STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Chapter 512,	)	
Charging Party,	)	Case No. LA-CE-2168
v.	)	PERB Decision No. 630
KERN COUNTY OFFICE OF EDUCATION,	)	July 14, 1987
Respondent.	)	

Appearances; Harry J. Gibbons, Jr., Attorney, California School Employees Association, for California School Employees Association, Chapter 512; Fekete, Carton, Velman, Hartsell & Chambers by Frank J. Fekete, for Kern County Office of Education.

Before Hesse, Chairperson; Porter and Shank, members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association (CSEA) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). The ALJ dismissed the unfair practice charge against the Kern County Office of Education of alleged violations of sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by terminating Mildred Hamaker, a

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

custodian, because of protected union activity rather than failure to perform her assigned duties.

PROCEDURAL HISTORY

By letter dated November 15, 1984, the superintendent dismissed Hamaker from her position as Custodian II. On November 29, 1984, Hamaker filed an appeal to the Personnel Commission, Office of Kern County Superintendent of Schools. On January 7, 1985, a hearing was held before J. S. Wallace, a hearing officer appointed by the Personnel Commission. The hearing continued on January 8 and 17, and concluded on February 8, 1985. The hearing officer recommended and the Commission held on February 17, 1985, that Hamaker's termination be upheld. The employee did not appeal the Personnel Commission's decision to the courts.

On May 2, 1985, the California School Employees Association filed an unfair practice charge with the Board and on June 4,

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herein are to the Government Code. Sections 3543.5(a) and (b) provide, 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.

1985, the general counsel issued a complaint. Respondent Kern County Office of Education filed an answer and formal hearing was held on July 22, 23 and 24, 1985. The ALJ issued a proposed decision on December 30, 1985, and the matter is now before PERB on exceptions to the proposed decision filed by CSEA.

DISCUSSION

We find that the ALJ's findings of fact are free from prejudicial error and we adept them as our own. The Board also affirms his decision in dismissing the unfair practice charge. In adopting the ALJ's findings of fact and affirming his decision, however, we do not approve his disposition of the respondent's motion to dismiss the instant complaint of unfair practice, made at the inception of the hearing, or that portion of his analysis wherein he applies the criteria set forth in Novato Unified School District (1982) PERB Decision No. 210.

I. Motion to Dismiss

Respondent's motion to dismiss was based upon the doctrine of collateral estoppel. Respondent contended that a full evidentiary hearing had been extended Mrs. Hamaker, at her request, by the Personnel Commission of the Office of the Kern County Superintendent of Schools (Commission). The local Commission is established under section 45245 of the Education Code and consists of a member nominated by the employees of the district, a member selected by the district and a third party

selected by the first two nominees. In turn the Commission appoints a hearing officer who, in this case, held several days of hearings and heard 17 witnesses and whose decision terminating Mrs. Hamaker was adopted en banc.

The ALJ, after hearing short arguments, denied the motion on the ground that PERB had established no precedent applying collateral estoppel. While this was true at the time of the hearing in this case, we note that PERB has since addressed the doctrine and a precedent now exists.[2] Because of the Board's affirmance of the substantive issue before the ALJ in this case, it is unnecessary to further consider the issue of collateral estoppel except to reaffirm that collateral estoppel may bar the relitigation of issues before PERB which have been heard and decided in a prior proceeding, where all of the

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[2]In State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, the relitigation of the issue of discrimination against an employee for union activity was barred where the State Personnel Board had decided against the employee in a prior disciplinary hearing. PERB relied upon People v. Sims (1982) 32 Cal.3d 468, and United States v. Utah Constr. & Min. Co. (1966) 384 U.S. 394, 86 S.Ct. 1545, which held that collateral estoppel may be applied to decisions made by administrative agencies when they are acting in an adjudicatory capacity resolving disputed questions of fact and the requirements of due process have been met.

California courts do not distinguish between local boards, state-wide agencies exercising statutory powers, and agencies deriving their authority from the California Constitution, in applying collateral estoppel. (See, City and County of San Francisco v. Ang (1979), 97 Cal.App.3d 673, 159 Cal.Rptr. 56; Greatorez v. Board of Administration (1979) 91 Cal.App.3d 54, 154 Cal.Rptr. 37.)

elements of the doctrine were present. Here, had the parties been provided an opportunity to make a full and complete presentation on the issue, the issue of collateral estoppel could have been properly before us.

II. The Novato Test

Because of difficulties in demonstrating that an unlawful motive, rather than the employer's stated reasons, was the cause of discipline where the employee has engaged in protected activity, this Board in Novato set forth circumstances which, if proved, would support an inference upon which a prima facie case may be based. Novato states at page 6:

> In Carlsbad [Unified School District (1979) PERB Decision No. 89], . . . the Board concluded that unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. Carlsbad, supra, at p. 11; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620; Radio Officers Union v. NLRB, supra, at pp. 40-43.
>
> To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. NLRB v. South Shore Hospital (1978 1st Cir.) 571 P.2d 677 [97 LRRM 3004]. Knowledge along with other factors may support the inference of unlawful motive. The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive. In general, the inference can be drawn from a review of the record as a whole. See Radio Officers, supra.

Application of the Novato test to the record in this case leads the Board to conclude that Charging Party has not made a prima facie showing of an unfair practice.

A. Disparate treatment. The record contains no evidence demonstrating that Hamaker was treated differently from others similarly situated.

B. Timing. Evidence of timing of adverse action in relation to protected activity does not support Mrs. Hamaker's claim. While it is not clear exactly when her employer learned of her union activity, that date is irrelevant because her employment problems predated her protected activity. Her employer's testimony at a separate PERB hearing (Office of Kern County Superintendent of Schools (1985) PERB Decision No. 533) was correctly found by the ALJ to be no more than coincidentally concurrent with the evaluation dated August 8, 1984, and which ultimately led to her termination. The performance evaluation upon which Mrs. Hamaker's separation was based covered the period from June 17, 1983, to June 17, 1984. Mrs. Hamaker was absent on leave from April 4 through July 15, 1984. No significance can be reasonably attached to the employer's delay in discussing Hamaker's evaluation due to her absence.

C. Shifting or Inconsistent Justification. No facts were proven that showed the employer gave varying justifications for the Charging Party's termination.

D. Departure from Established Procedures. Again, we find no evidence in the record that the employer departed from its established procedure*

As none of the above elements could be shown, the Charging Party has failed to establish a prima facie case that she was terminated because of her exercise of protected rights.

The ALJ made specific findings that the Respondent had ample business justification for its action against Charging Party. The findings were unnecessary, however, because the Charging Party never proved a prima facie case, and thus the burden of proof never shifted to the employer to show that, "but for" the protected activity, the termination would nonetheless have taken place.

ORDER

The unfair practice charge and complaint filed in this case are hereby DISMISSED.

