STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE VLADIMIR MRVICHIN, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-3346 PERB Decision No. 1091 March 16, 1995

Appearances: Charles A. Goldwasser, Attorney, for George Vladimir Mrvichin; Office of the General Counsel by Camille A. Goulet, Attorney, for Los Angeles Community College District.

Before Blair, Chair; Carlyle and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Los Angeles Community College District (District) of the administrative law judge's (ALJ) proposed decision (attached). In the proposed decision the ALJ determined that the District: (1) issued a Notice of Unsatisfactory Performance to George Vladimir Mrvichin (Mrvichin) who was an athletic trainer; (2) terminated his employment as trainer at one of the schools in the District; and (3) failed to rehire him as an instructor in the Physical Education Department, in violation of section 3543.5(a) of the Educational Employment Relations Act (EERA).[1]

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

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, the District's statement of exceptions and Mrvichin's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

STATEMENT OF FACTS

Mrvichin is an athletic trainer and a teaching instructor for the District. As such he is both a classified and certificated employee of the District. He is a classified employee because of his athletic trainer position and a certificated employee because of his teaching assignments.[2]

Mrvichin has two immediate classified supervisors, Rudolph Valles (Valles), dean of athletics, and Gilbert Rozadilla (Rozadilla), athletic director. Mrvichin's immediate certificated supervisor is Gerald Heaps (Heaps).

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

[2]According to the charge, Mrvichin is employed full time as a classified employee (athletic trainer) and as an hourly rate certificated employee (instructor). PERB issued a complaint which alleged that Mrvichin was "dismissed from his position." "Position" meaning both classified and certificated.

Mrvichin actively participated in the protest against campus President Omero Suarez' (Suarez) decision to discontinue interscholastic football. As both a classified and certificated employee, Mrvichin filed grievances. Mrvichin's complaint alleges that in retaliation for participating in this protected activity, protesting and filing grievances, the District terminated his employment.

Mrvichin contends that the District used student trainer, Xochilt Valdivia's (Valdivia) accusations to terminate him. Valdivia filed a grievance and a sexual harassment complaint against Mrvichin alleging improper conduct.

Initially, Valdivia's student grievance was handled by the District's Ombudsman, Daniel Castro (Castro). During the handling of Valdivia's suspension and name calling incident, Mrvichin filed several grievances against Castro. Due to the number of grievances filed by Mrvichin against Castro, College President Suarez appointed Ron Dyste (Dyste), Dean of Student Services, to handle Valdivia's complaints.

On August 19, 1993, the District tendered Mrvichin a Notification of Unsatisfactory Performance, Statement of Charges, and terminated him. The Notice of Unsatisfactory Performance, a form located at page 87 in the Collective Bargaining Agreement (CBA), has a signature line for both the immediate supervisor and the next higher level supervisor. Heaps, Chair of the Men's Physical Education Department, who worked for the District for 25 years and as Mrvichin's certificated supervisor, testified that

before a Notice of Unsatisfactory Performance is issued, it should be discussed with the Chair of the Department.[3] Mrvichin's two immediate classified supervisors, Rozadilla and Valles, were not consulted regarding Mrvichin's termination. Valles testified that he was not contacted by the District until he was directed to sign Mrvichin's Notice of Unsatisfactory Performance. Rozadilla did not sign the form.

Twenty-one days after his termination, Mrvichin, on September 9, 1993, filed with PERB an unfair practice charge against the District alleging retaliatory discrimination.

ALJ'S PROPOSED DECISION

After hearing four days of testimony, the ALJ analyzed the statements of the witnesses and compared the testimony of: (1) Rozadilla versus Dyste, (2) Valles versus Suarez, (3) Valles

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[3]Transcript, Volume II, pages 61-62:

> Q. I want to ask you some questions about a Notice of Unsatisfactory Performance. Would, to your understanding, a Notice of Unsatisfactory Performance ordinarily be discussed with a Department Chair prior to its being issued to an employee?
> A. I would certainly hope so.
> Q. Do you know if it's required by the rules?
> A. As far as I know it is.
> Q. Would a Statement of Charges seeking an employee's dismissal ordinarily be discussed with a Department Chair prior to its being issued?
> A. It should be.
> Q. Was either the Notice of Unsatisfactory Performance that was issued to Mr. Mrvichin or the Statement of Charges seeking his dismissal that was issued to Mr. Mrvichin ever discussed with you?
> A. No.

versus Dyste, (4) Rozadilla versus Suarez, (5) Mrvichin versus Dyste, (6) Heaps versus Dyste, and (7) Dyste versus Mrvichin.[4] The ALJ found that Mrvichin, Rozadilla, Valles, and Heaps were credible while the testimony of Suarez and Dyste was deemed not credible. There were too many conflicts, inconsistencies and problems with Suarez and Dyste's testimony.

Citing Novato Unified School District (1982) PERB Decision No. 210 (Novato) and a number of cases following it, the ALJ assessed retaliation by the District against Mrvichin for engaging in protected activity based on the following six incidents: (1) Valdivia's petition to change her grade, (2) Valdivia's student grievance, (3) Valdivia's sexual harassment charge, (4) Mrvichin's performance as an athletic trainer, (5) Mrvichin's performance as an instructor, and (6) Mrvichin's termination. All of these six events occurred in a little more than one school semester.

The ALJ's findings concluded that the District's departure from its established procedures included: (1) changing Valdivia's grade; (2) investigating Valdivia's sexual harassment complaint; and (3) attempting to negatively influence the supervisor's evaluation. Moreover, the ALJ also considered the District's verbal expression of animosity toward Mrvichin. The ALJ inferred a nexus between the adverse action taken by the District and Mrvichin's protected activity (grievances and protest). Thus,

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[4]For an in depth analysis see pages 14-18 of the ALJ's proposed decision.

the ALJ concluded that ample evidence supports the finding that the District's issuance of a Notice of Unsatisfactory Performance and termination of Mrvichin as an athletic trainer, plus the failure to rehire him as an instructor in the Physical Education Department, violated section 3543.5(a) of EERA.

DISTRICT'S EXCEPTIONS

The District filed 24 exceptions to the ALJ's proposed decision which can be classified into eight areas:
(1) jurisdiction;[5] (2) sexual harassment; (3) grade change;
(4) performance evaluation; (5) teaching assignment;
(6) certification of hours; (7) credibility and finding of inconsistent explanations; and (8) prior employment history.

The District urges that PERB "defer" jurisdiction over this unfair practice charge pending a full adjudication of Mrvichin's termination by the Personnel Commission of the Los Angeles Community College District (PCLACCD). The District argues that EERA section 3541.5[6] is instructive, in that it allows the Board

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[5]See "Jurisdiction" discussion, below.

[6]EERA section 3541.5 provides, in pertinent part, that:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. . . .
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . .

discretion to assert jurisdiction for settlement and arbitration awards and as such, the Board should defer ruling on this matter until PCLACCD's decision.

The District contends the ALJ erred by finding that the District departed from established procedures. Specifically, the District excepts "to the finding that the District departed from established procedures, and that the complaint is to go to a hearing officer." The District asserts that they had the "duty and the authority to address the problem directly" when the complainant (Valdivia) refused to elect to go to factfinding.

The District also asserts the ALJ erred when he concluded that "there was an inadequate investigation" regarding Valdivia's grade change, and also when the ALJ concluded she filed a second petition for a grade change. First, the District contends that the investigation was adequate because Dyste reviewed the roster, talked to students, talked to Mrvichin, and attempted to obtain the syllabus. Additionally, the District asserts that when Dyste reviewed the roster submitted by Mrvichin, he found some inconsistencies with respect to "points" and subsequent grades assigned to students.

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(2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

The District contends that the ALJ erroneously prohibited the District from putting on evidence which showed that Mrvichin was terminated from a previous athletic trainer position with another school district and that Mrvichin did not reveal this information when applying for his position with the District. According to the District, this evidence may independently support Mrvichin's termination.

