STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RACHAEL LARA, Charging Party, v. SANTA PAULA SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1574 PERB Decision No. 505 May 7, 1985
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SANTA PAULA CHAPTER #497, Charging Party, v. SANTA PAULA SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1581

Appearances; Patricia L. Roy, Field Representative for California School Employees Association and its Santa Paula Chapter #497, and representative for Rachael Lara; The Negotiation Center by Edward M. Jones and Anita Johnson for the Santa Paula School District.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Santa Paula Chapter #497 (CSEA) and by Rachael Lara to the proposed decision, attached hereto, of a PERB administrative law judge

(ALJ). The ALJ found that the District had violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by discriminating against Lara because of her protected activities when it transferred her from her assignment at Blanchard School to a new assignment at McKevett School. In addition, the ALJ dismissed the allegation that the District further violated the Act when it issued a letter of reprimand to Lara.

The Santa Paula School District (District) requests that the Board accept its late filing of its response to CSEA's exceptions.

The Board has carefully reviewed the entire record in this case. We conclude that the ALJ's findings of fact are free of prejudicial error and adopt them as the findings of the Board itself.[2]

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise noted.

Section 3543.5 reads, in pertinent part, 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

2The ALJ misstated the record when he found that the

DISCUSSION

As a preliminary matter, we address the District's request that the Board excuse its late filing[3] of a response to CSEA's exceptions of August 15, 1983.

On September 26, 1983, the District filed its request that, pursuant to PERB Regulation 32136, the Board accept its late filing. The basis for the request is, that because CSEA served District Superintendent De La Rosa and not the District's representatives, the representatives were not aware of the exceptions until September 21, 1983. On October 11, 1983, the District filed its response to the exceptions.

PERB Regulation 32142 provides direction to the parties for proper service. It states in part:

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memorandum of another aide "was never distributed because it was intercepted in advance by the principal where the aide worked." Proposed Decision, p. 51. In fact, the record demonstrates that the other aide's memorandum was distributed to the teachers while they were in the lounge, prior to the principal's arrival. The record does reflect that discussion of the memorandum and/or aide services was interrupted by the principal. This error, however, does not affect the outcome of the case, and thus is non-prejudicial.

[3]PERB Regulation 32310 requires that within 20 days following the date of service of the statement of exceptions, any party may file with the Board itself its response.

PERB Regulations are codified at California Administrative Code, Title 8, section 31001, et seq.

[4]PERB Regulation 32136 states:

> A late filing may be excused in the discretion of the Board only under extraordinary circumstances. A late filing

> Proper Recipient for Filing or Service. Whenever a document is required to be "filed" or "served" with any of the below listed entities, the proper recipient shall be:
>
> . . . . . .
>
> (c) An employer -
> (l) in the case of a public school employer - the superintendent, deputy superintendent, or a designated representative of a school district; or to the school board at a regular or extraordinary meeting. . . . (Emphasis added.)

As the regulations provide for service on the superintendent, CSEA's service was not improper and, thus, could not prejudice the District. Any delay in notification lies with the District itself and not CSEA. The District's excuse does not meet the extraordinary circumstance requirement found in PERB Regulation 32136. The District's request is therefore denied.

CSEA excepts to the findings that a letter that Lara wrote to the teachers at her school was not protected activity, and that the letter of reprimand to Lara was not retaliation for her otherwise-protected activities. Insofar as the Association's exceptions take issue with the ALJ's factual conclusions, the Board defers to the credibility determinations reached by the ALJ. (See Santa Clara Unified School District (1979) PERB Decision No. 104.)

> which has been excused becomes a timely filing under these regulations.

CSEA's objections are to the ALJ's treatment of Lara's letter to the teachers and the District's subsequent letter of reprimand. The record amply supports the ALJ's finding.

Contrary to the arguments made by CSEA, the evidence showed that the District told Lara and the other CSEA negotiators that it would notify the teachers of the change in hours for aides. There was no need for Lara to immediately inform them and "insert herself into a position of authority." CSEA did not ask Lara to issue her memorandum. CSEA Field Representative Manuel Armas stated he would issue a statement to the employer, which he did the following day.[5] Since the aide's sixth hour was used for planning lessons, a reduction to five hours with an elimination of lesson planning would have no effect on the five hours she worked with the students. Thus, there was no need for Lara to issue her letter to the teachers at her school. We agree with the ALJ that her actions were unprotected.

The record supports the ALJ's finding that the District did not impose a disproportionate penalty when it issued a written reprimand for Lara's unprotected activity. This reprimand was not so unusually harsh that an inference of discriminatory treatment can be drawn.

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[5]Such a position statement made by an employee organization is, of course, protected activity.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, it is found that the Santa Paula School District violated section 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c), it is hereby ORDERED that Santa Paula School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Restraining, discriminating against, or otherwise interfering with the rights of employees, and Rachael Lara in particular, because of the exercise of their right to participate in an activity protected by the EERA.

2. Denying California School Employees Association and its Santa Paula Chapter #497 rights guaranteed by the EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Within thirty (30) days following the date when this Order is posted, and upon her request, reinstate Rachael Lara to her former position at -Blanchard Elementary School, effective the next semester following a timely request.

2. Within thirty-five (35) days after the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive

workdays. Reasonable steps shall be taken to ensure that this Notice is not altered, reduced in size, defaced, or covered with any other material.

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

Members Jaeger and Burt joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Cases No. LA-CE-1574, Rachael Lara v. Santa Paula School District, and No. LA-CE-1581, California School Employees Association and its Santa Paula Chapter #497 v. Santa Paula School District in which all parties had the right to participate, it has been found by the Public Employment Relations Board that Santa Paula School District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act.

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

A. CEASE AND DESIST FROM:

1. Restraining, discriminating against, or otherwise interfering with the rights of employees, and Rachael Lara in particular, because of the exercise of their right to participate in an activity protected by the Educational Employment Relations Act.

2. Denying California School Employees Association and its Santa Paula Chapter #497 rights guaranteed by Educational Employment Relations Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Within thirty (30) days following the date when this Order is posted, and upon her request, reinstate Rachael Lara to her former position at Blanchard Elementary School, effective the next semester following a timely request.

Dated: _____ SANTA PAULA SCHOOL DISTRICT

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RACHAEL LARA, Charging Party, v. SANTA PAULA SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1574
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER #497, Charging Party, v. SANTA PAULA SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1581 PROPOSED DECISION (7/26/83)

Appearances; Waldo & Malley by Edward Lacey, Esq. for Charging Party Rachael Lara; Patricia L. Roy, Field Representative for Charging Party California School Employees Association and its Chapter #497; Edward M. Jones and Anita Johnson for the Santa Paula School District.

Before Stephen H. Naiman, Administrative Law Judge.

STATEMENT OF THE CASE

On May 10, 1982, Charging Party, Rachael Lara, as an individual, filed an Unfair Practice Charge against the Santa Paula School District (hereafter District or Respondent). The Charge was amended on May 27, 1982, and on June 16, 1982, a complaint issued. On June 21, 1982, the District filed its Answer. On July 26, 1982, Lara filed a Motion to Particularize

the Answer and on August 3, 1982, the District filed an amended Motion to Particularize the Charge. The Motion to Particularize the Answer was granted and the Motion to Particularize the Charge was denied.

On May 18, 1982, Charging Party, California School Employees Association and its chapter #497 (hereafter CSEA, Union, or Association), filed an Unfair Practice Charge against the District. A Complaint issued on June 16, 1982. On June 21, 1982, the District filed its Answer to the Complaint. On August 3, 1982, the District filed an amended motion to order CSEA to particularize its complaint. The motion was granted and CSEA filed a particularized Charge/Complaint on September 20, 1982. On October 13, 1982, the District filed its Answer.

Charging Party, Lara, alleges that the District discriminated against her by involuntarily transferring her and placing a letter of reprimand in her personnel file because of her activities in opposition to the District's reduction in hours for migrant aides. Lara further alleges that the District violated her rights by denying her a representative at a grievance meeting to protest this alleged discriminatory conduct. The allegations of Lara's Charge in case LA-CE-1574 are limited to violations of the Educational Employment

Relations Act (hereafter EERA or Act), section 3543.5(a).[1] CSEA restates most of the allegations set forth in Lara's, Charge. In addition, however, CSEA alleges that the District violated EERA section 3543.5(b) and 3543.5(c) by denying, as untimely, Lara's grievance when presented to the Board of Trustees and by transferring Lara in violation of the provisions of the agreement between the parties.

The Charges in cases LA-CE-1574 and LA-CE-1581 were consolidated for purposes of an informal conference which was held on or about July 20, 1982. Thereafter, a notice of consolidation and a notice of formal hearing were issued by the Chief Administrative Law Judge on November 29, 1982. The formal hearing in this matter was held on January 17, 18, and 19, 1983, and concluded on February 8, 1983.

Following conclusion of the formal hearing, the parties were sent copies of the record. Due to a mixup in addressing the transcript, the District did not receive the record until approximately a month after it was received by the Charging Party. As a result, the Respondent was given a short additional period of time in which to file its brief. The Charging Parties, Lara and CSEA, filed their closing brief on May 11, 1983, and the District advised the undersigned

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[1]The Educational Employment Relations Act is codified at California Government Code section 3540 et seq. Unless otherwise noted, all statutory references hereafter are to the California Government Code.

Administrative Law Judge on May 20, 1983, that it would not file a reply brief. Thereafter, the matter was deemed submitted.

FINDINGS OF FACT

The Santa Paula School District

The Santa Paula School District is located in Ventura County, California, approximately 15 miles east of the city of Ventura. Many of the students in the District have parents who work in the citrus orchards in Ventura County. These students and their families comprise a large transient population of the District and are either limited English-speaking, bilingual or largely Spanish-speaking children.[2] At all relevant times there were 450 to 600 migrant students in the District.

