



STATE OF CALIFORNIA
 DECISION OF THE
 PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA ROSA JUNIOR COLLEGE)	
FEDERATION OF TEACHERS LOCAL 1946,)	
)	
Charging Party,)	Case No. SF-CE-1330
)	
v.)	PERB Decision No. 895
)	
SONOMA COUNTY JUNIOR COLLEGE)	August 12, 1991
DISTRICT,)	
)	
Respondent.)	
)	

Appearances: Stewart Weinberg, Attorney, for Santa Rosa Junior College Federation of Teachers Local 1946; Margaret M. Merchat, Attorney, for Sonoma County Junior College District.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Sonoma County Junior College District (District) of the attached proposed decision by an administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)¹ by denying permanent

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part, that:

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 applicant for employment or reemployment.

employment to Richard Speakes (Speakes) because of his exercise of protected activity.

The Board, after review of the entire record, including the proposed decision, the District's exceptions and the Santa Rosa Junior College Federation of Teachers Local 1946's responses thereto, finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board insofar as they are consistent with the discussion below.²

DISCUSSION

On appeal, the District claims the ALJ erroneously found that it deviated from its long-established hiring practices by refusing to select candidates in the order recommended by the faculty hiring committee. According to the District, in order to be offered a teaching position, candidates must be on both the faculty committee's short list and placed in the "highly acceptable" category by the administration committee. The

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

²The following technical corrections are made to the proposed decision:

1. The ALJ stated that of the five candidates on the faculty short list, only one was a woman. In fact, there were two women on the list.
2. In footnote 11, the citation to the transcript should read R.T. III, p. 37.
3. At page 22, the reference to the Charging Party in the last paragraph should instead be to the Respondent.

District asserts that the college president has the ultimate authority to select new faculty members and he is not bound by department preferences.³

The evidence provides that on only two other occasions since 1971, has the president not made selections in accordance with a faculty committee's preference. Departure from established policies and procedures in dealing with employees is one of several factors in this case which may support an inference of unlawful motivation. (Novato Unified School District (1982) PERB Decision No. 210.)

The District's exceptions restate arguments made before the ALJ at the formal hearing. While the Board applies a de novo standard of review and is free to draw its own conclusions from the record, with the exception of the ALJ's finding that the District deviated from past practices, no justification is found in this case to deviate from the ALJ's analysis.⁴ We find that the ALJ's findings of fact and conclusions of law are supported by the record. The Board finds that the remaining factors are sufficient to conclude the District violated EERA section

³The college trustees actually complete the hiring process by acting on the president's recommendations.

⁴The Board is not convinced that the evidence supports a finding that the college hiring practices require the president to consistently select faculty candidates in accordance with department faculty recommendations. The mere fact that the president has followed faculty hiring committee recommendations in all but two other cases, does not as a matter of law establish that the president has abdicated his authority to select new faculty members. The Board hereby reverses the ALJ's finding that the District deviated from past practices by refusing to select faculty members in accord with faculty recommendations.

3543.5(a) and (b) when it refused to select Speakes for a permanent faculty position.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that Sonoma County Junior College District has violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act) and pursuant to section 3541.5(c), it is hereby ORDERED that the Sonoma County Junior College District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Violating EERA section 3543.5(a) by denying Richard Speakes employment in reprisal for his exercise of protected rights guaranteed by the Act; and
2. Violating section 3543.5(b) by denying the Santa Rosa Junior College Federation of Teachers Local 1946, rights guaranteed to it by the Act.

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

1. Employ Richard Speakes in a teaching position on the commencement of the first college semester after this decision becomes final, equivalent to that which he would have held at the time he was unlawfully denied employment;
2. Make Richard Speakes whole for any losses he has suffered since the first day of the Fall school term, 1989, as a result of the District's failure to employ him on that date.

Reimbursement for any monetary losses shall include interest at the rate of ten (10) percent per annum;

3. 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 are customarily 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; and

4. 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.

Chairperson Hesse and Member Shank joined in this Decision.