Concerning the ALJ's proposed remedy, the District also objects to the ALJ's order involving Mrvichin's teaching assignment. The District contends the PERB complaint was based solely on Mrvichin's termination from his position as an athletic trainer and it is improper to order make whole remedies relating to any teaching assignments.

MRVICHIN'S RESPONSE TO THE DISTRICT'S EXCEPTIONS

Mrvichin responds by indicating that the District either misread the ALJ's proposed decision, misunderstood the basis for the introduction of certain evidence, or misunderstood the ALJ's reasoning with regard to such evidence.

Mrvichin asserts that many of the exceptions noted by the District fail simply on the credibility issue alone. Basically, Mrvichin rejects the District's arguments and concurs in the findings of the ALJ that the District retaliated against him when it circumvented, abused, and avoided the District's process for employee termination and administration of the Sexual Harassment (S/H) Policy.

Mrvichin also asserts that since the District raises for the first time on appeal "the argument that the District's Personnel Commission should be allowed to rule on the disciplinary action before PERB issues a final decision," the deferral issue should not be heard. Mrvichin contends that there was "no earlier suggestion, either informally or by motion, that this proceeding (before PERB) should for some reason trail the Personnel Commission." Moreover, Mrvichin argues that the deferral issue was not raised for consideration before the ALJ and there was no opportunity for the parties to respond by presenting evidence on the District's deferral request.

Finally, Mrvichin asserts that the District was correctly precluded from presenting after acquired information regarding Mrvichin's termination from a previous position with another school district. Therefore, Mrvichin requests PERB to uphold the ALJ's decision.

DISCUSSION

The Board generally gives deference to ALJ's factual findings that are based on credibility determinations. (Regents of University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601, 617 [224 Cal.Rptr. 631].) In this case many of the ALJ's findings are based, at least in part, upon credibility determinations. After analyzing all the testimony, the ALJ found that "there were too many witnesses with too many statements in conflict with Dyste and Suarez."

With regard to cases of this nature, PERB has stated that:

> [W]e must emphasize that credibility-determinations play a vital role in the consideration of this allegation. While we are free to consider the entire record and draw our own conclusions from the evidence presented, we will afford deference to an ALJ's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (1979) PERB Decision No. 104. This appears to us to be a classic instance where deference is appropriate. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 8.)

This rule recognizes the fact that by virtue of having witnessed the live testimony, an ALJ is in a better position than the Board itself to accurately make such determinations, because the Board only reviews the written transcript of the hearing. (Temple City Unified School District (1990) PERB Decision No. 841, p. 5.) We uphold the ALJ's finding that Suarez and Dyste were not credible witnesses as to what transpired.

Discrimination

In order to prevail on a retaliatory adverse action charge, Mrvichin must establish that: (1) he engaged in protected activity, (2) the employer had knowledge of his protected activity, (3) the employer took adverse action against him, and (4) the employer took adverse action motivated by that activity. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad); (Novato).) Unlawful motivation is essential to Mrvichin's case. In the absence of direct evidence, proof of a connection or nexus may be established by circumstantial evidence and inferences can be drawn from the record as a whole.

(Livingston Union School District (1992) PERB Decision No. 965; Carlsbad.)

From Novato, and a number of cases following it, any host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: (1) departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); (2) the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento)); (3) inconsistent or contradictory justification for the employer's actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); or (5) 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 District to establish that it would have taken the action complained of regardless of the employee's protected activities. (Novato.)

Filing grievances and participating in employee organizational activities is protected conduct. EERA section 3543 permits any employee to present grievances to his employer. (See also North Sacramento [filing grievance considered protected activity].)

Knowledge of Mrvichin's protected activity is attributed to the District. There is no question that the District was aware of Mrvichin's participation in the protest against Suarez's decision to discontinue interscholastic football. Moreover, the District responded to Mrvichin's grievances.[7] These issues preceded Mrvichin's termination by several months.

Although timing of the adverse action alone is not sufficient to justify an inference of unlawful motivation (Charter Oak Unified School District (1984) PERB Decision No. 404), it may, when coupled with other factors, constitute a basis for such conclusion. (Campbell Union High School District (1988) PERB Decision No. 701; Moreland Elementary School District (1982) PERB Decision No. 227.)

Several incidents were analyzed and assessed by the ALJ with respect to the retaliation for Mrvichin's protected activity. The ALJ analyzed Valdivia's petition for grade change, her student grievance, and her sexual harassment charge. The ALJ also evaluated Mrvichin's performance as athletic trainer, as instructor, and his termination. The ALJ found that the inferences which emerged from this chain of events compels the conclusion that the District's actions were based in part because of Mrvichin's protected activity.

In its exceptions the District contends the ALJ erred when he found that the District departed from established procedures.

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[7]The District did not dispute Mrvichin's participation in the protected activities.

The District asserts that its sexual harassment procedures call for the complainant, Valdivia, to elect to go to factfinding, and when she declined to go to factfinding, the president of the college had the authority to address the problem directly. Even though the president of the college may have had the authority to address a problem directly, he failed to explain why the District had to depart from its own S/H Policy when Valdivia refused to take her harassment complaint to factfinding.

Instead of using its own S/H Policy, the District terminated Mrvichin via a Notice of Unsatisfactory Performance. The Notice form contains a signature line for the immediate supervisor and another signature line for the next higher level supervisor. Rozadilla is Mrvichin's immediate classified supervisor, and Valles is Mrvichin's next higher level supervisor. It is an undisputed fact that neither Rozadilla or Valles were consulted before the Unsatisfactory Notice was prepared.

The District takes exception to the relevancy of this fact arguing that the S/H Policy does not call for the supervisor's involvement. The District is correct. The S/H Policy does not require the involvement of the employee's immediate supervisors, and there was no such finding made by the ALJ.

The ALJ found that when the District investigated Valdivia's sexual harassment complaint, Mrvichin's immediate supervisors were not consulted. Valles, Dean of Athletics, and Mrvichin's immediate classified supervisor, testified that when he was Dean of Students he conducted an investigation of complaint of sexual

harassment pursuant to the District's S/H procedures. Valles confirmed the fact that as Dean of Athletics he should have been contacted by the person representing the student in the grievances. Valles testified that the administration should have, as a courtesy, contacted him but should not have directed him to sign Mrvichin's Notice of Unsatisfactory Performance.

Likewise, Heaps, Chair of the Men's Physical Education Department, worked for the District for 25 years. He testified that before a Notice of Unsatisfactory Service is tendered to an employee the signatures of the immediate supervisor and the next higher supervisor are required on the form. Heaps was not asked to sign the Notice of Unsatisfactory Performance.

The ALJ listed "departure from established procedures" as one of five factors of circumstantial evidence he considered when determining whether District animus was present.

The District also excepted to the ALJ's failure to make a finding that the District had a legal obligation to address incidents of sexual harassment and, after investigation of those incidents, to lawfully terminate an employee based on findings of misconduct toward a student. This exception is rejected. In this case, Mrvichin provided sufficient evidence to demonstrate that the District acted with unlawful motivation when it terminated him. At that point, the burden shifted to the District to demonstrate that it would have terminated Mrvichin as a result of his improper conduct regardless of his participation in protected activity. The District failed to provide sufficient

evidence in the record that showed cause to support Mrvichin's termination.

The District argues that the ALJ erred in his finding that the District conducted an inadequate investigation of Valdivia's request for a grade change. The District contends that Valdivia did not file a second petition. Whether Valdivia filed one or two petitions for a grade change, or whether there was one informal petition made orally in February and one formal written petition in May, is not relevant to this case. What is relevant is that Dyste and Suarez departed from the District's established procedures and the Education Code[8] when they changed Valdivia's grade. The District contends that Dyste reviewed the roster, talked to students, talked to Mrvichin, and attempted to obtain the syllabus. At first blush this appears to be an adequate investigation. However, what the District fails to disclose is that when Dyste went to talk to Mrvichin regarding his roster, Dyste failed to ask Mrvichin what the numbers on the roster meant. Dyste testified that he assumed the numbers were "points".

