STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LODI CHAPTER #77, Charging Party, v. LODI UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2081-E PERB Decision No. 1893 March 20, 2007

Appearances: California School Employees Association by Maureen C. Whelan, Attorney, for California School Employees Association and its Lodi Chapter #77; Pinnell & Kingsley LLP, by Kim Kingsley Bogard and Kerri Lynn Ruzicka, Attorneys, for Lodi Unified School District.

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Lodi Chapter #77 (CSEA) to the proposed decision (attached) of an administrative law judge (ALJ) dismissing the complaint and the underlying charge filed by CSEA against the Lodi Unified School District (District). The ALJ concluded that the District did not violate Section 3543.5(a), (b) or (c) of the Educational Employment Relations Act (EERA)[1].

The Board has reviewed the entire record in this matter, including the unfair practice charge, complaint, CSEA's statement of exceptions and the District's response thereto. The Board finds the ALJ's findings of fact and conclusion of law to be free of prejudicial error and

[1]EERA is codified at Government Code section 3540, et seq.

adopts the proposed decision as the decision of the Board itself, subject to the discussion below.

DISCUSSION

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

CSEA demonstrated that Leo Del Carlo (Del Carlo) exercised rights under EERA. Del Carlo engaged in protected activities by: serving as CSEA's site representative and a job steward at Parklane School, notifying the District of his contact with his union representative, and asserting his right to union representation at every meeting. Additionally, CSEA wrote to the District objecting to the harassment of head custodians. CSEA also filed an unfair practice charge on behalf of Del Carlo. Therefore, Del Carlo's actions constituted protected activity.[2]

ORDER

The unfair practice charge and complaint in Case No. SA-CE-2081-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shek and McKeag joined in this Decision.

[2]The record clearly establishes that Del Carlo engaged in protected activities. As such, the Board does not adopt the ALJ's conclusion that Del Carlo engaged in the "color of protected activity."

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LODI CHAPTER #77 Charging Party, v. LODI UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2081-E PROPOSED DECISION (9/15/04)

Appearances: Pat Miraglio, Labor Relations Representative, for California School Employees Association and its Lodi Chapter #77; Pinnell & Kingsley, by Kim Kingsley Bogard, Attorney, for Lodi Unified School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On February 14, 2002, the California School Employees Association and its Lodi Chapter #77 (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Lodi Unified School District (District). The charge alleged various violations of the Educational Employment Relations Act (EERA or Act).[1]

On April 22, 2002, PERB's general counsel, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a), (b) and (c) of section 3543.5.[2]

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

[2] Subdivision (a) of section 3543.5 states:

> 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

On June 17, 2002, the District answered the complaint denying all material allegations and propounding various affirmative defenses. An informal conference was held on June 25, 2002, in an unsuccessful attempt to reach a voluntary settlement. On January 9, 2003, CSEA filed a first amended charge. On February 20, 2003, CSEA withdrew part of its charge. On February 20, 2003, PERB issued an amended complaint. The District answered the amended complaint on August 12, 2003. Five days of formal hearing were held before the undersigned on August 26 and 27, November 4, 5, and 19, 2003.

On the first day of the formal hearing, the parties entered into a stipulation to withdraw a portion of the complaint. Complaint paragraphs 1 through 4 are introductory. Paragraphs 5 through 46 describe allegations of EERA violations by the District against Leo Del Carlo (Del Carlo). Paragraphs 47 through 50 allege an EERA violation with regard to Richard Woodward (Woodward), another District employee, and a CSEA job steward. Paragraph 47 describes Woodward's protected activities and then alleges that he told his principal that the new sign in/out policy had to be negotiated. Paragraphs 48 through 50 allege that the principal took adverse action against Woodward by issuing him a negative performance evaluation, and this action violated subdivisions (a) and (b) of section 3543.5.

CSEA agreed to withdraw paragraphs 48 through 50, but insisted that paragraph 47 not be part of the stipulation. Paragraphs 32 through 34 allege that the District violated

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> otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.. .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative... .

subdivisions (a) and (b) of section 3543.5 by directing Del Carlo to check in/out when going on breaks and lunch periods.

Paragraph 47, by itself, has no operative significance, other than to allege an additional example of the District's promulgation of an allegedly improper order against one of its other employees. In the final analysis, the District's actions vis-à-vis its check in/out policies against Del Carlo must be judged on their own merits. The fact that the District may or may not have done the same thing to Woodward is of little legal significance. Therefore, the evidence educed at the formal hearing with regard to Woodward will not be discussed or analyzed, other than a brief comment mentioning that at another school, another employee was subjected to the same requirement.

After the conclusion of the hearing, transcripts were prepared, and briefs were filed. The case was submitted for a proposed decision on March 18, 2004.

INTRODUCTION

CSEA alleges that the District discriminated against Del Carlo by (1) improperly removing an overtime assignment from him and giving it to another employee, (2) denying his vacation request, while approving a vacation request for another, less senior, employee, (3) removing a telephone from his office, (4) issuing him several letters of reprimand and punitive memos with insufficient justification, (5) issuing him an evaluation with "needs improvement" ratings, (6) involuntarily transferring him from his school work site, and (7) transmitting an unsatisfactory recommendation to a prospective employer.

The District insists that it did not discriminate against Del Carlo for his CSEA activities, and that all of its actions toward him were supported by sound personnel practices.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that CSEA is an employee organization and an exclusive representative, and the District is a public school employer within the meaning of the EERA.

Background

Del Carlo has been a District[3] custodial employee for sixteen years. In 1991 he was assigned to Parklane (Parklane), a kindergarten through third grade (K-3) school, with 34 classrooms and 550 students. In 1999 he was promoted to head custodian at that site. One responsibility of this lead person position was the "supervision" of two nighttime custodians. Throughout much of the time under consideration in this case, these two night custodians were Lamonte Lopstain (Lopstain) and Steve Brady (Brady). Del Carlo remained at Parklane until he was involuntarily transferred in October 2002. For the twelve years prior to the events described herein, Del Carlo had excellent evaluations, with almost all "outstanding" ratings. Five of these evaluations were signed by Jaye Hays (Hays), Parklane's principal and Del Carlo's immediate supervisor. In June 2001, Del Carlo was appointed CSEA's site representative and a job steward at Parklane.

Brady

In March 2001, Brady was hired and assigned to Parklane. Del Carlo and Brady did not like each other. Del Carlo sent several memos to Hays and other District administrators complaining about Brady's job performance and behavior. On October 7, 2001, Del Carlo sent an extensive letter to Elliot Grauman (Grauman), District Director for Classified Employees,

[3] The District is one of the larger districts in the state, with 40 sites, 25 to 30 elementary schools, 5 or 6 middle schools, and 3 comprehensive high schools.

complaining about Brady and his refusal to follow instructions. On January 2, 2002, Del Carlo alleges that Brady became incensed and started yelling profanities at him. Then he began to pick up garbage cans outside of Del Carlo's office, throwing them into an abutting parking lot. Del Carlo became concerned for his personal safety[4] and that of the school's students. Del Carlo reported the incident to Hays. On January 10, 2002, Brady was transferred from Parklane, although he remained a District employee. While Del Carlo was absent for six months from the school site on industrial leave, Brady returned to Parklane, on a sporadic basis, to work overtime on weekends.

Custodial Issues at Parklane - October 2001

In August 2001, Del Carlo complained to the District administration that Brady was guilty of (1) sexual harassment, (2) verbal abuse, (3) using foul language, (4) making threats, and (5) committing acts of violence.

Both Hays and Del Carlo agree that their relationship changed drastically in the summer of 2001. There no longer was a feeling of mutual trust and cooperation. Hays attributes this change to her checking with the Latchkey[5] teacher regarding the quality of custodial services she was receiving from Del Carlo. Hays was surprised to learn that the teacher had a myriad of complaints and had been forced to do much of her own cleaning. Once Hays learned of this, she alleges that she began to inquire of other teachers as to their experiences with the custodians. She did not discuss her findings with Del Carlo, but he could sense that she was putting distance between them. Some examples of this distance were that, (1) she was no longer interested in his complaints about Brady, (2) she stopped having Monday

[4] Brady was described by Del Carlo as being 5 feet, 10 inches to six feet tall, 230 pounds and being very strong. Del Carlo is 6 feet, 2 inches tall and weighing 200 pounds.

