STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES COUNTY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-535
V.	)	PERB Decision No. 263
OFFICE OF THE LOS ANGELES COUNTY SUPERINTENDENT OF SCHOOLS,	)	December 16, 1982
Respondent.	)	

Appearances; Robert A. Siegel, Attorney (O'Melveny & Myers) for Office of the Los Angeles County Superintendent of Schools; A. Eugene Huguenin, Jr., Attorney (California Teachers Association) for Los Angeles County Education Association, CTA/NEA.

Before Tovar, Morgenstern and Jensen, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles County Education Association, CTA/NEA (Association) to the attached proposed decision of a hearing officer. The hearing officer found that the Office of the Los Angeles County Superintendent of Schools (Office) did not violate subsections 3543.5(a) or (d) of the Educational Employment Relations Act (EERA or Act)[1] by transferring two counselors in the Regional

[1]EERA is codified at Government Code section 3540

Occupational Program (ROP) to positions as day-to-day substitutes in special schools.

Applying the test stated in Carlsbad Unified School District[2] (1/30/79) PERB Decision No. 89, the hearing officer

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et seq. All statutory references are to the Government Code unless otherwise specified.

Subsections 3543.5(a) and (d) provide as follows:

> 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.
>
> . . . . . .
>
> (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.

[2]In Carlsbad, the Board stated, at pp. 10 and 11:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
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> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
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> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the

found that the transfer of Anne Haffner did not harm employee rights under EERA, and that though the transfer of Alma Viardo did result in slight harm to employee rights, such harm was outweighed by the Office's need to reduce staff and retain the most highly qualified counselors. The hearing officer further found that, even in the absence of their Association activities, Haffner and Viardo would have been transferred. He therefore dismissed all charges.

We find the hearing officer's statement of facts to be free of prejudicial error and adopt that portion of his decision as the findings of the Board.

For the reasons set forth in the following discussion, we affirm the hearing officer's conclusions of law as modified herein.

> employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
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> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

DISCUSSION

The hearing officer's decision in this case was issued prior to the Board's decision in Novato Unified School District (4/30/82) PERB Decision No. 210, which clarified Carlsbad, supra. Under the Novato test, a party alleging discrimination within the meaning of subsection 3543.5(a) has the burden of showing that protected conduct was a motivating factor in the employer's decision to take adverse personnel action. The Board has recognized that direct evidence of motivation is seldom available and, therefore, has held that motivation may be demonstrated circumstantially. In accord is Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party can raise, by direct or circumstantial evidence, the inference that there is a nexus between the employee's protected activity and the adverse personnel action, the burden shifts to the employer to show that it would have taken action regardless of the employee's participation in protected activity. Novato, supra, and Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

The Transfer of Anne Haffner

Haffner was one of ten counselors transferred to other positions within Los Angeles County school districts as part of a general ROP budget reduction. In order to determine which of the existing 22 counselors to retain, the Office developed a rating system, applied to all counselors, based on evaluations

regarding their performance from immediate supervisors and from communications on file from districts where ROP counselors worked. No counselor retained received a rating of less than 36. Haffner's rating was 26.

Haffner's rating was based in part on an evaluation by her supervisor at Pasadena Unified School District who indicated that she had problems in relating to district staff, in following ROP and district procedures and in counseling, in that she had no total vocational counseling plan and did only one-to-one counseling, no small or large group counseling. Haffner's rating was also based on complaints received by the Office about her performance during her five years as an ROP counselor. Both Montebello and San Marino Unified School Districts had requested her transfer because of personality conflicts and shortcomings in her counseling performance, namely, a preference for quasi-administrative matters and a lack of interest in her job, respectively.

The Association contends that Haffner was transferred because she, along with Alma Viardo, were the two primary Association activists in the ROP program. However, no evidence in the record suggests that Haffner was singled out for transfer because of her Association activity or that her transfer was a result of anti-union animus by the Office. Haffner had stopped attending Association meetings in 1978, nearly a year before the Office's staff reduction. Although

the Office knew that Haffner was critical of the ROP program and vocal about some of the Office's policies at Board of Education meetings, her transfer cannot be viewed as a discriminatory or disciplinary measure by the Office. There were Association members retained and Association members transferred. Thus, no pattern of selection for transfer on the basis of union membership was demonstrated. Furthermore, when an ROP counseling position became open shortly after Haffner's transfer, both Haffner and Viardo were invited to apply for it. Neither chose to do so.

Based on these facts, we find that the Association has failed to show by direct or circumstantial evidence that Haffner's protected activity was a motivating factor in the Office's decision to transfer her.

The Transfer of Alma Viardo

Viardo was active in employee organizations since she was hired by the Office in 1974 and was a negotiator for the Association in 1978-79. The Office knew of Viardo's various protected activities. While working at Santa Monica Unified School District, Viardo was frequently absent for Association meetings and other reasons. A dispute arose between Viardo and her immediate supervisor, Mike Fisher, about the reason for her absences and her lack of prior notification when she was to be absent.

Fisher wrote a highly critical interim appraisal summary of

Viardo which was based in part on her absence from her job for Association meetings (protected activity). The Office used this evaluation in determining Viardo's rating of 14, the lowest of any of the 22 counselors. Thus, the Association has met its burden of raising the reasonable inference that Viardo's protected activity was a motivating factor in her transfer.

The burden thus shifts to the Office to show that it would have acted as it did regardless of the employee's protected activity. The Office has shown that, regardless of Viardo's Association activity, she would have been among those counselors transferred on the basis of her counseling performance.

Fisher's evaluation covered eight areas of concern,[3] only

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[3]The eight areas of concern are as follows:

> (1) Failure to develop realistic enrollment predictions for use in planning courses; (2) failure to conduct effective, in-depth counseling sessions with students; (3) failure to communicate and work well with employees of Santa Monica High School and Santa Monica Unified School District; (4) lack of a system for self-evaluation of ROP counseling and enrollment efforts; (5) emphasis on "best efforts" rather than "bottom-line results" regarding enrollment, attendance and resultant ADA; (6) lack of articulation with lower grade feeder schools regarding the ROP program; (7) noncooperation with Office supervisors and school district staff; and (8) use of ROP phones for non-ROP business.

two of which (failure to communicate and noncooperation) relate to Viardo's protected activities. Moreover, Fisher's evaluation was only one of several factors considered in Viardo's overall ranking. The Office had received several complaints about Viardo's performance at various school districts involving counseling deficiencies, including lack of attention to counseling, preference for administrative tasks, and inability to make group presentations. Administrators at Pasadena and Santa Monica Unified School Districts requested her transfer. Except in the case of Haffner, no school district requested the transfer of any other ROP counselor.