Seven elementary schools, covering grades kindergarten through 6 and one junior high school covering grades 7 through 8, comprise the educational facilities of the District. As of the 1982-83 school year, there were approximately 2,996 students in the District. Students from Santa Paula School District matriculate upon graduation to the Santa Paula Union High School District. (Ibid.)

The Migrant Education Program

The District maintains a Migrant Education Program which targets money support to provide special instruction to

[2]By stipulation of the parties and jointly-filed Exhibit I.

children of the "transient" residents working in the District. The Migrant Education Program provides the additional resources which must be brought to bear to compensate for lost educational opportunities due to the high rate of transfer and lost school time that many of these transient students experience. Most of the funds in the Migrant Education Program are expended to employ instructional aides. In view of the fact that many of the students targeted for the program are limited English-speaking, the aides selected for the program generally possess bilingual Spanish/English speaking abilities. (Ibid.)

Prior to the spring of 1981, the Migrant Regional Office, which is responsible for overseeing the Migrant Education Program, required that all aides employed in the program work six hours a day. Prior to November 1981, the District employed six migrant aides. After November 1981 to the present, the migrant aides worked only five hours per day.[3] Presently, the District employs seven migrant aides, three teachers, one Migrant Instructional Support Teacher (MIST) one community/health aide, and one statistical aide. (Ibid.)

At all times relevant to these proceedings, the superintendent of the District has been John De La Rosa. Eugene Marzec is assistant superintendent business/projects and

[3] At all times the student day has been five hours.

is the District's business manager and director of special projects including the Migrant Education Program. (Ibid.)

The District's Migrant Instructional Support Teacher, Rick Valencia, reports directly to Assistant Superintendent Marzec. Marzec testified that he and Valencia speak "weekly" about the activities in the program. Further, Marzec testified concerning his relationship with Valencia as follows:

> A. As MIST, he's required by first the region to go to monthly meetings and bring back information to me and to the aides. His job is also by, as required by migrant, to in-service aides. We require him to be the teacher who goes from school to school to see how the aides are functioning, to help them if they're having any particular problem with either the teacher they're working with or assist the teacher if this one specific pupil needs specific information or training in material then we can go ahead and see if he can find material to service this one specific child with their specific needs. He also helps me in that he keeps me informed on what the community, as a community liaison person that we have and she's a health aide combined, what's going on there and what's happening and keeps me informed on any needs of that area. He also is required to be over the statistical aide and then also keeps me informed of the number of children as the year progresses.

The Bargaining History of the CSEA and the District

In early May 1976, the District agreed to voluntarily recognize CSEA as the exclusive representative of all classified employees except for classified, management

personnel and confidential employees. This recognized unit included the instructional aides working in the District.[4] The parties entered into their initial collective bargaining agreement on or about February 10, 1978, covering the years 1977 through 1980, with reopeners for salary and fringe benefits during the life of the agreement. A successor agreement for the period of July 1, 1980, through June 30, 1983, was concluded in February of 1981. This agreement contained reopeners for salary and fringe benefits and one additional article during each year of the life of the agreement. At the time of the formal hearing, the parties were in the midst of negotiations on the issues of a grievance procedure; layoff procedures and reduction in hours and an additional, unspecified article proposed by CSEA.[5]

Lara's Employment History with the District

Rachael Lara was hired as a regular instructional aide and began work with the District at Bedell Elementary School on or about August 27, 1974. A few weeks later, she assumed the duties of a migrant instructional aide and remained at Bedell School for the entire year as part of the "Public Employment Program Act." In 1975, Lara was transferred to Isbell Junior

[4]By stipulation of the parties and Joint Exhibit II.

[5]The bargaining history is derived from a joint Exhibit II and by stipulation of the parties.

High School where she worked as a migrant instructional aide for three years through the spring semester of 1978. Thereafter, Lara was transferred, again, to Bedell/Blanchard Elementary School where she worked as a migrant instructional aide until November 16, 1981, when she was transferred to McKevett Elementary School where she is presently employed as a migrant instructional aide.

As a migrant instructional aide, it was Lara's responsibility to work with "identified migrant students." Thus, Lara was required ". . .to provide supplemental instruction to these students, supposedly under teacher direction, [and to] also make home calls." Generally Lara was responsible for Spanish surnamed or Latino children whose parents were engaged in the agricultural and fishing industry in and around Santa Paula.

Lara's job description provides, in relevant part:

> INSTRUCTIONAL AIDE (MIGRANT)
>
> DEFINITION
>
> Positions in this classification are established to reduce the adult-pupil ratio in a classroom and to relieve teachers of duties related to class work or other school activities.
>
> They are, under supervision, to assist teachers by performing a variety of instructional and non-instructional duties: ~. '. . and assist teachers in" individualizing instruction by working with individuals and small groups of children under the teacher's guidance.

EXAMPLES OF DUTIES

Assembles and prepares instructional materials as directed by the teacher;

. . . under the supervision of the teacher and using instructional activities, ... May maintain progress reports on students.

Facilitates growth of the migrant student in reading, math and oral language development. Attends weekly in-service training sessions developed by Migrant Instructional Support Teacher. Works only with migrant students validated by the Migrant Statistical Aide. Participates in parent involvement under the direction of the MIST. Makes home visits to all assigned children.

QUALIFICATIONS

. . . . . .

Ability to;

. . . . . .

Learn quickly the procedures, functions, and limitations of assigned duties;

Understand the particular needs of and relate positively to children;

Relate positively to parents and school personnel;

Exercise sound judgment;

Communicate with students and parents in Spanish and English when necessary;

Must have ability to understand and to relate to migrant student's needs. [Emphasis Supplied.]

At Blanchard School, Lara's duties varied from the usual classroom aide. Specifically, Lara was responsible for children in grades 4, 5, and 6. Lara testified that these children tended to have more learning problems in that they were older and required more aide assistance. In performing her functions, Lara acted independent of the teaching staff. She was not assigned to any specific classroom, but rather had her own room where she would meet with students from various classes. The students with whom Lara worked were instructed by at least 13 different teachers. Lara performed her duties by requesting the teachers to release the students to her. Thus colloquially, Lara was referred to as a "pull out" aide. The District had to obtain a special waiver from the Area Director of the Migrant Program in order for Lara to perform in this fashion. The other aides were assigned to specific classrooms under direct teacher supervision.

Prior to November 1981, Lara planned and prepared her own lessons and programs for the students. She also graded the students and gave them diagnostic tests. Prior to September 1981, Lara worked approximately six hours a day as a migrant instructional aide and, as previously noted, the students were in attendance approximately five hours during that day.

The District Reduces the Hours During Which Migrant Instructional Aides Work

On September 28, 1981, Lara received a letter from the District's Classified Personnel Director, Ed Walden, dated September 25, 1981. The letter stated:

> In order to serve migrant students more efficiently, all migrant aides will be reduced to five (5) hours a day effective October 25, 1981.
>
> Please contact Mr. Valencia if you have further questions.

The letter shows that carbon copies were sent to "R. Valencia," and "E. Marzec."

The reduction of hours would reduce Lara's salary by approximately $100 a month and would reduce her eligibility for certain dental and health care fringe benefits previously enjoyed as a six-hour aide. Similarly, all other migrant aides would experience a reduction in wages and benefits.

Lara Contacts Her Fellow Aides, the Union, the County Office, Parents, and Administrators

Upon receiving the letter announcing the reduction in hours for migrant aides, Rachael Lara immediately went to speak with her CSEA job representative, and long-time friend, Anita Pulido. Pulido is the secretary of the Blanchard School and is also the secretary of the school's Principal, Glenn Deines. Pulido's desk is located approximately three to five feet from Deines' office door. Lara informed Pulido of the District's intended action and asked what she should do. Pulido said that

she would look into the matter. The record fails to show that anyone else was present during this conversation.

Thereafter, Lara telephoned Rick Valencia from a telephone located in the nurse's room in the Blanchard School office. She reached Valencia at his office in the Barbara Webster School. Lara asked Valencia why the aides were being cut one hour and he stated that " . . . the District is going to hire more aides."

Next, Lara called Mr. Manuel Martinez who is the president of the Migrant Parent Advisory Council. This council is an organization of parents who have children in the migrant program and acts as an advisory body to the Migrant Educational Program. The call to Mr. Martinez was made from Lara's home. Lara asked Martinez if he knew that the District was going to cut the hours of migrant aides; and he responded to her on the telephone that he did not, but that he would contact Mr. Valencia. There is no evidence whether Martinez ever talked to Valencia following his conversation with Lara.[6]

Also on September 28, 1981, Lara contacted Minnie Garnica, migrant instructional aide at Grace Thille School and Amelia Rutherford, migrant instructional aide at Portal School. Lara,

[6]TO the extent that Lara testified as to out-of-court statements of another person that might be hearsay, these are not relied upon for the proof of the matter asserted. They may be used to show state of mind.

then contacted the remaining migrant aides employed by the District and discussed the reduction of hours with each of them.

Lara contacted Filiverto DeSantiago, Vice President of the Migrant Parent Advisory Council, and she asked him whether he knew that the hours of migrant aides were being cut. DeSantiago replied that he did not and said that he would talk to Valencia. There is no evidence whether DeSantiago talked to Valencia.

On Wednesday, September 30, 1981, Lara contacted Joe Mendoza, the area director of migrant education in Ventura County which comprises half of Region I of the Migrant Education Program. Mendoza is the liaison between the County and the Migrant Education Program in San Jose. The area director holds meetings with aides, provides inservice for aides and parents, and also approves the District's Migrant Education Program budget.