APPENDIX



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

After a hearing in Unfair Practice Case No. SF-CE-1330, Santa Rosa Junior College Federation of Teachers Local 1946 v. Sonoma County Junior College District, in which all parties had the right to participate, it has been found that the Sonoma County Junior College District violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

1. Violating EERA section 3543.5(a) by denying Richard Speakes employment in reprisal for his exercise of protected rights guaranteed by the Act; and

2. Violating section 3543.5(b) by denying the Santa Rosa Junior College Federation of Teachers Local 1946, rights guaranteed to it by the Act.

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

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2. Make Richard Speakes whole for any losses he has suffered since the first day of the Fall school term, 1989, as a result of the District's failure to employ him on that date. Reimbursement for any monetary losses shall include interest at the rate of ten (10) percent per annum.

Dated:

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



SANTA ROSA JUNIOR COLLEGE)	
FEDERATION OF TEACHERS LOCAL 1946,)	
)	Unfair Practice
Charging Party,)	Case No. SF-CE-1330
)	
v.)	
)	
SONOMA COUNTY JUNIOR COLLEGE)	PROPOSED DECISION
DISTRICT,)	(1/30/91)
)	
Respondent.)	

Appearances: Stewart Weinberg, Attorney, for Santa Rosa Junior College Federation of Teachers Local 1946; Robert Henry and Margaret M. Merchat, Attorneys, for Sonoma County Junior College District.

Before William P. Smith, Administrative Law Judge

PROCEDURAL HISTORY

On July 26, 1989, this unfair practice charge alleging that a part-time instructor was not selected for a full-time probationary position because of his protected activities was filed by Sonoma County Junior College Federation of Teachers Local 1946 (hereafter Charging Party, AFT or Local 1946) against Sonoma County Junior College District (hereafter Respondent, College or District).

After investigation, the General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a complaint on August 10, 1989. The complaint alleges that the district unlawfully: 1) refused to hire an instructor, Richard Speakes, for the position of full-time English instructor because of his protected activities while serving as Vice-President of

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.

the Charging Party, and participating in the organizing drive of the Charging Party leading to an election for certification as an exclusive representative; and 2) denied Charging Party its right to represent unit members. It is alleged that these actions violated the Educational Employment Relations Act (hereafter EERA or Act), sections 3543.5 (a) and (b).¹

The College filed its answer on September 26, 1989. Based on lack of information, the Respondent denied that Richard Speakes engaged in protected activity. Respondent denied it violated the Act by discriminating against Speakes because of any such protected activity. Respondent also denied that its conduct denied Charging Party the right to represent its members.

An informal conference was conducted by a PERB administrative law judge on September 13, 1989, but the matter was not resolved.

¹The 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) and (b) state that 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 interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For the purpose of this subdivision, "employee" includes an applicant for employment or reemployment.

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

A formal hearing was conducted by the undersigned administrative law judge on January 25, 1990, January 26, 1990, and February 1, 1990, in Santa Rosa, California. The final brief was submitted on April 18, 1990, and the case was submitted for decision.

FINDINGS OF FACT

It is stipulated by the parties and hereby found that the College is a public school employer within the meaning of section 3540.1(k). Local 1946 is an employee organization within the meaning of section 3540.1(d). Richard Speakes at all times relevant was a public school employee within the meaning of section 3540.1(j).

Richard Speakes was a part-time faculty member who submitted an application for a full-time position when the college posted three openings for full-time faculty positions in the English department for the 1989-90 school year. Of the three positions, two were regular full-time positions and one was a full-time substitute position to replace a faculty member on leave for the upcoming college year.

The established procedure for many years at the college was for a two step interviewing process. One conducted by a faculty committee² from the academic department concerned and the other by an administrative committee. The two committees separately interview each of the candidates.

²This is called the "hiring committee" by the faculty, but see footnote 3, infra pg. 4.

After deliberation, the faculty committee ranks a selected number of candidates according to its collective preference. If one position is open, it selects three from among those interviewed. If two positions are open, it selects four and if three positions are open it selects five. This is called the short list. The English department forwards this list, as well as the committee's summary evaluation of each of the candidates on the short list, to the administrative committee.

