

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TONY PETRICH,)
)
Charging Party,) Case No. LA-CE-2188
)
v.) PERB Decision No. 592
)
RIVERSIDE UNIFIED SCHOOL DISTRICT,) October 10, 1986
)
Respondent.)

Appearances; Tony Petrich, on his own behalf.

Before Hesse, Chairperson; Burt, Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the charging party, Tony Petrich, to the attached proposed decision of an administrative law judge (ALJ) dismissing the complaint. At the conclusion of the charging party's presentation of evidence, the respondent, Riverside Unified School District (District), moved for dismissal of the complaint for failure of the charging party to establish a prima facie case. After reviewing the transcript of the hearing and giving the parties the opportunity to submit briefs, the ALJ granted the motion to dismiss.

We have carefully reviewed the entire record, including the transcript and the exceptions filed by the charging party and, finding the ALJ's decision free from prejudicial error, we

adopt it as the Decision of the Board itself. We agree that the evidence presented by the charging party was insufficient to establish any prima facie violation of the Educational Employment Relations Act (EERA).¹ On appeal, the charging party also makes various claims of irregularities in the conduct of his hearing and in the filing and content of the District's post-hearing brief. We will briefly comment on each of these claims.

Rather than filing a brief in response to the motion to dismiss, the charging party filed a Motion to Exclude Briefs for Respondent from Consideration. This motion, based on the fact that the District's proof of service of its brief was inadvertently dated May 29, rather than April 29, 1986, was denied.² The charging party now appeals that denial. This claim is without merit. It would constitute a grave injustice to exclude a party's filing due to a clerical error in the proof of service when, in fact, all filing requirements were met and the opposing party suffered no prejudice.

¹The EERA is codified at Government Code, section 3540, et seq.

²The District's brief was timely served on April 29, and timely filed on May 2, 1986, in accordance with PERB Regulations. PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

The charging party also claims that the District's brief relies on waived affirmative defenses. However, the brief merely details testimony supporting the District's position that the adverse actions taken against the charging party were warranted and not the result of retaliation for protected activities.

Additionally, the charging party claims that the ALJ improperly excluded evidence of Unalleged unfair practices which the charging party asserts he should have been allowed to pursue in the hearing. We find that the ALJ properly excluded such evidence, for it either concerned allegations previously filed and dismissed by the Board or was irrelevant to any allegations articulated by the charging party.

Lastly, the charging party claims that the ALJ improperly cut off his opening statement before its conclusion. First, parties have no absolute right to make opening statements.³ Second, the charging party suffered no prejudice, for his opening statement consisted of a string of citations of authority unconnected to the facts of his case. As the ALJ explained to the charging party, the authorities cited were known to him and added nothing to the record.

³PERB Regulation 32180 defines the rights of parties in a hearing; there is no mention of opening statements or oral argument:

ORDER

Case No. LA-CE-2188 is hereby DISMISSED.

Chairperson Hesse and Members Burt and Porter joined in this Decision.

Each party to the hearing shall have the right to appear in person, by counsel or by other representative, and to call, examine and cross-examine witnesses and introduce documentary and other evidence on the issues.

The Administrative Procedure Act contains a similar provision, at Government Code section 11513(b):

Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf, he may be called and examined as if under cross-examination.

While Code of Civil Procedure section 607 appears to provide for opening statements in the conduct of jury trials, there is no such statutory basis with regard to bench trials. Gillette v. Gillette (1960) 180 Cal.App.2d 777, 781, Oil Workers Intl. Union v. Superior Court (1951) 103 C.A.2d 512, 581 ("oral argument in a civil proceeding tried before the court without a jury, is a privilege, not a right, which is accorded to the parties by the court in its discretion").

