



STATE OF CALIFORNIA  
 DECISION OF THE  
 PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTTS VALLEY EDUCATION	)	
ASSOCIATION, CTA/NEA,	)	
	)	
Charging Party,	)	Case No. SF-CE-1575
	)	
v.	)	PERB Decision No. 1052
	)	
SCOTTS VALLEY UNION ELEMENTARY	)	August 24, 1994
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
	)	

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Appearances; California Teachers Association by Ramon E. Romero, Attorney, for Scotts Valley Education Association, CTA/NEA; Kay & Stevens by Janae H. Novotny, Attorney, for Scotts Valley Union Elementary School District.

Before Blair, Chair; Carlyle and Garcia, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Scotts Valley Education Association, CTA/NEA (SVEA) and the Scotts Valley Union Elementary School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ dismissed SVEA's complaint which alleged that the District improperly transferred Marcia Allison (Allison) from a middle school to an elementary school. This conduct was alleged to violate section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).<sup>1</sup> Having determined that it has

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 states, in pertinent part:

jurisdiction over this case, the Board has reviewed the proposed decision, SVEA's exceptions, the District's response thereto, the District's statement of exceptions and the entire record in this case. The Board finds the ALJ's dismissal to be free of prejudicial error and adopts it as the decision of the Board itself as supplemented by the discussion below.

#### DISCUSSION

To demonstrate a violation of EERA section 3543.5(a) the charging party must allege facts which, if proven, would establish that: (1) the employee exercised rights under the EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato USD); Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad

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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.

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

USD.) The employer may then show as a defense that it would have taken the adverse action in the absence of the protected conduct. (Novato USD.)

An inference of unlawful motive may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad USD.)

The District generally concedes that Allison engaged in several protected activities during the 1991-92 school year. This included requesting compensation for the extra days she worked in August, 1991 and protesting her workload. Further, the District acknowledges that it had knowledge of this activity. However, the District in its exceptions to the proposed decision, claims no nexus exists (between the transfer and protected activities) as the superintendent never demonstrated animus towards Allison. The Board disagrees, and finds the ALJ properly concluded that Allison's involvement with protected activities, coupled with the timing of her transfer, along with other factors, gives rise to an inference of unlawful motivation in her transfer. (Carlsbad USD.)

Therefore, the defining issue of this case, as contained in SVEA's exceptions, concerns whether or not Allison would have been transferred notwithstanding her participation in protected activities. SVEA claims that Allison had an excellent work history (to offset the notion of poor relations with others) and that the superintendent transferred Allison only because of her exercise of protected activities.

A review of the record indicates that in 1991, relationships between Allison and Chris McGriff (McGriff) the principal at the middle school and Miyo Burnett (Burnett) assistant principal at the middle school became troubled. Allison testified that other than an issue in 1991, she did not have any problems with Burnett and described her relationship with Burnett as "cordial" and "professional." However, Burnett disagreed with this assessment. She testified that communication problems between the two developed at the beginning of the school year and continued to deteriorate until meaningful communication between them had ceased by November, 1991. The tension in the relationship is apparent from the memos written between Allison and Burnett. These memos demonstrate there were serious disagreements between them.

Additionally, McGriff, who previously had a good working relationship with Allison, began to have his own problems with Allison. This included the scheduling of teacher meetings by Allison during the time the District had advertised and set aside teacher/parent conferences in addition to the scheduling of other meetings at times when McGriff or Burnett could not attend. Soon thereafter, all requests between McGriff and Allison were put in writing. An example of how the relationships between Allison and McGriff and Burnett were suffering is apparent from a memorandum that Allison sent to McGriff and which was copied to the superintendent and the District's governing board. In the memo, Allison sharply criticized both McGriff and Burnett, questioning

their leadership skills, their lack of inspiration, and lack of acknowledgement of their employees.