Dyste also testified that he talked to students in Mrvichin's class. Out of the nine students, Dyste talked to four of the students. Two of the students, Valdivia and her close friend Losa, asserted that Mrvichin's grading policies were arbitrary. A third student said the grading was fair while a

[8]Education Code section 76224(a) allows the employer to change a grade if there is a showing of bad faith.

fourth student said Mrvichin would grade a student on what Mrvichin thought the student deserved, rather than the objective grades they earned during the course.

Mrvichin gave Valdivia a class grade of "B." She wanted an "A." Mrvichin testified that Valdivia did not take the final exam nor did she complete the lecture requirements of the class. Giving a student a "B" instead of an "A" who did not take a final exam or complete the lecture requirements does not demonstrate bad faith. Furthermore, Valles, Dean of Athletics, testified to what the normal procedures are for a grade change. Valles stated how the District did not follow its usual procedure. As a reason for not following the District's normal procedures, Valles advised that he was informed by the Vice President of Academic Affairs that legal counsel had requested the grade change and, thus, the president of the college ordered it. Once ordered, Valdivia's grade was changed. Changing a grade via this method is not the normal procedure. Thus, we uphold the ALJ's finding that the District's investigation of Valdivia's grade change was inadequate.

The District argues that the ALJ erroneously prevented the District from presenting evidence which showed that Mrvichin was terminated from a previous position as an athletic trainer with another school district and that he did not reveal this information when applying for his position with the District. The District claims that this evidence may independently support Mrvichin's termination. We reject this exception because the

District gave no indication that he was terminated from the District for any misinformation in the application process. Rather, the District repeatedly asserted that Mrvichin was terminated because of improper conduct. The United States Supreme Court recently ruled in McKennon v. Nashville Banner Publishing Co. (January 23, 1995) ____U.S. _ [63 U.S.L. Week 41045] that evidence of wrongdoing is not itself a bar to all relief sought by a victim of discrimination. Likewise, information acquired after Mrvichin was hired was correctly prohibited from use by the District.

The District objects to the ALJ's proposed remedy with respect to Mrvichin's teaching assignment. The District contends that the complaint was based solely on Mrvichin's termination from his position as an athletic trainer and it is improper to order make whole remedies relating to any teaching assignments. The record, however, is replete with references to both classified and certificated positions. In the charge, Mrvichin lists himself as both a classified and certificated employee of the District. At the hearing, Mrvichin testified that he was terminated because Suarez was upset because he filed numerous grievances -- two of which were in his capacity as a certificated employee. The ALJ made several findings regarding Mrvichin as an instructor, but makes no conclusion of law with respect to Mrvichin in that position. Nevertheless, there is sufficient evidence in the record to support a conclusion that Mrvichin was

terminated from his classified position as well as his teaching position because of his union activity.

Pursuant to PERB Regulation 32320, the Board has the authority to modify the ALJ's proposed decision. PERB Regulation 32320 states, in pertinent part:

> (a) The Board itself may:
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> (2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.

The District was put on notice that Mrvichin's termination was related to his certificated position. Mrvichin held two positions: (1) athletic trainer, classified position; and (2) instructor, certificated position. During the first day of the hearing, Mrvichin testified that he was both a certificated and a classified employee. Mrvichin filed eight grievances pertaining to the sexual harassment allegations. He also filed two grievances as a classified employee and two as a certificated employee, all unrelated to the sexual harassment incident. Furthermore, Mrvichin testified that he was being dismissed because "Dr. Suarez was upset with me [Mrvichin] for my filing of grievances." The District was aware that Mrvichin filed grievances as a certificated and classified employee, and any professed confusion now strains the credibility of the District.

Jurisdiction

Finally, the District contends that PERB should "defer" its jurisdiction over this unfair practice charge until the PCLACCD

has had an opportunity to fully adjudicate Mrvichin's termination. Termination of Mrvichin based on District animus and termination of Mrvichin for cause are two separate and distinct issues and should not be confused. PERB has exclusive initial jurisdiction to consider unfair labor practices. District animus is an unfair labor practice. EERA section 3541.5 states, in pertinent part:

> The initial determination as. to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. (Emphasis added.)

In San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893], the California Supreme Court recognized the preemptive nature of PERB's jurisdiction. Where the courts have said that PERB has exclusive initial jurisdiction even over the court, PERB's jurisdiction requires deferral to a collectively negotiated grievance and arbitration procedure.[9] That is not the case here. Accordingly, the District's jurisdictional exception is rejected.

ORDER

Based upon the foregoing findings of fact, conclusions of the law and the entire record in this case, it is found that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA), Government

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[9]Section 3541.5(a)(2). See also Lake Elsinore School District (1987) PERB Decision No. 646.

Code section 3543.5(a) by unlawfully: (1) issuing a Notice of Unsatisfactory Performance to George Vladimir Mrvichin (Mrvichin); (2) terminating his employment as the athletic trainer at East Los Angeles Community College (ELACC); and (3) delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its officers and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing Mrvichin because of his exercise of rights guaranteed by EERA.

2. Delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994.

3. Issuing to Mrvichin a Notice of Unsatisfactory Performance based on activities protected by EERA.

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

1. Reinstate Mrvichin to his position as the athletic trainer at ELACC and any lost opportunities to work as a certificated instructor.

2. Rescind and destroy all copies of the Notice of Unsatisfactory Performance issued to Mrvichin in September of 1993.

3. Delete from Mrvichin's personnel file any reference to the Notice of Unsatisfactory Performance, Xochilt Valdivia's sexual harassment complaint, or her grievance, and any other writings that are inconsistent with this decision and make no further use of such materials in any personnel action with regard to him.

4. Pay to Mrvichin the salary that he lost as a result of the unlawful termination. Such retroactive salary award shall include interest at the rate of seven (7) percent per annum.

5. Make Mrvichin whole for any other losses that he may have suffered as a result of the District's unlawful action, for example, loss of benefits, seniority credit(s), leave credit(s), and reasonably expected overtime salary opportunities.

6. 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 ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

7. 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 the director's instructions.

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

Member Carlyle joined in this Decision.

Chair Blair's concurrence and dissent begins on page 23.

BLAIR, Chair, concurring and dissenting: I concur in the determination that the Los Angeles Community College District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] when it terminated George Vladimir Mrvichin (Mrvichin) from his position as an athletic trainer. However, based upon a de novo review of the record,[2] I do not agree with all of the findings of the PERB administrative law judge (ALJ). Furthermore, I dissent from the remedy ordered.

In its exceptions the District contends the ALJ erred when he found that the District departed from established procedures by failing to involve Mrvichin's immediate supervisors in the investigation of the sexual harassment complaint. The District argues that the sexual harassment complaint procedure does not require the participation of the alleged offender's immediate supervisor.

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[1]EERA section 3543.5 states, in pertinent part:

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

[2]The Public Employment Relations Board (PERB or Board) applies a de novo standard of review of cases on appeal and the Board itself is free to draw its own conclusions from the record. (Santa Clara Unified School District (1979) PERB Decision No. 104.)

Upon a review of the sexual harassment complaint procedure, I find merit in the District's argument. The complaint procedure requires a complaint to be filed with the sexual harassment compliance officer who is responsible for developing an action plan to resolve the complaint. There is nothing in the sexual harassment complaint procedure which requires the involvement of an employee's immediate supervisor. The employee grievance procedure, set out in the parties' collective bargaining agreement, however, begins with an employee's immediate supervisor and can be appealed through various levels to the college president.