Chairperson Hesse and Member Porter joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION. Chapter 512.	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2168
v.	)	PROPOSED DECISION (12/30/85)
KERN COUNTY OFFICE OF EDUCATION.	)	
Respondent.	)	

Appearances: Harry J. Gibbons. Jr.. Attorney. California School Employees Association for Charging Party; Frank J. Fekete. Attorney. Schools Legal Service, for Respondent.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On May 2, 1985. the California School Employees Association. Chapter 512, (hereafter Charging Party, CSEA or Association) filed an unfair practice charge with the Public Employment Relations Board (hereafter Board or PERB) against the Kern County Office of Education (hereafter Respondent or Superintendent of Schools) alleging violation of sections 3543, 3543.1, 3543.5(a) and (b) of the Educational Employment Relations Act (hereafter EERA or Act) (commencing with section 3540 et seq. of the Government Code.[1] On June 4. 1985, the

[1]All section references, unless otherwise indicated, are to the Government Code. Sections 3543, 3543.1, 3543.5(a) and (b) are as follows:

General Counsel of PERB issued a Complaint against the Respondent in this matter. On June 24, 1985. the Respondent

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3543. Rights Of Employees

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6. 3548.7. and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

3543.1. Rights of Employee Organizations

(a) Employee organizations shall have the right to represent their members in their

filed its Answer to the Charge and the Complaint. The parties did not meet in an informal conference in this matter. The formal hearing was held on July 22, 23, and 24, 1985, at the

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> employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.
>
> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.
>
> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.
>
> (d) All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the

Respondent's headquarters. Both sides briefed their respective positions and the matter was submitted on November 13, 1985.

JURISDICTION

The parties stipulated to the Charging Party being an exclusive representative and the Respondent being a public school employer within the meaning of the Act.

INTRODUCTION

This case involves an employee of the Kern County Office of Education, Mildred Hamaker, who was terminated from her employment position as a custodian in November 1984. She alleges that the termination was in retaliation for her protected activities on behalf of the Association. The Respondent insists that whatever protected activities she did engage in had nothing to do with the termination and that her termination was the result of her not properly fulfilling the duties assigned to her.

> negotiating unit shall not be permissible except to the exclusive representative.
>
> 3543.5. Unlawful Practices: Employer.
>
> 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.

RESPONDENT'S MOTION TO DISMISS

The Respondent, very early in the formal hearing proceedings, made a Motion to Dismiss the Charge and Complaint in this matter. The Motion was based on its contention that PERB should defer to the decision of the Personnel Commission of the Office of the Kern County Superintendent of Schools. It supported its Motion with the argument that a full evidentiary hearing was held in the matter of Mrs. Hamaker's termination before a hearing officer appointed by the Personnel Commission, and at that time, one of Mrs. Hamaker's defenses was that she had received discriminatory and retaliatory treatment by the employer because of her participation as a member and officer of CSEA, Chapter 512. The hearing officer, in his conclusions and recommendations stated, "I did not find direct evidence of discriminatory or retaliatory supervisory treatment of this employee." The Respondent insists that PERB should defer to the decision of this neutral body, the Personnel Commission, in precisely the same way that it does to arbitration decisions. Respondent cites Local 8599. United Steel Workers of America, AFL-CIO v. Board of Education of the Fontana Unified School District (1984) 162 Cal.App.3d 823. 209 Cal.Rptr. 16 and Hollywood Circle. Inc. v. Department of Alcoholic Beverage Control, 55 Cal.2d 728, 361 P.2d 712 to support its contentions.

The Charging Party, in rebuttal, cited, (1) the fact that the Personnel Commission's decision, although administratively

final, was still subject to appeal in the Courts on an Administrative Mandamus Writ, Code of Civil Procedure 1094.5; and (2) a number of evidentiary rulings of the Personnel Commission's hearing officer limiting the scope of examination concerning union activities and union animus. The Charging Party also requested a continuance to prepare and submit further evidence in rebuttal to the Motion. It did this to preserve its rights on appeal to present such materials in the future should the Board, itself, decide the Motion had merit. The request for a continuance was denied.

The Motion was denied by the undersigned on the grounds that there have been no precedential PERB cases to date giving decisions of a Personnel Commission the same level of impact as an arbitration decision.

FINDINGS OF FACTS

I. Work Product Incidents

A. Background

Mildred Hamaker was hired as a custodian by the Respondent on February 20, 1979. Throughout the period of time covered by the events of this case CSEA was the exclusive representative of the bargaining unit to which the custodian classification was assigned. Mrs. Hamaker did not become a member of CSEA until April 1983.

B. Early Evaluations

Mrs. Hamaker was formally evaluated four times between June 1980, when she first became a probationary employee and

June 1982. Although she was given "Standard" or "Above Standard" ratings on all of these evaluations, there was a decline in both the number of "Above Standard" marks and the general tone of the accompanying "Comments." In two instances the "Comments" dealt with suggestions that she be careful when lifting objects. During this period Mrs. Hamaker was off work for several periods of time on workers' compensation leave due to back injuries.

C. March 22, 1983 "Out of Work Area" Incident

In the morning of March 22, 1983, Alan Hall, Director of Maintenance and Operations and Hamaker's immediate supervisor, went throughout her work area looking for her. He was accompanied by Dr. Jack Stanton, Director, Research and Development. They were unable to find her in her work area. Approximately 20 minutes later she approached them and said that she had heard that they were looking for her. She explained that she had left her area and gone over to the nurse's office in order to be weighed as part of an employer-sponsored "weight loss" contest. She insisted that she had tried to find and report her anticipated absence to her supervisor but was unable to find him. The contest rules required that she be weighed by the employer's nurse and, as the nurse was often in and out of her office, she went to the office when she knew that the nurse was available. Mrs. Hamaker eventually won the contest with a weight loss of

90 pounds. She estimates she was gone from her duty station only a few minutes. The nurse's office is only a few hundred feet away from Hamaker's work station in a separate, but nearby, building. The employer estimated her absence at 20 minutes.

This incident triggered a meeting with Hamaker. Hall and Stanton that same day. Later that day Stanton wrote a memo to Hamaker which stated that the reason for the memo was to be certain that the issues that were discussed that morning were understood by all parties involved. The memo covered such diverse topics as (1) the fact that Mrs. Hamaker had recently been given a medical release to full duty, (2) a request that she obtain a letter from her doctor stating that she was unable to work from February 15 to March 21, 1983. (3) an upcoming special evaluation of her work, (4) the parameters of her scheduled workday. (5) a specific delineation of her duties, and (6) a concluding sentence which stated "[D]uring this discussion you were afforded the opportunity to ask any questions and make any comments you deemed appropriate or necessary."

The general tone of the memo was business-like but was not specifically negative or punitive. There was no evidence proffered at the hearing which would suggest that employees who are meeting all the standards in their assigned tasks would receive such a memo. It is inferred from the lack of such

evidence and from the general tone of the text that although the memo, on its face, was not punitive the very fact that Mrs. Hamaker's supervisors felt it necessary to issue such a memo meant that such letter could reasonably be interpreted as a warning that, in their opinion, she had not previously been adhering to the scheduled workday and list of duties set forth.