The administrative committee consists of the president and the academic vice-president.³ It also interviews each of the candidates and ranks them into three general categories:

- (1) those it considers highly acceptable,
- (2) not quite as acceptable and
- (3) not acceptable

The administrative committee compares the candidates it placed in the first category with those on the short list of the faculty committee. The College superintendent/president then makes his choice(s) to fill the open position(s).³ He has always hired from the short list. In the case of the English department, he has made his choice according to its ranking.

The 1989 administration committee was Dr. Ray Mikalson, superintendent/president of the College and Dr. David Wolf, academic vice president.

³The trustees of the college, by appropriate school board action, completes the hiring process based on the president's recommendation.

For the 1989/90 school year, the departmental "hiring" committee members were Joyce Griffen, the English department chairperson; Ralph Farve, Melissa Kort, Marvin Sherak and Douglas Fisher, English department instructors; Edmund Buckley, the dean of instruction⁴, liberal arts-academic standards; and Richard Webster the department chair-elect. As such, Webster sat ex-officio on the committee without the right to vote.

Thirteen of the applicants for the positions were interviewed by the faculty committee and also by the administrative committee. The interview process took each committee several days during the last working days of May 1989.

The committee met again after the Memorial Day holiday to make its final decision on the candidates, based on the collective score each received from the members and the results of the interviews.

The faculty hiring committee procedures were very structured. In the preparation for the interview meeting with the committee, a candidate could present orally a methodology idea as they would to their department colleagues, or a sample lesson as they would to a classroom of students. Then the interview process moved on to asking each of the candidates to respond to a list of set questions. The committee members determined which of its members asked what questions and in what

⁴The dean though an administrative position, is a member of the departmental hiring committee and together with the department chair, transmits the results of its decision and evaluation to the administrative committee.

order. They could not ask additional questions unless they were follow-ups. Through this process the thirteen were cut to five. These five were then ranked by preference in this order: (1) Taylor, (2) Speakes, (3) Madskey, (4) De Blasio and (5) Cooney.⁵ Madskey is a woman, the others are men. Thus, the faculty hiring committee ranked Speakes as second among the five names it submitted to the administrative committee.

The practice of ranking the candidates by the English department's hiring committee when presented to the administrative committee, started in the mid 1970's and continued through the 1980's. Mikalson, Wolf, and Buckley said the proper procedure was to present the list as unranked. Mikalson said some departments presented the names in alphabetical, random or chronological order. He conceded they would, however, indicate their order of preference. But, in this case, as in all previous years, the actual list presented to the administrative committee from the English department hiring committee was a list with the names in the order as ranked in preference by the departmental hiring committee. In addition, the representatives of the

⁵While this was the hiring committee's final position, in preliminary discussion within the committee, two of its members would have ranked their preference for Speakes as lower. For example, Melissa Kort said she was:

. . . disturbed by the presentation that Speakes made. It didn't match what the criteria were for the presentation.

But Kort and one other committee member were persuaded by the majority to reach the unanimous accord.

departmental hiring committee met with Mikalson and Wolf when they presented its list to them, and in the discussion with Mikalson and Wolf that followed, informed the administrators of the departmental hiring committee's order of preference for the candidates. Melissa Kort confirmed that for the two years she was on the committee, they ranked the candidates in order of preference. Marvin Sherak, retired English department instructor who had served in the English department for thirty-three years and served on the departmental hiring committee for approximately three or four years, first in the 1970's and again in the 1980's, said that on every occasion he could recall, the administration hired the candidates as ranked by the departmental hiring committee. The candidates list ranked by the departmental hiring committee was transmitted to the administration by the dean of letters and science, who sat on the departmental hiring committee, such as Dean Buckley, or his predecessor. Mikalson and Wolf, however, made it clear that the ultimate hiring decision was the president's and that he was not bound by the ranking. The first time the rankings of the English department committee were not followed by the administration in making its selection, was in the Spring of 1989 when the hiring committee selected and ranked five for the three open positions, and of the five, all were offered positions except Speakes, who was ranked by the hiring committee as second choice among the five.

It is found that the English department in actual practice routinely presented a ranked list to the administrative committee.

