

**Selective Prosecution:
AFT 1493 Files Unfair Labor Practice Charge Against District
Arising Out of Board Election**

by Robert Bezemek and David Conway, AFT 1493 attorneys

On April 23, 2012, AFT 1493 filed an unfair labor practice charge against the District with the California Public Employment Relations Board, setting forth its allegations that SMCCD is engaging in selective, discriminatory and disparate treatment of AFT 1493 in violation of the Educational Employment Relations Act.

The charge arose because last fall District Vice Chancellor Harry Joel demanded that an AFT 1493 staff member “recall” an email he had received at an smccd.edu address, and then forwarded to his personal email “list” of about 50 colleagues and union officers, because that email contained “political” advocacy from a *challenger*-candidate to the District’s Board of Trustees, requesting support for his candidacy. Vice Chancellor Joel also demanded that the union staff member not send any similar “political” emails in the future by writing: “You cannot use District email for political purposes. Technically your forwarding this could be reported to the District Attorney for prosecution.”

Some time after, the District submitted criminal allegations against AFT 1493 to the San Mateo County District Attorney arising out of the email the AFT staff member forwarded, accusing the staff member of violating the Education Code. (The District has subsequently denied making this allegation, and professes that it simply forwarded an “inquiry” to the DA, but AFT has reason to believe otherwise.) As the Education Code was interpreted by Mr. Joel, even had Mr. Kaplan simply forwarded the email to his private email account, he would have violated the law!

Although the District has not yet shared a copy of its accusation to the DA with AFT 1493, we have learned that the District accused the AFT staff member of violating Education Code section 7054, which forbids District officers and employees to use “college district funds, services, supplies or equipment” “for the purpose of urging the support or defeat of any ballot measure or candidate.” AFT 1493 had denied the District’s allegation.

The Union’s charge alleges that the District concurrently, and for years, has permitted its administrators, Board members, and other employees use of its email and other electronic communication devices to engage in comparable political activities, and is now discriminating against AFT 1493 and its staff member’s support of a challenger-candidate to the Board. This other electronic political advocacy – equally allowable under section 7054 (but not targeted by the District) – ranges from routine CSEA communications and political advocacy to its members to the District’s own Director of Community/Government Relations, Barbara Christensen, providing information to “all employees” in support of Measure H.

For example, the Charge alleges that the District: “facilitated and permitted another labor organization, CSEA Chapter 33, to use the District’s web page to communicate with CSEA’s

members and unit, and engage in comparable political actions, including but not limited to posting and distributing information on the District's web page, urging its members to support and vote for candidates and/or ballot measures." The AFT Charge alleges that in treating AFT 1493 and its employees differently than it treated CSEA, the District violated sections 3543.5(a) and (b) of the EERA.

After the Union was contacted, we advised the DA that section 7054 did not apply to the Union staff member (or the Union), because, among other reasons, the law is directed at the "political activities of school employees" and school officers. (Education Code § 7050-7051) The next day, Vice Chancellor Joel emailed "all employees" notifying them that the District was turning over emails of employees to the DA as part of a criminal investigation. AFT has now requested the District disclose whose emails it turned over, and how it searched through faculty emails for "political advocacy" materials. We still await a response to this request.

Although Mr. Joel wrote in his email to all employees that the District's email was to "facilitate the work of the District," it is common knowledge that employees, including administrators, use district email for personal matters, including for "political," "concerted" and union activities. The District, like many California districts, distributes computers to faculty so they can communicate via the internet with their students, 24/7. This "dual usage" of computers gets more work from the faculty, and personal use of these computers comes with that territory. Further, the District provides free access to the internet for faculty, staff, and students, and this use invariably involves a myriad of personal uses, as faculty have considerable non-work time during a typical day at work.

