

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION AND ITS BEATRICE)
CHAPTER NO. 509,)
)
Charging Party,) Case No. SF-CE-979
)
v.) PERB Decision No. 650
)
REDWOODS COMMUNITY COLLEGE DISTRICT,) December 28, 1987
)
Respondent.)
)

CLASSIFIED EMPLOYEES COUNCIL,)
)
Real Party in Interest.)

Appearances; Madalyn J. Frazzini, Attorney, for California School Employees Association and its Beatrice Chapter No. 509; Kronick, Moskovitz, Tiedemann & Girard by James E. Mesnier for Redwoods Community College District.

Before Craib, Shank and Cordoba, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Redwoods Community College District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the Classified Employees Council (CEC) was an employee organization and that the District unlawfully interfered with, supported and dominated the CEC.

We have reviewed the entire record in this case, including the transcript, the proposed decision, the exceptions thereto and the response to the exceptions and, finding the ALJ's findings of fact and conclusions of law to be free of

prejudicial error, we adopt them as the Decision of the Board itself. However, we will take the opportunity to provide two cautionary notes, with the intention of better defining the parameters of this Decision.

First, we find it prudent to repeat a passage from a previous Board decision, Oak Grove School District (1986) PERB Decision No. 582 (a similar case wherein the Board concluded that a "teachers forum" was an employee organization):

This is not to say that all faculty councils or groups are per se unlawful, or that individual employees cannot speak to their employers about working conditions, including those within the scope of representation. But when the District sets up an organized group of teachers [or other represented employees] to meet at regular intervals on school time to discuss topics of mutual interest, it permits discussion of negotiable subjects at its own risk. (Id.; at p. 18.)

Second, we will comment briefly on the ALJ's reliance upon NLRB v. Cabot Carbon (1959) 360 U.S. 203 [44 LRRM 2204], where the Supreme Court held that the "dealing with" language of section 2(5) of the National Labor Relations Act (NLRA) (section 2(5) defines a "labor organization") includes employee groups that do not engage in actual negotiations with the employer. The ALJ similarly found that the "relations with the employer" language of section 3540.1(d) of the Educational Employment Relations Act¹ (EERA) is broader than language in the EERA defining the scope of representation.

¹The EERA is codified at Government Code section 3540 et seq.

As the majority noted in Oak Grove, supra, there has been some narrowing of the interpretation of the "dealing with" language found in the NLRA. In a departure from the ruling in Cabot Carbon, supra, the National Labor Relations Board (NLRB) has found that employee groups that engage in a mere discussion with management, rather than making recommendations to management, are not "dealing with" the employer. Fiber Materials, Inc. (1976) 228 NLRB No. 112. Furthermore, committees to which management has delegated actual decision-making authority have similarly been viewed as permissible. Sparks Nugget (1977) 230 NLRB No. 43; Mercy Memorial Hospital (1977) 231 NLRB No. 182. We find these more recent NLRB cases more instructive than Cabot Carbon and adopt the ALJ's reasoning within the confines of the principles enunciated in those cases. In this case, CEC's activities went beyond discussions, but fell short of constituting delegated managerial decision-making authority as contemplated in Sparks Nugget, supra.

In addition, the employer's delegation of managerial functions and the "nonrepresentative" status of the organization was relied on by the NLRB in General Foods Corporation (1977) 231 NLRB No. 122. There, the NLRB found that the work crews (which were charged with the responsibility to interview job applicants; inspect the plant and report safety infractions and, within limits; set their own starting and quitting times) were not employee organizations where the crews were given substantial managerial powers and where the

crew members spoke as individuals, not as representatives of the workers. In contrast to the facts in General Foods, however, the CEC was designed as a representative body with a primary purpose of making recommendations to management. The CEC, then, would clearly remain within the NLRA's definition of a labor organization. See also, Ferguson-Lander Box (1965) 151 NLRB No. 158; Geauga Plastics Co. (1976) 166 NLRB No. 69; Ace Manufacturing Co. (1978) 235 NLRB No. 137.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Redwoods Community College District and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Dominating or interfering with the formation or administration of any employee organization, or contributing financial or other support to any employee organization, or engaging in any conduct which tends to encourage employees to join any employee organization in preference to another.

(2) Interfering with the exercise of employee rights 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.

(3) Interfering with the right of the California School Employees Association and its Beatrice Chapter No. 509 to represent bargaining unit employees in their employment relations with the Redwoods Community College District.

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

(1) Disestablish the Classified Employees Council as the representative of employees in the bargaining unit represented on an exclusive basis by the California School Employees Association and its Beatrice Chapter No. 509 on all employment-related matters.

(2) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites or other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that 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 insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(3) Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Members Shank and Cordoba 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. SF-CE-979, in which all parties had the right to participate, it has been found that the District violated Government Code sections 3543.5(d), (b) and (a).

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

A. CEASE AND DESIST FROM:

(1) Dominating or interfering with the formation or administration of any employee organization, or contributing financial or other support to any employee organization, or engaging in any conduct which tends to encourage employees to join any employee organization in preference to another.

(2) Interfering with the exercise of employee rights 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.

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Dated:

Redwoods Community College
District

By _____

Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION. AND ITS BEATRICE
CHAPTER No. 509,

Charging Party,

v.

REDWOODS COMMUNITY COLLEGE
DISTRICT.

Respondent.

CLASSIFIED EMPLOYEES COUNCIL.

Real Party in Interest.

Case NO. SF-CE-979

PROPOSED DECISION
(7/11/86)

Appearances: Madalyn J. Frazzini. Attorney for California School Employees Association and its Beatrice Chapter No. 509; Kronick. Moskowitz. Tiedemann and Girard, by James E. Mesnier for Redwoods Community College District; Neil Kirk. President, for Classified Employees Council.

Before: Fred D'Orazio. Chief Administrative Law Judge.

PROCEDURAL HISTORY

On December 18. 1984, the California School Employees Association and its Beatrice Chapter No. 509 (hereafter CSEA or charging party) filed this unfair practice charge against the Redwoods Community College District (hereafter District or respondent). The charge, as amended, alleged that the District had formed, supported and dominated a rival employee organization, the Classified Employees Council (hereafter CEC

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

or Council).¹ in violation of sections 3543.5(d), (a) and (b) of the Educational Employment Relations Act (hereafter EERA or Act).² The Council was joined as a party on July 23, 1985. (California Administrative Code, title. 8. part III. section 32164)

The PERB General Counsel issued a complaint on April 4, 1985. incorporating the allegations in the charge. On May 6, 1985. the District filed its answer, admitting certain facts, denying the allegations of unlawful conduct and advancing affirmative defenses. Admissions, denials and defenses will be considered below where relevant. A settlement conference failed to resolve the dispute.

A prehearing conference was conducted in San Francisco on July 17, 1985. Six days of formal hearing were conducted in Eureka, California, between August 19, 1985 and November 7, 1985. The posthearing briefing schedule was completed on March 24, 1986 and the case was submitted.

¹CSEA also charged the District with refusing to negotiate several personnel actions which allegedly impacted on bargaining unit employees. All of these allegations were settled during the course of the formal hearing.

²The EERA is codified at Government Code section 3540, et seq., and is administered by the Public Employment Relations Board (hereafter PERB or Board). Unless otherwise indicated, all statutory references in this decision are to the Government Code.

FINDINGS OF FACT

I. Establishment of the Classified Employees Council:

During the summer of 1983, Dr. Donald Weichert, College of the Redwood's president and superintendent, concluded that a need existed for improved communications between the College of the Redwoods and "all parties" in the District.³ To this end, on August 3, 1983, he proposed to the College of the Redwoods Executive Committee the creation of the Classified Employees Council

To provide a representative body to deal with the non-collective bargaining issues that affect or are of concern or of interest to the classified employees. It is designed to provide an avenue of representation for the classified employee.

The CEC was to be comprised of all classified employees, including supervisors and managerial employees. The Executive Committee agreed with Dr. Weichert's proposal.

During August 1983, CSEA became aware of the District's plan regarding the establishment of the CEC. Dave Young, CSEA

³Dr. Weichert's conclusion was based in large part on two Communication Task Force reports and related studies which suggested that there was poor communications and low morale among classified employees in the District. One of the reasons cited for low morale was "the establishment of collective bargaining/negotiating teams, etc. which changed the 'family' structure to more of a 'labor-management' situation."

⁴The Executive Committee is the president's cabinet. It includes the president, vice-president, dean of business services, dean of administrative services, dean of students, and dean of instruction.

field representative, informed the District in a negotiating session that the union was not in favor of the idea, although he said it was premature to object in any concrete terms. Young reserved the union's right to raise future objections if CEC infringed upon CSEA rights as the exclusive representative of classified employees. Young said CSEA would closely watch the evolution of the CEC.

By August 1984, one year later. CSEA officials were convinced that their fears had become reality. Young wrote to Thomas Hannah, dean of administrative services:

Our expectations in this matter have been realized. The Classified Employees Council is infringing on CSEA's exclusive prerogatives on collective bargaining. Specifically, the council had a regular agenda slot at meetings of the Board of Trustees, and has a representative on Administrative Selection Committees, and has District's requested input in the budgetary process. Individually and collectively, these functions bear the form, and that developing substance, of an employee organization under the meaning of the Rodda Act.

Hannah disagreed in writing with Young and asked for further information in support of the assertion that the CEC had infringed on CSEA's territory as the exclusive representative. Young responded in somewhat colorful language which accurately frames the issues presented here.

You correctly state that, to date, the CEC has generally confined its activities to matters separate and apart from CSEA's prerogatives under collective bargaining. The CEC has not attempted to bargain in the strict sense of the word. Were it to do so. the violation we claim would be clear beyond dispute. Our concern is directed more at the developing relationship between the

District and the CEC, which bears the strong potential that the CEC could, at some fortuitous time, unmask itself and assume the full mantle of an employee organization. CSEA is a de jure employee organization under the Rodda Act. The CEC is, in our opinion, a de facto organization. Put differently, if it looks, acts and smells like a skunk, you probably don't want it to live under your house no matter how strongly it professes to be a kitty cat. The form is often as important as the substance.

