

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NEWARK TEACHERS ASSOCIATION,)
CTA/NEA,)
Charging Party,) Case No. SF-CE-1276
v.) PERB Decision No. 864
NEWARK UNIFIED SCHOOL DISTRICT,) January 14, 1991
Respondent.)

Appearances: A. Eugene Huguenin, Jr., Attorney, for Newark Teachers Association, CTA/NEA; Girard & Griffin by Allen R. Vinson, Attorney, for Newark Unified School District.

Before Hesse, Chairperson; Shank, Camilli and Cunningham, Members.

DECISION

CUNNINGHAM, Member: This case is brought before the Public Employment Relations Board (PERB or Board) by the Newark Unified School District (District) on exceptions to a proposed decision (attached) by an administrative law judge (ALJ), who held that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ by transferring unit

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5, amended effective January 1, 1990, states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (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. For purposes of this subdivision, "employee" includes an

member Gary Bookout (Bookout) for his exercise of protected rights, and for subsequently refusing to provide staffing information to the Newark Teachers Association (Association) relevant to the transfer. The ALJ further determined that the District did not violate EERA when it issued a negative evaluation to Bookout, nor when a District official made certain comments to a unit member about the need for an Association member to be present during a meeting. The Association does not object to the ALJ's findings relative to the evaluation and the meeting incident.²

We have examined the entire record in this matter, the proposed decision, as well as the District's exceptions and the Association's responses thereto, and, finding the ALJ's recitation of facts to be free from prejudicial error, we adopt it as our own. Consistent with the following discussion, we adopt the ALJ's conclusions of law as well.

FACTS

As noted above, the facts in this case are correctly set forth at length in the proposed decision, but will be briefly summarized herein.

applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

As no exceptions were filed as to these findings, we will not address them further.

Bookout was hired by the District in 1970, and initially taught at M. D. Silva Intermediate School for six years. In each of those six years, Bookout requested a transfer to the high school level; he disliked teaching at the junior high level and felt he was unsuited to do so.

Bookout, at the time of the events that are the subject of this complaint, was a certificated employee teaching at Newark Memorial High School (high school) and a member of the Association. In the 1986-87 school year, he served as the first chairperson of the faculty senate, a vocal group of educators that was formed to facilitate communication with management. Bookout also filed grievances and represented other grievants before District officials during this year.

In the 1987-88 school year, Bookout relinquished his role as chairperson of the faculty senate, but continued to file grievances based on alleged contract violations by the District, and to speak out publicly on controversial school policy matters. On May 16, 1988, Bookout received a negative evaluation from his principal, Kaz Mori (Mori). This evaluation reported an incident wherein Bookout allegedly uttered an expletive in an English department meeting after becoming upset over the meeting's length. Also, in 1988, Bookout represented another teacher, Virginia Forgatsch (Forgatsch), in a meeting with Mori over an assignment to which Forgatsch objected. In this meeting, Mori made several comments which questioned the need for the presence

of an Association representative. Bookout later objected to these comments.

In early spring of 1988, a teacher was transferred to the high school from Newark Junior High School (junior high), effective in the fall of 1988. Accordingly, Jack Roach (Roach), Director of Personnel for the District, determined that an English teacher would have to be transferred from the high school to the junior high to balance the scheduling effects of the earlier transfer. As stated by the ALJ, Roach first requested a volunteer for this transfer. When no one stepped forward, Roach decided that Bookout should be involuntarily transferred.

Bookout objected vehemently to this decision; as stated above, he had taught at the junior high level for several years before his transfer to the high school and disliked teaching at the intermediate level. Bookout requested Association assistance in the filing of a grievance regarding the transfer.

On June 24, 1988, Bookout met with Roach, in the company of an Association representative. At this meeting, the Association representative requested materials in the District's possession which would verify the need for a transfer. Roach, claiming that he thought the request to be too broad, refused to provide the information.

PROPOSED DECISION

The ALJ framed the issues of this case as follows:

(1) whether the District transferred Bookout because of his protected activity; (2) whether the District unlawfully refused to provide information to the Association during the grievance proceeding on this transfer; (3) whether the District issued **Bookout** a negative evaluation because of his protected activity; **and** (4) whether the District unlawfully encouraged another employee to refrain from involving the Association in her employment activities. As noted above, exceptions have been **filed** as to the findings regarding the first and second allegations only.

1. Bookout's transfer

The correct test to apply to determine whether a violation of EERA has occurred in this situation is enunciated in Novato Unified School District (1982) PERB Decision No. 210 (Novato). The charging party must demonstrate that he or she engaged in protected activity, that the respondent knew of such activity, **that** the respondent took adverse action against the charging party (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde)). and that the protected activity was a motivating factor in the adverse action. The employer may then show as a defense that it would have taken the adverse action in the absence of the protected conduct. (Novato.) An inference of unlawful motive may be drawn from the record as a whole. (Novato.) The ALJ correctly noted that Bookout had engaged

in a great deal of protected activity in the two school years preceding his transfer and that the District was well aware of this activity.

The ALJ found that the transfer constituted adverse action. This situation is unlike that in Palo Verde, according to the ALJ in that, here, Bookout was required to relearn junior high school curriculum, devise new lesson plans, and develop different learning strategies. These activities constituted a detriment to Bookout in that he was required to spend more out-of-class time involved in preparation. Furthermore, the ALJ determined that Bookout's temperament made it difficult for him to control younger students and rendered him ill-suited for the junior high environment.

Next, the ALJ found several factors which pointed to an inference of unlawful motivation on the part of the District. Timing indicated the presence of such a motive, as the transfer came at the end of the 1987-88 school year, in which Bookout filed several grievances and engaged in other protected conduct. The ALJ also found the shifting and vague justifications given for the transfer further supported the inference of unlawful motivation. Roach gave differing explanations of the reasons for the transfer at the June 3, 1988 meeting, in the subsequent written memo to Bookout, and in his testimony at the hearing in this matter. Additionally, the ALJ pointed to the fact that Roach admitted that he departed from a "long practice" of allowing involuntary transfer decisions to be made at the site

level by site administrators. Finally, the ALJ found evidence of anti-union animus in Roach's subsequent refusal to provide information to the Association at the grievance meeting about the transfer, as well as in earlier statements made by both Roach and Mori in regard to protected activities which occurred before the transfer decision was made.

As to the District's defense that it would have chosen Bookout for the transfer in the absence of protected conduct, the ALJ found that Roach's explanation for his choice of Bookout as the transfer recipient did not withstand scrutiny when viewed in the totality of the evidence.

Next, the ALJ analyzed the District's rationale for not choosing each of the other members of the English department from which Roach determined that the choice was to be made. Because Mary Neri, Adrienne Blackhart, Thomas Gulbranson, Mary Kay Henderson, Barbara Williams (Williams) and Betty Hollenbeck all had more seniority than Bookout, the ALJ found their retention at the high school to be supported by the record. Also, the ALJ determined that Bruce Wasser, Ronald Johnson and Susan Kenneally were retained on the justifiable basis of their multiple or special credentials. However, Roach's reasons for not transferring Jeffrey Hallford (Hallford), Steve Harrington (Harrington) and Christine Hunt (Hunt) were rejected by the ALJ as pretextual.

Roach claimed that one of the reasons Hallford was not chosen for the transfer was that he had taught at the junior high

level and had found the assignment to be "very undesirable." The ALJ pointed out the fact that Hallford was not called to testify, and that it would be difficult to imagine that Hallford's feelings in this regard were stronger than Bookout's. Roach was **aware of** Bookout's feelings, based on his knowledge of at least two of Bookout's transfer requests made during his junior high tenure. In regard to Hallford's alleged "special skills" in teaching seniors, listed by Roach as further justification for his retention, the ALJ rejected this reason based on the fact that Roach admitted that Hallford was teaching sophomores, not seniors, at the time of the hearing. Lastly, the ALJ rejected Roach's justification that Bookout had more experience at the junior high level. Although this assertion was true in terms of years, Hallford's experience was more recent in terms of time, with recent experience being one of the considerations listed in section 10.5.4 of the voluntary transfer guidelines of the **parties'** collective bargaining agreement, which Roach claimed **that** he followed. Based on the totality of the evidence, the ALJ found that Bookout and Hallford were equally qualified and, thus, following Roach's testimony regarding the effect of seniority, Hallford, with less seniority, should have received the transfer.

In considering the retention of Harrington, the ALJ initially noted that he was far less senior than Bookout. **Roach's** principal justification for retaining Harrington was his position as a drama teacher. Although Harrington was hired in 1985, he did not teach a drama class until at least 1986-87.

Also, Harrington usually taught no more than two sections of drama per semester. The ALJ concluded that Williams, the other drama teacher at the high school, could have been assigned Harrington's drama sections, and that Harrington, upon transfer, could have participated in the junior high drama department.

Lastly, the reasons given by Roach for the retention of Hunt were analyzed and rejected by the ALJ. The purported need for gender balance in the junior high English department was rejected, based primarily on the fact that the next vacancy in this department was awarded to a woman in preference to a comparably qualified male. The ALJ also rejected Hunt's multiple credential and journalism experience as a legitimate justification for her retention over Bookout. Hunt had taught no mathematics in recent years, and taught no more than one journalism section per term. Further, the fact that Hunt was away from the high school during the 1989-90 year teaching at the college level was found by the ALJ to undermine Roach's statement that she was needed to teach mathematics or journalism at the high school.

Based on the pretextual reasons given for the retention of Hallford, Harrington and Hunt, as well as the totality of the circumstances, the ALJ found that the District violated section 3543.5(a) and (b).

2. Refusal to provide information

The ALJ noted that, absent a valid defense, refusal by the District to provide necessary and relevant information is an unfair practice. (Trustees of the California State University (1987) PERB Decision No. 613-H.) Because the information requested by the Association regarding staffing and enrollment projections was relevant and necessary to enable the Association to verify the need for a transfer, the ALJ found it should have been provided. The ALJ rejected Roach's contention that he did not provide any information as he thought the request was overbroad and concluded that, if Roach believed the request to be too broad, he could have provided the enrollment and staffing projections, while retaining that material in his file which was personal in nature, such as notes, memoranda, etc.

DISTRICT'S EXCEPTIONS

The District files 31 exceptions to the proposed decision. These exceptions concentrate on the two areas in which violations were found, specifically the transfer and the refusal to provide information. With respect to the transfer, these exceptions relate to the following findings of the ALJ: (1) Roach's utilization of certain criteria in the transfer decision; (2) the transfer to the junior high as an adverse action; (3) the District's actions supporting an inference of unlawful motive; (4) the existence of a past practice within the District regarding involuntary transfers; (5) the credibility of Roach's testimony in regard to several anti-union comments allegedly made

by him; (6) the analysis of the District's reasons for the retention of the other teachers in the English department. As noted above, the Association has not filed exceptions to the proposed decision.

