SUPERCEDED by amendment to EERA section 3543.5, subdivision (a) Stats. 1989, Ch. 313

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAT M. MILLER, Charging Party, v. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2542 PERB Decision No. 741 June 16, 1989

Appearances: Tremaine, Shenk, Stroud & Robbins by Dan L. Stroud, Attorney, for Pat M. Miller; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

HESSE, Chairperson: This case arose out of an allegation by Pat M. Miller (Miller) that the Hacienda La Puente Unified School District (District) violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)[1] when it failed to consider Miller for reemployment following her

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 reads, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

termination. Miller alleges that this adverse action was taken in retaliation against her because she exercised rights protected under the EERA, specifically, her meeting and conferring with the executive director of the Hacienda La Puente Teachers Association, CTA/NEA about matters concerning wages, hours, and other terms and conditions of employment. The matter was heard by a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ). Pursuant to the Board's decision in Hacienda La Puente Unified School District (1988) PERB Decision No. 685, the ALJ found that Miller was not an employee at the time she sought reemployment and, therefore, lacked standing to invoke the protection of EERA. Accordingly, the ALJ dismissed the complaint.

The charging party filed exceptions alleging that the ALJ's reliance on Hacienda La Puente Unified School District, supra, PERB Decision No. 685 was misplaced as a petition for writ of review was pending at the time the ALJ issued her proposed decision. The District filed a response and excepted to certain ALJ findings of fact based on hearsay statements.

The Board, after review of the entire record, adopts the attached findings of fact and conclusions of the ALJ, and affirms her decision consistent with the discussion below.

On March 22, 1989, subsequent to the ALJ's proposed decision, the Court of Appeal, Second Appellate District, Division Four, denied the petition for writ of review. Accordingly, the Board's decision in PERB Decision No. 685 became

final. Consistent with PERB Decision No. 685, the Board affirms the ALJ's conclusion that Miller was not an employee at the time she sought reemployment and, therefore, lacked standing under the EERA. As the Board finds that Miller has no standing to invoke the protection of EERA, it is unnecessary to consider the merits of the complaint.[2]

ORDER

The complaint against the Hacienda La Puente Unified School District is hereby DISMISSED IN ITS ENTIRETY.

Member Camilli joined in this Decision.

Member Craib's dissent begins on page 4.

[2]Similarly, it is also unnecessary to address the District's exceptions to certain ALJ findings of fact based on hearsay statements.

Member Craib, dissenting: For the reasons set forth in my dissenting opinion in Hacienda La Puente Unified School District (1988) PERB Decision No. 685 [12 PERC 19113], I believe strongly that applicants for employment or reemployment do have standing to invoke the protections of the Educational Employment Relations Act. Accordingly, I would remand this matter to the administrative law judge for a determination of the merits of Pat M. Miller's retaliation claim against the Hacienda La Puente Unified School District.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PAT M. MILLER, Charging Party, V. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-2542 PROPOSED DECISION (8/30/88)

Appearances: Tremaine, Shenk, Stroud & Robbins by Dan L. Stroud for Pat M. Miller; Wagner, Sisneros & Wagner by John J. Wagner for Hacienda La Puente Unified School District.

Before W. Jean Thomas, Administrative Law Judge

I. INTRODUCTION

This case concerns a charge by Pat. M. Miller, the Charging Party, that the Hacienda La Puente Unified School District (hereafter District or Respondent) took adverse action against her by failing to rehire her as a teacher/counselor in its alcohol treatment program while offering employment to and/or hiring other individuals as teacher/counselors in the same program between June 1986 and April 1987. The Charging Party claims that the failure to reemploy her was motivated by the feelings of union animus of the part of her former supervisors because she sought the assistance of the Hacienda La Puente Teachers Association with regard to various employment matters.

The employer denies any unlawful conduct against the Charging Party, claiming, among other things, that Miller was not reemployed by the District for valid employment-related reasons.

II. PROCEDURAL HISTORY

On April 20, 1987, Pat M. Miller (hereafter Miller or Charging Party) filed an Unfair Practice Charge with the Public Employment Relations Board (hereafter PERB or Board) alleging that the Hacienda La Puente Unified School District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act)[1] when it terminated her employment with the District on June 13, 1986, and thereafter failed to reemploy her in retaliation for her participation in activities protected under the Act.