Two of Mrvichin's supervisors testified that they had been contacted in the past concerning grievances involving employees. However, these supervisors did not indicate whether these previous disputes involved employee grievances or sexual harassment complaints. I conclude that Mrvichin has failed to provide evidence which clearly shows that there is an established practice in the District of contacting an employee's immediate supervisor when a sexual harassment complaint has been filed against an employee. Therefore, I would reverse this finding.

The District also contends the ALJ erred when he concluded that the District granted Xochilt Valdivia's (Valdivia) petition for a grade change "after a very cursory investigation."

Ron Dyste (Dyste), Dean of Student Services, investigated Valdivia's petition for a grade change. Dyste testified that he spoke with four students about Mrvichin's grading practices and

he obtained the class roster which contained the scores of all of the students. In unrebutted testimony Dyste stated that Mrvichin explained his grading point system to him. Mrvichin indicated that assigned grades corresponded to a certain number of points listed on the class roster. Dyste noted that the grades were not consistent with the points written on the roster by Mrvichin. Consequently, Dyste informed College President Omero Suarez (Suarez) that the grading could have been arbitrary. Regardless of whether Dyste and Suarez gave Valdivia the proper grade, I believe there is sufficient evidence in the record to demonstrate that the District did conduct more than a "cursory investigation." Accordingly, I would reverse the ALJ on this finding.

The District excepted to the fact that the ALJ ignored its legal obligation to address incidents of sexual harassment and, after investigation of those incidents, to lawfully terminate an employee based on findings of misconduct towards a student.

Mrvichin provided sufficient evidence in this case to demonstrate that the District acted with unlawful motivation when it terminated his employment as an athletic trainer. At that point, the burden shifted to the District to demonstrate that it would have terminated Mrvichin as a result of his improper conduct regardless of his participation in protected activity. (Novato Unified School District (1982) PERB Decision No. 210.) The District simply failed to put sufficient evidence in the record to establish that it would have terminated Mrvichin

regardless of his protected activity. Therefore, I would dismiss this exception.

In a related exception, the District argues that the ALJ erroneously prohibited the District from submitting evidence which showed that Mrvichin was previously terminated from an athletic trainer position in another school district and that Mrvichin did not reveal this information when applying for his position with the District. The District implies that this evidence may independently support Mrvichin's termination.

This exception is rejected because the District gave no indication that Mrvichin was terminated because of any misinformation in the application process. Rather, the District repeatedly asserted that he was terminated because of improper conduct in relation to a student.

Concerning the ALJ's proposed remedy, the District objects to the ALJ's order regarding Mrvichin's teaching assignment. The District contends the allegations in the complaint were based solely on Mrvichin's termination from his position as an athletic trainer and it is improper to order make whole remedies relating to any teaching assignments.

Mrvichin was issued a Notice of Unsatisfactory Service on or about August 18, 1993, and his termination from his athletic trainer position was effective October 20, 1993. Mrvichin was not employed as an instructor at the time of his termination. He testified that he was unable to teach during the fall 1993 semester due to illness and he had not been offered a teaching

position for the spring of 1994. The complaint references the Notice of Unsatisfactory Service and Mrvichin's termination as a result of his filing grievances. Mrvichin did not allege that his teaching assignments were affected by his filing grievances and there is insufficient evidence in the record to reach that conclusion. Accordingly, I dissent from the remedy ordered and would modify the remedy to exclude any order pertaining to Mrvichin's teaching assignments.

Finally, the District contends that PERB should "defer" its jurisdiction over this unfair practice charge pending completion of the District's personnel commission appeals process.

PERB has exclusive initial jurisdiction to consider unfair labor practices. EERA section 3541.5 states, in pertinent part:

> The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. (Emphasis added.)

In San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893], the California Supreme Court recognized the preemptive nature of PERB's jurisdiction. Where the courts have said that PERB has exclusive initial jurisdiction even over the courts, PERB's jurisdiction must certainly prevail over an administrative proceeding of the District. One exception to PERB's exclusive jurisdiction requires deferral to a

collectively negotiated grievance and arbitration procedure.[3]
That is not the case here. Accordingly, this exception should be dismissed.

[3]EERA section 3541.5(a)(2). See also Lake Elsinore School District (1987) PERB Decision No. 646.

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. LA-CE-3346, George Vladimir Mrvichin v. Los Angeles Community College District, in which all parties had the right to participate, it has been found that the Los Angeles Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) by unlawfully: (1) issuing a Notice of Unsatisfactory Performance to George Vladimir Mrvichin (Mrvichin); (2) terminating his employment as the athletic trainer at East Los Angeles Community College (ELACC); and (3) delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994.

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

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing Mrvichin because of his exercise of rights guaranteed by EERA.

2. Delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994.

3. Issuing to Mrvichin a Notice of Unsatisfactory Performance based on activities protected by EERA.

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

1. Reinstate Mrvichin to his position as the athletic trainer at ELACC and any lost opportunities to work as a certificated instructor.

2. Rescind and destroy all copies of the Notice of Unsatisfactory Performance issued to Mrvichin in September of 1993.

3. Delete from Mrvichin's personnel file any reference to the Notice of Unsatisfactory Performance, Xochilt Valdivia's sexual harassment complaint, or her grievance, and any other writings that are inconsistent with this decision and make no further use of such materials in any personnel action with regard to him.

4. Pay to Mrvichin the salary that he lost as a result of the unlawful termination. Such retroactive salary award shall include interest at the rate of seven (7) percent per annum.

5. Make Mrvichin whole for any other losses that he may have suffered as a result of the District's unlawful action, for example, loss of benefits, seniority credit(s), leave credit(s), and reasonably expected overtime salary opportunities.

Dated:______________________________ LOS ANGELES COMMUNITY COLLEGE DISTRICT

By: ____________________________
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GEORGE VLADIMIR MRVICHIN, Charging Party, v. LOS ANGELES COMMUNITY COLLEGE DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-3346 PROPOSED DECISION (8/23/94)

Appearances; Charles A. Goldwasser and Corey W. Glave, Attorneys, for George Vladimir Mrvichin; Camille A. Goulet and Martha A. Torgow, Attorneys, for Los Angeles Community College District.

Before Allen R. Link, Administrative Law Judge.

INTRODUCTION

This case involves the dismissal of the athletic trainer, George Vladimir Mrvichin (Mrvichin), at East Los Angeles Community College (ELACC), one of the campuses of the Los Angeles Community College District (District). He was heavily involved in the protest against campus President Omero Suarez's (Suarez) decision to discontinue interscholastic football. In addition to his classified employee duties as a trainer, since 1988, he was a certificated instructor.

One of his student trainers, Xochilt Valdivia (Valdivia), petitioned to raise a grade. Shortly after he denied it she filed both a student grievance and a sexual harassment charge against him asking for money damages, alleging he chased her around a training room, grabbed and spanked her, and called her a "bitch."

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.

President Suarez and Dean of Student Services Ron Dyste (Dyste), after an abbreviated investigation, determined that Mrvichin was guilty of the charges and terminated his employment. Concomitant with this investigation, Dyste and Suarez brought pressure to bear on several of Mrvichin's supervisors to change otherwise favorable performance ratings.

PROCEDURAL HISTORY

On September 9, 1993, Mrvichin filed an unfair practice charge against the District alleging violations of subdivision (a) of section 3543.5 which is a part of the Educational Employment Relations Act (EERA or Act).[1]

On September 27, 1993, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board), after an investigation of the charge, issued a complaint alleging violations of subdivision (a) of section 3543.5.

On October 29, 1993, an informal conference was held in an attempt to reach voluntary settlement. No settlement was reached. On November 2, 1993, the respondent filed its answer to the complaint.

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[1]EERA is codified at Government Code section 3540 et seq. All section references, unless otherwise noted, are to the Government Code. Subdivision (a) of section 3543.5 states that it shall be unlawful for a public school employer to:

> 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. . . .

A formal hearing was held by the undersigned on February 22 through 24 and March 11, 1994. Each side filed post-hearing briefs. The last brief was filed on May 26, 1994, and the case was submitted for a proposed decision at that time.