In April 1983 Mrs. Hamaker became a member of CSEA.

D. The May 9, 1983 Special Evaluation

On May 9, 1983, Mrs. Hamaker received a special evaluation. In the 27 separate categories in which she received a rating she received 13 ratings of "Standard," 8 of "Improvement Needed." and 6 of "Unsatisfactory." The six "Unsatisfactory" ratings were in neatness, thoroughness, attendance, follows instructions, initiative and attitude. In the "Comments" section Mr. Hall, the rater, stated that improvements in the deficient areas "are to be made prior to her annual evaluation date of June 17, 1983, or it will be recommended that disciplinary action be taken by this office." The evaluation form stated that Mrs. Hamaker refused to sign it.

Mrs. Hamaker prepared and attached a rebuttal to the special evaluation. In her rebuttal she insisted that she had not been uncooperative and that she had been doing the same amount of work in the same way that she had in previous years and had consistently received "Standard" or above ratings in the past. She stated that she did not see how her work could

have changed so drastically within a few short months. With regard to her "Unsatisfactory" rating in attendance she cited the fact that she had "over two days of sick time left and quite a bit of vacation time."

Mrs. Hamaker, in her rebuttal, also insisted that she did not refuse to sign the evaluation form and that Hall never gave it to her for her signature. She admits to having had health problems but insisted that she had been doing what she could to improve her health. In summary she stated that she felt that the marks given her on that evaluation were in general unfair and untrue. Nowhere in her rebuttal does she state that the marks were a result of any union activity on her part.

E. The June 17, 1983 Annual Evaluation

On June 17, 1983, Mrs. Hamaker received her Annual Evaluation. She received 25 ratings of "Standard" and 2 of "Improvement Needed." The two lower ratings were in Attendance and Health and Vitality.

The Comments section contained the following:

> Mrs. Hamaker's attitude and work performance have both improved since her special evaluation on May 9, 1983. Attendance still has room for improvements. Supervisory personnel will continue to monitor and subsequent special evaluations will be made if deemed necessary.

F. The August 8, 1984 Evaluation and Accompanying Termination Recommendation

On August 8, 1984, a little over a year later, Mrs. Hamaker received another Annual Evaluation. Of the 27 categories rated

she received 10 ratings of "Standard," 8 of "Improvement Needed," and 9 of "Unsatisfactory." The Unsatisfactory ratings were in Thoroughness, Meeting Schedules, Speed of Work, Volume of Work. Adaptability, Attendance. Dependability, Organization, and Health and Vitality. The overall performance rating in this evaluation was "Unsatisfactory" and her termination was recommended. In the "Comments" section the rater. Alan Hall, inserted the following narrative:

> Prior to Mrs. Hamaker's special evaluation on 5/9/83, her work was becoming increasingly unsatisfactory. A discussion was held on that date and Mrs. Hamaker participated in that discussion. She was told at that time that there would be another evaluation soon. The subsequent evaluation was done in 6/19/83. Her work and her attendance did improve between the two evaluations and was so noted. Since the 6/19/83 evaluation, her work and her attendance have steadily deteriorated. Her work load has been lightened because she has asserted to me that she has certain physical limitations, but her performance remains inadequate. Mrs. Hamaker disappears from her assigned work area for extended periods of time. This makes her inaccessible for urgent requests or for instructions. She has been repeatedly instructed to remain in her assigned work area and she has consistently ignored those instructions. Her absences from her assigned area have placed additional burdens on her fellow employees because they have to substitute for her even when she is here.

Hall later admitted at both the Personnel Commission hearing and at the formal hearing in this case that Hamaker never asserted to him that she had certain physical limitations.

Following these "Comments" Supervisor Hall inserted a series of summarized Incident Reports as examples of the concerns he had indicated on the evaluation form.

Although the PERB is not empowered with the authority to determine whether the Respondent was justified in terminating its employee it does have the right and responsibility to determine whether or not such employee was terminated due to activities protected by the EERA. In order to determine whether a violation of the Act occurred it is necessary to examine the manifested reasons given by the employer for such termination.

Each of the Incident Reports included in the August 8 evaluation will be set forth, verbatim, followed by such additional circumstances as were presented at the formal hearing:

> 1. On August 12. 1983, Mrs. Hamaker requested to take 3 days Personal Necessity, 2 days Personal Necessity - No Reason, 2 days Comp. Time, 7 days Vacation and 7 days Off Without Pay. Subsequently, Dr. Stanton reported the following:
>
> > Had discussion with Mildred Hamaker about my concerns over the attached requests to have the entire month of September off duty.
> >
> > The following points were stressed:
> >
> > 1. Earlier evaluation had criticism and low rating regarding attendance.
> >
> > 2. Same criticism may be made again.

3. This action leaves her with no Sick Leave days or Personal Necessity days.

Mrs. Hamaker said she still needed to go.

Hamaker's Rebuttal

Management granted the leave although somewhat reluctantly. If asking for the leave supports a termination why did they grant it? It is unfair to grant a leave and then chastise an employee for requesting it.

2. On August 31, 1983, the last day prior to her vacation, she received 1/2 day Sick Leave. While she was on vacation, she called to inform Irene Mitchell (Office Manager) that one of her grandparents (that she was traveling to visit) had passed away. Subsequently, 5 of her days Off Without Pay were changed to Bereavement Leave.

Hamaker's Rebuttal

She did not request that she be given the Bereavement Leave. Mitchell or someone else in the office, credited her with such leave without asking her about it.

3. On February 21, 1984, Mrs. Hamaker requested a Leave of Absence from 3 p.m. to 5 p.m. to meet with her physician, Dr. Armstrong. Mrs. Hamaker was seen by Jess Gaitan and Wayne Roberts at approximately 4 p.m. at the Aurally Exceptional Center.

An inquiry as to the time of her appointment with Dr. Armstrong's office revealed that her appointment for February 21, 1984. was for 11:45 a.m.. however, she was late for her appointment, according to Dr. Armstrong's receptionist, and her appointment eventually began at 12:30 p.m. on that date.

In the second sentence of the first paragraph above, after the words. "Mrs. Hamaker was" the words "reported to have been" were inserted in cursive writing. The original copy of the report itself was typewritten. These words were inserted by the Respondent during an investigative process that occurred after the initial recommendation had been promulgated. Later, an amended copy was retyped and inserted into her personnel file. This process was initiated after Mrs. Hamaker had been given an opportunity to respond to these Incident Reports. The purpose of the investigative process was to determine whether Mr. Hall's recommendations would be supported by Respondent's administration.

Note: This incident was never put in separate written form by Alan Hall; nor was it discussed with Mrs. Hamaker until after the August 8, 1984 evaluation form was prepared.