Following an investigation of the charge by a PERB Board agent, the Charging Party filed a First Amended Charge on June 1, 1987, that modified the allegations presented in the original charge.

On June 4, 1987, a PERB Complaint was issued which alleged that the District violated section 3543.5(a) and, derivatively, section 3543.5(b)[2], when it failed to consider Miller for

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

[2]Section 3543.5 reads, in relevant part:

> It shall be unlawful for a public school employer to:

reemployment following her termination because of her exercise of protected rights, while offering employment to and/or hiring four other individuals between June 1986 and April 20, 1987.

Concurrent with the issuance of the Complaint, the allegation concerning the unlawfulness of the District's termination of Miller's employment in June 1986 was dismissed by the Board agent as untimely.

The District filed an Answer to the Complaint on June 22, 1987, which denied all factual allegations and asserted specified affirmative defenses.

An informal settlement conference was held on July 1, 1987; however, the dispute was not resolved.

A pre-hearing conference was subsequently held on September 1, 1987, immediately preceding a formal hearing held by the undersigned on September 1, 2, 3 and November 18, 1987.

Post-hearing briefs were filed and the case was submitted for proposed decision on March 21, 1988.

III. FINDINGS OF FACT

A. Background

The focus of this case is the District's adult school. At issue, specifically, is the operation of one of its adult

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

education programs called the "Court Programs." The court programs offer classes for people referred by court order following a conviction for driving while intoxicated.

Prior to her termination, Miller was employed as an adult-school teacher in the alcohol treatment component of the court programs located at the Proctor school site. Miller, who was known to her former colleagues as "Mickey," worked as a teacher/counselor in the program for "Understanding Alcoholism." Her duties as a teacher/counselor included interviewing court-referred clients, facilitating group counseling sessions, preparing written individual client progress reports and communicating with court and probation personnel about client progress.

Normally, Miller worked a 14-hour-per-week schedule, which was divided between two days of seven hours per day. By virtue of the number of regularly assigned weekly hours, Miller was classified as a temporary, part-time, certificated employee. Temporary employees were hired on a semester-to-semester basis. Miller also worked as a substitute teacher for the court programs.

As an adult school teacher, Miller was a member of the certificated bargaining unit exclusively represented by the Hacienda La Puente Teachers Association, CTA/NEA (HLPTA). At all times relevant to this case, she was also a member of HLPTA.

Miller's immediate superior during the entire period of her employment with the District was Madelyn Henderson-Maine. Henderson-Maine was the coordinator of the court programs. Although Henderson-Maine was a member of the same bargaining unit as Miller, she exercised ostensible supervisory authority over the day-to-day activities of all the rank-and-file court programs staff members[3]. Among other things, Henderson-Maine scheduled the weekly hours of work and the assignments of the teacher/counselors, issued memoranda about various matters related to the operations of the court programs, conducted regular staff meetings and consulted with and made effective recommendations to the adult school administrators concerning the management of the court programs. For example, staff requests for such items as overtime or leaves of absence were recommended for approval by Henderson-Maine before being approved by the administration.

Employees in the program regarded Henderson-Maine as their immediate supervisor and considered her to be a very influential person in the court programs. Until December 1985 Henderson-Maine's immediate supervisor was Don Roth, the director of the District's adult education program. Roth died in December 1985 and was succeeded by Lance Reuther. Reuther was the director at the time of Miller's termination in June 1986.

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[3]In October 1986 Henderson-Maine was promoted to a position outside the bargaining unit although her working title remained Coordinator of Court Programs.

B. Miller's Contacts with the HLPTA Regarding Employment Matters

On or about September 18, 1985, Miller had a telephone conversation with Roth. During their discussion Miller stated that she had concerns about her job security with the District. In exploring the reasons for her concerns, Miller said that she felt threatened by Henderson-Maine. The basis for Miller's feelings are unknown.

On September 19, 1985, Miller had two telephone conversations with Ray Lopp, the executive director of the HLPTA, to discuss her objection to not being paid for four hours of work performed on September 16, 1985. On or about September 19 Henderson-Maine had notified Miller that she was disallowing four of the seven hours that Miller worked on September 16 because she felt that Miller had not seen enough clients on that date to justify payment for the full seven hours.