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



TONY PETRICH.)
)
 Charging Party,) Unfair Practice
) Case No. LA-CE-2188
)
 v.)
)
 RIVERSIDE UNIFIED SCHOOL) PROPOSED DECISION
 DISTRICT.) (6/12/86)
)
 Respondent.)
)
 _____)

Appearances: Tony Petrich, on his own behalf; Best. Best & Krieger by Charles D. Field, for Riverside Unified School District.

Before: Martin Fassler. Administrative Law Judge.

INTRODUCTION AND PROCEDURAL SUMMARY

This case concerns a series of critical memoranda given to Tony Petrich, a gardener employed by the Riverside Unified School District (the District), by various supervisors and administrators of the District. The complaint alleged that eight such memoranda issued to Petrich were in retaliation for Petrich's participation in activities protected by the Educational Employment Relations Act:¹ the filing of PERB

¹The Educational Employment Relations Act. is found at Government Code Sections 3540 et. seq. All further references herein are to the Government Code, unless otherwise indicated. Section 3543.5(a) provides that it is an unfair practice for a public school employer to "[I]mpose or threaten to impose reprisals on employees . . . because of their exercise of rights guaranteed by this chapter."

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

unfair practice charges against the District and the filing of contract grievances against the District.²

The charging party (hereafter referred to as "Petrich") presented evidence in support of the allegations of the complaint on January 21, 22 and 31, 1986. At the close of the presentation of evidence by Petrich, counsel for the District moved for dismissal of all the allegations of the complaint, based on an asserted insufficiency of evidence to establish a prima facie case in support of each allegation. The parties were given an opportunity to examine the transcript made of the hearing to that point, and to submit written argument with respect to the motion. The District submitted a written brief in support of its motion on April 29.³ Petrich did not submit a written argument in connection with the motion.

FINDINGS OF FACT

Petrich was a gardener employed by the District, who, on February 25, 1985, was re-assigned from Woodcrest Elementary

2on the date the complaint was issued, the Los Angeles Regional Attorney of the Public Employment Relations Board (PERB) issued a letter dismissing numerous other allegations included in the charge (and its four amendments). Since then, the Board itself reinstated four of those allegations of unfair practices. (Petrich v. Riverside Unified School District, PERB Decision 562a. May 16, 1986). No aspect of this order is intended to reflect on any of those four allegations. A hearing on those allegations has been scheduled, but has not yet been held.

3Petrich filed a motion to "Exclude from Consideration" the District's brief, on the ground that it was not properly filed. The motion was dismissed in an order issued on May 27, 1986.

School to North High School. He worked at the high school throughout the period covered by the events at issue here. He was assigned some custodial tasks, as well as gardening and grounds maintenance work.⁴

A. Petrich's Protected Activities

The District did not dispute the allegations of the complaint concerning Petrich's protected activities. In 1984. Petrich filed two grievances, using the grievance procedure of the collective bargaining agreement between the District and California School Employees Association (CSEA), the organization which represented the classified employees of the District. Petrich filed one unfair practice charge against the District in November, 1984 and another in late December. He filed numerous grievances in early 1985. and six unfair practice charges against the District, all prior to March 4, 1985, the date of the first allegedly unlawful action by the District.

B. The Critical Memoranda

The complaint alleges that eight critical or corrective memoranda which were given to Petrich from March 4, 1985 through June 20. 1985 were issued in retaliation for Petrich's protected activities. One of the eight was given to him

⁴Assignment of custodial tasks to gardeners was apparently an accepted practice of the District. Petrich makes no allegation that any of his work assignments were improper.

by Frank Tucker, then assistant superintendent for personnel. One was given to him by North High School Vice Principal Robert Moshier; two were given to him by North High School Principal Douglas Wolf; and the remaining four were written by Petrich's immediate supervisor Phillip Hodnett, North High School plant supervisor.

