STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY FEDERATION OF TEACHERS, Charging Party,	)	Case No. LA-CE-3364
v.	)	PERB Decision No. 1114
POWAY UNIFIED SCHOOL DISTRICT, Respondent.	)	September 14, 1995

Appearances: Emily Shieh, Attorney, for Poway Federation of Teachers; Brown and Conradi by Clifford D. Weiler, Attorney, for Poway Unified School District.

Before Carlyle, Garcia and Caffrey, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Poway Federation of Teachers (PFT) to a proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ found that the Poway Unified School District (District) had not violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] when it took adverse action against employees at several

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

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

schools by issuing, and placing in their personnel files, formal letters of reprimand because of the employees' concerted refusal to attend back to school night activities.[2] The ALJ then dismissed the complaint.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, PFT's statement of exceptions and the District's response thereto. Based upon this review, the Board affirms the ALJ's proposed decision.

PFT'S EXCEPTIONS

PFT filed exceptions to the proposed decision, arguing that even if there is no protected conduct, the circumstances surrounding the imposition of discipline raise an inference that the reprimands were unlawfully motivated and therefore, the District had the burden of showing that the discipline would have been imposed regardless of the protected activity under Marin Community College District (1980) PERB Decision No. 145 (Marin).

DISTRICT'S RESPONSE TO EXCEPTIONS

The District responded by showing that the ALJ considered several indicators of the District's motive and the facts of

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

[2]The ALJ took official notice of another case involving these parties (Poway Unified School District (1994) PERB Decision No. 1050 (Poway)). in which the Board affirmed and adopted a Board agent's dismissal of the charge. That case involved the same collective bargaining agreement provisions and District policy under examination in the case at bar. The Board agent concluded that certain duties (supervision of student activities) were required as a condition of employment.

Marin made it inapplicable. The District repeated its justification for having made the written reprimands, and made note of the earlier PERB decision arising out of the same events and involving similar legal issues (Poway) in which the Board found no violation by the District.

DISCUSSION

The ALJ correctly found that PFT had not engaged in protected conduct, because the record contains ample evidence that attendance at back to school night was a mandatory term and condition of employment that was known to all through longstanding District Board policy. Furthermore, PFT has not provided evidence to raise an inference that the reprimands were unlawfully motivated.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3364 is hereby DISMISSED.

Members Carlyle and Caffrey joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY FEDERATION OF TEACHERS, Charging Party, v. POWAY UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3364 PROPOSED DECISION (5/18/95)

Appearances: Bobbitt and Gattey, by James M. Gattey, Attorney, and Emily Shieh, Executive Director, for Poway Federation of Teachers; Brown and Conradi, by Clifford D. Weiler, Attorney, for Poway Unified School District.

Proposed Decision by W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

The controversy in this case arose during the course of the parties' negotiations for a successor agreement during 1992 and 1993. The exclusive representative charges that the public school employer took unlawful adverse action, in the form of letters of reprimand, against unit members because they engaged in a concerted refusal to participate in back to school night classroom activities. Back to school nights, it is asserted, involve voluntary activities, hence the employees' non-participation was protected conduct.

The employer contends that the teachers' participation in back to school night events is not a voluntary assignment, but a contractually required activity that is referenced in the parties' negotiated agreement and a specific board policy. Thus the refusal of the employees to perform a mandatory duty was a violation of their contractual obligation and amounted to

insubordination. The issuance of written reprimands was an appropriate response to their misconduct and was consistent with the employer's past practice in addressing such actions.

PROCEDURAL HISTORY

On October 22, 1993, the Poway Federation of Teachers (PFT) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Poway Unified School District (District), alleging violations of the Educational Employment Relations Act (EERA or Act)[1].

Following an investigation of this charge, the Office of the General Counsel of the PERB issued a complaint on December 9, 1993, alleging that the District took adverse action against employees at several schools by issuing, and placing in their personnel files, formal letters of reprimand because of the employees' concerted refusal to attend back to school night activities. The complaint further alleges that the severity of the discipline was motivated by the District's union animus and its conduct thus violated section 3543.5(a) and (b).[2]

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[1]The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code unless otherwise indicated.

