STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH.	)	
	)	
Charging Party.	)	Case No. LA-CE-2143
	)	
v.	)	PERB Decision No. 571
	)	
RIVERSIDE UNIFIED SCHOOL DISTRICT,	)	May 7, 1986
	)	
Respondent.	)	
	)	

Appearance: Tony Petrich, on his own behalf.

Before Hesse, Chairperson; Morgenstern, Burt, Porter and Craib, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a Board agent's partial dismissal of Charging Party Tony Petrich's allegations that certain actions of the Riverside Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).[1]

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

Section 3543.5 states, in pertinent part:

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

Petrich alleged that the following conduct by the District violated the Act:

1. The District unilaterally changed his working conditions when it placed adverse material in his personnel file more than five days after he was provided copies of the material in violation both of section 17.1 of the contract between the California School Employees Association and the District (Contract) and of the Act.

2. The District made an unlawful unilateral change when it failed to give him a copy of a corrected memo prior to placing it in his personnel file in violation both of sections 17.1 and 17.4 of the Contract and of the Act.

3. The District unlawfully retaliated against Petrich for his participation in protected activity when the assistant superintendent recommended his dismissal and informed him of a month's suspension after a Skelly hearing.

4. The District's involuntary transfer of Petrich from Woodcrest Elementary School to North High School around

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

February 25. 1985. was both in retaliation for protected activities and an unlawful unilateral change.

A complaint issued on allegation number three above, but the remaining allegations were dismissed by the regional attorney for failure to state a prima facie case. Upon reviewing the entire record in light of the appeal, we affirm the regional attorney's dismissal of the allegations based on the District's failure to provide Petrich with a corrected copy of a memo prior to placing it in his personnel file and on the timing of the placement of materials in Petrich's file. For the reasons that follow, however, we reverse her dismissal of part of the charge based on the involuntary transfer.

DISCUSSION

The first issue in regard to all of the dismissed charges is whether sufficient facts were alleged to state a prima facie case of unlawful unilateral change.[2] To state such case. Charging Party must allege facts indicating that action was taken which changed the status quo regarding a matter within the scope of representation without giving the exclusive representative notice and an opportunity to bargain. San Francisco Community College District (1979) PERB Decision

[2]In reviewing a dismissal of a charge for failure to state a prima facie case, the allegations in the charge are presumed to be true. San Juan Unified School District (1977) EERB Decision No. 12. (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.)

No. 105; Anaheim City School District (1983) PERB Decision No. 364. The Board has also indicated that, to be unlawful, such a change must amount to a change in policy having either a generalized effect or a continuing impact on the matter within the scope of representation. Grant Joint Union High School District (1982) PERB Decision No. 196.

Timing of the placement of materials in Charging Party's personnel file: Contract section 17.1 provides as follows:

> Employees shall be provided with copies of any derogatory written statements five (5) workdays before it is placed in the employee's personnel file. Full-time permanent employees shall be given up to two (2) hours during normal working hours and without loss of pay to prepare a written response to such material. The written response shall be attached to the material.

Petrich provided one example of a derogatory memo which stated on its face that it and Petrich's response would be placed in his file ten workdays after the date of the memo. He said that the Contract language "five workdays" means five days, no more, no less, and that the District's action constitutes a breach of the Contract and thus an unlawful unilateral change in Petrich's terms and conditions of employment. The District said that the above Contract language means a minimum of five days, but that the time could be longer. It said that its conduct was consistent with past practice.

We find that the above allegation fails to state a prima facie case of unlawful unilateral change. It is clear that the

purpose of section 17.1 of the contract is to provide an employee with adequate time to respond to a derogatory statement prior to its placement in his/her personnel file. Although the language Petrich points to is. if read alone, susceptible to his interpretation, we find that, when it is read in the context of the whole section, it clearly establishes a minimum period for employee response that the employer must observe before placing the document in the file. Since the District did provide the necessary minimum response period, its conduct did not breach the contract. Thus, no violation of ERRA is alleged and this charge is dismissed.

Failure to send Petrich a corrected copy of an adverse memo: The memo in question referred to a pre-disciplinary meeting held on "January 8, 1984." Petrich informed the District in a grievance that the correct date was January 8, 1985. The date was corrected on the memorandum prior to its placement in Petrich's personnel file, but he alleges he did not receive a copy of the corrected memo.