DISCUSSION

1. The transfer

The District objects to the finding that the transfer was an adverse action under the Novato analysis. Under Palo Verde, a charging party alleging discrimination must demonstrate that the respondent took adverse action³ against the charging party. The Board applies an objective test in determining whether the action taken by the respondent actually resulted in harm to the charging party. (Palo Verde, at p. 12.) The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse

³The term, "adverse action," as used here, is not limited to formal disciplinary actions such as those enumerated in California Government Code section 19570.

impact on the employee's employment.⁴ Accordingly, retaliatory involuntary transfers have been found to be unlawful even though the transfers or reassignments were not accompanied by loss of pay or benefits. (See Pleasant Valley School District (1988) PERB Decision No. 708 (involuntary reassignment from mowing to other groundskeeper duties found retaliatory despite no loss in pay or benefits); see also Santa Paula School District (1985) PERB Decision No. 505 (involuntary transfer of teacher to another school found discriminatory); Santa Clara Unified School District (1985) PERB Decision No. 500 (transfer of teacher from senior to junior high found discriminatory); Novato Unified School District supra, PERB Decision No. 210 (charging party's removal as chairperson and transfer to another school found discriminatory); but see Riverside Unified School District (1985) PERB Decision No. 510 (Board agent found reassignment to other school did not constitute adverse action because hours, commute and duties identical).

In the present case, although Bookout suffered no loss of pay or benefits, the evidence demonstrates that the involuntary

⁴Our concurring colleagues state that Bookout's aversion to teaching at the junior high level must be considered in determining whether adverse action exists. To minimize the importance of the nature of the action taken by the employer, in favor of focusing primarily on Bookout's personal feelings toward the action, is to obfuscate the clear intent of Palo Verde. While the fact of employer awareness of an employee's intense aversion to a new assignment may be indicative of the employer's unlawful intent, under Palo Verde that fact would be insufficient to state a cause of action if the assignment, applying an objective standard, was not itself adverse.

transfer constituted adverse action under Palo Verde. According to District witness Roach, transfers from junior to senior high were regularly requested by junior high teachers as career moves. Additionally, the evidence indicated that, during Bookout's six-year tenure at the junior high, Bookout repeatedly attempted to transfer to the senior high. Furthermore, the ALJ reasonably determined that a transfer to the junior high was not looked upon as a desirable move, as evidenced by the lack of transfer volunteers from the senior high English department.⁵ Based on these factors, Bookout's transfer back to the junior high school after 12 years of successful teaching at the high school level could reasonably be viewed as a negative career move under these circumstances and, thus, constituted adverse action.

The ALJ determined that Bookout suffered an adverse action based on the increased amount of preparation time required in his new position. The District argues persuasively that Bookout may have had to develop new lesson plans for a newly-assigned class at the high school had he remained there. In the past, schedule changes had necessitated that Bookout devote additional time to learn curriculum for newly-assigned classes. Accordingly, we do not find, under these facts, that the potential increased preparation time supports the finding of adverse action.

⁵The District objects to this conclusion by the ALJ, which is derived from the fact that no teacher in the English department volunteered for the transfer. Although several other inferences could be drawn from this fact, this inference is reasonable based on the totality of the evidence. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 14-15.)

Additionally, the ALJ stated:

Bookout's demeanor on the witness stand clearly demonstrated that he is "temperamentally unsuited" to teach the junior high school age group, and as a result he has difficulty controlling younger students....

(Proposed Decision, p. 32.)

We do not agree that Bookout's demeanor on the witness stand necessarily bears on his ability to teach at the junior high level. Furthermore, Palo Verde necessitates an objective finding of adverse action; thus, as stated above, the question is not whether Bookout personally found the transfer undesirable, but whether a reasonable person under the same circumstances would consider the transfer to have an adverse impact on the employee's employment. Accordingly, we do not adopt this portion of the ALJ's opinion.

As to a finding of unlawful motive on the part of the District, inferences of such motive may be drawn from the record as a whole. (Novato.) There are, as stated by the ALJ, numerous facts supporting the inference of such a motive. The transfer was announced after a period of protected activity, including grievances filed in January 1988, vocal opposition to school security policy in March 1988, and criticism by Bookout of the handling of one of Bookout's grievances by the District in May 1988. Timing of an adverse action alone, however, is not sufficient for an inference of unlawful motive. (~~Los Angeles Community College District~~ (1989) PERB Decision No. 748.)

The ALJ correctly points out the shifting justifications presented by Roach, beginning with those advanced in the June 3, 1988 meeting with Bookout and ending with those reasons listed by Roach at the hearing in this matter, as further evidence of unlawful motive. (Pleasant Valley School District, supra, PERB Decision No. 708.) The District argues that the different reasons given for the transfer by Roach are not inconsistent. However, this objection is misguided, for the different reasons do evidence a shifting in emphasis, which the Board has determined in the past to support the inference of unlawful motive. (Ibid.)

Lastly record evidence indicates that involuntary transfers within the District were rare. Roach admitted this fact in his testimony. A common practice existed at the high school which allowed for the movement of multiple-credentialed teachers among departments as the need arose. However, that practice did not occur in this case. The simple fact that Bookout was the recipient of an involuntary transfer supports the inference of unlawful motive, based on the disparate nature of the treatment exercised by the District in this circumstance. (Id. at p. 16.)

When this evidence is viewed in conjunction with the other factors cited by the ALJ, the totality of the evidence supports a finding of unlawful motive.

The District, to avoid a finding of discrimination based on the evidence above, must show that Bookout would have been chosen for the transfer even if he had not engaged in protected

activity. (Novato.) The ALJ carefully analyzed each of the reasons given by Roach for the retention of the other teachers in the English department.⁶ The District claims that the analysis utilized by the ALJ here violates its managerial prerogative to make staffing decisions; however, the District may not base its managerial decisions on unlawful motivations. The ALJ's analysis was correct in this circumstance, and merely requires the District to offer reasonable justification for the retention of the other English teachers, consistent with the District's burden under Novato to show that Bookout would have been chosen for the transfer even absent his protected activity. (See Santa Clara Unified School District supra, PERB Decision No. 500; but see State of California (Department of Youth Authority) (1985) PERB Decision No. 535-S, p. 36, adopting the decision of the ALJ.)

The ALJ correctly concluded that the District's justifications for the retention of nine teachers were supported in the record. Teachers Neri, Blackhart, Gulbranson, Henderson, Williams and Hollenbeck were retained based on seniority; Wasser and Johnson, based on the ability to teach split assignments;

⁶The evidence demonstrated that a transfer was necessary based on the predicted number of English sections needed at the high school for the 1988-89 school year, as well as the vacancy at the junior high created by the earlier transfer. The District objects to the ALJ's finding that Roach appeared to utilize a very narrow approach in his decision making process. Also, the District objects to the ALJ's statement that Roach was aware of the ability to be flexible in the manipulation of assignments within the English department. Both conclusions are supported by the evidence and are based on reasonable inferences drawn by the ALJ.

and Kenneally, based on an English-as-a-second-language special (Credential). The remaining teachers in the department, Harrington, Hallford and Hunt, were determined by the ALJ to have been retained for pretextual reasons.

Harrington teaches drama and English at the high school and was fifteen years less senior than Bookout. Roach claimed that he retained Harrington due to his ability to teach drama. The ALJ's conclusion in regard to the District's ability to manipulate William's schedule to allow her to take all the school's drama sections does not find support in the record. Although there was evidence that schedule manipulation was frequently utilized as the need arose, there was no evidence in regard to the ability of Williams to teach drama sections all day, which she had not done in several years. Furthermore, as the District states, there was no evidence indicating the status of the junior high drama department from which the ALJ could have concluded Harrington would have been able to teach in that department had he been transferred. Discounting these two findings by the ALJ leads to the conclusion that the record evidence does support the retention of Harrington over Bookout.

The District has failed to show, however, a reasonable justification as to why Bookout was transferred in lieu of Hallford or Hunt. Accordingly, as the Association has shown that Bookout engaged in protected activity, the District was aware of this activity and the District took adverse action against Bookout because of that protected activity, the ALJ was

correct in his conclusion that the District violated EERA section 3543.5(a). Furthermore,, because this conduct against Bookout acted to deny the Association rights guaranteed under EERA, in that Bookout was acting in the role of a union activist, the District also violated section 3543.5(b), (El Dorado Union High School District (1986) PERB Decision No. 564.)

2. The denial of information

The ALJ correctly analyzes the District's failure to provide information. The Association was entitled to staffing and enrollment projections prepared for the District so as to be able to verify Roach's claim that a teacher had to be transferred from the high school to the junior high. This information was,, thus, both necessary and relevant. (Modesto City Schools and High School District (1985) PERB Decision No. 518.) The employer's refusal to provide such information constitutes bad faith bargaining unless the employer can demonstrate adequate reasons why it cannot provide the information. (Los Rios Community College District (1988) PERB Decision No. 670, p. 10; Stockton Unified School District (1980) PERB Decision No. 143, pp. 18-19.) The District contends that Roach did not refuse to provide the projections, but only refused to provide his personal notes, which he believed were encompassed in the Association's demand. However, Roach admitted at the hearing that he did have other documents regarding class assignments, besides his personal notes,, in his possession at the June 24 meeting. The ALJ appears to discredit Roach's assertion that he believed the Association's

request to be overbroad, and this finding is reasonable based on the record. (Santa Clara Unified School District, *supra*. PERB Decision No. 104.)

Even assuming Roach's assumption to be credible, he had the obligation to provide the relevant information in his possession at the meeting. The District has provided no reason why it could not provide this information. Accordingly, the District violated section 3543.5(c) by its conduct. The District's refusal to provide information necessarily denied the Association its statutory right to bargain on behalf of unit members, and thus also constitutes a violation of section 3543.5(b). Although a violation of section 3543.5(c) does not automatically give rise to a violation of section 3543.5(a) (see Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, p. 13), here the District's action denied Bookout the right to have representation on a contract grievance and thus also violated section 3543.5(a). (See Modesto City Schools and High School District, *supra*. PERB Decision No. 518.)

Under section 3541.5(c),⁷ PERB is given the power to issue

⁷Section 3541.5(c) states:

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

a decision and an order directing an offending party to take such action as will effectuate the policies of the EERA. As to the appropriateness of the proposed remedy, the only substantive alteration to the remedy provided by the ALJ relates to the timing for the reinstatement of Bookout at the high school. The ALJ ordered reinstatement for the beginning of the 1990-91 school year, now an impossible situation. Disruption in the educational process through reinstatement is to be avoided. (San Leandro Unified School District (1983) PERB Decision No. 288, p. 14.) San Leandro involved a reinstatement as a remedy for a discrimination violation. The decision issued on February 24, 1983 with the transfer ordered to occur at the beginning of the 1983-84 school year, which constituted the beginning of the next school semester. Accordingly, it is appropriate to order the District to reinstate Bookout, upon request, at the beginning of the spring semester, in or about January 1991.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the District violated section 3543.5(a), (b) and (c). It is hereby ORDERED that the Newark Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees, particularly

Gary Bookout, for participation in employee organization activities of their own choosing for the purpose of representation of matters of employer-employee relations;

2. Interfering with the right of the Newark Teachers Association, CTA/NEA to represent its members in their employment relations with the public school employer;

3. Failing to negotiate in good faith with the exclusive representative by refusing to provide the Newark Teachers Association, CTA/NEA with relevant information needed to prosecute contract grievances on behalf of certificated employees of the District.