Thus, the Office has demonstrated that, because of Viardo's counseling performance as compared to that of the counselors retained, she would have ranked lower on the Office's rating scale even without consideration of her absences for Association activities. The fact that the Office invited Viardo to apply for a vacant counseling position after her transfer further refutes any inference of discriminatory motive.

Interference Charge

The Association argues that the transfer of Haffner and Viardo, two Association activists, was "inherently destructive" of employee rights and, therefore, interfered with employee rights under the test articulated in Carlsbad, supra. The Association's contention is without merit. Though we have not as yet specifically defined the term "inherently destructive,"

we find no need for a definition here. The Association has presented no evidence that the Office's actions tended to have a chilling effect on the exercise of employee rights. EERA does not guarantee employee activists a right to be insulated from nondiscriminatory personnel actions. We have found that the transfers here were nondiscriminatory, and we find no interference with any employee right guaranteed by the Act.

We affirm the hearing officer's dismissal of the Association's charge as to subsection 3543.5(a). No independent evidence of a violation of subsection 3543.5(d) was presented. Finding no violation of subsection 3543.5(a), we affirm the hearing officer's dismissal of the Association's charge as to subsection 3543.5(d).

ORDER

Based on the record before the Public Employment Relations Board, the charges filed by the Los Angeles County Education Association, CTA/NEA, in Case No. LA-CE-535 are hereby DISMISSED.

Members Tovar and Jensen joined in this decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

LOS ANGELES COUNTY EDUCATION ASSOCIATION,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-535
v.	)	
LOS ANGELES COUNTY SUPERINTENDENT OF SCHOOLS,	)	PROPOSED DECISION (4/29/81)
Respondent.	)	

Appearances: Robert Siegel, Attorney (O'Melveny & Myers) for Los Angeles County Superintendent of Schools; A. Eugene Huguenin, Jr., Attorney for Los Angeles County Education Association.

Before Kenneth A. Perea, Hearing Officer.

STATEMENT OF THE CASE

On October 9, 1979 the Charging Party, Los Angeles County Education Association (hereafter Association) filed an unfair practice charge, contending that the transfer of Ann Haffner and Alma Viardo violated section 3543.5(a) and (d).[1] Hearings were held before the above-named hearing officer of the Public Employment Relations Board (hereafter PERB) on June 10, 11, and 12, 1980; July 14 and 15, 1980; and August 1, 1980.

[1]All statutory references are to the California Government Code unless otherwise specified.

At the commencement of the hearing the Respondent, Los Angeles County Superintendent of Schools (hereafter Office), moved to dismiss the unfair practice charge on the basis of mandatory deferral to arbitration. The Association opposed the motion. The hearing officer took the motion under submission for decision in conjunction with his decision on the merits.

On November 24, 1980, the Association and the Office submitted simultaneous opening briefs. On December 11 and December 15 the Office and the Association, respectively, filed closing briefs and the matter was thereupon submitted for decision.

FINDINGS OF FACT

I. General Background

The parties stipulated that the Association2 and the Office are, respectively, an "employee organization" and a "public school employer" within the meaning of the Educational Employment Relations Act (hereafter EERA). The Association is the exclusive representative for certificated employees of the Office, including counselors assigned to the Regional Occupational Program (hereafter ROP) Division.

ROP is a cooperative occupational training program which the Office operates on behalf of 25 school districts in

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2The forerunner of the Association was SETA/ACT-SS (Special Education Teachers Association/Association of Classroom Teachers-Special Schools). Both will be referred to as the Association.

Los Angeles County. Participation in ROP by the districts is voluntary. John E. Young has been the director of the ROP since its inception in 1974.

In cooperation with the participating districts, ROP provides vocational instruction, occupational training, and a variety of curriculum and guidance services. The director, assistant directors, clerical and accounting staff, area coordinators and counselors are employed by the Office. The school districts hire the vocational teachers and technicians, as well as provide classrooms and other facilities.

Each participating district also supplies a part-time administrator to serve on an ROP Steering Committee. This group typically meets once a month and provides recommendations and input to the Office on the activities and functions of the ROP.

ROP is funded on an apportionment basis, based upon positive attendance accounting. The program receives income for the actual number of enrolled students who attend ROP classes each day (ADA). This differs from school district funding which is based upon estimated attendance.

Because ROP must make advance commitments of expenditures and services, proper screening and monitoring of students to insure that those enrolled in classes actually attend them is critical to ROP's financial viability.

In late 1978, responding to pressures to reduce the quantity of expenditures for the 1979-80 fiscal year, a task force of the ROP Steering Committee was formed to prepare recommendations on program reorganization. ROP Director Young was an advisor to this task force. The need for the reduction in expenditures was prompted by several factors. The program had originally been staffed for a goal of over 4,000 ADA for the 1977-78 school year. ROP had operated, however, at only around 2,700 ADA for the same school year. While the program had exhibited strong growth in ADA each year, the State Department of Education at that time decided to limit ROP to no more than a 10 percent increase in programming for the next year (1979-80). This created a situation where the program was not going to be able to generate sufficient income to maintain the current number and variety of staff on board. While the County had made up shortfalls in the ROP budget for the first few years, the director had been told that after the third year, the program must be self-sufficient. Finally, Young had been directed by the Steering Committee to reduce the amount of overhead in ROP to assure that 60-65 percent of the budget would go into the instructional area and vocational training. At that time, only 46-48 percent of the budget had been going into these areas.

The task force prepared several recommendations which were circulated in a staff memo on February 20, 1979. On March 2, 1979, the Steering Committee held a hearing to receive input and comments on the recommendations. The task force proposals were subsequently forwarded to the Office of the Superintendent which adopted a recommendation for a substantial staff reduction. As a result, ROP eliminated one of two assistant directors, 2 of 8 coordinators, and 10 of 22 counselors. In conjunction with this, ROP hired 20 classified technicians to provide support in the area of enrollment and attendance processing to the remaining 12 counselors.

Prior to making the decision as to which counselors would be retained, the Office mailed, on March 6, 1979, a Notice of Intent to Reassign to each ROP counselor. The letters were sent out pursuant to the California Education Code requiring that these personnel be notified of their next year's assignment prior to March 15 of the preceding year.

Responsibility for recommending to the Office's assistant superintendent which 12 of the 22 ROP counselors would be retained belonged to Young. In making this decision, Young testified that the two principal areas of input were: (1) communications from the districts that had been served by individual counselors; and (2) input from front-line ROP coordinators.