JURISDICTION

The parties stipulated that the charging party is a public school employee and the respondent is a public school employer within the meaning of section 3540.1.

FINDINGS OF FACT

I. Football Program Suspension Proposed by Suarez

In the beginning of 1993 Suarez proposed the suspension of the ELACC football program. A number of students and employees organized a series of protests. Mrvichin, Gilbert Rozadilla (Rozadilla), ELACCs athletic director, Rudolpho Valles (Valles), ELACCs dean of athletics, along with other coaches and allied personnel, were at the forefront of this protest.

Mrvichin had an especially high profile due to his multiple grievances, which were based on Suarez's alleged failure to follow the principles of shared governance of the college, as well as his habit of extensively researching his charges and alleging specific violations of regulations and statutes. The protest caught the interest of the Los Angeles Times, as well as the campus newspaper, creating considerable negative public opinion towards Suarez's action(s).

Despite these protests and negative public opinion the football program was ultimately eliminated.

II. Petition for Grade Change

Valdivia was a student trainer, working under the supervision of Mrvichin. She was also a student in his beginning athletic training course.[2] In the fall of 1992 she received a grade of "B" from him. She petitioned for an increase to a grade of "A." This petition followed the usual college grade appeal procedures. Mrvichin denied the petition, as did his two immediate scholastic supervisors, Physical Education Department Chair Gerald Heaps (Heaps), and Dean of Academic Services Ed Mitchell (Mitchell). She was notified that her petition was denied.

Later, she filed a second petition for a higher grade. This petition was handled in a manner that totally circumvented the usual procedures. Dyste was assigned to investigate the matter. He testified that he attempted to call nine students in Valdivia's class, but spoke to only four of them. Two, Valdivia and her friend and witness to all of her allegations against Mrvichin Sherrie Losa (Losa), said that Mrvichin's grading policies were arbitrary. A third said the grading policy was fair. The fourth, according to Dyste, said Mrvichin would grade students based on what he thought they deserved, rather than the objective grades they earned during the course.

[2] Rozadilla was told by Mrvichin, at some time "long before" either her grievance or her sexual harassment charge was filed, that Valdivia was a "problem" student.

On the basis of this "investigation," Dyste determined that there was bad faith on Mrvichin's part and recommended to Suarez that Valdivia's grade be. changed from a "B" to an "A."

However, on October 25, 1993, Suarez wrote Ernest Moreno, vice president for academic affairs, directing him to change the grade due to, among other things, he had "been advised that Mr. Mrvichin agreed to change Ms. Valdivia's grade to an 'A' during meetings last spring semester, reversing his previous denial of her Grade Petition." Mrvichin denies he agreed to the change but admits to a discussion of this possibility as a part of a settlement of the sexual harassment suit.

Eventually Valles was told that the District's legal counsel and Suarez were ordering him to change Valdivia's grade. Under these circumstances he had no choice but to comply and make the grade change.

In a related matter, Rozadilla, after Mrvichin's termination, was ordered to give Valdivia a meritorious certificate for having spent 900 hours, instead of 300, on school athletic endeavors.[3] Rozadilla refused to sign the ordered certificate, preparing it, instead, for Suarez's signature. He was never given any reason why Suarez believed such certificate was warranted. Suarez was never asked about this matter during his testimony.

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[3]Mrvichin had previously given her a certificate for only 3 00 hours.

III. Valdivia's Student Grievance

Valdivia filed a student grievance over a previous suspension by Mrvichin of her as a student trainer. As a part of this same grievance, she included an allegation that he had called her a "bitch." She filed the charge with Daniel Castro (Castro), ELACC's ombudsman. Eventually Dyste was substituted for Castro's replacement, as ombudsman, but only for this case.[4]

Dyste spoke to Valdivia, Losa and Mrvichin. According to Dyste, all she wanted was an apology and the matter entered into his personnel record. During the period of time that Dyste was acting as an ombudsman for the grievance procedure, he attempted to get Valdivia and Mrvichin to agree to a settlement of their dispute. Mrvichin consistently maintained that the only reason for the grievance was retaliation for his having previously suspended[5] her as a trainer and for the "B" she received. Dyste admitted that some of the information that he obtained while operating as a temporary ombudsman was used to support Mrvichin's eventual termination notice.

Eventually she withdrew the grievance, according to Dyste, because she was frustrated that the grievance process, which was running parallel to the sexual complaint process, seemed to be "bouncing her between the two" and was taking too long.

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[4]The reason for this substitution was a grievance Mrvichin filed against Castro regarding the manner in which he processed Valdivia's student grievance.

[5]There was no evidence proffered as to the reasons for such suspension.

IV. Sexual Harassment Charge

ELACC has a sexual harassment policy (S/H Policy) that contemplates the utilization of a campus sexual harassment compliance officer, Rose Najar (Najar). It sets forth four steps, the last of which is a formal fact-finding procedure before a hearing officer, chosen jointly by the "affected parties" and the Office of Employer-Employee Relations. The S/H Policy has very specific timelines controlling when notices shall be served and when various other steps shall be taken. The first two steps are described as a part of an informal resolution process. The third is a more formal mediation process in which the sexual harassment compliance officer, along with another member of the administration, attempts to mediate the dispute. Specific sections are devoted to the scheduling and the minute-taking of such mediation meetings. If this step fails, or if the alleged offender elects not to participate (emphasis added), the administrators are to submit a report and advise the complainant of procedures for filing a request for fact-finding. The process before the hearing officer contemplates the testimony of witnesses and the production of records. The hearing officer's decision is final and binding on the parties.

Valdivia filed her charge on February 24, 1993, and although it was not entered into the record, there was evidence that she complained of Mrvichin (1) calling her a "bitch,"[6] (2) chasing

[6]Mrvichin insists that he never called her a "bitch," but rather told her to "stop acting like a bitch." At a meeting of ELACCs trainers' club, Valdivia was verbally attacking both

after her and spanking her, and (3) grabbing his crotch in an obscene manner.[7]

According to Suarez and Dyste, Najar (she did not testify) complained about Mrvichin's lack of cooperation in her investigation. It is true that he filed eight grievances against her, citing alleged violations of the S/H Policy timelines, but no evidence was proffered by either side regarding the specifics of the manner in which she followed the appropriate procedures. Suarez insisted he stepped in because of the long delay between the filing of the complaint and the hearing. No evidence was proffered by either side as to which step the S/H Policy reached. Nor was any evidence brought forth regarding any specifics of Mrvichin's "lack of cooperation." However, it was clear that no formal hearing was ever held; therefore, no findings of fact were ever issued by a hearing officer, ELACC, or the District.

Suarez, in an informal discussion, while the process was ongoing, urged Mrvichin to participate in the sexual harassment procedure. During that conversation Mrvichin, according to Suarez, admitted that he had picked up Valdivia and grabbed her rear end.[8] Suarez does not remember anything about spanking

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Mrvichin and Cessie Alvarado, an unidentified ELACC student or employee. Mrvichin told her to quiet down. She refused to do so. After repeatedly trying to get her to calm down, he told her to "stop acting like a bitch."

[7]Mrvichin denies the obscene gesture charge. At the very most, he asserts, he was just adjusting his trousers.

[8]On February 25, 1993, Mrvichin had a physical ailment that caused him to suffer from diarrhea. An attack came on while Valdivia and Losa were complaining to him about something. He

being a part of the charge or admission. Mrvichin denies he made an admission of any sort to him at that or any other time. Suarez had heard that Valdivia was going to sue the District, but insists that neither that fact, nor Mrvichin's participation in the football grievance process influenced his decision to terminate him.

On October 14, 1993, after he had been terminated, Mrvichin learned from the District's attorneys that the sexual harassment charge had been dropped. There is no evidence in the record with regard to whether the charges were dropped as a part of a settlement, but in her testimony before the unemployment administrative law judge, Valdivia admitted to receiving $18,000 from the District.