[5] The Latchkey program at Parklane provided a daycare facility.

morning meetings with him, and (3) she began giving him written instructional memos, rather than speaking directly with him. She never gave him written warnings, nor did she explain what she had learned from the various teachers. This coolness naturally caused Del Carlo to become more wary and it led to his seeking representation whenever he did meet with her.

At the beginning of the 2001-02 school year, Hays attempted to mediate her custodians' conflicts. She met with all three and suggested that they start afresh with a few ground rules. She alleges that Brady and Lopstain agreed to try, but Del Carlo would not, insisting that Brady's actions made the breach in their relationship irreparable. Therefore, Hays asked Grauman to come to Parklane to try to resolve the conflict.

When Grauman arrived at Parklane on September 11, 2001, he was aware that Del Carlo had previously sent a number of written complaints about Parklane's custodial situation, in general, and about Brady, in particular. In addition, he knew that Del Carlo had filed an Equal Employment Opportunity Commission (EEOC) complaint against the District.

Grauman came to the campus on September 11, 2001, to speak to all three men, on an individual basis. On October 17, Grauman wrote letters to, and met with, each of them. It was at this meeting that Del Carlo first asked for representation. Once he began requesting representation at all meetings with Hays and Mark Edwards (Edwards), Parklane's vice-principal, both of them expressed some frustration with trying to coordinate meetings with him, as his representative was not assigned to Parklane. However, his requests for representation were always honored, and the meetings were merely re-scheduled and/or consolidated. CSEA cites these written complaints and requests for representation as examples of Del Carlo's protected activity.

In Grauman's letters, he reiterated basic personnel practices, such as adhering to the chain of command. In his letter to Del Carlo, he told him that his "style of leadership is

perceived to be aggressive and not conducive to maintaining a positive team atmosphere," and that he needs to add a "tone of respect" to his notes to his subordinates.

Del Carlo submitted several of his memos to his subordinate custodians into the record. These memos were cordial, cooperative and respectful. One complimented Lopstain on doing a good job. The District suggests that this merely shows that Del Carlo changed his attitude because of Grauman's letter. This viewpoint may have some validity, as two of the letters were dated October 29, 2001. However, the other two are dated September 25, 2001, before Grauman sent his letter, and January 8, 2002, almost two months after the letter was sent.

Grauman also directed Del Carlo to immediately clear his office of all material on a white board which could be perceived offensive to coworkers, other staff, students or parents.[6]

In Grauman's letters to Lopstain and Brady, which were essentially identical, he duplicated much of the material in his letter to Del Carlo, but left out the admonition regarding Del Carlo's allegedly "aggressive" leadership style and the reference to the inappropriate material in his office. However, he added that it was "apparent on more than a few occasions, the school has been secured for the night far in advance of the end of your scheduled shift." He told the two night custodians that these "actions are unacceptable and will not be tolerated."

Del Carlo wrote a letter to Grauman after their meeting, but before he received the above described letter. Del Carlo stated that he initially believed Grauman had come to Parklane to investigate his (Del Carlo's) complaints about Brady's job performance deficiencies. He reiterated that he had proof that the employee was leaving the site early and that work was being left undone. In addition, he told Grauman that he had previously reported the employee expressing "inexcusable, discourteous, offensive, abusive conduct and language"

[6] Del Carlo testified that a person walking by his office with the door open, could not see the words on the white board.

toward him, and that this employee (Brady) committed acts of insubordination by refusing or failing to comply with a direct order to perform specific work assignments.

Del Carlo responded to Grauman's letter in a generally positive manner, but did include one somewhat negative comment, stating that he believed Grauman's directive concerning the material in his office was an infringement of his "freedom of expression." However, the emphasis of his remarks was not complaining about Grauman's letter. Rather he suggested that if he was going to be assigned the cafeteria as his sole responsibility, as is common at other schools, then the office building and staff bathrooms should be assigned to someone else, as is also common in other schools.

He went on to ask Grauman if the real reason he came to Parklane was to investigate him (Del Carlo), "at the request of a probationary employee (Brady)." He went on to allege that during Grauman's investigation "his desk was broken into, a lock on a filing cabinet was destroyed and confidential files were tampered with." He also complained that his personal property was rummaged through in violation of his rights. He ended the substantive part of his letter with the following two sentences:

> For these reasons, I have contacted an employment attorney and my union representatives. Copies of this letter have been forwarded to all persons mentioned herein.

Copies of this letter were sent to the District maintenance and operations supervisor, Parklane's principal, the District's superintendent, the CSEA chapter president, the CSEA labor representative assigned to the local chapter, and a private attorney.

Although Grauman never responded directly to Del Carlo's letter, his subsequent October 17 letter was, in general, a response to many of Del Carlo's requests and criticisms.

Latchkey Overtime Assignment - October 25, 2001

At Parklane there was a custodial overtime assignment called "Latchkey." It was a daily one-hour overtime assignment that required a custodian to provide maintenance in the classroom assigned to the school's day care facility for working parents. Del Carlo, as head custodian, assigned these pre-scheduled overtime hours to himself, stating that for his entire time at Parklane, the Latchkey overtime assignment was always performed by the head custodian.

In the 2001-2004 collective bargaining agreement (CBA), the overtime section was modified to implement a rotating system for all pre-scheduled overtime assignments.

In September 2001, Lopstain and Brady complained that Del Carlo was taking most of the scheduled overtime opportunities, including the entire Latchkey assignment, only allowing others to participate when he had a conflict or did not wish to work those hours. When Grauman investigated, he learned that the complaints had merit.

He recommended an assigned overtime schedule that he believed would equitably distribute these overtime assignments, rather than a rotational system. As a part of this schedule, Lopstain would be given the entire Latchkey assignment. However, other pre-scheduled overtime hours would be distributed among the other two custodians, Del Carlo and Brady.

CSEA argues that Grauman's recommendations (1) were a unilateral modification of the CBA, and (2) did not even follow the District's alleged "longstanding practice" alternative of "if everyone agrees."

Del Carlo contends that Grauman's distribution was not equitable, nor was it in compliance with the CBA. One reason for his contention was that the Latchkey assignment was performed during the workweek, while the rest of the overtime was on the weekend,

requiring the assigned employee to return to the site to earn the extra hours. Del Carlo complained to Hays that granting Lopstain the exclusive right to the Latchkey assignment was in violation of the CBA. He said that she replied, "I am the administrator and I make the decisions."

Grauman justifies giving Lopstain the Latchkey assignment exclusively, by stating that this enabled Del Carlo to come to work at 6:00 a.m., rather than 5:00 a.m., and that there were concerns that part of Del Carlo's problems were that he was often tired. Besides, Grauman insists that it was only a recommendation.

As a result of Lopstain's being given the Latchkey assignment, Del Carlo went from twenty-two overtime hours to between twelve and sixteen per month. In his current assignment, Del Carlo receives five to six overtime hours per month.

Grauman distributed his recommended schedule to Hays and each Parklane custodian, and for approximately two weeks in October/November it was followed. After Del Carlo pointed out that Grauman's schedule was merely a recommendation, Hays scrapped it and implemented a rotating schedule.

The parties' CBA, section I, sets forth a seniority-based rotating system for pre-scheduled overtime distribution. However, the District contends that this rotating system could be superceded by a unanimous agreement of all of the affected custodians. To support its contention, the District submitted into evidence an August 21, 2002, letter from CSEA representative, Pat Miraglio (Miraglio) to Del Carlo. The District quoted the letter, which told Del Carlo that it reflected "the settlement to the ULP charge that was filed by C.S.E.A. on your behalf." In this letter Miraglio stated:

OVERTIME ROTATION shall be as per the collective bargaining agreement to wit:

> On a straight rotation basis, week to week scheduled monthly in advance. Each schedule shall be agreed to, made and posted by the 20th of the current month for the following month.
>
> This will not preclude the classified staff and administration from mutually agreeing on a different system as long as everyone agrees, including CSEA. [Bold and emphasis in original.]