Lara testified she understood that Mendoza had been to Santa Paula to discuss the budget for the Migrant Program a day prior to her phone call. She asked Mr. Mendoza whether he knew that the migrant aides were being cut and he responded that he did not. She further testified that Mendoza said he told Valencia to leave the budget alone and would check into the matter further and call her back. Mendoza did not call her back; and on Friday, October 2, 1981, Lara called Mendoza again

and asked him whether he had talked to Valencia. She testified Mendoza's response was that she should talk with Valencia.

On October 7, Lara, Amelia Rutherford, and another aide went to the office of Assistant Superintendent Marzec to obtain a copy of the budget for the Migrant Education Program. Marzec told the aides they could ask him any questions they wanted; however, they demurred and stated that they wanted the budget which was public information. When Marzec could not obtain a copy from his secretary he suggested that they talk with Valencia and obtain a copy of the budget from him.[7] Right after their meeting with Marzec they went to Valencia's office and obtained a copy of the Migrant Education budget.

On October 8, 1981, Lara spoke with her Principal Glenn Deines in his office. She asked him if he knew that the aides' hours were being reduced. He stated that he did. When she asked him why, he stated it was because the District was going to hire more aides. When she asked him if he could do anything about the situation, he said "no."

During the same period of time, Lara also contacted Union President, Craig Logsdon, a custodian at Bedell School, and CSEA Field Representative, Manuel Armas. She asked these people to assist her and they agreed to look into the matter.

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[7]Marzec testified he could not remember whether the aides came to his office. This questionable lapse of memory does not refute the clear testimony of Lara on which this finding is based.

Lara testified that she had a number of conversations with Union officials, with the affected aides, and daily conversations with Anita Pulido. Most of the conversations with Pulido took place in the school office near Principal Deines' office. Lara and Pulido testified that on many occasions, Deines was present in his office or nearby. During late September and early October, Lara spoke with at least five parents of migrant students, advising them of the cut in hours for migrant aides and enlisting their support.

Possibly, two weeks after Lara received the letter notifying her that the hours of aides would be cut, she spoke with Pulido about whether the District was obligated to negotiate the question of reduction in hours with the Union. Pulido informed Lara that the CSEA office in San Jose had said that the District should be negotiating with the Association. Lara and Pulido decided a meeting between the aides and management might be advantageous. Lara placed a call to Valencia and Pulido then discussed the idea with him. Valencia told them he would speak with Marzec and would have Marzec get back to them. Valencia called back later and told Pulido to call the District office. At about that same time, Superintendent De La Rosa called Pulido and she asked him about her idea for a meeting. He told her it had been taken care of and "too many spoons spoiled the soup."

On or about October 19, the migrant aides were informed by a letter from District's Personnel Director which stated:

> I have received direction from the Board that the effective date for decreasing your working hours form 6 to 5 hours per day has been extended to November 13, 1981.
>
> The change in insurance described in my September 25th letter will therefore not take effect until December 1, 1981.

The Negotiations Concerning the Reduction in Migrant Aide Hours

In the last week of October, Union President Logsdon asked Lara to represent the migrant aides on the CSEA negotiating committee. On November 2, 1981, Logsdon sent a letter to the superintendent of the District, requesting that Rachael Lara, Anita Pulido, and a person named Steve Barker be given leave to meet with the District concerning the migrant aide hour reduction on November 5, 1981.

At 9:00 a.m. on November 5, 1981, the four persons mentioned in Logsdon's letter, as well as Amelia Rutherford, met with the District's negotiating team in the Union Bank in Santa Paula. Representing the District were Mr. Ed Jones, Mr. Ed Walden, Mr. Gene Marzec, Mr. Ed Kessler, and Ms. Denise Buckley. The chief spokesperson for the Union was CSEA Field Representative Manuel Armas; the spokesperson for the District was Ed Jones. The meeting lasted approximately until 10:30 or 11:00 a.m.

In response to the Union's question as to the District's reason for reducing the hours, Lara testified that Jones said

that migrant aides " . . . were reduced in hours due to the fact there were only so many hours, so many pupil-teacher contact hours at each school and that [the aides] were doing lesson planning and [they] weren't supposed to be doing that anyway." The District remained firm that the aides' hours would be reduced from six to five hours. Lara and Pulido testified the District was asked who would tell the teachers that the aides were to no longer do planning. Pulido credibly testified that the District's response was "that will be taken care of."[8]

At the conclusion of the negotiating session, the Union bargaining team stayed behind to discuss the substance of negotiations among themselves. This discussion lasted approximately one hour. Armas testified that the aides said, if they did not do planning then the program would not be able to function correctly. He testified Lara said "that it would create havoc within that classification because of the lack of planning by the classified, since a lot of teachers did not do it." Armas suggested to the Union negotiators that a position paper should be prepared telling employees that since the District had refused to compromise on the reduction of hours, the aides would work to rule, would not do volunteer work and would not do any planning. Armas also suggested that the aides

[8]Although field representative Armas could not remember or denied that the District responded to this question, I find that the question was asked and find that Pulido's credible testimony accurately reflects the District's responses.

should tell the teachers that they would no longer be doing lesson planning. Lara asked whether it would be possible to write a note to her teachers because there were 13 of them; however, she testified she received no response from Armas. She testified that she understood his silence to mean that she should go ahead and inform the teachers in writing. After the meeting, the Union negotiating team spent approximately 30 minutes eating lunch. The normal lunch period for these employees is 20 minutes.

Lara's Letter

Upon her return to school, Lara composed a letter to teachers. She showed a copy of the letter to Pulido who responded that it "looked fine." The next morning at home, Lara typed the letter and brought it to school with her. The letter stated:

> TEACHERS:
>
> Due to the fact that migrant aides have been cut back from 6 to 5 hours and due to the aide job description, I will no longer be planning instruction for migrant students. Therefore, it is necessary that all teachers provide me with lesson plans and materials to work with migrant students.
>
> District management states that no aide is to plan instruction.
>
> If there is any question on this matter, please contact the principal or Mr. Rick Valencia.
>
> Thank you for your cooperation.
>
> [Signed Rachael Lara]

At the bottom of the letter, Lara wrote the following note to Principal Deines and then placed the letter containing this handwritten note on his desk:

> Mr. Deines,
>
> This informs teachers of my job description. It is important to note that I will not be able to service a migrant student without a prescription and materials from the teacher.
>
> Thanks for your cooperation regarding this matter.

Lara testified that she left the letter with the handwritten note on Deines[1] desk as "a courtesy to him to explain why [she] was doing this and because [sic] District had told us we're not supposed to be doing lesson plans." Immediately after placing the letter on Deines' desk, Lara showed a copy of the letter to Terrence Hill, the teacher in charge at Blanchard School. Hill read the letter and Lara testified that he had no apparent reaction to it. Lara then proceeded to place the letter in the teachers' boxes at Blanchard school. On that same day, Lara received a lesson plan from a teacher in her box; and she personally contacted three teachers, Shrinkoski, Mackey and Ingle. Lara testified that none of these individuals said anything to her which indicated that they were "unhappy or incensed about the letter."

When Deines discovered the letter to teachers which Lara had left in his office, he immediately went to the teachers' boxes to see if he could recover the letter. By the time he reached the teachers' boxes, all but three letters had been removed. Deines testified that he was concerned about how the teachers might react and went to the teachers lunchroom. Deines also testified that on the way he was approached by three teachers, Doug Armstrong, Ms. Paillette, and Ms. Weaverling. Deines testified that while he wasn't sure whether Armstrong was a certificated site representative in the year in which this incident occurred, he seemed to be speaking for the teachers. Armstrong told Deines that the teachers were agitated and concerned and that he had to calm them down.[9] Deines also testified that Paillette and Weaverling expressed concern about the letter from Lara. Deines testified that Paillette said "There's no way somebody's going to tell me that I have to do this, and you know, we have a contract too, you know." Weaverling, according to Deines, asked whether "Doug had spoken with him" and said "You're going to do something, aren't you?" Deines immediately sent a letter to all teachers, telling them to disregard Lara's letter.

[9]Armstrong's out-of-court statements that the teachers were agitated and upset are hearsay as to those relevant facts and are used here only to show Deines' state of mind.

At sometime on November 6, Lara entered the school office and saw Mr. Deines standing in the doorway to his office. He said to her "you were late coming back from the meeting yesterday." Lara responded "yes, a little bit." Deines then said " . . . nothing is going to happen this time." Deines had a copy of her letter in his hands and then stated to Lara ". . . Mrs. Pulido said the Union told you to do this." Lara responded "Yes." And Deines showed her the letter and said "No." Lara then walked out.

Also, on November 6, CSEA issued its position letter concerning the previous day's negotiations to all classified employees. The letter stated:

> TO: ALL CLASSIFIED EMPLOYEES
>
> FROM: MANUEL ARMAS, FIELD REPRESENTATIVE, CSEA
>
> This letter is to inform you of the district's attitude regarding the lay-off of Migrant and Special Aides from six hours per day to five hours per day.
>
> THIS ALSO AFFECTS YOU!!!
>
> The following is the position of the Administration of the Santa Paula School District:
>
> 1. They refuse to reinstate Aides back to six hours due to "Lack of Work". (Aides are doing the planning for students instead of the teachers.)
>
> . . . . . .

This cut-back smacks of 'Intimidation' because six (6) hours per day cannot be sufficient money to keep this district solvent!

. . . . . .

Therefore, it is CSEA's position that all classified employees should work only their required hours and perform only those duties as required. If any employee is to do any work after the end of his or her work day (house calls, home visits, etc. they shall be entitled to a "call-back minimum of two (2) hours as per contract Article IV.