The Administrative committee's interview process was shorter and less structured. It was conducted on May 30, 1989. After a brief introductory warmup of small talk, it consisted of asking a couple of predetermined questions of each of the candidates. In Speakes case, it lasted no more than 15 or 20 minutes. Dr. Mikalson engaged Speakes in the introductory small talk and Dr. Wolf followed up with the questions. Speakes said it was only one question. Dr. Mikalson said Speakes response jumped from question to question and he didn't put his thoughts together very well. Mikalson said:

He seemed to start and then lose focus in his interview. And he was not looking directly at us when he was responding to the interview as I am doing to you.

Dr. Wolf said Speakes did not interview well. The Administrative committee ranked Speakes among its second category of candidates. That is, those who were "not quite as acceptable."

Griffen, Webster and Buckley presented the department hiring committee's list of five preferred candidates to Dr. Mikalson and Dr. Wolf shortly after the first of June 1989. The department hiring committee's list was delivered to the administrators with the candidates' names presented in the sequence that represented the committee's preference for the candidates. The list also

included after each name a brief summary prepared by Buckley, but not reviewed by the committee,⁶ of the candidates strengths and

⁶Because of its importance in conveying the committee's preference to the administration committee, it is set forth in its entirety:

In making these recommendations, the Committee considered commitment and ability to teach the whole range of English offerings, especially including basic skills courses. The Committee also considered special qualities the recommended candidates would bring to the Department. Thus there is a variety of strengths represented in the choices below.

Ron Taylor. Ron has a PhD. in Linguistics--and applies effectively what he knows to the teaching of reading and composition. Six years experience at the Univ. of Virginia plus work in the Orient in ESL. Interview was very strong--he was assertive, confident, articulate. One of the brightest candidates interviewed.

Richard Speakes. Richard has both the M.A. and M.F.A (creative writing) and is a serious, practicing writer and poet. He brings a fresh approach to composition, particularly remedial composition. He is insightful about the writing process and sensitive to the predicament of the novice student writer. Considerable experience (Murray State in Kentucky).

Candace Matzke. Candace is, apparently, "superteacher" at College of the Sequoias, active in the department and the college at large, as well as interested and involved in such state wide matters as Title V course standards and AB 1725 staff development (including ISW activities). Her interview was very strong, and included a well prepared, innovative classroom presentation.

Gloria DeBlasio. Gloria has taught many levels of reading and composition, including ESL. While not as strong in literature as some others, she demonstrated tremendous

qualifications as perceived by the committee. Over the former approximate twenty years, the result of the two-committee screening procedure, as it related to the English department, had been that the president had always selected instructors to fill open positions according to the order of preference for the candidates expressed by the departmental hiring committee on its short list.⁷

Mikalson selected Taylor, Madskey and De Blasio to fill the positions. Prior to Mikalson making an offer of employment to his three choices, members of the departmental hiring committee learned of Mikalson's decision to skip over Speakes. Representatives went to both Mikalson and Wolfe, as well as Buckley, and protested the decision to skip Speakes. Since the

energy and commitment to students and has an engaging manner.

Rian Conney. Rian is also a practicing writer, and has had full time experience at Foothill (wants to leave that area). His interview was excellent, revealing that he has thought long and hard about teaching and that he is committed to it.

⁷This had previously been the result generally throughout the College in other departments as well. However, the Respondent was able to produce evidence of two exceptions in which the president had not followed the preference expressed by the department. One related to the engineering department during the same 1988/89 screening period. In that case, the president selected the engineering department's second preference from among a list of three, for the single open position. The second exception occurred in 1979, when the president selected the second ranked preference of the speech department. These two instances were the only exceptions presented by the Respondent. Between 1971 and 1986, 1500 to 2000 candidates for full-time faculty positions were interviewed and 275 to 300 have been hired using this same screening process.

president had failed to make his selections following the preference among the applicants as ranked by the departmental hiring committee, they sought explanation and justification. Originally, the reason given by Mikalson and Wolf to the faculty committee was that Speakes did not interview well. When later pressed by the representatives of the hiring committee, Dr. Wolf gave as a reason, the need to maintain departmental "gender equity." Since the English department already had an equal or better percentage of women to men, the faculty committee found this explanation unacceptable. Madskey, the only woman among the five, withdrew in favor of a job elsewhere. Mikalson skipped Speakes a second time and chose Cooney, a man. Wolf told the representative of the faculty hiring committee:

. . . that they might very well rank people at the committee level, that when the discussion took place with the administration, those were presented unranked and that the administration's impressions were then integrated with those of the hiring committee to reach the final conclusion and further

. . . that the administration was a player, and what we had here was an exception that proved the rule.