B: TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Upon request, restore Gary Bookout to his former position, or its equivalent, at Newark Memorial High School effective the beginning of the spring semester, in or about January 1991, without prejudice to his seniority and other rights and privileges.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any

material.

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

Member Shank joined in this Decision.

Member Camilli's concurrence begins at page 23.

Chairperson Hesse's concurrence begins at page 26.

Camilli, Member, concurring: Although I agree, as does the majority, with the ALJ's analysis concerning the Newark Unified School District's (District) refusal to provide information and the issues of protected activity, District knowledge thereof, and unlawful motive regarding the transfer of Gary Bookout (Bookout), I strongly disagree with the majority opinion's discussion of the issue of adverse action, and its interpretation of Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde). I, therefore, write separately to address the portion of the opinion which discusses the issue of adverse action.

I agree with the Board's statement in Palo Verde that there must be an adverse action in order to find that an unlawful act of discrimination occurred, however, I am wary of magnifying the issue of "adverse action" so as to be out of perspective when viewed in terms of carrying out the purposes of the statutes which the Public Employment Relations Board (PERB) enforces.

The statutes administered by PERB grant to employees certain rights, i.e., to join organizations of their own choice and be represented by such in their employment relationships with their employers. The statutes go on to protect those rights by making it unlawful for an employer to discriminate, retaliate or interfere with employees because of their exercise of these rights.

In order to ensure that the statutory rights granted to all employees are meaningful, primary consideration should not be given to the degree or extent of an action's adverse nature or

impact, but to motive. However, concerning the issue of adverse action, it must be shown that the conduct would be adverse to a reasonable person standing in the shoes of the recipient of the conduct, or would reasonably be viewed as such by those with whom the recipient works. This serves the purpose of the statutes, which protect an employee from retaliation because of protected activity.¹

In the instant case, I find that the showing of anti-union animus, as analyzed under the factors enunciated in Novato Unified School District (1982) PERB Decision No. 210, is very strong. The employer was aware of Bookout's protected activity, and it is clear from the record that Jack Roach (Roach) was aware of Bookout's intense aversion to the assignment of working at the junior high. The action taken against Bookout would be adverse to a reasonable person standing in the shoes of Bookout.² Finally,

¹It is important to bear in mind that although our discussion here concerns solely adverse action, a violation could never be found without sufficient evidence of unlawful motive or nexus.

²This requires us to take into consideration Bookout's aversion to teaching at the junior high school. Bookout taught English at the junior high school level from 1970 to 1976. He requested a transfer each of the six years he taught at that level. Roach served as a site administrator in the District from 1974 through 1987. Bookout's unrebutted testimony is that Roach acknowledged locating at least two of these transfer requests. When, on June 3, 1988, Roach called Bookout to a meeting to announce the transfer, Bookout told Roach that he had had a very bad experience teaching at the lower level for those six years, and explained to Roach that he had requested a transfer in each of those six years. He further told Roach that he felt he was "temperamentally unsuited" to teach at the junior high school level. To ignore this evidence would be to make it lawful for an employer, to discriminate against employees for protected activity as long as the employer tailored the adverse action to that particular employee.

the employer did, not provide sufficient business justification or evidence showing that the action would have been taken regardless of anti-union animus. I would, therefore, find a violation.

HESSE, Chairperson, concurring: I concur with Member Camilli's discussion on Palo Verde Unified School District (Palo Verde) (1988) PERB Decision No. 689 regarding the analysis of a discrimination claim. I write separately to further emphasize Palo Verde's inaccurate interpretation of the proper test.

There is no argument that, in determining whether there has been a violation of Government Code section 3543.5(a), the employee must demonstrate that he or she participated in protected activity, the employer knew of such activity, and the employer would not have taken the actions it did "but for" the employee's protected activity. Novato Unified School District (1982) PERB Decision No. 210. The Board summarized this test in California State University, Sacramento (1982) PERB Decision No. 211-H, as follows:

. . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct . . .
(Id. at pp. 13-14.)

In that case, the employee's employment was terminated, therefore, the action taken by the employer was not in issue.

Under the National Labor Relations Act (NLRA), the question of whether the employer in fact changed the employee's tenure or terms and conditions of employment is rarely, if ever, disputed. (See Morris, The Developing Labor Law (2d ed. 1983) chapter 7.)

In most cases, the employer's reason for discriminating will determine whether or not it has committed an unfair labor practice, i.e., the keystone of proving a violation is determination of unlawful motive. (Morris, Id. at p. 208.) In discussing Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB No. 150"[105 LRRM 169], Morris states:

The initial focus under Wright Line is on the elements of the General Counsel's prima facie case, i.e., the existence of protected activity, knowledge of that activity by the employer, and union animus.
(See Morris, 5th supp. (2d ed.) p. 93.)

From this discussion, it is quite apparent that the nature of the action of the Wright Line employer is not of major concern. However, since the Board's decision in Palo Verde, the initial focus, in some cases, has been on whether or not the employer's conduct constituted "adverse action." As a result, this type of analysis may, in some instances, require unnecessary efforts to describe the employer's discriminatory conduct within the confines of a formal personnel action.¹ This can be attributed to Palo Verde's lack of definition of what type of harm is required to establish a prima facie case of discriminatory treatment, and to Palo Verde's use of such phrases as "adverse action," "adverse consequences," "adverse injury," "actual injury," and "harm" to describe a standard of required employer action. Further, that decision inferred that an employee's working conditions must be substantially changed as a

¹See footnote 3 at page 11 of the majority opinion.

result of the employer's actions before it can be considered adverse to the employee.²

Notwithstanding Palo Verde's emphasis on the harm suffered by an employee, a number of cases decided by the Board, both prior and subsequent to Palo Verde, have not limited the employer's action against the employee to substantial changes in working conditions, loss in pay or benefits, or discharge.³ Therefore, the focus should not be on the employee's "injury" but on whether or not the discriminatory action was motivated because of the employee's protected activities.

On the facts presented in the case before us, I find the District's actions are sufficient to support the inference of an

²I agree with the majority's discussion (see majority opinion pp. 11-13) regarding the adversity of involuntary transfers, applying the analysis of pages 18 and 19 of Palo Verde, which does result in a violation.

³For example, see Novato Unified School District, *supra*, PERB Decision No. 210 (charging party's removal as chairperson and transfer to another school found discriminatory); Santa Clara Unified School District (1985) PERB Decision No. 500 (transfer of teacher from senior to junior high school found discriminatory); Santa Paula School District (1985) PERB Decision No. 505 (involuntary transfer of teacher to another school found discriminatory); Pleasant Valley School District (1988) PERB Decision No. 708 (involuntary reassignment from mechanized mowing to other groundskeeper duties found discriminatory); and Woodland Joint Unified School District (1990) PERB Decision No. 808, petn. pending (employer unlawfully required employee to obtain doctor's excuse in retaliation for protected activity). Similarly, the NLRB has also found employer action short of discharge or other formal "adverse/disciplinary action" to be discriminatory where there was little impact on wages, hours, or other working conditions. (See Armour Con-Aara (1988) 291 NLRB No. 134 [131 LRRM 1320]) (employee was unlawfully transferred to third shift for isolation as a union activist) and Inductive Components, Inc. (1984) 271 NLRB No. 209 [117 LRRM 1207] (employee's work assignment unlawfully changed even though it was a less onerous assignment).)

unlawful motive, and the transfer to Newark Junior High School is a violation of Government Code section 3543.5.

APPENDIX

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



After a hearing in Unfair Practice Case No. SF-CE-1276, Newark Teachers Association, CTA/NEA v. Newark Unified School District, in which all parties had the right to participate, it has been found that the Newark Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (Act).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees, particularly Gary Bookout, for participation in employee organization activities of their own choosing for the purpose of representation of matters of employer-employee relations;
2. Interfering with the right of the Newark Teachers Association, CTA/NEA to represent its members in their employment relations with the public school employer;
3. Failing to negotiate in good faith with the exclusive representative by refusing to provide the Newark Teachers Association, CTA/NEA with relevant information needed to prosecute contract grievances on behalf of certificated employees of the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS
DESIGNED TO EFFECTUATE THE POLICIES OF THE
ACT:

1. Upon request, restore Gary Bookout to his former position, or its equivalent, at Newark Memorial High School effective the beginning of the spring semester, in or about January 1991, without prejudice to his seniority and other rights and privileges.

Dated: _____

NEWARK UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



NEWARK TEACHERS ASSOCIATION,)
CTA/NEA,) Unfair Practice
) Case No. SF-CE-1276
Charging Party,)
)
v.) **PROPOSED DECISION**
) **(6/15/90)**
NEWARK UNIFIED SCHOOL DISTRICT,)
)
Respondent.)
_____)

Appearances! A. Eugene Huguenin, Jr., Attorney, for the Newark Teachers Association, CTA/NEA; Girard and Griffin, by Allen R. Vinson, Attorney, for the Newark Unified School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by the Newark Teachers Association, CTA/NEA, (hereafter Charging Party, NTA or Association) against the Newark Unified School District (hereafter Respondent or District) on September 13, 1988. The charge was amended on March 1, 1989.

The General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a complaint on September 6, 1989. The complaint alleges that the District unlawfully: (1) transferred a teacher because of his protected activity; (2) issued a negative evaluation to the same teacher because of his protected activity; (3) refused to provide the Association with information necessary and relevant to the processing of a grievance challenging the transfer; and (4) encouraged an employee to refrain from involving the Association in her

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

employment-related activities.¹ It is alleged that these actions violated the Educational Employment Relations Act (hereafter EERA or Act), sections 3543.5(a), (b) and (c).²

The District's answer was filed on September 22, 1989, denying that it violated the Act. A settlement conference was conducted by a PERB administrative law judge on October 6, 1989, but the matter was not settled.

A formal hearing was conducted by the undersigned administrative law judge on January 8-11, 1990, in Newark, California. The final brief was submitted on April 30, 1990, and the case was submitted for decision.

¹The complaint also alleges that the District unilaterally changed evaluation procedures. As a result of a post-hearing settlement, this part of the complaint was withdrawn.

