STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOYCE C. JOHNSTON, Charging Party,	)	Case No. S-CE-246-S
v.	)	PERB Decision No. 575-S
STATE OF CALIFORNIA (DEPARTMENT OF HEALTH SERVICES), Respondent.	)	June 20, 1986

Appearances: Loren E. McMaster, Attorney for Joyce C. Johnston; Marjory Winston Parker, Deputy Attorney General, for the State of California (Department of Health Services).

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION AND ORDER

HESSE, Chairperson: Joyce C. Johnston excepts to the attached decision of the administrative law judge (ALJ) dismissing her charges that the Department of Health Services violated sections 3519(a) and (b) of the State Employer-Employee Relations Act (SEERA).[1] The Department of Health Services excepts to one finding of fact made by the ALJ, but not to the remaining findings or to his conclusions of law.

The Board has considered the entire record and the proposed decision in light of the exceptions and briefs, and hereby adopts the proposed decision and Order as the Decision and

[1]SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Order of the Board itself. Accordingly, we DISMISS, in its entirety, the unfair practice charge in Case No. S-CE-246-S.

Members Porter and Craib joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOYCE C. JOHNSTON. Charging Party. v. STATE OF CALIFORNIA (DEPARTMENT OF HEALTH SERVICES). Respondent.	Unfair Practice Case No. S-CE-246-S PROPOSED DECISION (10/23/85)

Appearances: Loren E. McMaster. Attorney, for Joyce C. Johnston; Marjory Winston Parker. Deputy Attorney General, for the State of California (Department of Health Services).

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A State-employed attorney attended a legislative hearing despite her supervisor's denial of two hours of vacation time to cover the absence. Following her subsequent grievance about the denial of vacation time, the attorney was transferred to a position she considered less desirable. The question presented here is whether the transfer was an unlawful retaliation for the protected filing of the grievance.

The charge which commenced this action was filed on March 12, 1985. by Joyce C. Johnston. As originally filed, the charge named Richard H. Koppes, deputy director of the Department of Health, as Respondent. The Public Employment

Relations Board (hereafter PERB) subsequently identified the Respondent as State of California (Department of Personnel Administration) in the complaint which was issued on April 17. 1985. The identity of the Respondent was changed by stipulation at the hearing to State of California (Department of Health Services).

The complaint alleges that by filing a grievance on September 10. 1984, the Charging Party engaged in conduct protected under the State Employer-Employee Relations Act (hereafter SEERA). By subsequently abolishing Ms. Johnston's position as lead counsel and transferring her to another position, the complaint alleges, the State retaliated against Ms. Johnston for engaging in protected conduct. This action, the complaint continues, violated SEERA subsections 3519(a) and (b).[1]

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[1]Unless otherwise indicated, all references are to the Government Code. The State Employer-Employee Relations Act is found at section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The State answered the charge on May 14, 1985. denying the key allegations in the complaint and denying that it had violated the SEERA. The State also raised several affirmative defenses, including a contention that there was no nexus between Ms. Johnston's protected conduct and the actions affecting her job. In addition, the State alleged that the decision to place Ms. Johnston in a different position was motivated by legitimate business reasons and that in any event, the change did not amount to an adverse action.

A hearing was conducted in Sacramento on August 26 and 27, 1985. The parties filed simultaneous briefs on September 23, 1985, on which date the matter was submitted for decision.

FINDINGS OF FACT

The Department of Health Services (Department) is a unit of State government which administers some 200 health-related programs. Among these are Medi-Cal, which funds health care for low-income persons, and programs involving family planning, genetic diseases and toxic chemicals. The Department is included within the definition of "State employer" under SEERA.

The events at issue took place within the Department's Office of Legal Services. During the relevant period, the legal office was divided into five units: The Preventive Health Section, the Medi-Cal Policy Section, the Audits and Investigations Section, the Toxics and Environmental Health Section and the Administrative Appeals Section.

