STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS PLACER HILLS CHAPTER 636,

Charging Party,

v.

PLACER HILLS UNION SCHOOL DISTRICT,

Respondent.

Case No. S-CE-453

PERB Decision No. 377

February 14, 1984

Appearances; E. Luis Saenz, Attorney for California School Employees Association and its Placer Hills Chapter 636; Douglas A. Lewis, Attorney for Placer Hills Union School District.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the California School Employees Association and its Placer Hills Chapter 636 (CSEA) and by the Placer Hills Union School District (District).

In the proposed decision, the administrative law judge (ALJ) concluded that the District had not violated provisions of the Educational Employment Relations Act (EERA or Act) by failing to permit an employee, Eric Steele, to return to work

when, after injuring his wrist, his physician restricted him to light duty.[1] The ALJ also held that, while the District did not act unlawfully in insisting that Steele provide written acknowledgment of documents, the District impermissibly unilaterally adopted the written acknowledgment rule.

The Board has carefully reviewed the entire record in light of the parties' exceptions. Consistent with the discussion below, we affirm the ALJ's proposed decision in part and reverse it in part.

FINDINGS OF FACT

In late January or early February 1980, Eric Steele, then employed by the District as a utility groundsperson, injured his shoulder and back on the job. He suffered torn ligaments in his right shoulder and strained muscles in his lower back. As a result, he was placed on medical leave for four and one-half months. His physician, Dr. Gordon Lewis, authorized Steele to return to work on May 12, 1980. The authorization stated "May return to work . . . no heavy overhead lifting or any activity not tolerated." Steele tendered this release from Dr. Lewis to Ed Vanderpool, his immediate supervisor.

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all references are to the Government Code.

After consulting with others, Vanderpool told Steele that the release was unacceptable because it was too vague.[2]

Dr. Lewis issued a second release on May 19, 1980, which provided, "May drive bus, riding mowers, and operate weed eater. He may not lift or operate equipment above shoulder level." This release was accepted by the District.

Steele returned to work. He testified that he could perform most of his duties except for the "over-the-shoulder working part." In July 1980, Steele was promoted from utility groundsperson to maintenance person.[3]

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[2]The parties' negotiated agreement contains the following with respect to verification of sick leave:

> Verification of illness or injury may be required from a licensed physician or practitioner acceptable to the Board; a medical release to return to work may also be required.

3The job description of the maintenance person provided as follows:

> Repairs and performs general maintenance work on plumbing systems; cleans out drains and obstructions in water and sewer systems; services fans, compressors and pumps by oiling, greasing, packing and cleaning; replaces broken glass in windows and doors; mixes concrete, places posts and secures cyclone fence, etc.; repairs doors, locks, hinges and closures; does electrical repair work; cleans and prepares surfaces for painting; operates power and hand tools; cleans and maintains trade tools; repairs furniture and does other carpentry work; operates motor vehicles as required. Care and maintenance on stationary equipment such

On February 25, 1981, Steele testified as a witness, under subpoena, at a PERB-conducted formal hearing concerning an alleged discriminatory discharge of another District employee, Robert Ledbetter. In that case, CSEA alleged, inter alia, that Ledbetter was not retained by the District because of his union activity. At that hearing, Steele's testimony was offered to establish that the promotions he received coincided with his periods of nonmembership in CSEA. He recalled one specific occasion, two weeks before the Ledbetter hearing, when Fred Machado, District Director of Transportation, told him that the "union stuff" was going to get Steele in trouble around the District. Although Machado also testified at the hearing and denied making the statement, the ALJ resolved the credibility determination in favor of Steele.[4]

On June 27, 1981, after the ALJ's proposed decision in the Ledbetter case issued, Steele suffered a fractured wrist bone during nonwork hours while playing Softball. Steele went to

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> as playground equipment, heating and cooling equipment, fire alarm equipment, clock and bells, etc. Performs other duties as required.

[4]Placer Hills Union School District, Unfair Practice Case No. S-CE-384, Proposed Hearing Officer's Decision (6/4/81). On November 30, 1982, PERB issued its own decision (PERB Decision No. 262) affirming the facts as found by the ALJ. The Board upheld the ALJ's conclusion that the District had not unilaterally altered the layoff policy. The Board did not review the ALJ's dismissal of the discriminatory discharge allegation, no exceptions having been taken to that determination.

the Grass Valley Hospital emergency room where, after X-rays, his injury was diagnosed as a hairline fracture of the navicular bone. The attending physician placed a plaster cast on his lower right arm and hand, enclosing the thumb but not the fingers. On June 29, Steele went to his personal physician, Dr. Lewis, who replaced the cast with a lighter fiberglass cast which covered the same area of his arm. Steele testified that Dr. Lewis asked him about his shoulder injury, and Steele said "it hadn't changed at all, it was just the same. It was still a little tender." He did not complain of any injury to his shoulder which was different than it had been for the past six months.

Upon request, Dr. Lewis gave Steele a release dated June 29 which stated that Steele could return to work that day. The words "light duty" were written on the release. During that visit with Dr. Lewis, Steele did not describe or provide him with a copy of his job duties as a maintenance person. Dr. Lewis merely limited Steele to light duty. They did not discuss any specific limitations.

Steele presented the release to Fred Machado, serving as Steele's supervisor in the absence of Vanderpool who was on vacation that week. According to Steele, Machado said that he did not think Steele could work with the cast on and that he would have to get the opinion of Vanderpool. Machado called Vanderpool and asked him if there were any kind of light duty

jobs. Vanderpool testified that the only thing he could think of was tiling floors. Vanderpool advised Machado as follows:

> I told him to tell Eric to get a leave slip or, you know, just — I can't remember what I said, to tell you the truth. I just told Mr. Machado that there wasn't anything for him to do. I mean, it was — we might as well just, you know, let him send him home.

Steele worked for five hours that morning. At approximately 11:30, Machado told Steele that there was "no such thing as light duty," and that Steele would have to go home. Steele said he asked Machado why he could not work light duty as he had for the previous 13 months because of his back injury. His response, according to Steele, was, "All I can tell you at this point is there's no such thing as light duty at Placer Hills School," and that he could "no longer work here with any type of work restriction whatsoever."