According to the district's position NO AIDES SHOULD BE DOING ANY PLANNING!

Therefore, the Association requests that any Aides that are doing planning for students cease doing so immediately and refer this back to certificated employees.

. . . . . .

You CAN protect your rights and strengthen your organization!

PLEASE COME TO A VERY SPECIAL MEETING

WHICH WILL BE HELD THURSDAY, NOVEMBER

12th AT 6:30 PM IN THE ISBELL CAFETERIA

THIS IS ONLY THE BEGINNING!!!

The letter shows that carbon copies were purportedly sent to the Assistant Superintendent Marzec and to the principals of various schools.

The District's Reaction; The Letter of Reprimand and Transfer of Lara to McKevett School

Deines contacted Superintendent De La Rosa about Lara's letter. Deines indicated to the superintendent that he wanted to write a letter of reprimand and; indeed, he drafted one and showed the letter to the superintendent who reviewed it and approved it. Deines had never written a letter of reprimand before and wanted to have the approval of the superintendent since he viewed the letter to be a serious matter.

November 7 and 8, 1981, fell on a Saturday and Sunday and Lara was absent on Monday and Tuesday. Wednesday, November 11, was a holiday. Thus Lara's first day back following November 6 was on November 12, 1981. When Lara returned to work, she went to Deines' office to show him her new five-hour schedule and to obtain his approval. At that time, he read her the letter of reprimand and advised her that she would be required to sign it. The letter stated:

> The intent of this letter is to reprimand you for placing yourself in a position of authority above the teaching staff at Blanchard School. This was done through your memo to teachers directing them to provide you with lesson plans and materials.
>
> First, all memos to staff are to be approved by the building principal before distribution. Second, your job description does not include informing teachers of their duties and responsibilities.

> It is assumed that this letter and conference will prevent this type of incident from reoccuring [sic]. In the future if you have any questions regarding this or any other matter please feel free to contact me.
>
> I understand that my signature does not signify agreement or disagreement; only that I have discussed the above in a conference held on 11/6/81.
>
> _____Rachel Lara, Migrant Aide
>
> _____Glenn E. Deines. Principal
>
> This letter will be placed in your personnel file on 11/19/81. You have 5 days from this date to respond in writing and to have your response attached to this letter.
>
> Sincerely,
>
> Glenn E. Deines
> Principal, Blanchard School
>
> Witness: _____

Lara refused to sign the letter of reprimand and suggested that perhaps, Deines should have a witness to the matter. Deines agreed and teacher Terrence Hill was summoned into the room to sign the letter of reprimand. Deines stated that he needed Hill's signature because the letter was going into Lara's personnel file. Hill signed the letter.

At that same time, Deines also informed Lara that she would be transferred to McKevett School on November 16, 1981. Lara testified that she was in a state of shock and that Deines went on to say that she was going to be transferred on November 16 to McKevett School because she was a "qualified and experienced aide." This was the first time that Lara had been informed of

even a possibility of a transfer. Lara had spoken with Valencia on October 27, 1981, and had asked him whether there were any migrant openings. Valencia said that there was one at Isbell School, one at Barbara Webster School, one at Portal School, and one at Grace Thille School. Lara testified that Valencia did not mention an opening at McKevett School. Sometime in the afternoon on November 12, 1981, Lara received the following letter in her school mailbox dated November 9, 1981:

> This letter is to notify you that as of Monday, November 16, 1981, you will be transferred to McKevett School. The criteria for this transfer is the need at McKevett School for a qualified, experienced Migrant Aide. We feel that you will make a needed contribution at this new location.
>
> Sincerely.
>
> (S/John De La Rosa, Superintendent)
>
> (S/Glenn E. Deines, Principal)
>
> (S/Larry Ytuarte, Principal)

On approximately November 12, 1981, Gene Marzec telephoned the District personnel commission and instructed the transfer of Rachael Lara effective November 16, 1981.[10] He informed

[10]The record shows pursuant to Marzec's instructions, the first transfer document was generated on November 12, 1981 which characterized the transfer as "change of school location." The record contains a second transfer document dated November 16, 1981, which characterized the transfer as "administrative."

Principal Deines as well as the Principal of the recipient school Mr. Larry Ytuarte of the decision to transfer Lara. The principal at McKevett School testified that he did not take part in the decision to transfer Lara. Rather he was informed by telephone of the decision. It appears as well that the principal at Blanchard School was only marginally involved in the discussions and that the actual decision to transfer Lara was made by someone above his level. The principal at McKevett School testified that the numbers of students had not substantially changed. Marzec testified that they had. Marzec testified that he determined to transfer Lara because she was an experienced aide. The principal at McKevett School testified that he had a full-time migrant teacher running the educational program at his school. When Lara was sent to him, he met with the migrant teacher to determine in which classes Lara would be utilized. There appears to have been no specific classroom function which demanded a person of Lara's experience. In fact, it appears that she was assigned to three kindergarten classrooms at McKevett School solely because the three locations were adjacent to one another.

Deines and Ytuarte testified that they were informed that there had been a decision to make the transfer sometime in October. Marzec similarly testified. However, later in his testimony Marzec stated that the decision to transfer Lara to

McKevett School was made once they knew that there were going to be additional monies to hire an aide sometime after November 5, 1981.

The only decision which Marzec made concerning the transfer of a specific person related to Rachael Lara. Thereafter, he left the decision of who would be hired to the personnel commission. The personnel commission had a seniority list from which it determined who should be offered employment or transfer. On November 17, 1981, an order was prepared for an aide to be assigned to Lara's position at Blanchard School. According to the seniority list, employee Jennie Herrera, a migrant aide, working less than five hours, qualified for the five-hour position. Herrera was offered and accepted a transfer to Blanchard School. The record shows that Herrera had been employed by the District since 1977 as a migrant instructional aide.

Lara Grieves

On November 17, 1981, Lara sent a written memorandum to Principal Deines. The memorandum was referenced "Request for Informal Meeting as per Article XII, section 12.6.1 of the Grievance Procedure of the Collective Bargaining Agreement." Lara wrote:

> I would like to respond verbally in an informal meeting prior to submitting my response in writing in regard to the Reprimand dated November 6, 1981.

> I hereby request that a meeting be held to discuss the Letter of Reprimand dated November 6, 1981.
>
> Your immediate response to this request will be greatly appreciated. You may contact me at McKevett School . . . . If you are unable to contact me, please contact Mr. Manuel Armas, CSEA Field Representative . . . .

The section of the contractual grievance procedure specifically invoked by Lara's memorandum to Deines reads as follows:

> 12.6 Grievance Resolution - Any member of the bargaining unit who 5¥lieves he/she has a grievance may present the grievance orally to the site manager within ten (10) working days after the grievant knew, or with reasonable diligence would have known, of the circumstances which formed the basis for the grievance. The manager may hold a conference and attempt to resolve the matter within five (5) working days after the presentation of the grievance. If the bargaining unit member or the site manager prefers not to hold a personal conference, the grievant must go to Step 1 of the format level of the grievance procedure. It is the intent of this Section 12.6.1 that an opportunity be provided for at least one personal conference between the aggrieved member of the bargaining unit and the site manager. Although this personal conference is permissive and may be bypassed at the request of either the bargaining unit member or the site manager, it is highly recommended by the District and the Association that an attempt be made to resolve the matter at this Informal level. [Emphasis supplied.]

On Monday, November 23 Deines called McKevett School and left a message for Lara that he would meet with her at 2:00 p.m. that day. Lara wanted to have Manuel Armas with her and asked him to come to the meeting. However, Armas was not available at the time suggested by Deines. Lara called Deines back and informed him that Armas was not available and asked if he could meet at another time when Armas could be present. Deines said he did not understand why Armas had to be there and suggested that Lara read her contract.

On November 24, 1981, Lara called Deines about 8:15 a.m. and suggested that "we" could meet with him that day. Deines said he could not meet that day because he had a teachers' meeting. Lara testified that in her experience at Blanchard School, teachers' meetings were held at 3:45 p.m. Deines asked Lara "who is 'we?'" Lara responded: "Manuel [Armas] and myself." Deines responded "uh, uh," which Lara inferred to mean "no." She then said " . . . are you, indeed, refusing me the right to have a party of my choice come in with me?" Deines stated "uh-huh." Lara said she inferred that this meant "yes." That ended the conversation. Lara testified that she wanted Armas to act as her witness in the informal grievance meeting.

Deines testified that he understood that a request to have the CSEA Field Representative present was not a request to have merely a witness, but to bring the Union activity into the

grievance procedure at Step 12.6.1. Deines testified that he interpreted the contract to provide for an informal level of discussion between an employee and her site representative without the involvement of the Union in a representative capacity. It was his interpretation that the Union would not be involved with the grievance procedure until the formal grievance was filed. Deines testified he, therefore, exercised his prerogative to not hold the permissive personal conference which included the Union. Deines credibly testified that he believed if Lara brought the Union, he would have to have the District's representative at the informal meeting, thus detracting from the informality and duplicating the formal Step I of the grievance procedure.

Armas, who was present during negotiations, confirmed Deines[1] interpretation of section 12.6.1. He testified that the section "does not allow representation at the informal level . . . . " The section merely permits a witness to be present but this person would not be speaking or taking part in the "actual confrontation in any way, shape or form."