Hamaker's Rebuttal

Mrs. Hamaker went to Dr. Armstrong's office on her lunch break between noon and 1 p.m. for her medical appointment. Dr. Armstrong told her to obtain some X-rays. She received an appointment for the X-rays later that same day. Mrs. Hamaker went back to work and asked to take medical leave between 3 p.m. and 5 p.m. According to the uncontradicted testimony of both Mrs. Hamaker and Mrs. Lucille Haven, the technician who took the X-rays. Mrs. Hamaker arrived at Mrs. Haven's office at 3:45 p.m. and stayed until 4:30 p.m. This testimony is

corroborated by the fact that Mrs. Haven left work at 4:30 p.m. in order to catch a bus and her log for that day shows that Mrs. Hamaker was the last person to receive an X-ray that day. The particular series of X-rays given to Mrs. Hamaker usually take approximately 25 minutes. The X-ray log was first shown to the Respondent at the Personnel Commission hearing.

The direct testimony of Mrs. Hamaker and Mrs. Haven contrast with the hearsay statements contained in the Incident Report. According to the Incident Report Gaitan and Roberts saw Hamaker at her husband's work site, the Aurally Exceptional Center, at "approximately" 4 p.m. Mrs. Hamaker testified she left the X-ray office at 4:30, too late to return to work, and proceeded home without ever going to the A.E. Center.

When Hall, or someone on his behalf, called Dr. Armstrong's office he was informed, correctly but incompletely, that Mrs. Hamaker had been in the doctor's office at about 12:30 p.m. Based on this limited and incomplete information Hall concluded that Hamaker had abused her medical leave request. Neither Gaitan nor Roberts testified at the formal hearing about the facts in this incident.

Mr. Hall did not ask Mrs. Hamaker for an explanation at the time of the incident in January but rather noted the incident and five months later used the incident to support a termination recommendation.

4. On March 1, 1984, on two separate occasions, once in the morning and once in

the afternoon, neither time Mrs. Hamaker's assigned breaktimes, Joyce Bussell entered the Custodial Storage Room nearest the Lounge to make announcements on the loudspeaker. On both occasions, Mrs. Hamaker was standing and apparently reading a magazine which she quickly covered and tried to conceal.

Note: This incident was never put in separate written form by Alan Hall; nor was it discussed with Mrs. Hamaker until after the August 8, 1984 evaluation form was prepared.

Hamaker's Rebuttal

Mrs. Hamaker did not submit any testimony or other evidence in rebuttal of this particular charge.

5. At 10:40 a.m., March 23, 1984, Barbara Bergquist reported to Joyce Bussell that Mrs. Hamaker was sitting and apparently reading in one of the stalls in the east Ladies' Room. Barbara also stated that she had observed that Mrs. Hamaker has often been in the Ladies' Room - apparently reading since you could clearly hear her turning the pages of a book or a magazine. Mrs. Hamaker also stayed for some time since she did not leave the room before Barbara did.

Joyce Bussell checked the same Ladies' Room at 10:50 a.m. and also observed that Mrs. Hamaker was apparently reading and that she was still there when Joyce left the room several minutes later.

Note: This incident was never put in separate written form by Alan Hall nor was it discussed with Mrs. Hamaker until after the August 8, 1984, evaluation form was prepared. Mrs. Hall's secretary did, however, make and keep notes about the incident.

Hamaker's Rebuttal

Mrs. Hamaker denied that she ever took a magazine or a newspaper into the ladies' room or that she ever was reading in one of the stalls there. She also testified that she would find reading material, obviously brought in there by others, in both the men's and ladies' restrooms several times a week when she went in there to clean.

> 6. Mrs. Hamaker was released at noon on April 18 by her physician, Dr. Pulskamp, to return to work. She did not report for work until 2:05 p.m. on April 19.

Note: This incident was never put in separate written form by Alan Hall; nor was it discussed with Mrs. Hamaker until after the August 8, 1984 evaluation form was prepared.

Hamaker's Rebuttal

This criticism is also based on an incomplete investigation. Had Mr. Hall inquired of Mrs. Hamaker. he would have found out that although Mrs. Hamaker's doctor had released her to return to work on April 18, 1984. she had to go to the emergency room at Mercy Hospital once, her doctor's office once, and return to the hospital for further tests within the next 24 hours. District attendance records show that Mrs. Hamaker worked sporadically for two weeks after this incident and was then off for the next two months. All of this time off was due to worker's compensation leave. Once again, there was no immediate inquiry as to what Mrs. Hamaker's version of the incident was. Hall merely noted the incident

and used it two months later to support a termination recommendation.

7. In a memo dated 4/9/84, from Alan Hall to Jack Stanton. Mr. Hall requested suggestions for additional duties for the substitute for Mrs. Hamaker. In that memo. Mr. Hall stated:

> I would like to bring to your attention that the substitute custodian for Mrs. Hamaker (Dale McCoy) has been covering all of the assigned tasks in Mrs. Hamaker's work area so efficiently that he has time for additional assignments. This was also the case when Mrs. Calhoun substituted for Mrs. Hamaker two weeks ago.
>
> I would like any suggestions you might have for additional duties besides the ones I have already given him. He is already working on some areas that have been neglected for some time because of Mrs. Hamaker's absences and performance evaluations.
>
> I would also like to point out that Mrs. Hamaker's routine duties are being accomplished by Mr. McCoy in less than 3 hours. She required 8 hours for the same duties. I have also observed that Mr. McCoy is easily located for requests and instructions since he is always working in the assigned work area and he adheres to the work schedule assigned to him.

Note: Although reduced to writing on April 9. 1984 the subject of this memo was not shown to or discussed with Mrs. Hamaker until after the August 8, 1984 evaluation form was prepared.

Hamaker's Rebuttal

Mr. McCoy did not testify as to the length of time it took

him to complete his duties. Mrs. Hamaker insisted that it would be virtually impossible for anyone to complete her former duties in three hours.

8. On July 25, 1984. Harry Coleman. Mrs. Hamaker's leadperson. reported:

> I have told Mrs. Hamaker on at least three occasions during the last 12 months and again today that she is to remain in her work area at all times, except on her lunch and break periods. The reason for these requests is that too often Mrs. Hamaker cannot be located in or near her work station when she is needed.

Note: Although reduced to writing on July 25, 1984 this memo was not shown to or discussed with Mrs. Hamaker until after the August 8, 1984 evaluation form was prepared.

Hamaker's Rebuttal

There was no direct evidence regarding Mrs. Hamaker being out of her work area other than the March 1983 incident which was discussed earlier. The March 1983 incident, Hamaker contends, was effectively rebutted by the overall rating of "Standard" in her June 30. 1983, Annual Evaluation and the following "Comments" contained therein: "Mrs. Hamaker's attitude and work performance have both improved since her special evaluation on May 9. 1983.

Coleman himself did not testify. Hamaker insists that Coleman never told her he was upset with her actions regarding leaving the area other than a memo concerning that subject from him on March 22, 1983. Rather, in the conversations she had

with him he spoke generally about all the custodians and told Hamaker to be careful because "they are watching us." She did not take these remarks to be aimed directly at her nor did she interpret them as criticisms of her work performance. She admits she might have said something about staying in her work area but she really doesn't remember it. She remembers only one other occasion, prior to April 1984, when Coleman told her Hall and Stanton were "raising hell" about custodians in general.

