in the classroom. The restriction, according to the court, was authorized under Education Code section 7055. Further, it held that the restrictions did not violate either the U.S. or California State Constitutions because it was narrowly tailored to restrict the speech sponsored by the District. (San Diego at p. 1387.)

The policy could only be applied in instructional settings. The court first addressed under what circumstances political activity by the district's employees fell within a district's power to dissociate itself from political controversy. The conclusion was that the restriction could prohibit employees from engaging in political activity in instructional settings. (San Diego at p. 1392.) This was considered by the court to be an appropriate restriction as to the time, place or manner of speech.

²In Wilmar, the Board found that buttons and a sign in a teacher's (she was also a union representative) vehicle parked in the school parking lot, in support of candidates for the school board, were political and could be restricted under Education Code section 7055. This case is discussed under the "History of Political Button Cases" section, below.

among the teachers, fostering communication between members, and expressing the collective opinion of unit members to the district about TTA's bargaining demands by wearing the button. "Clearly, the teachers' 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." (ALJ Gallery proposed dec. at p. 4.)

Based on San Diego and Wilmar, ALJ Gallery found the district restriction to be reasonable. He proposed dismissing the complaint and unfair practice charge.

East Whittier I

The controversy over union buttons in the elementary school classroom first came to the District in an unfair practice charge (East Whittier City Elementary School District (2002) PERB Decision No. HO-U-800-E (East Whittier D)). This decision was made by ALJ Tom Allen (Allen) and was not appealed. It is therefore binding on the parties.

The District adopted a policy limiting when employees could wear any signs, buttons, or other objects favoring or opposing any matter that was the subject of negotiations between the District and the exclusive bargaining representative, California School Employees Association (CSEA). The limitation was that these could not be worn in the presence of students.

The motivation for the policy, according to the District, was that all matters related to collective bargaining negotiations be kept out of the classroom and other instructional areas by both the exclusive bargaining representative and the District.

The ALJ saw the issue as whether the District unlawfully interfered with employee rights to wear union buttons. Buttons stating "Strength through Unity" were allowed in the classroom but buttons that stated "Fair Contract Now" were not. The classified employees most impacted were the instructional aides because they spent more of their time in the

classroom when students were present. That was contrasted with the custodians who were usually in classrooms when no students were present.

ALJ Allen found that wearing a union button has long been a protected right. Therefore, CSEA did establish a prima facie case using the Carlsbad test. Under prong two of the test, he said that there was harm to the union members but that the harm was slight.

The burden then shifted to the District to show a valid reason for this policy. ALJ Allen found the District offered a justification under the operational necessity to limit classroom distractions. CSEA argued that it was necessary for the District to show "extraordinary circumstances" based on Parks and Recreation. The ALJ disagreed and noted that that case did not alter the Carlsbad test. Parks and Recreation was distinguished because in that case the buttons were banned completely not by time, place or manner.

Because East Whittier I did not impose a total ban, he believed the harm was slight and the burden was therefore less than it was on the employer in Parks and Recreation. Further, he noted that in Parks and Recreation most of the employees did not interact with the public. He believed that in the East Whittier I case the instructional aides interacted with a "public" of elementary and middle school students who were supposed to be focused on their curriculum. He noted at least some of them were easily distracted, based on the evidence.

In East Whittier I, prongs two, three and four of the Carlsbad test were found applicable and used in balancing the competing interests of the parties.

Turlock I (PERB Decision)

Both parties filed exceptions to the ALJ proposed decision in Turlock Joint Elementary School (2002) PERB Decision No. 1490 (Turlock ft. The Board did not agree with the ALJ. The proposed decision of the ALJ was reversed on the basis that the Board did not agree with the "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." The Board found the district interfered with "employee rights guaranteed by EERA in violation of Section 3543.5(a) and (b) by prohibiting the wearing of the button at issue." (Turlock I at p. 1; fn. omitted.)

The Board did not agree with the ALJ that the buttons in this case came under the parameters of Education Code section 7055 and stated "[w]hen examined in light of adjacent statutory provisions and the purposes of EERA, the scope of the definition of 'political activities' 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 role 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."

The Board went further and said, "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 the election of a candidate or a ballot measure." Attorney General Opinions were cited in support of this premise.³ San Diego was distinguished by the Board because the buttons worn were related to a statewide proposition. PERB saw the issue in that case as, "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.)