Joyce C. Johnston, the Charging Party, was employed by the Department in May 1980. She went to the Department at the urging of Robert Tousignant. an assistant chief counsel, who had worked with her in another State department while she was a legal intern. Mr. Tousignant became her supervisor at the Department of Health Services where she started as an entry level attorney. As an attorney. Ms. Johnston held a job within State employee bargaining unit no. 2, which includes attorneys and hearing officers. Even though Ms. Johnston was a lead attorney during the relevant period and supervised the work of others, she was not excluded from the bargaining unit as being management, supervisory or confidential.

Ms. Johnston received rapid promotions following her employment with the Department. She was admitted to the State Bar in 1977 and before the end of 1983 she already had attained the position of Staff Counsel III, the highest rank-and-file job for attorneys within the Department. Ms. Johnston has received a series of highly favorable evaluations throughout her career with the Department. In January 1982. she was rated as "outstanding" in every category for her final probationary report as a Staff Counsel II. On the narrative portion of the evaluation form, her supervisor, Robert Tousignant, described her as "one of the outstanding attorneys in the office" who in "a relatively short time . . . has developed a thorough knowledge of department programs and office practices."

In December 1982, Mr. Tousignant gave Ms. Johnston a favorable appraisal in a promotional examination for the position of Staff Counsel III. He described her variously as "extremely capable in the area of work management," "obviously concerned about the needs of the department, her clients and the office." a person who "effectively presents ideas both orally and in writing," who "writes clearly and persuasively," whose work is "well-organized and logically presented." Mr. Tousignant described Ms. Johnston as "among the most creative and independent attorneys in the office" with "analytical skill [that] is unsurpassed" who identifies "publicly sensitive issues and responds to such issues in a consistently proper manner." He wrote that Ms. Johnston "has no difficulty in getting along with people in any context" and said that she "gets along well with co-workers, program staff and department management at all levels." Mr. Tousignant wrote that Ms. Johnston "readily accepts the viewpoints of others on most issues" and that "even on issues that she feels strongly about, Joyce has developed a tolerance for the views of others."

Mr. Tousignant was joined by the Department's chief counsel, Richard H. Koppes, in such high appraisals of Ms. Johnston's work. In a July 1983 memorandum urging the promotion of Ms. Johnston and several other attorneys, Mr. Koppes praised Ms. Johnston's work as a lead attorney, supervising the work of others. He wrote that she had "an

efficient and common sense approach to dealing with the department's legal problems" and that she has "excellent writing skills and ability to quickly grasp and analyze an issue." In August 1983, Mr. Koppes appended to a standard certification for salary adjustment that Ms. Johnston "more than" met the level of work expected and that he "highly" recommended her for a merit salary adjustment.

Such praise-filled evaluations of Ms. Johnston's work from both Mr. Tousignant and Mr. Koppes continued through the spring of 1984. There are no criticisms of her performance in the record which were written prior to the controversy over her attendance at the legislative hearing. By the fall of 1984. when the present dispute arose. Ms. Johnston had been in the legal office for four years, had risen to the highest rank-and-file class available, reviewed the work of five to six attorneys and was considered by her supervisors to be one of the Department's most skillful lawyers.

The legislative hearing which gave rise to the present dispute was conducted by the Senate Health and Human Services Committee on September 11, 1984. The hearing was scheduled by its chair. Senator Diane Watson, to take testimony about proposed Department changes in State family planning contracts. The Department enters contracts with some 140 to 170 organizations and institutions to provide family planning assistance to California residents. The administration desired

to change those contracts for the 1983-84 fiscal year to ensure that no State money would be spent on abortion. There were some delays in issuing the contracts because of the changes and some legislators, including Senator Watson, were upset about both the delays and the nature of the proposed changes. Senator Watson had attempted unsuccessfully to subpoena the director of the Department to compel attendance at the hearing. The subject of the hearing had become highly visible and there was extensive news reporting about it throughout California.

Because of the charged atmosphere, the Department wanted to restrict the number of staff members who would attend the hearing. The Department director and members of the executive staff were fearful that legislators might try to call staff members from the audience to testify at the hearing. The Department wanted to avoid such an eventuality by limiting employee attendance. Mr. Koppes testified that the Department director was "very concerned about just who might be summoned up there."