Rozadilla and Valles, Mrvichin's two immediate supervisors, stated that he (Mrvichin) had no past history of making sexual comments, gestures or inappropriate language around the female trainers. To the contrary, Rozadilla remembered Mrvichin

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told them that he had to go to the men's room. They insisted that he stay and listen to their complaints. He repeated his insistence that he had to leave. They continued to block the way. He pushed them out of the way and went directly to relieve himself, but not before he soiled his pants. This, according to Mrvichin, was the only behavior he engaged in that could remotely be connected to the "grabbing and spanking" allegation.

At the unemployment insurance appeals hearing Valdivia and Losa testified about Mrvichin running after and spanking Valdivia, although Losa stated Mrvichin put Valdivia across his lap and Valdivia testified that he put her across a table. Both Valles and Rozadilla testified that Mrvichin, due to (1) his size, he is considerably overweight, and (2) a bad knee, is unable to run at all.

admonishing the football players when they were around the female trainers by insisting, "Let's be gentlemen."

Even though (1) they were Mrvichin's immediate supervisors and (2) the alleged misconduct occurred in an area over which they were directly responsible, neither Valles nor Rozadilla were involved or even consulted by either Dyste or Suarez, in any manner, about Valdivia's sexual harassment charge.

V. Mrvichin's Performance as ELACC's Athletic Trainer

Mrvichin consistently received good to glowing performance reports with regard to his job as a trainer. However, despite this unconditional approval of his immediate supervisor(s), Dyste tried to pressure both of them into modifying Mrvichin's late spring 1993 performance evaluation. He told Rozadilla that the evaluation was a thorn in their (Dyste and Suarez) side. He wanted Mrvichin to get an overall rating of "unsatisfactory."

Valles testified to his conversation with Dyste regarding this matter as follows:

> Q. Did he tell you -- I don't know how to say this. Did he implore you to change the evaluation?
>
> A. He did , so I sort of -- and if I might use the little vulgar words, with your permission. "You got to change this 'cause otherwise Omero's going to be very pissed and going to be very pissed at you, and you're, you know -- you're going to be in a bad light with Omero."
>
> Q. And Omero is who?
>
> A. Dr. Suarez, the President of the college at that time. And I proceeded to tell him, I says, "I'm not changing it. If you want to make amendments, you'll have that right if you

> want to, but I'm not going to do anything with that."

Dyste denied that he demanded the evaluation be changed. However, he does admit that he questioned the ratings. He insists that he learned of things about Mrvichin's performance while he was investigating Valdivia's grievance that made him question his abilities as a trainer. He reiterates that he did not demand that Valles make changes "because I intended to review his performance myself." He insists Valles was "kind of . . . cooperative . . . there was no tension over this."

VI. Mrvichin's Performance as an ELACC Instructor

Heaps, Mrvichin's immediate certificated supervisor, consistently gave him good evaluations as an instructor. Heaps was not involved, nor consulted in any manner, in the sexual harassment charge.

In fact, Heaps thought enough of Mrvichin's teaching abilities to offer him an instructor's position for the fall semester of 1993. However, the class was cancelled due to an insufficient student enrollment, although the history of physical education courses at ELACC shows that many students sign up for classes after the start of the semester. There was insufficient evidence educed at the hearing to make a determination as to whether such class was prematurely closed. Mrvichin was not offered a teaching position for the spring of 1994, but was offered one pending administrative approval for the fall semester of 1994.

VII. Mrvichin's Termination

In August 1993 Mrvichin was given a Notice of Unsatisfactory Performance and terminated. Neither his classified nor certificated supervisors were involved in the investigation prior to the preparation of this notice, although Valles was directed to sign the document. Valles testified, with regard to the manner in which he was directed to affix his signature to the notice, as follows:

> Q. Well, who said "sign it?"
>
> A. Mr. Dyste is the one.
>
> Q. Okay.
>
> A. Dyste is the Dean of Students. And I looked and I says -- I wasn't even comfortable with it once I started to read some of it. To this date I don't even recall everything that was said, but I was not comfortable with it.
>
> Q. Why Not?
>
> A. It had to do with a complete, I think, of unsatisfactory service and it was the final stage, I would have to say, for firing Mr. Mrvichin. I was told in a harsh voice, loud voice, and came very close to my face sort of like reaching over and saying, "Sign it. You got to sign this." And saying that I knew that George was guilty and had done all these wrong things. And if I didn't sign it, "Omero is going to be very pissed at you and you know how he is." And I took that as a threat to me and my position and my livelihood.
>
> Q. Did you sign it?
>
> A. I felt that I had no choice. I signed it.
>
> Q. When he said to you, "you know how he is," referring to Dr. Suarez, what did you understand him to mean? I mean how did - - what did you understand Mr. Dyste to mean when he said, "you

know how he is," referring to Dr. Suarez?

A. Well, the impression that I had, and distrust and behavior, was that I would be retaliated on if I refused.

Dyste denies this conversation ever occurred. He said he and Valles worked on Mrvichin's Notice of Unsatisfactory Performance together. He believed that Valles agreed with the notice.

VIII. Unemployment Insurance Appeals Hearing

Mrvichin was awarded unemployment insurance benefits after his termination. ELACC appealed. On December 22, 1993, a hearing was held before Unemployment Insurance Administrative Law Judge (ALJ) Catherine Leslie. Mrvichin was represented by an attorney, Charles Goldwasser. The District was represented by two employee relations officers, Karen Billings and Herbert Spillman.

These two officers, Valdivia, Losa and Mrvichin all testified. Valdivia admitted that many of the allegations she related at the hearing were not reported to the District until she filed her sexual harassment complaint. In at least one case this was three to five months after they allegedly occurred. Other incidents were not reported until four to seven days after they occurred. Although Goldwasser was able to cross-examine the District's witnesses, the ALJ made it quite clear that the scope of such cross-examination was restricted.

Mrvichin denied all of Valdivia's charges except the one regarding the use of the word "bitch" which he explained in

context. There was no evidence proffered regarding the outcome of the unemployment insurance appeals hearing.

VIII. Credibility Conflicts

A. Rozadilla versus Dyste - Rozadilla testified that Dyste conveyed to him the feeling that he (Dyste) and Suarez resented the fact that Mrvichin filed grievances against the football suspension. Dyste told Rozadilla he should control Mrvichin and should persuade him to back off on the grievances. Rozadilla refused to do so. He told Dyste that Mrvichin had every right to file a grievance. This conversation occurred in the spring of 1993.

Dyste denies this conversation ever occurred, but believes Valles may have called Rozadilla and made such demands.

B. Valles versus Suarez - 1. Valles says Suarez complained about Mrvichin filing grievances.

Suarez says he does "not recall making that statement."

2. Valles also stated that Suarez told him that he (Valles) was not a good supervisor because he let people complain.

Suarez denies making this statement.

3. In November of 1992, Valles told Mrvichin that Suarez's attitude toward the entire athletic department was very negative and that everyone in the department, Valles and Mrvichin included, should watch themselves and not give him any reason to act on this attitude. A number of times during the spring semester of 1993 Valles told Mrvichin that he should watch

himself because Suarez did not like him (Mrvichin) and that he (Suarez) believed he was a "pain in the ass."

Suarez was not asked about this statement in his testimony.

C. Valles versus Dyste - 1. Dyste told Valles during the spring of 1993 that Mrvichin was a "pain in the ass" because of these grievances and that he had been assigned by Suarez to respond to the grievances and to neutralize Mrvichin.

Dyste denies making this statement.

2. At a different time Dyste told Valles that Suarez and the District's chancellor, wanted to get rid of Mrvichin and that they had found a way to do so.

Dyste denies making this statement.

D. Rozadilla versus Suarez - Prior to the football suspension issue arising, Suarez told Rozadilla that Mrvichin did not exemplify or typify a real trainer because he was fat and smoked too much.