To appreciate the gravity of what the District has done, and the impropriety of the District's allegation, it is necessary to review some of the history of email and Internet use at the District. The Fall 2011 Board election featured three incumbents – Dave Mandelkern, Karen Schwarz, and Pat Miljanich. They were challenged by Joe Ross, who was endorsed by AFT 1493. AFT 1493 did not endorse the incumbents, partly the result of their action in overturning the Arbitration decision won by AFT 1493, in which a neutral arbitrator restored pay wrongly denied to a unit member under the Agreement. Incumbent Dave Mandelkern, however, *was* endorsed by CSEA Chapter 33. This fact is important to understand the AFT's ULP charge for disparate treatment.

The front page of the July 2011 edition of the CSEA Chapter 33's *Monthly Review* contains a boxed, bold announcement that,

"Trustee Mandelkern receives Chapter 33 Endorsement for November Board election."

Like most Union newsletters, CSEA newsletters sometimes contain "political" advocacy. The U.S. Supreme Court has recognized that employees have a right to engage in political activities while at work. California courts agree with this. It is not surprising then that CSEA, like other unions, distributes "political" advocacy at the colleges. Many of CSEA's 2011 newsletters urged support for Michael Bilbrey, a candidate competing for election to the CalPERS Board of Administration.

CSEA's endorsements of Mandlerkern and Bilbrey were posted on the CSEA webpage, which is part of the District website. By agreement, the District has provided CSEA a "web page on the District's web server, serviced by the District with content from and controlled by CSEA." There, CSEA newsletters are accessible to CSEA members and the public. CSEA newsletters downloaded from the site may be emailed by anyone to anyone else - from District employees to others, including administrators.

The CSEA's posting of its newsletters illustrates a common usage of email, and the Internet, to distribute matters of interest to employees and others, including elections and "political" advocacy. Thus, it should hardly come as a surprise that District managers and administrators have also used the internet and email for "political" advocacy. Since early 2010, District Trustee Mandelkern has sent emails from his campaign website, with "political" advocacy, to Dan Kaplan, members of AFT 1493 and presumably many District employees, at @smccd.edu addresses. These emails, as we understand, travel through the District's router(s) and onto District web servers. They include:

* February 9, 2010, to Dan Kaplan @smccd.edu, asking for AFT 1493's help in his campaign for Tax Collector/Treasurer of San Mateo County.

* March 18 and March 23, 2010, to Dan Kaplan at his @smccd.edu address, inquiring about AFT 1493's endorsement of Mandelkern for Tax Collector/Treasurer, and explaining his qualifications.

* May 12, 2010, to Dan Kaplan @smccd.edu, asking for Kaplan's help in his run for Tax Collector/Treasurer, and asking Kaplan to forward Mandelkern's political advocacy materials to Kaplan's private email list.

* October 18, 2010, to Dan Kaplan @smccd.edu, asking for AFT 1493 to run an article Mandelkern wrote containing "political" advocacy in support of his run for County Tax Collector/Treasurer.

* October 27, 2010, to Dan Kaplan @smccd.edu, asking the Union to forward to its members Mandelkern's "political advocacy," asking members to vote for him for Tax Collector/Treasurer.

* April 16, 2011, to Dan Kaplan at @smccd.edu, recommending a vote for Richard Holober for County Supervisor, stating "I encourage you to vote for him to ... and please spread the words to your friends and ask them to vote for Richard too."

* June 22, 2011, to Dan Kaplan at his @smccd.edu email addresses, stating, "I would greatly appreciate your endorsement of my re-election to the San Mateo County Community College District Board ... please feel free to email me ... Thank you in advance for your support ... If you are willing to endorse me for another term ... please let me know by reply to this email ..." (Emphasis added.)

In these emails, Mr. Mandelkern appealed for support for himself, or others, and in one he asked Mr. Kaplan to forward his appeals to Union members or, in another instance, to Mr. Kaplan's "list." Had Mr. Kaplan done as Mr. Mandelkern requested, and forwarded Mandelkern's "political" email, then in Harry Joel's views as expressed in October 2011, such action would have subjected Mr. Kaplan to criminal prosecution! AFT 1493 has no reason to believe that Mr. Mandelkern was reported by the District to the DA for sending "political appeals" through the District "router" or "server," to AFT 1493 at an smccd.edu address, and requesting that these emails be forwarded via District email.