> 9. Mrs. Hamaker does not demonstrate the necessary dedication to the duties of her position. Although she worked only 153 days of her 250 day schedule for 1983-84 and was on leave July 1 through July 25, she has requested vacation for the full period of August 31 through September 28. 1984.

Hamaker's Rebuttal

Much of the lost time can be attributed to workers' compensation leave and should not be held against her. The vacation leave was granted by her supervisor and the Respondent's management. If the Respondent did not feel she should have taken the September vacation it should not have granted her leave to do so. By granting her that vacation period her supervisors are estopped from complaining that she went on vacation.

G. General Work Deficiency Compilations by Hall's Secretary

Joyce Bussell, Hall's secretary, collected the written materials and oral reports which formed the basis of the nine sections of the June 1984 termination recommending evaluation.

Bussell did not testify as to when she began to formally compile this information. She did testify that she had been receiving informal reports from employees for "months" before she began to compile them for Hall's use. She had not considered these reports "terribly important" until later. They became more important in the overall picture as their frequency increased. Hall and Stanton mentioned to her that Hamaker's performance was deteriorating.

The ladies' room reading incident, for example, had been preceded by similar incidents for over a month prior to Bussell actually calling the incident, reported in the June 1984 evaluation, to Hall's attention.

Bussell further testified that when Mrs. Hamaker first came to the main building as a custodian everyone was pleased with her work performance. However, in early 1982 the custodian hours were changed to 8:30-5:00 in order to conserve on energy costs. Bussell does not remember what Hamaker's hours were prior to that date but does remember that she (Hamaker) requested an earlier starting time -- some time between 7:00 and 7:30 a.m. The request was denied. The administration believed that, for her own safety, a woman should not be in the building alone. Mrs. Hamaker's work performance started to deteriorate after that schedule change denial.

H. Charging Party's Rebuttal Witnesses

The general tone of both the nine Incident Reports attached to the June 1984 termination recommendation as well as

Joyce Bussell's testimony support an inference that Mrs. Hamaker's assigned areas were not properly cleaned and otherwise cared for. In rebuttal, Charging Party brought in a number of employees who were assigned work space in the subject areas to testify in Hamaker's behalf.

Those testifying were Mark Underwood, a former maintenance worker, Adrian Agundez, a former electronic equipment repairman, Frances Callahan, a supervisor in the Payroll and Auditing Section and Lauren Barnes, the Director of Instructional Resource Center. Mr. Barnes went so far as to write, on August 15, 1984, one week after Hamaker received the termination recommendation, an unsolicited memorandum praising Mrs. Hamaker's job performance. However, Hall testified that Hamaker's performance would improve for a certain period of time after each negative evaluation or "talking to."

Mrs. Hamaker worked in the west end of the Respondent's main building from about 1980 until July 1984 and in the east end from July 1984 until her termination. Callahan and Underwood observed Mrs. Hamaker's performance in the west end of the building during the time covered by Mr. Hall's April 1984 memorandum. Barnes and Agundez observed her performance in the east end from July 1984 until her termination.

I. Mrs. Hamaker's Grievance Procedures

Mrs. Hamaker grieved her evaluation and its accompanying termination recommendation. After the superintendent conducted

an investigation the grievance was denied on October 25, 1984. According to the rules and regulations and other laws pertaining to this public school employer a hearing was held before the Personnel Commission of the Respondent. The four-day hearing was held before an independent hearing officer. During this termination hearing 17 witnesses testified. 9 for the Respondent and 8 for Mrs. Hamaker. at least one of which was an adverse witness. Alan Hall.

Mrs. Hamaker's appeal was based on the following reasons:

1. The charges are untrue and do not reflect the real reason for my dismissal.

2. The quality and speed of my work is not and has never been the issue, and further, is not and has not been below standard.

3. My absences from work were due to illnesses and can be so proved. I have no control over an injury or illness and this should not be held against me.

4. My immediate supervisor has discriminated against me for my affiliation with the employee organization. CSEA.

5. If the facts were investigated, it could be proved that the charges set forth are not the true facts.

The hearing officer submitted the following conclusions and recommendations:

> Upon reviewing the findings of this hearing it is my conclusion that the charges by the superintendent are supported by the evidence. No one charge in itself would be sufficient to warrant so severe a penalty.

> but taken as a whole they constitute a pattern of unsatisfactory performance. Further I did not find direct evidence of discriminatory or retaliatory supervisory treatment of this employee.
>
> Therefore, I recommend to the commission that the dismissal action taken by the Kern County Superintendent of Schools be upheld.

On February 19, 1985, the Personnel Commission of the Kern County Superintendent of Schools met in executive session and found that the following charges were sustained and that no evidence of discrimination was found.

1. Lack of thoroughness.

2. Lack of speed and volume of work.

3. Failure to meet schedules and frequent absence from work areas.

4. Unsatisfactory attendance and dependability.

5. Unsatisfactory health and vitality to meet the demands of the job.

The reasons cited by the Commission for those findings are as **follows:**

1. It was demonstrated repeatedly in the hearing that Mrs. Hamaker's responsibilities were not carried out in a thorough manner, particularly in regard to details of cleaning.

2. Lack of speed and volume were shown when substitutes were able to accomplish her work assignment in less **time than** did she. It was necessary to move her to a less demanding work assignment area.

3. This employee was frequently away from her work area and often could not be counted upon to meet prescribed work schedules.

4. Her poor attendance pattern during 1983-84, primarily because of workers' compensation sick leave, contributed to her unsatisfactory evaluation.

5. Mrs. Hamaker's health became so poor that she could not accomplish the ordinary tasks of her assignment satisfactorily. These prescribed duties brought on an inordinate number of work-related illnesses.

The ruling of the commission was that the dismissal order of the superintendent be upheld. The dismissal was effective on November 16, 1984.

II. Protected Activity

A. Mrs. Hamaker's CSEA Activities

Mrs. Hamaker started working for the Respondent in February of 1979, became full-time in June of 1980 and joined CSEA in April of 1983, shortly after she received her first "warning" letter and shortly before she received her first negative evaluation.

In February or March 1984 Melinda Poison, CSEA chapter president, asked Hall to change Mrs. Hamaker's lunch period from 12:00 noon to 1:00 p.m. in order to allow her to attend a CSEA meeting. The meeting was with the local CSEA leadership and some out-of-towners to plan strategy for the upcoming

decertification election. Hall was not told of the reason for the meeting but due to the upcoming decertification election it was logical to assume that decertification was the subject of the meeting. Mr. Hall said that there would be no problem with her changing her lunch period. It was at this time that he first learned of her status as an officer in the CSEA chapter, although he knew of her membership earlier. He did not remember exactly when or how he learned of that membership.

During late summer/early fall of 1983, CSEA, the exclusive representative, circulated a proposed collective bargaining agreement among the rank-and-file. There had been no such agreement prior to this time. A number of employees became upset over this action and circulated the following statement which came to be known as the Letter of Concern.