[2]Section 3543.5(a) and (b), states, in pertinent part, as follows:

> 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

The District filed an answer to the complaint on January 3, 1994, wherein it denied allegations of unlawful conduct and asserted numerous affirmative defenses which will be addressed later.

An informal conference held on January 24, 1994, failed to resolve the dispute.

A formal hearing was conducted by Administrative Law Judge Allen R. Link on October 5 and 6, 1994. The filing of post-hearing briefs was completed on January 12, 1995. The case was reassigned to this writer on March 8, 1995, for issuance of a proposed decision.

On March 24, 1995, this writer notified the parties of an intent to reopen and augment the record by adding evidence concerning the collective bargaining agreement (CBA) that expired in June 1992 and to clarify evidence about an exhibit that purported to be a CBA covering the period from July 1, 1991, to June 30, 1993. After conferring with the parties, the record was reopened on April 7, 1995, to add stipulations developed by PFT and the District, plus attachments which were identified and received as joint exhibits.

The case was thereafter resubmitted for proposed decision, effective April 7, 1995.

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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.

FINDINGS OF FACT

Background

The parties stipulated, and it is found, the District is a "public school employer" and PFT is an "employee organization" within the meaning of EERA. The District operates 27 regular elementary and secondary schools that serve an estimated 27,000 students. It employs more than 1,200 teachers who are in the certificated bargaining unit exclusively represented by PFT.

Since at least 1980, PFT and the District have been parties to a number of successive CBAs. In the summer of 1992, they commenced negotiations for a successor contract to the 1991-92 CBA which expired on June 30, 1992.[3] These negotiations led to a request for impasse in February 1993, which was declared by PERB on March 4, 1993.

Prior to June 1993, the parties had one negotiating session with a state-appointed mediator, but no progress was made toward resolution of any issues.

On or about June 7, 1993, PFT convened a meeting of unit members to apprise them of the status of the negotiations. At this meeting, which was attended by approximately 400 people, a

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[3]The parties have stipulated that the 1991-92 CBA was ratified in September 1991, although the final document was never signed, printed, or distributed. A copy of the final "working" version of the contract, as ratified, is in evidence as joint exhibit no. 1.

It was also stipulated that the 1992-93 CBA in evidence as respondent exhibit no. R was not ratified by the parties until November 1993, at the conclusion of the negotiations that resulted in the 1993-96 CBA (respondent exhibit no. Q).

resolution was passed to "work-to-the-rule," i.e., to work the contractual seven-hour day, exclusive of lunch, and to withhold voluntary duties if negotiations were not progressing or settled by the start of the 1993-94 school year.

The parties met again for one negotiating session sometime in August 1993, however the negotiations remained stalled. The state mediator, nonetheless, did not certify their unresolved issues to factfinding.

The Teachers' Non-Participation in Back To School Night Activities

At a meeting with several hundred teachers on August 31, 1993, the PFT leadership discussed implementation of the June 1993, "work-to-the-rule" resolution. It was decided that the resolution should be implemented and guidelines were provided regarding the seven-hour workday and the performance of extracurricular activities. The decision regarding the teachers' participation in back to school night activities was left up to the individual school sites.

The next day both PFT and the District began to distribute memoranda regarding the status of the negotiations and the possibility of the teachers' non-participation in various non-teaching assignments, including the back to school nights. Back to school nights traditionally have been held within the first few weeks of the opening of school.

For example, in a memo dated September 1, 1993, David Hughes (Hughes), assistant superintendent of personnel support services, sent a memo to all principals that discussed (1) the status of

negotiations in relationship to the teachers' workday and the District's expectations regarding the teachers' performance of required supervisory duties, including participation in back to school night activities, and (2) the principals' responses to teachers about their non-performance of such duties as it related to unauthorized absences. Hughes' memo also stated that the District did not believe that PFT was advocating non-performance of required duties.

