STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RIO HONDO FACULTY ASSOCIATION, CTA/NEA,

Charging Party,

v.

RIO HONDO COMMUNITY COLLEGE DISTRICT,

Respondent.

Case No. LA-CE-1101

PERB Decision No. 272

December 28, 1982

Appearances: Charles R. Gustafson, Attorney for Rio Hondo Faculty Association, CTA/NEA.

Before Tovar, Morgenstern and Jensen, Members.

DECISION

TOVAR, Member: The Rio Hondo Faculty Association, CTA/NEA (Association) has filed exceptions to the attached proposed decision of the hearing officer which dismisses the Association's charge that the Rio Hondo Community College District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).[1]

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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 noted.

Section 3543.5 in pertinent part provides:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals

The Association's charge is based on allegations that the District violated one or more of the above-noted unfair practice subsections by: (1) reducing the workyear of employee Vince Furriel from 11.5 months to 10 months; (2) refusing to participate in a grievance proceeding invoked by Furriel and Tom Dickson; (3) proposing changes in the teaching schedules of Furriel, Steve Collins and Dan Guerrero; (4) relocating Furriel's office; and (5) refusing to meet with Furriel, Collins and Guerrero in the presence of an Association representative.

The Public Employment Relations Board (PERB or Board) has reviewed the proposed decision and the entire record in light of the Association's exceptions to the dismissal of these charges. For the reasons which follow, we affirm the hearing officer's proposed dismissal of the first four charges enumerated above. With respect to the Association's charge that the District violated the EERA by refusing to meet with

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> 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.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
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> . . . .

three employees in the presence of their Association representative, we reverse the hearing officer and find that the District violated subsections 3543.5(a) and (b) by that refusal.

We find the hearing officer's statement of facts to be free of prejudicial error and therefore adopt those findings, together with additional factual determinations reached herein, as the findings of the Board itself.

DISCUSSION

The Charges of Employer Reprisal

The Association excepts initially to the hearing officer's finding that the District's decision to reduce Furriel's work year was unconnected with protected activity on Furriel's part.

In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth a test by which charges of discrimination are to be resolved. To establish a prima facie case under that test, the charging party must make a showing sufficient to raise the inference that employee activity protected by the EERA was a motivating factor in the employer's decision to take the complained-of action. If the charging party makes such a showing, the burden shifts to the respondent to demonstrate that it would have acted as it did regardless of the employee's protected conduct.

Here, because the record shows that the District's decision to reduce Furriel's work year was made prior to Furriel's

allegedly protected activity, it is apparent that the identified activity could not have been a motivating factor in the District's decision. We therefore affirm the hearing officer's proposed dismissal of this charge.

The Association has also excepted to the hearing officer's dismissal of its charge that the District engaged in an unlawful reprisal by failing to participate in the grievance proceeding initiated by Furriel and Dickson. The Association has failed, however, to identify any basis for concluding that the hearing officer committed error in finding that the District did in fact participate in the grievance proceeding. We therefore summarily affirm the hearing officer's proposed dismissal of this charge.[2]

The Association's third exception is to the proposed dismissal of the charge that the District threatened to alter the teaching assignments of three employees in reprisal for their exercise of protected rights. In support of this exception, the Association points to evidence that the District's proposal to change teaching assignments was directed

[2]In affirming the dismissal of the Association's charge that the District violated the EERA by its conduct in connection with the grievance proceeding, however, we disavow the hearing officer's interpretation of section 3543 set forth in the proposed decision at the last paragraph beginning on p. 18 and continuing at the top of p. 19. We disagree that "[t]he primary intent of the section is to prevent the interference of exclusive representatives in individual grievances," as the hearing officer states.

only at the three employees who had prosecuted a grievance against the District and who had an acknowledged history of activity on behalf of employee interests which the Association alleges were protected by the Act. Based on this evidence, we find that the Association has made out a prima facie case of unlawful District reprisal under the Novato test.

The hearing officer, however, found as a matter of fact that the District's proposal of schedule changes was justified by criteria wholly unrelated to the employees' protected activity. We conclude, therefore, that the District would have acted as it did even in the absence of prior protected activity on the part of the three employees and, on that basis, affirm the dismissal of the allegation.

The Association's final exception pertaining to the proposed dismissal of its charges of employer reprisal is that the hearing officer erred in finding that the relocation of Furriel's office was not an act of reprisal and in dismissing the charge on that basis. The circumstantial evidence presented by the Association in support of its allegation is again sufficient to establish a prima facie case of reprisal under Novato. Here too, however, the hearing officer's finding, which we affirm, was that the District's action was justified by criteria wholly unrelated to Furriel's protected activity. We conclude, therefore, that the District would have acted as it did even in the absence of prior protected activity

on the part of Furriel, and affirm the dismissal of the allegation on that basis.

Denial of Representational Rights

As noted in the hearing officer's findings of fact, the District makes available to its faculty an in-house grievance procedure which is set forth at College Procedure No. 5005. That procedure provides that the aggrieved faculty member shall initially make an effort to meet and resolve the matter on the basis of informal discussion.[3]

In the instant case employees Furriel, Collins and Guerrero were aggrieved by the District's proposal to alter their work

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[3]College Procedure No. 5005 provides in relevant part:

PROCEDURE

1. Preliminary Action

A. The faculty member shall first attempt to resolve his/her grievance by informal discussion with the person or group directly involved in the matter.