To assess the first factor, Young reviewed each counselor's file for pertinent communications as well as relying on his own knowledge and personal contacts with certain district administrators. Regarding the second factor, Young testified that formal evaluations from prior years were not useful in his decision since the evaluators tended to rate all counselors as "satisfactory" without sufficient differentiation among them. Because formal evaluations for 1978-79 would not be prepared in time, Young requested the coordinators to rank their current counselors on a 0-10 basis for 4 criteria that he had personally selected. These criteria were as follows: (1) ability to relate to students; (2) ability to make large group presentations; (3) ability to work as a team member; and (4) self-direction and motivation. Although Young testified that comparison of these numerical rankings accounted for approximately one-third of the ultimate decision, it is significant that no counselor involuntarily removed from ROP had a numerical score as high as the lowest score of any of the retained counselors.

In June 1979 the Office transferred Ann Haffner and Alma Viardo, counselors in the ROP Division of the Office, to assignments as day-to-day substitutes in the Special Schools Division of the Office. Shortly thereafter, both Haffner and Viardo filed grievances pursuant to the grievance procedure contained in the collective bargaining agreement between the

Office and the Association. The grievance procedure called for arbitration. A hearing was held on January 21, 1980 before Arbitrator Robert Leventhal who subsequently issued an award recommending that the Office had not violated the transfer and reassignment provisions of the collective bargaining agreement by transferring Haffner and Viardo. Neither party sought review of the arbitration award by the Office's Board of Education, and thus under the express terms of the collective bargaining agreement, within 10 days it became "final and binding on all parties."

II. Ann Haffner

A. Employment History in ROP

Haffner was first employed by the Office on September 10, 1974 as an ROP counselor for the Montebello School District. In December of that year, she was reassigned to a joint position servicing both the South Pasadena and San Marino School Districts. Following the 1976-77 school year, Haffner was removed from the San Marino School District and in its place was assigned duties at Pasadena Unified School District, during which time she retained the South Pasadena School District. On June 30, 1979, Haffner was reassigned out of ROP as part of the general staff reduction. She is presently a day-to-day substitute in the Special Schools Division of the Office.

B. Union Activity

Prior to the representation election in the spring of 1977, Haffner, along with other ROP counselors, formed the ROP Counselors Association (ROPCA). Haffner served as secretary of the organization. She requested permission from Young to make ROPCA announcements following Young's ROP staff meetings.

After the election for exclusive representative, she became a CTA member and attended meetings until 1978. She also stayed in contact with nearby ROP counselors, informing them about the activities of the Association. Haffner attended an Association workshop on grievances as well as some meetings of the County Board of Education. In 1978, on an issue of summer pay for the counselors, Haffner personally called each member of the Board and wrote a letter to Assistant Superintendent of Schools Ross in opposition to Young's recommendation that counselors be placed upon a two-month unpaid leave during the summer. In 1979, Haffner responded in opposition to the recommendations for an ROP staff reduction by writing a memo to the Steering Committee Task Force and attending the March 3 hearing where she spoke with Task Force members and ROP Director Young. At a subsequent meeting of the County Board of Education, at which time the Board approved a recommendation to transfer 10 ROP counselors and replace them with technicians, Haffner and Viardo spoke individually to members of the Board in an attempt to dissuade them from taking this action.

C. Decision To Reassign; Numerical Rating

The lowest total numerical rating given to one of the 12 retained counselors was a 36. Haffner received a rating of 26 from her ROP coordinator, F. Honsberger. Although the evidence reflects that Honsberger was aware of Haffner's prior position in ROPCA, he testified that he was not aware that she was active in the Association when he compiled her rating in 1979. The Association presented no contrary evidence. Additionally, those problems with Haffner which Honsberger personally testified to were consistent with complaints of District administrators from the areas she had serviced.

Honsberger identified these problems as primarily her relationship with District staff and her difficulties following ROP and District procedures. With regard to her actual counseling, Honsberger testified that she had no total vocational counseling guidance plan and that he didn't see any evidence of anything but one-to-one counseling—no small or large groups. Haffner did not deny the latter and as to the former, testified that she was never asked to formulate such a plan.

D. District Input

The Office presented testimony by Young as to the complaints he received from various district administrators throughout Haffner's tenure as an ROP counselor. As rebuttal, the Association both attempted to show Haffner's lack of blame

or responsibility for the specific incidents mentioned as well as introduced letters, primarily from school principals and Pasadena Unified School District administrators, indicating that Haffner had been a dedicated and desirable ROP counselor. However, there was no evidence presented to support a finding that either (1) the circumstances underlying the complaints from the districts were tied to Haffner's participation in protected activity, or (2) that Young knew or had reason to know at the time he used the complaints about Haffner in making his decision, that Haffner might have been without blame or responsibility for some or all of the incidents underlying those complaints. This being the case, the accuracy with which district personnel interpreted certain incidents goes more to an issue of whether the Office made a sound decision in deciding not to retain Haffner rather than the issue here of whether it made a discriminatory decision.

The major complaint Young received about Haffner was her problem in getting along with others in the districts she serviced. Young testified that Montebello Director of Vocational Education B. Stetler had verbally requested Haffner's transfer from his district for just such a reason. Stetler's role in her transfer was challenged by Haffner who testified that Stetler had told her, "I had nothing to do with it. I told them I would have nothing to do with it." This first transfer pre-dated any Association activity by Haffner.

Young received similar critical comments from district personnel in San Marino. The evidence reflects that Haffner's problems there stemmed primarily from a personality conflict with San Marino High School Career Center Supervisor Barbara Bice. Although there was conflicting testimony as to which of the two women was to blame for the conflicts, the evidence suggests that Bice had been an employee trusted and valued by San Marino High School Principal J. Rankin and that, in the face of this severe personality conflict, Bice was in the eyes of the principal, regardless of blame, simply the more valuable, less expendable individual.

Young also received input from W. Dingus, superintendent of San Marino Unified School District, that Haffner exhibited a lack of interest in her job and a preference for quasi-administrative matters. Haffner generally denied this. Young requested that Dingus put something in writing, and Dingus consequently sent Young a letter dated May 5, 1977 requesting a change in ROP personnel. Young testified that with the exception of Alma Viardo he never received any letters requesting the transfer of any other ROP counselor.