Petrich alleges that the failure of the District to provide him with a copy of the corrected memo constitutes an unlawful unilateral change in that it violates Contract sections 17.1, described above, and 17.4, which provides that:

> Any person who places written material or drafts written material for placement in an employee's file shall sign the material and signify the date on which such material was drafted.

The District complied with both provisions when it originally placed the memo in Petrich's personnel file. The memo contained an inadvertent or typographical error in the date of the referenced meeting. The District agreed to correct this error and Charging Party was fully aware of its intention. Neither of the above Contract sections can be reasonably read to apply to the correction of such an error where the employee is aware of both the error and its change.[3] Therefore, no breach of the Contract is adequately alleged and no unilateral change can be found. For this reason, we affirm the regional attorney's dismissal of this charge for failure to state a prima facie case.

Petrich alleges that his reassignment from Woodcrest Elementary School to North High School constitutes a change in three District policies. First, Petrich asserts that the District changed its policy on transfers. In support of this, he states that a prior contract included a provision setting out a policy on transfers. He does not quote or paraphrase the substance of that provision or policy. Petrich says that that provision was deleted in subsequent contract negotiations, but the California School Employees Association (CSEA) and the

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3Had the correction been a material one, arguably the corrected memo could be viewed as a new document triggering application of the two Contract provisions. However, that is not the situation here.

District were unable to agree on a new transfer policy and later contracts have therefore been silent on that subject.

It is settled law that an employer policy on a negotiable subject may be changed only after negotiations with the exclusive representative. Thus, until a policy is replaced by a mutually-agreed upon new policy, the old policy remains in effect. Oak Grove School District (1985) PERB Decision No. 503. Here. Petrich has specifically alleged that the negotiating parties have been unable to agree to a successor policy to the old contract provision. Since no facts were presented indicating that the parties intended the elimination of the prior contract provision to create a policy prohibiting or restricting involuntary transfers, it follows that the old contract policy remains in effect as a matter of past practice. Because Petrich has not alleged exactly what the policy is, he has not adequately alleged that the District has departed from the policy. We, therefore, affirm the

[4]We note, in addition, that the regional attorney obtained information that the District's established practice is to transfer employees involuntarily when it is in the best interests of the District and after informal discussion with CSEA. Petrich was advised of this in a letter dated May 22, 1985 and, thus, had the opportunity thereafter to submit additional or contrary information and amend his charge. Instead of doing so. he filed this appeal. When factual information obtained by the regional attorney does not conflict with the factual allegations set forth in a charge and is not contested by the Charging Party, then it may fairly be presumed true for the purposes of charge processing pursuant to PERB Regulation 32620.

regional attorney's conclusion that the charge fails to state a unilateral change in transfer policy.

The charge also states that the District changed its policy on hours by assigning Petrich to new work hours when it transferred him to North High School. The charge states that:

> . . . the District has agreed, pursuant to Government Code section 3543.2, that, once an employee's work hours are established, a change, or changes in an employee's hours of employment is/are negotiable.

Petrich also references one instance in which the District did negotiate a change in hours. Liberally construing the charge, it appears that Petrich is asserting that existing policy does not permit such a change in hours as allegedly occurred unless the change has been agreed to in negotiations between CSEA and the District. The District apparently told the regional attorney that its existing policy permits it to change an employee's work hours when the employee is reassigned to a new position. In imposing her own resolution of this factual conflict, the regional attorney exceeded her authority. We, therefore, reverse her determination and order that a complaint issue on this allegation of unilateral change.

Finally. Petrich also alleges that his reassignment constituted a unilateral change in his job classification assignment. Specifically, he alleges that his position at

Woodcrest Elementary School was that of "Gardener" but, when he was reassigned to North High School, he was placed in a position classified as "Gardener-Custodian" and given new duties primarily of a custodial nature. According to the charge, that classification is not included in the list of agreed-upon classifications which appear in the current contract. Moreover. Petrich alleges he is now required to perform custodial duties as well as the gardening duties he performed in his prior assignment.

Upon investigating, the regional attorney received information from the District that, although the notice it first sent Petrich indeed indicated his new position would be that of a gardener-custodian, it later sent him a letter stating that the reclassification was in error and that his classification at the new school remained that of a gardener. However, a comparison of his duties at the old school with those of the new assignment indicates that he is now performing more custodial duties than before.

Even though there may be no change in his classification title, the change in duties may constitute a de facto change in classification. While the new duties may be comprehended within his job description, the evidence in the record is insufficient to draw that conclusion with certainty. Therefore, we reverse the regional attorney's determination and order that a complaint issue on this charge.