However, CSEA in its rebuttal brief contends that although the contents of the letter support the District's case, it is not controlling for the following reasons: (1) the letter was addressed to Del Carlo, not the District, (2) the letter was written in furtherance of a settlement, and is therefore privileged, (3) the letter asks Del Carlo to review the proposal and advise if he had any questions, (4) Miraglio prefaced the "overtime rotation" quote, supra, with a statement that we "will set a meeting to go over these items and insure that all concerned understand the methods for scheduling vacations and assigning overtime," (5) the letter makes no mention of the "as long as everyone agrees" phrase being a part of any "long standing" agreement or practice, and (6) Miraglio had recently taken over responsibility for the Lodi CSEA chapter and was not cognizant of all of the chapter/District interactions. Shortly after Miraglio sent this letter, he was told by the chapter officials that this letter was contrary to the intent and practice regarding overtime in the District. CSEA further contends that if there had been a "long standing" practice, it would not have been necessary for the parties to have memorialized it in a July 2002 settlement agreement. Furthermore, if there was such a practice, the District would not have had to resort to a settlement letter from Del Carlo's representative to prove it; especially a letter that contained a position that was never discussed or advocated after the date of the letter.

CSEA presents a persuasive argument that the "if all parties agree" language was not a bilateral interpretation of this CBA provision. The CBA provision sets up an elaborate, and obviously well thought-out, rotation plan. However, as there is no requirement that a site's employees must follow such a plan, the possibility of them developing an alternative plan would seem to be a viable option. If all parties actually agree to an alternative rotation plan, there would be no reason for CSEA and/or the District to be involved, as there would be no one left to complain. At Parklane, not all employees agreed to an alternative. Therefore, a revolving plan was necessary and was implemented after Grauman's recommended plan was abandoned by Hays.

Hays acknowledged Del Carol's unhappiness with Grauman's pre-scheduled overtime assignments, but told him that if a true rotation system was going to be instituted, he had the responsibility of making out the schedule, one month in advance. She explained the schedule had to be set out and distributed to the other two custodians. Over the next few months she heard a number of complaints from Lopstain and Brady that this distribution had not occurred. Therefore, they did not know when their overtime assignments were scheduled.

However, when Del Carlo was absent from the site, due to a job-related injury, the District contends that the remaining custodians collectively agreed to a fixed overtime schedule, as opposed to a rotating one. CSEA disagrees, stating that Lopstain merely asked the two nighttime custodians to work on Saturday and Sunday, as he was going to work the daily Latchkey assignment exclusively. When Del Carlo returned, the school implemented a rotation schedule.

Vacation Request Conflict -October 22. 2001

On October 22, Lopstain submitted a written request to his immediate supervisor, Del Carlo, for vacation on November 1 and 2. On Lopstain's written request, Del Carlo said

that he marked the "disapprove" box and wrote, "I'm off on vacation then." He alleges that he left Lopstain's request on his desk until he could talk to him to determine how important these days were to him, with the idea that perhaps it was possible they could work out some sort of an accommodation. Lopstain removed his request form from Del Carlo's desk and gave it directly to Hays.[7] Hays approved Lopstain's request. On October 19, 2001, Del Carlo alleges that he submitted a written request to Hays to take vacation on November 1 and 2. Hays denied Del Carlo's request. When asked, by his own counsel, why Hays approved Lopstain's request, and not his, Del Carlo said, "I don't know."

CBA Section XII.K., Vacation Scheduling, states, in pertinent part:

> . . . If there is a conflict between employees who are working at the same sites as to when vacations shall be taken, the employee with the greatest District seniority . . . requesting vacation shall be given preference. [Emphasis added.]

Grauman described the District's practice regarding what constituted a "conflict." He stated that if Hays had "written or verbal knowledge prior to signing Lamonte [Lopstain's request form] . . . I would have told her to follow the contract." By "following the contract," it is clear that he meant that under this hypothetical example, she should have signed Del Carlo's request form, as he was the more senior employee.

The conflict in this case is over whether or not Del Carlo submitted his request prior to, at the same time, or after, Lopstain submitted his. Hays said that when Lopstain brought his written request for a vacation to her, she had not previously seen, or heard of, a request from Del Carlo.

[7] Lopstain said that he often took vacation request forms directly to Hays' office, because if he first gave them to Del Carlo, they would just sit on his desk for days, causing the administration to have a diminished amount of time to make a decision on his requests.

Shortly after Hays denied Del Carlo's request, he came to her complaining about her granting Lopstain's request, rather than approving his previously submitted request. Hays told him that she had not seen his vacation request. Hays has a practice of marking all approved vacation requests on her calendar in order to better enable her to physically track her subordinate employees. She did not have Del Carlo's vacation days marked on her calendar. She also checked with Vice-principal Mark Edwards (Edwards) and her secretary, Kathy Perry (Perry). Neither of them had seen a vacation request from Del Carlo.

Hays told Perry of Del Carlo's complaining about his lost vacation request form and asked her to try to locate it. When Perry checked her in-basket she found it, but was suspicious about how it got there. Several times each day she goes through her in-basket, because employees are always dropping things in it. Each time she culls through her in-basket, she arranges the documents into a particular order. Perry eventually found Del Carlo's request form in a spot that she would not have placed it.

After receiving a vacation request form, Perry first places a small dot in its corner to show that she has seen it, and secondly, she makes a notation on her calendar. Del Carlo's vacation request did not have this mark on it, nor was it marked on her calendar. However, neither did Lopstain's request form have a mark on it, nor did another Lopstain form, dated August 28, 2002, bear this mark. The missing mark on the first Lopstain form is understandable, as the evidence showed that it did not go through Perry, but was given directly to Hays. With regard to the second Lopstain form, there was no evidence regarding whether or not it went through Perry and her marking system. Due to these inconsistencies, this "marking" evidence is given a diminished level of credibility .

However, Perry came to the personal conclusion that Del Carlo's request form had been placed into the middle of the stack of papers in her in-basket, rather than having been placed

on her desk in a routine manner. In addition to her reliance on the missing dot, she had three other reasons that caused her to believe that it was inserted into the middle of the stack of papers in her in-basket. First, she did not recall previously seeing it. Second, found it in a place in the stack that she would not have placed it. Third, there was no notation on her calendar that Del Carlo had requested vacation days.

As a result of these inconsistencies, Hays believed that Del Carlo inserted his request form into the middle of the stack of papers in Perry's in-basket, rather than placing it on the top of the stack for Perry to process in the usual manner. She believed this was done to create the impression it had been submitted prior to Lopstain's request.

Once Hays concluded that Del Carlo's request form had not been submitted prior to Lopstain's, she ignored the seniority differences between the two men and ratified her signature of Lopstain's request.

Because of Del Carlo's written comment on Lopstain's request form, CSEA contends that Hays must have known of the controversy between the two custodians when she approved Lopstain's request. The argument fails for two reasons. First, Hays insists that the document entered into evidence by the charging party was not the same document she signed. As she remembers it, the document she signed did not have Del Carlo's comment about his own vacation on it. However, the District did not enter into evidence an alternative Lopstain vacation request form which included Hays' original signature but did not include the Del Carlo comment. Secondly, even if Lopstain's request form did have Del Carlo's comment on it, as she had not previously received a request form from him, she had every right to approve Lopstain's. Once she investigated and came to the conclusion that Del Carlo had not, in fact, submitted a prior vacation request, she was within her rights to ratify her earlier approval of Lopstain's request.

Removal of Books and Boxes from Loft - November 2. 2001

Del Carlo states that on November 1, 2001, he was on the Parklane campus when he was informed at 2:30 p.m. (one-half hour past his quitting time) that the Maintenance and Operations Department was going to arrive the next morning at 6:00 a.m. to demolish a loft in classrooms 5 and 6. He told Brady to empty the loft of books and any other material, and to move the classrooms' furniture away from the loft, during his night shift. Brady said, "Ok, I'll take care of it." Later Del Carlo alleges that Brady told a substitute custodian, "I'm not going to do it. I don't have the time. Let Leo do it."

The next morning Del Carlo arrived at 5:30 a.m., and began to unlock and unarm the various school alarms and get ready to clean the administrative offices. Edwards told him that the Maintenance and Operations Department crew had arrived, but nothing had been removed, and they were going to leave the campus because the loft was not ready to be demolished. Del Carlo said that, in an attempt to keep the crew from leaving, he and Edwards pitched in and quickly moved the books and boxes, and after the crew completed its work, they replaced all of the furniture.