Lopp advised Miller to discuss the problem directly with Roth rather than with Henderson-Maine in order to get the matter resolved. Lopp further indicated that he would tell Roth that Miller was coming to see him and offered to accompany Miller if she wanted his presence. Miller declined Lopp's offer, stating that she preferred to go alone and keep the discussion informal.

It is not known whether Lopp actually called Roth before Miller went to see him. However, Miller called Roth and went

to his office the next day to discuss the matter.

During their face-to-face conversation on September 20, Miller told Roth that the next day after their telephone discussion, Henderson-Maine came to Miller and informed her that she would not be paid for four hours of the time worked on September 16 for the reason already stated above. Roth told Miller not to worry about being paid.

After the September 20 meeting Miller had no further discussion about this pay issue with either Henderson-Maine or Roth. Although Miller claims that Roth told her that he spoke with Henderson-Maine about Miller's complaint, Henderson-Maine denies that Roth ever spoke with her about Miller's complaint concerning her disallowance of the four hours or about Miller's September 20 meeting with him. Nonetheless, Miller did receive compensation for the disputed hours in her next pay warrant.

On or about September 23, 1985, Henderson-Maine gave Miller a memo which read as follows:

> Because of our very large sign in the main office, I would like to make a request that you not smoke in your office. It seems a little unfair to our clients to suggest that they not smoke when we, as employees, are permitted to do so.
>
> Please feel free to take cigarette breaks as often as you feel necessary. There are benches and tables outside of the cafeteria which seem suitable.
>
> Thank you for being understanding and sensitive, as usual, to our effort to remain fair to all.

Henderson-Maine prepared the memo the day after Eleanor Acosta-Santana, a teacher/counselor and also the staff advisor, informed her that Rose Alvarez, another part-time teacher/counselor, left work feeling ill because of Alvarez's exposure to Miller's cigarette smoke. Alvarez's office space was adjacent to Miller's office. Neither office had any ventilation. Acosta-Santana worked in the court programs as a teacher/counselor. In addition, she served as the staff advisor, a non-supervisory duty. Acosta-Santana reported directly to Henderson-Maine.

After receiving this memo, Miller telephoned Lopp the same day and told him, "She's at me again . . ., she knows that I'm addicted [to cigarettes] . . ., this is just another form of harassing me." Miller also complained that Henderson-Maine had scheduled her (Miller) for seven hours of work but, earlier in the day, she informed Miller that she had approval to pay her for only six hours. Miller had told Henderson-Maine that she would not work the additional hour without receiving compensation. She did not work the disputed hour.

During their September 23 conversation, Lopp advised Miller to document things that were happening to her at the worksite. Lopp took no action with the District on Miller's behalf concerning Henderson-Maine's memo.

After Miller received the September 23 memo, there was no further discussion between Miller and Henderson-Maine about

Miller's smoking in her office or her working the seven hour schedule as assigned.

On January 30, 1986, a memo was issued to all court programs staff highlighting the discussion that had occurred at a staff meeting held January 23, 1986. One item quoted Henderson-Maine as stating that a full-time certificated position might open in the court programs within the next year.

Upon receipt of this memo, Miller called Lopp sometime in early February to discuss her interest in being appointed to the new position, if created. She also spoke with Lopp about her ongoing fear of losing her job. As stated earlier, the factual basis for Miller's fear in this regard is unknown. Additionally, Lopp's response, if any, to this particular comment is unknown. Lopp did advise her to keep copies of all communications that she received from the District concerning employment matters. He also advised Miller to give Henderson-Maine a written request expressing her interest in being considered for the full-time position and to request a copy of the job posting.

In response to Lopp's suggestion, Miller wrote a letter to Henderson-Maine on February 4, 1986, stating simply that she would like the position and hoped that Henderson-Maine would consider her request when a selection was made. She also requested a copy of the job posting.

On February 5, 1986, Henderson-Maine issued a memo to all certificated court staff that set forth some specifics about job postings for all new certificated positions. She stated that the new positions (rather than the single position mentioned in the January 30 memo) would be "open and competitive" and that an interview panel was being considered for applicants for each position. She assured the staff that as soon as a decision was made about the posting for new positions, current staff would be the first to know.