The Board agrees with the ALJ that sufficient evidence exists showing that communication between Allison and other school employees also was causing a disruption at the school. We find that this disruption was significant in having a potential affect on the interpersonal relations of students and employees of the middle school. Accordingly, the Board concludes that the District has met its burden of demonstrating that Allison would have been transferred notwithstanding her involvement in protected activities.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-1575 are hereby DISMISSED.

Chair Blair and Member Garcia joined in this Decision.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTTS VALLEY EDUCATION	)	
ASSOCIATION, CTA/NEA,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. SF-CE-1575
v.	)	
	)	PROPOSED DECISION
SCOTTS VALLEY UNION ELEMENTARY	)	(9/8/93)
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	
_____	)	

Appearances: Ramon Romero for Scotts Valley Education Association, CTA/NEA; Kay & Stevens, by Janae H. Novotny for Scotts Valley Union Elementary School District.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

The Scotts Valley Education Association, CTA/NEA (Union or SVEA), filed a charge on June 30, 1992, and an amended charge on November 18, 1992. After investigation, the general counsel of the Public Employment Relations Board (Board or PERB) issued a complaint on December 23, 1992, against the Scotts Valley Union Elementary School District (District).<sup>1</sup> The complaint alleges that Marcia Allison (Allison) exercised rights guaranteed by the Educational Employment Relations Act (EERA or Act)<sup>2</sup> by requesting extra pay for extra days worked, protesting her workload and

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<sup>1</sup>Allegations in the original and amended charges relating to alleged discrimination against two other employees were dismissed by the deputy general counsel. That action was not appealed by SVEA.

<sup>2</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

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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.

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filing a grievance. It was alleged that thereafter the District took adverse action against Allison by transferring her from the middle school to an elementary school. This action, it was alleged, was done in violation of section 3543.5(a) and (b).<sup>3</sup>

The District's answer, filed on January 11, 1993, admitted jurisdictional allegations, but denied violation of the EERA. A PERB conducted settlement conference was without success. Formal hearing was held on May 11, 12 and June 25, 1993. Upon the filing of final briefs on August 13, 1993, the matter was submitted for decision.<sup>4</sup>

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<sup>3</sup>Section 3543.5(a) and (b) collectively provide that it is unlawful for the 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

Respondent's motion to correct the transcript, uncontested by charging party is granted. Volume III, page 20, line 11, the word "parody" shall read "parity." Volume III, page 99, line 27, the word "instructions" shall read "discussions."

Charging party's motion to strike respondent's post-hearing brief as untimely is denied. PERB Regulation section 32130(c) provides that the extension of time provided by California Code of Civil Procedure section 1013, subdivision (a), shall apply to any filing made in response to documents served by mail. Section 1013(a) provides that in case of service by mail, "if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be shall be extended by five days if the address is within California." Here, the transcript was served by mail, and a brief was due to

### FINDINGS OF FACT

The District is an employer, and SVEA is an exclusive representative within the meaning of the Act. Marcia Allison is an employee within the meaning of the Act. Allison has been employed by the District since September of 1987.

For all times relevant, Andre LaCouture (LaCouture) has been District superintendent. The District operates two elementary schools, Vine Hill and Brook Knoll, and one middle school. Chris McGriff (McGriff) has served as principal of the middle school. The District's administration, called the management team, consists of the superintendent, the assistant superintendent, the director of business services, the middle school principal and assistant principal, and the two elementary school principals.

In January of 1990, SVEA requested the Board of Trustees to discipline LaCouture for his ordering a District employee to remove SVEA campaign signs posted in the community. The board did discipline the superintendent.

Allison taught at one of the elementary schools for two years, beginning in 1987, and then transferred to the middle school as 6th grade teacher where she taught for two years. She was meanwhile obtaining course credits and appropriate credentials to become a counselor. She applied for and was appointed counselor in the middle school for the 1991-92 school

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be filed 30 days following mailing of the transcript. The transcript was mailed on July 9. Hence, respondent had until August 13, 1993, to file its post-hearing brief. The brief was hand filed on that day. The brief was timely filed.



year. Her assignment was 80 percent counseling and 20 percent teaching an English class.