B. If the faculty member still believes the issue has not been resolved satisfactorily, he/she may submit a written statement to the Academic Senate specifying the time, place and nature of his/her grievance, and a representation as to what transpired, the results, adverse effect and any recommendations made after complying with paragraph 1A immediately above. The Senate shall make arrangements for a formal hearing of the grievance.

schedules and therefore sought a meeting with Assistant Superintendent Don Jenkins pursuant to the District's grievance procedure in order to attempt a resolution of the matter through the prescribed informal discussion. Furriel testified that he telephoned Jenkins regarding the proposal to alter work schedules and that they discussed whether the issue could be resolved via informal procedures or whether a formal hearing would be necessary. They agreed, explained Furriel, to meet and attempt resolution of the matter short of formal proceedings.

In attempting to resolve their grievances "by informal discussion with the person . . . directly involved in the matter," as prescribed by College Procedure No. 5005, the three employees sought the representation of their employee organization. The District, however, refused to participate in the prescribed informal discussion unless the employees agreed to participate in those discussions without the representation of their employee organization.

The Association has charged that the District's refusal to permit the attendance of the Association's representative at those employer-employee discussions was a denial of the employee's right, as set forth at section 3543 of the EERA, to be represented in their employment relations, and was concurrently a denial of the Association's right, as set forth

at subsection 3543.1(a), to represent its members in their employment relations.

The hearing officer correctly found that the meeting at issue here was not an investigatory interview which might reasonably result in disciplinary action, so as to bring it within the rule of NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689]. Nonetheless, he thereafter erroneously relied on Weingarten to conclude that no right to representation existed, ignoring the independent right to representation in grievance proceedings, discussed herein.

Section 3543 provides, in relevant part, that:

> Public school employees shall have 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.

Subsection 3543.1(a) provides, in relevant part, that:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers, ...

In Mount Diablo Unified School District, et al. (12/30/77), EERB Decision No. 44,[4] the Board addressed the representational rights of employee organizations and concluded that the Act guarantees such a right, stating:

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[4]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

Section 3543.1(a) confers on an employee organization the right to represent its members in a grievance proceeding. . . .[5]

Additional rationale in support of that finding is articulated in Chaffey Joint Union High School District (3/26/82), PERB Decision No. 202.

Mount Diablo and Chaffey, supra, addressed only the representational rights of employee organizations as embodied in subsection 3543.1(a). We find it apparent, however, that the Act concurrently protects the right of employees themselves to be represented by their employee organization in grievance proceedings, pursuant to section 3543's guarantee of the right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." This conclusion is based upon the concept of collective representation, which is at the heart of the EERA[6] and which

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[5]The Board noted in Mount Diablo that while subsection 3543.1(a) generally guarantees to all employee organizations the right to represent its members in grievance proceedings, the Act's system of exclusive representation requires that, where employees have selected an exclusive representative for their unit, only that organization and no other may represent unit members in such proceedings.

[6]Section 3540, which sets forth the purpose of the EERA, provides in part as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of

acknowledges a right of employees to join together in an organization which may serve as the vehicle by which they assert their interests in their employment relationship with their public school employer. It is the nature of grievance resolution that the manner in which a single employee's grievance is resolved may serve as a model to be followed should another employee raise the same issue in the future. Thus, while the immediate impact of a grievance resolution may affect only the single employee directly involved, the resolution is nevertheless a matter of collective concern for the individual's fellow employees.

It is apparent that the Legislature intended that the right to representation in grievance proceedings be protected. Thus, not only did the Legislature enact the general guarantees set forth at section 3543 and subsection 3543.l(a), but it provided, at subsection 3543.l(c), that "A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time . . . for

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> California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. . . .

the processing of grievances." We note in this regard that the Association is the exclusive representative of the District's certificated employees.

We conclude that, by refusing to permit the Association to represent members Furriel, Collins and Guerrero in the grievance resolution process, the District denied those employees their right set forth at section 3543 to representation on a matter of employer-employee relations and, concurrently, denied the Association its right set forth at subsection 3543.1(a) to represent its members in their employment relations. By denying the employees a right guaranteed by section 3543, the District violated subsection 3543.5(a); by denying the Association a right guaranteed by subsection 3543.l(a), the District violated subsection 3543.5(b).

REMEDY

We have found that the Rio Hondo Community College District violated subsections 3543.5(a) and (b) of the EERA. As a remedy for those violations, the District will be ordered to cease and desist from further such violations and to post the Notice attached hereto as an appendix which announces the disposition of the charges and the District's readiness to comply with the ordered remedy. These measures are consistent with the Board's remedial authority as set forth at subsection 3541.5(c) of the EERA.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it. is hereby ORDERED that:

The Rio Hondo Community College District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

1. Violating Government Code subsection 3543.5(a) by denying to its employees the right to be represented by their employee organization in the grievance resolution process;

2. Violating Government Code subsection 3543.5(b) by denying to the Rio Hondo Faculty Association, CTA/NEA, the right to represent its members in their employment relations with their public school employer.

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

1. Within five (5) workdays of the date of service of this decision, post copies of the Notice attached as an appendix hereto at all work locations in the Rio Hondo Community College District where notices to employees customarily are placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps should be taken to insure that these Notices are not reduced in size, altered, defaced or covered by any other materials; and,

2. Notify the Los Angeles regional director of the Public Employment Relations Board in writing within 30 (thirty) workdays from service of this decision of what steps the District has taken to comply herewith.