PFT President Don Raczka (Raczka) also issued a memo to PFT building representatives and officers, which stated in pertinent part:

> Obviously, the FAX that principals received from the District yesterday has taken some wind out of some sites' sails. Now really. Did you actually think that if you threatened to postpone, boycott (or whatever other verb you considered) Back-To-School night that the District would say, "Oh! O.K. You're right, of course! How silly of me!! These after school activities have been voluntary and we understand how you feel. So we'll reschedule the Open House to another night when all this blows over." Yeah, right!
>
> So principals have this "list" of duties. Evidently, the FAX communicated to principals not to cooperate with their teachers. So? Is there any change to our position? NO. It remains the same. We consider the extra hours assignments as voluntary, and sites should use the guidelines PFT has given you. Sure, I understand that there is some additional pressure on you at the sites. Yes, if you collectively take action at your site, your teachers might receive a Letter of Reprimand. Yes, PFT will help you write a collective response and make sure it gets attached to that letter (and gathers dust in your personnel file).

On or about September 2, 1993, Raczka distributed a flyer to the teachers entitled "Work-To-The-Rule, It's not 'Business as Usual'." This document set forth specific guidelines and recommendations of the PFT officers regarding what working strictly within the time frame of the contractual day and withholding voluntary duties and services meant. It also included the following comments

> The thorny issue, of course, is whether the activities you are refusing to perform are required activities or voluntary. You must perform your normally required and assigned duties. There is no requirement for you to perform voluntary activities. For each activity, you must ask yourself: "Is it purely my choice to participate or is it being assigned as a mandatory duty by my administrator?" These are not easy questions to answer and really should be made in conjunction with your site and your PFT Building Rep.

On the first day of school, which was September 2, PFT distributed another flyer to teachers entitled "Q & A on the Seven-Hour Day." This flyer offered PFT's view of how specific non teaching duties fit within the parameters of the work-to-the-rule resolution. It also advised teachers on how to respond to a direction from the principal to take on extra-curricular activities and addressed why PFT had not directed a districtwide boycott of such activities, particularly back to school night. In this regard, the flyer stated

> Following the direction you gave, both in June and last week, PFT has called for a strict, work-to-the-rule 7-hour workday. Because of the immediacy of the Back-to-School-Nights, we felt it was up to each individual site to make the determination for

> that particular activity. Unlike the District Office, the PFT believes in site-based management. The important thing is that all the teachers at your school can come to a decision and take concerted action. Each school should decide for themselves what action will be most effective at their site and which action will receive the broadest support.

Finally, the flyer again acknowledged that although PFT believed that a collective decision not to attend back to school night was a "protected activity" under the EERA, PFT anticipated that the teachers would receive letters of reprimand and it was helping each site to draft a collective response for all teachers that could be attached to the reprimand.

Assistant Superintendent Hughes sent another memo to all principals on September 8, 1993, advising them about how to respond to various questions related to the teachers' participation in back to school night activities. His memo explicitly stated that "attendance at Back-to-School Night is a contractually required activity as referenced in the contract and specifically stated in Board Policy." The memo further advised principals to notify teachers in writing, that their attendance was required and expected, and failure to attend, without cause, would subject the teachers to disciplinary action. Among other items addressed, the memo also advised principals that back to school events should not be re-scheduled or cancelled. Hughes also sent a sample letter of reprimand with his September 8 memo and directed the issuance of the written reprimands that are at issue in this case.

Back to school night is described as an open house where teachers explain their programs for the coming year to parents. Each teacher is responsible for his/her own classroom presentation. The dates and other non-classroom events presented at back to school night vary from school to school, depending, among other things, on the grade levels involved. The District's back to school night activities for the 1993-94 school year were scheduled to begin on September 8 through the third week of September.

Most principals informed their staff of the District's position and distributed some type of written information regarding the District's expectation of the teachers prior to the date of their scheduled back to school activities.

Between September 8 and September 23, 1993, teachers at nine school sites did not participate in the back to school night classroom activities at their respective sites.[4] On their scheduled nights, some teachers went to their school sites and distributed flyers about the status of the parties' negotiations to the parents as they arrived at the school campuses. Others offered to meet with parents during their workday, but none of them went to their classrooms to make a presentation. Others simply stayed home.

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[4]The school sites where the teachers' concerted activities occurred were Rancho Bernardo High School, Bernardo Heights Middle School, Black Mountain Middle School, Middlebrook Middle School, Twin Peaks Middle School, Canyon View Elementary School, Painted Rock Elementary School, Sierra Bonita Elementary School and Valley Elementary School.