Petrich did not testify during the hearing. However, he called as witnesses Tucker. Moshier. Wolf and Hodnett. The administrators' and supervisors' testimony was, with one exception noted below, straightforward and credible. Petrich also called as witnesses two non-supervisory employees of the District, each of whom was familiar with events underlying one of the documents which Petrich challenged in his unfair practice charge. The testimony of these two witnesses, also straightforward and credible, confirmed the accuracy of the accounts of the supervisors and administrators who wrote the critical memoranda to Petrich.

The facts underlying each of the critical memoranda are set out briefly in sections C through J.

C. The March 4, 1985 Memorandum from Assistant Superintendent Frank Tucker.

On March 4, Assistant Superintendent Frank Tucker sent to Petrich a one-page memorandum about an incident which had occurred earlier that day. The memorandum criticized Petrich for entering Tucker's office while Tucker was out of the

office, at lunch, and noted that shortly after that. Tucker had instructed Petrich that in the future he was forbidden to enter Tucker's office when Tucker was not present.⁵

Tucker was the only witness to testify about the incident. His testimony was consistent with the concise description in the March 4 memorandum.⁶ Shortly before 1:00 p.m. that day. Tucker returned to his office and found on his desk a letter

⁵The memorandum is in evidence as Charging Party Exh. 4. It reads, in its entirety:

TO: Tony Petrich
FROM: Frank C. Tucker
SUBJECT: Conversation. March 4, 1985

I returned from lunch at 12:52 p.m.. March 4, 1985 to find a letter from you rebutting my memo of February 26, 1985 on my desk. My secretary was still out to lunch. Within approximately five minutes, you came in the office and asked that I confirm the filing of a grievance. I complied with your request. I attempted to return to you the hub cap you had given to Principal Sund and she had refused. You refused to take it. You said the hub cap belonged to her. not to you.

I directed you never again to enter my office unless I was present. You acknowledged that you heard and understood the direction.

A copy of this memorandum will be entered in your personnel file as a matter of record.

⁶Tucker's testimony about the incident is in Volume III of the transcript, pp. 21-31. Hereafter, transcript references will take the form TR:____.____. with the volume indicated by a Roman number and the page number by an Arabic numbers.

from Petrich regarding an earlier dispute. The entrance to Tucker's office from the building corridor was through an office used by Tucker's secretary. Tucker and his secretary were both absent from their offices for lunch during the same hour. Tucker testified.

A few minutes after Tucker arrived in his office and found Petrich's memo on his desk, Petrich arrived. Tucker confirmed that a grievance filed by CSEA on behalf of Petrich in another matter had been timely filed. He then tried to return to Petrich an automobile hub cap which Petrich had tried to bestow on a school principal as a gift. Petrich would not take back the hub cap. He and Tucker discussed the hub cap incident. After that. Tucker told Petrich not to enter Tucker's office when Tucker was not present, instructions which he repeated in writing in the challenged memorandum.⁷

Tucker's testimony is credible and unchallenged. It is credited.

D. Hodnett's Memorandum Concerning the Broken Light Cover

On March 28. Hodnett gave to Petrich a memorandum criticizing Petrich's failure to follow Hodnett's directions on the afternoon of March 26. The memorandum reads, in pertinent part:

⁷petrich elicited from Tucker testimony that the District personnel office for classified employees was closed between noon and 1:00 p.m., every day. Petrich apparently believed this testimony to be helpful, but it is beside the point.

On Tuesday, March 26, at approximately 3 p.m., in the storeroom, you asked me where the light covers were so that you could replace one in the Attendance Office. I told you not to worry about the light cover, that I wanted you to clean your restrooms. You then stated that you had promised to replace it. I then told you not to replace it. that I wanted you to clean your restrooms. You then stated. "There they are." I then told you not to touch the light covers and again told you I wanted you to clean your restrooms. You then stated that you still had time to replace the cover and clean the restrooms. I told you. if you had that much time, you could finish picking up the palm tree fronds in your area. You stated you didn't have that much time. I then again told you to leave the light cover alone and clean your restrooms. You then left the storage room. I went home. Upon my return to school at 5:30 p.m., I was informed that you were seen leaving the storage room with a light cover. I then checked the restrooms you were told to clean. The boys' restroom was clean. The girls' restroom was not clean and was unlocked. You failed to perform the assigned duty in a satisfactory manner . . . You failed to obey direction. This type of behavior and work performance cannot continue. (Charging Party Exhibit 7) ⁸