The fact that the CEC is a creation of the District lends credence to our concern. If a group of employees had independently created the CEC for their own purposes, and if the District had maintained a clear and defined distance from the organization, in effect denying to it the apparent mantle of employer approval and authority, our concern would be greatly diminished. However, that is not the case. The CEC is a direct creation of the District, and it is formally recognized by the Board of Trustees. Take a walk through the CEC's newly adopted Constitution, and you will find several passages which seem to indicate a purpose and scope of activity far beyond the bland vanilla you profess to taste.

Meanwhile, the CEC had already been set up. After communicating during August with the Board of Trustees about the proposed Council. Dr. Weichert sent a memo to all classified employees on September 12, 1983. In the memo employees were informed that the Board of Trustees agreed with the stated objectives of CEC (i.e. improved communications) and asked that steps be taken to inaugurate it. Attached to the memo was Dr. Weichert's detailed proposal for implementing the Council, including the intended purpose of the CEC, and the

quite elaborate "organizational process" by which the CEC would be implemented. In general terms it covered: (1) areas of representation; (2) nominations of CEC members; (3) election of members; (4) procedure to determine length of member's terms; (5) election of president and secretary; (6) frequency of meetings; (7) role of CEC president; (8) structure of quarterly classified employee meetings; (9) year-end report of CEC to the Board of Trustees/president; (10) role of the College of the Redwoods president on CEC matters; and (11) role of the CEC president on the College of the Redwoods Coordinating Council.

In an annual orientation meeting of all classified staff on September 14, 1983. Dr. Weichert, as chairperson of the meeting, presented the idea to create CEC. Minutes of that meeting indicate that an open discussion occurred.

Specifically, Dr. Weichert stated that he intended that the CEC include all classified employees, including managerial and supervisory. In response to a question about whether the president of CEC would have a seat on the College of the Redwoods Board of Trustees. Dr. Weichert responded that he would take the matter to the Board for decision. Other areas of discussion included release and travel time for CEC representatives.

Regarding expressed concerns that the existence of CEC might cause conflict with CSEA, the exclusive representative of classified employees, Dr. Weichert explained that the CEC would

have the same relationship to CSEA as the Academic Senate had to the College of the Redwoods Faculty organization (CRFO). the exclusive representative for certificated employees; that is. CEC would not deal with negotiable items, and if controversy existed between the two groups they should meet to resolve their problems. In line with Dr. Weichert's comments, Neil Kirk, president of CEC, informed employees present that CEC's doors were always open to discuss matters of controversy with CSEA.

At another point in the meeting, the District was broken up into seven areas for CEC representation.⁵ Each area would have a representative. Once again, this action was taken pursuant to Dr. Weichert's proposal.

The procedure to choose the seven CEC representative members was discussed, again pursuant to Dr. Weichert's suggestion, and it was agreed that the meeting be opened for volunteers and nominees. Some names were received during the meeting. Provision was made for other names to be submitted to

⁵These are: (1) administrative services, including the business office, personnel office, and president's office; (2) student services, including admissions, counseling, financial aid, veterans, and handicapped student services; (3) instructional support services, including instructional media services, library, learning assistance center, community education, data processing, central duplicating, and child development center; (4) academic services, including academic divisions, office of instruction, and program development; (5) foundation, including dorms, food service, and book store; (6) operational services, including maintenance/custodial and security; (7) centers, including branches and education centers.

Nancy Hauser. Dr. Weichert's secretary, after the meeting. By 2:00 p.m. the next day. September 15. nominations and volunteers had been received for all areas of representation.

At the end of the meeting Dr. Weichert asked the classified employees in attendance if they concurred in the proposal to establish the CEC. The employees in attendance agreed.

On September 16, 1983, Dr. Weichert circulated the minutes of the September 14 meeting to all classified staff. He reiterated the requirement that additional names of volunteers or nominees for CEC membership be submitted to Nancy Hauser. He also informed employees that the personnel office would conduct the election, and ballots would be sent out by the end of September.

On September 30, ballots were prepared by the District and circulated to all employees, including those employees at the various "satellite branches." The election was by secret ballot. All costs were absorbed by the District. Ballots were returned to Nancy Hauser, who placed them in a central spot. Thomas Hannah supervised the ballot count which was carried out by the support staff of the District's managerial employees. The successful candidates and their respective areas of representation are as follows:

- (1) administrative services- Cathy Dellabalma
- (2) instructional support services- Sue Bailey
- (3) foundation - Bill Connors
- (4) education centers - Claudine Gans-Rugebereg
- (5) student services - Neil Kirk
- (6) academic services - Frank Martinez
- (7) operational services - Paul Jadro

Dellabalma is the personnel officer (a managerial position) in charge of classified employees. Bailey was a temporary management employee at the time of the election, but she gained permanent status as a supervisor on July 1, 1984. Connors was a managerial employee at the time of the election. Others elected to the Council were bargaining unit employees. Newly elected Council members dined as guests of the District at a "meet your trustees" buffet dinner on October 17, 1983. Dr. Weichert issued a personal invitation to each member to attend the Board of Trustees meeting later that evening.

The first regular meeting of the Council, held on October 18, 1983. was attended by Dr. Weichert, Nancy Hauser, and members of the Council. Hauser prepared the minutes. Dr. Weichert again reiterated his ideas about the role CEC would play in increasing morale on campus. The meeting included a discussion about potential CEC-CSEA conflicts. The minutes indicate that participants agreed that CEC would function as a "social organization", and collective bargaining rights left to CSEA.

The election of CEC officers was held during this initial meeting. Kirk was elected president. Gans-Rugebregt was elected vice-president, and Bailey was elected secretary-treasurer. Also, the terms of the Council members were determined by drawing lots, and the frequency of CEC

meetings was established.⁵ 5

Three other significant items were discussed at the meeting. The first involved information showing the name and the telephone number of the CEC representative in each area of representation, as well as the names of employees in these respective areas. It was agreed that Cathy Dellabalma, the personnel officer, would prepare and distribute this organizational list. This was accomplished by October 28, 1983, the date of the second CEC meeting. The second significant issue discussed in the October 18 meeting involved Dr. Weichert's agreement that a reasonable amount of release time be permitted for CEC members to conduct CEC activities. The third significant issue involved Dr. Weichert's suggestion that the CEC place a representative on the various "governance organizations" on campus. (These organizations and their respective roles are

5The terms of office were as follows: Dellabalma, Gans-Rugebregt. Kirk and Martinez drew two-year terms. Bailey, Connors and Jadro drew one-year terms. Except for Gans-Rugebregt, who resigned in mid-year, these employees served on the CEC for the 1983-84 school year.

The following employees were elected to the CEC for the 1984-85 school year. Pat Lindley (instructional support services); Lila Reynolds (food service); Steve McCollum (educational center, Del Norte); Barbara Organ (educational center, Mendocino); Jadro was re-elected to represent operational services. The election procedure for the 1984-85 school year was the same as that for 1983-84. Of those who served on the CEC for 1984-85, only Dellabalma and Reynolds were management employees.

more fully discussed below.) Potentially, this could include such organizations as the administrative staff, the Board of Trustees meetings, program development, hiring review boards, etc. However. Dr. Weichert's recommendation during the meeting made specific reference only to the administrative staff meetings and the Board of Trustees meetings.

II. THE CEC CONSTITUTION:

A lengthy document, the CEC constitution was prepared by members of the Council and ratified at the general orientation meeting of all classified employees on September 14, 1984, one year after Dr. Weichert first proposed establishment of the Council to the staff. The preamble states that the mission of the CEC is to "provide for greater participation of classified employees in the governance and policy setting network of the college." Article II. section 1, states the primary purpose of the Council.

The primary purpose of the Classified Employees' Council is to provide the classified staff of the College of the Redwoods with a representative body to act in its behalf in determining the need for, and in the formation of policies in all matters affecting the welfare of the college and the classified employees.

Some "subsidiary aims" of the council were outlined in Article II. section 2:

- A. To provide the president of the college with a representative classified employees body that can assist the president in matters affecting the welfare of the college.

- B. To provide the administration of the college with a democratic means of ascertaining the problems, convictions, and suggestions of the classified staff.
- C. To promote communication and mutual understanding among the classified staff, administrators. Board of Trustees, the Faculty, and the Community.
- D. To provide the administration and staff of College of the Redwoods a means of acknowledging individual classified employees' outstanding accomplishments.
- E. It is not now. nor shall it ever be. the intent of the Classified Employees Council to participate in collective bargaining nor to represent employees during normal grievance procedures. Therefore, these activities are considered to be outside the scope of the Council.

The CEC Constitution and By-Laws were patterned after those of the Academic Senate and CSEA. Copies of these documents were provided to the CEC by Dellabalma.

In addition to those provisions stated above, the Constitution describes a network of connections between CEC and the College of the Redwoods administration which suggests a close working relationship between the two entities. For example, the Constitution empowers the CEC to present its views to the Board of Trustees and to the president of the college. It provides that the District receive copies of minutes and of agendas to CEC meetings. It says that recommendations and decisions by the Council shall be included in the CEC minutes, and. if approved by the Board of Trustees and the college president pursuant to an elaborate procedure for CEC

presentation and District response, the recommendation could become a College policy. The Constitution also provides that a CEC representative will sit on certain college governance committees, and that the college president can be invited to the CEC meetings as a "consultant or adviser." Lastly, and most significantly, the Constitution provides that the Constitution and amendments thereto must be approved by the majority of the electorate and the Board of Trustees.

III. ASSISTANCE TO CEC:

1. Financial Assistance.

At a CEC meeting on November 4, 1983, funding for the Council was discussed. Dr. Weichert suggested that money from a foundation maintained by the District be given directly to CEC. Since CEC had no dues structure and thus no treasury. Kirk accepted the suggestion and an arrangement was established whereby Kirk could draw on a \$500 "front" money fund as needed.⁶ Since the stated purpose of CEC was social in nature. Kirk used the money to pay in advance the expenses for CEC-sponsored social functions. Profit was usually made at these functions (e.g. by selling tee-shirts) and used to repay the foundation. Since repayment was always made, the \$500 seed money never needed to be renewed.