At the District's board meeting on September 20, 1993, Raczka made a presentation to the board during which he proposed that PFT would ask the teachers to cease all public demonstrations regarding the negotiations, but to continue to withhold unpaid, after-hours supervision of sports, clubs, or social activities, except for the remaining back to school nights, if the District would commit to a set number of intensified days of negotiation and agree to submit their dispute to factfinding. Although the board did not publicly accept Raczka's proposal, the parties shortly thereafter agreed to additional negotiating dates.

Following Raczka's September 20 proposal, two teachers received letters of reprimand for non-attendance at the back to school night activities at Mount Carmel High School on September 30, 1993.

In total, 338 members of the bargaining unit received written reprimands for not attending their respective back to school night activities. In the reprimands the teachers were accused of violating board policy, the CBA, taking an unauthorized absence and insubordination. A copy of the reprimand was placed in each employee's District personnel file. One teacher at Painted Rock Elementary School filed a grievance regarding her reprimand on September 16, 1993. The grievance was denied at level II of the contractual grievance procedure and not pursued any further.

At one site, Bernardo Hills Middle School, the principal postponed the back to school night for students in grade six as a result of a misunderstanding regarding advice he received from Hughes. Consequently, no written reprimands were issued to the teachers who did not attend that event.

The parties' subsequently settled their negotiations in October 1993, without submitting the dispute to factfinding. On November 22, 1993, they ratified a CBA with an effective term from July 1, 1993, to June 30, 1996.

Relevant Provisions of the CBA and District Policy

Section VIII of the 1991-92 CBA contained provisions covering unit members' hours of employment. This section reads, in relevant part, as follows:

> WORK DAY
>
> The school based work day for teachers in the Poway Unified School District shall be seven (7) hours, not including a minimum 30-minute duty-free lunch period. Prep periods approximately equal to 1/5 the classroom instructional time shall be provided teachers in grades 6-12.
>
> - Each teacher shall be on duty prior to the beginning of the instructional day for an adequate amount of time to discharge any routine or special professional responsibilities or assignments and to prepare for the teaching day.
>
> - Teachers shall remain on duty after the close of the school day long enough to ensure a professional and adequate performance in the discharge of professional responsibilities as required in the appropriate job classification description and specified in Board Policy.

UNAUTHORIZED ABSENCE

Unauthorized absence is defined as non-performance of those duties and responsibilities assigned by the District and its representatives including all duties and responsibilities as defined by the Education Code, Policies of the Board of Education, the rules and regulations of the District, and the provisions of this agreement.

- Unauthorized absence may include, but is not limited to, refusals to provide service, . . . non-attendance at required meetings, and failing to perform supervisory functions at school-sponsored activities.

- An employee is deemed to be on unauthorized absence at such time and on such occasions as the employee may absent him/herself from required duties without prior approval of his/her principal or immediate supervisor, except as provided for in this agreement.

The CBA also contained grievance procedures (Section VI) that culminated in a final decision by the District board. Although the grievance/arbitration provisions allowed claims by unit members of violations, misinterpretations or misapplication of express terms of the contract, it provided limited grievance rights for PFT.[5]

During all times relevant to this case, the District had a board policy in effect that pertains to a teacher's non-instructional responsibilities. This policy, designated as Board

[5]PFT's right to file a grievance was limited to an alleged violation of Section I (Recognition), Section XII (Rights of the Exclusive Representative), or any other specific subsection of the CBA where a right was created solely for the benefit of PFT as an entity.

Policy Section 4.205 (Teacher Responsibility) reads, in part, as follows:

> In addition to instructional duties, responsibilities and tasks which are primary, teachers are responsible, secondarily, for related instructional, co-curricular, and student social and recreational activities. Participation in such activities is required as a condition of employment and includes, but is not limited to, the following activities:
>
> . Open houses, PTA functions, Back-to-School Nights, and other meetings with parents.

This policy was incorporated into the terms of the 1991-92 CBA through the work day language set forth in Section VIII (supra, at p. 12).

The District's position description for all classroom teachers also states that one of the major professional tasks of teachers is to "[M]eet obligations as specified by the Board of Education in Board policies."