Edwards contends that shortly after he and Del Carlo started the task, Del Carlo just stood off to the side while Edwards completed the job. Del Carlo disagrees, contending that he was called away by various school alarms going off as teachers arrived. Once those tasks were completed, he returned and vacuumed and dusted the two rooms.

He states that he spoke to Hays on November 5 about Brady's refusal to do as he was told, and was "totally shocked" by her dismissal of it, telling him to "worry about your own job and mind your own business."

There was no evidence that either Hays or Edwards ever attempted to check as to whether or not Brady had been assigned the job the day before, or whether Del Carlo quoted the substitute custodian correctly.

Failure to Open School in Time for Staff Development Day - November 3, 2001

Hays sent a memo to Del Carlo on November 6, 2001, memorializing a conversation they had that day. She chastised him for being 30 minutes late on Saturday, November 3, to turn off the school alarms so the teachers' staff development day could commence. She also reminded him of a prior tardiness in cafeteria preparation that resulted in a delayed student assembly on October 23.

In his rebuttal to Hay's November 6 memo, Del Carlo stated that his normal start time for Saturday School is 8:30 a.m., but pursuant to a Hays personal request, he attempted to come in at 8:00 a.m., but was admittedly fifteen minutes late. He also acknowledged being late on October 23, but blamed that on having to leave the campus to pick up needed supplies. He cited his many successful years with the District and insisted that in the face of the many extra hours he has devoted to Parklane, he finds it difficult to understand why he is being warned for being fifteen minutes late. He finished his rebuttal with the following two sentences: "I will not be selectively discriminated against for any reason. This is a form of harassment." He also said that he was not paid for coming in before 8:30 a.m.

Telephone Removal - January 2002

In January 2002 Hays noticed a white board in Del Carlo's custodial office with words such as "fucking lazy SOB", and "no good piece of crap" written on it. Hays contends that the words were visible to anyone walking by, if the door were open. Del Carlo disagrees, stating that a person walking by his office, with the door open, could not see the words on the white

board. In any case, the school's administrators, under normal circumstances, rarely go into his office, although their pass keys will open the door.

Hays also contends that in response to her inquires about the words written on the board, Del Carlo told her, on January 17, 2002, that he had received at least one phone call that was "slanderous and vulgar in nature." Hays said that Del Carlo told her that he wrote the subject words on the white board as a way to remember the exact language used in these calls.

Del Carlo denies making any of these statements to Hays. He typed a letter, addressed it to "Whom it may Concern," with a handwritten date of "2-26-02" on it, but mailed to the District in an envelope with a postmark of April 9, 2002. In it he states that he "never claimed to have received an obscene phone call!!!!!!". Nor had he ever said that he "received any call that was inappropriate!!!!!". He insisted that the "only slanderous remarks made to me came out of the mouth's [sic] of the night custodians." He continued, stating that the "only harassment has come from the night custodial staff and now Ms Hays." He ended his letter with the phrase, "This is an all time LOW for the school." (Capitalization in Original.)

Hays determined that the easiest way to stop the incoming calls from continuing was to remove the phone. She opined that there were no head custodial phone calls that could not be made from other nearby school telephones. Before her phone removal decision could be implemented, Del Carlo went on medical leave and Lopstain replaced him in a temporary assignment as head custodian. On February 26, 2002, six days after Del Carlo's industrial leave commenced, Hays had the phone removed from what was then Lopstain's office.

CSEA contends that this removal was in retaliation for the filing of the instant unfair practice charge on February 14, 2002.

On August 13, 2002, Del Carlo returned from his medical leave. He was without a phone in his office from August 13 to October 15, when he was involuntarily transferred to another District school.

During the time that Del Carlo was on industrial leave, he continued to write letters to various District administrators. The letters became more aggressive with an ever-increasing number of exclamation marks and capitalized words.

Ben Pippenger, a District custodian, substituted at Parklane on various occasions. He was working there when Del Carlo returned from his industrial disability leave. A few days after Del Carlo's return, Lopstain told him (Pippenger) that he (Lopstain) had been promised Del Carlo's job as head custodian by both Hays and Edwards. They both deny having made such a promise.

Required Check-in/out Memo - August 19, 2002

Edwards became Parklane's vice-principal on September 10, 2001. At Del Carlo's request, as a part of an EEOC settlement, Edwards took over direct supervision of the custodial staff from Hays when Del Carlo returned from industrial leave on August 13, 2002. Prior to taking on this assignment, Edwards believed that Del Carlo did not respond well to verbal direction. Therefore, he believed it would be helpful to his custodial supervision if he placed his requests and/or clarifications to Del Carlo in writing. He had a history with Del Carlo that included a number of negative incidents that, in and of themselves, were not that important, but together, he believed, described an employee that needed constant follow-up and supervision.

Edwards was aware of several incidents, prior to Del Carlo's medical leave, in which the school office had not been able to reach him on his radio. These incidents occurred when Del Carlo should have been on campus and readily available, unless he was on his lunch break.

Edwards alleged that this behavior had often occurred prior to Del Carlo's leave, and he was determined to bring a stop to this pattern of behavior.

Shortly after Del Carlo's return from his medical leave, Edwards observed him reporting six minutes late to work at 5:36 a.m. Grauman attempts to justify this seemingly overreaching of a six minute tardiness, by referencing a prior complaint from a cafeteria worker. He stated that in February 2002 an unidentified cafeteria manager said that s/he had been made to wait to begin work on several occasions because Del Carlo arrived late. Therefore, the worker could not begin his/her shift as the alarm system had not been turned off.

On August 19, 2002, Edwards had a "tardiness and availability" discussion with Del Carlo, after which he gave him a memo that set forth what the school expected of him in the future. The memo directed Del Carlo to (1) arrive at work on time, and (2) check with the office before and after his breaks and lunch periods. Edwards did not consider the memo to be disciplinary, nor was it placed in Del Carlo's personnel file.

CSEA contends that the check-in/out requirements are discriminatory, as no other Parklane custodian[8] was required to meet such requirements. It also insists that such requirements were a change in working conditions and, therefore, had to be negotiated with CSEA prior to their becoming implemented.

On August 29, 2002, Edwards gave Del Carlo a memo stating that he had not been checking in/out when he went on a rest break or lunch period. The reminder included an admonition that failure to follow this directive in the future would be considered insubordination.

[8] The majority of the working hours of the other custodians were during non-student hours. Therefore, there was no one available to monitor their check in/outs.

Patricia Caldiera (Caldiera), CSEA's chapter president, says that the District has 130 custodians, and Del Carlo is the only one who has ever told CSEA that s/he is required to check in and out for breaks and lunch. However, she is aware of a memo sent by Tony Wight (Wight), a principal at Heritage Intermediate School (Heritage), requiring his (custodial) employees to sign a check-in/out sheet. She also notes that the head custodian at Heritage is Woodward, a CSEA first vice-president, job steward, and Del Carlo's representative in his various meetings with Parklane and District administrators. She states that CSEA has never agreed, and in fact has objected "quite strongly," to a check in/out system, insisting that the District does not have the unilateral authority to institute such a system. At various times the District has asked for authority to institute temporary check in/out systems for employees who were having attendance problems, and CSEA's response has always been to object to such implementation. The District asserts that it is using check in/out procedures at nine of its approximate forty sites.

Del Carlo alleges that once he started to be held accountable for every minor infraction, he started to insist upon his contractual rights, one of which was a thirty-minute, duty-free lunch period. He said that he was often being called on during his lunch period to handle custodial duties. Once he insisted upon this duty-free period, Edwards retaliated with the check in/out requirement.

One of the reasons Del Carlo was so incensed about being required to adhere to a check in/out system was that he knew the night crew was leaving the campus up to one and one-half hours before their shifts were scheduled to be completed. He told both the school and District administrators about this, but the only reaction he received was Grauman's comment that he told them to stop leaving early.