⁶The record is unclear about the source of this money. However, it appears that the money did not come from general funds marked for educational purposes.

This practice still continues.

2. Release time

CEC representatives were granted a reasonable amount of release time to engage in social as well as representational (more fully described below) activities. Social activities for which CEC members were given release time included, for example, CEC sponsored events such as the "super stars competition," softball game, golf tournament, and barbecue. CEC members were also granted release time to select a "classified employee of the year," a popularity contest where the selected employee received a plaque at an awards dinner. The District paid for the dinner.

In representational or business matters. Kirk received about three or four hours per month of release time. He had a loose release time arrangement with his supervisor, Jim Harrington, under which he orally informed him of his whereabouts.

In contrast, CSEA representatives were permitted release time only for negotiations or "steward-related activities." While there was no cap on release time for CSEA, representatives had to request the time in writing and provide as much notice as possible. CSEA was also required to provide a monthly log showing use of release time. CEC was not required to submit such a log. Despite the requirements placed on CSEA use of release time, the record shows that the District routinely provided a reasonable amount of release time to CSEA

representatives.

3. Miscellaneous Assistance.

The District assisted CEC in a variety of additional ways. Election for CEC officers was conducted by the District, using District resources and personnel. CEC used District stationery for almost all of its written communications. The District assisted in the distribution of CEC questionnaires to classified employees.⁷ CEC photocopying expenses were covered by the District, while CSEA paid for use of District photocopying equipment. District meeting rooms were provided for CEC meetings, although the same rooms were routinely provided to various other organizations.

IV. CEC PARTICIPATION In "GOVERNANCE ORGANIZATIONS":

It is undisputed that the District from the outset intended that CEC participate in the various "governance organizations" on campus. Testimony focused on four major programs of this type in which CEC participated. They are: (1) program review; (2) administrative staff meetings; (3) administrative organization task force; and (4) budget of potential

7once such questionnaire, distributed to all classified employees, solicited input as to appropriate CEC philosophy, and asked for activities where CEC should be involved. Most responses stated that CEC should serve the District in an advisory capacity, or be involved in social events. But a few said that CEC should replace CSEA. This particular CEC questionnaire was typed by Harrington's secretary.

extra-income. Also included in this area for purpose of discussion is CEC participation at Board of Trustees meetings, the ultimate "governance organization" on campus, and certain hiring committees.

1. Program Review:

Dr. Gary Peterson, Executive Vice President for Academic and Student Affairs, initiated the process known as program review after coming to College of the Redwoods in 1984 from the College of Siskiyous, where he had used the technique. Briefly stated, program review is a process used to evaluate the entire College of the Redwoods operation to determine where resources were being spent, and where any changes in programming, staffing, etc. could be beneficial. The process was undertaken primarily because a four-year decline in ADA had generated some concern by the Board of Trustees and the president. Obviously, program review can result in major changes in employment conditions, such as program reorganization or elimination, layoffs, staffing changes, budget cuts. etc.

The process itself consisted of a massive data-gathering effort by individuals from the various departments or segments of the District. Approximately 40 meetings were held from October 1984 through January 1985, with members of the committee, and sometimes members of the public, in attendance. During these meetings, which were usually chaired by

Dr. Peterson, information was presented, questions were asked, and far-ranging discussions were held. Eventually, based on the information generated, Dr. Peterson compiled a series of recommendations in the form of a "Final Recommendation to the Board of Trustees of the Redwoods Community College District." an 89-page document which was submitted to the Board in February, 1985. It included a minority report to which CSEA was a signatory. The Board ultimately approved several fiscal and non-fiscal recommendations and. as a result. \$700,000 was saved over an 18-month period. The content of this process and/or final recommendation and CEC's participation in the overall process drew much attention during the hearing.

Specific areas considered during the program review are too numerous to mention in this recommended decision. However, it is necessary to describe some of these areas in order to resolve the issues presented by this case.

According to Dr. Peterson, it was understood from the beginning that the program review process would involve personnel actions. This understanding proved to be accurate. A partial list of recommendations potentially impacting on classified employees was contained in the final document Dr. Peterson sent to the Board of Trustees and covered the following subjects: reinstatement rights, reduction in hours, elimination of positions, purchase of new equipment, layoffs, hiring, and reduction in force through resignation. All of

these and many other employment-related items were considered in the context of the total budget. In fact, many of the recommendations were ultimately implemented (e.g. elimination of certain positions, reduction of hours). According to Yvette Tucker, CSEA chapter president, none of these items was negotiated with CSEA prior to the time Dr. Peterson sent his recommendation to the Board of Trustees.

Although CEC was expressly invited by the District to participate in the program review process, precise evidence concerning the degree of that participation was sketchy. Dr. Peterson invited a CEC representative to the first program review meeting on October 5, 1984. Paul Jadro attended for CEC. Minutes of the second program review meeting, held at the Samoa Cook House restaurant on November 16, 1985, show that Kirk was present for CEC and that Tucker was present for CSEA.⁸ Kirk also attended an "all staff" program review meeting on November 2, 1984.

It appears, however, that these were only preliminary meetings. According to Dr. Peterson, it was not until about the November 6 or November 15 meetings that the program review

⁸According to Dr. Weichert, the main reason for this meeting was to discuss, in a general sense, potential layoffs which might occur as a result of the program review process. The thrust of this meeting involved District lawyers' and representatives' explanations of the layoff process.

committee was actually constituted. It was at this time that the committee formally began the process of collecting information from the College of the Redwoods staff and bringing it to the program review meetings. This process resulted in Dr. Peterson receiving approximately one thousand recommendations on December 8, 1984.⁹ Up until this point, the record shows that the most involvement CEC could have had with the program review process was some gathering of information and participating in the discussions at the various meetings.

A distinction exists between attending early program review meetings and formal membership on the program review committee. According to Peterson, simply attending the preliminary meetings and occasionally raising questions or making comments was far different than being on the committee itself. A seat on the committee involved more extensive preparation, information gathering, and participation at meetings.

The record shows that the CEC was invited to send a representative to program review committee meetings, and, in fact, CEC representatives attended some of the preliminary meetings as stated above. However, specific evidence concerning what

⁹Copies of the recommendations from the program review process were sent out to the general population at the College, including CEC.

transpired at official committee meetings and participation by CEC at these meetings was limited, except that the final written recommendations to the Board of Trustees, submitted in February 1985. shows that Cathy Dellabalma, who was still a CEC member at that time, was on the committee. Since the evidence about the extent of her participation was very limited, her actual participation in the process cannot be stated with any degree of certainty.¹⁰

The program review function has not ended in the District. Peterson testified that, beginning in September 1985, the Academic Services Council/Student Services Council commenced, among other things, an ongoing program review function in their respective areas. The only difference between the old program review committee and the new arrangement is that the latter will undertake this effort in a more limited way; that is, the initial program review committee evaluated all programs in the District in a short period of time, while the new committee will perform the same program review function over a two or three year period, evaluating about one third of the programs per year.

The CEC is a member of the Academic Services Council/Student Services Council. Dr. Peterson testified that, except for issues in the Curriculum Committee, the CEC

¹⁰The final document also shows that Bill Connors was on the program review committee, but his term as a CEC officer expired shortly before the program review process began early in the 1984-85 school year.

representatives will be permitted to participate in non-binding votes. These votes are taken to determine where certain members stand on projects proposed by Dr. Peterson. CSEA was not asked to be on the Academic Services Council or the Student Services Council.

Additionally, College of the Redwoods also has a steering committee which plays the role of a coordinating council for four major areas: (1) accreditation; (2) program review, including instructional and student services, financial services, and facilities; (3) educational master plan; and (4) comprehensive state pilot plan. A CEC representative sits on the steering committee.

Dave Young testified that during negotiations for the 1981-82 school year, CSEA proposed that it participate in several of the areas described above where CEC is now involved. Among these was a proposal that CSEA have a representative on any committee that addresses or determines the "goals, objectives and future" of the District. The District rejected the proposal, according to Young, because it was part of the administrative function. The proposals were on the table for months, they were modified, and eventually dropped.

2. Administrative Organization Task Force (AOTF):

During 1985 CEC participated in the AOTF, a body whose broad purpose was to use the committee system to evaluate and

reorganize, if necessary, the administrative staff in the District. AOTF objectives included the following.

1. To provide leadership for evolving educational program goals through assuring participation, communication, and understanding.
2. To provide clarification of role, responsibility, accountability, and appropriate balance of administration and supervision assignments.
3. To assign appropriate titles and compensation for duties.
4. To improve balance and coordination within the administration team.
5. To establish framework for making administrative assignments.

Neil Kirk was appointed to the AOTF in February 1985. There were approximately two or three AOTF meetings per week for twelve weeks, culminating in a reorganization which was implemented on July 15, 1985. The subject areas ultimately evaluated by the AOTF involved reclassification, staffing, administrative costs, lines of authority, and overall responsibilities.¹¹

In a May 20, 1985 meeting, during the reorganization process, the CEC offered to Dr. Peterson its view of a "proposed" organizational development plan. Offered "for discussion purposes", the plan contained CEC's version of college governance, suggesting makeup of the Executive Committee.

¹¹The AOTF reported its recommendations to the program review committee, although they were two separate projects. Dr. Peterson served as a liaison between the two groups.

and the timing and structure of administrative staff meetings. Additionally, CEC proposed a college committee structure which included the Academic Services Council, Student Services Council, and Administrative Services Council, as well as sub-committees under each. CEC suggested it have a representative on each council. The record is unclear how these suggested discussion items were received by Dr. Peterson.