On November 25, 1981, Rachael Lara filed a Formal Level I grievance. In relevant part, the formal grievance procedure provides as follows:

> 12.6.2 Formal Level
>
> 12.6.2.1 Step I - If: the grievance is not settled during the informal conference or an informal conference was not held and the grievant wishes to press the matter, the

> grievant shall present the grievance, in writing, to the site manager within five (5) working days after the oral decision by the manager, if an informal conference was held, or within fifteen (15) working days after the grievant knew, or with reasonable diligence would have known, of the circumstances which formed the basis for the grievance, if an informal conference was not held. . . .
>
> . . . . . .
>
> The site manager shall communicate a decision to the grievant in writing within ten (10) working days after receiving the grievance, with a copy to the Association. Within the above-mentioned time limits either party may request a personal conference with the other party. If the site manager does not respond within the time limits, the grievance shall be deemed to have been resolved and the next step of this procedure shall be initiated. [Emphasis supplied.]

Lara alleged that she was arbitrarily transferred in violation of the involuntary transfer provisions of the contract, section 7.4.1 and that the transfer was an attempt to coerce and intimidate her because of her CSEA activity. Lara further alleged that the letter of reprimand, placed in her personnel file and dated November 6, 1981, was a direct attempt to intimidate, coerce and discriminate against her because of the exercise of her right to engage in CSEA activity and because she was following the advice of the Association to make teachers aware that she would not do planning. Finally, Lara alleged that Deines violated Article XII of the grievance

procedure by denying her a "representative of [her] choice . . . at the informal level."

On December 7, 1981, Deines issued a written denial of Lara's grievance, stating that her transfer was based upon the educational needs of the District, that the letter of reprimand was reasonable and not based upon her Union activity, but rather was a response to her attempt to give a management directive to employees in another bargaining unit.

On December 14, 1981, Lara appealed Deines[1] denial pursuant to Article XII, section 12.6.2 of the grievance procedure. That section provides in relevant part:

> 12.6.2.2 Step II - If the grievance is not resolved at the building level, the grievant may appeal [sic] by forwarding the grievance in writing to the Superintendent within five (5) working days after he/she has received the site manager's decision or, if the manager has not responded at Step I, within five (5) working days after the deadline for response in Step I . . . . The written statement shall include a copy of the original grievance including the decision rendered, and a clear, concise statement of the reasons for the appeal. The Superintendent or his/her designee shall meet with the grievant within ten (10) working days and shall attempt to arrive at a satisfactory solution. The Superintendent or designee shall communicate his/her decision in writing to the grievant with a copy to the Association within ten (10) working days after the meeting. [Emphasis Supplied.]

Lara addressed her letter to Superintendent De La Rosa. She indicated that the letter was in reference to her grievance dated November 25, 1981, and wrote that " . . . I do not agree with Mr. Deines' decision, therefore, I am appealing as per Step II of the Grievance Procedure, Formal Level." The record indicates that on December 28, 1981, District representative, Ed Jones, instructed the principal to obtain more information from Lara pursuant to the provisions of the contract which require that a grievance must include a copy of the original grievance including the decision rendered and a clear, concise statement of the reasons for the appeal. Lara was apprised of the Jones' request and complied by furnishing the requested information to the District. The District extended the time deadlines of the grievance procedure in order that Lara could comply with the request to provide the required information.

On January 27, Superintendent De La Rosa issued a written denial of Lara's Level II appeal, stating that because she had an opportunity to respond to the letter of reprimand and because her transfer was for legitimate reasons, the grievance should be denied.

On February 1, 1982, Lara requested that the Union submit the grievance to the Board of Trustees pursuant to Article XII, section 12.6.2.3 of the agreement. That section provides in relevant part:

> 12.6.2.3 Step III - If the grievance is not resolve3 in Step I or Step II, within ten (10) working days after the decision is rendered at Step II, the grievant may request that the Association submit the grievance to the Board of Trustees. It shall be the function of the Board of Trustees to make a final determination to resolve the grievance. The ruling by the Board of Trustees shall be final. [Emphasis Supplied.]

On February 26, 1982, the Union wrote a letter to the Board of Trustees, requesting that Lara's grievance be heard, attaching certain written arguments in support of the Association's position. This is the first time that the Union had requested a level III grievance pursuant to the provisions of the contract and the record does not indicate that prior to this time an employee had ever asked the Union to take a grievance to this level.

On March 19, 1982, the superintendent responded on behalf of the Board of Education. The written response notes that the letter denying the Level II grievance was dated January 27, 1982, and the grievance was not filed until February 26, 1982. The Board's decision stated that the level III grievance did not comply with contractual "time constraints." In addition, the Board's decision noted a previous extension of time had been granted to permit Lara to supply the information necessary to comply with Level II of the grievance procedure. The Board, through the superintendent,

then went on to state that the "burden of proof" of the grievance was on Lara and that there had been no "concrete proof . . . to substantiate [the] allegation of discrimination in either the transfer or letter of reprimand." The Board, further observed that Deines was not in violation of the contract when he would not meet informally with Lara and her representative and quoted from the agreement as follows:

> If a bargaining unit member or the site manager prefers not to hold a personal conference, the grievant must go to Step I of the formal level of the grievance procedure.

Finally, the Board stated that it was:

> . . . impelled to deny [Lara's] grievance based on its finding that acceptable procedures were adhered to in regards to the transfer and the Letter of Reprimand. The Board wishes to emphasize that it could find no concrete proof to substantiate [her] allegation of discrimination in either the transfer or the Letter of Reprimand.

Based upon these facts, CSEA and Lara contend the District violated EERA.

ISSUES

1. Did the District violate EERA when it involuntarily transferred Rachael Lara?

2. Did the District violate EERA when it issued the letter of reprimand to Rachael Lara?

3. Did the District violate EERA when Principal Deines indicated a reluctance to hold an informal grievance session with Lara and the CSEA field representative?

4. Did the District violate EERA in the processing of Lara's formal grievance?

CONCLUSIONS OF LAW

A. The Alleged Discrimination and Interference by Transferring Lara and Issuing a Letter of Reprimand

The charging parties allege that the District discriminated against Rachael Lara because of her exercise of protected rights under EERA. Lara urges that this discrimination took the form of a transfer from one school site to another and issuance of a letter of reprimand. Additionally, Charging Party CSEA alleges that, by discriminating against Lara, the District also interfered with the exercise of rights by CSEA and its members and repudiated the agreement which prohibits arbitrary transfers, thus violating section 3543.5(c).

Section 3543.5(a) of EERA makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, . . . because of their exercise of rights guaranteed by [the Act]. The express rights guaranteed to employees by EERA include the right to ". . . form, join, and participate in activities of employee organizations of their own choosing for the purposes of representation on all matters of employer-employee relations." (Cal. Gov. Code sec. 3543.) Correlatively, public school employees shall have the right to "refuse to join or participate in the activities of employee

organizations and shall have the right represent themselves individually in their employment relations with the public school employer, . . . " (Ibid.)

In Novato Unified School District (4/30/82) PERB Decision No. 210, PERB set forth the test and general standards to be applied in cases where employers are alleged to have discriminated against employees because of an exercise of rights protected by EERA. Under the Novato rule, the Charging Party alleging discrimination within the meaning of section 3543.5(a) has the burden of showing that the protected conduct was a motivating factor in the employer's decision to take adverse personnel action. (See also California State Employees' Association, Chapter 41 and Regents of the University of California (6/10/83) PERB Decision No. 319-H at 15.) Quite often, evidence of such motivation must be circumstantial since direct proof is often unavailable. (See Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620] . If the Charging Party can establish a nexus between the proved, protected activity and the adverse personnel action, the employer can still avoid a finding of wrongdoing by demonstrating that it would have taken the action regardless of the employees' participation in protected activity. (Novato, supra; see also, NLRB v. Transportation Management Corp. (1983)

__U.S.___[____LRRM____] Supreme Court No. 82-168; Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)[10]

In order to establish a prima facie case, Charging Party must first prove it was engaged in protected activity. Next it must establish foundational evidence that the employer had knowledge of the protected activity. This is a fundamental fact which must be shown in order to establish motivation by circumstantial evidence. (Novato Unified School District, supra; Moreland Elementary School District (7/27/82) PERB Decision No. 227.) Thereafter, further circumstantial evidence of unlawful motivation may be shown by, inter alia, an examination of the timing of the alleged discriminatory conduct in relation to the exercise of protected rights; inconsistent treatment of the alleged discriminatee as compared with other, similarly situated employees; a pretextual justification for the employer's action which is either inconsistent or contradicted by the employer's action or other objective evidence in the record when viewed in its totality; a departure

[10]In Transportation Management Corporation, supra, the Court stressed that a Charging Party has the burden of proving anti-union animus and this burden does not shift. Moreover, once the Charging Party proves unlawful motive by a preponderance of evidence, the Respondent still may avoid liability by proving, as an affirmative defense, that the action would have been taken in any event and for valid reasons. Thus, the Respondent only has the burden of proving its affirmative defense, if any.

from established procedures and standards when dealing with the alleged discriminatee; and a perfunctory investigation of the contentions of the alleged discriminatee.

1. Lara's Protected Activity

The record amply demonstrates that Rachael Lara engaged in the exercise of rights protected by EERA. Immediately upon learning that she and the five other migrant aides would be reduced in hours, Lara contacted her Union representative, Anita Pulido. Lara and Pulido actively discussed the reduction in hours and worked together to demand negotiations concerning the District's intended action, a matter which is clearly within the scope of representation. See Pittsburg Unified School District (6/10/83) PERB Decision No. 318; North Sacramento School District (12/31/81) PERB Decision No. 193.