³The opinions related to teachers wearing political buttons in class (77 Ops.Cal.Atty.Gen. 56) and teachers wearing political buttons at back-to-school-night (84 Ops.Cal.Atty.Gen. 106). The opinions indicated teachers could not wear political buttons in class but could wear them to back-to-school-night. There was no definition of the term "political."

PERB pointed out that the ALJ had seen the purpose of wearing the button in Turlock I was "to cause the governing board of trustees to change its position at the bargaining table" and indicated the Board itself believed "[t]his purpose, within the context of collective bargaining, is critical to the determination of this case."

PERB also distinguished Turlock I based on the belief that the buttons and sign in that case were related to a board of trustees election and not collective bargaining issues. The Board stated:

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.

That decision also noted that the district did not put forth any argument or evidence that special circumstances⁴ existed in this case. PERB held that "teachers [had] a right to wear the union buttons unless 'special circumstances' were established under EERA or they were found to violate the Education Code."

Turlock I issued on July 17, 2002.

East Whittier II (Proposed Decision)

In June 2003, another District union button case came before ALJ Allen. This is the case now before PERB. The specifics of the case are addressed below. In light of the Turlock decision, ALJ Allen found the District failed to show that the special circumstances of student distraction and student sensitivity were sufficiently high to justify the policy that union buttons could not be worn in the classroom.

⁴This was an exception set forth in Parks and Recreation.

Turlock II (Court of Appeal)

Six months after the ALJ proposed decision in East Whittier II, the Fifth District Court of Appeal held in Turlock Joint Elementary School District v. PERB (2003) 112 Cal.App.4th 522 [5 Cal.Rptr.3rd 308] (Turlock II) that wearing union buttons in the classroom constituted political activity subject to restriction by the school district. This reversed the Turlock I decision.

In reversing, the court of appeal addressed the question, "whether a teacher's wearing of union buttons in the classroom during class time constitutes 'political activity,' which may be restricted by the District under the Education Code." (Turlock II at p. 310.)

The court issued a peremptory writ of mandate directing PERB to vacate its July 17, 2002, decision (Turlock I) and issue a new decision dismissing the complaint and the underlying unfair practice charge. Costs were awarded to the district. (Turlock II at p. 319.)

PERB complied and issued the new decision.

Turlock (California Supreme Court)

The TTA appealed to the California Supreme Court. On January 22, 2004, the Supreme Court denied review and ordered the case to be "Not Published".⁵

History of Political Button Cases (and constitutional concerns)

A number of cases addressed the wearing of buttons that did not have a union collective bargaining message. The message was, in those cases, an uncontroverted political message.

Some of these such as San Diego and Wilmar, have been referenced, above. Wilmar included not only the issue of political buttons but also a political sign.

⁵Under the California Rules of Court 979(d), the Supreme Court, on its own motion, may order an opinion of a court of appeal depublished. Depublication shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion.

There have been cases brought arguing that any attempt to restrict the freedom of expression of teachers is illegal as a violation of the freedom of speech, right to associate or other constitutional concerns. These cases have not been limited to California. While the cases from other states are not binding, some do provide insight into setting forth the critical issues.

In Green Township Education Association v. Stephen P. Rowe, et al. (2000) 328 N.J. SUPER. 525, 746 A.2d 449 [164 LRRM 2180] (Green Township), the issues related to employees campaigning on school property in support of a candidate. The buttons at issue in that case read, "NJEA SETTLE NOW". The policy challenged was in relation to political activity but the button was in support of the teachers' union. The union challenged the school conflict of interest policy stating it was a restriction on freedom of speech.

The court found that parts of the policy did restrict constitutionally protected conduct but found the restriction against the buttons acceptable.

The policy in question, applicable here, reads, "All employees are prohibited from engaging in any activity with students during performance of the employees' duties, which activity is intended or designed to promote, further or assert a position on any voting issue, board issue, or collective bargaining issue." (Green Township at p. 529.)

The union argued the restriction was overbroad and further argued that the button reading "NJEA SETTLE NOW" was allowed under the first amendment because it related to an issue of public concern. (Id. at p. 530.)