All other charges filed against the Rio Hondo Community College District in Case No. LA-CE-1101 are hereby DISMISSED.

This Order shall become effective immediately upon service of a true copy thereof on the Rio Hondo Community College District.

Members Morgenstern and Jensen joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1101, Rio Hondo Faculty Association, CTA/NEA v. Rio Hondo Community College District, in which both parties had the right to participate, the Rio Hondo Community College District has been found guilty of violating subsections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) by refusing to permit an agent of the Rio Hondo Faculty Association, CTA/NEA, to represent employees Vince Furriel, Steve Collins and Dan Guerrero at a meeting with Assistant Superintendent Donald Jenkins which had been scheduled in an effort to resolve grievances of those employees.

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

(A) WE WILL CEASE AND DESIST FROM:

1. Denying to our employees their right guaranteed by the EERA to be represented in grievance matters by the Rio Hondo Faculty Association.

2. Denying to the Rio Hondo Faculty Association, CTA/NEA, its right guaranteed to it by the EERA to represent its members in grievance matters.

RIO HONDO COMMUNITY COLLEGE DISTRICT

Dated:______________________ By: ______________________________
Authorized Representative

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

RIO HONDO FACULTY ASSOCIATION, CTA/NEA, Charging Party, v. RIO HONDO COMMUNITY COLLEGE DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-1101 PROPOSED DECISION (4/1/81)

Appearances; Charles R. Gustafson, Attorney for Rio Hondo Faculty Association; John J. Wagner, Attorney (Wagner & Wagner) for Rio Hondo Community College District.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

On January 8, 1980, the Rio Hondo Faculty Association (hereafter Association) filed an unfair practice charge against the Rio Hondo Community College District (hereafter District or College) alleging violations of section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (hereafter EERA).[1] The charge alleged that the District had reduced the work year of instructor Vince Furriel from eleven and a half months to ten months as a reprisal for activities protected by the EERA.

[1]Government Code section 3540 et seq. All statutory references are to the California Government Code unless otherwise specified.

The Association also alleged that the District had refused to participate in a grievance proceeding initiated by Furriel and another instructor subsequent to the work year reduction.

On January 22, 1980, the Association amended its charge to add allegations that the District had threatened further reprisals in the form of changes in the teaching schedules of Furriel and two other instructors, Steve Collins and Dan Guerrero. The amendment also claimed that the District, at a meeting to discuss those schedule changes, denied the instructors the right to be represented by the Association and denied the Association its right to represent them. On the same day, the Association filed a request for injunctive relief which was subsequently denied by the Public Employment Relations Board (hereafter PERB).

The District answered both the original charge and the amendment on February 11, 1980.

On April 9, 1980, the Association filed a second amendment alleging a third reprisal against Furriel in the form of a change in his office location. The District answered this amendment on April 25.

When the matter could not be resolved at informal conference, a formal hearing was held on June 4, 5, 12, and 19 and July 9 and 10, 1980. Post-hearing briefs were filed and the case was submitted on October 14, 1980.

FINDINGS OF FACT

The parties have stipulated that the District is a public school employer within the meaning of the EERA and that the Association is an employee organization within the meaning of the EERA.

All of the charges to be resolved in this case involve members of the Department of Public Service (hereafter Department) at Rio Hondo Community College. Through this department, the College operates a police academy which is located down a hill from the cluster of buildings which constitute the "main campus." The Department offers courses both in the academy and on the main campus and also makes use of faculty offices in both locations.

The record discloses a long history of discord and personality conflict within the Department. In particular, Department Chairperson Alex Pantaleoni has developed strained relationships with four instructors: Vince Furriel, Tom Dickson, Steve Collins, and Dan Guerrero. This recurring tension forms the background for the events underlying these charges.

The Reduction in Furriel's Work Year

Furriel was hired in early 1978 under an eleven-month contract, later raised to eleven and a half months per year.

In January of 1979, Pantaleoni was informed by Don Jenkins, Vice President for Academic Affairs, that substantial budget

reductions would be necessary in the wake of the Proposition 13 property tax initiative.[2] After receiving Pantaleoni's recommendations later in the month, Jenkins prepared a proposed personnel analysis for the Department which showed that Furriel and Dickson would be hired for only ten months in the 1979-80 school year. Reductions were also listed for four other instructors and for several classified employees.

On March 2, 1979, Jenkins sent a letter to Furriel informing him that the Board of Trustees had approved his employment as a regular employee for the 1979-80 school year. Furriel testified that he interpreted this letter to mean that he would continue on a work year of eleven and a half months. Jenkins testified that it indicated only a change from "contract" status to "regular" status as an employee. There is no inconsistency in the record; rather, it appears that Furriel misunderstood the intent of the letter.

A Department faculty meeting took place on March 26. Furriel made a motion that Pantaleoni conduct a review of the distribution of instructional workloads and of release time for administrative duties. The motion was seconded by Collins and

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[2]Proposition 13, a tax relief measure which added Article XIIIA to the California Constitution, placed significant limitations on the taxing power of local and state government and sharply reduced the amount of revenue that local entities could raise by taxing property. The constitutionality of this measure was upheld in Amador Valley Joint Union School District v. State Board of Equalization (1978) 22 Cal.3d 208. See also Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296.

passed. Pantaleoni said he would comply.