That morning, Steele also saw George Dunham, District Superintendent. Steele told Dunham about his broken wrist. Dunham testified that he told Steele it was going to be difficult for him to work, and Steele replied, "Yeah, there's no light duty, I can't work." This conversation was to have taken place between 7 and 8 o'clock in the morning.

Following his one-week vacation, Vanderpool returned to work for a two-week period. During that time, Steele testified, he received a phone call from Vanderpool who asked how he was doing. Vanderpool stated, according to Steele,

"Well, we have tile that can be laid and different things that can be done." However, Vanderpool asked Steele about his doctor's releases and, when Steele told Vanderpool that they were the same, Vanderpool told him he would have to have the restrictions cleared up before he came back.[5]

The decision to release Steele from work was made by Machado and Vanderpool. Vanderpool testified he would have tried to accommodate Steele, but there were certain jobs which had to be done which he believed Steele to be incapable of performing and that he was concerned about Steele's health.

On July 16, Steele again visited Dr. Lewis. At this visit, Dr. Lewis examined Steele's shoulder and collar joint. According to Steele, Dr. Lewis did nothing with regard to his wrist. Based on Steele's job description, which had been provided to Dr. Lewis by the District, Steele said he discussed with Dr. Lewis the various components of his job as maintenance person. Dr. Lewis then wrote a release that said Steele could return to work and perform "light duty." Although he saw the words "light duty" on the release and was aware that the prior light duty release had been unacceptable, Steele said he did

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[5]Vanderpool did not testify as to any telephone conversation. He did testify, however, that Steele came to work on one occasion during this time period and that he told him they could not have a maintenance person working with one hand. He told Steele that perhaps it would be a good opportunity for him to recover from both his shoulder and wrist injuries.

not ask Dr. Lewis to be more specific because Steele did not think the District would accept the release.

Steele testified that, when he returned to the District and showed the release to Machado, Machado said, "You cannot work here with any type of work restrictions whatsoever. They all have to be cleared up before you are allowed to return to work." Steele requested that Machado put this statement in writing because, at the Ledbetter hearing, Machado had denied having a conversation with Steele.

On or about July 26, the District hired John Jones, a former District maintenance person, as a substitute for Steele. He was employed until the end of August. Vanderpool felt a substitute was necessary because he could not use other employees to perform the duties for which Steele was responsible since maintenance duties were outside the job description of custodians. During the summer, when students were not in attendance, the maintenance department typically did a lot of classroom work. Generally, maintenance employees cleaned air conditioning units located on classroom roofs and did outside work such as trenching.

The District submitted as evidence a series of work orders describing the various jobs that were in fact done by the maintenance department during the summer following Steele's wrist injury. Most were done by Jones, Steele's substitute. Some of the jobs were as follows: placement of shims in window

latches, requiring use of a hammer, punch and electrical drill; replacing a vacuum breaker on the sprinkler system; checking ballasts in classroom lights, requiring an employee to climb a ladder and work overhead with ballasts weighing about 12 pounds; moving an old stove weighing about 100 pounds; removing floor tile with a hammer and chisel and cementing in new tile; drilling holes in storeroom door bolts with an electrical drill; using an electrical jackhammer to chip a one-foot wide, six-inch deep channel about seven to eight feet long in a cement floor to install a floor plug; bending an electrical conduit; loading and unloading 50-pound bags of cement onto and off a truck and into a wheelbarrow and hand-mixing the cement to fill the channel; tipping an upright piano to repair a wheel; and climbing a ladder to repair or set several classroom clocks.

Vanderpool testified that he felt most of these jobs required the full use of both hands. However, in Steele's opinion, his wrist injury did not impair his ability to do the normal summer maintenance duties, one of which was unloading and stacking cartons of paper, each weighing 40 to 100 pounds. Steele thought that his assignment for the week of June 29, if he had been permitted to work, would have been to irrigate the field at Lemoore School and, in general, to perform such jobs as tightening screws on doors and checking hinges. Steele did not recall what his actual work orders were on the morning of June 29.

On July 27, after Machado rejected Dr. Lewis[1] second "light duty" release, Steele filed a grievance which stated:

> The District has exceeded its rights, violated the contract and my rights by the following:
>
> On June 29, 1981, I reported to work with my arm in a light cast and proceeded to work at my regular duties. At approximately 11:30 am, I was ordered to leave work and then was unilaterally placed on sick leave although I had a doctor's release which allowed me to return to work. On July 20, 1981, I returned to work after seeing my doctor again and obtaining another medical release to return to work. Again, I was sent home and again forced to use my sick leave and vacation time to maintain my pay status.
>
> In accordance with the contract, I had obtained a medical twice to return to work and twice I was denied this right to return to work. Such refusal to allow me to return to work is discriminatory and denies me rights granted by law and the contract.

As a remedy, Steele requested restoration of all money, benefits, leave and vacation accounts. This grievance was first denied by Vanderpool on August 7.

On August 11, Steele again visited Dr. Lewis. Dr. Lewis wrote a release that stated Steele should do "No over shoulder lifting greater than 75 pounds."

Steele said his visit to Dr. Lewis on August 11 was at the request of the insurance carrier who wanted him to have his back rechecked because Steele had informed the carrier that all releases would have to be cleared before returning to work. He did not ask Dr. Lewis about a release for his wrist. When

Steele gave this release to Vanderpool on August 12, Vanderpool said the shoulder limitation looked good, but he could not return to work because of his fractured wrist.

On August 11, Steele appealed the grievance to the second step and, on August 18, 1981, a meeting was held in Superintendent Dunham's office. In attendance were Dunham, Clifford Massey, CSEA field representative, and Dale Roberts, then CSEA president. The most recent release of August 11 was discussed. During that meeting, Massey expressed his belief that the release was for both the shoulder and the wrist. Because there was some disagreement on this point, Dunham decided to contact Dr. Lewis to ascertain the extent of the release. Thereafter, Dunham advised Roberts that he was going to contact Dr. Lewis to determine whether Dr. Lewis was "releasing Mr. Steele for his shoulder or his wrist or both."