²The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references in the decision are to the Government Code. Sections 3543.5(a), (b), and (c) state that 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.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

INTRODUCTION

The District is a public school employer within the meaning of section 3540.1(k). The Association is an employee organization within the meaning of section 3540.1(d), and the exclusive representative of an appropriate bargaining unit of the District's certificated employees within the meaning of section 3540.1(e). Gary Bookout is a public school employee within the meaning of section 3540.1(j). He is an English teacher and a member of the certificated bargaining unit.

FINDINGS OF FACT

I. Bookout's Protected Conduct

A. The 1986-87 School Year

The faculty senate was started on the Newark Memorial High School (NMHS) campus during the 1986-87 school year. Established by the collective bargaining agreement, the senate was designed to facilitate communication between teachers and management regarding policy and procedures. Bookout served as faculty senate chairperson during the 1986-87 school year, adopting a highly visible role on such issues as class size, parent complaints, and forced teacher participation in extra-curricular activities. These were subjects covered by the collective bargaining agreement.

Kaz Mori, NMHS principal, testified that meetings with Bookout during the 1986-87 school year were frequently "vigorous and intense." In one such meeting in November 1986, according to Bookout's unrebutted testimony, Mori displayed "extreme anger."

He told Bookout "I'm getting tired of this faculty senate business." Mori claimed the senate was "manufacturing problems where they do not exist." He said, "I'm the person who runs this school. If there are difficulties that occur in this school, I'm the one who gets called on the carpet, not you."

In October 1986, Bookout filed a grievance against Mori for refusing to recognize and deal with the faculty senate. After a prolonged series of meetings, described by Bookout as an "exacting and exhausting process," the parties reached agreement on the grievance in February 1987.

In March 1987, then NTA President Gerald Turney spoke at a board of education meeting. Bookout learned that Mori later called several newly hired teachers to his office and informed them that Turney's comments enhanced their chances to be laid off. Bookout immediately sent an angry note to Mori asking him "in the name of common decency, as well as in the interests of professional harmony, to not further damage Mr. Turney's professional reputation by suggesting to teachers facing layoff that our NTA president is responsible for this crisis."

In May 1987, Bookout represented Ilse Meyer during a meeting with Mori. Meyer, a teacher who had received parent complaints, felt Mori had not supported her in responding to the complaints. According to Bookout's unrebutted testimony, Mori launched an "unprovoked tirade" at him. He accused Bookout of interfering with the settlement of the issue and stated his (Bookout's) input was not welcome. After the meeting, Meyer wrote to the faculty

senate publicly thanking Bookout for "hammering out" a solution with Mori.

In the spring of 1987, Bookout and other teachers became upset at what they perceived to be unfair treatment of a teacher by the student newspaper. They submitted a letter of protest to the advisor of the newspaper. The Argus, a local daily newspaper, published a story about the incident. This upset Mori, who asked Bookout to convene a faculty senate meeting so he (Mori) could express his concern.

Bookout testified that Mori was "very angry" at the meeting. Mori's face became red and he raised his voice. Essentially, Mori informed those in attendance that he didn't want outsiders involved in NMHS problems. Mori said he didn't like Association representatives on campus. According to Bookout, Mori's tendency to want everything resolved within the high school "family" was a frequent topic of discussion in the past. Mori testified, but could not recall the incident. Therefore, Bookout's recollection stands as unrebutted testimony.

B. The 1987-88 School Year

During the 1987-88 school year, Bookout relinquished his role as chairperson of the faculty senate, but continued to serve as a member of that body. He also served on the NTA board of directors as the high school director.

Doss Welsh succeeded Bookout as faculty senate chairperson. Consistent with Bookout, Welsh testified Mori dealt with the senate in hostile terms. Mori grudgingly responded to senate

inquiries. It was not uncommon, according to Welsh, for Mori to say things like "I'm tired of you taking pot shots at us." When the senate raised issues - such as parent complaints, in-house substitution, uniform cheating policy - Mori accused the senate of being "negative." At the end of one meeting, Mori told Welsh "I can't work like this. I can't work with you."

In January, 1988, Bookout filed two grievances. The first grievance concerned an English department meeting which lasted longer than permitted by the contract. Bookout testified that there was an ongoing problem in the English department with excessively long meetings. When Bookout found himself in such a meeting he objected. Lou Haga, English department chairperson, ignored the objection. Bookout then left the meeting briefly to retrieve a copy of the contract. Upon returning, he pointed out the section of the contract limiting the length of department meetings and loudly threatened to file a grievance. According to Bookout, Haga made an "amusing pleasantry," but continued to ignore him. Shortly thereafter, the meeting ended and Bookout filed a grievance complaining about the length of the meeting. Iris Berke, NMHS vice principal, was present but said nothing.

On May 16, 1988, Bookout received his written evaluation from Mori. The evaluation, alleged as an independent violation in the complaint, stated that "Mr. Bookout was observed at [an English department] meeting to utter an expletive and leave the meeting abruptly." Bookout objected to this aspect of the otherwise favorable evaluation. He denied uttering the expletive

"damn." He apologized to Haga for the loud manner in which he reacted, but not for the content of what he said or for leaving the meeting. Bookout said it was not unusual for teachers to leave department meetings for short periods of time, even to retrieve copies of the collective bargaining agreement.

Mori had based the evaluation on information he received from Berke. He verified the information with Haga before including it in the evaluation. Mori did not discuss the evaluation with Bookout before doing so.

Upon investigating the matter, Bookout learned that the source of the comment was Berke. Berke told Bookout that she had not discussed it with him (Bookout) because she was not the official evaluator. Subsequent meetings did not resolve the dispute.

On June 2, 1988, Mori proposed removing the comment from the evaluation and reducing it to a memo to be placed in Bookout's personnel file. Bookout objected and refused to sign the evaluation. He threatened to file another grievance, but did not do so because the next day he learned of his transfer and immediately turned his attention to that matter. The comment was left in Bookout's personnel file.

The second grievance, filed on January 27, 1988, concerned the elimination of Bookout's contractually guaranteed preparation period. Berke and Mori demanded that Bookout attend a meeting to discuss student placement. The meeting was scheduled during Bookout's preparation period at a time when Bookout was preparing

for final exams. He suggested holding the meeting after school, but Berke refused. Ultimately, the meeting was held during Bookout's preparation period, prompting him to file a grievance. This grievance was resolved in May, after what Bookout described as a "rather drawn out, ongoing process."

In March 1988, Bookout spoke at a city council meeting opposing a change in school security policy. He objected to the placement of armed, uniformed police officers on a high school campus. He complained that the change was suddenly announced without notice to faculty. He also signed a faculty senate-sponsored petition, submitted later to the city council, opposing the security policy.

According to Bookout, Jack Roach, who had taken over as director of personnel in August 1987, became irritated by Bookout's speech. Roach told Bookout that he (Bookout) had overstepped his bounds by identifying himself as a representative of the faculty senate. Bookout disagreed that he had done so.

The text of the speech delivered to the city council does not indicate Bookout overstepped his bounds. It indicates Bookout merely identified himself as a teacher who held offices in the faculty senate and on the NTA board of directors. There is no evidence that Bookout purported to speak for any body.

In April 1988, an incident occurred which forms another independent allegation in the complaint. Bookout represented Virginia Forgatsch, a librarian, in a meeting with Mori. Forgatsch was upset because Vice Principal Berke had ordered her

to perform clerical duties during an open house. She requested a meeting with Mori to discuss the assignment with Bookout as her representative.

The meeting was unremarkable. It lasted between ten and twenty minutes. Shortly after the meeting, Mori granted the request to change the assignment. However, Bookout became concerned that during the meeting Mori twice mildly questioned the need to "[involve] the Association." Bookout did not object at the meeting. He admitted that the tone of Mori's comments was "pleasant, it wasn't antagonistic." After the meeting, Mori approached Forgatsch and again questioned the need for Association representation at such meetings.

On April 26, Bookout wrote to Mori complaining that such messages may "intimidate teachers" and "may give a false impression of attempting to undermine the legitimate business of the organization." The letter also conceded that under some circumstances it may be appropriate for Mori to invite employees to see him (Mori) "privately anytime." Also on April 26, Bookout wrote to Association officials complaining about Mori's conduct. As for the underlying issue concerning Berke's directive, Bookout said in the letter that he "felt all parties did an exemplary job in solving this difficulty."

During the 1987-88 school year, there were approximately five contract grievances filed at NMHS. Mori testified that he "normally" seeks advice from Roach on grievances. It is "general practice," according to Mori, to inform Roach when a grievance is

filed. Roach typically represents the District at step two of the grievance procedure. Thus, Roach either participated directly or was consulted regarding the grievances filed at NMHS during the 1987-88 school year.

Roach was apparently annoyed at having to spend time dealing with grievances and contract administration. Welsh testified that Roach seemed "pretty disturbed" at the amount of time he was spending in contract administration. At the beginning of a step two grievance meeting in the spring of 1988, according to Welsh, Roach stated that this situation "had to stop." Bookout was also in attendance.

Roach first denied that he was concerned about the number of cases at NMHS. Yet he testified that he did not have a clear recollection of how the meeting referred to by Welsh started. Asked directly if he made the statement attributed to him by Welsh, Roach said he did not recall. Then Roach testified "I honestly don't know that I said that. . . . If I made a statement like that, and I were irritated and meant it, I'm almost certain I would [recall]."

This conflict in testimony is resolved in favor of Welsh. Welsh was a convincing witness who recalled with clarity not only that Roach made the statement, but also the precise time in the meeting the statement was made. In contrast, Roach's testimony was far less clear. Roach first denied any concern about the amount of time he was spending in contract administration. Welsh recalled that the comment was made at the outset of the meeting,

but Roach could not remember how the meeting started. Especially significant in resolving this conflict is the fact that Roach could not unequivocally rule out the possibility that he was "irritated" with the number of grievances at NMHS.

II. Bookout's Transfer

A. The Transfer Decision

The decision to transfer Bookout from NMHS to Newark Junior High School (NJHS) was made near the end of the 1987-88 school year by Roach. Roach admitted that, during the time he was deciding who to transfer, he knew of Bookout's participation in the grievance procedure, as well as his roles in the faculty senate and in NTA.

In the early spring of 1988, the District transferred Robert Risken, an English teacher, from NJHS to NMHS, effective September 1988. The parties stipulated that the District had a "reasonable" basis for this decision and thus Risken's transfer is not contested here. The transfer of Risken created a need for an English teacher at NJHS. By late March 1988, Roach decided that a teacher would have to be transferred from NMHS to NJHS to fill this need. Roach immediately began the process to do so.

The need to transfer an English teacher to NJHS was discussed at staff meetings attended by Haga, Berke, Mori and Roach. These meetings occurred during April and May 1986. Mori

and Roach also had approximately six telephone calls where they further discussed the transfer.³

On direct examination, Mori testified that Roach sought his opinion about who should be transferred. According to Mori, several names "came up."⁴ On cross examination, however, Mori could not recall Roach asking him for recommendations. Mori further testified, on cross examination, that Roach asked him for information about teachers, but they never engaged in a dialogue whereby the qualifications of the various teachers were rated and compared.