Miyo Burnett (Burnett) came to the District as assistant principal that same year. In addition to her administrative responsibilities (80 percent), she also taught 20 percent of the same English class that Allison taught.<sup>5</sup> A third teacher, on a substitute assignment taught 60 percent of the class. In November of 1992, that teacher was replaced by Linda Rodgers (Rodgers), who had been Allison's student teacher in the prior school year.

Allison and Burnett met during interviews for the assistant principal position, and at another meeting in May 1992, they discussed the eighth grade English class they would be teaching together. At Allison's request, Burnett gave a list of books that she thought would be appropriate for the class.

At McGriff's request, Allison commenced working in August, before the start of the school session. Later, after receiving her September pay check, Allison spoke to McGriff about compensation for the extra days. Her contract called for 190 days at 80 percent time. McGriff was uncertain and contacted LaCouture, who told him to have Allison put her request in writing. Allison did that, and the next month she was paid for the extra time worked.

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<sup>5</sup>Burnett had taught in the San Francisco school district for some 15 years. Of late, she served as head of the English Department.

Allison appeared before the board at a meeting, as the teachers' representative. She testified that LaCouture became distant and cold to her thereafter.

LaCouture and Allison, at her request, had a meeting not long after. They discussed the extra days of work. Allison's version of their discussion is that LaCouture was upset that she was not "task oriented" and that she should work whatever hours were required. He did not care about the contract, she said. He left the meeting displeased, she said. After the meeting, he avoided her, she said.

LaCouture testified it was a "philosophical" meeting discussing the number of days the counseling position should have assigned to it.<sup>6</sup> He caused a survey to be taken of other schools in the area and determined that counselors were generally working a longer work-year than Allison's schedule called for. Later, he was successful in reaching agreement with SVEA to increase the number of workdays of the counselor to 195 days, with no increase in pay.<sup>7</sup>

The record evidence, respondent exhibits 1, 2, 3, 4 and 5 demonstrate tension between Burnett and Allison, and then, more significantly, between Allison and McGriff. In the fall of 1991, Burnett and Allison exchanged memos relating to serious

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<sup>6</sup>LaCouture was a counselor for three or four years prior to becoming an administrator. He has served as assistant principal, principal, superintendent/principal, and superintendent.

<sup>7</sup>There is very little evidence on the negotiated revision of the counselor's workyear. It is clear, however, that the change came about with the agreement of SVEA.

disagreements between them. The problems stemmed from their mutual complaints about lack of communication between them, requiring Allison to seek McGriff's facilitation of a meeting between the two employees. They also had disagreements about decision making regarding the English class they were both teaching.

Burnett sensed trouble in their relationship when, in August she arrived and found that none of the books she had recommended to Allison for the eighth grade class had been ordered. Allison, who testified that she did not understand Burnett's recommendations to be direction to purchase the books, nonetheless explained, without substance, why she purchased the books that she did.

They had mutual difficulty regarding the budget for the English class. Burnett had never been exposed to a system where teachers got a budget for class. She deemed it appropriate for Allison to make her own budget, and Burnett would attempt, in her role as assistant principal, to secure funds for her purposes.

On the other hand, Allison thought Burnett was avoiding the budget issue.

Of particular concern to Burnett was a field trip planned by Allison and Rogers. This was to take students to San Jose for a cultural event. According to Allison, Burnett was at a meeting where the trip was discussed. According to Burnett, she first learned of the meeting at a parent club conference where the trip was announced. The president of the club inquired of Burnett

about the trip, and she was embarrassed because she knew nothing of the trip. She felt upset that Allison had not included her in the planning, as she was also teaching the English class.

In mid-November, Burnett observed Allison and Carolyn Brook in a conversation. She said the conversation was very negative about her. Allison denied the conversation was about Burnett but then noted that it was about the lack of communication between her and the principal. "Burnett had been a part of that involvement and we were talking about that."

The incident caused Burnett to write a memo to Allison on November 15. Allison responded four days later.