Prior to June 1986 the District employed seven teachers/counselors, including Miller, on a temporary, part-time basis to work a 14-hours-per-week schedule in the court programs. In a memo to these employees dated February 27, 1986, Henderson-Maine informed them that, as part of the reorganization of the court programs, there was a strong possibility that over the next five months four or five 30/32-hours-per-week positions would be posted as job openings. Henderson-Maine went on to state:

> . . . I am very sensitive and concerned that some present staff members will not remain so, due to the change. If I can assist you in securing employment elsewhere, please let me know.
>
> Please refer any questions regarding these postings to me or Eleanor Acosta-Santana. Any <u>other</u> information from staff will be completely erroneous. (Original emphasis)

Miller called Lopp about Henderson-Maine's February 27 memo shortly after receiving it. She called him because of her

lingering fears about losing her job. Lopp told her that nothing could be done about her fears unless in fact she was not appointed to one of the new positions. He advised her to continue documenting everything of concern to her that occurred on the job. Other than that, nothing further was said or done by Miller or Lopp with respect to Henderson-Maine's February 27 memo.

On April 17, 1986, Miller called Lopp to complain about her client counseling assignments. According to Miller, the number of client appointments booked for her on Wednesdays did not allow her time for breaks to go outside and smoke or to have lunch. Miller testified that she was "going bananas" because she could not smoke from the time she went to work until her work day ended. At that time Miller was working her seven-hour assignments mainly from 12 noon or 1:00 p.m. until 8:00 or 9:00 p.m. Miller felt that Henderson-Maine was being unfair to her in the scheduling because the other teacher/counselors had time during their assignments for short breaks. Miller also voiced concern that the client bookings scheduled after June 13, 1986, did not show assignments to any particular counselor.

At Lopp's request during the April 17 conversation, Miller sent him copies of her appointment bookings for his review. A day or two after their conversation, Miller called Lopp to see if he had received and/or reviewed her booking assignments. Lopp had received and reviewed them. He told Miller that he

was just going to keep the material for the time being. He advised her to continue to keep her own documentation of all communications, etc.

Following her discussion with Lopp, Miller gave a written note to Henderson-Maine sometime in mid-May stating that she was not getting her breaks because of overbookings. This note made no mention of Miller's discussions with Lopp about this matter nor did it indicate that a copy had been sent to Lopp.

In response to Miller's complaint, Henderson-Maine reviewed Miller's counseling appointment bookings for the period from January to May 1986. She gave Miller a memo on May 19, 1986, that summarized the amount of noncounseling or "free" time that Henderson-Maine determined was available to Miller on each Wednesday during that particular six-month period. The "free" time was time available because clients failed to keep their scheduled appointments. The amount of "free" time shown in the summary varied from one and one-half to two and one-half hours for each day that appointments were booked.

During her testimony, Miller admitted that Henderson-Maine's assessment of the "free" time was correct. However, she denied that she was able to take any personal breaks or lunch during such periods because of the follow-up paperwork that she was required to complete when clients did not keep their appointments.

There is no evidence that Lopp ever spoke to Henderson-Maine about this matter after Miller registered her complaint with him. Nor is there any evidence that Miller and Henderson-Maine ever had any dialogue about Miller's concern after Henderson-Maine gave her the May 19 memo.

C. The Reorganization of the Court Programs

On May 1, 1986, Henderson-Maine sent a letter to all part-time certificated staff in the alcohol treatment program, to inform them that all 14-hour assignments would become "obsolete" on June 13, 1986, which was the end of the spring semester. The letter also stated that:

> We will be posting five, 30 hour Adult School Teacher positions May 19th, 1986. They are to be open and competitive, which means that anyone meeting the school district and county Office on Alcohol Programs requirements, may apply. All posting will include the knowledge and availability to teach alcohol education, group facilitate and perform one-on-one counseling, among other responsibilities. All assignments are evenings and Saturdays. . . .

Anyone wishing to apply for one of the positions was advised to contact Henderson-Maine's office for an interview appointment. The date scheduled for interviews was May 30, 1986.