The District's Past Practice Re Discipline for Failure to Participate in Back to School Night Activities

PFT contends that, in responding to the teachers' concerted activity in September 1993, the District ignored its progressive disciplinary procedures that apply to unpaid, extra-curricular assignments by issuing written, instead of oral, reprimands.

It is undisputed that the District has an administrative procedure that provides for discipline in the event that a teacher fails to perform extra assignments besides classroom teaching. Administrative Procedure Section 4.205.1 has been in effect since July 29, 1991. This procedure states that it is

> . . . designed to assist managers in dealing constructively with any instances in which teachers fail to perform such prescribed responsibilities. . . .

Section 4.205.1 outlines a three-step progressive disciplinary process. Step 1 calls for an oral reprimand, with or without written confirmation of such reprimand. Step 2 provides for a written reprimand with a warning of further more severe disciplinary action if the action is repeated. At Step 3, the employee may receive a more severely written reprimand, and consideration of further disciplinary action such as a suspension or docking of pay.

Written reprimands issued at Steps 2 or 3 are given to the employee for review and comments, which are attached to the reprimand and placed with it in the employee's District personnel file.

The evidence establishes, that with minor exceptions,[6] traditionally most teachers have been required to participate in back to school night activities or be subject to discipline. For example, one witness recalled a couple of instances when a teacher failed to attend a back to school night event, the teacher received a "scolding," i.e., oral reprimand, from the principal the next day.

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[6]There is testamentary evidence that prior to September 1993, certain unit members, such as resource and special education teachers who have no specifically assigned classroom or students at the beginning of the school year, have not attended back to school nights and were not disciplined. This testimony, however, reflected initial actual, and continuing implicit, consent of the site administrator or the principal on a case-by-case basis.

In September 1983, during protracted negotiations between PFT and the District, the teachers at Twin Peaks Middle School decided to take action "on their own" by boycotting their school's scheduled back to school night activities. This concerted action was neither initiated nor sanctioned by PFT. All teachers who engaged in the boycott, including Raczka who was then a classroom teacher at Twin Peaks, received written reprimands immediately following the boycott.[7] The text of the reprimands issued in 1983 was similar to those issued in September 1993.

In 1983 the teachers filed a group response to their reprimands, but no grievances were filed.

Other than the 1983 incident, there is no documented instance of a teacher receiving a written reprimand for failing to attend back to school night activities until the concerted action occurred in September 1993.

ISSUES

(1) Whether the teachers' concerted refusal to participate in back to school night activities was a "protected activity" under EERA?

(2) If so, was the discipline imposed on the teachers in violation of section 3543.5(a) and/or section 3543.5(b)?

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[7]In 1983, the relevant language of the CBA, the District board policy and administrative procedure relied on by the District to impose discipline were substantially similar to those in effect in 1993.

CONCLUSIONS OF LAW

The Standard for a Prima Facie Case of Discrimination

Section 3543.5(a) prohibits public school employers from discrimination and reprisals against employees who engage in conduct protected by the EERA. The express rights guaranteed to public school employees by section 3543 includes the right to ". . . participate in activity of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."

In this case, it is alleged that the District unlawfully disciplined teachers in reprisal for their concerted refusal to perform voluntary non-teaching services, a right which is protected by EERA. The District's action allegedly violated section 3543.5(a) and also 3543.5(b) because it denied PFT the right to represent its members.

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), PERB refined the test and general standards to be applied in discrimination cases. In order to establish a violation of section 3543.5(a) under Novato, the charging party has the burden of showing that there was some engagement in protected activity; the respondent knew of this participation in protected activity; and the respondent took adverse action motivated by that activity. Proof of a connection or nexus between the protected activity and the adverse action may be established by direct or circumstantial evidence and inferences drawn from the record as a whole. (Livingston Union School

District (1992) PERB Decision No. 965.) Once a nexus is established, the burden shifts to the respondent to demonstrate that it would have taken the same action regardless of the employees' participation in protected conduct. (Novato.)