The departmental hiring committee was very incensed and expressed its concerns in a letter dated June 15, 1989, to Mikalson and Wolf as to what it considered a deviation from the past practice.

Mikalson responded in a letter directed to the members on June 21, 1989, as follows:

Dear Members of the Hiring Committee:

In response to your letter of June 15, I wish to emphasize my regard for the efforts supplied by you in the matter of reviewing candidates and recommending individuals to the administration. Over the years, it is these procedures that have yielded the fine staff we currently have in the English Department.

As you pointed out, shared governance involves the cooperative participation by both faculty and administrative interests. We have on this particular occasion a most unusual instance where, after careful review and extensive discussions with you as a group and individually, we were still unable to reconcile differences in every single instance.

I want to stress that all the administrators involved in this latest round of English hiring were careful participants in the interviews of the candidates, and, in the case of the one instance where there continued to be disagreement, special care was taken to listen to the arguments made by members of the committee and to spend special time pursuing references of the candidates. After all this effort was expended and in response to the special requests made by the committee, we were, unfortunately, still unable to reach agreement on one of the selections. This, in the last analysis, is a reflection of the exercise of the administration's best judgment as to the relative merits of the competing candidates. In fulfilling my obligation to act in a fashion consistent with my best judgment and in weighing all the factors as best I can, the ultimate responsibility in these matters resides in my office.

In all the many personnel selection procedures undertaken by the college, the record will show that it is unusual for these kinds of disagreements to result; however, they have from time to time, and they are ordinarily the result of differences in judgment and the requirement that the

administration take final responsibility for staffing decisions.

With great respect,

Roy G. Mikalson
Superintendent/President

Speakes' activities on behalf of an employee organization

Speakes is a member of Santa Rosa County Junior College Federation of Teachers Local 1946 and serves as its vice-president. When Speakes first joined the union in the Spring of 1988, there was no exclusive bargaining representative of the faculty. The union decided to seek certification as the exclusive representative of all the instructors. The president of Local 1946, Sarah Gill, asked Speakes to accept the position of vice-president so that the union could more likely be successful in its appeal to other part-time instructors to support the union in the election campaign. Thus, Speakes played a high profile role on behalf of the union around the college throughout the election campaign. The union, as part of its election campaign, published a newsletter entitled "Excellence" and several single page election flyers.

Respondent's knowledge of Speakes union activities

(a) Publications

Speakes was featured prominently in "Excellence" as well as in the election flyers, by the union. Copies of "Excellence" with Speakes' picture on the front page together with his name in the caption and text was distributed during September or October

of 1988, and again during March or April of 1989. A flyer consisting principally of his picture and its caption, and some text, was distributed during May of 1989, just prior to the May representational election.⁸ This literature was widely distributed to the faculty and was also placed directly into the administrators' mail boxes including those of Mikalson and Wolf.

(b) PERB pre-election conference

In addition to knowledge of Speakes' election campaign activities through "Excellence" and the union election flyers, Mikalson and Wolf had knowledge of Speakes' active participation on behalf of the union as a result of Speakes' attendance on April 27, 1989, at a pre-election conference held at the PERB regional office in San Francisco.

Dr. Mikalson and Dr. Wolf, together with counsel, appeared on behalf of the College, and Speakes was one of the several representatives present on behalf of the union, together with its counsel.⁹ A significant portion of the more than one-half day long meeting was conducted in a 12-foot by 14-foot conference room with all the foregoing named people sitting around the conference table. The result of the conference was that a unit

⁸The election gave voters a choice of the Charging Party and two other employee organizations as well as no representative. The Charging Party and one organization were then the contestants in a run-off election at a later date in the Fall of 1989, not relevant herein.