Very little testimony was given about the incident which preceded this memorandum. Hodnett's testimony, in response to Petrich's question asking him to describe the circumstances which led to the writing of the memorandum, was this:

WITNESS: As it stated here, you were not doing your work and you were going to do something that was not in your job description. I asked you not to do that, to go ahead and do your work. You did what I asked you not to do and your work still was not done. That's why this was written up. (TR: II. 19).

⁸Hereafter. charging party exhibits will be referred to as CPX__, with the exhibit number following the abbreviation CPX.

Hodnett's testimony, while informal and abbreviated, is consistent with his written description of the March 26 events. There is no other evidence about the March 26 events. It is found that the events of that day took place as described in Hodnett's March 28 memorandum.

E. The April 2 Memorandum from Hodnett

On April 2, Hodnett gave Petrich another critical note. It read, in pertinent part:

On Thursday, March 28, I gave you a memo about Failure to Perform Assigned Duty in a Satisfactory Manner March 26. (Girls' restroom not clean and left unlocked) Again on March 28 and March 29, I found the girls' restroom had not been cleaned and was left unlocked. Your afternoon break is from 2:30 p.m. to 2:45 p.m. From 2:45 p.m. until 4:00 p.m.. you are to sweep, clean, dust, take out all trash and mop all the restrooms in the social study area. (Men, Men Faculty. Women, Women Faculty Restrooms) (CPX 2)

There was no evidence offered about these events. Petrich, as noted, did not testify about them. Hodnett, the other person who apparently had information about them, was not asked

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about them, nor was any other witness.

There is insufficient evidence to make any findings about the memorandum or the underlying incidents.

⁹The closest Petrich came to asking about the events here was to ask Hodnett about a conference which took place later on April 2. after Hodnett had given Petrich the memorandum. None of the testimony about that conference sheds any light on the events which preceded issuance of the critical note. CSEA Alan Aldrich. field representative testified that at that meeting Petrich asserted other employees had been assigned to do the work in question (TR: I. 154). However. Hodnett specifically denied that to be the case (II. 80).

F. Moshier's Memorandum to Petrich about Parking Assignments.

On April 26. Vice-Principal Richard Moshier and Hodnett met with Petrich to discuss parking assignments. Petrich asked to be represented at the meeting by an agent of CSEA. Since none was present, the meeting was postponed. After that brief encounter, Moshier wrote and gave to Petrich a written memorandum about the subject. It read, in pertinent part:

When you started to work at North High School, you began parking in an assigned teachers and visitors parking space in the front parking lot. On March 13, 1985, you were told by your immediate supervisor, Phil Hodnett, to park in the custodian parking lot. You then began parking in the student parking lot. You were then told by the campus aide, Mr. Taylor, that you could not park in the student parking lot without a sticker. Then you began to park in someone's assigned space in the cafeteria parking lot. You were again told by your supervisor to park in the custodian parking lot. You asked to be assigned a parking space in the cafeteria parking and were told by your supervisor to see me about being assigned a parking space.

You came to see me on Monday, April 15, 1985, and I told you about the fact that you were parked in an area that is not for parking. I also discussed with you that Mr. Hodnett, your immediate supervisor, could show you where to park or you could get a parking sticker from my secretary and park in the student parking lot. As of today you have not complied with the above. This is insubordination.

Also, when you enter and leave the student parking lot in the performance of your duties, anytime you unlock a gate to enter or leave the student parking lot you shall lock it behind you.