Although Kirk testified that the AOTF meetings never included discussions about the impact of reorganization on bargaining unit employees, the record shows just the opposite. In a June 11, 1985 memo addressed to the AOTF (and the program review committee), Jerry Six, Dean of Student Services, sought input regarding the structure of a department where the Financial Aid Director and the Director of the Student Activities, both bargaining unit positions, had been combined into one management position without providing for clerical support. This action was taken based on an AOTF recommendation. Specifically, Six suggested filling the support position, and requested the committee's support in addressing these issues after the management position was filled.¹¹

¹¹At one point. Dr. Peterson testified that both positions were in the bargaining unit. He then testified that only one of the positions was in the unit. Thus, the record is unclear on this point. See transcript 552-553. This inconsistency need not be resolved here. For purposes of this

According to Dr. Peterson, this caused a major "Snafu" and prompted the AOTF to hold another meeting to discuss the situation. He said the AOTF was concerned only with the administrative structure, and once that was in place the existing support staff issue would be resolved. This necessarily involved the moving of bargaining unit positions.¹³

In another example, the AOTF discussed secretarial help for the new Dean of Instruction. This was probably the main personnel change in the new organization, according to Peterson.

3. Administrative Staff Meetings:

Administrative staff meetings are held each Monday afternoon. As the name implies, they are attended by members of the administrative team, but they are also open to the public.¹⁴ These meetings appear to take the form of round

decision, it is enough that at least one bargaining unit position, and the clerical support position attached to it, was affected by the AOTF recommendation.

¹³Dr. Peterson testified that any impact on bargaining unit employees as a result of this decision was negotiated with CSEA. Tucker testified that negotiations didn't begin until the recommendations were already made, and the bargaining was in process as of the time of the hearing in this matter.

¹⁴Dr. Peterson testified that administrators and management staff attend these meetings. He defined administrators as certificated members of the institution who are paid on the certificated scale., i.e. Division Chairperson, Deans, President, Executive Vice-President, etc. The management staff, he said, is made up of the classified equivalent of administrators.

table discussions about a variety of subjects which happen to be of a pressing nature when the meeting occurs. For example, the agenda for the meeting of October 20, 1983 includes subjects such as personnel, program review, review of Board of Trustees minutes and sabbatical leaves. The agenda for the November 14, 1985 meeting includes the status of current negotiations, and the announcement of a workshop to discuss the then current collective bargaining agreement.¹⁵

The CEC Constitution. Art. VII. says that a CEC representative "shall" be on the administrative staff committee. Consistent with this provision, according to the testimony of both Neil Kirk and Dr. Weichert, the District invited CEC to attend.

Beginning in October, 1983, Kirk attended administrative staff meetings as his schedule permitted. Since these meetings were held at 2:00 p.m., presumably Kirk used release time. Kirk received agendas for all administrative staff meetings. He was introduced at the first meeting he attended, but it appears that he did little, if anything, during his attendance at the remainder of the meetings. Kirk testified that he usually spoke only when asked questions. His main purpose was to report back to the CEC regarding the items discussed at the

¹⁵The contract administration workshop was conducted by one of the District's attorneys. Neil Kirk, CEC president, was invited to attend.

meetings.¹⁶ Thus, CEC's actual participation at these meetings appears to have been limited.

Yvette Tucker testified that, before CEC was formed, she asked to be on the administrative staff committee, but this request was rejected by Tom Hannah because the committee was a "governance" committee, and, according to Hannah, CSEA had no right to be involved in that process. After CEC was formed, Tucker renewed her request, but Hannah again rejected, explaining that there was no need for a CSEA representative on the administrative staff committee because classified employees now had a representative in the form of the CEC.

Additionally, in 1984-1985, CSEA proposed during negotiations that a vehicle for improving communications be developed, according to Tucker. CSEA suggested that the parties meet regularly to discuss non-negotiable matters and generally to engage in problem solving. CSEA patterned this proposal after a similar arrangement that had been set up successfully in the Eureka City Schools. Once again, Hannah responded that there was no need for this because CEC existed.

4. Budget of Potential Extra Income

On January 3, 1984, Dr. Weichert, by memo, sought input from CEC and other groups on campus to help implement the next step of financial planning necessary for the 1984-85 budget.

¹⁶The same can be said about other CEC members who attended when Kirk couldn't.

The possibility existed that funds vetoed by the Governor in prior years would be restored and/or additional funds would be available. The essence of Dr. Weichert's memo was to solicit input from various "District Organizations" as to how they would prioritize the spending of any additional funds.¹⁷ The goal was to get a "profile of staff viewpoints" on this issue. Dr. Weichert wrote in the memo that "the planning instrument will be considered by the administration and the Board of Trustees as one of the criteria in the development of the 1984-85 budget." Meetings were set for the various organization to give input.

Over CSEA objections, CEC met with the District on January 27, 1984 in the Forum Theater on campus to discuss the CEC input. Dr. Weichert and Dorothy Dilling, the business office representative, conducted this significant meeting from a position immediately in front of the stage.¹⁸ The seven CEC members sat on the stage facing the audience, which was made up largely of classified employees. Matt Rosen, a CSEA

¹⁷"District Organizations" were defined in Dr. Weichert's memo as the Academic Senate, Classified Employees Council, College of the Redwoods Faculty Organization, California School Employees Association, and the Associated Students.

¹⁸Although Dr. Weichert's memo suggests he wanted input from the various organizations on campus, and the January 27 meeting was advertised as seeking CEC input, questionnaires went out to individual employees in an attempt to get their input. Thus, the District effectively sought input from two sources, individual employees and organizational sources.

representative, sat on stage with the CEC members. At one point Rosen stood to declare that he generally supported CEC efforts, but he also took that opportunity to clarify the respective roles of CEC and CSEA. i.e. that CEC should not invade the domain of the exclusive representative.

Seeking input about how additional money should be spent, Weichert and Dilling asked employees for their ideas in the event the District received an additional \$400,000. an additional \$800,000. or an additional \$1,000,000? Employees offered their views, and. according to Kirk, a "lively" discussion occurred. Various suggestions made by classified employees and CEC members regarding prioritized spending of additional funds were ultimately placed in the College of the Redwoods Financial Master Plan. Similar meetings were held where CSEA submitted its input on the budget. Dr. Weichert testified that he gave equal weight to the CEC and the CSEA presentations.

¹⁹A related governance organization is the financial management committee. The purpose of this committee, which met monthly, is to play a major role in the overall budgetary process in the District. On May 29, 1985. Al Hassman, Director of Business Services, asked CEC to select a member to participate on the committee. Hassman wrote to Kirk: "We are making many changes in our present system. The time for your influence is 'now.'¹¹¹ Kirk testified that he asked Council members to join the committee, but no one stepped forward. During the 1981-82 negotiations CSEA proposed that it be given representation on the District's budget committee. According to Dave Young, the District expressed "strong reservations" about the proposal. The proposal was dropped after several months.

The Forum Theater meeting was advertised as a CEC meeting and invitations were sent out to all classified employees by Sue Bailey. Kirk said that the CEC knew nothing about the invitations and played no part in their issuance.

Additionally, at this meeting Kirk informed employees that they should be free to present their problems to the CEC without fear that employee names or problems would be revealed at some later date; that is. Kirk made clear that employee communications with CEC would be kept confidential. He testified that he did this in the spirit of opening communications and permitting employees to have an outlet for discussion of their problems when the offices of CSEA representatives were not open for these purposes.

5. Board of Trustees Meetings:

As CEC president, Neil Kirk was invited to all Board of Trustees meetings and given a slot on the agenda under "Organizational Reports." This enabled CEC to present reports on a diverse set of issues within the time frame allotted by the board. For example, on one occasion he presented the CEC year-end report. On another occasion he endorsed a tentative agreement in the collective bargaining agreement between CSEA and the District. Another presentation by Kirk at a Board of Trustees meeting involved the CEC position on recommendations of the AOTF.

In contrast, CSEA has no special slot on the Board of

Trustees agenda. Instead, CSEA representatives are permitted to speak only during the "Public Comment" slot. According to Dave Young, this arrangement presents problems because the board limits public comment to those matters already on the agenda. CSEA wants to be able to raise any item at the board meeting, as is the privilege of CEC by virtue of its placement under organizational reports.

At various times during negotiations between CSEA and the District, this issue arose and CSEA pressed for its own slot. Before CEC was established. CSEA negotiators were told by Thomas Hannah that it was inappropriate for CSEA to have such a slot because it was the exclusive representative. After the CEC was established. CSEA again raised the issue and Hannah again said there was no need for such a slot because classified employees were represented by CEC at the Board of Trustees meetings.

6. Hiring Committees:

Neil Kirk was asked by Tom Hannah to provide a representative to sit on a screening committee established to hire a Career Center Information Technician, a bargaining unit position. One purpose of the committee was to screen applicants and establish a best qualified list. The record is unclear as to whether it was a function of the committee actually to select a candidate. Kirk provided the

representative, but had no further involvement. A bargaining unit employee was eventually promoted into the position.

In addition. Kirk sat on a screening committee for the Associate Dean of Student Services, and the Dean of Student Services. During the interviews. Kirk asked the applicants questions about the role of CEC.

District recently revised its policy to include a CEC representative on each screening committee for the selection of administrators other than the Superintendent/President, Executive Vice President and Division Chairpersons. Dave Young testified that he proposed during the 1981-82 negotiations that CSEA be given some voice in these committees. The District opposed this suggestion. During the course of negotiations the proposal was modified and eventually withdrawn.

ISSUES

1. Is the CEC an employee organization within the meaning of section 3540.1(d)?
2. Did the CEC represent employees in a bargaining unit where CSEA served as exclusive representative?
3. Did the District
 - A. dominate or interfere with the formation or administration of CEC. or
 - B. contribute financial or other support to CEC, or
 - C. in any way encourage employees to support CEC?

DISCUSSION

Positions of the Parties:

The charging party contends that the CEC is an employee organization which is created, supported, and dominated by the District. This conduct, continues the charging party, tends to encourage employees to prefer CEC over the CSEA in violation of Section 3543.5(d). In addition, the charging party contends that the District's "creation and maintenance" of the CEC interferes with the fundamental principles of employee free choice and exclusivity, in violation of Sections 3543.5(a) and 3543.5(b).