Approximately an equal number of representatives were present representing a competing faculty organization.

was agreed upon and a mail ballot election was conducted. The ballots were counted on June 13, 1989.¹⁰

Dr. Mikalson denies he was aware of Speakes' aforementioned activities on behalf of the union's organizing effort. Dr. Wolf conceded that he was probably aware of Speakes' AFT activities.

It is found that Drs. Mikalson and Wolf had knowledge of Speakes' protected activities on behalf of the union when the administrative committee conducted its interviews of the applicants on May 30, 1989.

Union Animus

Both Mikalson and Wolf deny union animus on their part. No objection to certification of the election results was made by participants charging unlawful acts by the administrators. Wolf had been president of a college in the Los Angeles Community College district, where the AFT was an exclusive representative of the instructors. Buckley had been a member of the AFT earlier in his career at Sonoma Junior College. Mikalson's attitude toward the collective bargaining election is best described by this dialogue from the transcript. The questions are by counsel for Charging Party and the answers are Dr. Mikalson's.

Q. In fact you are not happy with the prospect that the faculty was organizing. Isn't that correct?

A. I think that happiness isn't -- well --

¹⁰As a result of this election, AFT gained the largest number of votes, but less than a majority. A run-off election was scheduled for the Fall of 1989, to determine whether AFT or a competing faculty organization would be selected as exclusive representative.

Q. Well, you are unhappy about it, let's put it that way; you were not pleased?

Q. I would agree with that.

Q. Why was that?

A. Because I think we were getting along so well the way we were doing it, our relationship with the faculty. We had an excellent working rapport with them. There was an excellent working rapport with the Board of Trustees and the faculty and I felt that -- that anything that might endanger those relationships would not be for the best interest of the students, the staff, period.

Q. Why did you think that collective bargaining or meeting and conferring was a threat to those relationships?

A. Because I think it changes the relationships.

Q. But why was it a threat to the relationship?

A. Well, because it would -- it would change them and I -- I would -- I thought we were having -- we had excellent relationships with all elements of the campus.¹¹

Speakes' Previous Ranking by Hiring Committee

Speakes had been a candidate for one of the two positions open in the English department in each of the two previous years. The 1987 and Spring 1988 departmental hiring committees selected three for its short lists from among the numerous applicants, and forwarded the ranked lists to the administrative committee. Speakes was ranked third on these short lists and each time Dr. Mikalson selected the first two as ranked. In each case, Speakes

¹¹Transcript, Vol.11, p. 37.

participated in a similar interview selection process for temporary positions that became available and was selected as a temporary instructor instead. The interview process for selection of persons for these temporary positions used the same criteria as was applied in the selection process for the full-time positions.

Speakes' Teaching Employment:

Speakes received his Master's degree in English from the University of Washington and ultimately a Master of Fine Arts degree from Vermont College. He was first employed as a teacher at the university level at the University of New Orleans and then at the Murray State University in Kentucky as an assistant professor. At Murray, where he taught from 1985 to 1987, he was head of the creative writing program and in a tenure track position. He came to Santa Rosa Junior College in 1987. After coming in third on the departmental short list, the result of the interview process for two regular full-time English positions, he was offered and accepted in lieu thereof, a full-time temporary position teaching English at the College, Fall semester 1987. The following semester, Spring of 1988, he was employed by the College as a part-time instructor teaching two sections of English. The College employed him as a full-time summer session instructor teaching English during the Summer of 1988. The College reemployed him again in a temporary full-time instructor position for the Fall semester of 1988, and then again as part-

time for Spring semester 1989, and Fall semester 1989. He is scheduled to teach part-time again, Spring semester 1990.

Evaluation of Speakes' instructional performance

Speakes was evaluated on his performance as an instructor in sections English 1A on December 2, 1988, and on January 26, 1989. Dean Buckley conducted the class observations and made the evaluations. The first one was very laudatory of Speakes' performance and ended with the conclusionary statement:

I am glad he is teaching at Santa Rosa
Junior College.