The forthcoming legislative hearing was a subject of discussion within the Department. During lunch on September 7, Ms. Johnston mentioned to her supervisor. Mr. Tousignant, that she thought the hearing would be interesting and she would like to attend. However, from that first mention of interest by Ms. Johnston. Mr. Tousignant discouraged the idea. He told her

that it would not be prudent for her to attend and that he did not think she should do it. She told him that she was considering the submission of a vacation absence form but Mr. Tousignant was negative about her even making a request. Ms. Johnston quoted him as telling her. "if you told me what it was for. I'd deny it." Mr. Tousignant did not contradict this testimony.

The then-existing Department policy on legislative contacts contained no prohibition against employee attendance at legislative hearings on an employee's own time. Indeed, the policy specifically permitted employees to testify before the Legislature as private citizens.

Department policy on vacations existing at the time of the hearing likewise contained no restriction that would have prevented Ms. Johnston from using vacation time to attend the legislative hearing. There was no policy prohibiting employees from taking vacation in an increment as small as two hours. There was no policy restricting what an employee could do during his or her vacation and the Department did not have a practice of reviewing the purpose for which an employee requested a vacation. No witness at the hearing could recall any previous situation where a vacation request by an attorney had been denied, although employees have been requested to change dates because of workload pressures.

On September 10, 1984. Ms. Johnston completed the Department's standard absence notice. She requested to be absent the entire morning of September 11 for "personal business (vacation)." Ms. Johnston testified that as soon as Mr. Tousignant saw the vacation slip in her hand, he began to say. "No. no. no." She testified that she asked him why she should not make the request and he responded that, "You don't have any business being there." She responded that what she did during vacation was her own business to which Mr. Tousignant responded that the Department could always deny a vacation for "press of business."

Either when he first saw the vacation request or at a later time prior to the hearing the next day. Mr. Tousignant told Ms. Johnston that he would be conducting interviews on September 1. He said that because he would be busy he wanted her to be in charge during the time he was interviewing. The interviews were conducted in Mr. Tousignant's office and he did not leave the office during them.

At the time Mr. Tousignant first rejected Ms. Johnston's request for two hours of vacation, he told her that although he was declining the request she could appeal to Mr. Koppes. Ms. Johnston immediately filed an appeal with Mr. Koppes. In a note, she advised Mr. Koppes that she wished to attend a legislative hearing as a private citizen on her own time. She promised that she would not participate in the hearing or

identify herself as a Department employee but would merely observe. She requested to take off two hours of vacation and offered to make up the time by lengthening her work shift if necessary.

Ms. Johnston took the note to Mr. Koppes' office and left it with his secretary in the early afternoon on September 10. Mr. Koppes did not see the request until after 5:00 p.m. because he had been meeting all day with the Department's executive staff to make plans for the legislative hearing. When Mr. Koppes' secretary handed him the note, she told him that. "Bob refuses to deal with this." Mr. Koppes understood the remark to mean that Mr. Tousignant had not taken action on the vacation request and his initial focus was on why Ms. Johnston's immediate supervisor had side-stepped the request. He called but was unable to reach Mr. Tousignant who had left for the day.

Mr. Koppes responded to the request by writing on the absence form that he,

> . . . would prefer that you not attend [the] hearing and that you report to work as usual unless you have an illness or emergency to attend to.

He gave the note to his secretary who placed it in Mr. Tousignant's communications basket.

Ms. Johnston, meanwhile, was concerned that by late in the afternoon she still had not received a response to her vacation

request. At 5:20 p.m.. she went to Mr. Koppes' office. As she stood at the door his secretary announced her arrival. Ms. Johnston testified that Mr. Koppes never looked up from his desk and before she could say anything he stated simply, "the answer is no." She asked whether he knew the question and after some brief verbal sparring between them. Mr. Koppes stated that he already had sent the answer back to Mr. Tousignant. She asked what he had written to Mr. Tousignant and he responded that he "would prefer" that she not attend the hearing. She excused herself and went to Mr. Tousignant's office to search for the written response. She found it on Mr. Tousignant's desk.