Suarez denies making this statement.

E. Mrvichin versus Dyste - Dyste says Mrvichin admitted, in a meeting in the school's stadium late one evening, that he chased Valdivia.

Mrvichin remembers the evening "meeting." He states that Dyste came into his work area to talk to him. Mrvichin referred him to Michael Lopez, an assistant trainer, instead. Dyste spoke to Lopez for about an hour to an hour and a half. Mrvichin was not present during this conversation, therefore, he denies making any statements to Dyste at that time.

F. Heaps versus Dyste - In a conversation in his office Heaps testified he told Dyste that he had no problems with Mrvichin's teaching performance. Dyste said "Come on - his records are a mess."

Dyste denies Heaps ever made this positive teaching performance statement about Mrvichin to him. He also denies he ever said anything about Mrvichin's record keeping abilities or that he was ever in Heaps' office.

G. Dyste versus Mrvichin, Rozadilla, Valles, and Heaps - When Dyste was asked why Mrvichin's certificated and classified supervisors would all support him by testifying that Dyste made statements that he never actually made, he answered as follows:

> A. Yes, the -- the answer to me, remember I'm new to this campus. The chain of command that I've had the most attention, that has absorbed most of my time since I've been at the campus, has involved Rudy Valles, the Head of Admissions, and the Athletic Director and the Athletic program. We have changed the entire registration process, reorganized the way we handle the Athletic program, we eliminated major sport. One employee was involved in major grievances. It's absorbed a tremendous amount of time. The men involved, it's my clear impression, that they are all very close to each other, they've been friends for years, and they're very disturbed by all of these changes, and I'm a part of the process and one of the individual who's made those changes. And I know Rudy's gone home ill on occasion because of stress. There's been a lot of change over in that area, and I think they're all very resentful. They have never, though, told me anything to my face. They never challenged me. But on many many occasions I know they've bad-mouthed me behind my back because I've had people come and tell me, including the President. I have never taken any action against them for doing this because I understand it. You know, I don't retaliate. People have feelings, I try to work

> with them. And I think the reason that these things that you're asking me -- asking me astonish me, that these things are being said. But in the context of that college, I'm not really surprised because of the fact that people fabricate stories and create alliances, and I mean it's, it's -- I told the President when I was there a week that he had a medieval management system where everybody was jousting with each other, and everybody had fiefdoms. It was incredible. And I think this is the main reasons, that these gentlemen are resentful and unhappy about the changes that they've been put through. But rather than coming directly to me and confronting me about them, they talk about me to other people and this is another form for doing that, that's all. But while -- I want to emphasize something. I have been hearing about this sort of thing for a long long time that goes on. It gets back to me, but I have never taken any action against those guys that would be adverse.

IX. Credibility Findings

There are too many witnesses with too many statements in conflict with Dyste and Suarez to arrive at anything other than a finding that their testimony is not credible. Dyste was obviously a very powerful administrator at ELACC. And yet three sub-administrators, plus Mrvichin, have testified to having heard eight separate improper statements, all of which Dyste and Suarez have denied making. These sub-administrators all hold responsible positions at the college and have done so for many years. They are putting their careers on the line in testifying to the truth as they know it. This writer does not believe they would contradict the testimony of their supervisors without sufficient provocation.

Even more persuasively, an. objective evaluation of the evidence leads to an inescapable conclusion that Mrvichin was well aware of the charges against him, the process by which such

charges would be investigated and the consequences of a negative recommendation by the sexual harassment compliance officer. He filed grievance after grievance complaining about technical deficiencies in the manner in which the S/H Policy was being implemented.

In order to credit the statements of Dyste and Suarez, it would be necessary to believe that in a casual conversation with Suarez and in a slightly more formal investigatory interview with Dyste, Mrvichin blurted out a complete confession to all of the charges against him. To believe that this happened strains one's credulity.

Due to all of the above, the testimony of Mrvichin, Rozadilla, Valles and Heaps is credited over that of Dyste and Suarez.

ISSUE

Did the District terminate Mrvichin in retaliation for his protected activities in violation of the Act?

CONCLUSIONS OF LAW

I. Precedent and Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of subdivision (a) of section 3543.5 of EERA:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights

> granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct <u>but for</u> an unlawful motivation, purpose or intent. [Emphasis added.]

In <u>Novato Unified School District</u> (1982) PERB Decision No. 210 (<u>Novato</u>), the Board clarified the <u>Carlsbad</u> test for retaliation or discrimination in light of the National Labor Relations Board decision in <u>Wright Line. Inc.</u> (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. In <u>Novato</u>. unlawful motive must be proven in order to find a violation. In addition, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case, the charging party must first prove the subject employee engaged in protected

activity.[9] Next, he must establish that the employer had knowledge of such protected activity. Lastly, it must be proven that the subject adverse action(s) were taken, in whole or in part, as a result of such protected activity.

There is no doubt that Mrvichin filed grievances and had a very high profile with regard to the campus protest over Suarez's decision to suspend ELACC's football program. The direction he took in his football suspension grievances was that his rights as an employee were diminished and even abrogated by Suarez's refusal to follow the principles of "shared governance" of the college with regard to his decision to suspend the ELACC football program. Nor is there any doubt that both Suarez and Dyste were aware of Mrvichin's activities with regard to this matter.

The crucial question is whether the District's adverse actions were motivated in whole, or in part, by Mrvichin's participation in such protected activities.

Proving the existence of unlawful motivation can be a difficult burden. The Board acknowledged that when it stated the following in Carlsbad:

> Proof of Unlawful Intent Where Offered or Required
>
> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective

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[9]Section 3543 grants public school employees:

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

> condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board in Novato set forth examples of the types of circumstances to be examined in a determination of whether union animus is present and a motivating factor in the employer's action(s). These circumstances are (1) disparate treatment of the affected employee(s), (2) proximity of time between the participation in protected activity and the adverse action, (3) inconsistent explanations of the employer's action(s), (4) departure from established procedures or standards, and (5) inadequate investigation(s). (See also Baldwin Park Unified School District (1982) PERB Decision No. 221.)

A. Disparate Treatment of Mrvichin

The manner in which Valdivia's second grade appeal petition was handled suggests disparate treatment of Mrvichin. Her first petition went through the usual steps, from her teacher up through his academic supervisors. The second petition went directly to Dyste, and after a very cursory investigation process, was granted. And yet, Heaps testified that no grade should ever been changed unless the instructor agrees, or mistake, fraud, bad faith or incompetency is proven. Certainly, Dyste's conversation with two uninvolved students, was

insufficient to prove that mistake, fraud, bad faith, or incompetency were present in Valdivia's case.

In addition, a certificate for an additional 600 hours of community service was awarded Valdivia. There was no evidence of any sort proffered to justify this certificate. Suarez did not even go through the pretense of suggesting that Mrvichin had agreed to such issuance. Granted, Suarez was the president of the ELACC campus, and as such he had certain rights. However, the individual instructors have rights, as well. The changing of a grade and tripling of the number of hours cited in a "meritorious" certificate, without the agreement of the involved instructor, is not an accepted manner of processing a grade petition appeal. Valdivia's appeal was handled in a rather cursory fashion, one that was designed to ignore, or at least minimize, Mrvichin's input. In other words, with regard to Valdivia's second petition, Mrvichin was treated differently from other instructors who have faced a student grade petition appeal.

The manner in which Valdivia's sexual harassment complaint was handled also raises questions of disparate treatment of Mrvichin. Although the sexual harassment allegedly occurred within the purview of the athletic department, neither of Mrvichin's athletic department immediate supervisors, Rozadilla and Valles, were involved in the investigation of the charge. Nor was his academic supervisor, Heaps, involved in the investigation. In fact, not only were they not involved, they were not even informed such an investigation was ongoing. As

Mrvichin was treated differently than other instructors in this regard, this evidence sets forth another instance of disparate treatment of him.