Young's final source of district input on Haffner was from E. Waller, director of Career and Vocational Education for Pasadena Unified School District which Haffner serviced for the 1977-78 and 1978-79 school years. Young received calls from Waller where Waller discussed problems such as Haffner's

concentration on quasi-administrative concerns, not concentrating on the students, and not screening the students for classes. Young also received a letter dated nearly three weeks after Haffner had been notified of her reassignment out of the ROP, that Waller preferred that another ROP counselor, K. Moore, be retained rather than Haffner. Although the letter said nothing really negative about Haffner, it did express a comparative preference for Moore. The Association introduced a letter from Waller to Young written in response to the Task Force's February 20 request for input on their recommendations where he stated that he was "very pleased with the counselors as assigned to Pasadena Unified School District at the present time." These were Moore and Haffner. This evidence supports the conclusion that Waller would have preferred not to reduce the number of counselors, but if that was the decision, he favored Moore over Haffner.

III. Alma Viardo

A. Employment History in ROP

Viardo was first employed by the Office as an ROP counselor in December 1974. She was assigned to the Pasadena Unified School District to service Blair and John Muir High Schools. Following the 1976-77 school year, Viardo was transferred to the Santa Monica School District where she worked until the end of November 1978. At that time, she was reassigned to the Monrovia School District. She remained there until June 1979

at which time, pursuant to the ROP staff reduction, she was removed from the ROP and reassigned to a teaching position in special schools as a day-to-day substitute.

B. Union Activity

Prior to the election of an exclusive representative, Viardo was a founder and active member of the ROPCA. She was also a participant by invitation in SEERG (Superintendent's Employee-Employer Relations Group), convened by Los Angeles Superintendent of Schools Clowes. After the representation election in the spring of 1977, participation in these groups ended.

Viardo was invited to attend all executive board meetings of the Association and, while the record is somewhat unclear, it seems she was an observer at three negotiation sessions while a counselor in Pasadena. She has served on the grievance committee since 1976 (initially through ROPCA) and was a member of the negotiation team in 1978 and 1979. She attended numerous negotiation sessions with release time while a counselor at Santa Monica.

Viardo was also involved in drafting remarks for the Association presentations before the Board of Education which were critical of ROP administration policies. And she conducted research for an Association job description project.

Each of her ROP coordinators, Honsberger in Pasadena, and Fisher in Santa Monica, as well as ROP Director Young, testified that they were quite familiar with the fact that Viardo was an active Association member.

C. Absence for Negotiations

Testimony appears throughout the record that Viardo's frequent absences from her job site generated numerous complaints from both district and ROP staff. Viardo testified that these absences were primarily because of her participation in negotiations. Fisher testified to the contrary, stating that very few of the absences related to union activity. The amount was apparently sufficient, however, to warrant a suggestion by Fisher that Viardo ought to consider giving up the negotiations team in order to spend more time on relationships with the district and ROP personnel. Thus, regardless of the credibility resolution here, absences due to negotiations had an impact on her overall relations with the staff, at least from the perspective of coordinator Fisher.

Problems were generated by three facets of Viardo's absences: frequency, lack of notice, and lack of site coverage. The only specific testimony regarding frequency was Viardo"s that she attended at least 10 negotiation sessions during the months of May and June 1978.

Each party's testimony regarding notice went essentially uncontroverted. For the Office, Fisher testified that he rarely, if ever, received prior personal notice from Viardo that she was going to be absent from her work station. He also testified that on several occasions this situation was discussed with Viardo without result.

None of this was contradicted by the Association. Although Viardo testified that she "sent [Fisher] memos every time [she] was away at negotiations," the record is insufficient to determine whether this was notification prior to or subsequent to the event. However, it was uncontroverted that the Office itself sent out prior official notice of persons accorded release time to participate in negotiation sessions, and that these notices were received by both Young and Fisher. Fisher testified that although the notices may have been on his desk prior to the event, since he spent considerable time in the field, he didn't actually see the notices until after the event. The sample Official Notice produced by the Association, however, casts doubt upon this impracticability argument. That notice was dated May 31, announcing negotiations two weeks hence on June 14. While Viardo apparently made little effort to personally notify her ROP coordinator, neither did the ROP apparently respond to the situation by doing anything to expedite its processing of the Official Notices.

The Official Notices additionally indicated that if substitutes were needed, they were to be provided in the usual manner. ROP never provided for nor requested any substitutes to cover Viardo's station. While Fisher testified that he himself would have been the ROP substitute had he had prior notice of an absence, another of Fisher's counselors, Michael Pines, testified that on an occasion when Fisher had prior notice, he did not, in fact, fill in as a substitute counselor for Pines. Finally, as partial coverage for her site, Viardo, when absent, would always leave a note on her window along with a sign-up sheet for students.

The Office's own testimony indicated that this problem regarding absences was the biggest problem with the district and high schools in Santa Monica. And in his Interim Appraisal Summary (IAS) of Viardo, Fisher indicated that this situation influenced the letters written by Santa Monica District Supervisor of Secondary Education Karadenas, and Santa Monica High School Principal Pearson, (requesting her removal from Santa Monica School District) which made up approximately three-sevenths of the written district input in the record on Viardo.

The evidence from both parties reflects that the subject of absences due to negotiations was discussed several times between Viardo and Fisher, especially during the last six months she was in Santa Monica. For example, it went unrefuted

that Fisher, at these times, apprised Viardo of Young's concern about this matter. Where the testimony differs greatly, however, is in regard to the tenor of these discussions.

Essentially, Viardo testified that Fisher told her on several occasions that he wanted her to give up being on the negotiation team and that she had to choose between negotiations and ROP. Fisher denied these statements.

The focus of this conflicting testimony was a much controverted private meeting between these two on August 28, 1978. There, Fisher testified that:

> The district was very disappointed in particularly the area of employee relationships, district and high school level, and the staff of this career center. And I suggested to Alma prior to the year getting going on that perhaps she should consider whether it is worthwhile that she represent the union or perhaps with the light of the district dissatisfaction the need to spend more time on relationships, et cetera, that maybe she ought to consider giving it up.

Viardo introduced her notes of the meeting indicating Fisher stated, among other things, that (1) her efforts were O.K.; (2) her performance was never the issue; (3) the problem was the concern of he and Young about her union activities; (4) that he wasn't going to stand for anymore of that negotiations "crap"; (5) that he was giving her a choice, union activities or ROP and there were no two ways about it; and (6) that in

exchange for her cooperation, he would get Young off her back. This conflict in testimony is resolved in favor of Viardo since her testimony, from notes taken shortly after the meeting, appears much more specific as to precisely what Fisher said in contrast to the more general testimony of Fisher as to what he "suggested" to Viardo.