When Del Carlo complained about night custodians leaving the campus early, he relied on security clock records obtained from Director of Police Services Frank Biglow (Biglow). The night custodians are required, as a part of their duties, to set the alarm system for each portion of the campus, once they finish their duties. All activations and deactivations of alarms are electronically time-recorded and available to Biglow. These records confirmed Del Carlo's belief that, at times, all alarms were fully activated an hour to an hour and a half prior to the time the night custodians were scheduled to complete their shifts. Biglow stated it is not possible for anyone to work on the campus after the alarms have been activated, as either the motion detector or the opening of a door would have activated the alarm. After about a month of sharing this Parklane alarm data with Del Carlo, Biglow was directed by Grauman to send all future Del Carlo requests for such information through him. Grauman justified this direction to Biglow by stating that Del Carlo was a lead person and not a supervisor.

When asked why they left early, the night crew said that whenever Del Carlo called them in early, he would tell them to leave early the next night to balance their weekly hours. Del Carlo disagreed, stating that just about the only time the night crew came in early was to help with track changes.

Letter of Reprimand re Office Wall Material - August 29. 2002

In October 2001, Grauman had ordered Del Carlo to remove specified materials, which were perceived by the District to be offensive, from his office walls. On August 29, 2002, Edwards observed that two of these materials were still on, or had returned to, the walls. Edwards removed the two items, placed them in an envelope, and attached the envelope to a letter of reprimand, which he delivered to Del Carlo and his CSEA representative(s).

These pictures were, in and of themselves, fairly innocuous, although admittedly inappropriate for K-3 school children. However, there were some aggressive overtones to

them that could support an inference of potential violence or at least constitute a harbinger of confrontational behavior. This, coupled with Del Carlo's rather strident letters to the administration, which included multiple exclamation points and capitalization, caused Grauman and other administrators to be more restrictive and/or punitive than they would be in a more routine situation. However, there was no empirical evidence, from any source, that suggested that Del Carlo had either said or done anything that could be considered violent.

There was also evidence proffered of Brady and Lopstain having made inappropriate comments, as well as having offensive pictures in their custodial areas. CSEA claims that the District was treating Del Carlo in a disparate manner, when it did not issue a letter of reprimand to Lopstain for identical behavior. However, this was Del Carlo's second offense and Lopstain's first. When Grauman previously noticed Del Carlo's allegedly inappropriate wall materials in October 2001, he merely directed him to take them down, and no letter of reprimand was issued.

This entire subject seems to be little more than an attempt by one side to use innuendo to smear an employee, with the other side replying in kind with its own recitations of inappropriate comments and the displaying of offensive pictures by other employees who did not receive letters of reprimand.

Letter of Reprimand re Poor Performance dated September 4. 2002

In his meeting on August 26, 2002, Edwards provided Del Carlo with specified procedures to follow in the event he could not complete his daily assignments. In such an event, Del Carlo was directed to (1) ask for assistance from the night crew, or (2) notify Edwards or Hays, so they could determine an appropriate course of action. Two days later Edwards saw Del Carlo spend an inordinate amount of time watching a nearby construction

crew at work. Just before Del Carlo left for the day, Edwards asked him if he had completed his assignments. Del Carlo said that he had.

Shortly thereafter, on that same day, Edwards found two trash cans in Del Carlo's office, one of which was filled almost to the brim with lunch-related garbage; the other was about one-half full with various trash items. In the office there were also three trash cans with, according to Edwards, "enough milk inside ... to nearly cover the bottom." In addition, Edwards found another garbage can on the cafeteria stage with milk residue in its bottom. Del Carlo had not asked the nighttime crew for assistance, nor had he informed either Edwards or Hays of his inability to complete his assignments that day.

The charging party cites the fact that Edwards admitted that he saw others watching the nearby construction crew, and that he, himself, spent sometime watching them. However, Del Carlo was the only one to receive a memo complaining of this behavior. In his rebuttal memo, Del Carlo contends that one of the construction workers was actually a District employee from the Maintenance and Operations Department who was replacing the sprinkler time clocks. Del Carlo contends that he wanted to ask the worker about whether an automatic or manual timer was to be installed.

However, this rebuttal argument ignores the fact that the gravamen of the subject memo was not the watching of the construction crew, but rather the fact that his assignments were not completed on the same day that he was spending time watching the crew.

Edwards discussed these events with Del Carlo and his representative on August 29 and issued a letter of reprimand to him regarding the incident on September 4, 2002.

When asked by the District's counsel to explain why four negative memos were issued to Del Carlo on September 4, Edwards replied:

> A ... Two of those memos were a recap of information that was shared with Leo verbally on August 29th at that meeting. Two of the memos were addressed to events that happened on September 3rd, the day before. Things were happening really, really quickly at this time. And it was becoming more difficult to communicate. In this particular situation, the two memos for September 3rd were addressing health and safety concerns. And so I didn't believe it was a good idea to wait a period of time to give the memo. I believed it needed to be addressed quickly. And previous to that time, Leo had asked ... if we were going to talk about anything that might lead to a disciplinary action, that he be allowed to have representation. And I respected that right and wanted to address it.... In this particular case, these two memos related to health, safety in the cafeteria and I wanted to address it immediately.
>
> Q And so you gave those memos without first having a meeting with union representation?
>
> A That's correct, I would also say,... for me it was easier to write four distinct memos and address the events of a particular situation in that one memo, rather than try to blend them all together ....

Blood Contaminated Trash Can - August 22, 2002

On August 22, 2002, the school clerk radioed for custodial assistance at approximately 11:45 a.m., because an office trash can contained blood from a student's nose. Del Carlo answered the page, but failed to come to the office until 1:00 p.m.

Edwards discussed this incident with Del Carlo and his representative on August 29. Del Carlo offered no explanation for his delay at that time. On September 4, 2002, Edwards issued a letter of reprimand to Del Carlo with regard to this incident. In a written response to the memo, Del Carlo contended that he had been busy during the subject period of time cleaning blood that was splattered in the restroom where the student initially began to bleed. He stated that he was not overly concerned about the blood in the trash can, as it was in a contained area and posed no threat to anyone so long as they did not reach into, or get in, the can.

The District's supervisor of maintenance and operations, Louie Schiaffino (Schiaffino), testified that, based on its number of fixtures, he believes that the entire restroom could be cleaned in approximately 36 minutes. He also explained that custodians are given very specific training regarding blood contamination. He believes that under these circumstances, Del Carlo should have locked the bathroom, cleaned the contamination in the office, an open area, and therefore of greater concern, and then gone back to clean the bathroom.

Failure to Empty Full Trash Cans - September 4, 2002

On September 3, 2002, at approximately 12:25 p.m., Edwards inquired of Del Carlo why a trash can filled with cafeteria garbage had not been emptied. Del Carlo said that it was left over from breakfast, but it was too heavy for him to lift it by himself.

Both Edwards and Del Carlo were concerned about his ability to lift heavy trash cans into the school's dumpsters. Edwards suggested that the trash cans be emptied more often, thereby eliminating the need to lift full cans. He also suggested, for the same reason, that the cans be emptied repeatedly during the lunch hour. This is a strategy that had been employed successfully on other campuses, and one that was endorsed by Schiaffino.

Del Carlo stated that he had been too busy that morning to monitor the cans and empty them before they became too heavy for one man to lift. Edwards said that he directed Del Carlo to get the assistance of the night crew to empty the can. At 2:40 p.m., forty minutes after Del Carlo left for the day, Edwards observed the same full can in the cafeteria. Edwards asked both night custodians if Del Carlo had requested their assistance in dumping the can. They both said that he had not.

In his rebuttal to Edwards' letter of reprimand, Del Carlo states that Edwards did not tell him to request the assistance of the two night custodians, but rather said that he, Edwards, would assign the task to them. In this letter he complained about the perceived injustice of

being required to perform the cafeteria duty alone. He states that it had been a two-person assignment for fourteen years. He cites the fact that, as head custodian, he has to handle radio calls, deliveries, phone calls, set-up for meetings, etc. He insists that turning the cafeteria duty into a one-man job, along with his other duties, was unfair and oppressive. The negative aspect of this assignment was compounded, he claims, as both night custodians had been instructed by Edwards not to help him, in any manner, with any of his cafeteria duties.