At home that evening. Ms. Johnston decided that she wanted to attend the legislative hearing despite Mr. Koppes' statement of preference. She wrote another note to him stating that she understood his position as a statement of preference that she not attend the legislative hearing but that he was leaving the ultimate decision up to her. She promised that her attendance at the hearing would not cause "embarrassment to you or to the administration." However, she continued, if she had misinterpreted his position and he planned to disapprove her request for two hours of vacation, then she wanted "to know the reason for such disapproval, and you may consider this as a grievance regarding the denial of the requested two hours' vacation time."

The next morning Ms. Johnston delivered her memorandum to Mr. Koppes' office and gave a copy to Mr. Tousignant. After he read the document. Mr. Tousignant went to Ms. Johnston's office and emphasized to her that he had denied her request for vacation. He told her "it was inappropriate for her as an attorney for the Department to attend a hearing related to matters that she had worked on." Mr. Tousignant testified that he also,

> . . . told her that I thought it as potentially embarrassing to the Department and to Rich to have her there because her views on the issues related to the hearing were well known and it was clear that she wasn't representing the Department at the hearing.

Ms. Johnston's second note was sitting on Mr. Koppes' desk when he arrived at work on the morning of September 11. When he saw the note he sent it to Mr. Tousignant with the instruction to "Please handle this matter." He also wrote, "I repeat my preference that she not attend [the] hearing." Mr. Koppes testified that he read Ms. Johnston's note "very quickly" and did not notice the statement that he should consider the memo a grievance if he chose to deny her request for two hours of vacation.

Once he received Mr. Koppes' note, Mr. Tousignant went to Ms. Johnston and stated that the note meant that she had been denied permission to take two hours of vacation. Ms. Johnston asked the reason for the denial and, she testified.

Mr. Tousignant responded, "press of business." This was explained to be the interview process which would keep Mr. Tousignant tied up in his office throughout the day. Ms. Johnston replied that she had requested the grievance to be resolved before 10:00 a.m. but Mr. Tousignant stated that he believed he had five days to respond and that he would check with the Department's labor relations office.

Just before 10:00 a.m. on September 11. 1984. Ms. Johnston made arrangements with two other attorneys to be in charge of the office in her absence, wrote a note to Mr. Tousignant and left for the hearing. In her note she advised Mr. Tousignant which attorneys would be in charge, told him that she was going to the hearing and when she would return. She arrived at the hearing just as it was about to commence. She entered through a side door and was immediately observed by Mr. Koppes and other representatives from the Department. She was offered a seat with the group from the Department but she declined and sat several rows behind them. Ms. Johnston brought only a pen and writing materials with her. She did not testify and did nothing to call attention to herself. The hearing lasted until about 12:30 p.m. at which time Ms. Johnston returned to work.

That afternoon. Mr. Koppes went to Ms. Johnston's office but departed without speaking when he saw that she had a visitor. Ms. Johnston returned the visit later in the day and

left a note that she was available. However, Mr. Koppes did not attempt again to contact her.

Immediately after returning to the office upon completion of the hearing. Mr. Koppes went to Mr. Tousignant and told him to relieve Ms. Johnston from her duties as a lead attorney. This meant that she no longer would be reviewing the work of other attorneys and would be responsible only for her own work. At the PERB hearing. Mr. Tousignant was asked if the removal of the designation of lead attorney was because Ms. Johnston attended the hearing. He responded: "That was the. sure, that was a reason." When asked if the removal was because of her attendance at the hearing. Mr. Koppes responded: "Well, that was one reason. There were others."

On September 14. Mr. Tousignant went to lunch with Ms. Johnston. On the way to the restaurant he told her that Mr. Koppes had directed the reorganization of the office to do away with the position of lead attorney. He also told her that it was indiscreet of her to attend the hearing and that it was unlikely but not impossible there would be adverse disciplinary action against her. Mr. Tousignant said that he personally had been angered by her attendance at the hearing but that he had cooled. However. Ms. Johnston testified, Mr. Tousignant told her that Mr. Koppes had been "livid and pounding on the desk" and had not cooled. Mr. Koppes testified that he had not

pounded on the desk and Mr. Tousignant denied that he had told Ms. Johnston that Mr. Koppes had pounded on the desk.