Refusal to Participate in Back to School Night Activities

Here it is undisputed that in September 1993, many of the teachers had decided to work-to-the-rule, that is, to perform exactly those duties which were required but no more.[8] In a work-to-the-rule case, the inquiry focuses on whether or not the activities which were not performed were required or voluntary. "The refusal to do voluntary activities is protected conduct, while the refusal to do normally required assigned and assigned adjunct duties is not." (Modesto City Schools (1983) PERB Decision No. 291 (Modesto), citing Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195 (Palos Verdes).) Thus, if the teachers' were required to attend back to school night, their concerted refusal to participate in the manner required of them by the District was unprotected conduct. If, however, attendance or participation was not required, then the refusal to participate was lawful and the teachers were merely

[8]It is further undisputed that the actions at issue were not instigated by PFT. Although PFT had led the membership in adopting a resolution to work-to-the-rule in order to apply pressure on the District in the negotiations, it is clear that the boycotting of back to school nights was not PFT-directed. Within this time frame, the teachers at approximately five or six school sites attended and participated in the back to school nights. Thus it is evident that the decision not to attend back to school nights was made by the teachers at the individual school sites.

exercising their protected rights to participate in the activities of an employee organization.

The District argues that teachers' participation in back to school night is a mandatory duty. This duty, it maintains, is mandated by the language of Article VIII of the CBA, which requires the performance of the professional responsibilities specified in board policy section 4.205. Further, the teachers' job description requires the performance of obligations specified by board policy. All of these documents have been in existence since the mid 70s and early 80s. Board policy section 4.205, it is argued, expressly mandates participation in back to school nights "as a condition of employment." Thus, it is argued, the plain language of the governing documents clearly make participation in back to school nights a required duty.

PFT defends its theory of the "voluntary" nature of this duty by asserting that the District has not consistently enforced similar refusals to participate. It also maintains that although board policy section 4.205 lists a wide variety of activities that are secondary, including back to school nights, to a teacher's primary instructional tasks, the manner or extent of participation in the secondary activities is not defined. Hence, teachers who appeared and attempted to fulfill their obligation to meet with parents outside the scheduled periods, "participated in a limited and unorthodox manner" but they did act to ensure that the goals of the evening were met.

The relevant language of Article VIII of the 1991-92 CBA makes it clear that teachers are required to remain on duty after the close of the school day "to discharge responsibilities as required in the appropriate job description and specified in board policy." Board policy section 4.205 states explicitly that one of those responsibilities, in addition to the instructional duties and tasks is to participate in back to school night activities. There is nothing in the language of the policy that indicates that participation in back to school nights is voluntary in nature or that the District has granted teachers discretion in the manner in which they perform this duty. In fact, the District's policy specifies that participation in such activities is "required as a condition of employment."

Thus, once the back to school nights were scheduled in September 1993, individual teachers had no right to boycott them. There was no longer a right to choose whether or not to participate. The scheduled back to school nights became as much a required duty as teaching. Even though some teachers showed up on the night of their scheduled event and offered to meet with parents at other times, this did not compensate for their absence from the classroom meeting with parents to explain their educational program for the coming year. PFT's argument that the majority of the disciplined teachers "participated" in a limited and unorthodox manner is therefore not persuasive.

In fact, PERB has stated that employees may not assert a protected right to determine for themselves whether they will

perform required duties. (El Dorado Union High School District (1985) PERB Decision No. 537 (El Dorado).) In El Dorado the Board held that a partial work stoppage or slowdown is unprotected and is also unlawful, since a partial withholding of services denies the employer the opportunity to "defend itself" against the action. (See San Ramon Valley Unified School District (1984) PERB Decision No. IR-46 (San Ramon).)[9]

Those principles apply to this situation. PFT and the teachers were well aware that *on* back to school nights, the teachers were expected to make presentations in their classrooms and not at a time and location determined by the teachers themselves.[10]

For these reasons, it is concluded that the teachers' concerted refusal to participate in back to school night "classroom" activities was unprotected conduct as well as a

[9]In San Ramon, the Board concluded that although the teachers may not have absolutely withheld the services to be performed during the pre-class period, their insistence upon performing them off school premises had the similar potential of denying the employer the opportunity to accommodate itself to the teachers action.