The involuntary transfer as a reprisal for protected activities: Petrich also alleges that the involuntary transfer was made in retaliation for his participation in protected activities. To state a prima facie case of unlawful retaliation, facts must be alleged which, if proven, indicate that the employee had participated in protected activity and the employer's conduct was motivated, at least in part, by that protected activity. Unlawful motive may be inferred from circumstantial evidence. Novato Unified School District (1982) PERB Decision No. 210. Petrich has clearly engaged in protected activity in that he has filed numerous grievances and unfair practice charges against various District actions. Unlawful motivation on the part of the District may be inferred from several factors: much of Petrich's protected activity has resulted in extensive conflict with the District, the involuntary transfer followed on the heels of the protected activity, and the District indicated that it was not made because of the District's manpower needs but, rather, because of its dissatisfaction with Petrich's performance. While not conclusive, these factors imply a nexus between Petrich's protected activity and the District's action.

In sum, for the foregoing reasons, we find that Charging Party has alleged prima facie cases of unilateral change in hours and in classification/duties and of retaliation based on the involuntary transfer. Thus, we order that a complaint

issue on those charges. We find, however, that a prima facie case of unilateral change was not stated with respect to the involuntarily transfer itself, to the timing of the placement of derogatory documents in an employee's personnel file or with regard to the District's failure to provide Petrich with a corrected copy of a memo placed in his personnel file and, therefore, affirm the regional attorney's dismissal of these charges.

ORDER

Except for the alleged change in the transfer policy itself, the dismissal of charges in Case No. LA-CE-2143 based on the Riverside Unified School District's involuntary transfer of Tony Petrich is hereby REVERSED and the charges are REMANDED to the general counsel for the issuance of a complaint. The dismissal of the charges in Case No. LA-CE-2143 based on the District's failure to provide Tony Petrich with a corrected copy of a memo and on the timing of the placement of derogatory documents in an employee's file is hereby AFFIRMED.

Members Morgenstern and Craib joined in this Decision.

Member Porter's Concurrence and Dissent begins on page 12.

Chairperson Hesse's Concurrence and Dissent begins on page 26.

Porter, Member, concurring and dissenting: I concur in the majority's dismissal of those portions of the charges that allege a unilateral change when the District failed to provide Petrich with a copy of a corrected memo, failed to place material in his file within five days after his receipt, and involuntarily transferred him.[1] As to the alleged failures by the District to provide Petrich a corrected copy of a memo and to comply with the contract as to timing of placement of material in his file, I would dismiss, not on the ground that no contract violation exists, but rather, on the ground those charges fail to meet the standard established by the Board in Grant Joint Union High School District (1982) PERB Decision No. 196. I must, however, respectfully dissent from the remainder of the majority opinion.

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[1]While the majority opinion states at page 3 that it reverses the regional attorney's dismissal of the charges based on involuntary transfer, and again on pages 10 and 11 it states it would find a prima facie case of unilateral change and of retaliation based on the involuntary transfer and orders a reversal and issuance of a complaint based on the involuntary transfer, the Decision itself states on pages 7 and 8 that it affirms the regional attorney's conclusion that the charge fails to state a unilateral change in transfer policy. I read this to mean that, while the majority would not find a prima facie case has been stated that the transfer itself was unlawful, certain actions flowing from the transfer are to be specified in the complaint, i.e., Petrich's change in hours and change in job classification. This distinction would have an impact on the remedy, should Charging Party prevail at the hearing, in that it would not be appropriate to order the District to return Petrich to his former job site when the transfer itself is not unlawful.

Charging Party has asserted that certain conduct by the District breached the negotiated agreement between CSEA and the District and, therefore, violated EERA section 3543.5(c). The majority opinion dismisses these two allegations (timing of placement of material in Petrich's file and providing him a corrected copy of a memo) on the ground that the conduct asserted does not breach the contract. However, conduct which breaches a negotiated agreement may nonetheless fail to constitute an unfair practice. This distinction was articulated in Grant, supra. In Grant the Board stated;

> PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. . . . This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. . . . By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement.