On the occasion of Buckley's second evaluation of Speakes, Buckley concluded the evaluation¹² as follows:

¹² The evaluation in more detail stated:

This evaluation is based on an observation of Richard Speakes' English 1A class on November 18, plus a review of his course syllabus, writing assignments, and a number of student essays.

The hour was devoted to a discussion of two student essays, each in response to an assignment related to television commercials. The flavor of the discussion, and Mr. Speakes' way of leading it, is captured in his written communications to the students. . . . That is, in class and on paper, he approaches his subject obliquely, often beginning with observations about his own responses. One is tempted to think there is little structure to the class, and Mr. Speakes clearly is mistrustful of imposed structures; yet it is evident that he had very clear objectives for the hour that I observed. In the course of the discussion, he was able to get students (as readers) to appreciate the complexities involved in deducing the writer's intention and (as writers) to consider strategies for communicating difficult and complex ideas.

I have reviewed several student essays and the corrections and comments that Mr. Speakes has written on them. He is attentive to technical issues, particularly sentence structure, and also comments

Based on this observation and my discussions and observations in the past, I continue to see Richard Speakes as an excellent teacher of composition.

ISSUES

Did the Respondent discriminate against Richard Speakes because of his protected activity in violation of the Act? Did the Respondent deny the Charging Party the right to represent its members in violation of the Act?

DISCUSSION

Section 3543.5(a) prohibits discrimination against an employee for engaging in conduct protected by the EERA. In order to prove an allegation of discrimination, the charging party bears the burden of showing that the aggrieved employee engaged in protected activity, that the employer knew of the employee's activity, and that the employer took an adverse action motivated by that activity. (Novato Unified School District (1982) PERB Decision No. 210; Palo Verde Unified School District (1988) PERB Decision No. 689.)

The party alleging discrimination must make a prima facie showing of unlawful motivation by demonstrating a nexus between the protected conduct and the adverse action. Under Novato,

carefully about the writer's voice, his or her "heart," and the depth of thinking brought to the subject. In most cases he has appended a typed paragraph describing in some detail his overall response. For even the most struggling writers, he has accompanied his criticism with tactful, supportive statements. Also, he responds as an interested reader, outside the "teacher-critic" role.

unlawful motivation within the meaning of section 3543.5(a) occurs where the employee's participation in protected conduct was a "motivating factor" in the employer's action against the employee.

Consistent with other California and federal precedent, the Board has adopted a test which requires the trier of fact to weigh both direct and circumstantial evidence to determine whether an action would not have been taken against an employee but for the exercise of protected rights. (See Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enf. in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].)

Absent direct evidence, indications of unlawful motivation have been found in many aspects of an employer's conduct. Words suggesting retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Other indications of unlawful motivation have been found in an employer's: failure to follow usual procedures (Santa Clara Unified School District, supra); timing of the action (North Sacramento School District (1982) PERB Decision No. 264); shifting justifications and cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of a union adherent (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); and pattern of

antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

The record does not support a finding of union animus by Wolf. Mikalson was, in fact, the actual decision maker. Mikalson's aversion toward collective bargaining is supported by his own testimony. Speakes, from Mikalson's perspective, was a key spokesman in the AFT's effort to bring collective bargaining to the College.

Since organizational activity such as Speakes engaged in threatened to bring collective bargaining to the College, it is found that Mikalson had union animus.

The established practice for the administration in selecting new hires for the English department at the College over the last decade, had been to select from the list forwarded to it in the order as ranked by the departmental hiring committee. Indeed, in only two prior cases, one in 1979, in the speech department, and the other in the engineering department, is there evidence of exceptions. Thus, there is a deviation of practice shown.

Based on Buckley's evaluations of Speakes' teaching and the College's continuing reemployment of him, it is concluded that factors other than the quality of his teaching played a role in his nonselection.