As soon as she received her letter, Miller called Henderson-Maine to request an appointment. According to Miller, Henderson-Maine responded by asking Miller if she (Miller) did not think that her request was a bit "premature." Nonetheless, Miller was given an appointment.

Toward the end of the month, Henderson-Maine issued a memo,

dated May 27, 1986, to all staff who had requested interview appointments, informing them that the District had decided to cancel interview appointments for the time being. She promised to keep everyone informed about further developments as early as she could.

Upon receiving the May 27 memo, Miller was quite concerned about the significance of this decision for her. She again called Lopp to inform him of the latest development and to ask if he knew what was going on. Lopp gave her no additional information beyond what Miller already knew about the situation.

Henderson-Maine's May 27 memo to the staff caused concern among other certificated staff besides Miller. Rose Alvarez and several other temporary counselors were in "plain limbo" because after the interviews were cancelled, they did not know where they stood with regard to their future employment status with the District. The temporary employees knew that the positions were to be filled by the beginning of July 1986, but they did not know who would be considered and eventually selected for the five positions.

Just before July 1, 1986, Alvarez was notified by Acosta-Santana that she had been selected to fill one of the 30/32 hour positions. Alvarez was not interviewed prior to her selection.

Contois (Connie) Simpson was employed full-time by the District as a social worker at the regional center for the

developmentally disabled. Simpson also worked ten hours per week as a part-time teacher/counselor in the court programs. Simpson was concerned about the reorganization because, as of early June 1986, none of the affected employees knew who was going to be terminated or rehired. Sometime in late May or early June 1986 Simpson telephoned Henderson-Maine about her hours. Simpson needed to know if her position was in jeopardy because of certain financial commitments that she had made, in reliance on her part-time employment. Henderson-Maine told Simpson that she did not see any problem for Simpson as far as her hours were concerned. Henderson-Maine also stated something to the effect that since

> . . . change is inevitable, she hoped that people would accept it and be mature about it. However, if people go running to the union, I can't guarantee anything.

At the time of their conversation, Simpson felt that Henderson-Maine's comment about the union was personally directed to her. Simpson did not respond to this comment or seek clarification about its meaning from Henderson-Maine.

On either June 12 or 13, 1986, Simpson was speaking with Lance Reuther, Roth's replacement as Adult School Director, in his office about her regional center activities. In the course of their discussion, Reuther asked Simpson if she was going to be working for the District during the summer. Simpson indicated that she was uncertain about her job because she had

not received a contract. Reuther immediately called Henderson-Maine to find out if there was a reason why Simpson had not yet received a contract. Simpson does not know the substance of Henderson-Maine's response. Nonetheless, she received a contract for summer employment in the mail the next day. Simpson's summer employment with the District remained on a part-time basis.

Miller never personally informed Roth, Henderson-Maine, or Reuther about any of her communications with Lopp about her job-related concerns or complaints. She also has no knowledge that Lopp ever spoke with Roth, Henderson-Maine or Reuther about her contacts with him with regard to these matters.

D. Miller's Termination and Subsequent Employment Contacts with the District

On or about June 10, 1986, Miller received a letter from Reuther, dated June 9, 1986, informing her that as a result of the alcohol treatment program's reorganization and the restructuring of staff assignments, her part-time assignment was one of those which was eliminated. Reuther's letter went on to state that:

> As of June 13, 1986, your employment with the Alcohol Treatment Program expires. Unless you direct us to the contrary, your name will be carried on the substitute list for Summer, 1986, and school year, 1986-87.
>
> You will be considered for rehire if future positions become available. You will be receiving a formal letter of recommendation in the next few days that could be used with new potential employers if you wish.

On receiving this notice, Miller immediately called Lopp to inform him that her employment was being terminated. It is not known what, if any, advice or assistance Lopp offered or provided to her at that juncture. The other part-time teacher/counselor whose job was eliminated by the reorganization was Paul Ramsey.

Miller's last day of employment with the District was June 13, 1986. The other five 14-hour, teacher/counselor positions were changed to 30-hour positions and were filled by the five incumbent 14-hour, part-time teachers/counselors in the alcohol treatment program.