The two met in November in Burnett's office. Both were tense and testified that the other was confrontational. Allison became emotional, and dissatisfied with her own emotional display left the meeting. Thereafter, their relationship was uncomfortable to both.

Burnett shared with McGriff, both before the November 15 memo and after, her difficulties with Allison. She also discussed the problems with the management team at their weekly meetings.

According to Burnett and McGriff, in December 1992 and January 1993, the management team discussions of staffing for 1992-93 included the question of whether Allison would continue as counselor for the next succeeding year. McGriff testified

that in early March he recommended to LaCouture, that she not be counselor at the middle school the following year.<sup>8</sup>

Burnett also described difficulties she had with regard to Allison's failure on two occasions to notify her of students referred to the Student Attendance Board. She further described the distance between the two in working on a shared project for orientation of fifth grade students for the middle school. Communications were so tense that, although working in the same office, they worked separately on the project. Allison did not rebut Burnett's testimony on these points.

McGriff encountered problems, beyond those he witnessed between Burnett and Allison (and Rogers), with Allison.

At the beginning of the year the staff agreed to hold teacher grade level meetings on an alternating basis every Monday afternoon. Allison changed the meeting time and frequency to every week at noon time. This precluded McGriff and Burnett who had to cover students during their breaks.

Weekly planning meetings of the student support group, including Burnett and Allison became unproductive because of the tension between those two.

In the fall they disputed her practice of scheduling grade level meetings (she scheduled 6th grade teacher meetings) when the middle school had scheduled teacher-parent conferences. The

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<sup>8</sup>Neither Burnett nor McGriff were precise on when the decision to transfer Allison was made. This does not detract from the announcement on March 10 by LaCouture that he elected to make that move.

grade level meetings were important to Allison and she protested the relocation of those meetings as she wanted to avoid teachers having to meet after school. He told Allison that was not the issue. He only wanted the sixth grade level teachers available for the parent conferences. There is no evidence that what McGriff was attempting to do would result in after hours work by teachers.

Towards the end of January he encountered problems with her performance with regard to remediation efforts and contracts for eighth grade students who were failing. He felt she was taking too long and the contract form and process was ineffective.

In February 1992, McGriff and Allison commenced interchange on the direction McGriff had given to Allison that she perform yard supervision during break and lunch periods. On February 26 she wrote him a note asking him to inform teachers in writing, of his request for her to assume those tasks.

On March 5 Allison wrote to McGriff, with copies to the superintendent and Board of Trustees, complaining about his nonresponse to her request for help. She needed secretarial assistance and took umbrage at his notice that the superintendent wanted her to assume yard duty assignments during break and lunch. She pointed out that she also taught a class and usually spent her break assisting students and her lunches were scheduled for grade level meetings. She stated that his lack of support led her to infer that he considered the counseling position and her to be a "catch all" for miscellaneous assignments, he did not

value her as a staff member, and that he is "unable or unwilling to treat particular staff members in a humane and respectful manner." The letter also expressed anticipated retaliatory-action for her letter.

McGriff responded on March 8 advising her that she had been assigned to be visible on campus during break and lunch and that she had not been assigned yard duty. He stated "the counselor should be circulating among students during these times to prevent problems and to be available to students in an easy access situation." He further stated, after responding to other allegations she made in her letter,

Your antagonistic attitude towards the administration and the assistant principal in particular continue to prevent the development of a team work approach to problem solving and task completion at S.V.M.S. . . .

Among his expectations for the remainder of the semester were:

You will be out on campus meeting with students during break and lunch. If an emergency occurs where you need to meet with students, parents, or staff please let me know and I will make arrangements for additional personnel to be outside.

He further ordered Allison to hold grade level meetings before or after school.