The Board countered that this was a restriction only in place during the time that teachers were in the school building and in the presence of students.

The court agreed the buttons did pertain to a question of public concern but balanced the interests involved and determined that, "[a]s innocuous as the buttons may seem, their

message is a political grievance, and there is no useful purpose in subjecting whole classrooms of children, who are a captive audience for most of the day and who cannot vote, to that message." (Id at pp. 530-531.)

The court then addressed the overbreadth issue and went through a recitation of a number of significant constitutional law cases, some of which have significant bearing on the case before us.

Of particular note, is the language from Green Township:

Although educational policy and labor relations are undoubtedly subjects of public concern, teachers obviously have a personal stake as well in seeking solutions and resolving problems in these areas. Whatever interest teachers have in expressing their views concerning the operation of the public schools is surely diminished in the setting of the classroom and the presence of students. The objective of the teacher in this context must be to educate his or her students and not to advance his or her self-interest. Conversely, the Board of Education has no interest in barring teachers from expressing their views on educational policy. 'But where government is employing someone for the purpose of effectively achieving its goals,' Waters v. Churchill, 511 U.S. at 675, 114 S.Ct. at 1888, 128 L.Ed. 2d at 699, it has an interest in restricting its employee's speech in order to accomplish that objective.

The court noted also, that

teachers serve as authority figures, and students are their captive audience. A classroom is not a free market of ideas. There is often no counterpoint to the views expressed by the teacher. Against this backdrop, we see nothing amiss in the Board's insistence that teachers confine their classroom activities to promoting the education of their students. [Id at p. 539.]

In Green Township the buttons related to collective bargaining were seen as political buttons. The resolution was a balance between the free speech concerns of the union and a reasonable restriction based on a time, place and manner analysis. The restriction was related to what the teachers were supposed to be doing in class, namely teaching the curriculum, not furthering their own financial interests.

It is significant that the students are required to be in the classroom and have no option of leaving. It is also possible that there would be cases where the students were encouraged to participate in conveying the teacher's message as well.

In Konocti Unified School District (1982) PERB Decision No. 217 (Konocti), a bus driver, who was the president of the union and chairman of its negotiating team, stopped the school bus he was driving on the way to school and urged the students on the bus to stay out of school if the union went on strike.

The union argued that public employees have a legitimate interest in communicating with students about labor disputes between the district and employee organizations. The Board found the activity of the bus driver was unprotected. It found,

Franklin's actions on the bus were conducted in an indefensible manner and are, consequently, unprotected. The incident occurred while Franklin was on duty and while transporting students to school. By making such an unauthorized stop, he temporarily interrupted his work to conduct organizational business without authorization and probably in violation of existing work rules. Further, he delivered his appeal to boycott classes to young students, likely to be impressionable and who were forced to hear it without being given the opportunity to leave.

The Instant Case

Association's Position

Here, the teachers object to a District policy that states, in relevant part:

It shall be the policy of the Board of Education that all matters related to collective bargaining negotiations shall be kept out of the classroom and other instructional areas in the presence of students by both the exclusive bargaining representatives and the District.

District employees shall not initiate any discussion with students in any District classroom or in other instructional areas that are related to collective bargaining negotiations between the District and the exclusive bargaining representatives. District employees shall not wear or otherwise display in the classroom or in other

instructional areas in the presence of students, any signs, buttons or other objects that favor or oppose any matter that is the subject of negotiations between the District and the exclusive bargaining representatives.^[6]

The unfair practice charge arose after some teachers wore a button into their classrooms that said, "It's Double Digit Time." There were also some other buttons. The District had not objected to "Make Teachers a Priority." The District believed that was facially neutral and did not believe that appeared related to collective bargaining.

The East Whittier Education Association (Association) position is that the proposed policy infringed on the teacher's rights of free speech and their right to show unity. The Association also put on testimony about the classroom activities such as spirit day, pajama day and crazy hat day, et al., to show that these caused disruption and were accepted by the administration.

District's Position

The District did not think the policy was a problem because it did not restrict teachers from wearing all buttons at all times.