On August 26, Del Carlo and his representative were told that if he was not able to complete his routine cafeteria duties on any given day, he was to inform Edwards or Hays, and they would determine the best course of action to be taken. On September 3, Del Carlo had neither informed the administration or requested the assistance of the night crew. On September 4, Edwards issued a letter of reprimand to Del Carlo regarding this September 3 incident.

Failure to Communicate with Night Crew - September 4, 2002

Edwards was aware of concerns regarding communications between the Parklane custodians prior to Del Carlo going on medical leave. Edwards was also aware of Grauman's memo on this subject to Del Carlo in October 2001.

Del Carlo approached Edwards regarding five items unattended by Rodrigo Contreras (Contreras) the previous night.[9] Edwards requested that Del Carlo meet with Contreras and work out their differences. Edwards told Del Carlo that if he needed assistance, he would accompany him to this meeting. Del Carlo declined his offer of assistance.

[9] Late[9]Later, on October 14, 2002, Contreras wrote a letter to "Whom Cleanliness of Parklane is a Concern." In it, he set forth specific deficiencies in what he believed was Del Carlo's work product. He finished his letter with the following comment: "Today I had the chance to show Mr. Mark Edwards first hand."

Later, Edwards learned that Del Carlo never met with Contreras and, as a result, on September 4, 2002, Edwards issued a memo to Del Carlo about his failure to resolve this matter. The memo also directed him to speak to Contreras about these items and to inform Edwards when he had completed this conversation.

"Needs Improvement" Evaluation

In September of 2002, Del Carlo received an evaluation from Hays that included "needs improvement" ratings in four areas: (1) human relations skills, (2) work responsibilities, (3) quality of work, and (4) quantity of work. The evaluation had been scheduled for April, but because of Del Carlo's leave it was delayed until his return. The remaining ratings, work habits, attendance, and tardiness, were marked "meets standards." No area was marked "unsatisfactory." The area designated, "Identify this Employee's Strengths," included the following sentence: "Leo has good attendance and he completes paper work (site work orders; district reports) in a timely manner."

Involuntary Transfer from Parklane

During the summer of 2002, while he was on industrial leave, the District determined that it would be advisable to move Del Carlo from Parklane and sent him a written transfer offer, but Del Carlo did not respond. A month or so after Del Carlo returned to work, and after the avalanche of negative memos from Edwards in September, Len Casanega (Casanega), District assistant superintendent of personnel, once again broached the subject of a transfer. He discussed the matter with Caldeira.

At CSEA's urging, the District agreed to set up a mediation between Del Carlo, Parklane's administration, and the night custodians. CSEA chose mediator Shirley Campbell (Campbell). Neither Casanega nor Caldiera participated in the mediation session, but both discussed the matter with the mediator afterwards. This discussion confirmed Casanega's

belief that it was necessary to move Del Carlo to another site as soon as possible. In response to Caldeira's request for additional time for her to convince Del Carlo to voluntarily transfer, Casanega granted Del Carlo release time to discuss the matter with her.

When Casanega called Caldeira later to ask her for a status report on her conversation with Del Carlo, Casanega was told he was still not willing to leave Parklane. Casanega then told Caldeira that not only was Del Carlo being transferred, but due to sensitivities on the part of various Parklane employees, both administrative and custodial, he was directing that Del Carlo not return to the campus that day.

Del Carlo was transferred to Plaza Robles Continuation High School, but he was, at CSEA's request, permitted to delay his arrival for another week and a half to help him make the transition. He was placed on administrative leave with pay status during this transition period.

Del Carlo was transferred pursuant to CBA Section XIV.B. which states:

> A permanent employee may be transferred based upon the needs and best interest of the District and/or employee, provided that such transfer will not result in loss of pay or benefits to the employee.
>
> An employee shall be notified five (5) days prior to the effective date of the transfer whenever practical.

The District contends that this transfer was not disciplinary in nature, supporting this contention with the fact that involuntary transfers are not a part of the disciplinary provisions of the CBA.

When asked why the District transferred Del Carlo, Casanega said he first became aware of problems with the Parklane custodian staff in December 2001, when Grauman told him of the Department of Fair Employment and Housing claim that Del Carlo had filed. For a

time after that, he received very little additional information. Over the next several months, however, he began to hear more about the relationships at the site. He continued:

> A ... About the middle of 2002, I felt that the situation, the relationship and conflict between Mr. Del Carlo and the administration at Parklane had escalated to a point where we were considering moving Mr. Del Carlo to another site.

He explained the District's reasons, as follows:

> A ... First of all, our job in the district is to serve kids, we are there to educate kids... [T]he conflicts between the administration and Mr. Del Carlo were becoming more and more frequent. I just felt it was very disruptive of the educational process. Because it involved several staff members, it involved administration, it involved other custodians, it involved teachers, we even had a board member call[[10]] concerned about it, and at that time I felt the disruption was inappropriate and that the best way was to transfer Mr. Del Carlo. I was also concerned looking at some of Mr. Del Carlo's letters that he wrote, that he was becoming increasingly angry and frustrated by situations at the site.

Casanega, in response to a question from CSEA's counsel, about why Del Carlo was frustrated, explained:

> A ... he felt that he wasn't being supportive [sic] that other people were picking on him, that his concerns weren't listened to, and that the principal was favoring other employees over him.

When asked why he had so many exclamation marks and underlined words in his letter to the administrators, Del Carlo explained he was trying:

> A ... to get a point across, maybe some frustration from a lack of response from the school district, hostile working environment, unsanitary conditions.

A short time later he explained why he was, so frustrated:

> A I felt the injury that I suffered was avoidable with a little cooperation and team work. I was off work for an extended period of time on modified pay. I feel that it was something that

[10] The board member's wife taught at Parklane.

> was avoidable. The night custodians are given directives [by a site administrator] not to assist me with anything related to the cafeteria. It was a change of lifestyle being injured.

Allegation of Unsatisfactory Recommendation

CSEA alleges that Del Carlo was told by the San Joaquin County Sheriff's Department, a prospective employer, that the District gave it a negative review of his job performance.

As part of his application, Del Carlo gave the Sheriff's Department a release which permitted it to view his personnel file and speak with District personnel. The District alleges that only two of its employees spoke with the Sheriff Department's investigator. One of these, Casanega, when asked about Del Carlo's most recent evaluation, merely referred the investigator to Hays, explaining that principals perform evaluations. The other, Hays, said that in her conversation with the Sheriff's investigator, she "concentrated on Leo's strengths as [she] knew them." However, Del Carlo was told by the Sheriff's Department investigator that he was told that he (Del Carlo) was suing the District.

Job Performance at New School

On June 30, 2003, Del Carlo was given an evaluation in his new job as the head custodian at Plaza Robles High School (Plaza Robles). He received all "outstanding" ratings, with the following comment in the "identify this employee's strengths" category: "Leo Del Carlo takes initiative and is always cooperative and helpful."

While at Plaza Robles Del Carlo was given the opportunity to be on the overtime rotation at Bear Creek High School, which was near his home.

ISSUES

1. Did the District, when it removed Del Carlo's Latchkey overtime assignment discriminate against him because of his protected activities, thereby violating section 3534.5(a)?

2. Did the District, when it denied Del Carlo's vacation request, while granting that of Lopstain, discriminate against him because of his protected activities, thereby violating section 3543.5(a)?

3. Did the District, when it removed the telephone from Del Carlo's office, discriminate against him because of his protected activities, thereby violating section 3534.5(a)?

4. Did the District, when it (1) issued Del Carlo (a) several letters of reprimand, (b) a number of punitive memos, or (c) an evaluation with several "needs improvement" ratings, or (2) involuntarily transferred him from Parklane, discriminate against him because of his protected activities, thereby violating section 3534.5(a)?

5. Did the District, when it allegedly provided an unsatisfactory recommendation to a prospective employer, discriminate against Del Carlo because of his protected activities, thereby violating section 3543.5(a)?

6. Did the District, when it (1) removed Del Carlo's Latchkey assignment, or (2) failed to give him a vacation request preference, unilaterally modify the terms and conditions of employment, thereby failing to meet and negotiate in good faith with CSEA, in violation of section 3543.5(c)?