Dunham was unable to contact Dr. Lewis until August 25, when he was told by Dr. Lewis that the form referred only to Steele's shoulder and that he wanted to give Steele a couple more weeks for the wrist injury to heal before he would be released to perform regular duties.

After his conversation with Dr. Lewis, Dunham wrote to Steele on August 28:

> At our conference on August 18, 1981, attended by Mr. Massey, Mr. Roberts and myself, it was felt some clarification of Dr. Lewis' physical lifting clearance was in order. I spoke to Dr. Lewis on August 25, 1981 and he stated the 75 pounds lifting

> limit was for your shoulder and not your wrist. He informed me he wanted at least another two weeks healing time for your wrist.
>
> Mr. Massey, in our telephone conversation today, August 28, 1981, when informed of Dr. Lewis' explanation, said that Dr. Lewis' decision solved this grievance.
>
> As a clarification, your broken wrist was and is the reason for your not working at this particular time. Therefore, since this is not a work related accident, your request for restitution of your vacation time, which you had requested be deducted in order to receive a full July paycheck, must be denied.[6]

Less than one week later, on August 31, Steele again saw Dr. Lewis. Steele told Dr. Lewis that the District wanted a full release for his wrist before he could return to work. At this visit, his cast was removed. Dr. Lewis gave Steele a full work release from his wrist injury effective September 1. Steele returned to work the following Monday and the release was accepted by Vanderpool.

In an effort to demonstrate that the District had discriminated against Steele because of his testimony at the Ledbetter hearing, CSEA presented evidence of two other District employees who, unlike Steele, were permitted to continue to work after suffering injuries.

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[6]Steele subsequently appealed Vanderpool's and Dunham's denial of his grievance, and a hearing before the board of trustees was requested by Roberts on September 1, 1981. No hearing was scheduled or occurred.

John Thackeray was employed by the District in June 1979 until September or October 1980 as a CETA employee. During his first four or five months, he worked as a carpenter/painter trainee. His primary duties were brush and spray painting classrooms and exterior walls. About a month and a half after he started his employment, he suffered an injury to his thumb which required a plaster cast covering his thumb and extending to his elbow.

Pete Neese and Ed Vanderpool were his supervisors. When he returned to work after his accident, Neese asked him if there were any work restrictions. He said his doctor had not given any such instructions. Thackeray continued to do his work for the six or eight weeks during which he wore the cast. Both Steele and Thackeray are right-handed and suffered injuries to their right hands.

Fred Machado, then leader of the transportation unit, cut his knee cap with a chain saw approximately five or six years prior to Steele's injury. The knee injury required 13 stitches. Machado testified that his doctor told him he could work, subject to his own tolerance of pain. Machado took himself off bus driving duties but did his other work such as supervision and training of bus drivers, paperwork and supervision of and work with bus mechanics.

In addition to CSEA's charge regarding Steele's work limitation, the following evidence was presented in conjunction

with its claim that the District harassed Steele by requiring him to attach his signature to all documents he received.

In an effort to resolve Steele's grievance regarding the work releases, a meeting was held on September 15. Steele, Roberts, Dunham and Doug Lewis, attorney for the District, were present. One subject discussed at that meeting was Dr. Lewis' release of August 11 regarding the 75-pound lifting limit.

Dunham testified that he said the release was acceptable because the District did not have anything that heavy to be lifted. Steele disputed this contention, asserting that cases of paper delivered to the schools sometimes exceeded 75 pounds. Steele insisted that he did not make any statement about having acted contrary to his doctor's orders. He maintained that his statement was that, while he had lifted over 75 pounds, he had not lifted that weight over his shoulders.

Dunham's version of the conversation was different. He testified that Steele stated he had lifted items over 75 pounds over his head. Dunham recalled asking if Steele had lifted such weights since his return to work after the wrist injury, September 1, and Steele said that he had. Dunham said he was concerned about the doctor's limitation and the District's liability.

A few days after this conference, Vanderpool gave Steele a letter from Dunham, dated September 16, that stated:

> During the grievance conference held September 15, 1981 in my office, you stated

> that you had lifted items in excess of 75 lbs. since returning to work September 1, 1981. (75 lbs. was a limit specified by Dr. Lewis in the written work release for your previous shoulder injury.)
>
> You are specifically instructed not to lift objects of 75 lbs. or greater over your head without assistance since it is contrary to your best health interest and since the District could possibly be held liable for any subsequent injury incurred by you lifting objects 75 lbs. or greater over your shoulders.
>
> If you <u>continue</u> to lift objects 75 lbs. or greater above your shoulder without assistance from another employee or a mechanical device, you may be subject to disciplinary action including, but not limited to, dismissal. (Emphasis supplied.)[7]

On September 23, Vanderpool showed Steele another draft of the letter he had shared with Steele following the meeting of September 15. This one was marked, "Revised as per Counsel's request." It was the same as the letter just described but had stamped under the typed part of the letter the following:

NOTICE

> The foregoing material will be entered in your personnel file 15 calendar days after the date of this Notice.

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[7]In response to Dunham's letter, Steele filed a grievance on September 18 which disputed the statement that Steele had ever exceeded the weight-lifting limitation. Vanderpool responded to the grievance on September 23, stating that the letter was intended as instructional and not intended to harass or intimidate Steele. After Vanderpool denied the grievance, it was appealed to Dunham and then to the board of trustees, where it was denied as being nongrievable.

Education Code 44031 gives an employee the right to examine any derogatory materials prior to its being placed in his personnel file. Employee has the right to enter and to have attached to any such derogatory information his own comments thereon. If you wish to attach any written comments to the foregoing materials, you must do so no later than 15 calendar days after the date of this Notice.[8]

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[8] Education Code section 44031 provides:

> Personnel file contents and inspection. Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
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> Such material is not to include ratings, reports, or records which (1) were obtained prior to the employment of the person involved, (2) were prepared by identifiable examination committee members, or (3) were obtained in connection with a promotional examination.
>
> Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employing district.
>
> Information of a derogatory nature, except material mentioned in the second paragraph of this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comments thereon. Such review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

Following the notice was a line for the date and signature of the employer and a statement, "Receipt of a copy of foregoing material and Notice is hereby acknowledged on," with lines for the date and the signature of the employee.