D. Interim Appraisal Summary

In order to provide some kind of a final evaluation as well as a guide for Viardo's new coordinator, Fisher prepared an Interim Appraisal Summary (IAS) of Viardo on January 2, 1979, covering the final period of her term at Santa Monica, May 2, 1978 to November 29, 1978. On January 17, 1979, Viardo, Young, and Ed Romeo, CTA Consultant, met to review the IAS because it was highly critical of Viardo's performance.

The IAS covered eight items of concern. These areas of concern included (1) Viardo's failure to develop realistic enrollment predictions for use in planning courses; (2) her failure to conduct effective, in depth counseling sessions with students; (3) her failure to communicate and work well with employees of the Santa Monica High School and Santa Monica Unified School District; (4) her lack of a system for self-evaluation of ROP counseling and enrollment efforts; (5) her emphasis on "best efforts" rather than "bottom line

results" regarding enrollment, attendance and resultant ADA; (6) a lack of articulation with lower grade feeder schools regarding the ROP program; (7) her non-cooperation with Office supervisors and school district staff; and (8) her use of ROP phones for non-ROP business use.

Two of the eight items discussed focused on Viardo's relationship with the district and ROP staff. A significant factor used to appraise each of the two items was the problems generated by Viardo's absences.

In both the case in chief and in rebuttal, Viardo testified that at the conference, she and Romeo rebutted and clarified all the items of the IAS, had brought documentation to support their rebuttal, had pointed out that the period of time stated as being covered by the IAS was erroneously long and actually covered one and one-half months; that Young agreed at that time that this IAS was not to go into Viardo's personnel file and would not be used in any way; and that Viardo should prepare a memorandum to him to that effect. The Association produced that memo dated January 23, 1979 confirming any agreement reached in the January 17 conference. The Association also introduced Young's response dated January 31, which said that his decision, except as to one item suggesting misuse of

ROP telephones, was not to recall or consider nonexistent the IAS.[3]

3whether Viardo and Romeo rebutted and clarified all the items in the IAS is a matter upon which the parties disagree. In any event, there is insufficient evidence in the record from which the hearing officer can conclude whether in fact the items in the IAS were rebutted and classified.

The Association urges that Young agreed to not use the IAS in any way and then subsequently reneged on his agreement. This, the Association alleges, is further evidence of Young's discriminatory treatment of Viardo. The Association's own exhibits, however, betray its contention that Young agreed not to use the IAS in any way at the January 17, 1979 meeting.

On January 23, 1979, Viardo wrote to Young:

> In accordance with the agreement made during a conference last January 17, 1979. . . I am sending you the memo requesting that all copies of the "interim appraisal summary" and the accompanying attachments dated January 4, 1979 . . . be recalled and considered non-existent on the following grounds'!
>
> . . . . . .
>
> Please notify me by memo of your action on the matter as early as possible. Thank you. [Emphasis added.]

On January 31, 1979, Young wrote to Viardo:

> . . . There seems to be ample support documentation for the appraisal and the documents or copies of the documents were [sic] attached to the appraisal that was presented to you.
>
> The information and recommendation referred to in Item 8 of the Appraisal will be removed from the Appraisal and handled as a separate item.
>
> My decision based on the information above is not to recall or consider nonexistent the Interim Appraisal Summary presented to you.

E. Decision to Reassign; Numerical Rating

The lowest total score received by one of the 12 retained counselors was a 36. Viardo's total was the lowest of any counselor, a 14. For the relevant period, Viardo had two different coordinators, Fisher in Santa Monica and Sparks in Monrovia. Although no specific rating was introduced, Young testified for the Office that Sparks was "very pleased with the work that was being done in Monrovia at that time." Viardo's ultimate numerical rating, however, was a composite of information from both Sparks and Fisher.

Witnesses for the Office presented contradictory testimony as to how Viardo's ultimate score of 14 was derived. Young testified that Fisher and Sparks each completed an individual numerical rating on Viardo. Weighing them equally, he averaged the ratings by adding them together and dividing by two. Fisher, however, testified that when asked by Young to do a numerical rating on Viardo he replied that the Interim

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It is therefore concluded, based upon Viardo's January 23, 1979 memo to Young "requesting" that the IAS be recalled and considered nonexistent and Young's January 31, 1979 memo denying that request that Young did not agree at the January 17, 1979 conference that the IAS would not be used in any way.

Appraisal Summary spoke for his time with Viardo. He testified that the IAS was the only written input he gave Young.[4]

F. District Input

Young testified that his District input came from three sources.

The first source was E. Waller, director of Career and Vocational Education for Pasadena Unified School District, Viardo's first assignment. In an April 25, 1977 letter to Young, Waller requested Viardo be transferred from Pasadena citing her lack of in-depth counseling, lack of vocational guidance, and preoccupation as a paper-producer. There were also attendant discussions between Young and Waller on a similar vein. In rebuttal, Viardo testified that in a May 19, 1977 meeting about Waller's letter attended by E. Lambert, assistant superintendent of Pasadena Unified School District, Waller, Honsberger and Viardo, "Mr. Waller admitted that he only got verbal input from two of the staff. And one of the staff which he claimed he got verbal input [from], had written a letter on [her] behalf.. . . And Mr. Lambert at,

[4]In resolving the Office's inconsistent testimony, it is reasonable to conclude that the testimony of Fisher, the person who prepared the IAS and presented Young with whatever data of his was used in determining Viardo's numerical rating, would be the more accurate. Accordingly, Fisher's testimony on this point is credited and Young's testimony is not.

during our confrontation asked, actually reprimanded Mr. Waller for doing this." Viardo subsequently summarized the meeting in a memo to Lambert and requested that Young be apprised of the outcome.

Young also received input from Mr. Pearson, principal of Santa Monica High School. He requested Viardo's transfer in a November 15, 1978 letter to Young, although he gave no specific reasons. As stated before, Fisher testified that Viardo's absences without coverage caused the biggest problems with the high school, and that that situation influenced the November 15 letter.

Finally, Young received input from M. Karadenas, supervisor of Secondary Education for Santa Monica Unified School District. Young testified as to personal discussions where Karadenas complained about Santa Monica not getting sound vocational guidance and the considerable friction between Viardo and the district staff. Fisher, testifying about his frequent discussions with Viardo about her role on the negotiating team, stated that a source of problems was that when Viardo was absent, the other career center personnel were aggravated that they had to continually field her phone calls when they didn't know where she was. He testified that these complaints worked their way up to Karadenas.

Young testified that Karadenas threatened to withdraw the entire district from ROP unless Viardo was transferred. In a November 16, 1978 letter, he formalized that request.