In addition to contacting her Union representative, Lara proceeded to call the Migrant Instructional Support Teacher who supervised the program and worked directly with the assistant superintendent for business affairs of the District. On the very day Lara learned of the intended reduction in hours, she contacted all other migrant aides to discuss how they would respond to the District's action. Lara also called the president and vice-president of Migrant Parents' Council; she called the Area Director of the Migrant Program for Ventura County who approves the District's budget for the program; and she contacted parents and teachers to enlist support and to

determine what course of action would be taken in response to the District's intended reduction of migrant aide hours. Lara contacted the assistant superintendent in charge of business matters for the District to obtain a copy of the District's budget and to question the cost justifications for the reduction in hours. Finally, Lara served on the Union negotiating committee to discuss the reduction of hours. In this capacity she acted as a representative of the affected employees. Lara participated in negotiations and was visible throughout. The above conduct unquestionably constitutes protected activity.

Lara and CSEA also contend that Lara's letter telling teachers to supply her with lesson plans was also protected. The letter was an outgrowth of the Union discussions following negotiations with the District on November 5, 1981. During these discussions, Lara and the others agreed that they would work to rule.

Moreover, because of comments made during negotiations, Lara, CSEA and other employees specifically took the position they would no longer do lesson plans. It was the understanding of the Union negotiators that one of the reasons for the reduction in hours was that the aides were not supposed to do lesson plans and that this was a teacher function. Thus, Lara undertook to tell each teacher that as of November 6, she would "no longer be planning instruction for migrant students." Lara

went on to tell the teachers that, as of that time, it would be necessary that they "provide [her] with lesson plans and materials to work with migrant students." The obvious inference to be drawn from this communication was that circumstances would be changed and the teachers would be required to amend whatever practice had developed in their relationship with Lara.

I find that Lara's letter to teachers on November 6, 1981, was not protected. While it is clear that employees may communicate with the public and with employees in other units to publish the nature of a work dispute with an employer as well as to publicize conditions in a working environment, this right of communication is not without its limitations. (See Mount San Antonio Community College District (6/30/82) PERB Decision No. 224; Allied Aviation Service Co. of New Jersey, Inc. (1980) 248 NLRB 229 [103 LRRM 1454] enfd (3rd Cir. 1980) 636 F.2d 1216; Robbins v. Pruneyard Shopping Center (1980) 23 Cal.3d 899, 909 [153 Cal.Rptr. 854]; In Re Lane (1969) 71 Cal.2d 872 [79 Cal.Rptr. 729]; Schwartz-Torrance Investment Corp. v. The Bakery and Confectionary Union (1964) 61 Cal.2d 766 [40 Cal.Rptr. 233].)

In the instant matter, Lara did not write the letter to publicize her dispute. The obvious import of the letter was to tell teachers that she would no longer do work. The record reflects that Lara operated substantially independent of the

teachers. Rather than being informational, the letter created confusion and concern among the teachers who were left to question both Lara's authority and the extent to which they were obligated to comply with the letter's request. The practice at Lara's school had been to have the migrant aide do lesson plans. Lara's letter asserted a change in that practice in an ostensible reliance upon management statements. The letter created a dilemma for the teachers: should they alter a practice and take away what had been unit work previously done by the classified migrant aides or should they not provide lesson plans to the migrant aides and risk leaving students without appropriate training. Thus, the letter was not designed to clarify a position at all, but rather was a method of communicating a dispute which also constituted a disruption of the work in the program. See NLRB v. General Indicator Corporation, Redco Division (7th Cir. 1983)_____F.2d ____ [____ LRRM_____].

The letter which Lara wrote was one which appropriately should originate from management. Lara had no reason to communicate a change in operating procedures regardless of whether she had been reduced in hours. Management said at the table they would notify other employees. Nowhere in the record has any reason been given why Lara was compelled to send this directive to the teachers except to thumb her nose at management's decision to reduce the aides by one hour a day.

On balance I find that the letter issued to the teachers on November 6, 1981, was disruptive and constituted unprotected conduct.

2. The District's Knowledge

Throughout these proceedings, the District contends that it had no knowledge of Lara's protected activities. The evidence is to the contrary. The record establishes that not only was Lara concerned about the District's action in reducing hours, she was an aggressive, vocal, and forceful advocate for that position. She began her activities by frequently discussing these matters with the principal's secretary in the school office. Though the principal denies overhearing these conversations or paying any particular attention to them, it is evident that the constant dialogue between Lara and his secretary creates an inference that some, if not much, of this dialogue was overheard. Moreover, Lara discussed the reduction in hours with Principal Deines, himself, in early October.

There is direct evidence that Lara spoke with Assistant Superintendent Marzec and asked for a copy of the budget. Marzec was the one who signed the orders for Lara's transfer and arranged for her position to be filled by a migrant aide from another school. As soon as Lara learned of the impending reduction in hours, she contacted Valencia, the migrant instructional support teacher who oversees and who supervises all migrant instructional aides. Valencia worked directly

under Marzec and was an admitted conduit between migrant aides and administration as well as the public and the District. Valencia was questioned by Lara as to the District's reasons for the reduction in hours.

In addition, Lara contacted the head of the Migrant Parents group as well as the Ventura County's Area Director for Migrant Programs. The record reflects that there was a great deal of communication between Lara and those persons in charge of and affected by the Migrant Education Program.

Lara was designated the representative of the migrant aides at the negotiating table. It must have been clear to Marzec and other District representatives sitting across from her that she was engaged in protected activities while bargaining for herself and the other similarly affected aides.

Last, though Lara's letter to teachers was not itself protected, it served notice to the District of her involvement in the negotiations and her support for the Association's position which was outlined in its position letter issued immediately following negotiations. Both the principal and the superintendent knew that Lara had written this letter to teachers reflecting, in part, her understanding of the outcome of negotiations. I find that because of Lara's conduct described above, the District's administrators knew of Lara's Union activities.

3. Circumstantial Evidence of Discriminatory Transfer

(a) Timing

Negotiations concerning the reduction in hours for migrant aides occurred on Thursday, November 5, 1981. On Friday, November 6, 1981, Lara distributed her letter to teachers. Thereafter, following the weekend Lara was off work two days for unspecified reasons and on Wednesday for a holiday. When Lara returned to work on November 12, 1981, she was notified that she would be transferred. The record shows that the transfer letter was prepared on or about November 9, 1981, following negotiations and the events leading up to them. The actual notification of transfer was on November 12, almost a week to the day following the conclusion of negotiations. The administrative paper work for the transfer was not begun until November 12, and was concluded on November 16, 1981. The timing of the notification of transfer as well as the supporting documentation is suspiciously proximate to Lara's protected activities. The District argues that the timing was merely coincidental; however, this contention, when examined in light of the justification for the transfer, pales under scrutiny.

(b) Pretextual Justification for Lara's Transfer

The District contends that it was necessary to transfer Lara to accommodate an increase in migrant students at the receiving school. The record shows that McKevett always had a

full-time migrant teacher working with migrant children. The record shows that while the number of migrant students at McKevett increased in the year that Lara was transferred, there was not a substantially greater number of migrant students at McKevett than in previous years when there was no migrant aide.

In the three years that Lara was assigned to Blanchard School she worked primarily with students in grades 4 through 6. These individuals were more difficult to work with than younger children because of their age, longer exposure to Spanish as an exclusive language, gaps in learning skills, and behavior problems. Thus, work with these children required greater skill of the migrant aide. At Blanchard, Lara acted primarily on her own. She worked with students removed from their classrooms and from the supervision of their teachers. Lara would plan and prepare lessons and "diagnose " student needs independent of teacher supervision. By special waiver from the Area Director, Lara was the only District aide who removed children from the classroom and worked with them in her own teaching area.

At McKevett School Lara worked primarily with kindergarten children whom she testified were easier to work with. Additionally, Lara's work with the children was in a classroom, supervised by a teacher, as opposed to the more independent type of work she performed at Blanchard.

One day after Lara was transferred to McKevett School her position at Blanchard School was filled by another aide. The paperwork for the assignment of the new aide to Blanchard was completed on November 17 pursuant to instruction from Gene Marzec, the person transferring Lara to McKevett School. The record contains no satisfactory explanation why the District transferred Lara in mid-semester only to fill her position with another employee. Most assuredly, Lara could have remained at Blanchard and the recalled teacher could have been assigned to McKevett School. Both individuals had substantial tenure in a position of migrant aide in the District. While a reduction in hours permitted the District to hire additional aides, there is no reason to believe that these additional funds also necessitated a transfer of employees. The record shows that Lara was the only specific aide upon which the District focused in the transfer process. All other decisions for transfer and filling aide positions was left to the independent personnel commission and its seniority list.

The District argues that it had forewarned Deines and the principal at McKevett School that Blanchard might lose its aide and McKevett might obtain an aide. While the record reflects some nebulous discussions to this effect, the record equally shows that Deines was not informed that he would lose his migrant aide for the 1981-82 school year until the decision was made to transfer Lara. Similarly, the principal at the

receiving school was not informed of the transfer until shortly before it occurred. This lack of involvement of the school principals, themselves, indicates that there was some reason for the transfer other than the justification given by the District. The testimony, that the decision was not made until the statistics were reviewed, defies credulity in that the statistics had not remarkably changed from the prior year.

Finally, the District argues that it transferred Lara because she was a qualified aide and was needed in the position to which she was transferred at McKevett School. This contention is hollow in view of the facts discussed above. Further, it must be recalled that the principal at McKevett School did not know until the time Lara was about to transfer he would receive an aide. He further arbitrarily assigned Lara to the kindergarten classrooms without any specific use for her abilities at that level. Her assignment was based upon geographic proximity of the classrooms to one another. There is no evidence that Lara's skills were ever relied upon or applied to her work at the receiving school. Nor is there anything in the record to show that her work could not have been performed as well by any other aide available for transfer or recall.

Upon reflection, I conclude that the District's justification for the transfer of Lara is wholly pretexual.