You are to meet with Mr. Hodnett and me on May 2, 1985. at 9 a.m. in my office. If you desire you may bring representation at that time.

A copy of this memo will be placed in your district personnel file in five (5) working days. You have the right to respond and to have that response attached to this document. (CPX 9)

On May 2. another meeting took place about the same subject. Present at this meeting were Moshier. Hodnett. Petrich, CSEA Staff Representative Alan Aldrich. and Carlos Corona (grievance chairperson for the CSEA chapter in Riverside during that school year). Aldrich questioned Moshier about why Moshier had written a formal memorandum to Petrich about the parking dispute. Moshier explained that he wrote it because Petrich had asked for a "formal" meeting about the subject. Moshier believed that such a meeting should have a formal document for all parties to consider. (TR: I. 66, 158). Hodnett, similarly, said something to the effect that the written memorandum would not have been prepared if Petrich had not asked for a meeting with representation by CSEA (TR: I. 159).¹⁰

Assistant Superintendent Tucker testified that the parking problem memorandum was ultimately not placed in Petrich's personnel file, at Tucker's instructions. (TR: III. 60-61).

As to the substance of the dispute, Moshier testified that his description of the sequence of events in the spring semester of 1985, in the April 26 memorandum to Petrich, is correct, with one exception which is of no significance

¹⁰Aldrich, Moshier and Hodnett all testified about this meeting. Their testimony is generally consistent.

here.¹¹

Petrich never testified about any of the incidents described in the memo. Moshier's testimony is credible on its face, is uncontradicted, and is credited.

G. Hodnett's April 30 Memorandum Regarding Absences

The collective bargaining agreement between the District and CSEA, which was in effect during the first half of 1985, included the following provision in Article XIII. concerning leaves of absence:

13.3.4 A doctor's certificate or other proof of illness or disabling conditions may be required by the District for any illness or disabling condition in which the absence is five (5) days or more or when the classified employee has been informed that verification for future absences will be required. Such verification statements may be required by the District Personnel Office.

It is inferred that some time shortly before Petrich's reassignment from the elementary school to North High School, the District notified Petrich that he would be required to provide a doctor's verification for any absence assertedly caused by illness. There are two references in the record to this requirement, although the document imposing this

¹¹Moshier testified that the memorandum's statement in its first paragraph. "Then you began parking in someone's assigned space in the cafeteria parking lot" is incorrect. In fact, Moshier testified, Petrich then began parking in an area which was not marked as a parking spot, which Moshier intended to keep clear of parked cars because of its proximity to the entrance to the parking area and to the cafeteria delivery area. (TR: 77-78. 92-93)

requirement was not entered into evidence. In a February 20 letter to Petrich informing him of his reassignment to the high school. Assistant Superintendent Tucker wrote:

Please be aware that you must still provide a physician's verification of illness if you are to be paid for days you are off work because of illness. This order stands through June 30, 1985. (CPX 3)

The second reference to the requirement is in a letter sent to Petrich by Tucker on February 26. In this letter (CPX 2). Tucker rejects the letter of verification offered by Petrich for absences on January 23 through 27 and February 13 and 15. Tucker writes:

The physician's verification of illness you provided for your absences of January 23 through January 27, and February 13, 15 is not an acceptable verification . . .

Because the verification was not required before February 11, and because I want to give you ample warning without penalty before you are refused paid sick leave, the district will not dock your pay for the February 13 and 15 absences. However, a non-verification such as Dr. Lee's will not be acceptable for absences after February 15, 1985.