ISSUES

1. Should the unfair practice charge in the above-captioned matter be deferred to the grievance-arbitration procedure contained in the collective bargaining agreement between the Association and the District pursuant to section 3541.5(a)?

2. Was the involuntary transfer of Haffner from her position as an ROP counselor to a position as a Special Schools day-to-day substitute in violation of sections 3543.5(a) and/or 3543.5 (d)?

3. Was the involuntary transfer of Viardo from her position as an ROP counselor to a position of a Special Schools day-to-day substitute in violation of sections 3543.5(a) and/or 3543.5 (d)?

4. If the answer(s) to issues numbered 2 or 3 is in the affirmative, what is the appropriate remedy?

CONCLUSIONS OF LAW AND DISCUSSION

1. The Unfair Practice Charge In The Above-captioned Matter Should Not Be Deferred To The Grievance-Arbitration Procedure Contained In The Collective Bargaining Agreement Between The Association And The District Pursuant To Section 3541.5(a)

The Office argues that the above-captioned matter should be deferred to the grievance-arbitration procedure contained in

the collective bargaining agreement between the Association and the Office pursuant to section 3541.5(a).[5] The grievance

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5Sec. 3541.5(a) states:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
> . . . . . .
> (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

The District orally raised the issue of deferral to arbitration for the first time on June 10, 1980, the first day of the administrative hearing in the above-captioned matter.

The Public Employment Relations Board itself promulgated Rule 32654 on the subject of Board Deferral and the Question of Repugnancy and filed same with the Secretary of State on June 18, 1980 which thereupon became effective on July 18, 1980. Rule 32654 provides as follows:

> Board Deferral and the Question of Repugnancy
>
> (a) Objections to the issuance of a complaint pursuant to a prima facie charge may be made on the ground that issuance of said complaint is prohibited pursuant to section 3514.5(a)(2) or 3541.5(a)(2) of the Government Code. Objections shall be in the form of a motion to deny issuance of complaint and must be filed with the Board within the time limits applicable to the filing of an answer to the charge pursuant to Section 32635(a).
>
> (b) Upon such motion, the Board shall set the matter for hearing, except that in cases where there are no factual disputes, the Board may limit the parties to submission of briefs or oral argument.

(c) If it is determined that the Board must defer, the Board agent shall refuse to issue a complaint and dismiss the charge pursuant to Section 32630.

(d) If it is determined that the Board is not required to defer, the Board agent shall issue a complaint pursuant to Section 32652, including a written statement of the reasons therefor.

(e) The decision to issue a complaint pursuant to this Section may be appealed to the Board itself within 20 days following the issuance of the complaint by filing an original and four copies of the appeal with the Executive Assistant to the Board. The appeal shall be in writing, signed by the party or its agent, and contain the facts and arguments upon which the appeal is based. Service and proof of service of the appeal pursuant to Section 32140 are required.

(f) If the appealing party files a timely appeal, any other party may file with the Board itself an original and four copies of a statement in opposition within 20 days following the date of service of the appeal. Service and proof of service of the statement pursuant to Section 32140 are required.

(g) An unfair practice charge originally dismissed under the deferral requirement may be refiled within applicable statutes of limitation, based on a claim that the grievance award resolution is repugnant to the Act.

(h) The Board shall conduct a hearing on the repugnancy claim. After the close of the hearing, a Board agent shall issue a recommendation to the Board itself regarding the repugnancy claim. The recommendation shall be concurrently served on all parties. Each party may file with the Board itself a response to the recommendation of the Board agent within 20 days following the date of service of the recommendation.

procedure contained in Article V, Section I of the agreement between the Association and the Office provides in pertinent part as follows:

> The decision of the arbitrator within the limits herein described shall be in the form of a recommendation to the Board of Education. If neither party files a request to the Board [Board of Education] to undertake review of the advisory decision within ten (10) working days of its issuance, or if the Board declines such a request, then the decision shall be deemed adopted by the Board and become final and binding on all parties. If a timely request for review is filed with the Board and accepted by the Board, it shall then undertake review of the entire hearing records and briefs. The Board may also, if it deems it appropriate, permit oral arguments by representatives of the parties, but only in the presence of one another. Within thirty (30) working days after receiving the record, the Board shall render its decision on the matter, which decision shall be final and binding on all parties. . ..

> response shall be filed with the Executive Assistant to the Board. Service and proof of service of the response pursuant to Section 32140 are required. The recommendation of the Board agent together with any responses filed pursuant to this Section and the case record shall be submitted to the Board itself for a decision.
>
> (i) If the grievance award is found to be repugnant, the Board itself shall remand the case, ordering the issuance of a complaint and the processing of the charge accordingly.
>
> (j) If the award is found not to be repugnant, the Board itself shall refuse to issue a complaint and dismiss the charge.

Pursuant to the grievance-arbitration procedure described above, a hearing was held on January 21, 1980 before Arbitrator Robert M. Leventhal who subsequently issued an award recommending that the Office had not violated the transfer and reassignment provisions of the agreement by transferring Haffner and Viardo. Neither party sought review by the Office's Board of Education of the arbitration award, and thus under the terms of the collective bargaining agreement, within 10 days it became "final and binding on all parties."

In the hearing officer's opinion, the Office's deferral argument places too much reliance on the phrase "final and binding on all parties" as contained in the above-quoted portion of Article V, Section I. Careful examination of the entire section in question reveals a classic advisory arbitration clause whereby the arbitrator makes a "recommendation" to the Board of Education, after which either party may request the Board to undertake a review of the recommendation, and thereafter the Board "shall render its decision on the matter, which decision shall be final and binding on all parties," or "if neither party files a request to the Board to undertake review of the advisory decision

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Because the effective date of Regulation 32654 occurred subsequent to the Office's motion to defer, Regulation 32654 has not been applied in deciding said motion.

within ten (10) working days of its issuance, or if the Board declines such a request, then the decision shall be deemed adopted by the Board and became final and binding on all parties." [Emphasis added.]

When Arbitrator Leventhal issued his "recommendation" to the Board of Education regarding the grievances of Haffner and Viardo, the Board was not bound by his award. Since neither party requested the Board of Education to review the "advisory" decision within 10 working days of its issuance, the decision was deemed "adopted by the Board [of Education]." Thus, in reviewing the award for purposes of the Office's motion to defer, the hearing officer is actually reviewing the Board of Education's award.