The District argues in response that the CEC is not an employee organization within the meaning of the Act. The District's position is that an organization that does not actually participate in activities specifically delegated to the exclusive representative (i.e. traditional collective bargaining) is not an employee organization within the meaning of the Act. The District maintains that CEC did not attempt to engage in traditional collective bargaining or grievance handling in this case. CEC activities involved primarily information gathering, and did not interfere with CSEA's role as exclusive representative. Thus, CEC cannot be labeled an employee organization, nor can its activities otherwise be considered unlawful under the Act. Even if the CEC is found to

an be employee organization, continues the District, there can be no violation since under the EERA an employer has the right to consult with "any employee organization" on any matter outside the scope of representation. Finally, the District argues that any prohibition on the right of CEC to exist violates CEC's members freedom of speech and right to association under the First Amendment to the United States Constitution, as well as the employer's freedom of speech under the same provision.

Employee Organization Status:

The first question to be addressed is whether CEC is an employee organization within the meaning of the EERA.

Section 3540.1(d) defines employee organization as follows:

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

Taking guidance from the private sector, the Board has interpreted similar language under the State Employer-Employee Relations Act (SEERA)²⁰ to mean that a given aggregation of

20section 3513(a) defines employee organization as follows:

(a) "Employee organization" means any

employees, to be considered an employee organization, need not be formally constituted, have formal membership requirements, hold regular meetings, have constitutions or by-laws, or in any other manner conform to the common definition of an "organization." Rather, the Board placed the central focus on whether the group has, as a key purpose, the representation of employees on employment related matters. Under this test, the Board has found that even two employees who act in concert to present grievances about cuts in overtime and loss of jobs may be viewed to have constituted themselves an employee organization because they have joined together to represent employees concerning working conditions. Monsoor v. State of California. Dept, of Developmental Services (1982) PERB Decision No. 228-S; see also CSEA v. Regents of the University of California (1984) PERB Decision No. 449-H. pp. 95-96. where a single employee, acting in concert with only two other employees regarding a matter affecting wages, was found by the Board to be an employee organization within the meaning of the

organization which includes employees of the state and which has as one of its primary purposes representing these employees in their relations with the state.

Higher Employer-Employee Education Relations Act.²¹

Under this precedent, it is concluded that CEC is an employee organization. The CEC is a far more formal organization than were the employee organizations in either Monsoor or U.C. Regents with regard to its level of organization and its activities.

Regarding employee organization characteristics. CEC had regular meetings, it kept minutes of these meetings, and it elected representatives from the various components of the District in a secret ballot election. It also elected officers by secret ballot to specified terms. Its internal organization included establishing a list of employees with telephone numbers in the various organizational components of the District. CEC had a formal constitution and set of by-laws. Although it had no dues structure, it claimed as its

21section 3562(g) of the HEERA defines employee organization as follows:

(g) "Employee organization" means any organization of any kind in which higher education employees participate and which exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees. Employee organization shall also include any person such an organization authorizes to act on its behalf. An academic senate, or other similar academic bodies, or divisions thereof, shall not be considered employee organizations for the purposes of this chapter.

constituency a well defined group of employees, including those represented by CSEA on an exclusive basis. Release time was granted for CEC representatives to engage in a variety of activities. The conclusion that CEC was structured in the same mold as an employee organization is inescapable. See NLRB v. Cabot Carbon Co. (1959) 360 U.S. 203, [44 LRRM 2204]; NLRB v. Thompson Ramo Wooldridge (CA 7 1962) 305 F.2d 807, [50 LRRM 2759]; Oak Grove School District (1986) PERB Decision No. 582.

An examination of CEC activities leads to the same conclusion. To qualify as an employee organization under the plain language of section 3540.1(d), an organization need not represent employees on negotiable matters. It need only represent employees in their "relations" with the public school employer. Thus, the CEC may be an employee organization under the Act even assuming it never represented employees in the bargaining process or grievances. Let us examine the areas where CEC was active.

District witnesses and CEC President Kirk (and the CEC Constitution) disclaimed any intention of usurping the role of exclusive bargaining agent. They steadfastly maintained that, despite CEC's union-like structure, its sole purpose was to provide a line of communication from classified employees to the District (and vice versa) and to increase morale. While the record is replete with such disclaimers, the reality of the situation clearly was otherwise. CEC was not simply a shell of

an organization designed to improve morale by sponsoring social functions and satisfying a communications need in the District. Obviously, to some extent it did serve these purposes.²² but it did much more.

Consistent with the representative status conferred upon the organization by Dr. Weichert and the Constitution and By Laws. CEC. in addition to having the markings of a full-fledged employee organization, in fact, acted in a representative capacity for classified employees in their employment relations with the District. That the CEC took on this role really came as no surprise to CSEA. As early as August of 1983, Dave Young protested the formation of the Council for precisely this reason. His predictions proved to be accurate.

Dr. Weichert's early memo in August 1983. during the formative stages of the Council, expressly declared that the CEC was a "representative body" designed to deal with "non-collective bargaining issues" which were of concern to classified employees. The memo states that the CEC was to provide an "avenue of representation" for classified

²²Even this point is subject to question. Kirk testified the delineation of the respective roles of the two organizations was a subject of ongoing debate on campus. And the record shows that on some occasions there were extremely heated discussions between CSEA and CEC representatives about this subject. Thus, at least in some circles, the question of whether the creation of CEC improved morale or represented a divisive issue is debatable. The debate is no doubt fueled by the fact that at least one reason cited for low morale on campus was the advent of collective bargaining. See footnote 3, supra.

employees. The CEC Constitution similarly provides that a primary purpose of the Council is to be a "representative body to act in the formation of policies in all matters affecting the welfare of the college and the classified employees."

Neil Kirk was invited to all Board of Trustees meetings and given a permanent slot on the agenda under "Organizational Reports." Kirk used this slot on several occasions as a public forum to present the views of CEC on a variety of subjects, ranging from CEC annual reports to AOTF recommendations to collective bargaining. In doing so, he purportedly spoke as a representative of all classified employees, since the CEC held itself out as an organization that counted as its constituents all classified employees.

In a similar context, the CEC represented the views of its constituents on the extra money question, clearly a matter which related to a negotiable subject. See Section 3543.2 and Oak Grove School District, supra. Arguments that the District sought only to get input from "district organizations" or to get a "profile of staff viewpoints" on this issue miss the point. The reasons the District held the meetings are irrelevant. What is relevant is that CEC, a well organized organization supported by the District and purporting to speak for all classified employees, represented these employees in giving vital input to the District on a negotiable matter. Significantly, Dr. Weichert's

candid admission that he gave equal weight to the CEC and the CSEA input, elevates CEC to a level comparable to the exclusive representative.

No one could seriously contend that CSEA, by its participation in the same process, was not "representing" unit employees in a negotiable area. Indeed, one might argue that it was bound by law to do so. See section 3544.9. The activities of these two employee organizations in the context of the extra money question were strikingly similar. To characterize CEC's activity as a "communication" effort and CSEA's as a "representational" effort simply elevates form over substance.

The details surrounding the meeting on extra money cannot be overlooked because of the preferred status it placed on CEC. The meeting was announced as a CEC meeting and open to all employees, but it was structured in a way that suggested it was a joint meeting sponsored by District and CEC representatives. Dr. Weichert and Dorothy Dilling conducted the meeting, with CEC members participating from on stage. It was against this

²³In fact, the kind of CEC participation in the extra money question, as well as in the AOTF and program review areas, is not unlike that kind of representational right which the Board has guaranteed to nonexclusive representatives in other settings. See e.g. State of California. Franchise Tax Board (1982) PERB Decision No. 229-S; Los Angeles Unified School District (1983) PERB Decision No. 285, and cases cited therein. In view of these decisions, it cannot credibly be argued that the activities by the nonexclusive representatives in these cases amounted only to "communications."

background. Kirk testified, that a "lively" discussion occurred. At one point in the meeting he told employees, in the presence of Weichert and Dilling, that they should be free to present their problems to the CEC without fear that their names will be revealed at some later date. Kirk testified that he made this suggestion in the limited spirit of opening communications and giving employees an outlet to discuss problems when the offices of CSEA were closed. One would have to seriously distort reality in order to conclude that this signaled anything other than an open offer of representation on employment related matters.

Additional CEC representation of classified employees is found in its participation in the Administrative Organization Task Force. The purpose of the AOTF, in essence, was to use the committee system to evaluate and reorganize, if necessary, the administrative staff in the District. CEC proposed an organizational development plan which contained its version of "college governance" and a college committee structure. This participation, which involved about two to three meetings per week for about twelve weeks, clearly establishes that CEC was deeply involved in the AOTF, thus underscoring its preferred status. It is indeed quite unusual for an employer to permit an organization of bargaining unit employees access to programs which traditionally have been closely guarded areas of managerial prerogatives.

Nevertheless, although the main purpose of the AOTF was directed at analyzing the administrative staff, it must be recognized for purposes of evaluating CEC's level of activity that changes at the administrative staff level unavoidably impacted on working conditions of the support staff, which was made up of the bargaining unit employees represented by CSEA. At least two examples of such an impact are found in the record. First, as a result of the task force recommendation, the Financial Aid Director and the Director of Student Activities, both bargaining unit positions, were combined without providing for clerical support. Second, the task force was involved with implementation of secretarial help for a new Dean of Instruction.

The testimonial dispute between Tucker and Petersen about whether the impact on bargaining unit employees which flowed from these changes was negotiated need not be resolved. The only purpose here is to show the extent of CEC involvement on the task force, the vehicle through which changes impacting on bargaining unit employees were conceived and implemented.

Yet another area where CEC represented classified employees was at administrative staff meetings. These meetings involved wide-ranging discussions about a variety of subjects, some of which included negotiable items, i.e. personnel, program review, sabbatical leaves, etc. CEC was invited by the District to attend these meetings, which were held each Monday afternoon. Kirk was the CEC representative who attended most

of these meetings, and he received release time for doing so. Although it appears that Kirk's actual participation at these meetings was limited, he nevertheless attended in an official capacity as an officer of the CEC. and. since CEC counted among its constituents all classified employees, it must be concluded that he attended as a representative of these employees. The fact that his actual participation was limited suggests only a lesser degree of representation. It does not diminish his overall status as a representative.