B. Proximity of Time

All of the events that occurred in this case were concentrated in little more than one semester. There was ample evidence to show that Suarez and Dyste were upset over Mrvichin's football grievances. The processing of Valdivia's grievance, sexual harassment complaint and grade petition appeal occurred during the time that Mrvichin's grievances were being processed. The evidence shows that Suarez's and Dyste's negative comments about Mrvichin's grievances were being made at the very same time his termination was being orchestrated.

Although "proximity of time" alone is not sufficient to create an inference of unlawful motivation (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404), it certainly can be used in conjunction with other credible evidence to support an inference of unlawful motivation.

C. Inconsistent Explanations of the Employer's Actions

1. Suarez told Ernest Moreno that Mrvichin agreed with the grade change. Mrvichin never agreed to such change.

2. Valles was told that the District's legal department was directing him to make such a grade change. There was no evidence to show that the District's legal department was ever involved in the grade change.

3. Dyste says Valles worked with him on developing Mrvichin's Notice of Unsatisfactory Performance and termination. Valles says he never saw the document before Dyste presented it to him as a completed document.

4. Dyste says that Valles agreed with the substance and issuance of a Notice of Unsatisfactory Performance to Mrvichin. Valles testified that Dyste threatened him with Suarez's wrath if he did not agree to sign the document. He not only did not agree with it, but he even became uncomfortable with it as soon as he started to read it.

5. Both Suarez and Dyste testified, under oath, that they had no problems with Mrvichin filing grievances over the football suspension issue. However, Rozadilla testified that Dyste told him that he (Dyste) and Suarez "have found a technicality so we are going for an immediate unsatisfactory notice and immediate dismissal."

All of these, and they are just representative, are inconsistent explanations of the employer's actions and support an inference of unlawful motivation.

D. Departure From Established Procedures

Many of the examples of this were covered above, such as the manner in which the grade petition was processed, the issuance of a meritorious certificate tripling the hours devoted to the school athletic program, and failure to involve the charged employee's immediate supervisors in the sexual harassment complaint. All of these are examples of Suarez's and Dyste's

departures from established procedures and support an inference of unlawful motivation.

In addition, the evidence shows that Dyste attempted to browbeat Mrvichin's immediate supervisors into changing his annual performance evaluations. The fact that the supervisors refused to be intimidated certainly does not prohibit the use of this attempt as additional support for an inference of unlawful motivation.

E. Inadequate Investigation

The evidence in this case is replete with examples of inadequate investigations. They include (1) Valdivia's grievance, (2) her sexual harassment complaint, and (3) her grade petition appeal.

The sexual harassment complaint deserved some level of special investigatory consideration. Valdivia charged Mrvichin with engaging in specific acts. The only witness she had was her friend, Losa. Mrvichin denied the acts. Valdivia received $18,000 from the District due to her complaint. Mrvichin had a history of proper actions towards females within his realm of authority. No reference was made to any other female on the ELACC campus that believed Mrvichin had acted improperly towards her. Even before the alleged sexual harassment incidents occurred, Valdivia had had difficulties at ELACC, i.e. (1) Mrvichin told Rozadilla she was a problem student and (2) she had been suspended from her duties as a student trainer. Under all of these circumstances, logic would suggest that there was

something more to this case than a simple case of harassment on the part of the instructor, and yet Suarez and Dyste "investigated" the case only to the degree that they received confirmation of their preconceived ideas, and terminated Mrvichin.

Suarez insists that he had to insert Dyste into the sexual harassment investigation process because Najar said that Mrvichin refused to cooperate with her. There was no evidence proffered with regard to the manner in which he "refused to cooperate" other than allegedly refusing to attend meeting(s). Najar did not testify, so we have insufficient evidence regarding whether he was being a recalcitrant accused, or an employee who was upset over her refusal to follow the very specific time and subject matter guidelines set forth in the District S/H Policy.

Even if Suarez is correct and Mrvichin was uncooperative, the S/H Policy provides a remedy for such a circumstance. The policy states that "if the alleged offender elects not to participate" the complaint is to go directly to the formal hearing stage before a hearing officer. If Mrvichin had refused to participate at that point, the District would be entitled to take whatever steps were appropriate. Rather than availing himself of the District's policy remedy, Suarez elected to interject Dyste into the process.

Based on the circumstances set forth above, it is concluded that the manner in which Suarez implemented the District S/H

Policy with regard to Mrvichin supports an inference of unlawful motivation.

As the District provided insufficient legal justification for its actions, it is determined that when it took specified negative actions towards Mrvichin it did so with an unlawful motivation, and therefore violated subdivision (a) of section 3543.5.

SUMMARY

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is determined that when the District (1) issued a Notice of Unsatisfactory Performance to Mrvichin, (2) terminated his employment as the trainer at ELACC, and (3) to whatever extent it has failed to hire him as an instructor in the Physical Education Department, it violated subdivision (a) of section 3543.5.

REMEDY

PERB, in section 3541.5(c) is given

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

In order to remedy the unfair practice of the District and to prevent it from benefitting from its unfair labor practice, and to effectuate the purposes of the EERA, it is appropriate to order the District to (1) rescind and destroy the Notice of Unsatisfactory Performance issued to George Mrvichin in September

of 1993, (2) reinstate him to his position as the athletic trainer at ELACC, (3) stop delaying and/or withholding administration approval to certificated employment offered to him at ELACC for the fall semester of 1994, and (4) to cease and desist from discriminating against him because of his exercise of rights guaranteed by EERA.

It is also appropriate that Mr. Mrvichin be made whole by receiving any salary lost as a result of his unlawful termination as athletic trainer and any lost opportunities to work as a certificated instructor. Such retroactive salary award shall include interest at a rate of 7 percent (7%) per annum. He should also be made whole for any other losses, such as benefits, seniority credit(s), leave credit(s) and reasonably expected overtime salary opportunities, for example, he would have received, but for the District's unlawful actions.

It is also appropriate that the District be required to post a notice incorporating the terms of this Order. The notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered or covered by any other material. 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. It effectuates the purposes of the Act 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.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr.584], the California District Court of Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, as it is found that the Los Angeles Community College District (District) violated subdivision (a) of section 3543.5, of the Educational Employment Relations Act (Act) by unlawfully (1) issuing a Notice of Unsatisfactory Performance to George Vladimir Mrvichin (Mrvichin), (2) terminating his employment as the athletic trainer at East Los Angeles Community College (ELACC) and (3) delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994, it is hereby ORDERED that the District, its officers and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing Mrvichin because of his exercise of rights guaranteed by the Act.

2. Delaying and/or withholding administrative approval of certificated employment offered to him at ELACC for the fall semester of 1994.

3. Issuing to Mrvichin a Notice of Unsatisfactory Performance based on activities protected by the Act.

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

1. Reinstate Mrvichin to his position as the athletic trainer at ELACC.

2. Rescind and destroy all copies of the Notice of Unsatisfactory Performance issued to Mrvichin in September of 1993.

3. Delete from Mrvichin's personnel file any reference to the Notice of Unsatisfactory Performance, Xochilt Valdivia's sexual harassment complaint, or her grievance, and any other writings that are inconsistent with this proposed decision and make no further use of such materials in any personnel action with regard to him.

4. Pay to Mrvichin the salary that he lost as a result of the unlawful termination. Such retroactive salary-award shall include interest at the rate of 7 percent (7%) per annum.

5. Make Mrvichin whole for any other losses, such as benefits, seniority credit(s), leave credit(s), and reasonably expected overtime salary opportunities, for example, that he may have suffered as a result of the District's unlawful action.

6. Within ten (10) workdays of service of a final decision in this matter, post at all District sites and all other work locations where notices 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.

7. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with his instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further ORDERED that all other aspects of the charge and 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.)

ALLEN R.. LINK
Administrative Law Judge