The ALJ noted,

One District middle school assistant principal testified . . . during lunchtime, nutrition and passing periods some nine or ten students asked him what the button meant and if the teachers were going on strike. He answered that the teachers were not going on strike and that negotiations were taking place, but the students seemed unsatisfied. Because students were talking about the button as they came out of the classrooms during passing periods, he said he would 'assume that possibly some of this discussion had taken place in the classroom.' [East Whittier I (ALJ Allen proposed dec. at p. 6).]

⁶District Administrative Policy 4142.

ALJ's Position

The ALJ applied the Carlsbad test to the question of whether the District interfered with employee rights to wear union buttons.

He looked specifically at the two, three and four prongs of the test as those potentially applicable here. He cited Turlock I. Following that case specifically he found the employer had violated EERA by banning bargaining related buttons during teaching. He stated that based on that case the employees' right under EERA to wear buttons remained intact, and stated further,

Under Turlock and Carlsbad, the District appears to have a fairly heavy burden in this case to prove 'special circumstances' that might justify its policy and regulation. In its post-hearing brief, the District argues in part that special circumstances are 'inherent' in the elementary school district classroom. This argument, however, is contrary to PERB's conclusion in Turlock that an elementary school district violated EERA by telling teachers not to wear bargaining-related buttons while teaching. Even though the employer in Turlock was an elementary school district, and even though the limitation on buttons specifically applied to the classroom, PERB found 'no evidence' of special circumstances.

The ALJ did note that PERB had not defined special circumstances, but stated that the National Labor Relations Board had set forth some "special considerations," none of them, however, were the same context as a public elementary school. Although PERB did not set forth specific special circumstances he noted that in Turlock I PERB indicated safety, discipline and disruption as possible special circumstances.

State of the Law at Present

When the California Supreme Court de-published the court of appeal decision in Turlock II, it did not vacate the holding. The law at present is that the PERB decision was reversed and the complaint and charge filed were dismissed. The result is that union buttons

still cannot be worn in the classroom in Turlock schools. The underpinning for the ALJ decision in this case is gone.

The union button cases noted, supra, are different than the case at hand. The Parks and Recreation case is not on an elementary school campus. Turlock I is on an elementary school campus and the decision in that case is that teachers may not wear buttons in class. The East Whittier I ALJ proposed decision is founded on law that no longer exists.

The political button cases noted, supra, allow for a time, place and manner restriction of free speech and note the school districts have the right to set the curriculum for teachers and that includes the subjects discussed or addressed during instruction. Those cases note the students are a captive audience and not involved in the bargaining process.

It is correct to look at how accessible to others the classroom is. Elementary schools are not public places. Members of the public, even parents of students do not have any access to the classrooms while classes are in session, without registering at the school and receiving permission to be there. The school board hires the teachers to teach the curriculum as adopted by the school board. The standard to be applied to a teacher's classroom expressions has been stated as

.. . teachers retain their First Amendment right to free speech in school. [Cit] On the other hand, it is well-settled that public schools may limit classroom speech to promote educational goals. [Cit.] Courts have long recognized the need for public school officials to assure that their students 'learn whatever lessons [an] activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.' [Cit.]

'In light of these competing principles we find that a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern, [cit.]; and (2) the school provided the teacher with notice of what conduct was prohibited [cit.]'

.....
[A] teacher's classroom speech is part of the curriculum. . . .
Thus, schools may reasonably limit teachers' speech in that
setting. [Cit.]^[7]

The Konocti case notes, significantly, that when the employee deviates from the duty at hand, the activity is not protected. The EERA covers protected activity. Teachers can however, according to the California Attorney General,⁸ wear buttons at back-to-school-night, and other places on campus.

That, coupled with an appropriate time, place, manner restriction on the employees' right to wear a union button shows a rule allowing buttons at non-instructional places and times, outside the presence of students. This does not prohibit teachers from wearing union buttons at other times and places, including times and places on the school property. It does however make it more likely that the curriculum adopted by the district will be what is discussed in class as opposed to a discussion of the teacher's financial interest in collective bargaining with the district.

The key is not whether the buttons are disruptive but rather, more importantly, that they are not part of the curriculum and there is no one in the classroom to which a presentation of a viewpoint on collective bargaining is relevant or appropriate. The Association, at oral argument, indicated the wearing of the buttons is a benefit to the employer to allow it to gauge the level of employee interest in a subject. It is irrelevant in this situation as to whether or not wearing union collective bargaining buttons is a benefit to the employer and lets it know the heartbeat of the union because there are no employer representatives in the elementary school classroom.

