



**CALIFORNIA TEACHERS ASSOCIATION**  
DEPARTMENT OF LEGAL SERVICES

February 14, 2005

## Supplemental Legal Department Report

*East Whittier School District*  
*PERB Decision No. 1727*

The board majority (Neima and Whitehead) affirmed the ALJ's decision that the district interfered with union and employee rights by adopting a policy prohibiting wearing collective bargaining buttons "in instructional areas in the presence of students." PERB ordered the district to cease and desist from prohibiting employees from wearing collective bargaining buttons and to "rescind or revise" board policy and administrative regulations accordingly.

PERB again held that wearing union buttons is not "political activity" which the district is authorized to regulate under Education Code Section 7055. Rather, it found that "political activity" under Education Code Section 7055 is related to the election of a candidate or a ballot measure. Thus, the board reiterated its decision in *Turlock Joint Elementary School District* (2002) PERB Decision No. 1490, which was subsequently overturned by the Court of Appeal, depublished by the California Supreme Court, and vacated by the board, rendering it non-precedential.

The decision also affirms the "well settled" law that employees have a protected right to wear union buttons, absent special circumstances. The case is significant in that it presents PERB's first opportunity to discuss "special circumstances." The board explains that "what constitutes special circumstances depends on the setting" and involves a balancing of the rights of employees under EERA to clear and open communication with the employer against the interest of the employer in educating its students in classrooms free of undue distraction and disruption." Slip Op., pp. 10-11.

The board rejected the district's primary claim-that elementary classrooms should always be considered special circumstances.

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While the Board is open to the possibility that certain instructional settings may constitute a per se special circumstance, the Board does not believe that “special circumstances” are inherent to all instructional settings. Instead, the Board holds that as a general rule the right to wear union buttons attaches in instructional settings as it does elsewhere. Slip Op, p.11

Instead, the decision sets forth the following “objective test” to be applied where it is alleged that a union button is distracting or disruptive:

Buttons that contain profanity, incite violence, or which disparage specific individuals will always meet the special circumstances test. Otherwise, the trier of fact must examine the button in its given context to determine whether an objectively reasonable person would find it unduly distracting or disruptive. In determining whether a button is unduly distracting or disruptive, the trier of fact should consider both PERB precedent and private sector cases under the NLRA. . . . The trier of fact should also compare the buttons to other distractions prohibited or allowed by the employer. Slip Op., p13.

Applying this standard, the board found the evidence of disruption presented by the district in this case was insufficient to establish special circumstances to justify its policy. That evidence, summarized as pages 7-8 of the slip opinion, consists of testimony that students had asked questions about the buttons here (“It’s Double Digit Time”) and about union buttons worn by certificated and classified employees in the past. All of the questions occurred during non-instructional time and were dismissed with a single brief response. In one instance, an assistant principal believed the students seemed unsatisfied with the response. In another instance, a principal believed the student “frowned” and was “concerned.”

In addition, the district presented evidence of various district policies intended to minimize interruptions and distractions. In response, the association witnesses testified regarding numerous disruptive activity allowed and/or sponsored by the district, including wearing buttons and t-shirts with various sayings, distributing flyers about community activities, parties for holidays and birthdays, and “fun days” when students are encouraged to wear special colors, “crazy hats” or pajamas to school.

Staff attorney Rosalind Wolf represented the association.