Roach described the process as follows. Except to gather information about teachers, Roach testified, he did not consult with site administrators before deciding to transfer Bookout. Later in his testimony, Roach said he discussed potential impact on NMHS if certain teachers were transferred. Roach said he then evaluated all relevant information and informed site administrators (as well as the superintendent) of his decision. Roach said he was prepared to change his mind if site administrators objected, but no one at either NMHS or NJHS opposed the decision to transfer Bookout.

³As a principal, Mori has no authority to transfer a teacher. The authority to transfer rests with the superintendent or his designee. In this case, Roach was the designee. However, Mori and other site administrators have the authority to determine local assignments.

⁴Mori recalled discussions about three English teachers at NMHS: Bookout, Ronald Johnson and Jeffery Hallford.

Meanwhile, Roach also considered transferring a teacher from Churchill High School (CHS), a continuation school, to NJHS. He rejected the idea, however, because CHS had only four teachers. A transfer from Churchill was unworkable since it would unreasonably restrict assignment flexibility. For the same reason, Risken was not transferred from NJHS to CHS.

Roach also solicited volunteers from among the teachers in the NMHS English department. However, no one was interested in transferring to NJHS.

During the selection process, Roach collected information about teachers in the NMHS English department. There is no evidence that Roach considered teachers outside the department. A key source of information was the employment cards kept in the personnel office. These cards contained information about credentials, seniority, courses taught, etc. All teachers in the NMHS English department possessed the requisite credential to teach at NJHS. In fact, Roach pointed out in his testimony that the State of California makes certain assumptions about what the holder of a particular credential can teach. For example, it is presumed that a person who holds a credential to teach English can also teach journalism. Roach also reviewed staffing information and enrollment projections compiled by the District.

With the above referenced information in hand, Roach set out to decide which of the thirteen teachers in the NMHS English

department to transfer.⁵ Roach's evaluation of each candidate may be summarized as follows.

Adrienne Blackhart, Mary Neri and Tom Gulbranson are more senior than Bookout. None had experience teaching at the junior high school level.

Steve Harrington, fifteen years less senior than Bookout, taught English and drama. Roach testified that Harrington preferred to teach drama and in fact had been hired to do so. His transfer, according to Roach, would have disrupted the drama department at NMHS. However, the employment card relied on by Roach confirms that Harrington was hired in 1985, but did not teach a drama class until 1987. (Other records suggest that Harrington may have taught a single drama section in 1986-87.) At no time during 1987-88 and 1988-89 has Harrington taught more than two sections of drama. It was not until the 1989-90 school year that Harrington taught three sections of drama. There was another teacher (Barbara Williams) in the drama department at NMHS who in the past had been solely responsible for the program. Records show that, in each of the years mentioned above, Williams schedule could have been realigned to permit her to teach the drama sections assigned to Harrington. Also, NJHS had a drama department in which Harrington could have participated.

⁵Roach rejected the idea of transferring a K-8 teacher to NJHS for two reasons. First, a teacher with a K-8 credential could not teach ninth grade. Second, it would not have made room for Risken at NMHS.

Mary Kay Henderson also had teaching experience at the junior high school level, but she is more senior than Bookout. Also, Henderson had already been involuntarily transferred once in her career and Roach did not want to transfer her again.

Chris Hunt, eight years less senior than Bookout, has multiple credentials. In addition to English, she is credentialed to teach math and journalism. She taught all math from the 1978-79 school year through the 1986-87 school year. In 1987-88 she switched to English. During 1987-88 and 1988-89, Hunt typically taught four sections of English and one section of journalism. Hunt taught at Ohlone College during 1989-90 in a program designed to encourage students to attend Ohlone. Hunt is scheduled to return to the District after the 1989-90 school year. Hunt has three years experience teaching at the intermediate school level. She was kept at NMHS to maintain assignment flexibility.

Ronald Johnson, eleven years less senior than Bookout, typically teaches a split assignment of English and social studies. He also coached several sports. Roach retained him at NMHS to maintain assignment flexibility in teaching and coaching.

Susan Kennelly was retained at NMHS primarily because she taught ESL. Bookout is fifteen years more senior than Kennelly.

Bruce Wasser, three years less senior than Bookout, typically teaches a split assignment of English and history. Roach retained him at NMHS to maintain assignment flexibility.

Wasser has three or four years teaching experience at the intermediate grade level.

Barbara Williams is an English/drama teacher who is more senior than Bookout. She was retained at NMHS because of her split assignment, importance to the drama program and seniority.

Jeffrey Hallford is seven years less senior than Bookout. He taught at the junior high school during the 1982-83 school year. Although Roach described this as a "partial assignment, Hallford actually taught at the lower level from October 1982 through June 1983. Thus, Hallford had the practical equivalent of one year teaching experience at the junior high school level. Hallford was not transferred because he had less junior high school experience than Bookout, he viewed teaching at the junior high school level as a "very undesirable assignment," and he possessed special skills teaching seniors. As of the date of the hearing, Hallford was teaching sophomores at NMHS.

Betty Hollenbeck, an English teacher who had been on special assignment, returned to NMHS for the 1988-89 school year. She served as department chairperson and also taught four sections of English. (Lou Haga, Hollenbeck's predecessor, had no teaching assignment. He had taken an administrative position in the District's office.) Hollenbeck is four years more senior than Bookout.

Roach admitted that, as of the time he selected Bookout, he had not investigated the teaching experience of candidates who taught elsewhere prior to the time they were employed by the

District. Thus, despite the weight placed on junior high school experience, whether any candidate had junior high school teaching experience outside of the District was unknown to Roach when he decided to transfer Bookout.

During the decision making process, Roach was aware of the great flexibility to realign and manipulate assignments when necessary in the English department at NMHS. District documents show that this practice was not uncommon. From the spring of 1988 through the fall of 1989, several teachers in the NMHS English department had their assignments realigned as needed and even crossed departmental lines to fulfill other assignments. In addition, new teachers were assigned sections in the NMHS English department when the need arose. For example, the District hired a basketball coach in 1989 and assigned him two sections of English, in addition to three sections of physical education.

Eventually, Bookout was chosen for the transfer. Bookout had taught English at NMHS for the past twelve years. From 1970 to 1976 he taught English at the junior high school level. His experience teaching at the junior high school level was extremely unsatisfactory. Bookout requested a transfer each of the six years he taught at that level. In 1976 he was transferred to NMHS.

The process followed by Roach represented a departure from the way involuntary transfers were made in the past. Roach served as a site administrator in the District from 1974 through the summer of 1987. During this thirteen year period, he

testified, selection of teachers for involuntary transfer had been the prerogative of the site principals, not the director of personnel. Roach explained the departure as an attempt on his part to avoid potential "hard feelings" between site administrators as a result of disagreements about the transfer.

Because involuntary transfers occur infrequently, there is limited evidence of past practice in this area. However, in one recent transfer similar to this case, seniority seemed to be a determining factor. In 1987, the District attempted to transfer one of the most senior NMHS science teachers to NJHS. There was a protest over the notion that a senior teacher would be transferred. The Association intervened and it was determined that the least senior teacher would be transferred instead. In another recent example, the need arose to transfer four of eight counsellors to classroom assignments. Although the counsellor transfers presented issues not present here (e.g., appropriate credentials, teaching versus nonteaching assignments, etc.), it nevertheless contained certain similarities. As a major personnel action, it involved reassignment of certificated employees under circumstances which represented significant career changes for the affected employees. In the counsellor situation, the District developed a formal rating system whereunder all candidates were objectively evaluated using weighted factors.

B. The June 3, 1988 Meeting

On June 3, 1988, Roach called Bookout to a meeting and announced the transfer, effective September 1988, to NJHS. The announcement stunned Bookout. Bookout explained he was "temperamentally unsuited" to teach at the junior high school level. He told Roach he had a very bad experience teaching at the lower level during his first six years in the District. One year, in particular, he received a negative evaluation. He explained he asked for a transfer each of those six years. According to Bookout's unrebutted testimony, Roach acknowledged locating at least two of those transfer requests.

Other possibilities were discussed. Bookout asked why a less senior teacher/such as Harrington, was not transferred instead. Roach responded that Harrington had expertise in drama and thus was needed at NMHS. Hallford was discussed. Roach said Hallford, unlike Bookout, had skills in teaching seniors. (Hallford currently teaches sophomores English at NMHS, not seniors.)

During the course of the meeting, Roach cited several reasons for the transfer. Roach said Bookout's experience at the junior high level was successful. Bookout, on the other hand, explained that just the opposite was true. Roach also said he was concerned with establishing a male-female balance at the junior high. Bookout was "dubious" about the notion of male-female balance. There was also discussion about the overall desirability of the NJHS assignment. Roach claimed it was a good

assignment because NJHS had recently won a statewide award for excellence, and the teaching environment was a good one. Bookout explained that NMHS had an ongoing problem with low CAP scores and he wanted to be a part of improving the scores. The meeting ended.

After consulting the Association president, Bookout asked Roach for a written statement of reasons for the transfer. On June 6, 1988, Roach provided Bookout with the following reasons in writing.

After a great deal of thought the District has decided that you are the best qualified person for the junior high position. You are fully credentialed to teach all grades at this level. Also, in making the decision the District considered experience. You were originally hired in Newark to teach junior high students. You have extensive experience teaching average or above average students. In addition, the junior high English staff has been a strong one, but because of turnover during the past several years, many excellent teachers have left the program, and it is the District's desire to place an experienced, highly qualified person in the job.

Finally, some consideration was given to the fact that there is presently only one full time male scheduled into this department, whereas six women are full time.⁶

⁶At the hearing Roach said departmental gender balance was a goal under a program known as Project Equals, as well as under the District's affirmative action policy. Departmental gender balance may be a laudable goal. However, the District's written affirmative action policy does not expressly require departmental gender balance. Rather, the program is geared to ensure that "transfers ... are carried out in keeping with the Affirmative Action Policy." The "policy," drafted in general terms, is to afford "equal opportunity employment to all applicants for employment with the school district." It would appear that this policy is designed to enable women and minorities to move into

In addition to the reasons offered on June 3 and in the June 6 memo, Roach testified about other reasons for the transfer.

Roach said that he wanted to send a good teacher to NJHS because the English department there had recently (prior to 1986-87) lost six "tremendous teachers," and he wanted to maintain the high level of teaching at the school. Roach also said he considered that Mary Kay Henderson, another NMHS English teacher, was returning from a sabbatical. Roach was of the opinion that her return would lessen the impact of Bookout's departure.