(Grant, supra, pp. 8-9, emphasis added.) The Board in Grant proceeded to hold that a prima facie case will be successfully stated if the complaint alleges facts sufficient to show: (1) that the district breached or otherwise altered the parties' written agreement; and (2) that those breaches amounted to a change in policy, that is, they had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members. In dismissing a part of the association's charges, the Board found that the facts asserted merely challenged the district's application of the particular contract provision. The district did not deny its contractual obligation, but claimed that it had properly implemented the provision. The Board stated, "We find in these competing claims nothing which demonstrates a 'policy change.'" (Id. at p. 12).

The Grant test was devised to accommodate the interaction between conduct that allegedly violates both a collective bargaining agreement and EERA, in light of Government Code section 3541.5(b).[2] Grant specifically holds that not all

[2]Section 3541.5(b) states:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter. (Emphasis added.)

contract violations constitute violations of EERA, and it places the burden of articulating an EERA violation on the charging party, as a pleading requirement. This is appropriate in that this agency requires charging parties to state prima facie cases, including factual allegations in support of the charges, before a matter may proceed to a complaint and hearing. See PERB Regulation 32615(a)(5).

Examination of established labor law principles reveals a legislative and private sector preference for encouraging parties to settle disputes involving the terms of the collective bargaining agreement through the negotiated dispute resolution mechanism of the contract. Thus, we find in Government Code section 3541.5(a) a jurisdictional prohibition against the issuance of "a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either through settlement or binding arbitration."[3]

Similarly, under the National Labor Relations Act, a contract violation is not in itself an unfair practice. See 1 Morris, The Developing Labor Law (2d Ed. 1983) Chapter 19,

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[3]It is not clear whether this language also prohibits the issuance of a complaint where the contract provides for advisory arbitration. Clearly, PERB does not defer to an advisory arbitration decision. However, the point is, the language of the section denotes a legislative preference for utilization of the agreed-upon dispute resolution mechanism of the contract.

section IV A, p. 909 et seq., and cases cited thereunder. Consequently, the National Labor Relations Board (NLRB) and courts have grappled with the question of whether the NLRB has jurisdiction to interpret contracts between the parties. The question has been answered in the affirmative, where such interpretation is necessary for the board to resolve the unfair practice charge. Thus, the United States Supreme Court, in the leading case of NLRB v. C & C Plywood Corporation (1967) 385 U.S. 421 [64 LRRM 2065], held that the NLRB has jurisdiction to interpret a contract provision where the employer raised the provision as a defense to an unfair practice charge that alleged the employer unilaterally implemented a premium pay provision. In that case, the employer's unilateral action on a matter within scope, i.e., wages, clearly constituted an unfair labor practice in the absence of some defense, such as contractual authorization.[4] The underpinning of the Court's holding was that the board had done no more than to enforce the union's statutory right to negotiate on behalf of its membership, which right "Congress considered necessary to allow labor and management to get on with the process of reaching fair terms and conditions of employment - 'to provide a means by which agreement may be reached.'" Id. at 428 [64 LRRM at 2068].

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[4]The contract at issue contained no arbitration provision, and thus the Court stated that the Board's action was in no way inconsistent with its previous recognition of arbitration as "an instrument of national labor policy for composing contractual differences." *16.* at 426 [64 LRRM at 2067].

Unlike the C & C Plywood case, supra, we have here an individual employee, not represented by the exclusive representative, who asserts nothing more than a breach of contract by the employer. He does not allege that past history in the District has imbued the contractual language with the interpretation or understanding he puts forth. Significantly, the exclusive representative, which is the other signatory to the agreement and the only party that may negotiate with the employer on behalf of Charging Party (Government Code section 3543), has not undertaken to represent Charging Party in this dispute. Certainly, one inference to be drawn from this absence is that the exclusive representative does not object to the District's interpretation of the contract language.

Also, unlike C & C Plywood, where the employer unilaterally implemented a new pay incentive plan, the employer's action at issue here would not, in and of itself, clearly constitute an unfair practice. Rather, to state a prima facie case, the Charging Party would need to assert that the employer had an established past practice. Alternatively, if the Charging Party relies on the contract provision to establish the practice, then to state a prima facie unfair there must be some indication in the charges that the alleged breach of contract "represents a conscious or apparent reversal of a previous understanding" and that the violation has a generalized effect or continuing impact. Grant, supra, emphasis added. As further pointed out in Grant, the facts asserted there merely

challenged the district's application of the particular contract provision. The Board held there was nothing in those competing claims that demonstrated a policy change. So too, in the present case, all we have before us is a claim by Charging Party that the employer breached the contract when it gave him ten days to respond to an adverse memo, rather than five, before placing the adverse memo in his personnel file and that the District failed to give him a corrected copy of a memo. There is nothing in this claim that reflects a policy change. While the contract language may be subject to Charging Party's interpretation, it is also, and quite reasonably, subject to the employer's construction, which is that the provisions give the employee "at least" five days to respond and that the District was not required to provide a corrected memo under the facts asserted by Charging Party. Thus, all we are presented with here is conflicting interpretations of contractual language, which is insufficient under Grant to establish an unfair practice by the employer. Therefore, it is unnecessary to decide that no breach of contract has occurred and to do so constitutes an unwarranted contract interpretation.