> Employees of the Kern County Superintendent of Schools Office receive benefits equal, if not superior to, any other public agency in the State. These benefits are paid by the Kern County Superintendent of Schools Office with no contributions from employees. Unlike most school districts, we have now been placed in a position of negotiating increased costs for the benefits we receive.
>
> We have always had a very close working relationship with Dr. Richardson and Dr. Blanton in regard to employee/employer matters.
>
> During the recent money shortage situation, not one classified employee was laid off or fired. This is contrary to the common practice of school districts. Classified employees are more easily and quickly dismissed than certificated employees. In the recent reduction of positions in the

office due to financial difficulties, no more classified positions were reduced than certificated positions.

CSEA. Chapter 512, is asking that its members draft a collective bargaining agreement proposal to be presented to the administration. Since the law and the merit system provide specific and detailed guidelines on employee rights, it is assumed that a collective bargaining agreement would cover potential salary increases and fringe benefits.

While the merit system is sometimes hard to understand and sometimes hard to implement, it does provide more protection for employees than any other negotiated contract in the schools system.

Since our office currently possesses one of the best fringe benefit programs for employees would it not be extremely harmful to re-negotiate these benefits. By re-negotiating a "good thing." employees could find themselves faced with the possibility of paying all or a part of increased premium costs.

CSEA has never contributed a thing toward building the tremendous job security we presently have, toward building the competitive salary schedule we presently have, nor the tremendous fringe benefits we presently have.

There is an old saying: "If it is not broken, don't fix it." The only possible thing that classified employees could gain from changing our present policies of representation for employees is confrontation, conflict, controversy and divisiveness with the possibility that we could become the big loosers [sic] in the end.

It is not right that a few (40) employees should take it upon themselves to change what is so important to so many with less

> than three days notice and without giving the other approximately 300 classified employees a chance to express their views.

On the copy of the Letter of Concern entered into evidence the first signature below the text was that of Alan Hall, Mrs. Hamaker's immediate supervisor.

Shortly after this Letter of Concern was circulated a number of classified employees organized and mounted a decertification campaign against CSEA. The employees supporting this decertification campaign formed an organization called the Superintendent of Schools Classified Association or SOSCA. Alan Hall was in favor of such campaign and went so far as to carry a copy of the "Letter of Concern" out to employees in the field in order to facilitate their signing such document.

Throughout this campaign Mrs. Hamaker spoke out in favor of CSEA, wore a CSEA button to work and regularly attended CSEA meetings. Sometime during this period, probably on January 1, 1984, but the evidence regarding the exact date is sparse and conflicting, she assumed the office of the secretary of the CSEA chapter. Hall was aware of her having become a CSEA officer a month or two later. After assuming the office of secretary, Hamaker would sit at the head table at all CSEA meetings with the rest of the officers. However, there was no evidence proffered at the hearing that stated or inferred that Hamaker was involved in any grievance meetings, engaged in any confrontations with management on CSEA's behalf or sponsored or circulated petitions regarding management policies or positions.

B. Alan Hall's Actions vis-a-vis CSEA/SOSCA Conflict

One incident concerning Stanton. Hall and Hall's secretary. Joyce Bussell, should be noted. Bussell was presented a document by the two men. She gave it a very cursory reading. She is very active in local partisan politics and has strong pro-union beliefs. The document made her angry. Stanton and Hall were both previously aware of her views on such matters. Her attitude towards the document was apparent from her action. She had "utter contempt" for the document, put it back in the in-basket and walked out. She was not asked to sign the document. When Dr. Stanton became aware that she was going to be testifying at the previous PERB formal hearing he mentioned to her that he had not shown her a petition but the Letter of Concern. She is not absolutely certain whether the document was the Letter of Concern or a decertification petition.

A decertification election was held and won by SOSCA on March 24, 1984. Hall was linked by at least two witnesses with the dissemination of the petition to request a decertification election. CSEA, however, contested the results and a hearing was held in July of 1984 regarding the circumstances surrounding such appeal. Mrs. Hamaker was not a witness at the hearing. However. Hall was a witness. The hearing concluded on July 19, 1984. The PERB administrative law judge ordered a new election, both parties filed exceptions but the PERB, itself, affirmed the proposed decision and ordered a new

election in Office of Kern County Superintendent of Schools (1985) PERB Decision No. 533. The Respondent is presently under an order to post the Board's decision. A new election will follow.

The administrative law judge in that case, in the Conclusions of Law section of her Proposed Decision, concluded the following with regard to Alan Hall's actions vis-a-vis the Letter of Concern:

> There is no dispute that Hall, however innocently, made known his disapproval of certain CSEA activities. In addition to his statements. Hall signed the letter of concern and assisted in its circulation. On working time, he transported the letter of concern to Duane Haskins and gave him an opportunity to read it, review it and sign it. Moreover, during working hours, he invited Garbett and Salazar to review and sign the letter of concern and when they indicated that they were CSEA members, they were ordered back to work. In addition, Hall directed two other employees. Joe Riehl and Mark Underwood to go to Kathy Freeman's office for the purpose of reading and reviewing, and possibly signing, the letter of concern.

The administrative law judge eventually concluded that,

> (S)uch conduct by the supervisor, although admittedly not egregious, crosses over the line of a permissible expression of opinion. Given the content of the letter, given his active role in both its distribution and the gathering of signatures, it is found that the employer violated the Act.

The Charging Party stressed, in its brief, the fact that Hall's termination recommendation was given to Hamaker a few

days after Hall was called as a witness in the decertification appeal hearing. However, it must be noted that Hamaker was on a workers' compensation leave from March 28 to July 25. with the exception of a few partial and some full days in late April. July 25 was the first time in over three months that Hamaker had been back to work in anything near a full-time capacity.

ISSUE

Was Mildred Hamaker terminated from her position as a custodian at the Kern County Office of Education in violation of section 3543. 3543.1. 3543.5(a) or (b)?

CONCLUSIONS OF LAW

I. Precedent and Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89, set forth the following test for the disposition of charges alleging violations of section 3543.5(a) or (b):

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

> employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> (4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> (5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. (Emphasis added.)
>
> Proof of Unlawful Intent Where Offered or Required
>
> Unlawful motivation, purpose or interest is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles, the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.

In Novato Unified School District (1982) PERB Decision No. 210, the Board clarified the Carlsbad test for retaliation or discrimination in light of the NLRB decision in Wright Line (1980) 105 LRRM 1169. In Novato, unlawful motive must be proven in order to find a violation.

In both cases, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case. Charging Party-must first prove the subject employees engaged in protected activity. Next, it must establish that the employer had knowledge of such protected activity.

In that regard, section 3543 of the Act grants public school employees,

> . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

There is little doubt that Mrs. Hamaker was engaged in some level of protected activity in her role as secretary of the local CSEA chapter. Nor is there doubt that the District, in general, and her immediate supervisor, Alan Hall, in particular were aware of her position with the Association early in 1984. The crucial question is whether the termination was motivated in whole or in part by her participation in such protected activity.