Allison responded on March 18. She took exception to his assertions about comments she may have made at a meeting by pointing out that she was not at the meeting. Other assertions in his March 8 letter were responded to. She expressed recognition that they held different perceptions of

acknowledgement and support. She reiterated her concerns about the conflict presented by the yard duty assignment, and difficulty she was having in getting teachers to meet for grade level meetings after school. Allison concluded by stating:

Because I do not believe there is a safe environment in which to express one's opinions at SVMS, I will continue to request that a colleague attend our meetings as an observer. I honor your desire to have Ms. Burnett attend on your behalf. . . .

An informal meeting was held on March 24 between McGriff, Allison, Breta Holgers, president of the union, Rita Prindle, grievance coordinator for SVEA, and Susan Fong, District assistant superintendent. The meeting was to address a possible contract violation that provides teachers are to be relieved of yard supervision except in "in the event of unusual circumstances." From notes of the meeting taken by Susan Fong, assistant superintendent for educational services, it is clear that this was an informal meeting prefatory to the next level of the grievance procedure.

It was the administration's position that Allison was not being assigned yard supervision but rather the assignment was to make her available to students in an informal manner. McGriff apologized for the appearance of "yard duty" but it is clear the administration placed high emphasis on school administrators and the counselor to be visible during lunch periods and breaks. It is also clear that through her processing of the grievance, Allison never saw that need as a priority over her own view of what she should be doing.



On April 2, 1992, Allison filed a grievance on the March 8 directive from McGriff.

Also, during the 1991-92 school year there was wide-spread discussion and concern about the conditions prevailing at the middle school. Various reports were advanced to the Board of Trustees. In May, the board took formal action in adopting sundry recommendations. During this time, LaCouture also took recommendations to the board concerning the middle school. Among his March 10 recommendations were to increase the vice-principal and counselor positions to full-time, and to revise the counselor and vice-principal job descriptions to provide for visibility on the playground during student lunches and recesses. He further suggested that the principal, vice-principal and counselor not conduct staff meetings during lunch time to ensure their availability to students.<sup>9</sup> He also noted his intent to transfer Allison to an elementary school.<sup>10</sup>

In May, Allison was given a summary evaluation that carried two negative observations. The first had to do with asserted belated development of remediation contracts with students who had received failing grades. McGriff stated that she developed them only after several requests. McGriff also criticized her

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<sup>9</sup>The board adopted a plan that called for, among other things, that the principal, assistant principal and counselor conduct no staff meetings during student lunch times and to be visible and available to students during that time. This was adopted on May 19, 1992.

<sup>10</sup>LaCouture testified without contradiction that the transfer was within his authority. He was seeking board support by making the announcement as a recommendation.

for her reluctance to perform general supervision of the campus during school hours. Throughout the school year he wrote, she "has displayed an uncooperative attitude toward requests made by the administration which were designed to increase her visibility on campus and increase her effectiveness with students."

On May 19, 1992, LaCouture notified Allison in writing, that she was to be transferred to one of the District's elementary schools, yet to be determined, effective with the 1992-93 school year. She was invited to meet with him to discuss the reasons for the transfer, pursuant to the contract, and LaCouture requested that she make that request before June 5.

At the time he presented the notice to Allison, she requested the reasons for the transfer. He refused to explain the transfer.

The parties' collective bargaining agreement contains provisions relative to involuntary transfers. Article 11, section 11.4.1 provides:

An employee who does not request a transfer may not be transferred to another school within the District until given an opportunity for a meeting with the Superintendent to discuss the reasons for the transfer. The employee shall, upon request, be considered for other vacancies which are available at the time of the impending transfer for which the employee is qualified.

Among the stated reasons allowing an involuntary transfer is the "improvement of the educational program within any school, including but not limited to, balancing staff background experience, interests, and academic preparation;" and, as a

separate ground, "improvement of the staff interpersonal relationships in any school."<sup>11</sup>

LaCouture interpreted "staff" to mean all staff and not just teachers.

On June 1 Allison requested a written explanation, complaining that the contract required a meeting before the transfer, and that she had not gotten the reasons before the "transfer notification."