On April 30, Hodnett gave to Petrich a memorandum which read, in part:

Your reassignment to North High School started February 25, 1985. Since your reassignment to North High School, the rate of usage of sick leave and other absences has become detrimental to the proper maintenance, health, and safety of our school and students. Your attendance record is listed as follows:

The memorandum then listed 19 dates between February 28 and April 26 when, according to Hodnett, Petrich was either absent or late to work. Hodnett listed seven days of full day absence. 11 days of partial absence (generally 1 1/2 hours) and one day on which Petrich was 20 minutes late arriving at work. Petrich had provided a doctor's verification for five of the seven full-day absences. According to the memorandum. Petrich claimed each of the 11 partial-day absences was caused by a physician's appointment. He had (again, according to the memorandum), provided physician's verification on only one of the 11 days.¹²

Hodnett's memorandum also commented upon Petrich's work shortcomings on the days he had worked (including some cited in the March 28 and April 2 memoranda). Hodnett then instructed Petrich to clean the girls' restroom in his work area daily, without having to receive daily directions, and also gave these general instructions:

I want you to improve the quality and volume of acceptable work. Clean all restrooms in the social studies area and provide me with a physician's verifications for all doctor's appointments and illnesses.

Any future failure to perform assigned duties in a satisfactory manner.
Article 19.3.1, and failure to obey

¹²The full-day absences for which there were no verification, according to the memorandum, were March 7 and April 22. The partial-day absences lacking verification were on March 6. 8. 13. 15. 20. 22. 25, 29, April 5 and 23. The late day was April 26 (20 minutes).

directions. Article 19.3.2. will result in a request from me to George Williams for disciplinary action. Your behavior at North High School is becoming a case of aggravated insubordination not only to me but to Mr. Moshier. the vice principal at North High School.

While there was no testimony about most of the dates cited. Hodnett testified to the general accuracy of the dates and absences noted in his memorandum, and commented upon Petrich's general failure to provide a doctor's verification of illness

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on days he was absent from work (TR: 27-28, 33).¹³

The District did not submit any documentary evidence prepared on a daily basis, to confirm Hodnett's allegations of absence on the various days listed in the memorandum.

Based on the little evidence about this subject in the record the following findings of fact are made:

(1) The only physician's notes which Petrich submitted during the period in question (late February through late

13The only dates which were the subject of specific testimony were April 22 and 23. Petrich submitted to Hodnett a note dated April 25, 1985, signed by a Dr. Anil Garde. The handwritten note, which confirms the popular belief that doctors have very poor handwriting, probably says:

Pt. [Patient] was seen today because of abd [abdomenal] pain. He had similar episodes earlier i.e. Mon [Monday] [and] Tuesday. [April 22 and 23]. (CPX 14)

Hodnett did not accept this letter as verification of illness on April 22 and April 23. Hodnett noted, correctly, that the note does not say that Petrich was seen by a doctor on April 22 or 23. (TR: II. 53-55).

April) are those acknowledged in the April 29 memorandum in evidence: those notes cover February 28, March 1. March 18. March 27. and April 1, and April 25. The finding that no other physician's notes were submitted by Petrich is permitted by Evidence Code Section 413¹⁴

(2) No findings are made on whether Petrich was absent from work on any of the days cited in the note, other than April 25. the only date which was the subject of direct evidence. No findings are possible on this point because there is no documentary evidence, and because Hodnett's testimony was so vague.

(3) Finally, there is no evidence that Hodnett's conduct in this respect, or the District's conduct generally, was based on hostility toward CSEA, or that any such conduct was in retaliation for Petrich's EERA-protected activities (the filing of contract grievances and use of PERB procedures).

H. Hodnett's June 7. Memorandum

On June 7. Hodnett sent to Petrich a memorandum commenting critically upon Petrich's "Tardiness. Failure to Work

¹⁴Evidence Code section 413 provides:

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

Diligently, Failure to turn in Key. Leaving Campus during Worktime." (CPX 12)

The memorandum commented upon Petrich's hours of work on May 31 and June 3, and also noted some general shortcomings allegedly noted by Hodnett over a period of time. Hodnett concluded.

After working with you for many weeks it appears that your performance and your attendance is poor because you deliberately make it so. Therefore. I am recommending that the severest possible disciplinary action be taken against you.