The collective bargaining agreement also played a prominent role in Bookout's transfer. The contract covers involuntary transfers in general terms. The agreement gives the District great authority to involuntarily transfer a teacher, providing only for notice and a statement of reasons. Article 10, section 10.5 of the contract contains a more detailed provision covering voluntary transfers. That provision states:

The following criteria shall be reviewed when considering applications for a posted vacancy:

- 10.5.1 Certification requirements.
- 10.5.2 Affirmative Action goals of the District.

desired positions. Its application to situations such as the one presented by this case is questionable. In any event, departmental gender balance as a reason for transferring Bookout was undercut when the District, in 1989, filled the next vacancy in the NJHS English department with a white female over a comparably qualified white male. According to Roach, the new hire "had student teaching experience only and she had worked in the area of Drama somehow or other in the schools in the Alameda Unified." The rejected male had also student-taught and had recent experience in a teacher training corps program.

- 10.5.3 All of the criteria in Section 10.5 having first been considered and being found equal, a unit member's length of service with the district will be the determining factor.
- 10.5.4 The qualifications, including the recent training of the unit member compared to those of other candidates for both the position to be filled and the position to be vacated.
- 10.5.5 The needs for efficient operation of the District.
- 10.5.6 The needs of the unit member.

Roach testified as follows as to the weight he gave the section 10.5 criteria.

You know, one of the things that you could say is pretty much all things being equal, you know, look at seniority as an important factor. I think seniority should be given the overwhelming weight, but I think seniority is extremely important.

Roach did not clearly inform Bookout or the Association that he applied the section 10.5 criteria in deciding who to transfer. Aleita Huguenin, Association representative, testified that it was not until the formal hearing in this case that Roach first announced he followed the contractual voluntary transfer criteria.⁷

⁷The District argues that the notes of Association representative Joan Perlowitz, taken at the June 24 meeting described below, show Roach considered the section 10.5 criteria in making the transfer decision. These notes are not a reliable piece of evidence. Perlowitz did not testify at the hearing, and the notes are vague and confusing. According to the notes, it appears that at one point Huguenin asked Roach if section 10.5 was used. Roach responded that he "considered what was in letter." This seems to indicate that Roach said he relied on the content of the June 6 letter, not section 10.5. At another point, the notes show that application of section 10.5.4 was

Meanwhile, Bookout's grievance challenging the transfer was denied by Mori at step one of the grievance procedure.⁸ On June 17, 1988, Bookout met with Roach again to discuss a possible resolution. They discussed the transfer again, but Roach was unwilling to modify his position.

B. The June 24, 1988 Grievance Meeting

Bookout's grievance first questioned the need for the transfer. If a transfer had to be made, the grievance further asked whether Bookout was the appropriate person. The parties discussed these issues at the June 24, 1988 grievance meeting.

Roach explained that transfers and assignments are made on the basis of a "population analysis" which includes total number of students and teachers. A specific number of sections are assigned to each campus; assignment of those sections is left to local campus administrators. Roach's explanation prompted Aleita

raised. According to the notes, Roach responded that he "did not consult update for recent training." This again seems to indicate that Roach said he did not rely on the "recent training" criterion in section 10.5.4. Later, the notes indicate that Roach said "I feel 10.6 and 10.1 was all I had to referred to. I followed this." This response similarly indicates no application of section 10.5. Thus, even if the notes are competent evidence, they do not support the District's contention. The notes tend to show that section 10.5 was mentioned on June 24, but they do not establish that Roach clearly informed the Association that he relied on section 10.5.

⁸The decision to transfer Bookout was very unpopular. Students and faculty staged a demonstration. A contingent of teachers read a resolution on Bookout's behalf to the superintendent. Teachers in the English department presented the principal with a petition urging retention of Bookout at NMHS. Letters were sent to the school board by students, teachers, former students, parents and various elements of the community. Articles appeared in the local newspaper, as well as in the San Jose Mercury News.

Huguenin, Association representative, to request enrollment projections, staffing and assignment information to verify Roach's explanation and to analyze the basis of the transfer. At that time, the Association was not satisfied with Roach's explanation as to the need for the transfer or the selection of Bookout. Huguenin requested "staffing and assignments" information for prior years and for the upcoming school year, 1988-89. Huguenin needed this information to determine what had occurred and to make an informed evaluation of the decision to transfer Bookout.

Roach had a great deal of the staffing and assignment information at the June 24, 1988 meeting. Although Roach referred to written information on occasion during the course of his explanation, he refused to make it available. According to Huguenin, Roach said the requested materials constituted his "working papers," and he would not share them unless told to do so by a "higher authority."

Roach admitted that Huguenin asked for materials to verify his position. He said he checked his files, but the file containing the enrollment projections was not in his possession. Roach testified that he interpreted the request for staffing and assignment information as an attempt to review his entire file. He felt this exceeded the enrollment projections and staffing information, hence he refused. Roach admitted that he responded with a "flip remark" that he would provide the information when

ordered by a "higher power." He admittedly did not give Huguenin the staffing or assignment information.

Because Roach's refusal was firm, Huguenin did not renew the request for information after June 24, 1988. The grievance was eventually dropped because the grievance procedure provided only for advisory arbitration.

Bookout's transfer to NJHS became effective September 1988. The transfer adversely affected Bookout in several ways. After twelve successful years of teaching at NMHS, he was required to adapt to a very different environment. The transfer required that he relearn the junior high school curriculum, develop new lesson plans, and devise new teaching strategies. These factors required that Bookout spend more out-of-class time in order to teach effectively at NMJS. He convincingly testified that he is "temperamentally unsuited" to teach the junior high school age group and strongly prefers the subject matter and the students at the high school level. He has difficulty controlling younger students and finds it necessary to write more disciplinary referrals at NJHS.

ISSUES.

1. Whether the District transferred Bookout because of his protected activity?⁹

⁹Although the complaint alleges that Mori made the decision to transfer Bookout, it was established early in the hearing that Roach was the decision-maker. The case was fully litigated with that in mind. Therefore, this decision will treat the transfer decision by Roach as unalleged violation. Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 18-19.

2. Whether the District unlawfully refused to provide relevant information, to the Association during the grievance procedure?

3. Whether the District issued Bookout a negative evaluation because of his protected activity?

4. Whether the District unlawfully encouraged an employee to refrain from involving the Association in her employment activities?

DISCUSSION

Bookout's transfer

Section 3543.5(a) prohibits retaliation against an employee for engaging in conduct protected by the EERA. To establish a violation of section 3543.5(a), Charging Party bears the burden of showing that Bookout engaged in protected activity, that the Respondent knew of the activity, and that the protected activity was a "motivating factor" in the transfer decision. Novato Unified School District (1982) PERB Decision No. 210. The Charging Party must also show, under objective standards, that the employer's action was adverse to an employee. Palo Verde Unified School District (1988) PERB Decision No. 689. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. Ultimately, the employee must show that "but for" the protected conduct he or she would not have suffered the adverse action. Novato Unified School District, supra. In applying this test, the trier of fact is required to weigh both

direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee "but for" the exercise of protected rights. Novato Unified School District, supra. See also, Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 729-730.

It is undisputed that Bookout engaged in a rather large amount of protected activity during the period (the 1986-87 and 1987-88 school years) immediately preceding his transfer. He served as head of the faculty senate and on the NTA board of directors. He filed numerous grievances and represented employees in a variety of employment related disputes. The nature and amount of protected activity by Bookout placed him in a highly visible role as a prominent NTA leader.

To justify an inference of unlawful motive, the Charging Party must show that the employer had actual or imputed knowledge of the employee's protected conduct. Novato Unified School District, supra. p. 6. In this case it is undisputed that Roach, who became chief of personnel in August 1987, was aware of Bookout's protected activity throughout the 1987-88 school year. Roach admitted that, during the period he was deciding who to transfer, he knew of Bookout's participation in the grievance procedure, as well as his role in the faculty senate and the NTA. It is similarly undisputed that Mori, who provided substantial input to Roach during the transfer process, knew of Bookout's protected conduct during the 1986-87 and 1987-88 school years.

There are several pieces of evidence which suggest unlawful

motive and thus provide the nexus between Bookout's protected conduct and the involuntary transfer to NJHS. Bookout's transfer came on the heels of an extended period of protected conduct, near the end of Roach's first year as chief of personnel. The transfer was soon after Roach told a grievance meeting that contract disputes "had to stop." Timing of a discriminatory act is evidence from which an unlawful motive may be inferred. North Sacramento School District (1982) PERB Decision No. 264, p. 9.

Other evidence which points to unlawful motive is found in the reasons given by Roach to support the transfer. Beginning with the June 3, 1988 meeting, Roach's overall explanation for Bookout's transfer became a patchwork of vague, shifting and exaggerated reasons. For example, at the June 3, 1988 meeting, Roach told Bookout he was chosen because he (Bookout) had successful experience at the junior high school level, affirmative action considerations dictated a man fill the slot at NJHS, and the assignment was desirable because NJHS had recently won a statewide award for excellence. But in his June 6, 1988 written statement of reasons, Roach modified his justification for the transfer. He added that Bookout had extensive experience teaching above-average students, a factor quite different from 3xperience at the junior high school level. The June 6 memo explains that, although the NJHS English staff has been a strong one, "because of turnover during the past several years, many excellent teachers have left the program, and it is the District's desire to place an experienced highly qualified person

in the job." This justification is inconsistent with Roach's June 3 statement that NJHS was at that time an excellent school and Bookout should welcome the opportunity to teach there. Roach's concern, based on high teacher turnover in the English department at NJHS, seems exaggerated for a school which had recently won an award for excellence. Moreover, Roach later admitted that the teachers who left the English department at NJHS had done so prior to the 1986-87 school year. Thus, Roach's concern about dilution of the quality of the English staff at NJHS seems not only exaggerated but also somewhat untimely. Vague, shifting and exaggerated, reasons offered to justify Bookout's transfer is evidence which suggests an unlawful motive, - Novato Unified School District, supra, pp. 13-14; Pleasant Valley School District (1988) PERB Decision No. 708, pp. 17-18.

In his testimony Roach added other previously unannounced reasons to support his decision to transfer Bookout. He said that the return of Mary Kay Henderson, who had been on sabbatical during the 1987-88 school year, made the loss of Bookout more acceptable at NMHS. Although Roach steadfastly maintained throughout the hearing that his mind was open to arguments to persuade him to change the decision, he never mentioned Henderson's return as a factor. Thus, a reason for the transfer was known only to Roach. Bookout was given no opportunity to state his case with respect to Henderson's return.

The same is true with respect to the section 10.5 criteria. The absence of any reference to section 10.5 either on June 3 or

in the June 6 memo supports Huguenin's testimony that Roach first announced application of this section at the hearing. Even if Perlowitz' notes are considered, they suggest that on June 24 Roach avoided any admission that he used section 10.5. Roach's belated announcement that he used the section 10.5 criteria indicates an attempt to legitimize the transfer decision after the fact. Like the failure to mention the Mary Kay Henderson situation, the failure to clearly inform Bookout or Huguenin that the contractual voluntary transfer criteria had been followed largely precluded a meaningful discussion about the basis for the transfer. Ignorant as to the precise criteria used, Bookout could not have possibly persuaded Roach to change his mind. This is evidence from which an unlawful motive may be inferred. See Woodland Joint Unified School District (1987) PERB Decision No. 628, adopting decision of administrative law judge at page 34.