A few days later, Furriel, Dickson, Collins and Guerrero met with Jenkins to discuss their continuing concerns about the management of the Department.

The record is unclear as to when Furriel was first informed that his work year would be reduced. Furriel testified initially that Pantaleoni told him on March 26 that he would continue at eleven and a half months and then informed him of the reduction, without giving a reason, at another meeting on April 7. Later in the hearing, however, he testified that he first knew of the reduction at the end of March, after the Department meeting. Pantaleoni's testimony was that the subject did not arise at all at the March meeting and that he later called all of the employees who were slated for reduction to his office on an individual basis. He stated that he did explain the budget situation to Furriel when they met but indicated that the budget had not yet been adopted by the Board of Trustees. Pantaleoni's version is the more credible. Furriel's testimony was vague and inconsistent on the matter of dates.

Another meeting with Jenkins took place on April 19 with Pantaleoni present. Also included was Gary Curtis, an instructor and President of the College's Academic Senate. During the meeting, Pantaleoni produced a file on Furriel which

Furriel had not previously seen. Pantaleoni showed a part of the file to Curtis. The record does not disclose the contents of the file, except that Pantaleoni testified that it included a student complaint about Furriel. Pantaleoni also testified that he keeps files on all employees in the Department.

On May 1, the College's director of personnel wrote to Furriel to inform him officially of the reduction in his work year. The reduction went into effect July 1, 1979.

The Refusal to Participate in Grievance Proceedings

On May 29, 1979, Furriel and Dickson filed a grievance on behalf of "Vince Furriel, Tom Dickson, et al., Members of the Public Service Faculty" against "Alex Pantaleoni, Chairperson, Department of Public Service." The grievance contained allegations that Pantaleoni had refused to offer eleven-month contracts to qualified instructors without informing them of the criteria and had inequitably distributed release time within the Department. It also charged him with ignoring majority recommendations of faculty members and with allowing the advisory committee of police officials to dictate policy. Another charge accused him of keeping employee files containing derogatory material and using them in making decisions without permitting inspection by the affected persons. The grievance was filed under College Procedure No. 5005, an in-house procedure adopted by the president of the College but not by the Board of Trustees. The procedure provided for a hearing

before a three-member committee which would submit its findings to the president. Either party could then appeal the president's decision to the Board of Trustees, which had the ultimate authority in the matter. There was no provision for arbitration, binding or advisory, before a neutral party.

Pantaleoni responded to the grievance on June 14. At the same time, he filed a cross complaint alleging a variety of disruptive behavior by the grievants.

The Association became the exclusive representative of the College's certificated personnel in June of 1979. During the fall of that year, the grievants met with Gilbert Acosta, a representative of the California Teachers Association (hereafter CTA). Acosta assisted the grievants in preparing for their hearing. Instructors Collins and Guerrero also provided assistance. The grievance went to hearing on December 3 before a committee of two instructors and one administrator. Guerrero acted as spokesperson for the grievants, and Acosta also attended. Pantaleoni was present and was represented by another instructor.

On December 5, the second day of the hearing, Pantaleoni was represented by John Wagner, an attorney provided by the District. Wagner argued to the committee that the grievants' allegations were not proper grievances under the College's procedure and that the committee therefore lacked

jurisdiction. The committee rejected this argument. Wagner, Pantaleoni, and other administrators in attendance then left the hearing room, and the hearing continued without them. No one was present for the respondent on December 12, the third and final hearing day.

The committee issued its findings on January 7, 1980. The findings were predominantly favorable to the grievants, with the committee lamenting the low morale in the Department and the absence of established policies on several matters at issue. Leonard Grandy, President of the College, received the findings and solicited responses from the parties. Pantaleoni responded; the grievants did not. Grandy then issued his decision that the grievance was not proper because the allegations lacked the specificity required by the procedure. However, he expressed sympathy with the committee's concerns and indicated that he would take some action in response to them. Furriel then appealed to the Board of Trustees, which upheld the President's decision.

The Proposed Changes in Teaching Schedules and the Right of Representation

Meanwhile, another problem arose in December, 1979, when one of the grievants, Tom Dickson, resigned from the College. Dickson's resignation presented the Department with the need to adjust its course schedules for the spring 1980 semester to cover Dickson's scheduled courses. Proposed schedules for

Furriel, Collins and Guerrero were prepared by Pantaleoni and John Metcalf, another instructor in the Department. These schedules would have replaced the original schedules which had been prepared in September and which had already been published in a College schedule distributed to students. These three instructors were chosen for readjustment because they were best qualified to teach Dickson's campus classes and already taught all or part of their schedules on the main campus.

Pantaleoni sent the schedules to the affected instructors as attachments to a memo dated January 3, 1980. The memo indicated that the schedules were tentative and were drafted in response to Dickson's resignation. It also listed as considerations a request by Collins to teach one of Dickson's classes, the need to compensate Guerrero for his previous overloaded schedule, and the possibility of alleviating some of Furriel's "dissatisfaction" through rescheduling. In addition, the memo stated that the schedules would be discussed on January 7 at a meeting set by a previous memo from Ken Knowlton, a District administrator and Pantaleoni's immediate superior.