7. Did the District, when it (1) removed Del Carlo's Latchkey assignment, (2) failed to give him a vacation request preference, (3) removed the telephone in his Parklane office, (4) required him to check in/out for breaks and lunch periods, (5) issued him a letter of reprimand for allegedly inappropriate material posted on his office walls, (6) issued him four negative personnel letters, (7) involuntarily transferred him from Parklane, or (8) allegedly provided an unsatisfactory recommendation to a prospective employer, deny to CSEA rights

guaranteed to it by the EERA, i.e., the right to represent its members in their relationship with the District, thereby violating section 3543.5(b)?

CONCLUSIONS OF LAW

ISSUE NO. 1: Did the District, when it removed Del Carlo's Latchkey overtime assignment, discriminate against him because of his protected activities, thereby violating section 3543.5(a)?

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board (NLRB) decision in Wright Line. Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F. 2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In order to establish a prima facie case, the charging party must first prove that the subject employee engaged in protected activity.[11] Next, it must prove that the person(s) who made the decision(s) that resulted in the harm were aware of such protected activity. Lastly, 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.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), at page 11:

> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles

[11] Section 3543, in relevant part, grants public school employees:

> (a) 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.

> 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) the presence of any disparate treatment of the charging party; (2) the proximity of time between the participation in protected activity and the adverse action; (3) any inconsistent, contradictory or vague explanation of the employer's action(s); (4) any departure from established procedures or standards; and (5) any inadequate investigation. (See also Baldwin Park Unified School District (1982) PERB Decision No. 221.)

Carlsbad states that once a prima facie case is established, the burden of proof shifts to the respondent to show that it would have engaged in the complained-of conduct irrespective of any unlawful motivation.

Analysis

The evidence shows that Del Carlo's protected activities as a CSEA site representative were limited to complaining about various actions of Brady and Lopstain, as well as protesting the letters of reprimand and negative memos given to him by Edwards. Although these actions do have the color of protected activities, they are so overshadowed by his own employment circumstances that they lose much of the weight usually given to such activity. There is little doubt that Grauman, Hays and Edwards were aware of his letters.

The primary reason that the Latchkey overtime assignment was taken from Del Carlo's exclusive control was because of a recent CBA modification. Initially, Grauman gave Lopstain the exclusive assignment, in a manner that was not in conformity with the CBA. Two

weeks later, Hays made this assignment a part of a CBA-mandated rotation system that was in compliance with the CBA.[12]

Grauman's attempt to give Lopstain the assignment on an exclusive basis lends support to an inference of unlawful motivation. His defense that this would enable Del Carlo to get more sleep is rejected. An equally valid theory is that it would cause him to lose more sleep, because he was losing a substantial number of hours of overtime salary each month.

Irrespective of Grauman's attempt to mediate Parklane's custodial problems, the bottom line is that the new CBA overtime provisions would not permit Del Carlo to retain the assignment on an exclusive basis. Therefore, irrespective of what eventually happened to the assignment, the District's action in removing this assignment from Del Carlo was not unlawfully motivated.

ISSUE NO. 2: Did the District, when it denied Del Carlo's vacation request, while granting that of Lopstain, discriminate against him because of his protected activities, thereby violating section 3543.5(a)?

For an analysis of Del Carlo's protected activities and the District's knowledge thereof, see Issue No. 1, supra.

The operative action in obtaining vacation days at Parklane was the submission of a vacation request form. Hays had the ultimate authority to approve or disapprove such requests. She was given a request by Lopstain and she signed it. Del Carlo was upset and claimed he had submitted a prior form; therefore, he, as the senior employee, was entitled to a preference. He attempted to convince Hays his form had been submitted first. Hays, after investigating his claim, did not believe him and stood by her approval of Lopstain's request.

[12] Later, it again became Lopstain's exclusive assignment. This occurred when Del Carlo was on industrial leave. Therefore, it is not directly relevant to whether the assignment(s) were made in a discriminatory manner.

After examining the argument put forward by Del Carlo, it must be concluded that the weight of the evidence is in favor of Hays' decision. Perry's testimony regarding the attention she pays to her in-basket materials was especially persuasive. The existence, or lack, of Del Carlo's written comment on Lopstain's request form is troubling, but without having received Del Carlo's form prior to being given that of Lopstain, Hays had every right to approve Lopstain's request. The burden of proof is on Del Carlo to show that Hays' action was unlawfully motivated. It is determined that he failed to meet this burden. Therefore, it is concluded that with regard to the vacation request issue, the District did not violate section 3543.5.

ISSUE NO. 3: Did the District, when it removed the telephone from Del Carlo's office, discriminate against him because of his protected activities, thereby violating section 3543.5(a)?

For an analysis of Del Carlo's protected activities and the District's knowledge thereof, see Issue No. 1, supra.

This matter, in the final analysis, is a "she said/he said" issue. Hays removal of the phone even after Del Carlo went on leave and her allegedly favorite replacement, Lopstain, moved into the office, adds some weight to her version of the conflict. If Hays was unlawfully motivated to remove the phone to punish Del Carlo, there would be no reason to remove it once Lopstain occupied the office. It is therefore concluded that the evidence presented is insufficient to support a determination of District unlawful motivation on this issue.

ISSUE NO. 4: Did the District, when it (1) issued Del Carlo (a) several letters of reprimand, (b) a number of punitive memos, or (c) an evaluation with several "needs improvement" ratings, or (2) involuntarily transferred him from Parklane, discriminate against him because of his protected activities, thereby violating section 3543.5(a)?

For an analysis of Del Carlo's protected activities and the District's knowledge thereof, see Issue No. 1, supra.

When Del Carlo was on leave, the District sent him a letter offering a transfer from Parklane. He failed to respond. In between the date of his return, August 13 and September 11, 2002, he received numerous letters of reprimand, negative personnel memos, and an unfavorable evaluation. The evidence is quite clear that these letters and memos are all a part of an attempt on the part of the District to force Del Carlo out of his Parklane job. In some of the cited circumstances, Del Carlo was "guilty" of less-than-stellar performance. On others, the District micromanaged and documented any and all improprieties, real or imagined. In all of these circumstances, Del Carlo was subjected to an intense level of scrutiny, i.e., a memo for arriving at work six minutes late at 5:36 a.m.

The ultimate issue is not whether or not Del Carlo is "guilty" of some or all of the alleged improprieties, but rather was the District micromanaging his performance and attempting to disparage his performance because of his protected activities, or for some other reason.

Hays and Del Carlo had a cooperative relationship for over five years. In 2001, two things occurred. One, Del Carlo became Parklane's CSEA representative. Two, Hays had a discussion with the Latchkey supervisor. The District contends that it was this discussion that led Hays to question, and then investigate, Del Carlo's performance. The ensuing investigation led to a negative re-evaluation of Del Carlo's past performance. This re-evaluation, in turn, led to a closer scrutiny of his current performance. Hays insists that the results of this scrutiny caused her to lose faith in him as her head custodian.

The District, however, did not explain (1) why Hays did not know of Del Carlo's allegedly poor performance prior to this time, or (2) why Hays did not merely confront him with her newly found information, get his reaction, and set out a plan to solve the problem.

During the latter part of 2001, Del Carlo was involved in the following issues: (1) Latchkey assignment, (2) vacation request form submission, (3) clearing of the loft, and (4) a late arrival at Saturday Staff Development Day. It is questionable if any of these, by themselves, were sufficient to justify the submission of negative letters into the personnel file of a thirteen year employee who had received an uninterrupted series of positive evaluations.

However, once Del Carlo left the school on industrial leave, Hays believed the quality of performance at the school improved, and the interpersonal controversies appreciably diminished.

This change in the custodial circumstances led the District to offer Del Carlo a transfer. When he failed to respond, the District assumed that he was not willing to voluntarily leave Parklane. After he returned, the District and Parklane's administrators embarked on systematic micromanaging of his performance. This approach would reasonably lead to one of two results: (1) Del Carlo would either be rehabilitated in Hays' view, or (2) the District would have sufficient justification to involuntarily transfer him.

The evidence clearly shows that once Del Carlo returned, it would have taken a superhuman effort to have convinced Hays and Edwards that he should stay at Parklane. There is little doubt that while Del Carlo was gone, Lopstain was promised his head custodian job.