Later on September 14. Mr. Tousignant met with Ms. Johnston in an informal grievance meeting. The Department's labor relations office had told Mr. Tousignant to treat Ms. Johnston's September 11 note as a grievance. The meeting was within the time deadlines set out in the contract between the State and the Association of California State Attorneys and Administrative Law Judges, the exclusive representative of employees in bargaining unit no. 2. During the meeting, Mr. Tousignant told Ms. Johnston that he believed the Department had the right to prohibit attorneys from attending legislative hearings concerning matters they had worked on. He focused on the political embarrassment to the Department for Ms. Johnston to be at the hearing. The two agreed that the matter could not be resolved at the informal level.

Following the meeting. Mr. Tousignant prepared a memorandum to the staff explaining the reorganization which would remove Ms. Johnston from the position of lead attorney. Ms. Johnston requested that Mr. Tousignant not send out the memo until she had a chance to speak with Mr. Koppes because once the memo became public there would be no possibility of turning back. Despite her request, the memo was distributed to employees on September 17. The change was justified in the memo as a step to "increase the efficiency of the section by eliminating

duplicate review of some assignments and by enabling Joyce to work on additional assignments." The memo also explained that the existing procedure had isolated Mr. Tousignant from "a significant part of the section's work." In the future, he wrote, all work assignments should be sent to him for review.

Mr. Koppes was on business in Washington during the week of September 17 and Mr. Tousignant was the acting chief counsel. On September 18. Mr. Tousignant met with the other assistant chief counsels to tell them about the problem with Joyce Johnston and to solicit their suggestions for how to deal with the situation. Mr. Tousignant testified that at the conclusion of the meeting there was a consensus that Ms. Johnston should be transferred to the "appeals section." also known as the Audits and Investigations Section. In that section, attorneys act as advocates for the Department at health care provider reimbursement hearings. Attorneys working in the section are subject to frequent travel and some consider the section an undesirable assignment.

Mr. Koppes returned from Washington on September 24 and he met with the assistant general counsels on September 27 to discuss the Johnston situation. When he convened the meeting, he told the assistant counsels that he wished to discuss a number of incidents involving Ms. Johnston including her attendance at the hearing. Mr. Koppes testified that his original plan was to keep Ms. Johnston in the Preventive Health

Section but to isolate her from the issues of family planning, abortion and nursing homes. Mr. Tousignant objected to that proposal saying it would be disruptive and that he would have difficulty supervising her under the situation. The counsel discussed the various sections into which Ms. Johnston might be transferred and ultimately agreed that the best place would be the Medi-Cal Policy Section.

Mr. Koppes notified Ms. Johnston on September 28 that he wanted to meet with her on October 3. The purpose of the meeting was to discuss office work assignments. Prior to the meeting. Ms. Johnston advised Mr. Tousignant that she would be bringing her attorney, Loren McMaster. with her to the meeting. After conferring with Mr. Koppes. Mr. Tousignant advised Ms. Johnston that Mr. Koppes was "not anxious" to have an attorney attend the meeting. Mr. Tousignant told Ms. Johnston that the subject was to be office organization and that a discussion about that subject would not occur if Ms. Johnston appeared with her attorney. She insisted that she wanted an attorney to accompany her to the meeting. Mr. Tousignant responded that if an attorney appeared with her then the meeting would be on "her agenda." Ms. Johnston replied that she would take the meeting any way she could get it.

On October 2, 1984, Ms. Johnston filed a written grievance about the denial of her request to take two hours of vacation

time on September 11. In the grievance she charged that the request was either improperly disapproved because of her desire to attend the legislative hearing or approved by the chief counsel and later disapproved by the assistant chief counsel. As a remedy she requested a determination that the request either was granted or improperly denied, a clarification of the office rules about such requests, and the removal from her monthly work report of a notation by Mr. Tousignant that she had been absent without leave for two hours on September 11. The absence without leave designation on the form would mean that she would be docked for two hours of pay.