Again. Petrich did not testify about any of the specific incidents or shortcomings cited by the memo. Nor did he attempt to elicit from Hodnett or any other witness detailed descriptions of any of the incidents or shortcomings cited in the memorandum. The District introduced no evidence, documentary or otherwise, which would substantiate the specific criticisms in the memorandum. Finally, there is no evidence that any of Hodnett's comments, or the memorandum as a whole, was linked in any way with Hodnett's hostility to CSEA, or to opposition on the part of Hodnett or the District to any of the EERA-protected activities in which Petrich participated.

I. Principal Wolf's Memoranda of June 12.

On June 12. North High School Principal Douglas Wolf gave Petrich a memorandum which included the following:

About 8:20 a.m. on May 30. 1985. you approached a female student sitting in a car in the student parking lot

and requested that she get some cigarettes. You gave her some money. She drove away. You waited at the entrance road from Linden Street. In a few minutes she returned and gave you the cigarettes.

Your action was inappropriate. You should not ask students to run errands nor should you give them money. As a school employee, you exposed the school district unnecessarily to a possible liability suit had the student been involved in an accident while running an errand for you.

You are hereby directed to not send students off campus on errands in the future. You are also directed not to give students money. Failure to follow this direction will result in my recommending disciplinary action be taken against you. (CPX 13).

Wolf testified that after hearing about the incident the day it happened, he called in the student involved. Julie Garst, who then prepared a written statement about the incident. This written statement was the basis for Wolf's memorandum to Petrich (TR: 140-141. 170). Petrich did not call any other witness to testify about the incident, nor did he testify about it himself.

It is found that the memorandum represents an accurate description of Wolf's understanding of the incident.¹⁵ There is no evidence that Wolf's memorandum was motivated by hostility toward CSEA, or hostility toward Petrich, based on any of Petrich's protected activities.

¹⁵petrich's failure to testify about the event, or to present any other evidence concerning the incident, lends support to this finding. Evidence Code Section 413 (quoted in footnote 14).

J. Principal Wolf's June 19 Memorandum.

On June 19, 1985, Principal Wolf sent to Petrich a memorandum regarding "Your Approaches to Miss Becky Porter, Teacher." The memorandum read, in pertinent part:

Miss Porter has described to me what appear to be inappropriate approaches you have made to her, and she has asked me to intervene.

She tells me that you have attempted to engage her in conversation about how female students have flirted with you and that you then asked her if it would not be better if classified employees asked teachers for dates. She said that you once called her "my little puppy dog," and at another time called her a "sexy lady."

Tony, for a male employee to force on a female employee unwanted and uninvited attentions having nothing to do with work could be considered sexual harassment. This is prohibited by law. Even though you may not view your own actions in that light, I'm sure you are aware that such actions are discourteous and unacceptable.

I'm asking you not to make advances to Miss Porter. She does not welcome them, and she is entitled to be free from all such contacts. (CPX 15).

Wolf testified that he prepared the memorandum after having a conversation with Porter, and then receiving from her a written description of the incidents. (TR: II, 145). Porter testified that she did in fact tell Wolf that the incidents described in the memorandum had occurred. (TR: I. 101-102). Neither Wolf nor Porter was specific about what Porter told the principal.¹⁶ Porter apparently did not use the term

¹⁶There remains considerable uncertainty about the conversation or conversations which Porter and Wolf had about

"inappropriate approaches" nor the term "sexual harassment." According to Wolf. Porter's comments were "more a standpoint of repugnance and fear." (TR: 146)

Petrich did not testify about the alleged incidents, nor did he introduce any evidence about the incidents, other than Porter's testimony. Since Porter's testimony amounted to a confirmation that the description in Wolf's memorandum is correct in essence, it must be inferred that the testimony is accurate, as is Wolf's description in the June 19 memorandum.