Vanderpool asked Steele to sign the letter dated September 16 which included the above-quoted notice. Steele said the facts were not true and that he did not feel he should sign it. Specifically, Steele objected to the implication, derived from the word "continue" in the fourth paragraph, that he had been lifting 75 pounds over his shoulder. Vanderpool said he had to sign it, and Steele said he would if he could have a representative present. Vanderpool said he could not, and Steele did not sign it.

On October 2, Vanderpool presented Steele with a letter from Dunham which acknowledged receipt of a letter Steele wrote in response to Dunham's September 16 letter. Vanderpool insisted that Steele sign off on receipt of that letter. This letter did not contain the stamped notice about insertion into the personnel file. Steele said that he would sign if he could have his union representative present. Vanderpool then read to Steele a prepared statement from a card which stated:

> I am giving you this letter — (or whatever, that you are handing the person) — your signature only verifies that you received the letter. It does not mean that you agree with the contents. If you refuse to sign the receipt of this letter, you will be insubordinate, and will be probably written up for this insubordination.

Steele's testimony was that Vanderpool began reading the card in October and that, when it was read, it was read so fast that the only thing Steele heard was the part about insubordination. Vanderpool denied Steele's request to read the card himself. Consequently, Steele refused to sign the October 1, 1981 letter. On the bottom of the letter, Vanderpool wrote, "Eric Steele refussed [sic] to sign this copy on 10-2-81 4:20 P.M. I read the card to him."

The parties' dispute as to the required signature continued to escalate. On October 7, Dunham wrote to Steele:

> On October 2, 1981 you refused to sign for the receipt of my letter to you dated October 1, 1981 (attached). Since you were informed that your signature only verified receipt of this letter, and that it by no means indicated agreement, you acted in an insubordinate manner. You are hereby informed that if you continue to display this flagrant disregard for your supervisor's instructions, you will be subject to disciplinary action including, but not limited to, dismissal.

The letter contained the stamped notice described above referring to the employee's personnel file and the right of the employee to respond.

Contrary to the assertion in Dunham's letter, Steele denied that he had been informed that his signature only verified receipt of the letter. Because Steele believed that this letter of October 7, 1981 contained adverse information and was to be entered into his personnel file, he wanted to have a union representative present. Vanderpool refused to permit

Steele the assistance of a representative and read Steele the aforementioned card. Steele nevertheless refused to sign the document and, on the October 7, 1981 letter, Vanderpool wrote, "Eric Steele refussed [sic] to sign or take this letter." After his signature, Vanderpool also wrote, "He said he was intitled [sic] to a union representative."

Thereafter, Steele was presented with another letter, this one from Vanderpool dated October 8, 1981. In that document, Steele was advised that, in the District's opinion, the letter dated October 2, 1981, in which Dunham acknowledged receipt of Steele's response to Dunham's letter of September 16, 1981, was informational only and, thus, Steele was not entitled to a union representative. Although there is some conflict as to when Vanderpool presented Steele with this document, Steele again refused to sign without his union representative being present.[9]

On October 23, Vanderpool presented Steele with yet another letter from Dunham dated October 21, 1981. The letter stated:

> On October 15, 1981 you refused to sign for the receipt of the attached letter dated October 8, 1981. Since you were informed that your signature only verified receipt of this letter and that it by no means indicated agreement, you acted in an insubordinate manner.

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[9]Vanderpool's letter was the second communication Steele received concerning his refusal to sign Dunham's letter on October 2, 1981. Vanderpool's letter denied Steele's grievance alleging a right to union representation.

> You are hereby informed that if you continue to display this flagrant disregard for your supervisor's instructions, you will be subject to disciplinary action including, but not limited to, dismissal.

The letter contained the stamped notice regarding inclusion in his personnel file. Steele testified that he got the letter after working hours and he did not want to sign it. Vanderpool told Steele that he wanted him to sign it, however, and Steele signed it with the notation "signed under coercion with threat of disciplinary action 4:35 PM."[10]

Also during the week of October 12, Steele discovered that there was a letter in his personnel file referring to a snow day in 1979 for which Steele had been docked. Steele testified that he spent two hours during work time preparing a response to that letter. After Steele had spent 40 minutes preparing his response, Vanderpool told him to stop the letter writing and return to work. Steele disregarded Vanderpool's directive and continued to write for another hour and twenty minutes.[11]

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[10]The incident involving the letter of October 21, 1981 prompted Steele on October 27, 1981 to file another grievance in which Steele charged that he had never seen the letter dated October 8 referred to in the October 21 letter and that, when asked, Vanderpool was uncertain as to which letter Dunham's comment referred.

[11]The response written by Steele, dated October 26, 1981, complained of the presence of an unsigned and undated letter that he had not seen in his personnel file. In addition to factual assertions about the snow day in question, the two and one-half page letter asserted the action was taken for union activity and complained of Dunham's asserted insistence on "absolute power" over employees.

On November 9, Vanderpool presented Steele with a letter from Dunham, dated November 3, which stated:

> During the week of October 12, 1981, you were given one-half hour by Mr. Vanderpool, your immediate supervisor, to respond to a letter in your personnel file. This letter was informational, not derogatory and, therefore, did not require the time you requested for the rebuttal letter you were granted. You informed Mr. Vanderpool that you could take as much time as you wanted to write the letter. Mr. Vanderpool has reported that you took two hours of work time to reply. Please be advised that you will be docked one and one-half hours of pay effective on your November 30, 1981 pay warrant.

The letter contained the stamped notice, and Steele signed it with the notation "signed under threat of coercion and Dis. letter."