I would also dismiss the allegations concerning the alleged breach of contract as a unilateral change on the grounds that an individual employee lacks standing to assert a violation of section 3543.5(c) based on conduct that assertedly violates the

contract.[5] The purpose of our agency is to insure the rights granted to the parties by statute, so that the employer and the exclusive representative, once one is selected, may meet, negotiate and reach agreement on the terms and conditions of employment as defined in EERA. Once such agreement is reached, PERB should be loath to inject itself into the interpretation of that agreement, unless it is absolutely necessary for the enforcement of statutory rights and obligations. This is especially true where one of the parties to the agreement is not even a participant in these proceedings. Thus, we are not asked in this case to preserve the union's right to negotiate, and Charging Party himself does not enjoy this privilege. (Government Code Section 3543.)

The harm sought to be prevented by section 3543.5(c) is the undermining of the exclusive representative's role in representing employees of the unit in their negotiations of terms and conditions of employment with the employer. Thus, until an exclusive representative is selected, the employer is under no duty to meet and negotiate or consult with a non-exclusive representative. Sections 3543.1 and 3543.5(c); San Dieguito Union High School District (1977) EERB Decision No. 22.[6] Similarly, once an exclusive representative is

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[5]In so concluding, I would overrule the Board's decision in South San Francisco Unified School District (1980) PERB Decision No. 112.

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

selected, a nonexclusive representative has no standing to file an unfair labor practice charge over matters involving wages, hours, and other terms and conditions of employment. Hanford Joint Union High School District (1978) PERB Decision No. 58.

Allowing an individual employee to assert that the employer violated the Act when it allegedly breached the contract (assuming the Grant standard is met) forces PERB to interpret the contract and render a binding decision on the meaning of that contract, without the benefit of the exclusive representative's position on the issue. This is analogous to an individual taking a grievance to binding arbitration, which is clearly prohibited by EERA section 3543.[7] The import of this section is to make certain that the exclusive representative has a chance to state its views, should an interpretation of the contract be reached that is contrary to its understanding. This, no doubt, is a reflection of the view that the grievance/arbitration process is all part of the collective bargaining continuum. Steelworkers v. Warrior & Gulf Navigation Co. (1960) 363 U.S. 574, 581 [46 LRRM 2416].

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[7]Section 3543 provides in relevant part:

> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration . . . and the adjustment is not inconsistent with the terms of a written

Given these policy considerations, the Board should not issue a complaint in a case where an individual employee asserts, as the basis of a charge of unlawful unilateral change, a breach of contract.

I dissent from the majority holding that a prima facie case of unilateral action has been stated with respect to Charging Party's change in job classification, duties and hours. The regional attorney found in her investigation that the District informed Petrich in writing, within one week of his receipt of the schedule marked "Gardener/Custodian," that the schedule was in error, he was classified as "Gardener," and that no classification of "Gardener/Custodian" existed. Charging Party was provided an opportunity by the regional attorney to amend his charge, but failed to do so. In his exceptions, Charging Party simply asserts that a "Gardener/Custodian" is really a "Utility Person" at two pay ranges higher than gardener. These assertions, when combined with the uncontested conclusion of the regional attorney's letter to Petrich, do not constitute a change, let alone an unfair practice.

On the issue of change in duties, the regional attorney correctly applied PERB precedent in concluding that, even if

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> agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response. (Emphasis added.)

Charging Party was performing more custodial duties, they are reasonably contemplated within his job description. Contrary to the holding of the majority opinion, no "de facto" change in job classification has been sufficiently stated, where the job description for "Gardener" specifically includes custodial duties. There is no factual dispute to send to a hearing.