Any level of such activity is protected by the Act. However, the level of protected activity becomes important later when we are required to measure the reasonableness of the Respondent's actions towards her. A negative employment evaluation is more likely to be attributed to protected activity when the subject employee is an active antagonist in comparison to other employees. Conversely an employee who engages in passive and nonconfrontational behavior is less

likely to incur the wrath of his/her employer and provoke the type of negative employment retaliation that is actionable under section 3543.5(a).

Mrs. Hamaker's "activism" with the CSEA was at a relatively low level. She could not remember if she was elected more than once to union office. She could not remember when she became the secretary of the local chapter. She did remember that it was in April but could not remember whether it was in 1983 or 1984. Later she thought it was near the end of some year. She also said that she "spoke up" at CSEA meetings and wore a CSEA button at work. She also sat at the head table at those CSEA meetings. She never accompanied or represented other union members at grievance meetings nor was there any evidence that she ever engaged in any confrontational or adversarial dialogues with any members of supervision or management over employer-employee relations issues.

However, it is not only Mildred Hamaker's CSEA participation that must be examined in order to determine whether or not there was a violation of the Act. Alan Hall's actions regarding the Letter of Concern and the decertification petition both left little doubt on which side of the CSEA/SOSCA controversy he stood. His actions regarding the "sounding out" of his secretary on signing the Letter of Concern add weight to his partisan role. These facts are important to the ultimate determination, as his advocacy, as concluded in the previous

proposed decision, and affirmed by the Board itself, in its decision, would reasonably create a heightened level of sensitivity to those employees that disagreed with his position.

The incident in early 1984 concerning CSEA president Poison asking Hall to change Hamaker's lunch period in order to accommodate the scheduling of a CSEA leadership meeting would tend to negate, somewhat, the image of Hall as an avowed supporter of the SOSCA cause and one prone to take swift and heavy handed measures against anyone opposing his views.

II. Examples of Circumstances to be Examined

Novato sets forth examples of the types of circumstances to be examined in a determination of whether or not union animus is present and a motivating factor in the employer's action. The types of circumstances to be examined are (1) disparate treatment of the Charging Party. (2) proximity of time between the participation in protected activity and the adverse action, (3) inconsistent explanations of the employer's action(s), and (4) departure from established procedures or standards. Each of these will be examined in order.

A. Disparate Treatment of the Charging Party

The only real disparate treatment alleged by the Charging Party in this case can be subsumed within the third of the Novato enumerated circumstances, inconsistent explanations of the employer's actions, and consists of the Charging Party's rebuttal of the employer's manifested reasons for

Mrs. Hamaker's termination. These allegations will be dealt with below.

B. Proximity of Time Between the Participation in Protected Activity and the Adverse Action

There are two separate and distinct circumstances to be analyzed with regard to this category. The first deals with the beginning of Mrs. Hamaker's membership in the Association and the second concerns a time correlation between Mr. Hall's testimony in a PERB formal hearing and his recommendation of Mrs. Hamaker's termination. These circumstances will be dealt with separately.

1. Mrs. Hamaker's Membership Enrollment

Mrs. Hamaker worked for the Respondent from early 1979 to June 1980 as a part-time temporary custodian. She became a probationary full-time employee in June of 1980. She was evaluated four times between June of 1980 and June of 1982. Although her ratings were standard or above in all of these evaluations they did show a general decline from the first to the last. In 1983 she had some difficulty with her immediate supervisor, Mr. Hall, and their supervisor, Dr. Jack Stanton. She was given a memorandum which did not specifically chastise her but would not have been necessary had these two men felt that she was performing her assigned tasks adequately.

She joined the CSEA a month later. On May 9, 1983. a month after she joined CSEA and two months after her memo from

Dr. Stanton she received a special evaluation with an overall evaluation of "Improvement Needed."

This chronology is set forth, not necessarily to give added validity to the negative evaluation, nor to suggest that Mrs. Hamaker joined CSEA to obtain assistance should there be any adverse employment action against her. There is no empirical evidence to support such an inference. The chronology is set forth to show that the negative evaluation preceded even her membership and certainly whatever level of activism she attained later in her employment career.

2. Time Correlation Between Mr. Hall's Testimony in a PERB Formal Hearing and His Recommendation of Mrs. Hamaker's Termination

In the usual circumstance the Charging Party attempts to show that a particular action of an employee was followed by a corresponding retaliatory employer reaction. In this case we have a novel approach in that the Charging Party is attempting to show that Hall's CSEA animus was heightened by his stint as a witness in the unfair practice formal hearing and that this heightened animus was the reason for the termination recommendation.

Mr. Hall did testify at the PERB formal hearing called to determine whether there had been an unfair practice committed and whether such unfair practice would operate as a bar to the certification of the results of the decertification election. His testimony was given during the formal hearing, which was

held on July 17, 18. and 19. He recommended termination for Mrs. Hamaker on a Classified Performance Review (evaluation form) dated August 8. 1984. The Rating Period was from June 17. 1983 to June 17, 1984. The reason for the rating was given as an Annual Evaluation.

Although the date of the recommended termination was approximately six weeks after Hall's PERB testimony it must be noted that Hamaker was not available to be given any sort of review, annual or otherwise, between April 4 and July 25 with the exception of a few days near the end of April. Therefore, even if Hall had determined on May 1 that he must recommend Hamaker's dismissal he would not have been able to serve the termination recommendation on her until she returned in late July. It is also not unreasonable for Hall to have delayed preparing the Annual Review due to serious doubts as to whether Hamaker would ever be returning to her employment after what amounted to almost a four-month medical leave.

C. Inconsistent Explanations of the Employer's Action(s)

It is under this category that the Charging Party sets forth what it considers its most persuasive evidence. Its point by point rebuttal to each of the allegations set forth by the employer to support Mrs. Hamaker's termination has been set forth in the Findings of Fact, supra, and need not be repeated here. Its rebuttal, in many cases, had some merit. However, as pointed out before, PERB is not empowered with the authority

to determine whether the Respondent was justified in terminating its employee. However, when PERB exercises its authority to determine whether or not such employee was terminated due to activities protected by the EERA, it must examine the manifested reasons for the termination in order to determine whether these reasons reasonably support the termination. A determination that the reasons given by the employer are not sufficiently plausible to support the termination will give rise to an inference that there must be some other reason for the termination. This inference can lead to a determination, if supported by sufficient evidence, that the employee is correct when he/she insists that the termination was due to protected activities.

An examination of the evidence offered by the District to support the termination and the rebuttal evidence offered by Mrs. Hamaker results in the following synopsis.