Thereafter, the two exchanged communications concerning a meeting for an explanation for the transfer. At times, one or the other were not available and they did not meet until June 19. During the exchange, LaCouture objected to Allison's selection of a representative. He later confirmed that she could have any one she wanted to represent her.

At the June 19 meeting, which was taped by Allison, LaCouture gave his reasons. The reasons were for "the improvement of the educational program at the Scotts Valley Middle School and for the improvement of staff interpersonal relationships at that school."

LaCouture's explanation was several fold. Called as a witness by SVEA he testified that the primary reason for the transfer was the tension in the relationship of Allison with McGriff and Burnett. LaCouture saw a linkage between programs in

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<sup>11</sup>According to Carolyn Brook, a negotiator for SVEA in the 1970's when this language was proposed by the District, SVEA inquired of the meaning of "staff" as SVEA did not want it to be used for punitive transfers. The District clarified that "staff" was meant to mean problems between teachers.

the first criteria and staff relationships in the second. When the latter was adverse, then programs suffered.

At the meeting he stated that on improvement of the educational program, consistent with the spring report referred to above, the import of academic quality. In this regard, Allison had a high number of D's and F's in the first semester. With regard to her counseling, he cited two instances of what he called "serious breaches of confidentiality." Because Allison was taping the conversation, he refused to reveal the names of the students.<sup>12</sup>

Allison was aware of one problem, and at his request had contacted a parent. Allison thought that problem had been resolved.

As for improvement of staff interpersonal relationships LaCouture cited Allison's conflicts with the site administration and other staff. He refused to name the staff persons who expressed observations about Allison. Evaluations of Allison's counseling or teaching did not enter into the decision to transfer her, he said, but was based solely on the year she served as counselor.

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<sup>12</sup>Although LaCouture said he did a little investigation into the problems, he did not ask Allison for her version of what transpired. He relegated these matters, to more of "concerns" rather than complaints.

## ISSUE

The issue in this case is whether the District transferred Marcia Allison from her counseling position at the middle school in retaliation for her engagement of protected activity.

## CONCLUSIONS OF LAW

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210.) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato, supra, and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983)

PERB Decision No. 328-S); or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employees' protected activities.

(Novato, supra. PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal. Rptr. 626].) Once employer misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance to other protected activities. (Ibid.)

Allison's protected activity, contends SVEA, is found in her protest of payment for the five days worked in August, when she objected to teachers being required to hold meetings after hours, and when she filed a grievance protesting her assignment to yard duty. Also, her appearance before the board as SVEA representative constituted protected activity.

It is found that Allison did engage in protected activity when she insisted on adherence to the contract with respect to the workdays required of the counselor. Requesting payment for the five days she worked in August was protected activity. As a representative of SVEA, appearing before the board, she also was engaged in protected activity. Allison's efforts to avoid

teachers having to meet after school likewise constitutes protected activity.<sup>13</sup>

The filing of the grievance, however, followed the official announcement of intent to transfer Allison from the counselor position by 14 days, so it could not have played a role in the employer's decision. Hence, while it does constitute protected activity, it had no consequence in this case.<sup>14</sup>

The District was aware of the request for payment of five days extra work. LaCouture was directly involved in processing the request. Both McGriff and LaCouture were aware of Allison's role representing SVEA before the Board of Trustees.

Pursuant to Novato, supra, SVEA must now make a connection between Allison's protected activity and the decision to transfer her. It asserts the following indicia gives rise to an inference of unlawful motivation for the transfer, and hence a violation of EERA.

SVEA first relies on the timing of Allison's request for the extra days work pay, and the meeting with LaCouture regarding the number of days a counselor should work. Then, in November she

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<sup>13</sup>The District generally concedes a finding that Allison was engaged in protected activity, and that LaCouture and McGriff were aware of such activity. On this ground, however, it takes issue that she was engaged in protected activity. In as much as other contemporary actions by Allison meet her first obligation under Novato, this issue is not critical.