The three instructors were unhappy with the proposed changes for several reasons. They objected to the short period of time they would have to prepare for new courses and

especially to teaching courses they had not previously taught. They also cited health and other personal objections to night classes with early morning courses on the following days. Collins considered five distinct course preparations to be unusually heavy, and Furriel disliked the proposal to remove him from academy teaching and place him on the main campus full time. The instructors voiced these concerns to Pantaleoni and made phone calls to Jenkins as well. Furriel and Collins met with Jenkins on January 7, but the problem was not resolved. Another meeting was then scheduled for January 16. In the meantime, the three instructors received a second set of proposed schedules and submitted a proposal of their own to Jenkins.

On January 16, the three instructors were accompanied by CTA representative Gilbert Acosta. Jenkins refused to meet with Acosta present because he had had no notice that Acosta would come and no opportunity to obtain representation of his own. The meeting was rescheduled for January 18, and John Wagner, attorney for the District, attended on that day. When Acosta and the instructors arrived, Wagner argued that there was no right to Association representation at this type of meeting. After several minutes of heated discussion, Acosta and the instructors left. Acosta testified that they were told to leave, while Jenkins testified that he and Wagner argued

with Acosta but did not order him out. In any event, it is clear that the District was unwilling to discuss the schedules with an Association representative present.

On January 22, Pantaleoni sent a memo to Furriel restoring his original schedule for the spring semester. Guerrero also taught the courses scheduled for him in September, with the exception of one class that was cancelled for insufficient enrollment. Collins, however, taught both of Dickson's campus classes. He voiced continuing objections to the late nights followed by early mornings in his final schedule and testified that he signed his course schedule "under duress" because so little time remained before the start of the semester. Dickson's academy classes were staffed by part-time hourly instructors.

The Relocation of Furriel's Office

Two months later, in March of 1980, the Department acquired a small computer for use in assembling mailing lists and tracking academy students in their satisfaction of graduation requirements. Pantaleoni discussed the problem of the location of the computer with several Department members, including Furriel. He concluded that the best method of accommodating the computer was to move Furriel from his office in the academy to an office on the main campus occupied by Dickson before his resignation. In a memo to Furriel dated March 21, Pantaleoni

outlined the reasons for his conclusion. He chose not to place the computer in a public area of the academy because of reduced security and because he believed smoke would adversely affect it.[3] He rejected other rooms for their space limitations and because of the smoking problem. The choice was narrowed to faculty offices, and Pantaleoni decided that Furriel should move because he was the only instructor with an office in the academy who was currently teaching on the main campus.

Furriel objected to the move for a number of reasons. He felt that it would impose a burden on him because his knee injury prevented him from walking the steep hill between the two sites and he would therefore have to increase his driving. In addition, he would have difficulty meeting with cadets because they were not permitted to leave the academy. Furriel suggested alternative locations for the computer and for himself. He presented some of these on March 27 at a meeting with Jenkins, Knowlton, Pantaleoni and Acosta.

The meeting did not resolve the issue, and Furriel, Acosta, and Pantaleoni then went to the academy to examine the available space in light of Furriel's suggestions. The

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[3] The Association argued that smoke would not be harmful to the computer and introduced evidence to that effect. However, the record indicates that the District believed that smoke would have a harmful effect and acted under that assumption in good faith.

following day Pantaleoni sent Furriel a memo indicating that he had considered the alternatives again but had not changed his mind. The move itself took place in early April 1980.

The record discloses that at the time of the move Furriel was teaching 60 percent of his regular course load in the academy and that no other instructor taught more hours there. However, the other full-time instructors with academy offices all had a portion of their time reserved for administrative or other non-teaching duties which required their presence in the academy.

ISSUES

1. Does the six-month statute of limitations bar the allegation involving the reduction of Vincent Furriel's work year?

2. If the allegation is not barred, was the reduction in Furriel's work year a reprisal imposed on him because of an exercise of rights protected by the EERA?

3. Did the District impose a reprisal on Furriel, or deny the Association's right to represent him, by a refusal to participate in grievance proceedings?

4. In proposing changes in the teaching schedules of three instructors, did the District threaten to impose reprisals on them because of their exercise of rights guaranteed by the EERA?

5. Was the District's unwillingness to discuss the proposed schedule changes in the presence of an Association representative a denial of the Association's right to represent the three instructors or of the instructors' right to be represented?

6. By changing the location of Furriel's office, did the District impose a reprisal for his exercise of rights guaranteed by the EERA?

CONCLUSIONS OF LAW

1. The Statute of Limitations

The District argues that the allegation involving the reduction in Vincent Furriel's work year is barred by the six-month statute of limitations because the reduction was effective July 1, 1979, and the charge was not filed until January 8, 1980. The District first raised this defense at the hearing and reiterated it in its post-hearing brief.

Section 3541.5(a) provides that the PERB shall not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. . .." Section 3541.5(a) is similar to and apparently modeled after section 10(b) of the National Labor Relations Act (hereafter NLRA),[4] which establishes a

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[4]29 U.S.C, sec. 160.

six-month limitation for complaints issued by the general counsel.