Program review is the last major area where CEC acted in a representative capacity. Before addressing the degree of CEC involvement in this area, however, it must be emphasized that the program review process carried with it the potential for the heaviest and the most serious impact on the terms and conditions of employment of classified employees. According to Dr. Petersen. this potential for significant personnel actions was clearly understood from the outset. In fact, some of the recommendations sent by the program review committee to the Board of Trustees involved such major items as reinstatement rights, reduction in hours, eliminations of positions, purchase of new equipment, layoffs, hiring, and reduction in force through resignation.²⁴

²⁴obviously several of these items are subject to decision and/or effects negotiations. For purposes of determining whether CEC served the program review process in a representative capacity, it is unnecessary to determine which items are negotiable or. in fact, if any of these items were negotiated with CSEA.

The record with regard to CEC participation in the program review process is somewhat fuzzy. While it is clear that some CEC representatives attended pre-November 1984 meetings, evidence about their degree of participation at these early-meetings, as well as at the later meetings, is sketchy. The only exception is the final written recommendation to the Board of Trustees, submitted in February 1985, which shows that Cathy Dellabalma was a member of the committee at that time. However, the charging party introduced no concrete evidence to establish her degree of participation. It can only be presumed, therefore, that as a committee member she participated to any significant degree. Thus, if one were required to make a finding regarding CEC participation in the program review process which occurred from September 1984 to February 1985. it might very well be adverse to the charging party due to lack of evidence.

However, Dr. Petersen forth rightly testified that the program review process continues in the District, although on a more limited scale, and CEC regularly participates as a member of the Academic Services Council/Student Services Council, as well as the Steering Committee. Thus, CEC continues to enjoy full participation in a major District governance organization and, therefore, has the opportunity to provide input which could conceivably lead to significant changes in employment- related matters.

The obvious question to be answered at this point is

whether these activities constituted representation of employees in their relations with the employer. Section 2(5) of the NLRA includes in its definition of "labor organization" any "employee representative committee or plan . . . which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (emphasis added.) The Court pointed out in NLRB v. Cabot Carbon Co. supra, that nothing in that section indicates the broad term "dealing with" is to be read as synonymous with "bargaining with." Similarly, I know of no persuasive argument which compels the conclusion that the term "representing" in section 3540.1(d) is synonymous with negotiating or grievance handling. It must be assumed that the legislature, in enacting the EERA, "did not purport to invent anew the law of labor relations." San Lorenzo Education Association (1982) Cal.3d 841, 187 Cal.Rptr. 432. Thus, even if CEC never acted to negotiate with the employer or to process grievances, it is nevertheless found to be an employee organization because it represented employees in employment-related matters. Oak Grove School District, supra. PERB Decision No. 582. In this same vein, it is noted that the Court in Cabot Carbon Co. rejected the argument, offered here by the District, that the entity in question was not a labor organization because the authority to make final decisions at all times rested with the employer.

To summarize, I find that the CEC was a highly structured

employee organization which openly claimed as constituents all classified employees. On behalf of these employees, and with the District's approval and assistance, it acted in an official representative capacity before the Board of Trustees, as well as in the areas of program review. AOTF, administrative staff meetings, budget of potential extra income, and. to a limited degree, the hiring/screening process. Some of these activities involved negotiable matters; others involved employment related matters which were not necessarily within the scope of bargaining. See Oak Grove School District, supra. Let us now turn to some of the District's defenses.

The District, both at the hearing and in its Brief, relied heavily on Los Angeles Unified School District, supra PERB Decision No. 285, in arguing that CEC is not an employee organization. The District claims that the Board, affirming the hearing officer's decision in Los Angeles Unified School District, found that an employee committee which forms to discuss with and suggest to the employer a way of improving work procedures and conditions is not an employee organization under the EERA. The District's reliance on this case is misplaced. While it is true that the hearing officer, based on the limited record in that case, reached the conclusion urged by the District, it is not true that the Board adopted the hearing officer's decision. The Board's opinion in Los Angeles Unified School District reveals that the District did not

except to the favorable finding that it did not violate Section 3543.5(d). The District appealed only the conclusion of the hearing officer regarding Section 3543.5(c) and (b) violations. These involved separate issues. The Board has generally declined to raise sua sponte matters to which exceptions have not been taken. Nevada City School District (1981) PERB Decision No. 185. Since the Section 3543.5(d) violation was not before the Board, the Board did not expressly address this alleged violation. Thus, the Section 3543.5(d) violation holding in Los Angeles Unified School District is merely the opinion of a hearing officer. It is a fundamental point of PERB practice that hearing officer decisions are not precedential except to the parties to the particular case. PERB Regulation 32215.

The District's reliance on Healdsburg Union High School District (1984) PERB Decision No. 375 is similarly misplaced. In that case the Board found nonnegotiable a union proposal prohibiting the formation of advisory committees. The proposal was objectionable because it was overbroad, and, as drafted, could have been interpreted as barring the formation of a committee which " 'concerns' bargaining unit members but which has no relation to the subjects of bargaining enumerated in section 3543.2." Even if one concludes from this holding that employer formation of advisory committees of bargaining unit employees which do not deal with negotiable matters is permissible, Healdsburg is not dispositive of the issues

presented here for at least three reasons. First, the CEC participated in areas which included negotiable items. Second. Healdsburg presented only the issue of negotiability and did not address the completely different issue of whether, under the totality of the circumstances as presented by this case, the employer's conduct "tends" to influence employee choice by violation of section 3543.5(d). See Santa Monica Community College District, infra. Third. Healdsburg doesn't resolve the question of whether the entity was an "employee organization," (even if it was an "Advisory Committee").

The District next points out that the CEC is similar to the Academic Senate, including a constitution which is patterned after that of the Academic Senate. Since the Academic Senate is not viewed as an employee organization, neither should CEC, according to the District. The status of the Academic Senate does little to resolve the issues presented by this case. In the final analysis the section 3543.5(d) allegations must be resolved by evaluating the evidence with respect to the relationship between CEC and the District. The law governing academic senates has nothing to do with classified employees. See section 3540; Government Code section 72292; and California Administrative Code, Title 5. section 35200 et. seq.

The District argues alternatively that even assuming CEC is found to be an employee organization, an employer is free to deal with any employee organization other than the exclusive representative on matters outside the scope of representation;

that is to say that an exclusive representative has exclusive rights only in the areas of collective bargaining and grievance handling. According to the District, an employer is free to engage in the kind of activities at issue here, provided it ultimately satisfies its obligation to negotiate with the exclusive representative about matters within the scope. The District stresses that CEC acted as a mere vehicle for communication between the District and the classified employees, while all decision-making authority remained in the hands of the Board of Trustees or appropriate District managers.

To support its argument, the District points to Section 3543.2, and claims that provision gives the employer the "absolute right" to consult with "any employee organization" or any matter outside of the scope of the representation. The relevant part of Section 3543.2 reads as follows:

All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

From a public policy point of view, continues the District, this language represents a "sensible and explainable" choice on the part of the legislature to enact a law which does not restrain the ability of a locally elected body to function democratically by receiving points of view from all concerned

in matters outside the scope. To do otherwise, says the District, would be unthinkable and attack the very foundation of representative government.

It is a basic principle of statutory construction that statutes are to be read as a whole so that the entire law is given meaning. San Lorenzo Education Association v. Wilson. supra. Additionally, the plain meaning should be given to statutory language. University of California (Student Body Presidents' Council) (1982) PERB Decision No. 253-H. p. 10. Application of these principles here leads to the following conclusions. While it is true that Section 3543.2 provides that the employer may consult with any employees or employee organizations about matters outside of scope, reading the statute as a whole reveals that there are limitations on this provision. Section 3543.1(a) provides that employee organizations have the right to represent their members in their employment relations with public school employers, except that once an exclusive representative is certified or recognized "only that employee organization may represent that unit in their employment relations with the public school employer." This limitation on rival unions plainly is not limited to negotiable items. The clear statutory language bars rival unions, where an exclusive representative exists, from representing unit employees in the much broader arena of "employment relations." Adoption of the District construction of Section 3543.2 would ignore this plain language, and. in

doing so. render the language in Section 3543.1(a) meaningless.

More significantly, the District's interpretation would undermine the principle of exclusive representation upon which the entire labor policy underlying EERA. SEERA and HEERA (and for that matter, the NLRA) is based. In Hanford Joint Union High School District (1978) PERB Decision No. 58. a minority union filed a refusal to bargain charge against the District for unilaterally implementing a school calendar. Between the implementation date and the time the charge was filed, an exclusive representative was recognized by the District. The Board held that whatever "representational rights" the rival union may have had prior to the establishment of the exclusive representative, it was ousted of those rights which obtained solely to the exclusive representative.

Such a conclusion is consistent with the principle of exclusive representation set forth in section 3540 of the EERA which states the legislative purpose to be "to promote the improvement of personnel management and employer-employee relations in the State of California by providing a uniform basis for recognizing the right of public school employees to" . . . select one employee organization as the exclusive representative of the employees in an appropriate unit." (Emphasis added.)

To hold that the Federation in this instance could pursue a representation-oriented charge after the establishment of the Association as the exclusive representative would tend to undermine the right of the employees to negotiate collectively through a representative of their own choice. Furthermore, the need for stability in employee organizations precludes encouraging the rivalry among various employee organizations that would be the inevitable consequence of a requirement that the employer deal with an organization other than the exclusive representative. As the United States Supreme Court has said, the obligation of dealing with the exclusive representative "exact[s] the negative duty

to treat with no other." Hanford Joint Union High School District, supra, p. 7; see also Mount Diablo Unified School District (1977) PERB Decision No. 44.