<sup>14</sup>SVEA takes the position that since she was notified on May 19 of her transfer, any activity antecedent thereto should be considered. As noted, the District announced its intent on March 10 to transfer Allison from the counselor position, hence the March 24 grievance process did not influence the earlier decision of the District.

asserted contract rights by insisting that teachers not have to meet after school hours. Then, by December, Allison's future service as a counselor was being discussed.<sup>15</sup>

Timing is a factor that may suggest unlawful motivation, but standing alone is not sufficient to justify an inference.

(Moreland Elementary School District (1982) PERB Decision No. 22 7.)

SVEA contends that LaCouture evidenced anti-union sentiment at the October meeting with Allison, when he told her that the contract was not important and that she should work as many hours as it took to complete the task.

While it is clear the fact that Allison requested compensation for the five extra days worked initiated the discussion, it is also clear that LaCouture was aware of his obligations under the contract. Prior to the meeting he directed her request for compensation be granted. At the meeting, she was not interested in discussing a longer work-year (and indeed, had no obligation to) because the contract called for 190 days. LaCouture felt that perhaps the 190 days was not enough, because McGriff had asked Allison to work the extra days. LaCouture undertook a survey about the counselor work-year in comparable schools, approached SVEA and obtained a negotiated longer work-

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<sup>15</sup>SVEA also contends filing the grievance was followed closely by the announced transfer, and that this should be considered evidence giving rise to an inference. While there is no consistency among Burnett, McGriff or LaCouture about when the decision was made to transfer Allison, it is clear that decision preceded March 10. Thus, the filing of the grievance on March 24 had no bearing on that decision.



year. Even though the longer work-year was without an increase in salary, none-the-less, SVEA, for whatever reason, entered into the agreement to modify the work year. I don't see anti-union animus in LaCouture's statement about the contract.<sup>16</sup>

SVEA further contends that Article 11.4 requires the decision to transfer to take into consideration length of service in the District, education and experience, and interests and competence.

There is no evidence that LaCouture did not include these factors in his determination to transfer Allison from the counselor position.

SVEA complains that the superintendent's failure to offer justification for the transfer to Allison at the time it took action is further evidence of unlawful motivation.

The parties had already agreed to a process by which the obligation of the District to relate reasons was triggered. Section 11.4.1 covers the matter. It provides that the employee may not be transferred "until given an opportunity for a meeting with the Superintendent to discuss the reasons for the transfer." There is no other requirement that at the time of notice of transfer the District was under an obligation to provide justification for the transfer.

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<sup>16</sup>SVEA argues LaCouture's credibility should be undermined by the reprimand he received from the Board of Trustees in 1990. No specific information on that reprimand was introduced into evidence. All that was introduced was SVEA's letter and its own views as to the matter. I decline to draw any inference from the incident.

SVEA contends the District departed from established procedures and standards in transferring Allison. It contends the transfer was inconsistent with Article 11.4.2.6 of the agreement as that provision provides that an involuntary transfer may be made for the improvement of staff relationships at a school. This means, however, according to SVEA, "problems arising between teachers, not between teachers and administrators."

Brooks testimony about the meaning of the contract term "staff" was not challenged by the District. Hence, if "staff" means just teachers, and does not include administrators, then, to the extent LaCouture considered conflicts between Allison and McGriff as justification for the transfer, the District did vary from the agreed upon grounds for transfer. McGriff was an administrator and not, if SVEA is correct, to be considered in the improvement of staff relationships. Burnett, also an administrator, was however, also a teacher for 20 percent time. The need for improvement of staff relationships could certainly include her to the extent of their co-teaching the English class. There was evidence about the difficulties they had in that endeavor. Also, LaCouture referred to other staff who had complained about Allison.

While not free from doubt, the precise definition of "staff" asserted by SVEA and not rebutted by the District, must suggest some variation from the agreed-upon grounds for transfer. An

inference of unlawful motivation may be drawn from this variation.

SVEA contends further evidence of an inference of unlawful motivation comes from the District's vague, ambiguous or shifting reasons as justification for the transfer.