On the issue of Charging Party's alleged change in hours, Charging Party asserts that, although the collective bargaining agreement is silent, the District agreed, pursuant to Government Code section 3543.5, that, once hours are established, a change in hours is negotiable. This cannot be read to mean that the District agreed to negotiate each and every individual change in hours that results from transfers. Petrich also cited a previous "mediation" situation, in which PERB supplied a mediator to resolve a dispute between himself and the District, that resulted when the District attempted to change his work hours at his site in a nontransfer situation. If Charging Party relies on this to demonstrate the District's "agreement to negotiate a change in hours," which is not at all clear from his charges, it is insufficient to support a conclusion that Charging Party has alleged that this is the existing practice regarding a change in starting times on transfers. Likewise, the mere allegation that the District "agreed" to negotiate a change is insufficient. This is so, particularly in light of the regional attorney's investigation which disclosed the District's position that its long-standing

practice on transfers is to conform an employee's work schedule to the site to which he is transferred. After Charging Party was informed of this in the regional attorney's warning letter, he did not challenge or contradict that this is, in fact, the practice on transfers. Nor did he assert that the agreement referred to in his charges encompassed transfer situations, as opposed to a change in hours at the same site. Without sufficiently alleging the existing practice on change in hours on transfers, the charge cannot state a prima facie case of unlawful unilateral change in that practice.

Further, if the District has the right to involuntarily transfer an employee, then clearly the District likewise has the right to make minor adjustments in the starting and ending times so that the employee's hours correspond to those of the new site. This, of course, assumes there is no change in the actual number of hours worked. Since Charging Party failed to state a prima facie case of unlawful unilateral change in the involuntary transfer, his charge that the District unlawfully changed his hours must likewise fail.

On the issue of the involuntary transfer as a reprisal, the majority opinion concludes Charging Party has stated a prima facie case, in that he has engaged in numerous protected activities. Further, unlawful motivation may be inferred, according to the majority opinion, from (1) the fact that much of Petrich's protective activity has resulted in extensive conflict with the District, (2) the involuntary transfer

followed on the heels of protected activity, and (3) the District indicated that the transfer was made because of dissatisfaction with Petrich's performance, rather than manpower needs.

I disagree that the charges support a prima facie case of retaliation, or that they support the majority opinion's conclusion regarding unlawful motive. The charges themselves do not even contain an allegation concerning reprisal, but rather, merely set forth a sequence of events leading up to the involuntary transfer. There is nothing in the charges filed by Petrich that alleges that his protected activity has "resulted in extensive conflict with the District." There is likewise nothing in the charges that alleges that the District indicated the reason for the involuntary transfer was not due to manpower needs, but rather, because of its dissatisfaction with his performance. The only other possible link is the timing, and timing alone is insufficient, (see Charter Oak Unified School District (1984) PERB Decision No. 404), especially given the history of Charging Party's problems in his employment.

In Charter Oak, id., the Board dismissed charges filed by an employee that alleged the district retaliated against her when it issued a letter recommending nonreemployment shortly after the charging party had filed a grievance. The charges included numerous documents that showed that the district's dissatisfaction with her performance predated her protected

activity. The Board stated;

> For the same reasons, "coincidence in time," by itself, is insufficient to prove unlawful motivation. We note that were this not so, any employee who perceived that he or she might be in danger of dismissal could, by the mere act of filing a grievance, be assured of a hearing before an administrative law judge of this agency and, further, place the legal burden of producing evidence on the employer to prove, pursuant to the test set forth in Novato, supra, that the discharge resulted from a legitimate operational justification. Such a state of affairs would be unwise and unnecessary.

Charter Oak is applicable and controlling in the present case.

The regional attorney dismissed the reprisal issue on the ground that Charging Party failed to show how the transfer was adverse. However, I believe that an involuntary transfer is itself sufficiently adverse, and nothing further need be shown in that respect. I would, nevertheless, dismiss the charge on the ground that Charging Party has failed to either allege or offer facts sufficient to fulfill the remainder of the Novato prima facie test.

For all of the foregoing reasons, I dissent and would dismiss all the charges.

Hesse, Chairperson, concurring and dissenting: I join in Member Porter's concurrence and dissent. I write additionally to note that the employer made no unilateral change in the bargaining unit's hours, only in the Charging Party's hours. As this Board has never required an employer to negotiate the hours of each employee individually, I see no reason to issue a complaint on an allegation that cannot possibly be a violation of the Act, even if Petrich's hours were changed. I would thus dismiss this allegation specifically, in addition to dismissing the rest of the charge for the reasons set forth in Member Porter's dissent.