On December 15, Steele refused to sign a letter from Dunham, dated December 14, 1981, which advised Steele that his written response to the November 3 and November 30, 1981 letters was placed in his personnel file. Vanderpool wrote on the bottom of that letter, "Eric wanted a representative present regarding this disciplinary situation before he would sign or have a meeting with Mr. Dunham."[12]

On December 22, Vanderpool presented Steele with a letter from Dunham, dated December 17, regarding Steele's refusal to

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[12] NO document dated November 30, 1981 appears among either party's exhibits. Dunham may be referring to Steele's November 30 pay warrant or an explanatory document attached thereto.

sign the December 14 letter. It noted that Steele had been informed that his signature was only for verification of receipt and that he acted in an insubordinate manner. The letter stated:

> . . . if you continue to display this flagrant disregard for my instructions, you will be subjected to disciplinary action including, but not limited to, dismissal.

Steele signed the December 22 letter with the notation that it was "signed under threat of disciplinary action including dismissal." He also wrote that Vanderpool stated that it was a disciplinary letter and "denied me any union representation in this matter. He is allowing me 1/2 hour to a rebuttal."

CSEA's final allegation concerns the District's unilateral imposition of the written acknowledgment requirement.[13] In

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13Paragraph six of the factual statement attached to the unfair practice charge alleges:

> 6. On or about April 6, 1981, District Superintendent Dunham tried to unilaterally change established procedures by demanding that CSEA President Roberts sign for receipt of letters from the District on contractual matters. President Roberts refused to sign, but did send a letter dated April 7, 1981, to the District which stated the District should propose such changes through the bargaining process. The District never responded to this letter, however, on or about October 1, 1981, the District unilaterally implemented a requirement that CSEA Representatives Roberts and Steele must sign receipt of all letters under threat of disciplinary action, which could include

that regard, Roberts testified that the District began insisting on written acknowledgment after the Ledbetter hearing in the first part of April 1981. At that time, Roberts himself was asked to sign for receipt of information. According to Roberts, he asked the superintendent to meet and negotiate this change. While no meeting was held, the District discontinued the practice.

In September, however, Steele was asked to acknowledge receipt of the letter concerning the 75-pound lifting limitation. In conjunction with the grievance filed regarding that demand, Roberts wrote to Dunham on September 23, 1981, stating:

> We have been provided with a copy of the REPRIMAND which you issued to Eric Steele September 23, 1981. Stamped on the REPRIMAND is a request that Eric Steele must answer this derogatory REPRIMAND within 15 days.
>
> Such request violates the negotiated contract and sets forth terms and conditions of employment not negotiated by the parties. Such unilateral change of terms and conditions of employment is in violation of rights guaranteed by the "RODDA ACT".
>
> It appears that your REPRIMAND is retaliatory action against Eric Steele because of his testimony in the Ledbetter unfair labor practice charge, and his present union activity.

> dismissal. CSEA again demanded to meet and negotiate such change. To date, the District has not responded to that request.

> Therefore, this is a demand to meet and negotiate on your unilateral attempt to change Article 900 of our collective bargaining agreement.[14]
>
> A response to this letter is expected within 5 days.
>
> Further, this letter is a demand on you to cease and desist in the harassment and retaliatory action taken against Eric Steele.

Roberts wrote a second letter to the District on October 15, which stated:

> In response to my letter of September 23, 1981 regarding Grievance No. 123, I asked you to respond within five (5) days, in your unilateral attempt to change Article 900 of our collective bargaining agreement.
>
> Also, this was a demand on you, GEORGE DUNHAM to cease and desist in the harassment and retaliatory action taken against Eric Steele.
>
> The intent of this letter is that you and each and all agents affilliated [sic] with you shall be put on notice of matters and things set forth herein.
>
> Whereas, you failed to respond, or ignored the demand to meet and negotiate this change.
>
> Your default in this request is now being processed as an unfair labor practice by CSEA.

Roberts testified that he received no response to either of his letters, and that, because the parties never had a meeting,

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[14]Article 900, section 902 provides that employees be given copies of any derogatory written material before it is placed in their personnel file. It requires that the employee be given an opportunity to initial, date and respond to material.

no written proposals were presented by CSEA to the District.

Dunham's testimony differs from Roberts'. Dunham agreed that the practice of requiring employees to sign for receipt of letters was done in response to the problem revealed at the Ledbetter hearing, that is, "people have forgotten that they have received information." However, he testified that the practice of requiring written acknowledgment did not begin immediately after the Ledbetter hearing but during the summer. He testified that, after the Ledbetter hearing, the management team devised the card to be read to employees to explain that their signature did not indicate concurrence with the contents of the document. According to Dunham, everyone was required to sign for receipt of information, not only Roberts and Steele.

Dunham's testimony also does not fully comport with the admissions made in the District's answer to the charge. In its answer, the District responded to paragraph 6 of the charge as follows:

> Admits that on or about April 6, 1981, Roberts refused to acknowledge receiving a letter and further admits that Roberts wrote a letter dated April 7, 1981, admits that on or about October 1, 1981, the District implemented a requirement that employees acknowledge receiving written work instructions and other correspondence from the District and further admits that failure to comply with work instructions could result in discipline being taken against the employee . . . .[15]

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[15]On January 8, 1982, a PERB hearing officer granted the

As to the request to negotiate the acknowledgment policy, Dunham testified:

> Q. And did the union ever ask you to negotiate that particular procedure?
>
> A. The union had said that we had to negotiate it, and that they disapproved, and they thought that we were out of order. They never came with a proposal.
>
> Q. And did you ever refuse to meet with them to discuss it?
>
> A. No. We have discussed it many times.
>
> Q. You say we have discussed it, who would that be?
>
> A. Excuse me, Mr. Massey, Mr. Roberts and myself.

DISCUSSION

Unlawful Discrimination

The thrust of CSEA's first contention in this case is that the District discriminated against Steele because of his testimony at the Ledbetter hearing. Thus, in our assessment of these particular charges, we have reviewed the evidentiary record to determine whether the District's conduct was unlawfully motivated and thus bore a sufficient nexus to Steele's protected activity. Novato Unified School District

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District's request to dismiss paragraph six of CSEA's charge, which referred to the unilateral change in these acknowledgment procedures said to have occurred on April 7, 1981, more than six months prior to the date when CSEA filed the instant charge. CSEA did not appeal the partial dismissal of the charge to the Board itself. Thus, the alleged unilateral change in the instant case concerns the District's conduct in the fall when it again began requiring written acknowledgment of receipt.