Adoption of the District interpretation of the relevant statutory language would lead inescapably to the pitfalls cited by the Board in Hanford. The stability which flows from exclusivity would be undermined. In this case, CEC would at least share the role of classified employee representative with CSEA in such vital employment-related areas as, for example, the program review and the Administrative Organization Task Force, thus fostering rivalry among employee organizations.²⁵

Statutes should be interpreted so as to effectuate the purposes of the Act as a whole. Regents of the University of California, supra. PERB Decision No. 253-H. p. 11.

Section 3540 clearly states the purpose of EERA.

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

25on a practical level, one need not strain to envision situations where the District's interpretation of the law, carried to its logical conclusion, would create utter havoc in local labor relations. For example, is the District free under its interpretation of section 3543.2 to "consult" with a minority union about the decision to lay off employees, a non-negotiable subject, while actually negotiating with the exclusive representative about the effects of such decision, a negotiable area.

The Board has held repeatedly that the decision to lay off employees is not negotiable but the effects of such a decision are. See e.g. Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.

choice, to be represented by such 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.

Adoption of the District's construction of sections 3543.2. 3543.1(a) and 3540.1(d) would undermine the principle of exclusivity and run afoul of the clear purpose of the Act. For these reasons, the District's arguments referred to above are rejected.

This conclusion is not inconsistent with the general notion advanced by the District that, under some circumstances, an employer is free to communicate directly with individual employees or groups of employees on employment-related matters without running afoul of its obligations under the Act. See e.g. NLRB v. Scott and Fetzer Co. (CA 6 1982) 691 F2d 288. [111 LRRM 2673] and cases cited therein. Such circumstances, however, are not present here. The organization of CEC, its on-going involvement in employment-related matters, and the assistance provided by the District (more fully discussed below) all point to the conclusion that the District acted unlawfully in its overall relationship to the CEC.

The 3543.5(d) Violation:

Section 3543.5(d) provides that it shall be an unfair practice to

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or

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

The threshold test for determining whether an employer has violated section 3543.5(d) is found in Santa Monica Community College District (1979) PERB Decision No. 103.

This section imposes on employers an unqualified requirement of strict neutrality. There is no indication in the statutory language that the Legislature meant to prohibit only those acts which were intended to impact on the employees' free choice. The simple threshold test of section 3543.5(d) is whether the employer's conduct tends to influence that choice or provide stimulus in one direction or the other. Id., p. 22 (Emphasis in original)

In addition, due to the limited PERB case law in the domination/support areas, guidance must be taken from the decisions of the NLRB and the Federal courts when resolving section 3543.5(d) allegations.²⁶

As the District points out in its brief, the line between employer domination or interference, which the Act prohibits, and mere cooperation, which the Act permits, is often fuzzy. There is no per se rule which can be used to resolve

²⁶section 3543.5(d) is patterned after section 8(a)(2) of the NLRA, which makes it unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. The construction of similar or identical provisions of the NLRA, as amended. 23 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See. e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13, Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608. 616. Compare section 3543.5(d) of the Act with section 8(a) (2) of the NLRA.

allegations of unlawful domination or assistance. No single act determines whether an employer has dominated, supported or otherwise interfered with an employee organization. In the private sector the NLRB and the reviewing courts have looked to a totality of the circumstances in each particular case to decide section 8(a) (2) allegations. See Classic Industries, Inc. V. NLRB (CA 1 1981) 667 F.2d 205; [109 LRRM 2057]. Also, see generally Morris. Developing Labor Law, Vol. I. pp. 267-305. Taking this approach in the present case, one can readily identify several factors identical to those found in decisions under the NLRA where the NLRB or the reviewing court found unlawful employer conduct.

As a general rule, the District's pervasive involvement in the formation and administration of CEC suggests unlawful conduct. It has been held repeatedly that employer participation in forming an employee organization for its employees is evidence of unlawful conduct under section 8(a) (2). Ace Manufacturing Co. (1978) 235 NLRB 1023. [98 LRRM 1462]; S-W Motor Lines (1978) 236 NLRB 938, [98 LRRM 1488]; Alta Bates Hospital (1976) 226 NLRB 485, [93 LRRM 1288]; Antelope Valley Community College District (1979) PERB Decision No. 97.

It is clear that Dr. Weichert had the idea to form CEC, based on earlier studies that showed low morale and lack of communication in the classified employee ranks. He took the

first steps of presenting the idea to the Board of Trustees, and then to the entire classified staff at an orientation meeting. There is no evidence that any rank and file employees contributed in any significant way to this decision.

The presence of employer supervisory personnel at union organizational meetings is also a significant factor which cannot be ignored in determining the role of the employer in the formation of an employee organization. See M-W Education Corp. (1976) 223 NLRB 495. [92 LRRM 1274]. In addition to Dr. Weichert, other management officials attended the early CEC meetings where fundamental organizational issues (i.e. constitution and by-laws, officers, etc) were discussed. Although, Dr. Weichert's participation at CEC meetings diminished as time went on, this does not erase his deep involvement at the crucial formative stages, nor does it eliminate the ongoing involvement (to be more fully discussed below) in the Council of other managerial employees. This kind of participation leaves the obvious impression that high ranking management employees favored CEC and its activities on campus. The District's role here was not unlike the employer's role in forming a "Teachers Forum" which the Board found unlawful in Oak Grove School District, supra.

After the CEC was formed, District representatives conducted a secret ballot election, after holding meetings with employees to announce its (the District's) detailed plans for implementation. Holding meetings with heavy management

participation and conducting elections (where managerial employees voted) by use of employer time and resources has been viewed by the NLRB as evidence of unlawful conduct. St. Vincent's Hospital (1979) 244 NLRB 84. [102 LRRM 1196]; NLRB v. Thompson Ramo Wooldridge. supra. 305 F.2d 807.

The CEC. which purported to represent all classified employees, had as members of its governing board several management employees. During the first year Dellabalma. Bailey and Connors were CEC representatives from the management staff. During the second year Dellabalma and Reynolds represented the management staff on the CEC. Given the size of the Council (only seven members), it must be inferred that these employees participated in CEC meetings and played at least some role in CEC deliberations on all matters, including those areas of representational activity described above.

Especially noteworthy in this regard is the participation of Dellabalma. the personnel officer. While she was on the Council, it must be presumed that Dellabalma played a central role in the formation of District personnel policies which covered employment-related matters. At least one clear message delivered to bargaining unit employees from this quite open arrangement is that CEC. because one of its officers had a direct pipeline to District policy makers, could produce quicker results. This is the kind of arrangement which "tends" to influence employees in their preference for one organization or another, in violation of section 3543.5(d), regardless of

the District's intention, or whether CEC ever benefited as a result of Dellabalma's connections. Oak Grove School District, supra, p. 18-19; Santa Monica CCD, supra, p. 22. Furthermore, the participation by a managerial employee as an agent or officer in an employee organization presents such an obvious impediment to union independence, it has been viewed as evidence of unlawful conduct by the NLRB. Vincent's Hospital, supra; Alta Bates Hospital, supra.

The District's conduct also runs afoul of that provision in Section 3543.5(d) which makes it unlawful for an employer to "contribute financial or other support" to an employee organization. Most important in this area is the financial grant, at Dr. Weichert's suggestion, to operate. A revolving account still exists for CEC benefit. It appears that the money was used primarily to finance social and recreational activities, and the account was always replenished by CEC with profits from these events. However, the limited nature of this grant does not detract from the fact that CEC was financially assisted by the District. Plainly, this is impermissible activity under Section 3543.5(d). NLRB v. Thompson Ramo Wooldridge, supra; Azuza Unified School District (1977) PERB Dec. No. 38.

There are several additional areas where the District provided "other support" to CEC. Each has been viewed as unlawful assistance by either the NLRB or the federal courts.

First is the authorization of release time. Section 3543.1(b) provides that a reasonable amount of release time be given only to a reasonable number of representatives of the exclusive representative and only for negotiations and grievance processing. Indeed, this is a negotiable matter under the EERA. Anaheim Union High School District (1981) PERB Decision No. 177. Yet CEC representatives, especially Kirk, were granted significant blocks of time to participate in social events, as well as in activities which I have found to be representational in nature. CEC representatives always cleared the use of such time with their supervisors, and it appears that granting it did not disrupt the work flow. Nevertheless, this evidence does not diminish the fact that the District supported CEC participation in these areas by a grant of release time. The Board looks with disfavor upon granting release time for such activities. See e.g. Oak Grove School District, supra.

As mentioned earlier. CEC elections were conducted by District representatives using District time and resources. CEC almost always used District stationery and copying facilities, and the District occasionally distributed CEC questionnaires to employees. Such conduct has been found to exceed the bounds of permissible cooperation and constitute unlawful assistance in violation of Section 8(a)(2) of the

National Labor Relations Act.²⁷ Kaiser Foundation Hospitals (1976) 223 NLRB 322. [91 LRRM 1523]; see also Clovis Unified School District (1984) PERB Decision No. 389. where PERB found such aid. provided in the face of a pending question concerning representation, improper. Providing rooms for employee organization meetings, as the District did for CEC, has also been viewed as impermissible assistance. St. Vincent's Hospital, supra. While any of these forms of assistance, standing alone, may not rise to the level of unlawful conduct, when considered in their totality they present a pattern of employer assistance which cannot realistically be described as mere cooperation. See NLRB v. Thompson Ramo Wooldridge. supra.

Other District conduct similarly runs afoul of the prohibition against engaging in conduct which "tends" to influence employee choice. CEC was given a preferred spot on the Board of Trustees agenda, while the District refused a similar spot to CSEA. CEC representatives were given high visibility roles in program review, the Academic Services Council, the Student Services Council. AOTF. administrative

²⁷The District's argument that CEC is entitled to use the campus mail under section 3543.1(b) misconstrues the statute. While employee organizations may be entitled to use the mail system, this provision of the Act does not contemplate the employer actually conducting a mailing for an employee organization by providing, among other things, secretarial help or stationery. See Richmond Unified School District (1979) PERB Decision No. 99.

staff meetings, the extra money question, and hiring/screening committees. Release time was provided to CEC representatives to engage in all of these activities. By contrast, CSEA's role was limited to some involvement in the initial stages of program review and in the extra money question; and. CSEA had a less desirable slot on the agenda at Board of Trustees meetings. All of these areas have been more fully discussed above, and the role of CEC need not be repeated here. Suffice it to say that the District's conduct in creating, supporting, and permitting CEC to become deeply involved in these areas placed that employee organization in a favored position. The competition between CEC and CSEA was therefore very real. See Sacramento City Unified School District (1982) PERB Decision No. 214; Oak Grove School District, supra. It is the kind of conduct which "tends" to influence employee choice, under the teachings of Santa Monica Community College District, even if the Council was not seeking to represent employees on an exclusive basis.