Timing of the District's action in twice rejecting Speakes to accept those ranked lower on the department's hiring list is completely overlapping the organizing effort by the AFT spearheaded on behalf of the part-timers by Speakes. This could

be merely coincidental, and by itself, would not be sufficient. (Los Angeles Community College District (1989) PERB Decision No. 748.) The shifting justification for failure to select Speakes; the vague and imprecise reasons given by the administration for Speakes' failure to rank in its interview of him in contrast to his proven history of satisfactory employment and re-employment at the College; Speakes' ranking as acceptable in four previous College selection processes, including the administration's portion thereof; taken together with Mikalson's union animus, is found to constitute a prima facie case on behalf of the Charging Party.

After the Charging Party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct.

The Charging Party's effort in this regard centers on an explanation that Speakes did not interview well, the basis of which sums up to be that, "He seemed to start and then lose focus . . . and he was not looking directly at us . . . as I am doing to you." Given the vague nature of this, his satisfactory performance in candidate screening interviews in the previous year, his employment and re-employment by the College over successive years, his performance evaluations, and the observation of the demeanor of Mikalson and Wolf as they were examined in regard to this issue, it is found that the

explanation given for his nonselection was pretextual. (Novato Unified School District, supra.)

The Respondent has failed to show it would have taken the same action, in failing to select Speakes, in the absence of his protected conduct.

It is found that Speakes would have been selected for the position, but for his union activity.

Given the entire record in this case, it is found that the District's failure to select Speakes was the result of his exercise of protected activities. Furthermore, because this conduct against Speakes acted to deny the Charging Party rights guaranteed under EERA, in that Speakes was acting in the role of a union activist, the District also violated section 3543.5(b). (Newark Unified School District (1991) PERB Decision No. 864, El Dorado Union High School District (1986) PERB Decision No. 564.)

REMEDY

Section 3541.5(c) empowers PERB 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.

In this case, the District has been found to have violated section 3543.5(a) and (b) by denying Richard Speakes employment in a position he would have received, but for his protected activity. The remedy for such violations should be designed to restore, so far as possible, the status quo ante. (Santa Clara

Unified School District, supra.) In this case, Speakes was unlawfully denied appointment. It is, therefore, appropriate that the District be ordered to employ Richard Speakes to a full-time teaching position in the English department, effective with the commencement of the first college semester after the decision becomes final, with service credit and pay, from the first day of the Fall school term 1989, and to make him whole for any losses he suffered as a result of the District's unlawful actions. This use is distinguished from the facts of Lemore Union High School District (1982) PERB Decision No. 271, where it was found that the unlawful act was the denial of opportunity to compete. Pursuant to State of California, Department of Transportation (1984) PERB Decision No. 459-S, reimbursement for any monetary losses shall include interest at the rate of ten (10) percent per annum. The District shall be entitled to offset from any amount owed pursuant to the Order, the value of wages and benefits secured from alternative employment during the period of liability.

It is also appropriate that the District be ordered to cease and desist from its unfair practices and to post a notice incorporating the terms of the Order. The Order should be subscribed by an authorized agent of the Sonoma County Junior College District indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and

desist from this activity and to return to the status quo ante. 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; Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584] NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case. It is found that Sonoma County Junior College District has violated sections 3543.5(a) and 3543.5(b) of the Educational Employment Relations Act.

Pursuant to sections 3541.5(c) and (e) of the Government Code;

IT IS HEREBY ORDERED that the Sonoma County Junior College District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Violating section 3543.5(a) by denying Richard •Speakes employment in reprisal for his exercise of protected rights guaranteed by the Act.

2. Violating section 3543.5(b) by denying the Santa Rosa Junior College Federation of Teachers, Local 1946, rights, guaranteed to it by the Educational Employment Relations Act.

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

1. Employ Richard Speakes in a teaching position on the commencement of the first college semester after this decision becomes final, equivalent to that which he would have held at the time he was unlawfully denied employment.

2. Make Richard Speakes whole for any losses he suffered since the first day of the Fall school term, 1989, as a result of the District's failure to employ him on that date. Reimbursement for any monetary losses shall include interest at the rate of the ten (10) percent per annum.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The Notice must be signed by an authorized agent of 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 workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that all other allegations of the charge and complaint are DISMISSED.

Pursuant to California Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, 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 Code of Regulations, title 8, sections 32300, 32305 and 32140.

Dated: January 30, 1991

William P. Smith
Administrative Law **Judge**