(4/30/82) PERB Decision No. 210. Where direct evidence is lacking, we have looked to such factors as timing (North Sacramento School District (12/20/82) PERB Decision No. 264; Coast Community College District (10/15/82) PERB Decision No. 251), disparate treatment (San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261; San Leandro Unified School District (2/24/83) PERB Decision No. 288), departure from past procedures (Novato, supra) and inconsistent justifications (State of California (Department of Parks and Recreation) (7/29/83) PERB Decision No. 328-S) which, under certain circumstances, may support an inference of unlawful motivation.

First, in agreement with the ALJ, we find that the District did not discriminate against Steele by failing to permit him to return to work with his wrist injury.

Specifically, we affirm the ALJ's conclusion that Steele was not treated differently than John Thackeray or Fred Machado. These employees, unlike Steele, were not placed on light duty restrictions by their physicians. Thackeray testified that, when he first returned to work after his injury, his supervisor, Pete Neese, saw his arm in a cast and asked him if he was able to work or whether he was given any job restrictions by his doctor. Thackeray's testimony implies that he told Neese that the doctor had not said anything about "not working," and the matter was not pursued by Neese or Vanderpool.

Similarly, Machado's physician did not place any limitations on his job performance after he suffered an injury to his knee. He testified that his doctor's instructions were that he could perform his duties if he was not in pain.

Based on this evidence, CSEA has failed to demonstrate that the District's treatment of Steele was substantially different from that of Thackeray and Machado or that it bore any nexus to Steele's testimony at the Ledbetter hearing. The salient difference between these employees and Steele is the fact that only Steele's doctor imposed any work restrictions.

In addition, the various duties performed by each employee further explain the basis for the District's treatment of Steele. At the time of his injury, Thackeray was employed as a painter/carpenter, a job which Thackeray described as "primarily doing painting, spray painting, brush painting some of the classrooms, and exterior walls . . . ." Although Thackeray's right arm was in a plaster cast that extended from his knuckles to his elbow, he testified that he went ahead and did his work, missing no work during the six to eight weeks his arm was in the cast. Steele's own testimony confirmed Thackeray's. Steele testified that Thackeray worked with the cast on during the summer months and that he saw Thackeray painting on a scaffold or ladder wearing his cast.
Dale Roberts also testified that he saw Thackeray spray

painting and working with tools using his right arm when his arm was in a cast.

Machado was a lead person at the time he was injured. His duties included bus driving, supervision and training of bus drivers, mechanical duties and all related clerical work. For the duration of Machado's knee injury, he "pulled himself off" the bus driving duties but continued to do his mechanical and supervisory duties. Thus, while Machado's injury did affect the type of work he performed, the scope of his actual duties permitted him some flexibility. It is unclear from the testimony who was assigned to perform Machado's prior two and one-half hour bus driving detail. There is no suggestion, however, that he encountered any difficulty in finding another employee to substitute for him or that Machado sat idle without alternative duties to perform during the previously-occupied bus driving period.

Unlike both Thackeray and Machado, Steele's wrist injury was incompatible with his job duties. Aside from Steele's own self-serving statement that he was able to perform his duties while his right arm was in the cast, Vanderpool persuasively testified to the contrary. A cursory review of the work orders for the specific jobs actually performed during the summer months by Steele's substitute confirms Vanderpool's opinion that the work required the use of two arms. These work orders seriously undermine the credibility of Steele's assertions,

both as to his abilities and as to his opinion of the tasks likely to be performed during the summer months.

Based on these factors, we reject CSEA's contention that the District discriminated against Steele by failing to accommodate him by adjusting his duties. Unlike Thackeray, Steele's injury did interfere with the performance of assigned duties and, unlike Machado, few aspects of Steele's job could be performed with his wrist injury, and the duties covered by the doctor's job restrictions could not be reassigned.

CSEA also contends that the District's conduct was inconsistent with regard to Steele's two injuries. Specifically, CSEA asserts that the District changed its position and demanded that Steele be free of all work restrictions, including those placed on him by his doctor in the course of his earlier treatment of Steele's shoulder injury. In support of that contention, Steele testified that, after his wrist injury, Vanderpool and Machado both told him he would have to have work releases covering both injuries before returning to work.

These statements are clearly at odds with the earlier situation when Steele was permitted to work with limitations placed on over-the-shoulder lifting. However, the evidence supports the ALJ's conclusion that, in spite of these statements, Steele was not treated inconsistently. Steele was not permitted to return to work in June because of his wrist

injury and not because of the lifting limitations. As stated above, the job duties assigned during the summer unquestionably required the use of both hands. Steele's wrist injury prevented such performance. When Steele visited Dr. Lewis in mid-August and received a work limitation ordering "no over shoulder lifting greater than 75 pounds," Vanderpool's response was that Steele's shoulder release looked good but that he could not return to work because of his wrist injury. Similarly, when Dunham inquired of Dr. Lewis as to whether the light duty restriction was because of Steele's wrist or shoulder injury, Dr. Lewis advised that the 75-pound limitation referred to Steele's shoulder injury and that his wrist needed more time to heal.

As noted by the ALJ, at the time Steele returned to work on August 31, 1981, with Dr. Lewis' "Full work release from his wrist fracture," Steele's release dated August 11, 1981, which imposed a 75-pound lifting limitation, remained viable. Thus, despite being told that all restrictions had to be eliminated, Steele was in fact permitted to return to work with the shoulder limitation on August 31, 1981, when the cast was removed from his arm. In sum, the evidence does not support an inference that the District's treatment of Steele was inconsistent or bore any nexus to his testimonial conduct.

Acknowledgment Rule

Next, CSEA excepts to the ALJ's conclusion that Steele was

not harassed or discriminated against by virtue of the District's requirement that Steele indicate receipt of documents by written acknowledgment.[16] Specifically, CSEA claims that the ALJ failed to fully assess the factual circumstances in light of its argument that the District's "harassment campaign" against Steele involved inconsistent insistence on Steele's written acknowledgment.