⁷Ward v. Hickey (1st Cir. 1993) 996 F.2d 448, cited in 77 Ops.Cal.Atty.Gen. 56 at p. 5.

⁸84 Ops.Cal.Atty.Gen.

Under the Republic Aviation⁹ test, set out in State of California (Employment Development Department) (2001) PERB Decision No. 1365a-S (State of California), the state was permitted to restrict unity break activity that did not occur during non work time in a non work area. Citing Republic Aviation, the Board noted that the Supreme Court stated,

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

The court in Peyton Packing Company (1943) 49 NLRB 828 [12 LRRM 183] also included the following: "Work 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."

In Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99 (Richmond) the Board adopted the test of Republic Aviation, and in State of California the Board said:

From Richmond and the other cases cited, it is clear that employees have the Dills Act protected right to communicate with each other at the worksite concerning their terms and conditions of employment during nonwork time in nonwork areas. Employees must be given leeway in the exercise of this right, which may be restricted by the employer only when it can be demonstrated that it is necessary to maintain order, production or discipline. In circumstances in which employees in a work

⁹Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620] (Republic Aviation).

setting not accessible to the public all take their lunch or break in their work area at the same time, it is considered a nonwork area during that nonwork time.

But the cited cases also lead to the conclusion that activities such as the unity break at issue there may be restricted by the employer if they do not occur during nonwork time in nonwork areas.

In the instant case, the District has not prohibited the right of teachers to wear union buttons on campus. Instead, they have been restricted to non-instructional times and places. Under the Republic Aviation test, the District has crafted a narrowly tailored restriction that is appropriate. The Association should be required to show the restriction is unreasonable in order to prevail. With this rule in mind, let me emphasize that each policy must be reviewed on a case-by-case basis. Let me emphasize also that here the District has not set out a policy forbidding the wearing of union buttons at work. The Association has not convinced me that the District restrictions are unreasonable.

The policy does limit the language on the buttons that can be worn in the instructional areas. What is presented in the classroom can be set by the District as it controls the curriculum. It is naive to think that there would never be any curiosity or question about a button in an elementary school classroom. With this policy there likely won't be and the classroom time can be devoted, as it should be, to learning the set curriculum. The teachers are free to wear their buttons related to collective bargaining at back to school night or in the teacher's lounge or the administrative offices or even in the hallways where there is a greater chance that someone who is aware of the collective bargaining issues will see them and be influenced one way or the other. That is outside the instructional area and time can be taken to answer student questions that arise.

The teachers are hired and paid to teach the curriculum, not promote their financial interests, that is outside the scope of their duties in the classroom. The buttons are not prohibited here, they are just removed from being a part of the instructional setting where students are captive. I believe the fact that the public is not allowed in elementary school classrooms during instructional time is also a special circumstance. No one in the classroom can address the issues related to collective bargaining and that makes the buttons inappropriate in those special circumstances.

In the hearing in this case, there was a lot of testimony as to special days in classrooms such as crazy hat day, pajama day and spirit day. The Association argued these were more distracting to the class than a button would be. I believe it is different when the whole class participates in a planned activity, such as one of the special days listed. In that setting, all of the students know ahead of time it will happen and can participate if they chose.

With the teacher suddenly wearing an innocuous button without explanation, the speculation possibilities are endless. Further, children do not always ask about things when they are concerned or confused. It is no more speculative to suggest that situation than to suggest student anxiety would have been detected by the staff and might have been addressed without banning the buttons themselves.

Based on the Republic Aviation test set out and adopted by the Board in Richmond and State of California, I would dismiss the charges.

**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. LA-CE-4264-E, East Whittier Education Association v. East Whittier School District, in which all parties had the right to participate, it has been found that the East Whittier School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by prohibiting certificated employees from wearing buttons related to collective bargaining in instructional areas while students are present.

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

A. CEASE AND DESIST FROM:

Prohibiting employees from wearing buttons related to collective bargaining.

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

Rescind or revise Policy 4142 and Administrative Regulation 4142 so that they do not prohibit employees from wearing buttons related to collective bargaining.

Dated: _____

EAST WHITTIER 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.