Roach also departed from what he described as a long practice whereby involuntary transfer decisions were made at the site level. According to Roach's own testimony, this practice existed for approximately fifteen years. While Roach claimed he was only trying to avoid hard feelings at the site level, departure from such a long and established past practice is nonetheless evidence from which an unlawful motive may be inferred. Woodland Joint Unified School District, supra, p. 6.

As more fully discussed below, Roach's refusal to provide relevant information to Aleita Huguenin at the June 24 meeting also raises the spectre of unlawful motive. Although the meeting

occurred after the transfer decision, Roach's refusal nevertheless is evidence from which an unlawful motive may be inferred. It indicates that Roach was more interested in transferring Bookout than he was in an open discussion about the merits of the transfer. See Baldwin Park unified School District (1982) PERB Decision No. 221, pp. 16-17.¹⁰

Further evidence of unlawful motive is found in the statements of Kaz Mori.¹¹ His comment in the spring of 1987 that he did not want outsiders involved in problems at NMHS suggests a hostile feeling for NTA representatives, including Bookout, who had supported a fellow teacher unjustly treated by the school newspaper. Unrebutted testimony regarding Mori's hostile comments and reluctant dealings with the faculty senate and NTA are similarly indicative of unlawful motive. See pp. 3-6, supra.

Under objective standards, the transfer adversely affected Bookout. A discriminatory transfer for purposes of retaliating against an employee for protected activity is viewed as adverse in nature. Woodland Unified School District (1990) PERB decision

¹⁰Roach's irritation at Bookout's seemingly mild speech to the city council and his comment to Welsh that contract disputes "had to stop" are further examples of unlawful motive. However, these need not be considered in detail. For purposes of argument under the Novato analytical framework, Charging Party has already shown sufficient anti-union motive on the part of Roach.

¹¹Roach sought information and input from Mori about who should be transferred. Mori and Roach discussed Bookout, Johnson and Hallford as candidates. Mori participated in several meetings where the transfer was discussed with Roach. Mori and Roach, according to Mori, had approximately six private telephone calls where they discussed the transfer. Although Mori was not the person who ultimately made the decision, it is concluded that he provided substantial input.

No. 808. In addition, this case is unlike Palo Verde Unified School District, supra, where the transfer merely resulted in mild inconvenience, the employee continued to perform the same duties, and working conditions in certain respects actually improved. In contrast, the transfer of Bookout constituted a major career setback. Bookout's demeanor on the witness stand clearly demonstrated that he is "temperamentally unsuited" to teach the junior high school age group, and as a result he has difficulty controlling younger students. He was required to relearn the junior high school curriculum, devise new teaching strategies and develop new lesson plans. All of this required that Bookout spend more out-of-class time preparing to teach. Furthermore, the failure of even one English teacher at NMHS to show the slightest interest in Roach's solicitation of volunteers indicates that teaching in the English department at NJHS was not viewed as a desirable assignment.

It has been established that Bookout engaged in protected activity, and that Roach and Mori knew of the activity. It has also been shown that the transfer adversely affected Bookout. And the existence of unlawful motive establishes a nexus between the protected conduct and the transfer. The burden now shifts to the District to prove that its actions would have been the same despite the protected activity. Novato Unified School District, supra, p. 14.

Roach's explanation, viewed in the totality of the evidence, does not withstand scrutiny. Despite the claim that this was an

extremely difficult decision which caused great concern, he adapted a surprisingly narrow approach. First, for all intents and purposes, he limited the pool of candidates to the English department at NMHS. Serious consideration was given only to these teachers. This automatically precluded consideration of the remaining teachers at the high school who may have been qualified to fill the slot at NJHS. The possibility exists that a teacher holding a multiple credential (e.g., Wasser, Johnson or Hunt) could have been reassigned to permit the transfer of a NMHS teacher from outside the English department. Second, there were no meaningful discussions between Roach and the local site administrators who presumably knew the candidates best. Roach took control over the decision. According to Mori, while he provided Roach with information and even discussed some individuals, there was never an in-depth dialogue between Roach and site administrators to rate and compare the candidates by use of objective standards. As evidenced by the example of the counsellor transfers, Roach (and Mori) used this procedure in the past and thus knew it was a viable option, yet it was not adopted. The arbitrary limitation on the number of candidates considered and the failure to rate or compare the candidates with the assistance of local site administrators, as had occurred in the past, indicates no real desire to fill the slot at NJHS in a fair and open process using clear and objective criteria.

Six of the teachers in the English department at NMHS who were considered for the transfer - Neri, Blackhart, Gulbranson,

Henderson, Williams and Hollenbeck - had more seniority than Bookout. Also, Hollenbeck was to replace Haga as department chairperson, Henderson had experience teaching at the junior high school level but had already been transferred once in her career, and Williams was the main teacher in the drama department.

Two candidates -- Wasser and Johnson - were less senior than Bookout. Wasser even taught at the intermediate level. However, both held multiple credentials and taught split assignments. Johnson coached at least two sports and Wasser typically taught several sections in the history department.

Another teacher (Kennelly) taught ESL. She was retained at NMHS for this reason.

Retention of these teachers at NMHS because of the above-stated reasons finds support in the record. However, viewed against a background of unlawful animus, Roach's reasons for selecting Bookout rather than any of the remaining teachers are deemed to be pretextual.

Roach offered several reasons for not transferring Hallford, who, like Bookout, taught only English. Roach claimed Hallford viewed teaching at the junior high school level as a "very undesirable assignment." Hallford was not called to testify. However, even if his dislike of teaching at the junior high school level is accepted as true, it is hard to imagine that Hallford's feelings in this regard were stronger than Bookout's. Roach knew this before he made his decision. At the June 3, 1988 meeting, Roach indicated he was already aware of at least two of

Bookout's six requests for transfer out of the junior high school. Although Roach claimed he was prepared to reconsider his decision even after it was announced, Bookout's June 3 emotional argument that he too disliked teaching at the junior high school level for all practical purposes was ignored.

Roach also claimed that Hallford, unlike Bookout, had special skills teaching seniors. Those skills were never identified at hearing. However, even if Hallford had such skills, Bookout too possessed similar skills easily applied to teaching seniors. In his June 6 memo, Roach wrote that Bookout had "extensive experience teaching average or above average students." At the hearing, Roach praised Bookout's dedication and teaching ability. Thus, the preference of Hallford over Bookout, based on the ability to teach seniors, was plainly exaggerated by Roach.

Bookout's teaching skills aside, the justification that Hallford was retained at NMHS to teach seniors is suspect for another reason. Hallford may be very good at teaching seniors. However, Roach admitted at the hearing that Hallford now teaches sophomores. The fact that Mori and/or Hollenbeck (the new department chairperson) have not found it necessary or desirable to assign Hallford to teach seniors severely undercuts one of Roach's chief reasons for choosing Bookout over Hallford for the transfer.

The final reason for not selecting Hallford is found in Roach's claim that Bookout had more teaching experience at the

junior high school level. Of course this is true in terms of number of years teaching at that level. But Hallford, like Bookout, possessed the required credential to teach at NJHS. And his experience, acquired during the 1982-83 school year, was far more "recent," a factor in section 10.5.4 which Roach claims he followed.¹² In comparison, Bookout had not taught at the junior high school level for twelve years. The questionable value of such obviously stale experience was inexplicably overlooked by Roach. Further, Hallford had taught in the District for approximately eleven years. Choosing Hallford would not have resulted in placing an inexperienced teacher at NJHS. Plainly, Hallford would have satisfied Roach's concern regarding the type of teacher that was needed at NJHS (whether one accepts the justification that NJHS was a good place to teach because it had recently won a statewide award or whether one accepts the somewhat different justification that the English department at NJHS needed an experienced teacher because of teacher turnover). In this connection, Roach's claim that he placed great weight on junior high school teaching experience is belied by his unexplained failure to investigate whether any of the candidates had taught at the lower level prior to their employment in the District. If junior high school teaching experience was such an

¹²Roach testified that he applied the section 10.5 criteria, including the "recent training" factor. Huguenin's notes of the June 24 meeting, introduced into the record by the District, indicate that Roach told Association representatives that he "didn't look at recent training/experiences or inservices only went on known credential." This inconsistency further undermines Roach's justification for the transfer.

important factor in resolving what Roach claimed was an extremely tough situation (nobody wanted to transfer to NJHS), it seems that investigating prior experience was the logical thing to do.

Based on the totality of the evidence, it is concluded that Bookout and Hallford were at least equally qualified candidates for the transfer. In such circumstances, Roach emphatically testified that, "all things being equal," seniority should be the governing factor. Roach stressed in his testimony that "seniority should be given the overwhelming weight . . . I think seniority is extremely important." This approach is consistent with that used in the 1987 science department transfer case. Since Bookout is seven years more senior than Hallford, under Roach's unilaterally adopted objective criteria, as well as under the limited past practice in the District, Hallford should have received the transfer.

The two remaining teachers - Harrington and Hunt - were far less senior than Bookout. They were retained at NMHS primarily because they taught other subjects, in addition to English. If Harrington and Hunt were truly needed at NMHS to teach drama and journalism/math respectively, their retention at that school would be justified. However, the record does not support this need.

Roach placed considerable weight on seniority. Bookout is fifteen years more senior than Harrington. Roach claimed Harrington was hired to teach drama. But the employment card relied on by Roach at the time of the decision indicates that

Harrington, hired in 1985, did not teach a drama course until 1987. (Other records indicate that Harrington may have taught a single drama course in 1986-87.) District records indicate that at no time during 1987-88 or 1988-89 did Harrington teach more than two sections of drama. In fact, Williams alone was responsible for the drama program in prior years. Harrington's relatively light teaching load in this area, coupled with Williams' availability and the option to reassign sections,¹³ casts serious doubt on the assertion that Harrington's absence from NMHS would have presented a serious problem. As for Harrington's preference for drama, NJHS had a drama department in which he could have participated.

The reasons Hunt was retained at NMHS are also questionable. The goal of departmental gender balance played only a minor role in the decision to transfer Bookout. Almost as an afterthought at the end of his June 6 memo outlining the reasons for transfer, Roach wrote that "some consideration was given" to this factor. At the June 24 grievance meeting, as well as in his testimony, Roach again indicated that gender was not a determinative factor. Thus, while gender may have been a consideration, Hunt cannot automatically be ruled out as a viable candidate.