Charges 1, 2 and 9 should be rejected. Charge 1 deals with a request to go on leave that was granted by the employer. Charge 2 concerns an acceptance (a passive acceptance insists the employee) of bereavement leave. Charge 9 concerns the inordinate use of workers' compensation leave. There is no negative inference to be drawn from the talcing of a leave granted by the employer. Mrs. Hamaker, according to the unrebutted evidence, used the bereavement leave for exactly the reason that it was supposed to be used. The fact that she

combined it with an already scheduled leave does not suggest any impropriety. Workers' compensation leave is to be used for the rehabilitation of persons injured on the job. If the District feels there was something improper about her injuries or the length of her rehabilitation they have their remedies through the workers' compensation law. a punitive termination is not one of those remedies.

However, after disregarding those three charges we still have six other specific charges before us. They range chronologically from February 21. 1984, to July 25, 1984. They encompass seven separate incidents of either not being in her work area at the appropriate time or completing an inadequate level of work. The employer relied, directly or indirectly, on eight separate employees. One of these employees was, if anything pro-CSEA, or at least pro-union in general and refused to have anything to do with either the Letter of Concern or the decertification petition, testified that she had been receiving informal reports from employees for months before she began to compile them for use by Mrs. Hamaker's supervisor. The only rebuttal we have is (1) four employees who said that they thought Mrs. Hamaker was doing a good job, one of whom wrote an unsolicited letter praising her job performance, (2) an X-ray technician who said she administered an X-ray at the time that two other employees said she was at her husband's place of employment, and (3) Mrs. Hamaker's insistence that all of the

District's evidence and supporting testimony is in error. The "praise" letter, it must be noted was dated one week after Mrs. Hamaker received her termination recommendation which raises a legitimate question of its status as "unsolicited." In addition, we have three Certificated Employee Reviews on record which encompass a 15-month period of employment, two of which insist that she was doing either "Improvement Needed" or "Unsatisfactory" work, and one of "Standard." The "Standard" and "Improvement Needed" evaluations preceded her becoming an officer in CSEA. She also has a letter from her second level supervisor dated 16 months prior to her termination recommendation in which he finds it necessary to delineate her duties and hours and make specific mention that "the level of cleanliness in your area of responsibility has been acceptable during these last three weeks, a period during which you were not on duty." This letter was dated prior to her joining CSEA.

It is determined that there are too many independent corroborating witnesses, too little hard rebuttal evidence and too many negative employment evaluations over too long a period of time, some of which was before any protected activity, to conclude that the reasons given by the employer were implausible. This is not necessarily a conclusion that the employer was justified in dismissing the subject employee but rather a determination that the reasons given by the employer were not so implausible as to give rise to an inference that there was some other reason for the termination.

D. Departure from Established Procedures or Standards

The Charging Party insists that the employer departed from established procedures in two separate and distinct areas.

First, it failed to notify Mrs. Hamaker that various negative incident reports were being prepared against her. Second, the employer stated in Hamaker's June 17, 1983 Annual Evaluation, that:

> Mrs. Hamaker's attitude and work performance have both improved since her special evaluation on May 9. 1983. Attendance still has room for improvement. Supervisory personnel will continue to monitor and subsequent special evaluations will be made if deemed necessary.

This, the Charging Party insists, obligated the employer to issue a special evaluation prior to any termination. No further evaluations were issued prior to the termination recommendation.

1. With regard to the first allegation of departing from established procedures the Charging Party cites Education Code section 44031[2] and Miller v. Chico Unified School District (1979) 24 Cal.3d 703, 711-712.

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[2]Education Code section 44031 states as follows:

> Personnel file contents and inspection. Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> Such material is not to include ratings, reports, or records which (1) were obtained

Education Code section 44031. inter alia, states: "[I]nformation of a derogatory nature, . . . shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon." Miller v. Chico U.S.D.. supra, states in pertinent part:

> Unless the school district notifies the employee of such derogatory material within a reasonable time of ascertaining the material so that the employee may gather pertinent information in his defense, the District may not fairly rely on the material in reaching any decision affecting the employee's employment status.

The Charging Party relied very heavily on the language just cited from both the statute and Miller, a California Supreme

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> prior to the employment of the person involved, (2) were prepared by identifiable examination committee members, or (3) were obtained in connection with a promotional examination.
>
> Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employing district.
>
> Information of a derogatory nature, except material mentioned in the second paragraph of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comments thereon. Such review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

Court case. The Respondent, just as strongly, insisted that, as Mrs. Hamaker was given the derogatory materials prior to Mr. Hall's recommendation being relied upon by the superintendent, the requirements of Miller and Education Code section 44031 were met.

Both parties miss the primary reason these circumstances are pertinent to a decision under Novato, supra. The crucial issue is not whether the District violated an Education Code section when it dismissed an employee; it is whether, based on the alleged violation of the code section, it can be inferred that the District harbored an unlawful motive. Even assuming the Education Code was violated and an unlawful motive is inferred by the trier of fact, this finding merely suggests that circumstantial evidence exists to show a nexus between Hamaker's protected conduct and the complained-of employer conduct. It does nothing to alter the ultimate conclusion reached above that the District had adequate reasons to terminate Hamaker and therefore she was not terminated because of her protected conduct.

There is also a question as to whether the Education Code section is technically applicable to many of the incidents relied upon in Mrs. Hamaker's case in that Mr. Hall's unrebutted testimony stated that many of the incidents were not reduced to writing at the time they occurred. He insisted that he relied on his memory to prepare the summarizations of such incidents when he prepared the termination recommendation.

This alleged breach of the Education Code section may have properly operated as a valid defense to the charge before the Personnel Commission and its hearing officer, but is only relevant to these proceedings before PERB in the manner described above.

2. The second example of the employer departing from established procedures concerns the fact that Mrs. Hamaker's June 17, 1983 Annual Evaluation states that "subsequent special evaluations will be made if deemed necessary." The Charging Party insists that the fact that the employer did not issue any "subsequent special evaluations" supports a reasonable contention on Mrs. Hamaker's part that her performance was meeting expectations. The employer's failure to issue such evaluation(s) should estop it from terminating her.

The analysis of this allegation must parallel that of the one above. The employer's failure to issue another special evaluation prior to the termination recommendation creates an inference of unlawful motive. However, as pointed out above it does nothing to alter the ultimate conclusion that the employer had adequate reasons to terminate Hamaker.

Novato describes four examples of circumstances to be examined in any investigation of whether an employee's employment status has been improperly denigrated as a result of an employer's union, or union activity, animus. All four of these examples have been examined and the resulting

determination is that the Charging Party has not been able to produce the quantum of evidence necessary to create an inference of the presence of union animus or that such animus, if proven, was a motivating factor in the employer's action.

CONCLUSION

Based on all of the foregoing, it is specifically determined that the Kern County Office of Education has not violated section 3543, 3543.1, 3543.5(a) or (b) of the Educational Employment Relations Act. It is determined that all charges filed by the Charging Party in this case are without merit and should be dismissed.

PROPOSED ORDER

Based on the foregoing Findings of Facts, Conclusions of Law and the entire record, the unfair practice charge and the complaint in this case are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III. section 32305. this Proposed Decision and Order shall become final on January 21, 1986, 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 January 21, 1986, 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: December 30, 1985

Allen R. Link
Administrative Law Judge