The PERB itself has had opportunity to pass upon the question of post-arbitral deferral in Dry Creek Teachers Association v. Dry Creek Joint Elementary School District (7/21/80) PERB Decision No. AD-81a. In holding that the Spielberg[6] standards are well within the contemplation of the Educational Employment Relations Act's language, PERB itself announced that "PERB is required to defer to a mutual settlement or a 'binding arbitration' award pursuant to a negotiated procedure,. . .."

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[6]Spielberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152].

It appears that Spielberg requires that the parties agree to be bound by the arbitrator's or arbitration panel's award rather than by an award of one of the parties, as in this case. As the National Labor Relations Board (hereafter NLRB) held in Spielberg;

> In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. [Emphasis added.]

It is therefore concluded that a requirement for post-arbitral deferral is that all parties to the arbitration proceedings must have agreed to be bound by the arbitral award of the arbitrator or arbitration panel. Since the award in question was "deemed adopted by the Board [of Education]" and only thereafter became "final and binding," deferral to the Board of Education's award would not be keeping with the Spielberg doctrine as affirmed by the PERB itself in Dry Creek, supra.

The Office further contends that the Association should not be permitted to relitigate the factual issue of whether Viardo and Haffner were equal to the 12 counselors who were retained with regard to "educational program needs," "student welfare," and "other qualifications" under the doctrine of collateral estoppel. The hearing officer concludes that the factual issue litigated in the unfair practice case is somewhat different,

however, since the criteria used by Young with respect to rating the counselors numerically were (1) ability to relate to students; (2) ability to make large group presentations; (3) ability to work as a team member; and (4) self-direction and motivation. Furthermore, to deny the Association its right to litigate the factual issue of whether Viardo and Haffner were equal in counseling abilities to the 12 retained counselors would, in effect, partially defer to the advisory award subsequently adopted by the Office's Board of Education. Deferral to such a grievance-arbitration process, as discussed earlier, is inappropriate.

2. The Involuntary Transfer Of Haffner From Her Position As An ROP Counselor To A Position As A Special Schools Day-To-Day Substitute Teacher Was Not In Violation Of Sections 3543.5(a) And/Or 3543.5(d)

The test applicable for alleged violations of section 3543.5(a) was announced by the PERB itself in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 as follows:

> To assist the parties and hearing officers in this and future cases, PERB finds it advisable to establish comprehensive guidelines for the disposition of charges alleging violations of section 3543.5(a):
>
> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the Charging Party establishes that the employer's conduct tends to or does result in some harm to employee rights

> granted under the EERA a prima facie case shall be deemed to exist;
>
> 3. Where the harm to employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.
>
> * * * * * * * * * * * * * * * * * * *
>
> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles, the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.

The above-quoted test shall be applied in examining the allegations of section 3543.5(a) violations in both Haffner's and Viardo's cases.

Application of the Carlsbad test as described above leads the hearing officer to conclude that Charging Party has failed to establish that the Office's conduct in transferring

Haffner from her position as counselor to a position as a day-to-day substitute in special schools "tends to or does result in some harm to employee rights granted under the EERA." The evidence shows that Haffner, although active in Association activities, had been the subject of several complaints regarding getting along with personnel at the districts she serviced. While the Association presented evidence to the effect that Haffner's personality conflicts with district staff was not the blame of Haffner, there is insufficient evidence to support a finding that either (1) the circumstances underlying the complaints from the districts were tied to Haffner's participation in protected activity, or (2) that Young intentionally utilized inaccurate information in comparatively ranking Haffner with other counselors. This being the case, the accuracy with which District personnel interpreted certain incidents goes more to the issue of whether the Office made a sound decision in deciding not to retain Haffner rather than the issue before PERB of whether it made a discriminatory decision within the meaning of section 3543.5(a). The soundness of the decision made by Young, in the absence of discrimination for reasons of protected activity, is simply a matter outside the jurisdiction of PERB. In reaching this conclusion, no finding is made that Haffner was anything less than a competent counselor. It is therefore concluded that, based upon the criteria used by Young in ranking all

counselors, and due primarily to personality conflicts with District personnel, Haffner ranked lower than those counselors retained.

Even assuming one could conclude that the evidence supports a finding that the Charging Party has established that the Office's conduct in transferring Haffner "tends to or does result in some harm to employee rights granted under the EERA," pursuant to Carlsbad, supra, it is concluded that the harm to employees' rights is slight and that the Office's operational necessity defense outweighs the slight harm occasioned employees' rights.

The record evidences several instances of complaints by districts regarding Haffner throughout her tenure as an ROP counselor including complaints from Montebello and San Marino School Districts requesting her transfer and the expressed preference that another ROP counselor, K. Moore, be retained rather than Haffner as counselor at Pasadena Unified School District. This input from school districts, taken in conjunction with Haffner's relative numerical rating of 26 compared to the lowest rating given to one of the 12 retained counselors of 36, outweighs any perceived harm to employee rights which might ensue as a result of an active Association member's transfer from her position as a counselor to a position as a day-to-day substitute teacher for special schools.

No independent evidence of a section 3543.5(d) violation having been presented and no violation of section 3543.5(a) having been established, no violation of section 3543.5(d) is found.

3. The Involuntary Transfer Of Viardo From Her Position As An ROP Counselor To A Special Schools Day-To-Day Substitute Teacher Was Not In Violation Of Sections 3543.5(a) And/Or 3543.5(d)'

The question of whether Viardo's transfer from her counselor position to a position as a day-to-day substitute teacher for special schools was in violation of section 3543.5(a) is complicated by the fact that Viardo's transfer was clearly, in part, a direct result of her exercise of rights guaranteed by the EERA. Much of Viardo's problems at Santa Monica High School stemmed from her absences while participating on behalf of the Association in negotiating sessions between the Association and the Office. These absences caused friction between Viardo and district personnel as they had to field her phone calls during Viardo's absences. This tension ultimately led to administrators for the district writing to the Office and requesting that Viardo be transferred from Santa Monica Unified School District.

It is also clear that the Office's decision to not include Viardo as one of the 12 counselors to be retained was motivated by several other factors. On April 26, 1977, Waller had requested in writing that Viardo be transferred from Pasadena

Unified School District, citing her lack of in-depth counseling, lack of vocational guidance, and preoccupation as a paper-producer. There were similar verbal complaints from Waller to Young concerning Viardo.