There is no evidence to suggest that either Wolf or Porter was motivated in any way by hostility to CSEA or to the exercise of EERA-protected activities.

There was considerable evidence given by various witnesses about a year-end evaluation which Hodnett gave to Petrich. However, there is no allegation in the initial complaint in this case about the evaluation. Thus, there is no need at this point to review the evidence about it.

the subject. Wolf testified about one conversation in particular, but the circumstances suggest he and Porter may have had at least two conversations about the subject. Neither Porter nor Wolf was able to remember the date or dates of their conversation(s). Further, the testimony of the two witnesses is inconsistent about the dates of the events of which Ms. Porter complained. She testified the events took place before Memorial Day (TR: I, 102). Wolf testified he was told one event took place Thursday, May 30. and the other took place Wednesday, June 5, (TR: 146). Since Memorial Day is generally celebrated the last Monday in May, both these dates are after Memorial Day.

LEGAL ANALYSIS

The Complaint alleges that all of the memoranda were written "because of" Petrich's protected activities, specifically, the filing of unfair practice charges with PERB and the initiation of contract grievances at various times in 1984 and 1985. Thus, the complaint puts forward a retaliation or discrimination allegation.

A charging party alleging such an unfair practice by an employer has the burden of making a factual showing sufficient to support an inference that protected conduct was a motivating factor in the employer's decision to engage in the conduct of which the employee complains. Novato Unified School District (1982) PERB Decision No. 210.

As noted, very little evidence was introduced about the events for which Petrich was criticized; in some instances, there is no direct evidence about the underlying events.¹⁷ There is considerable uncertainty about the accuracy of some of the memoranda written by Hodnett. and uncertainty about the dates of the incidents in which Ms. Porter was involved. However, at this stage of the proceeding, the respondent does

¹⁷No finding of fact may be based on uncorroborated hearsay evidence (PERB Regulation 32176). There is no direct, first-hand evidence about some of the events reported or described in memoranda in evidence. Since these documents are hearsay under the Evidence Code, the events to which they refer and for which there is no corroborating evidence may not be taken as proven.

not have an obligation to present evidence to substantiate its actions. The charging party carries the burden of presenting evidence to support his contention that the memoranda at issue were improperly motivated. It is concluded here that the charging party has failed to establish a prima facie case of discrimination with respect to each of the allegations in the complaint. With the exception of the April 26 parking memorandum (discussed below) there is no evidence of any link between Petrich's protected activities and the critical documents which are the focus of the hearing.

With respect to that April 26 memorandum, the evidence shows that it was written by Moshier after Petrich had exercised a protected right - - after Petrich had asked for representation by CSEA in a meeting with his immediate supervisor and the assistant principal. Thus, there is a link between the exercise of a protected right and the writing of the memorandum.

However, it cannot be said that the writing of the memorandum was a form of reprisal. Moshier, wrote the memo to give all the participants in the scheduled meeting a single summary document to serve as the beginning point of the discussion. The document, on its face, is suitable for that use, and Mosher's explanation is consistent with a common-sense approach to having a useful discussion including the CSEA representative who was, presumably, unacquainted with the problem.

Further. Tucker testified, credibly, that the memorandum was not placed in Petrich's personnel file, at Tucker's direction. Thus, the memorandum can play no part in any adverse action against Petrich.

CONCLUSIONS AND ORDER

The allegations that the District engaged in the conduct described in complaint paragraphs 9. 10. 11, 12. 13. 14. 15 and 16 because of Charging Party's protected activities, are hereby dismissed.

Pursuant to California Administrative Code, title 8. part III. section 32305, the charging party has the right to file exceptions to the dismissals set out above. Those dismissals shall become final on July 2. 1986 unless the charging party files a timely statement of exceptions. In accordance with PERB regulations, 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 at its headquarters office in Sacramento before the close of business (5:00 p.m.) on July 2 1986, or sent by telegraph or certified or Express 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.