In addition to the conflicts between McGriff, Burnett and Allison, LaCouture offered that Allison had a high number of "D's" and "F's" in the first semester. He also mentioned "serious breaches of confidentiality" in her role as counselor. Finally, he offered that he had "concerns" expressed by other members of the staff. While LaCouture stated that these were not the reasons for the transfer, they were offered by him as justification for his decision. Yet none of this information had been imparted to Allison before, save for one issue of confidentiality. At no time did the District, McGriff or LaCouture relate to Allison concern about a high number of low grades. Nor was there any concern about conflicts with other staff. Finally, nothing in writing was ever stated about problems with her grading practices or maintenance of confidentiality in her role as counselor. McGriff's summary evaluation issued on May 11, 1992, did not refer to low grades, problems with other staff members, or express concern of Allison's observation of confidentiality.

Finally, SVEA asserts that the reasons given by the District were pretextual, and the real reason was her protected activity.<sup>17</sup>

From the foregoing discussion, Allison's claim for extra pay, protesting of teachers working after hours, and her appearance before the Board of Trustees as representative, coupled with the timing, sometime in December and January of the consideration of whether Allison would continue on as counselor at Scotts Valley Middle School, along with other factors gives rise to an inference of unlawful motivation in her transfer. The other factors are: (1) LaCouture's application of the term "staff" to administrators when the term was meant only to be teachers, thus a possible variation from procedures and standards of the District; (2) LaCouture's explanation for the transfer, predicated upon factors that had not been imparted to Allison or which the District had not previously complained (the number of low grades in the first semester and breaches of confidentiality in her role as counselor); and (3) the superintendent was inconsistent when he testified that her performance as a teacher and counselor were not factors in the decision to transfer. These factors combined persuade me to find that SVEA has satisfied its burden to raise an inference of unlawful motivation

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<sup>17</sup>SVEA further finds an inference of unlawful motivation in the District's alleged cursory investigation of alleged misconduct. Because of the conclusions drawn here that an inference of unlawful motivation has been raised, this contention is not addressed.

for the transfer of Allison from the counselor position at Scotts Valley Middle School.

The District's reasons for transferring Allison was the level of tension that emerged in her relationship with the principal and the assistant principal. The middle school was under scrutiny by the Board of Trustees to improve its programs and campus safety. Contrary to its stated objectives of having more staff visible to students during their breaks, Allison was insisting on holding meetings with teachers that precluded her being visible to students during their breaks. This was not directed to Allison but rather to all the administrators and to the counselor position.

Allison did not contest the exacerbated situation between her and Burnett and indeed admitted they had little communication between them. Nor did she disaffirm the tension between herself and McGriff. Indeed, she expressed her views in the letter to the board, indicating McGriff viewed the counselor position as a "catchall"; he did not value her as a staff member; and he was "unable or unwilling to treat particular staff members in a humane and respectful manner."

The counselor role was part of the management team within the middle school. The principal's frustration with the lack of communication prevailing between his assistant, Burnett and Allison, as well as his own relationship with Allison was evident in the description, not rebutted by SVEA, that the team did not meet weekly as had been the plan at the beginning of the school

year. Allison continued to assert her own priorities as to time available to students in the direction of the school principal, a direction that became part of the District-adopted plan. That plan was that administrators and counselors be more visible to students during student's free time on campus. The communications between Allison and McGriff clearly show a disruption of working relationship appropriate for a principal and subordinate. I conclude that the decision to transfer Allison was predicated upon this failure of communication and deterioration of relationship between Allison and McGriff and Burnett.

It is found that the District would have transferred Marcia Allison despite her protected activity. Accordingly, the complaint and underlying unfair practice charge should be dismissed.

#### PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, Unfair Practice Charge No. SF-CE-1575, Scotts Valley Education Association. CTA/NEA v. Scotts Valley Union Elementary School District, and the companion PERB complaint are hereby 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

~~Administrative Law Judge~~  
Gary M. Gallery  
~~Administrative~~ Administrative Law Judge