Viardo's numerical ranking was the lowest of any counselor, a 14, whereas the lowest score received by one of the 12 retained counselors was a 36. Viardo's low ranking was a result, in part, of input from Santa Monica Unified School District since the interim appraisal summary was apparently used in compiling Viardo's numerical rating. The IAS, however, covered a total of eight areas of deficiency, two of which stemmed from her problems at Santa Monica Unified School District: failure to communicate and work well with employees of the Santa Monica High School and Santa Monica Unified School District and non-cooperation with Office supervisors and school district staff. As previously discussed, these problems appear to have developed in large part due to Viardo's absences for negotiations. Other areas of criticism contained in the IAS were Viardo's failure to develop realistic enrollment predictions for use in planning courses, her failure to conduct effective, in-depth counseling sessions with students, her lack of a system for self-evaluation of ROP counseling and enrollment efforts, her emphasis on "best efforts" rather than "bottom line results" regarding enrollment, attendance and resultant ADA, her lack of

articulation with lower grade feeder schools regarding the ROP program and her use of ROP phones for non-ROP business use. Thus, approximately one-fourth of the areas of criticism were affected by Viardo's absences due to negotiations, although it should be noted that absences for negotiations was a concern, in part, due to Viardo's lack of notice to district personnel which is not a protected activity.

The National Labor Relations Board (hereafter NLRB) has recently promulgated a causation test for mixed motive cases in Wright Line and Lamoureux (1980) 251 NLRB No. 150 [105 LRRM 1169]:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(l) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Since the PERB itself has established as part of the Carlsbad test that a violation of section 3543.5(a) occurs "where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent," it is concluded that the Wright Line test of the NLRB is an appropriate mechanism for deciding "mixed motive" cases under the EERA where the issue becomes whether

the employer would have engaged in the complained-of conduct "but for" an unlawful motivation, purpose or intent. To hold a violation of section 3543.5(a) occurs when the employer's conduct was "in part" motivated by an unlawful purpose or intent would place an employee in a better position as a result of the exercise of a right guaranteed by the EERA than he would have occupied had he done nothing. While a borderline or marginal employee should not be transferred because of the exercise of rights guaranteed by the EERA, that same employee should not be able, by engaging in protected activity, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of its decision. Furthermore, the Wright Line test represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation. This fact is underscored by the lack of discovery mechanisms afforded to charging parties from which they may investigate the employer's motivation.

Application of the above-stated principles leads the hearing officer to conclude that the Association has established a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Office's decision to transfer Viardo. References to

Viardo's problems at Santa Monica are contained in the IAS used to compute Viardo's numerical rating and several letters from Santa Monica Unified School District administrators were considered as input from the District's serviced by Viardo. Since Viardo's problems at Santa Monica stemmed primarily from her absences for negotiations, it must be concluded that Viardo's attendance at negotiation sessions was a "motivating factor" in the Office's decision to transfer Viardo and that the Office had knowledge of the specific reason for Viardo's absences and resultant problems.

As described above, however, several legitimate performance deficiencies were also considered by the Office in making its decision to transfer Viardo: the letter from Waller at Pasadena to Young dated April 25, 1977 requesting that Viardo be transferred to another school district, the memo from Honsberger to Young dated April 25, 1977 regarding Viardo's performance at Pasadena and the areas of concern outlined in the IAS (Viardo's failure to develop realistic enrollment predictions, lack of in-depth counseling, lack of a self-evaluation system, excessive emphasis on "best efforts" rather than "bottom line results," lack of articulation with feeder schools and use of ROP phones for non-ROP business).

Therefore, examining the motivating factors which stemmed from Viardo's participation in negotiations (and were therefore unlawful] and the Office's legitimate motivating factors stemming from school district input at Pasadena and the six

before-described factors contained in the IAS, it is concluded that while Viardo's exercise of protected rights was a motivating factor the Office has shown that several lawful areas in which Viardo was deficient were also considered and that the Office would not have retained Viardo as one of the 12, out of a total of 22, counselors to be retained in the absence of protected conduct. This being the case, it cannot be concluded that it has been shown that the Office would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent pursuant to Carlsbad, supra.[7]

Having so concluded, however, the hearing officer must still examine the harm to employee rights, or determine whether there is "slight harm" or "inherently destructive harm" and resolve the charge accordingly pursuant to the second prong of the Carlsbad test.

It is concluded that the Office's conduct in this case tends to or does result in at least some harm to employee rights granted under the EERA since, as concluded above, the Office was motivated in part by an illegal purpose or intent.

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[7] In Belridge Teachers Association, CTA/NEA v. Belridge School District (12/31/80) PERB Decision No. 157 the PERB itself considered a mixed motive case. Being unable to determine what portion of a disciplinary action against an employee was based on unprotected activity, the Board held that the entire reprimand must fall. See also San Ysidro School District (6/19/80) PERB Decision No. 134.

It is further concluded that the harm to employee rights under the facts of this case are "slight" rather than "inherently destructive" since both the employer's action in this case, transfer, and Viardo's protected activity, nondescript participation on the negotiating team, appear similar in scope to the employer's actions and activities considered by the PERB itself in Carlsbad, supra, and implicitly found therein to be "slight harm." [8]

Balancing the competing interests of the Office and the rights of the employees weighs in favor of the Office. The Office's operational defense shows that Viardo had legitimate criticism directed against her by Waller at Pasadena requesting her transfer to another school district. This criticism stemmed from specific deficiencies in Viardo's work product, not Association activities, and included lack of in-depth counseling, lack of vocational guidance, and preoccupation as a paper-producer. with the exception of Haffner, the Office received no other letters from districts requesting the transfer of counselors. Additionally, after being transferred to Santa Monica, Viardo's absences due to negotiations generated criticism from district staff, in part, because Viardo failed to keep district staff advised of her whereabouts when absent. Finally, the IAS prepared by Fisher indicates deficiencies in six areas unrelated to Association activities as described above. Weighing the Office's defense that it

[8]It is concluded that the PERB itself implicitly found the harm in Carlsbad to be "slight harm" since it balanced the harm to employees against the District's operational need defense.

considered the above factors and that Viardo compared less favorably than any of the retained counselors against the harm to employee rights due to perceived discrimination against Viardo because of her Association activities, it is the hearing officer's opinion that the Office's operational defense outweighs the harm to employee rights and that the charge should be accordingly dismissed.

No independent evidence of a section 3543.5(d) violation having been presented and no violation of section 3543.5(a) having been established, no violation of section 3543.5(d) is found.

PROPOSED ORDER

Based on the findings of fact, conclusions of law, and the entire record in this case, the unfair practice charge against the Los Angeles County Superintendent of Schools is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 19, 1981 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on May 19, 1981 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 Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

DATED; April 29, 1981

Kenneth A. Perea
Hearing officer