Cases interpreting section 10(b) hold that it is a statute of limitations and is not jurisdictional. It is an affirmative defense and is waived if not timely raised. NLRB v. A.E. Nettleton Co. (2d Cir. 1957) 241 F.2d 130 [39 LRRM 2338]. Accord, Chicago Roll Forming Corp. (1967) 167 NLRB 961 [66 LRRM 1228], enf. sub. nom. NLRB v. Chicago Roll Forming Corp. (7th Cir. 1969) 418 F.2d 346 [72 LRRM 2683].[5]

The PERB's regulations provide at Title 8, California Administrative Code, section 32635(a) that the respondent "shall file with the Board an answer to the unfair practice charge within 20 calendar days or at a time set by the Board agent following the date of service of the charge by the Board agent." The rules further provide at Title 8, California Administrative Code, section 32640(f) that the answer shall contain "[a] statement of any affirmative defense." The District failed to plead the statute of limitations in its two answers. It was not until the hearing itself, nearly five months after the charge was filed, that the District first objected to the introduction of evidence pertaining to events prior to July of 1979.

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[5]See also, Travelers Indemnity Co. v. Bell (1963) 213 Cal.App.2d 541; Mitchell v. County Sanitation District (1957) 150 Cal.App.2d 366.

By its failure to timely plead the statute of limitations or to provide evidence of extraordinary circumstances excusing untimely pleading, the District has waived its right to assert the statute of limitations as an affirmative defense. Therefore, the unfair practice charge is not barred by the statute of limitations.

2. The Reduction in Furriel's Work Year

The first charge is that the District imposed a reprisal on Furriel when it reduced his work year from eleven and a half to ten months. The Association alleges a violation of section 3543.5(a), which makes it unlawful for a public school employer to "impose or threaten to impose reprisals on employees. . . because of their exercise of rights guaranteed by the [EERA]."

The Association's claim contends that Furriel was exercising protected rights when he made his motion at the Department meeting of March 26, 1979, and in his discussion of Department problems with Jenkins a few days later. But even if these were protected activities,[6] the record indicates that the District's conduct was not a reprisal. The decision to reduce Furriel's work year was made

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[6]The PERB has yet to delineate the full scope of protected activity under the EERA, but it is arguably narrower than under the NLRA, because of differences in statutory language. Compare section 3543 of the EERA with the "concerted activities" language of section 7 of the NLRA (29 U.S.C. sec. 157).

in January, some two months prior to the allegedly protected activity. The District has explained its decision as the product of budget constraints and has shown that other employees received similar treatment.

In addition, Furriel's contention that he was told after January that he would remain on an eleven and a half-month contract is unsupported by the record. He misunderstood the letter of March 2 and offered vague and inconsistent testimony concerning what Pantaleoni told him on March 26.

The charge that the District violated section 3543.5 (a) by reducing Furriel's work year is therefore dismissed.

3. The Refusal to Participate in Grievance Proceedings

The Association charges that the District violated section 3543.5 (a), (b), and (c) by refusing to participate in the grievance procedure invoked by Furriel and Dickson. The parties have argued at length about the provisions of College Procedure No. 5005. The District contends that the grievance was filed against Pantaleoni as an individual and not against the District because the procedure does not provide for grievances against the District. It also argues that the respondent is permitted but not obligated to put on a defense under the procedure. The Association counters that the grievance was filed against "Alex Pantaleoni, Chairperson, Department of Public Service"; that is, against Pantaleoni in

his official capacity representing the District. It also contends that the District was obligated to adhere to its own in-house grievance procedure.

It is not necessary to resolve these questions, however, because the record shows that Pantaleoni, in whatever capacity, did participate in the proceedings, whether or not he was obligated to do so. After the initial grievance was filed, Pantaleoni filed a response and cross complaint. He was present and represented on the first day of the hearing, and on the second day his representative argued that the committee lacked jurisdiction. There is no evidence that this argument was not made in good faith. After the committee issued its findings, Pantaleoni responded to the President's call for input from the parties. The only evidence of non-participation in the record is the departure of Pantaleoni from the hearing on the second day and his absence on the third. There is no indication that his absence in any way hindered the resolution of the grievance; indeed, it may have helped to ensure findings favorable to the grievants. There is therefore no action by the District which might be considered a reprisal for the filing of the grievance or for any other exercise of rights guaranteed by the EERA.

There is also no merit to the Association's contention that an obligation to process the grievance in full arises from section 3543. That section provides, in part, that "any

employee may at any time present grievances to his employer, and have such grievances adjusted . . .." The Association argues that this provision not only grants employees the right to file grievances but also imposes on employers the duty to adjust or resolve them. However, the PERB has interpreted section 3543 differently. The primary intent of the section is to prevent the interference of exclusive representatives in individual grievances. An employer's refusal to process a grievance is not an unfair practice unless it is also a reprisal or discrimination for the exercise of employee rights. Neilman v. Baldwin Park Unified School District (4/4/79) PERB Decision No. 92.

A third argument of the Association is that the District denied the Association its right to represent the grievants in the grievance proceedings. The right of representation arises from section 3543.1(a), which provides that "employee organizations shall have the right to represent their members in their employment relations with public school employers . . .." Grievance procedures are included in "employment relations" under this section.[7] Section 3543.5(b) makes it unlawful for the employer to "deny to

[7]See, for example, Diablo Valley Federation of Teachers v. Mount Diablo Unified School District (12/30/77) EERB Decision No. 44.

employee organizations rights guaranteed to them" by the EERA. However, the Association has presented no evidence that the District prevented or attempted to prevent the Association representative from attending the grievance hearing or otherwise assisting the grievants. Without such evidence, a violation cannot be found.