As promised in his June 9 letter, Reuther provided Miller with "An Open Letter of Reference," dated July 1, 1986, which verified her prior employment with the District. This letter stated that Miller had been placed on the program's substitute list.

In addition to her duties as a teacher/counselor and staff advisor, Acosta-Santana was also responsible for calling substitutes, when needed. Approximately four weeks after Miller's termination, Acosta-Santana tried to telephone Miller about taking a substitute assignment, but was unable to reach her.

Shortly after attempting to call Miller, Acosta-Santana discovered that Miller had not turned in her group notes for approximately four weeks prior to the date of her termination. Group notes must be prepared by the group facilitator to report

what transpires during each group session and are a requirement of the program. The missing notes pertained to approximately 30 clients seen by Miller during the four-week period.

Acosta-Santana discovered this omission while in the process of preparing for a program audit by the Los Angeles County contracting office. The District has a contract with the county to provide the court programs. Consequently, the county monitors the programs on a quarterly basis. Acosta-Santana did not attempt to contact Miller about the notes. However, she did discuss her discovery of the omission with Henderson-Maine.

About the same time that Acosta-Santana became aware that the group notes had not been turned in, she also found out that Miller did not return the key to the room that she used for her group sessions. This was also reported to Henderson-Maine who asked one of the office secretaries to call Miller about the notes and the key. Miller denies ever receiving a call about either of these items. Although Miller returned the key to the District sometime in July 1986, the group notes were never provided.

Acosta-Santana also felt that Miller had not shown responsibility because she believed that Miller continued to smoke in her office after Henderson-Maine asked her to refrain from smoking in September 1985. Although Acosta-Santana never actually saw Miller smoking in her office, she smelled the odor

of smoke in the office on more than one occasion after September 1985. By her own admission during testimony, Miller did smoke in her office a few times after receiving Henderson-Maine's September 1985 memo. Miller characterized herself as "addicted" to cigarette smoking and claims that Henderson-Maine was aware of this problem when the memo was issued.

Because of these factors, Acosta-Santa decided not to call Miller anymore because she felt that Miller was not a responsible person. According to Acosta-Santana, Miller's name remained on the summer 1986 substitute teacher/counselor list even though she was not called again that summer. There is no evidence, however, which shows that Miller's name was placed on the substitute list for the 1986-87 school year as Reuther's June 9, 1986, letter stated that it would be.

Sometime in January or early February 1987 Miller telephoned Rose Alvarez to inquire about job information and to request Alvarez' assistance in applying for any posted position for which she was qualified. At that time Alvarez was the designated HLPTA site representative at Proctor. Alvarez informed Miller that Norman Rickman, who was a full-time teacher/counselor and one of Miller's former co-workers, was ill and unable to return to work. Since Alvarez had heard that Rickman's position was going to be offered to Paul Ramsey, she urged Miller to apply for the position immediately.

Miller, however, did not apply for the position. She did speak with Ramsey who informed her that he had been offered the position, but declined to take it. Subsequently, Linda Rodriguez was hired to fill Rickman's position. Rodriquez' previous employment relationship with the District, if any, is unknown.

Between June 1986 and April 20, 1987, the District hired three part-time teacher/counselors in the alcohol treatment program, in addition to Rodriguez. All of these individuals submitted an application to the District prior to being hired.

Following her termination in June 1986, Miller was eligible for reemployment with the District. However, in order for her to be considered for rehire, it was necessary for her to reapply for a position. Miller did not apply for any position with the District between June 1986 and April 20, 1987. She thought that she was already in the applicant pool by virtue of the statement about rehire in Reuther's June 9, 1986, letter to her.

Sometime after June 1987 Miller did apply for a position in the District's jail program. This program, however, was not under the direction of Henderson-Maine.

IV. ISSUES

1. Whether Charging Party has standing under the EERA to file an unfair practice charge on her own behalf?

2. If so, did the District refuse to reemploy the Charging Party because of her exercise of rights guaranteed by the EERA?

V. DISCUSSION AND CONCLUSIONS OF LAW

A. Charging Party's Standing to File An Unfair Practice Charge Under EERA

The District argues that since the Charging Party alleges that the discriminatory conduct took place subsequent to her termination, the Charging Party is no longer an employee within the meaning of the EERA and thus lacks standing to invoke the protection of the Act. As a threshold matter, it is appropriate to decide the standing question before proceeding with an analysis of the discrimination issue.