By the same token, the wall material issue, the slow response to the blood in the office, the failure to empty trash cans, and the incorrect assertion that his duties had been completed, were all circumstances that supported the District's pre-conceived decision to transfer him. The six-minute tardy issue was less of a failure on Del Carlo's part than it was evidence of the lengths to which the administration would go to justify an involuntary transfer. On the other hand, when it is abundantly clear to an employee that his supervisor(s) are trying to get rid of him, it is unwise to report to work even one minute late.

All of this analysis supports the District's contentions. Del Carlo's rebuttal stresses his summer 2001 appointment as CSEA'S Parklane representative. There was no evidence of Del Carlo's having a confrontation with Hays, Grauman, or any other District administrator, over any labor relations issue, other than those related to Del Carlo, himself. In fact, the record is devoid of Del Carlo's ever being involved in any CSEA issue not involving his own employment status. In the final analysis, there is insufficient evidence to show that Edwards, Hays, or Grauman were ever upset over anything that Del Carlo did on behalf of CSEA.

The only evidence that provides some support for an inference of unlawful motivation is the timing of (1) Del Carlo's appointment as a CSEA site representative and the start of Hays' increased change in attitude toward him, and (2) the filing of the instant unfair practice charge and the removal of the telephone from his office. However, PERB has made it clear the timing alone is insufficient to create an inference of a nexus between protected activity and negative personnel actions. (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.)

The issues of disparate treatment brought up by CSEA have all been either factually decided against Del Carlo's position, or have been found not to have been sufficiently persuasive to support an inference of unlawful motivation.

Due to the above analysis, it is concluded that the District's actions with respect to the issues set forth in Issue No. 4, did not violate section 3543.5(a).

ISSUE NO. 5: Did the District, when it allegedly provided an unsatisfactory recommendation to a prospective employer, discriminate against Del Carlo because of his protected activities, thereby violating section 3543.5(a).

For an analysis of Del Carlo's protected activities and the District's knowledge thereof, see Issue No. 1, supra.

There is very little evidence on this issue. Two District administrators admitted talking to a Sheriff's Department investigator. One said that he merely referred the investigator to Hays. Hays said that she tried to stress Del Carlo's positive qualities, which is not to say that his allegedly negative performance issues were not discussed. On the other hand, Del Carlo said that the investigator told him that "someone" at the District said he was suing it.

It must be noted that the gravamen of the issue is not whether a District administrator gave the gave the Sheriffs investigator a negative report on Del Carlo, but whether this alleged report was in retaliation for, or the result of, his protected activity. Granted, the act of "suing the District," i.e. filing an unfair practice charge, is a protected activity. However, the above analyses conclude that there was insufficient evidence to support a conclusion that the District's other actions against Del Carlo were unlawfully motivated. This, coupled with the lack of any non-hearsay, empirical evidence that an unsatisfactory recommendation was actually given, supports a conclusion that there is insufficient evidence that the District violated section 3543.5(a) when it discussed Del Carlo's employment with the Sheriff's Department.

ISSUE NO. 6: Did the District, when it (1) removed Del Carlo's Latchkey assignment or (2) failed to give him a vacation request preference, unilaterally modify a term and condition of employment, thereby failing to meet and negotiate in good faith with CSEA, in violation of section 3543.5(c)?

In determining whether the employer has violated section 3543.5(c), PERB utilizes either the "per se" or "totality of circumstances" test. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 at pp. 4-5 (Pajaro).)

A unilateral change in policy within the scope of representation is so egregious that it meets the "per se" test, and is unlawful without any determination of subjective bad faith on the part of the employer. (Id.)

"Per Se" Test

The elements of the "per se" test are set forth in Grant Joint Union High School District (1982) PERB Decision No. 196 ("Grant"). When this test was applied in Sonoma County Office of Education (1997) PERB Decision No. 1225, the criteria were enumerated as a four-part test. The charging party, in order to prevail, must establish by a preponderance of the evidence that

> ... (1) the employer breached or altered the party's written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change in policy (i.e., having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. [Cits.]

Latchkey Reassignment

There was no credible evidence that the District "breached or otherwise altered" the CBA. Quite to the contrary, the very reason the assignment was taken away from Del Carlo's exclusive control was a recent CBA modification that required a rotational overtime system. The fact that Grauman initially gave the exclusive right to Lopstain, as noted supra, is troubling. However, the fact that Hays rectified that mistake after two weeks provides sufficient evidence that Grauman's action amounted to an isolated breach; it was not a change in policy, i.e., it had no generalized effect or continuing impact on the bargaining unit members' terms and conditions of employment.

Therefore, it is determined that, with regard to the Latchkey reassignment issue, the District did not unilaterally modify a term and condition of employment in violation of section 3543.5(c).

Vacation Preference

Once again, there was no credible evidence that the District "breached or otherwise altered" the CBA. In the "findings of fact," supra, pages 12-15, it was determined that Del Carlo's vacation request was submitted after that of Lopstain. Therefore, there was no "conflict" between the two employees that should have created a preference for the more senior employee. As a consequence, it is concluded that the District did not unilaterally modify a term and condition of employment, in violation of section 3543.5(c).

ISSUE NO. 7: Did the District, when it (1) removed Del Carlo's Latchkey assignment, (2) failed to give him a vacation request preference, (3) removed the telephone in his Parklane office, (4) required him to check in/out for breaks and lunch periods,[13] (5) issued him a letter

[13] As noted in the procedural history section (pages 2-3, supra) CSEA withdrew allegations of check in/out violations of subdivisions (a) and (b) of section 3543.5, as they affected Richard Woodward. No reason was given for this withdrawal. Therefore, any evidence proffered with regard to Woodward being required to check in/out was admitted purely to support the allegation that Del Carlo was similarly required to check in/out. However, in its brief, CSEA requests that the District's check in/out policy, as applied to Woodward, be reinstituted as an "Unalleged violation," citing Santa Clara Unified School District (1979) PERB Decision No. 104. In this decision the Board set forth six requirements that must be present before PERB will consider an unfair practice that is not specifically alleged. These requirements are (1) adequacy of notice, (2) the opportunity to defend, (3) the Unalleged violation is intimately related to the subject matter of the complaint, (4) the communicative acts are a part of the same course of conduct, (5) the Unalleged violation is fully litigated, and (6) the parties had an opportunity to examine and be cross-examined on the issue.

The evidence in this case shows that not only was there an inadequacy of notice, the charging party specifically withdrew this allegation at the beginning of the hearing. There was an opportunity to defend, but with regard to Woodward, the anticipation was that the issue was purely a peripheral one. The check in/out issue, as it pertained to Woodward, was not "intimately related," but rather a separate instance of a similar circumstance. The "communicative acts" were not a part of the same course of conduct, but rather constituted similar conduct with a different employee, supervisor, and school. The parties had an opportunity to examine and cross-examine, but as the respondent reasonably anticipated this to be more than a peripheral issue, the cross-examination was considerably less detailed than it would have been had paragraphs 48-50 remained in the complaint.

There was no allegation in the complaint, nor did CSEA request, in its brief, that the District's actions constituted a violation of subdivision (c) of section 3543.5.

Therefore, this Unalleged violation will not result in a separate finding.

of reprimand for allegedly inappropriate material posted on his office walls, (6) issued him four negative personnel letters, (7) involuntarily transferred him from Parklane, or (8) allegedly provided an unsatisfactory recommendation to a prospective employer, deny to CSEA rights guaranteed to it by the EERA, i.e., the right to represent its members in their relationship with the District, thereby violating section 3543.5(b)?

The evidence in each of these eight instances was determined, in the conclusions of law, supra, to be insufficient to support an inference of unlawful motivation. Without a determination that the District was unlawfully motivated in its relationship with its employees, there can be no determination that CSEA was concurrently denied rights accorded by the EERA. In addition, there was no evidence supporting an independent denial, by the District, of such CSEA rights. Therefore, it is determined that there was no violation of section 3543.5(b).

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is concluded that the Lodi Unified School District did not violate subdivisions (a), (b), or (c) of section 3543.5 of the Educational Employment Relations Act. It is ORDERED that all aspects of the complaint, and its underlying charge, 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Allen R. Link
Administrative Law Judge