I recognize the fact that the District's actions in creating the CEC were undertaken with the best of intentions. The District was not in my view motivated by any desire to undermine the exclusive representative. Its actions were premised on the belief that creation of the CEC would improve communication and morale among classified employees in the District. The ultimate goal was to create a more efficient operation. Nevertheless, it cannot be ignored that

Section 3543.5(d) unqualifiedly forbids unlawful support, interference and the kinds of actions taken by the District which otherwise tend to influence employee choice, be they benevolent or malevolent. See Oak Grove School District, supra; Santa Monica Community College District, supra; Alta Bates Hospital, supra²⁸.

CONCLUSION

Based on the foregoing, it is concluded that the District violated Section 3543.5(d). By its conduct the District has concurrently violated Section 3543.5(a) and (b). See Oak Grove School District, supra.

REMEDY

Section 3541.5(c) provides that:

The board shall have 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.

²⁸compare NLRB v. Northeastern University (CA 1 1979) 601 F.2d 1208, [101 LRRM 2767], and Hertza and Knowles v. NLRB (CA 9 1974) 503 F.2d 625. [87 LRRM 2350], Cert, denied 433 U.S. 875, [90 LRRM 2554], where, despite the presence of similar indices of unlawful conduct found in this case, the First and Ninth Circuits respectively refused to enforce NLRB orders finding domination. It should be noted, however, that both of these cases may be distinguished from this case, since the idea to form the organization in both came from employees, thus evidencing a degree of free choice which was not present here. See also NLRB v. Homemaker Shops, Inc. (CA 6 1984) 724 F.2d 535, [115 LRRM 2321], where the Sixth Circuit refused to enforce an NLRB finding that a Board-certified organization was dominated because, unlike the instant case, the record did not support the conclusion that employee free choice had been undermined.

CSEA argues that the CEC is a dominated employee organization. Therefore, following private sector precedent, CSEA seeks the remedy of disestablishment. The District, of course, opposes such a remedy. It has taken the position throughout that CEC is not an employee organization; even if CEC is found to be an employee organization, the District argues, there has been no unlawful conduct in its dealings with CEC.

Since the District's arguments have been rejected, it must now be determined if the complained-of conduct constitutes only unlawful support or rises to the level of domination. A narrow and often obscure line often divides these two categories. The distinction is crucial, for if it is determined that the District dominated CEC, disestablishment is appropriate; if the District merely interfered with or supported CEC, a cease and desist order is appropriate. See Carpenter Steel Company (1948) 76 NLRB 670. [21 LRRM 1232]. NLRB v. Dennison Manufacturing Co. (CA 1 1969) 419 F.2d 1080, [72 LRRM 2972].

The facts of this case do not fit neatly into any case I am aware of. However, this is not atypical when domination/support issues are raised. Each case must be evaluated on its facts to determine the level of employer control or assistance and ultimately the impact of the unlawful conduct on employee free choice. See Hertza and Knowles v. NLRB, supra. Under this standard, a review of the totality of the circumstances presented here leads to a finding of domination.

It is undisputed that the initial formation of CEC did not represent the exercise of employee free choice. Plainly, it was Dr. Weichert's idea from the beginning, and he participated heavily during the employee orientation meetings where CEC was born. He had a similar level of participation at two early CEC meetings. It was Dr. Weichert's September 12, 1983. memo to employees which effectively set the quite detailed structure for CEC. It seems clear that, but for Dr. Weichert's efforts, CEC would never have come into existence.

In reaching the conclusion that CEC was a dominated organization, it cannot be overlooked that management representatives sat on the Council, and obviously participated in all meetings, including executive sessions. Specifically, they were privy to all Council discussions, activities, and, importantly, even the so-called "confidential" communications from bargaining unit employees who, according to Kirk, may have gone to CEC after becoming disenchanted with CSEA. By virtue of the superior positions of these management representatives in the District hierarchy, one would have to distort reality to conclude that this arrangement presented anything but a serious threat to employee organization independence.

The CEC constitution represents yet another area which points to employer control. A unique document, the Constitution intertwines the District and CEC so tightly that any remedy short of disestablishment seems incapable of

breaking the ties. That document expressly establishes CEC as a representative organization, and it has been found that CEC acted out this representational mandate with quite considerable District help. It provides a formal procedure for CEC presentation of recommendations to the District and for District responses, a procedure not unlike the give and take found in the bargaining process itself.

The Constitution further provides for CEC participation in the kinds of governance organizations described above, and the College President may be invited to CEC meetings as a "consultant or advisor." Perhaps the strongest indicator of actual control lies in the constitutional provision which gives the District the right to reject the Constitution itself, or any amendments thereto. Under such an arrangement the District is free to mold the organization in accordance with its desires or, arguably, to disband it completely. In the end, it is the District, not employees, who have the final say regarding constitutional matters.

It should be noted that the Constitution disclaims any intent to represent employees in grievances or negotiations, and the record is clear that CEC has not done so. However, a close reading of the Constitution reveals that it does not disclaim any intent to engage in the kinds of representational activities in "employment-related" matters which have been found above to be unlawful.

The assistance in conducting elections, and in providing photocopying, stationery, mail service, release time, meeting rooms and even money points to domination, as well. Indeed, one gets the definite impression that, but for this considerable amount of support at almost every level of operation, CEC could not generate internally the necessary machinery to operate.

When examined closely, it becomes clear that CEC's role in the various governance organizations, and its participation at the Board of Trustees meetings was more the result of District encouragement and invitation than of CEC's independent efforts. It was the District which repeatedly invited CEC to, for example, program review or administrative staff meetings. The record is replete with such overtures. The level of participation by CEC in at least some of these areas seemed largely to be that of an observer. This can be said about the administrative staff meetings, the early program review meetings, and the extra-money meetings in the Forum Theater, which was actually conducted by Dr. Weichert and Dorothy Dilling. Indeed, CEC representatives even rejected, for lack of time, the opportunity to sit on a seemingly important financial management committee. This is not to minimize the fact that CEC played an effective role in some of the activities described above. Nevertheless, one gets the impression from the overall record that it was the District.

not CEC. which in large part orchestrated CEC's representational activities.

Finally, it appears that disestablishment under the facts presented here will not pose an overly disruptive threat either to the classified employees or the District. CEC is a fairly young organization, with a history of representation dating back only a few years. It has no formal membership, nor does it have a dues structure. It is limited to only seven members who actually sit on the Council. Dismantling such an organization does not present the kind of difficulties inherent in disestablishing an organization which might have stronger historical ties to the employees or the District.

The District, in its brief, argues that disestablishing CEC is tantamount to a declaration that "all organizations of employees existing on a college campus which have any dialogue whatsoever with college administration is prohibited." The District's projected impact of such a finding is grossly exaggerated, in my view. Employees are certainly free to establish, on their own initiative, an organization which serves a social or recreational purpose, or, for that matter, serves as a communications vehicle or even an employee organization. The District remains free to communicate with and gather information from employees directly or through the exclusive representative. However, the District is not free to create an employee organization out of whole cloth and support

and control it to the level described herein. Oak Grove School District, supra, p. 18. And, this is true whether or not employees as a group complain about the domination. Lawson Co. V. NLRB (CA 6 1985) F.2d. [118 LRRM 2505].

Finally, the District asserts that any restriction on the right of CEC to exist will violate CEC members' freedom of speech and right to association. It asserts additionally that any prohibition on the right of CEC to communicate its views will infringe on the District's freedom of speech, i.e. "the right to hear."

The arguments advanced by the District have long been rejected by the U.S. Supreme Court.

Respondents argue that to hold these employee committees to be labor organizations would prevent employers and employees from discussing matters of mutual interest concerning the employment relationship, and would thus abridge freedom of speech in violation of the First Amendment of the Constitution. But the Board's order does not impose any such bar; it merely precludes the employers from dominating, interfering with or supporting such employee committees which Congress has defined to be labor organizations. NLRB v. Cabot Carbon Co. 360 U.S. 2-3.

The recent Supreme Court cases cited by the District do not compel a different result. While these cases covered freedom of speech and association, they did not present unlawful domination/interference issues such as those presented here. As the Court pointed out in Cabot Carbon Co., a disestablishment order would not interfere with any

Constitutional right. Employees remain free to form and join organizations such as CEC. Such organizations are free in appropriate ways, to present their views to the District and the District is free to listen. See e.g. San Ramon Valley Unified School District (1982) PERB Decision No. 230.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the Redwoods Community College District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and otherwise to comply with the proposed order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 589. 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law. and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Redwoods Community

College District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Dominating or interfering with the formation or administration of any employee organization, or contributing financial or other support to any employee organization, or engaging in any conduct which tends to encourage employees to join any employee organization in preference to another.

(b) Interfering with the exercise of employee rights 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.

(c) Interfering with the right of the California School Employees Association and its Beatrice Chapter No. 509 to represent bargaining unit employees in their employment relations with the Redwoods Community College District.

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

(a) Completely disestablish the Classified Employees Council as the representative of employees in the bargaining unit represented on an exclusive basis by the California School Employees Association, and its Beatrice Chapter No. 509, on all employment related matters.

(b) Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other

work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that 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 insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(c) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8. part III. section 32305, this Proposed Decision and Order shall become final on July 31. 1986, unless a party files a timely statement of exceptions. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8. part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on July 31. 1986. or sent by telegraph or certified or Express

United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: July 11, 1986

Fred D'Orazio
Administrative Law Judge