Aside from the weight given departmental gender balance, there are other reasons to question use of this goal as a valid

¹³District records show that Williams' schedule was such that, with relatively minor reassignments, she could have taught the drama sections assigned to Harrington. Such minor reassignments were frequent in the English department at NMHS.

reason for Bookout's transfer. The District's affirmative action policy, relied on by Roach, does not expressly address departmental gender balance. In fact, the next vacancy in the NJHS English department was filled by a white woman in preference to a comparably qualified male, thus further underscoring the lack of importance placed on departmental gender balance.

Hunt's retention at NMHS is questionable for other reasons. She had two years of more recent teaching experience at the intermediate school level, and she was eight years less senior than Bookout. Although she held multiple credentials, the employment card relied on by Roach indicates that she had not taught math since the 1986-87 school year, having been assigned no math sections during the 1987-88 or 1988-90 school years. This undercuts the contention that she was needed in the NMHS math department. In addition her journalism course load was light. Records show she typically taught no more than one journalism section per term. Under the presumption that any holder of an English credential is able to teach journalism, any of the teachers in the NMHS English department presumably could have been assigned the single journalism section taught by Hunt. Therefore, the claim that she was needed to teach journalism is not convincing.

The need for Hunt to teach math and journalism at NMHS is called into question on yet another basis. During the 1989-90 school year, Hunt taught at Ohlone College. Although she is scheduled to return to NMHS, her absence during this period tends

to support the observation that her presence at NMHS to teach either math or journalism was not crucial.

The collective bargaining agreement provides that the District has the right to transfer an employee when it is in the best interest of the District. The basis of what is in the best interest of the District, however, cannot be an employee's involvement in protected activity under the EERA. See e.g., McFarland Unified School District (1990) PERB Decision No. 786, pp. 8-9. Other legitimate criteria must be advanced for the District to exercise its discretion. The District has offered several reasons to support Bookout's transfer. No reason offered by the District, standing alone, supports the conclusion that the transfer was unlawfully motivated. However, the reasons advanced for Bookout's transfer cannot be viewed in a vacuum. The trier of fact may "consider facts and incidents compositely and draw inferences reasonably justified therefrom." Santa Clara Unified School District, *supra*, pp. 14-15. As explained above, Roach's rationale for transferring Bookout rather than Hallford, Hunt or Harrington does not withstand scrutiny and is therefore deemed to be pretextual. Based on the totality of circumstances, the inference to be drawn is that the District's position is more indicative of unlawful motivation than legitimate justification. See San Leandro Unified School District (1983) PERB Decision No. 288; Santa Clara Unified School District (1985) PERB Decision No. 500.

Based on the foregoing, it is concluded that the transfer of Bookout violated section 3543.5(a)... Because Bookout was an Association activist, the same conduct also violated section 3543.5(b).

The denial of information.

An exclusive representative is entitled to all information that is necessary and relevant to the discharge of its duty to represent employees in contract administration. Modesto City Schools and High School District (1985) PERB Decision Nos. 479 and 518. The employer's refusal to supply such information evidences bad faith bargaining unless it demonstrates adequate reasons why it cannot provide the information. Stockton Unified School District (1980) PERB Decision No. 143. Absent a valid defense, refusal to furnish necessary and relevant information is in itself an unfair practice. Trustees of the California State University (1987) PERB Decision No. 613-H. Relevance is determined by a liberal discovery-type standard, and information is not deemed irrelevant simply because an exclusive representative is able to negotiate a contract or present a grievance without the information. Id.

The information concerning staffing and enrollment projections, requested by Huguenin on June 24, 1988, was plainly relevant to Bookout's transfer grievance. The Association was not yet convinced that a transfer was necessary, nor had it accepted Bookout as the logical selection. The information would have assisted the Association in evaluating the need for the

transfer, the District's reasons for the transfer, and the selection of Bookout.

In response to Huguenin's request, Roach checked his files and found that he did not have the enrollment projections. This information, therefore, could not be provided. However, Roach also refused to provide staffing and assignment information which he had in his possession. The record contains many documents containing such information which Roach admitted in testimony that he had in his possession during the June 24 meeting. Thus, he was obligated to give Huguenin that information. The contention that Roach believed Huguenin's request for the staffing and assignment information was overbroad is not persuasive. The plain meaning of Huguenin's request, as well as the purpose of the meeting itself, was to secure information to enable the Association to evaluate the transfer. Roach was aware of this. Even if he believed the request was overbroad or sought confidential documents, he could have provided the staffing and assignment information while retaining the remainder of the file. See Los Rios Community College District (1988) PERB Decision No. 670. He did not do so. He responded with a "flip remark" while firmly refusing production. Since the District has raised no valid defense, the refusal to provide the staffing and assignment information was unlawful under the Act.

Based on the foregoing, it is concluded that the District refused to provide necessary and relevant staffing/assignment information to the Association, in violation of section

3543.5(c). The same conduct also violated section 3543.5(a) and (b).

Bookout's evaluation

The comment placed in Bookout's May 16, 1988 evaluation - that he uttered an expletive and abruptly left a staff meeting - must be evaluated under the Novato standards. As described earlier, Bookout engaged in the requisite protected activity. Mori, the evaluator, knew of Bookout's protected conduct and on occasion had demonstrated hostility towards Association activity. However, the objectionable part of the evaluation did not originate with Mori. The evaluation was initially based on Berke's report. Since she was not the official evaluator, Berke reported her observations to Mori. Mori confirmed the report with Haga. In reality, it was Berke and Haga who were responsible for the objectionable part of the evaluation. Mori simply accepted their input concerning the meeting.

There is no evidence in the record upon which it can be concluded that either Berke or Haga harbored an unlawful motive against Bookout because of his protected conduct. Therefore, even if the contested part of the evaluation is inaccurate, it cannot be found unlawful under the EERA. See Moreland Elementary School District (1982) PERB Decision No. 227 (Employer conduct, even if inappropriate, may not be remedied under the Act where it

is not based on anti-union motive.)¹⁴ This part of the complaint is hereby dismissed.

The Forgatsch meeting

As the parties point out in their respective briefs, employees have the right to be represented at certain meetings with their employers. Citing Fremont Union High School District (1983) PERB Decision No. 301, Charging Party contends that employees have the right to be represented in "all matters of employer-employee relations." Relying on Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617, [205 Cal.Rptr. 523], Respondent argues that employees have the right to representation only in meetings surrounded by "highly unusual circumstances." However, since Mori did not deny Bookout the right to represent Forgatsch, the extent of an employee's right to representation is not the central issue here. Having consented to Bookout's presence, Mori was bound to participate in the meeting in a lawful manner. The issue, therefore, concerns the appropriateness of Mori's comments to Forgatsch, during as well as after the meeting.

An employer is entitled to express its views on employment related matters over which it has legitimate concerns. Only employer speech which carries a "threat of reprisal or force or promise of benefit" will lose its protection. Rio Hondo Community College District (1980) PERB Decision No. 128, pp. 19-

¹⁴Given this finding, it is unnecessary to resolve any lingering dispute about the accuracy of the contested part of the otherwise favorable evaluation.

20. In assessing employer speech, the Board considers the likely impact on employees who may be more susceptible to intimidation or to the coercive import of the employer's message. *id.*, p. 20. In addition, employer speech is evaluated in the total context which it occurred to determine whether it is unlawful. See e.g., Antelope Valley Community College District (1979) PERB Decision No. 97, pp. 20-23; Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9.

Applying these standards here, it is concluded that Mori's comments to Forgatsch did not exceed the kind of employer speech permitted by the Act. It was Forgatsch who requested the meeting. Although the subject of the meeting was to be a routine work assignment, Mori honored Forgatsch's request that Bookout attend. The meeting was brief and almost immediately Mori granted Forgatsch's requests regarding the assignment. Bookout conceded that the tone of the meeting was "pleasant, it wasn't antagonistic." Mori's references to Association representation were apparently so mild that Bookout was not moved to object during the course of the meeting. Even in post-meeting correspondence, Bookout was not unduly critical of Mori. In a memo to Association officials, Bookout admitted the parties did an "exemplary job" in solving the problem. In a memo to Mori, Bookout suggested it was permissible for Mori to invite employees to see him (Mori) "privately at any time." While it is recognized that even subtle employer comments can occasionally carry a coercive message, that does not appear to be the case

here. Mori's comments during and after the meeting are in line with the view that the subject was truly minor in nature and could have been resolved accordingly. These statements are not the type which objectively interfere with employee rights under the Act.

Based on the totality of circumstances, it is concluded that Mori's comments to Forgatsch were not unlawful under the Act. This part of the complaint is hereby dismissed.

REMEDY

Under section 3541.5(c), PERB is given the power to issue a decision and order directing an offending party to "cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of [the Act]."

It has been found that the District unlawfully retaliated against Gary Bookout by involuntarily transferring him from NMHS to NJHS. By this conduct the District violated section 3543.5(a) and (b). Trustees of the California State University (1990) PERB Decision No. 805-H. It has also been found that the District unlawfully refused to provide necessary and relevant information to the Association at the June 24, 1988 grievance meeting. By this conduct the District violated section 3543.5(c), (a) and (b). Modesto City Schools and High School District (1985) PERB Decision No. 518. It is appropriate to order the District to cease and desist from all such conduct.

In addition, it is appropriate to require the District to reinstate Bookout, upon request, to his former position or its

equivalent at NMHS without prejudice to his seniority and other rights and privileges. To avoid disruption of the educational program, the transfer of Bookout to NMHS need not occur until the beginning of the 1990-91 school year. San Leandro Unified School District, supra, PERB Decision No. 288.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The notice should be subscribed by an authorized agent of the Newark Unified School District, indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist from this activity and otherwise comply with the proposed order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69; Davis Unified School District, et al. (1980) PERB Decision No. 116.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, the entire record herein, and section 3541.5(c), it has been found that the District violated section 3543.5(a), (b) and (c). It is hereby ordered that the Newark Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(A) Retaliating against employees, particularly Gary Bookout, because they participated in activities of employee organizations of their own choosing for the purpose of representation on matters of employer-employee relations;

(B) Interfering with the right of Newark Teachers Association, CTA/NEA to represent its members in their employment relations with the public school employer;

(C) Failing to negotiate in good faith with the exclusive representative by refusing to provide the Newark Teachers Association CTA/NEA with relevant information needed to prosecute contract grievances on behalf of certificated employees of the District.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(A) Upon request, restore Gary Bookout to his former position, or its equivalent, at Newark Memorial High School effective the beginning of the 1990-91 school year, without prejudice to his seniority and other rights and privileges.

(B) Within seven (7) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive calendar days. Reasonable steps shall be taken to insure that the Notice is not

reduced in size, altered, defaced or covered by any other material.

(C) Within thirty (30) workdays of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall

accompany each copy served on a party or filed with the Board
itself. See California Administrative Code, title 8, sections
32300, 32305 and 32140.

Dated: June 15, 1990

Fred D'Orazio
Administrative Law Judge