The Association further alleged in the original charge that the District's conduct in withdrawing from the hearing violated section 3543.5(c). That section makes it unlawful for an employer to "refuse or fail to meet and negotiate in good faith with an exclusive representative." Again, however, the Association presented no evidence or argument to support this allegation, and no violation can be found.

The Association has failed to demonstrate by a preponderance of the evidence that any conduct by the District with respect to the grievance proceedings violated section 3543.5 (a), (b), or (c). Accordingly, this portion of the charge must be dismissed.

4. The Proposed Changes in Teaching Schedules

The Association alleges that the District violated section 3543.5(a) by its proposed changes in the teaching schedules of Furriel, Collins, and Guerrero. The basis of this argument is that the proposed changes constituted a threat to impose

reprisals on the three instructors for the processing of Furriel's grievance against Pantaleoni.[8]

The test to be applied in resolving issues of reprisal is set out in Oceanside-Carlsbad Federation of Teachers v. Carlsbad Unified School District (1/30/79) PERB Decision NO. 89, as follows:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
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> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

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[8]Sec. 3543 grants employees the right to "present grievances to [the] employer" and to "participate in the activities of employee organizations." By rendering assistance to Furriel, Collins and Guerrero participated in organization activity.

The Association has made out a prima facie case under the second part of the Carlsbad test. At the time of the proposed change, the affected instructors had recently been involved in a grievance proceeding against their Department chairperson. The grievance had been preceded by an extensive history of discord and complaints about the management of the Department. In addition, the instructors did have reason to believe they would be adversely affected by the schedules. They were being asked to prepare for new courses in a very short time and to teach less desirable hours. It is conceivable that such a prospect could inhibit the exercise of employee rights.

However, the Association has not shown the District's conduct to be "inherently destructive of employee rights." The action taken was not severe. It was of the type which is not punitive on its face and could occur in the normal course of events. The three instructors were not heavily involved in organizational activities, and no great chilling effect on such activities could be expected. The timing does not clearly show the District to have been responding to the grievance, since the schedules were proposed some seven months after the filing and one month after the hearing began.

The case therefore falls under the "slight harm" section of the Carlsbad test. The employer's business justification must be balanced against that slight harm. Here the District has

offered a reasonable explanation for its conduct. The resignation of Tom Dickson came less than two months before the start of the new semester, with the Christmas vacation intervening. The District had to adjust the schedule of classes quickly to maintain an adequate curriculum in the Department. Collins, Guerrero and Furriel were already sharing with Dickson the responsibility for the Department's campus classes. Their qualifications and recent teaching experience made them likely candidates for schedule adjustment. In addition, the College's large population of working students had traditionally meant that many classes would be offered in the evenings and early mornings.

The Association argues that the District's restoration of the original schedules for Guerrero and Furriel after their protests showed that the District lacked any justification of business necessity. But the withdrawal of the proposed changes could just as easily have demonstrated the District's responsiveness to the instructors' concerns. In either event, the District cannot be required to come up with the best possible solution in the eyes of the instructors or of the hearing officer. The problem was thrust upon the District by Dickson's resignation, and it responded by proposing a solution and calling for a meeting. When objections were raised, the District prepared a second set of schedules for consideration. The record also shows that Collins did eventually teach a

schedule different from his original one. This provides some evidence that the solution did require some adjustment in the spring schedule.

The Association draws its nexus between employee rights and District action entirely on inference from the timing and from Department history. The District, on the other hand, can point to a problem which it did not create and to which it had to respond quickly. It has offered a reasonable explanation for the way it handled the situation. The balance tips in favor of the District's business justification. The charge of a threatened reprisal is therefore dismissed.

5. The Right of Representation

The Association also alleges in the first amendment to the charge that the District's unwillingness to discuss the proposed schedule changes in the presence of an Association representative constituted a violation of section 3543.5(a) and (b). The claim is that the District interfered with the right of the three instructors to be represented by the Association and denied the right of the Association to represent them. These rights are guaranteed by EERA sections 3543 and 3543.1(a), respectively. Section 3543 provides that:

> Public school employees shall have 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. '. 7. [Emphasis added.]

Section 3543.1(a) provides that:

> Employee organizations shall have the right to represent their members in their employment relations with public school employers.... [Emphasis added.]

The Association argues that the present case falls within the analogous private sector right enunciated by the Supreme Court in NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689]. Weingarten established the right of an employee to union representation upon request at an investigatory interview which he reasonably believes might result in disciplinary action. This right was based on the NLRB's interpretation of the "concerted activities" clause of section 7 of the NLRA[9] to include union assistance in such a situation. The Court also reasoned that the union representative would safeguard the interests of other union members by assuring that the employer does not impose punishment unjustly.

The PERB has followed Weingarten in a situation quite similar on its facts. In SEIU v. Marin Community College District (11/19/80) PERB Decision No. 145, an employee was called to a meeting with his supervisor to discuss an incident in which he had allegedly engaged in a shouting match and made physical contact with another supervisor. The employee refused to meet without a union representative because he believed that discipline could result. He was subsequently reprimanded, both

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[9] 29 U.S.C. sec. 157.

for the original misconduct and for the refusal to meet with his supervisor. The Board found both reprimands to be in violation of section 3543.5(a).