Besides Mr. Mandelkern, Trustee Richard Holober has also sent at least one email to an smccd.edu address. On March 1, 2011, Mr. Holober wrote to Mr. Kaplan with an email announcing that the California Federation of Teachers had endorsed his candidacy for San Mateo County Supervisor, and asked for support, including helping with phone banks and precinct walks, and linking to his Facebook campaign page.

In addition, on September 6, 2011, Barbara Christensen, the District Director of Community/Government Relations, sent an email "Fact Sheet" to *all* District employees at @smccd.edu addresses, on a *district-created list*, from her official @smccd.edu address, which discussed Measure H on the November ballot, a measure designed to obtain funds for the District. Her email contains considerable information set forth in the Voter Guide in favor of Measure H, which was filed with the County on August 19, 2011. AFT's unfair labor practice alleges that Christensen's email does not set forth the arguments against Prop H. It also alleges that under Regulation 18420.1 of the Fair Political Practices Commission, a local government agency may not spend agency funds for a communication that clearly advocates the support or defeat of a ballot measure. Further, a communication is not fair and impartial if, "taken as a whole and in context," it "unambiguously urges a particular result," *or* can "reasonably be characterized as campaign material," and "is not a fair presentation of the facts serving only an informational purpose." People can judge for themselves if Christensen's email to all employees was "fair and impartial." AFT alleges that the District's treatment of Mr. Kaplan's email to about 50 colleagues was inconsistent with Ms. Christensen's email to all employees about Prop. H.

When an employer such as SMCCD discriminates against one union and its members, while treating another union or group of employees more favorably, it inherently violates the EERA. Cases hold that restricting a Union's access to employees and refusing them permission to distribute campaign literature is inherently destructive of employee rights." Similarly, disparate treatment of employees is recognized as being inherently destructive of employee rights. Finally, a criminal accusation lacks a reasonable basis, or is objectively baseless, if no reasonable litigant could realistically expect success on the merits. AFT alleges that the allegations presented by SMCCD to the DA lack a reasonable basis.

In the situation presented here, one district union's support of an incumbent, one administrator's email about a District bond measure, and two incumbent Board members use of the Internet and an internet "connection" to SMCCD to distribute "political" advocacy did not

draw the District's ire. Yet the District objected to, and made a criminal accusation of, an AFT 1493 staff member who engaged in similar or related political activities, but in support of a challenger-candidate.

Added to this, Education Code section 7054 has not been interpreted to forbid electronic "political advocacy" communications. In the recent decision in *San Leandro Unified School District*, the California Supreme Court held that school and college districts are not compelled to exclude candidate endorsements from a school's physical mailboxes, and that a forum under the control of the governing board of a community college district is available for political advocacy use when it is "made available to all sides on an equitable basis." *San Leandro* (2009) 46 Cal.4th at 837. It also ruled that a table with multiple uses was not "equipment" covered by section 7054. A district's router and server have multiple uses, from downloading websites, to publishing commentary, to lecturing, or receiving student papers. And, like a table, are available to anyone walking onto the campus, who chooses to connect.

It is AFT 1493's strongly held position and belief that the Internet and email available on District college campuses has been and should continue to remain available to all sides in political debates and issues, including election support or opposition. We believe that many employees, students and even visitors routinely send, receive, download and view "political advocacy," many during the last election, and many before. Surely none of these internet users reasonably could have believed they were violating the law when they did this, whether sending an email about the election to a friend, or reading a political editorial online. Singling out AFT 1493 for attack, when District email access is utilized by other unions or employee groups, administrators, or Board members, is selective treatment, and a violation of the EERA.

AFT does not believe the internet uses discussed here violate Education Code section 7054 because the internet and the District's internet connections are available to all sides and have multiple uses. AFT is pursuing this unfair to assure that the District ceases and desists in applying a different standard to AFT 1493, one that stifles its ability to advocate, and chills the exercise of Constitutional freedom of speech. AFT also hopes to reach agreement with the District on new contract language to recognize the reality of equitable internet usage, and to recover its legal expenses in this dispute.