Section 3541.5(a) states that an unfair practice charge may be filed by "[a]ny employee, employee organization or employer. . . ." The Charging Party plainly is neither an "employee organization" nor an "employer" as these terms are defined by the EERA[4]. She must therefore fall within the definition

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[4]Section 3540.l(d) defines an "employee organization" as:

> . . . any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their

of an "employee" in order to properly file and pursue an unfair practice charge before PERB.

Section 3540.l(j) defines an "employee" as:

> . . . any person employed by any public school employer except persons elected by poplar vote, persons appointed by the Governor of this state, management employees, and confidential employees.

In Hacienda La Puente Unified School District (1988) PERB No. 685, the Board recently considered the question of whether the EERA protects hirees or applicants from discrimination and concluded that it does not.[5] In that case the charging party, an individual, filed an unfair practice charge on his own behalf, alleging, among other things, that the District

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> relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

Section 3540.l(k) states as follows:

> "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

[5]A petition for writ of review was filed on July 25, 1988, by the California Teachers Association in the Second Appellate District, Division Four, Case No. B036106. The Board has filed a motion to dismiss the petition. As of the writing of this proposed decision, a ruling on the petition was pending.

See also Los Angeles Unified School District (1988) PERB Decision No. 686, which was decided the same day as Hacienda La Puente Unified School District, supra. In this case the Board held, among other things, that the charging party, as ah applicant, lacked standing to file an unfair practice charge, since EERA's protection extends only to employees as defined by the Act.

unlawfully refused to rehire him when he applied for reinstatement because he had engaged in protected activities prior to his termination from employment. In reaching the determination that the Charging Party had no standing to invoke the protection of EERA, the Board construed the term employee in section 3543.5(a) and the word employed in section 3540.l(j) as referring only to an individual already in an existing employment relationship with a public school employer, and not to an applicant or prospective employee. The Board concluded that inasmuch as the charging party was not an employee at the time that he applied for reemployment with the District, his status as an applicant excluded him from coverage under EERA.

In the present case, the Charging Party's continuous employment with the District was severed on June 13, 1986. There is no evidence that she reestablished an employment relationship with the District after that date. This conclusion is reached even though Adult Education Director Reuther's June 9, 1986, letter to Miller stated that her name would be carried on the substitute list for courts program certificated staff for the summer of 1986 and the 1986-87 school year.

Since Miller's name was carried on the substitute list during the summer of 1986, she was a potential hiree during that time. However, she was not employed by the District. Thus, her employment relationship with the Respondent was not reestablished at any time during the summer of 1986.

Between June 1986 and April 1987 Miller did not reapply for employment in the court programs or seek to clarify her hiring status with the District. During this period she mistakenly believed that she was already on the District's reemployment list and thus should have been considered for rehire at the same time that the other individuals were hired for teacher/counselor positions between June 1986 and April 20, 1987. Miller's confusion about her eligibility for rehire is somewhat understandable in view of the rather ambiguous statement in Reuther's June 9, 1986. The letter stated that she would be considered for rehire if future positions became available. But it did not advise her that resubmission of an application was a prerequisite for future hiring consideration.

Even in January or February 1987 when Miller was urged by her ex-coworker Alvarez to submit an application for a full-time teacher/counselor position that the District was going to soon fill, she failed to do so.

In summary/ the facts of this case show that Miller was not employed by the District at the time of its alleged discriminatory conduct, nor was she even an applicant for reemployment during the relevant time in question.

Therefore/ under the standard adopted by the Board in Hacienda La Puente Unified School District, supra, it can only be concluded that the Charging Party was not an employee

within the meaning of EERA when she alleges that the District failed to offer her reemployment. She therefore lacks standing to individually pursue an unfair practice charge under the protection of section 3543.5(a). The entire Complaint must therefore be dismissed.

Inasmuch as this case has been resolved on the basis of the "standing" question, it is unnecessary to consider the merits of the discrimination issues presented by the Complaint.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, it is hereby ordered that the Complaint is DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. 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. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last

day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: August 30, 1988

W. JEAN THOMAS
Administrative Law Judge