The transfer was discriminatorily motivated to punish Lara for her outspoken activities on behalf of the Association and her fellow workers. Further the transfer would place her under close teacher supervision. The Charging Party has established a nexus between the protected activity and the discrimination. Because the District's justifications are at best pretextual, it has not met its burden of establishing the affirmative defense that it would have transferred Lara but for her protected activities. The District thus violated section 3543.5(a) of EERA when it transferred Lara.

4. The Letter of Reprimand

While it has been concluded that Lara's letter to teachers was not protected despite the fact it came on the heels of otherwise protected activity, it is necessary to analyze the District's response to her letter. Although Lara's conduct may not have been protected, the District's response to it may be so disproportionate as to be evidence of an intent to discriminate against her because of her protected activities. (San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261.) Thus, Charging Parties contend that the District over reacted when it issued a letter of reprimand to Lara for merely communicating with the teachers for whom she worked.

In analyzing the District's motivation here, the factors previously discussed are all relevant. The timing of the

letter of reprimand, which closely followed Lara's protected activity, also was coincidental to the unprotected conduct of the letter to teachers.

The justification given by Principal Deines for the letter of reprimand was that Lara had attempted to insert herself into a position of authority above the teaching staff. This concern of the principal is consistent with the language of Lara's letter and its distribution to all staff prior to any notice from management of a purported change in practice. In this regard, it is recalled that there was no compelling reason for Lara to send her letter. Change in procedures, if any, should ordinarily be mandated by management; and it had agreed to do so. The fact that Lara may have been doing planning after the student day did not detract from the fact that she still had students only five hours a day and was only required to do whatever training she could in that period of time. Her letter to teachers would not have altered her obligations during the five hours when she met with the students.

As discussed above, Lara's letter to the teachers could be legitimately viewed as disruptive, confusing and a cause of difficulties for the principal at Blanchard School. The evidence establishes that at least three teachers immediately complained to Deines about Lara's letter. Their reported complaints were consistent with Deines' concern about a classified employee giving direction to certificated

employees. Moreover, the record shows that Deines reacted immediately and attempted to remove the letter from the teachers' boxes. When he was unable to do so, he responded by sending a memorandum to teachers telling them to disregard Lara's letter. Thus, Deines' conduct showed that he was really concerned about the impact of the letter upon his teaching staff. His reaction to the letter was not so extreme as to the evidence of discrimination. The written reprimand to Lara was not inappropriate in view of the impact which her letter to teachers had or could have had upon the working environment at Blanchard School.

Charging Party contends that certain inequities surrounding the issuance of the letter of reprimand justify the finding of discrimination. The record shows that the letter of reprimand was the first issued by Deines to a classified employee. However, there is no evidence that there had been similar conduct by employees at his school which was otherwise overlooked. While there was no letter of reprimand issued to another aide who took Lara's memo and attempted to distribute it to the teachers with whom she worked, the record shows that the memorandum was never distributed because it was intercepted in advance by the principal where the aide worked. This fact distinguishes the treatment of this employee and does not show disparate treatment.

I conclude that the District did not impose a discriminatorily disproportionate penalty on Lara when it issued its letter of reprimand to her for her letter to teachers. The allegations that the District discriminated against Lara in violation of 3543.5(a) by the letter of reprimand are dismissed.

5. Interference

The Association argues that by discriminating against Lara and transferring her from one school to another because of her protected activities, the District also interfered with her protected rights, the rights of other employees, and the right of the Union to represent those employees. (See Carlsbad Unified School District (1/30/79) PERB Decision No. 89.) Often the distinction between discrimination and interference with guaranteed rights is not easily discerned. (See Coast Community College District (10/15/82) PERB Decision No. 25, at 19-20.) PERB holds that there must be a "nexus between the employer's conduct and the exercise of a right protected by EERA with resulting harm or potential harm to that right." (Novato Unified School District, supra, at 5.) In examining the Board's decision in Carlsbad Unified School District, the fourth in its set of the five guidelines is relevant to this case:

> 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. [Id. at 10-11.]

By transferring Lara, the actions of the District had a chilling effect on her activities as an advocate of migrant aides and further demonstrated to all other employees that such conduct would be met by the District with discrimination and reprisals. Thus, the transfer of Lara caused substantial harm to her rights and the rights of her fellow employees. (Carlsbad Unified School District, supra, at 12-13.) Further, the District's discrimination against this activist impacts upon the Union's ability to represent other employees effectively. Throughout the negotiations, the Union worked closely with Lara to attempt to reverse the District's decision to reduce the hours of aides. When Lara was transferred following an unsuccessful negotiating meeting with the District, the message to the employees was that the Union's involvement in this matter was equally inept and ineffective. The transfer of a highly visible Union negotiator at the conclusion of negotiations negatively impacts upon the Association's ability to marshall support and represent employees in the future.

As shown above, the District's justification for the transfer was a pretext; and thus, I find that by transferring Lara, the District also interfered with her rights, the rights

of her fellow employees, and the rights of the Association in violation of section 3543.5(a) and (b).

Having found above that Lara's letter to teachers was not protected and that the District's issuance of a letter of reprimand was not discriminatorially disproportionate, there was no interference by virtue of this conduct on the part of the District. It is found to be a reasonable personnel action under the circumstances. (See Office of the Los Angeles County Superintendent of Schools (12/16/81) PERB Decision No. 263 at 8-9; Cf. San Joaquin Delta Community College District, supra.) This aspect of the interference allegation is dismissed.

6. Lara's Transfer as Constituting a Repudiation of the Agreement between the Parties

CSEA contends that the District repudiated the agreement between the parties when it transferred Lara. Grant Joint Union High School District (2/26/82) PERB Decision No. 196; Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 92. See also the discussion at pages 61-62 below. Paragraph 7.4.1 provides:

> A member of the bargaining unit may be transferred for the good of the classified service from one position to another in the same classification; however, such transfer shall not be for arbitrary reasons.

The above language clearly prohibits the District from making arbitrary involuntary transfers. Having found that the District's reasons for transferring Lara were based upon an

intent to discriminate against her for protected activities; concomitantly, the transfer was for arbitrary reasons and constituted a violation of the express terms of the agreement between the parties. However, PERB has found that a mere isolated act for retaliation against an individual employee will not constitute an unlawful unilateral change in an established policy or repudiation of contractual obligations. North Sacramento School District (12/20/82) PERB Decision No. 264 at 13. The evidence in the record only supports a finding of an isolated transfer against a single individual. This evidence is insufficient to support a finding of repudiation and therefore the allegations that the District violated section 3543.5(c) of EERA are dismissed.

B. The Alleged Unlawful Conduct of the District in Processing of Lara's Grievance

The Charging Parties, Lara and CSEA, argue that the District violated EERA in the processing of her grievance. Ostensibly these allegations involve alleged violations of 3543.5(a) by interfering with Lara's rights to pursue her grievance, 3543.5(b) by interfering with CSEA's rights to represent Lara in her grievance and 3543.5(c) by repudiating the provisions of the agreement which cover the grievance process.

1. Denial of Informal Personal Conference with a CSEA Field Representative Present

Lara and CSEA contend that the District violated the Act by refusing to meet with Lara and her CSEA representative at the informal level of the contractual grievance procedure. Charging Parties rely upon the private sector law emanating from the leading case of the NLRB v. Weingarten (1975) 420 U.S. 251 [58 LRRM 2689] in which the Supreme Court held that an employee may have a representative present at an investigatory interview called by the employer which the employee reasonably believes is likely to lead to discipline.[11]

While the Charging Parties do not specifically make the argument, PERB has found that the rules set forth in Weingarten and its progeny do not exhaust the representational rights enjoyed by the employees and Unions pursuant to EERA. Thus, in instances where private sector employees would not be given representational rights, PERB has found that the express language of the Act requires that public sector employees be given such rights. (See Rio Hondo Community College District (12/28/82) PERB Decision No. 272 [right to Union representation at informal grievance procedure where next step is appeal to

[11]See Riverside Unified School District (4/19/82) PERB Decision No. HO-U-127 for an exhaustive analysis of the private sector law surrounding NLRB v. Weingarten, supra, and its application to the public sector.

Academic Senate] ; Redwoods Community College District (3/15/83) PERB Decision No. 293 [right to have a Union representative at "appellate" meeting involving disputed evaluation to act as a buffer to confrontation, acrimony and misunderstanding]; Fremont Union High School District (4/6/83) PERB Decision No. 301.) Thus, in addition to the specific arguments which Charging Parties have made relying upon the Weingarten Rule, the facts of this case will be analyzed in light of the newly developed principals set forth by PERB in its recent decisions.

As found above, the contract provides for an informal personal conference between the grievant and site manager. At that level, a grievant may meet with the site representative to discuss informally and orally any grievance which might be filed. The express language of the contract provides that if either the bargaining unit member or site manager "prefer not to hold a personal conference, the grievant must go to Step I of the formal level of the grievance procedure." Further, the contract states that the personal conference is "permissive and may be bypassed at the request of either [party] . . . . "

At the outset the record fails to clearly establish that Respondent refused to meet with Lara and a Union representative. The record shows that pursuant to Lara's request for a meeting, Principal Deines called her and offered to meet with her at 2:00 p.m. November 23, 1981. Lara demurred on the basis that Manuel Armas, the specific person she wanted

to be with her was unavailable at that time. Deines questioned why that representative had to be present. The following day Lara called to set up a meeting at her and Armas' convenience and Deines said he could not meet that day because of a teachers' meeting. Lara testified she suspected that Deines[1] excuse was untrue since she knew teachers' meetings occurred late in the afternoon. Lara then asked Deines whether he was refusing to allow her to bring a "party" of her choice and she testified that he said "uh-huh".