The District's position is that the negotiated agreement permits it to require employees to acknowledge receipt of all documents that may be considered derogatory. Specifically, the District points to Article 900, section 902, which provides that employees be presented with any derogatory material and, before its entry into their personnel files, be "given an opportunity . . . to initial and date the material and to prepare a written response . . . ." In addition, the District cites to Steele's own testimony in which he explained the need to have Machado reduce to writing his refusal to let Steele return to work after suffering his wrist injury.

The ALJ found an inference of unlawful motive because the requirement was first imposed in September, not long after the District changed its reaction to Steele's medical releases in July. However, this chain of discriminatory conduct seems to

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[16]Contrary to the original charge, the issue of discriminatory application of the acknowledgment requirement is raised by these exceptions as to Steele and not as to Roberts.

erroneously link the acknowledgment requirement to the other alleged discriminatory act, the District's posture as to Steele's back injury, a contention we dismiss as unsupported. With that link removed, the temporal evidence does not support the allegation that the District imposed the acknowledgment requirement in retaliation for Steele's testimony at the Ledbetter hearing on February 25, 1981.

The ALJ's proposed decision in the Ledbetter case issued June 4, 1981. The first time Steele was required to attach written acknowledgment was September 16, 1981. Thus, the first time Steele was required to sign for a document was some seven months after the Ledbetter hearing and more than three months after the proposed decision issued in which that ALJ credited Steele's testimony. Moreover, Steele was not required to sign for receipt of Vanderpool's denial of his grievance on August 7, 1981, which was closer in time to his protected activity. Thus, the element of timing does not clearly raise suspicion of unlawful motivation.

The record with regard to disparate application of the rule is also inconclusive. Dunham testified that the requirement was applied to all employees and grew out of management's legitimate concerns subsequent to the Ledbetter hearing. This claim is not disturbed by evidence that the District may have varied its practice in applying the acknowledgment requirement to Steele. Lacking is the critical evidence that Steele was

treated differently from other employees. Thus, from the record before us, unlawful motive does not emerge from any evidence of disparate application of the rule.

Some indicia of unlawful motive emerge from the District's explanation for the rule. The District initially maintained that correcting the problem of proving receipt of documents was the purpose for imposing the requirement. It also explained, however, that the rule was consistent with its contractual obligation to permit employees to initial derogatory materials. We conclude, however, that the District's two justifications, while divergent, are not necessarily inconsistent. One could argue that, since derogatory material is more apt to be the subject of a grievance or unfair practice charge, the necessity for written acknowledgment to facilitate proof of receipt is greater in those instances.

In sum, our review of the transcript and examination of the numerous documents Steele was required to sign, suggests that the District's behavior was excessive and perhaps ill-advised. However, while the large number of documents issued by the District and the trivial nature of the issues addressed by these letters raise some serious questions as to the District's intentions, we remain unconvinced by the evidence that this conduct bears a sufficient connection to Steele's Ledbetter testimony.

Negotiability

CSEA also objects to the ALJ's conclusion that Steele did not have the right to a union representative when asked to acknowledge receipt of various documents. It argues that, because the ALJ found imposition of the acknowledgment rule to be negotiable as a matter of employee discipline, Steele was entitled to representation.

First, we find that the District was free to unilaterally institute the acknowledgment requirement notwithstanding the fact that refusal to do so could result in discipline. We find the ALJ's reliance on the Board's decision in San Bernardino City Unified School District (10/29/82) PERB Decision No. 255 to be misplaced. In that case, the Board found that certain rules of conduct were negotiable based on the finding that the rules were related to the employees' hours of work. The unilaterally enacted rule requiring lesson plans in that case bore a relationship to hours of employment because it created a new, mandatory job duty requiring employees to work more hours. Similarly, the rule prohibiting employees from leaving their work site during work hours impacted on employees' hours of employment because of its intrusion on nonduty lunch or break periods.

In the instant case, however, we find that the written acknowledgment rule does not satisfy the requirements of the Board's test for negotiability articulated in Anaheim Union

High School District (10/28/81) PERB Decision No. 177. We find no evidence that the rule requiring employees to sign for receipt of documents bore any logical or reasonable relationship to wages, hours or other enumerated terms and conditions of employment. The fact that discipline may result if an employee refuses to acknowledge receipt does not elevate the rule itself to a disciplinary matter with an impact on wages, hours or other enumerated subjects. To adopt this analysis would bootstrap all work rules into negotiable items within scope. We, therefore, find the institution of this rule to fall within the parameters of the employer's discretion.

Counsel of Union Representative

While concluding that the District was free to unilaterally impose the written acknowledgment rule, we nevertheless find that Steele was entitled to the counsel of his union representative on those occasions when he was asked to sign for receipt of documents.

In the instant case, the District asserts that no union representation was necessary because it was merely requesting that Steele sign the documents to signify receipt and that written acknowledgment did not indicate agreement with the allegations contained in the documents. However, there is no evidence that Steele was so advised by Vanderpool specifically as to each letter or that Steele, in fact, clearly heard and understood the meaning of the language written on the card from

which Vanderpool read. Absent these assurances, it was reasonable for Steele to assume that his signature did evidence approval or agreement and, therefore, to seek the advice of his union representative before signing the documents. Moreover, we find verbal recitals insufficient to dispel Steele's hesitancy to act unadvised where the documents themselves contained no indication that written acknowledgment did not indicate agreement. Thus, based on his uncertainty as to the significance of attaching his signature to the letters, it was reasonable for Steele to seek the assistance of a union representative to provide advice and direction.

We find that an employee's right to representation includes the right to consult with a union representative likely to be more knowledgeable when that employee is asked to supply immediate, written response to material placed in his/her personnel file. The right to such representation is justified when the employee reasonably believes the written response to such material will likely be reviewed by superiors when promotions, transfers or evaluations are prepared (see Modesto City Schools (3/8/83) PERB Decision No. 291), or when disciplinary measures are contemplated. Thus, while we do not mandate that prior submission to the union representative is required when an employee is presented with most routine or perfunctory documents, in this case, we find that Steele was so entitled.