[10]See also Palos Verdes wherein the Board concluded that the teachers' refusal to give "discretionary" final exams as part of its bargaining strategy constituted a partial work stoppage. The Board determined that implicit in the teacher's discretionary location in which to perform required pre-class services is the student oriented requirement that they be available in the school. Because their choice was based solely on their bargaining strategy, the Board found it to be a partial work stoppage and a violation of section 3543.6(c) of EERA.

violation of the CBA.[11] Having made this conclusion, it is determined that PFT has failed to establish the threshold requirement in a discrimination case, i.e., that the employees engaged in protected activity. Under the Novato standard, further analysis may properly end.

The District's Imposition of Discipline

Even where the refusal to perform an activity is found to be unprotected, further inquiry may be required, nonetheless, where it is alleged that the nature or severity of the ensuing discipline evidences improper motivation. (Modesto.)

Here, PFT argues that, in responding to the teachers concerted activity, the District ignored its own progressive disciplinary procedure by issuing written instead of oral reprimands as called for in Step 1 of District administrative procedure section 4.2 05.1. The District thus imposed a more severe form of discipline, PFT asserts, without regard for its own procedure or an investigation of the individual teacher's circumstances. PFT also contends that the discipline was

[11]Official notice is taken of another unfair practice case involving these parties, Case No. LA-CE-3387, filed on December 15, 1993. The latter charge involved the same time frame as the instant case and presented the issue of an alleged unilateral change of policy on teacher supervision of student activities.

In LA-CE-3387, the Board agent traced the same CBA provisions and District policy under examination here and determined that the plain meaning of the language was that certain duties (supervision of student activities) were required as a condition of employment. The Board affirmed and adopted the Board agent's warning and dismissal letters in Poway Federation of Teachers v. Poway Unified School District (1994) PERB Decision No. 1050.

disparate in that there was no evidence that teachers who had individually failed to attend back to school nights in past years had ever received more than an oral reprimand except when large groups of teachers engaged in concerted activities.

The District defends its conduct on the ground that the primary motivation for the discipline was the teachers' insubordination. Those teachers who failed to attend their back to school nights events, without cause, after being told that it was a required and expected duty took "unauthorized absences" in violation of their contractual obligation found in Section VIII of the CBA. The District further argues that prior to the teachers' boycott, the District warned them of the consequences of non-attendance. Finally, the District maintains that administrative procedure section 4.2 05.1 is not applicable to the activity at issue since it was not an "extra-curricular assignment" but a part of the teacher's regular responsibilities. And that even if arguably applicable, the procedure is only a "guideline" to assist managers in dealing with instances of teachers non-performance of duties.

For several reasons, the circumstances surrounding the September 1993 and October 1993 imposition of discipline do not raise an inference that the reprimands were unlawfully motivated. First, the District notified the teachers in advance of the discipline that might be imposed if they failed to participate in a required duty. Second, PFT also indicated in two memos to unit members in early September 1993, that it anticipated that

teachers would receive letters of reprimand and that it would help them to draft collective responses for attachments to the reprimands. Third, PFT knew from the District's response to the teachers' September 1983 concerted action that the District would regard a boycott of back to school nights as a contractual violation and probable insubordination. And, lastly, PFT, the teachers and the District recognized the educational importance of the back to school nights classroom presentations to the parents.

Even if District administrative procedure section 4.205.1 was applicable to the teachers' conduct, the use of oral reprimands in prior routine situations need not dictate the District's response to an imminent partial work stoppage with potentially significant consequences. Both the teachers and PFT were well aware of the risks involved in refusing to perform a required activity. In this instance the District's proffered justification is sufficient to uphold the issuance of reprimands in September and October 1993. It is therefore concluded that the District's discipline of its employees for refusing to perform required duties did not violate section 3543.5(a). The allegation should therefore be dismissed.

The Section 3543.5(b) Allegation

The complaint also alleges that the District's conduct denied PFT the right to represent unit members in violation of section 3543.5(b). No independent evidence was presented to show that the District's disciplinary actions against the teachers

interfered with PFT's representational rights guaranteed by EERA. Thus, the allegation of a section 3543.5(b) violation must also be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c) of the Government Code, it is hereby ordered that the underlying unfair practice charge and complaint be 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.)

W. JEAN THOMAS
Administrative Law Judge