Without more, Charging Party argues that the record justified the finding of wrongdoing on the part of the employer. There is no evidence on the record that Lara made an attempt to bring her Union representative with her to a meeting which had been scheduled. There is no evidence that Lara attempted to schedule any further meetings with the principal or attempted to come to the meeting which he was trying to schedule. Thus, the Charging Party has failed to show any effort on the part of Lara and CSEA to attend the informal meeting where a clear demonstration of rejection or denial of representation by the District could be shown. Something more than mere speculation on the part of the Charging Party must be shown in order to hold a Respondent to have acted unlawfully. (Contrast Fremont Union High School District, supra, at 10.)

However, on the record Deines admitted he did not believe he was obligated to meet with Lara and a union representative

who would actively prosecute her case at the informal personal conference. He testified that such a confrontation would require him to have a representative there and take away from the informality of the conference. For reasons set forth below, Deines' conduct would not be found to be unlawful on the facts of this case.

In various circumstances, PERB has found that an employee has a right to have a union representative present at the early stages of the contractual grievance procedure. (See Rio Hondo Community College District, supra; Fremont Union High School District, supra.) PERB has not determined whether employees are entitled to have a specific representative present[12] nor has it confronted the issue of whether this right may be waived by contract. I find that Lara did not have a right to demand that a specific person be her representative at the informal meeting with the District. Further, Lara's cancellation of that meeting in order to have that specific representative there is not protected by law.

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[12]The private sector cases provide that an employee may have a. representative but not a particular representative. The employer is not required to postpone a meeting or interview because a specific representative is unavailable. (See Roadway Express (1979) 246 NLRB No. 180 [103 LRRM 1050]; Crown Zellerbach (1978) 239 NLRB No. 158 (Representative "as witness only"); Coca Cola Bottling Co. of Los Angeles (1977) 227 NLRB No 173.)

In this case, the contractual grievance procedure negotiated by the Union clearly envisions a permissive informal level to that process. That permissive level permitted either party to cancel the informal step and go directly to the formal level of the grievance procedure without any justification. In cancelling the informal personal conference, no prejudice obtains to any party. The first step of the formal grievance procedure permits a grievant, along with a union representative, to present the complaint to the same site manager who would have been involved in the informal personal conference.

In this case, unlike those previously reviewed by PERB, a grievant is not subjected to a meeting with an employer where prejudicial information can be elicited from them without the assistance of a union representative. Moreover, the employees are not required to attend a meeting to present any part of their grievance without the assistance of a union representative to balance what otherwise may be an inequitable employer-employee confrontation. Rather the cancellation of the informal step of the grievance procedure obviates any prejudice to the grievant and ensures that the presentation of the grievance at the formal level I is accomplished through a union representative if desired.

Thus it is clear that the Union, by entering into the contract which specifically provided for a non-mandatory and

waivable informal level of the grievance procedure, agreed to waive representation at that level should the employer desire to not hold the informal conference. Conversely, the employee is not obligated to participate in the informal conference without a union representative present. This conclusion is reinforced by Union representative Armas' testimony in which he admitted that section 12.6.1 of the contract permitted an employee to have only a witness present and not a Union representative acting as an advocate.

The allegations that the District violated EERA in any fashion by failing to hold a informal meeting with Lara and the CSEA representative are not supported by the facts or law. These allegations are dismissed.

2. The Allegations that the District Repudiated the Agreement by Denying Lara's Grievance on the Basis of an Untimely Filing.

CSEA argues that the District repudiated the provisions of the agreement between the parties because the Board of Trustees denied Lara's grievance as untimely. Presumably, the Union relies upon the line of cases which analyze an employer's unilateral alteration or repudiation of an unambiguous contract provision or a policy of generalized effect. (Grant Joint Union High School District, supra; Victor Valley Joint Union High School District, supra; see also, C & C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 1065]; Davis Unified School

District et al. (2/22/80) PERB Decision No. 116 and NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) In cases involving contract repudiation it is necessary to be aware of the fine line between PERB's lack of authority to enforce an employment contract between the parties, and the need to determine its content or terms in order to establish whether a violation of EERA has occurred. (Victor Valley Joint Union High School District, supra; C & C Plywood Corp., supra.)

In Grant Joint Union High School District, PERB held that in order to establish a prima facie violation of section 3543.5(c) when a unilateral change in or repudiation of a contract or past practice is alleged, a Charging Party must show: (1) that the Respondent has breached or otherwise altered the parties' written agreement or its own established past practice; (2) that the breach or alteration amounts to a change of policy (i.e., that it had a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (3) that the change in policy concerns matters within the scope of representation. (Placer Hills Union School District (11/30/82) PERB Decision No. 262 at 3.) A mere isolated act against a single employee is insufficient to establish a unilateral change in or repudiation of an established policy or an existing contractual term. (North Sacramento School District, supra, PERB Decision No. 264 at 13.)

Here the Union contends that the District denied Lara's grievance as untimely. Level III of the contractual grievance procedure provides: "within ten (10) working days after the decision is rendered at Step II, the grievant may request that the Association submit the grievance to the Board of Trustees." The record shows that Lara requested that the Union file a Level III grievance within three days after the resolution at Level II of the grievance procedure. However, the Union did not submit the grievance to the Board of Trustees until almost a month after the resolution of the Level II grievance. This was the first time that a Level III grievance had been submitted pursuant to the terms of the agreement.

A hearing was held before the Board. The superintendent, on behalf of the Board, issued a decision denying Lara's grievance. The Board's decision noted that Lara's grievance had been filed considerably after the 10-day time limit in the contract. However, the decision makes it clear that the denial of the grievance was not based upon an untimely filing. Rather the denial of the grievance was based upon Lara's failure to prove the allegations in support of her grievance.

It is unnecessary to reach an interpretation of the agreement to see whether the District's action was a repudiation of the express language of the agreement or whether it was consistent with the intent of the parties to give the Board of Trustees reasonable notice of an intent to pursue a

grievance after its denial at the lower level. I conclude that the District did not deny the grievance based upon an untimely filing, and there is no evidence that in the processing of the grievance the District repudiated the agreement between the parties or an existing practice of generalized effect. Thus the allegations of the complaint based upon these facts are dismissed.

CONCLUSION

I thus find that the District discriminated against Lara because of her protected activities when it transferred her from her assignment at Blanchard School to a new assignment at McKevett School. By this conduct, the District not only violated the rights of employee Lara pursuant to section 3543.5(a) of the EERA, but also interfered with the rights of other employees pursuant to that section and denied and interfered with the rights of CSEA pursuant to section 3543.5(b). Except as found above, all other allegations of the complaint have not been proved and are dismissed.

REMEDY

The Educational Employment Relations Act section 3541.5(c) provides that PERB shall have the power:

> . . . to issue a decision and order directing an offending party to cease and desist from the unfair practice and take such affirmative action, including but not limited to the reinstatement of employees with or without back pay as will effectuate the policies of this chapter.

In cases involving unlawful discrimination, PERB has repeatedly issued a cease and desist order against the unlawful conduct and has ordered that the respondent take action to make whole those injured by the discrimination by restoring any benefits lost because of the unlawful conduct. In this regard, restoration to positions from which employees had been transferred or moved is an appropriate part of the remedy. (See San Leandro Unified School District (2/24/83) PERB Decision No. 288 at 14-16; Marin Community College District (11/19/80) PERB Decision No. 145 at 19-20.)

In this instance the cease and desist order is necessary to ensure that employees and employee organizations will be guaranteed their statutory rights to take part in protected activities and to otherwise engage in the representation of employees provided by EERA. Such an order will demonstrate that discriminatory conduct as evidenced in this case will not be tolerated; will assure employees they need not fear participation in protected activities; and will assist in restoring the credibility of the employee organization.

In this case there is no evidence that Lara suffered any detriment by virtue of the District's discriminatory transfer nor is it clear that she wishes to return to the position from which she was transferred. However, should she desire to return to her prior position at Blanchard School, she should be given the opportunity to do so. On the other hand, because

other employees are involved and the District must be given some latitude in managing its business, the offer of reinstatement should not remain open indefinitely. Thus, it is appropriate that Lara make any request for reinstatement to her prior position as aide at Blanchard School within thirty (30) days after this order becomes final. If no such request is made, then the District shall not be obligated to reinstate her thereafter. Moreover, because this order may not become final at the beginning of the school year and disruption may occur if the District were required to reinstate Lara in the middle of the school year, it is further appropriate that the reinstatement should also coincide with the beginning of an academic semester unless all parties agree to another time period.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The notice should be subscribed by an authorized agent of the District indicating that the Respondent will comply with 'the terms of the order. The notice shall not be reduced in size. Posting such a notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist from this activity. The notice effectuates the purpose of EERA that employees be informed of the resolution of the controversy and that the Respondent announce its readiness

to comply with an ordered remedy. (See Placerville Union School District (9/18/78) PERB Decision No. 69.) In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ordered that Santa Paula School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Restraining, discriminating against, or otherwise interfering with the rights of employees and Rachael Lara because of the exercise of their right to participate in an activity protected by the Educational Employment Relations Act.

(b) Denying California School Employees Association and its Chapter Number 497 rights guaranteed by EERA.

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

(a) Upon request, but not later than 30 days following the date when this order becomes final, reinstate Rachael Lara to her former position at Blanchard Elementary School effective the next semester following a timely request.

(b) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) consecutive workdays at its headquarters offices and in conspicuous places at the location where notices to classified employees are customarily posted. The Notice must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within twenty (20) workdays from service of the final decision in this matter, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

IT IS FURTHER ORDERED that all other aspects of the charge and complaint are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 15, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 15, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: July 26, 1983

STEPHEN H. NAIMAN
Administrative Law Judge