Here, the barrage of documents began with the first letter accusing Steele of having improperly lifted objects beyond the 75-pound limitation. His concern for the threatened discipline was exacerbated by the uncertainty Steele felt concerning the significance his signature would carry. Indeed, when presented with each subsequent letter, Steele entertained reasonable concerns that his signature might indicate more than mere receipt and would subject him to future disciplinary action. Under such circumstances, Steele was entitled to seek the advice of his union representative prior to signing these documents.

In reaching this conclusion, we do not rely on the rule articulated in NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689]. Under Weingarten, the right to union representation arises only in those situations where the employee is present at an investigatory interview which the employee reasonably believes will result in disciplinary action. Subsequent decisions have clarified the parameters of the rule and have extended the employee's representation rights to disciplinary interviews where the discussion is not merely for the purpose of informing the employee of a previously determined decision to impose discipline. Baton Rouge Water Works Company (1979) 246 NLRB 995 [103 LRRM 1056]. See Morris, Developing Labor Law, Second Ed., pp. 149-156. While this Board has adopted a rule affording employees Weingarten rights

(Rio Hondo Community College District (11/30/82) PERB Decision No. 260), the Weingarten rule is inapplicable here because in no situation where Steele was asked to sign for receipt did a "meeting" or "interview" take place.[17]

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[17]While recognizing Weingarten's inapplicability, we note that the lead opinion in Baton Rouge, supra, would extend Weingarten protections to interviews where the employer informs the employee of its previously made disciplinary decision and the employer attempts to get the employee to admit his/her wrongdoings or to sign a statement to that effect.

In addition, we note the following cases where the import of prior union consultation has been discussed. In Amax, Inc., Climax Molybdenum Co. (1977) 227 NLRB 1189 [94 LRRM 1177], the NLRB held that, under Weingarten, both the employee and the union representative had the right to a pre-interview consultation meeting prior to an investigatory interview which might have resulted in discipline. The Board found merit in the argument that Weingarten logically extends to prior consultation in order to insure effective representation.

In Climax Molybdenum Co. v. NLRB (10th Cir. 1978) 584 F.2d 360 [99 LRRM 2471], the Tenth Circuit reversed the NLRB's decision and declined to extend Weingarten rights beyond the actual investigatory interview. It stated, however:

> The employer is under no obligation to accord the employee subject to an investigatory interview with consultation with his union representatives on company time if the interview date otherwise provides the employee with adequate opportunity to consult with union representatives on his own time prior to the interview. Thus, we do believe that Weingarten requires that the employer set investigatory interviews at such a future time and place that the employee will be provided the opportunity to consult with his

Nevertheless, we do not find this failure fatal to the result reached herein. The employee's right to prior consultation with a union representative derives from the right to participate in the activities of an employee organization, particularly the representation of its members in their employment relationship with the public school employer. In accordance with those cases where the Board has specifically found that EERA extends employees' representation rights beyond those granted by Weingarten (Rio Hondo Community College District (12/28/82) PERB Decision No. 272; Redwoods Community College District (3/15/83) PERB Decision No. 293, rev. pending), we find that Steele was entitled to consult with his union representative prior to signing the documents presented to him by his superior. The District's failure to permit this

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representative in advance thereof on his own time. (Emphasis supplied.)

In Pacific Telephone and Telegraph Co. v. NLRB (9th Cir. 1983) 711 F.2d 134 [113 LRRM 3529], the Ninth Circuit recently upheld the decision of the NLRB and found that an employee was entitled to a pre-interview conference with his union representative. By failing to so provide, according to the Court, "the ability of the union representative effectively to give the aid and protection sought by the employee would be seriously diminished."

While these cases ultimately involved circumstances where an investigatory interview ensued and thus Weingarten rights attached, the principle of consultation with a union representative before responding to employer inquiries or accusations maintains.

consultation violated subsection 3543.5(a) of EERA by interfering with Steele's statutory right.

REMEDY

Subsection 3541.5(c) of the Act empowers the Board to fashion a remedy which will best effectuate the purposes of EERA. We have found that the District unlawfully insisted that Steele sign for receipt of numerous documents without affording him the opportunity to consult with and be advised by a representative of his union. Accordingly, we find it appropriate to order the District to remove from Steele's personnel file any and all documents which refer to his failure to sign for receipt and all documents which Steele did in fact sign without aid of his representative.

ORDER

Upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Placer Hills Union School District shall:

A. CEASE AND DESIST FROM:

Interfering with, restraining or coercing employees because of the exercise of rights guaranteed by the Educational Employment Relations Act by refusing to afford employee Eric Steele the opportunity to consult with his union representative prior to attaching his signature signifying receipt of documents tendered.

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

1. Remove and destroy all materials in the personnel file of Eric Steele which refer to his failure to attach written acknowledgment of receipt or which were signed by Steele without affording him an opportunity to first consult with his union representative.

2. Within thirty-five (35) days after the date of service of this Decision, post copies of the Notice to Employees attached as an appendix hereto. Such posting shall be maintained for at least thirty (30) consecutive workdays at the District's headquarters office and in conspicuous places at the locations where notices to classified employees are customarily posted. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

C. All other charges are DISMISSED.

Members Jaeger and Burt joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-453, California School Employees Association and its Placer Hills Chapter 636 v. Placer Hills Union School District, in which both parties had the right to participate, it has been found that the District violated Government Code subsection 3543.5(a).

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

A. CEASE AND DESIST FROM:

Interfering with, restraining or coercing employees because of the exercise of rights guaranteed by the Educational Employment Relations Act by refusing to afford an employee the opportunity to consult with his/her union representative prior to attaching his/her signature signifying receipt of documents tendered.

B. TAKE THE FOLLOWING ACTION DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Remove and destroy all materials in the personnel file of Eric Steele which refer to his failure to attach written acknowledgment of receipt or which were signed by this employee without being afforded the opportunity to first consult with a union representative.

Dated: ______________________ PLACER HILLS UNION SCHOOL DISTRICT

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, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.