The Association urges a similar application of Weingarten in the present case on the grounds that Collins, Furriel, and Guerrero had reason to believe that the proposed schedules were a form of discipline for their complaints about the management of the Department and for their participation in the grievance proceedings. While the record shows that the three instructors may have had reason to fear an adverse impact in the form of less desirable hours and greater course preparation, not every adverse impact on an employee's work situation can be classified as disciplinary action under Weingarten. The NLRB has construed the term "disciplinary action" quite narrowly, limiting it to punishment for poor work performance or other misconduct. For example, a recent case found that "fitness for duty" examinations prompted by excessive absenteeism and intended for use in determining work assignments could not be considered as disciplinary action. U.S. Postal Service (1980) 252 NLRB No. 14 [105 LRRM 1200]. In the present case, the record contains nothing to indicate that the meetings were called for the purpose of discussing poor performance or other punishable conduct. The meetings therefore are not of the type to which Weingarten rights of union representation attach.

Nonetheless, the PERB in Marin Community College District, supra, did not state that representational rights under the EERA extend only to the limits of Weingarten. Federal authorities are a useful starting point, but they do not establish the boundaries of public employees' representational rights.[10] The right to be represented under the EERA is specifically mentioned in section 3543 without limitation to discipline or to investigatory interviews. Rather, it extends broadly to cover "all matters of employer-employee relations." In addition, section 3543.1(a) grants a distinct right of representation to employee organizations which does not appear in the NLRA.

The right of representation under the EERA thus extends situations not covered by Weingarten itself.[11] However, this does not mean that Weingarten should not be followed with respect to issues other than the types of meetings for which the right attaches. For example, Justice Brennan wrote in his majority opinion that:

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[10]See Social Worker's Union v. Alameda County Welfare Department (1974) 11 Cal.3d 382, decided under the Meyers-Milias-Brown Act (Government Code section 3500 et seq.).

[11]Neither the PERB nor any court has precisely defined the scope of this expanded right in the public sector.

> Exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one . . . . 88 LRRM at p. 2691.

Nothing in the EERA indicates that this policy should not apply where similar employer prerogatives exist.[12] In the present case, for example, there is no indication that the employer could not have acted without any meeting at all. The record shows that the first meeting originated in a memo to the instructors from a District administrator indicating that alternative schedules would be discussed. The later meetings at which the representation issue arose were set by agreements between Jenkins and the instructors to postpone their discussion. At this point, the District did not insist that the instructors attend a meeting without their representative. Nor did the District reprimand them or take any other action in

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[12]Such prerogatives do not exist in the public sector in discipline for misconduct, faculty evaluation, or other situations in which employers generally do have an obligation to hold an interview or hearing before taking action. But the present case is not of that sort.

retaliation for their desire to be represented. Instead, the District exercised belatedly its prerogative not to meet with them at all. Brennan's reasoning indicates that the right of representation does not override the exercise of this prerogative.

Since the District did not engage in conduct which could constitute interference with the right of representation, it is unnecessary to determine whether or not the particular subject matter of the meeting fell within the statutory meaning of "employer-employee relations." Hence, even if an instructor's course schedule is a matter of employer-employee relations, the District did not violate section 3543.5 (a) by expressing its unwillingness to conduct the meeting in the presence of an Association representative.

The District's conduct also did not deny the Association its right to represent the three instructors. Once the District exercised its prerogative not to meet, there was no meeting in which the Association could represent its members. There was therefore no denial of Association rights in violation of section 3543.5(b).

Accordingly, the allegations pertaining to the right of representation are dismissed.

6. The Relocation of Furriel's Office

The second amendment to the Association's charge alleges that the District took further retaliatory action against Furriel when it relocated his office from the academy to the main campus. Again, the Association can point to the filing of the grievance as protected activity preceding this action. In addition, Furriel was the primary complainant in the unfair practice charge which had already been filed and once amended.

Applying the Carlsbad test, the Association has not, however, established that the office change was "inherently destructive" of employee rights. Furriel did not have a high profile as an Association activist. And the timing of the District's action does not clearly indicate retaliation. The decision to relocate Furriel's office was made some two months after the filing of the amended unfair practice charge and the completion of the grievance committee's proceedings.

The charge therefore falls under the "slight harm" prong of the Carlsbad test, and the District's business justification must be considered. The District offers as a justification its acquisition of a computer to perform certain functions in the academy. The record shows that Pantaleoni considered a number of factors, including a reasonable belief that smoke would be harmful, and concluded that a faculty office was the best location for the computer. Furriel was chosen as the

instructor to be moved because he would not be operating the computer, had no administrative duties in the academy, and was the only instructor with an academy office and classes on the main campus.

The District has offered a credible explanation for the need to move an instructor and for the choice of Furriel. The tie between the arrival of the computer and the decision to relocate Furriel is clear and immediate. The Association's argued nexus between that decision and previous protected activity is less obvious and more remote. The balance therefore tips in favor of the District, and no violation of section 3543.5(a) is found.

The Association also alleges violations of section 3543.5(b) and (c) but has presented no supporting evidence or argument. The Association's allegation is therefore dismissed.

PROPOSED ORDER

Based on the findings of fact, conclusions of law, and the entire record in this case, the unfair practice charge against the Rio Hondo Community College District is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 21, 1981 unless a party files a timely statement of exceptions within twenty (20) calendar days

following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on April 21, 1981 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

DATED: APRIL 1, 1981

BRUCE BARSOOK
Hearing Officer