Ms. Johnston said that she filed the request on October 2 because that was the last day under the contract that she could file the grievance in a timely manner. She said she waited until the last day because she had been hoping to resolve the dispute informally. When it became apparent that she would not reach an informal resolution prior to the deadline, she testified, she filed the formal, written grievance.

The October 3 meeting was attended by Mr. Koppes, Mr. Tousignant. Ms. Johnston and Mr. McMaster. her attorney. At the start of the meeting, Mr. Koppes said to Ms. Johnston and Mr. McMaster, "It's your meeting, go ahead." Mr. McMaster stated that he hoped to help the parties resolve their differences and not to make the situation worse. He said that the meeting was a grievance meeting and he hoped that the

dispute could be worked out informally. To these comments, Mr. Koppes said nothing. Mr. McMaster tried to draw Mr. Koppes into a discussion about the dispute but Mr. Koppes would not speak. He refused to answer questions. He only listened.

Toward the end of the meeting, Mr. McMaster stated that if the dispute could not be resolved at the meeting, Ms. Johnston would have no alternative but to pursue whatever other remedies she had available. At this Mr. Koppes urged Ms. Johnston "to exercise all of your rights, and I intend to exercise mine." Mr. McMaster replied that the comment sounded like a threat. Mr. Koppes did not respond. Then Mr. Koppes indicated that the meeting was over and he told Mr. McMaster that he intended to meet with Ms. Johnston afterwards. Mr. McMaster said he could not prevent that but it would not be appropriate for Mr. Koppes to discuss the grievance or to take any action against Ms. Johnston at the subsequent meeting. Mr. Koppes stated that he intended only to discuss work assignments.

Mr. McMaster left the building and Ms. Johnston was told to report to Mr. Koppes' office at 11:15 a.m. At the meeting, Mr. Koppes told Ms. Johnston that the management team believed that her skills could best be used in the Medi-Cal Section. Ms. Johnston replied with a quip that she thought the transfer would be to Mr. Lockett's section, referring to William Lockett who supervised the administrative law judges. Mr. Koppes replied that it could have been to Mr. Outright's section which

would have been worse with the travel and all. James Cutright was in charge of the Audits and Investigations Section.

Mr. Koppes asked Ms. Johnston if it was clear that she had been transferred. She said that it was clear and asked for a reason. Mr. Koppes responded, "The reasons are your conduct." She asked how her conduct had changed since the "glowing reports" she had received the month before. Mr. Koppes identified her "actions designed to embarrass the Department and the administration." She asked him to be specific but he said no more. Ms. Johnston was transferred effective October 15 to the Medi-Cal Section. The transfer was announced in an October 10 memo from Mr. Koppes to the staff.

On October 15, 1985. Ms. Johnston filed an employee complaint about the denial of her request for vacation on September 11 and the subsequent actions taken against her. A complaint, as distinguished from a grievance, involves an alleged violation of a written departmental rule. The highest level of appeal for a complaint is to the Department head.

The Department offers a series of justifications for the removal of Ms. Johnston from the lead attorney position and her transfer from Preventive Health to Medi-Cal. Mr. Koppes testified that by her appearance at the legislative hearing and other acts, Ms. Johnston caused a loss of confidence in her by Departmental clients. Mr. Tousignant described Ms. Johnston's attendance at the hearing as "putting her personal interests

ahead of her client's interests." Mr. Tousignant said that Ms. Johnston's attendance at the hearing "made it extremely difficult to have her work closely with the family planning program." He said he had a "lack of confidence in her ability to deal discreetly with family planning issues and . . . was not anxious to organize the section in a way so that work of one of the client organizations that we deal with would need to be done in secret."

Other justifications advanced by Mr. Koppes, both in his answer to Ms. Johnston's employee complaint, and on the witness stand include what became known as the PKU incident. Ms. Johnston's expressions of political beliefs in the office. Ms. Johnston's role in negotiations over some nursing home legislation. Ms. Johnston's role in negotiations over problems at the San Francisco General Hospital, and the disappearance of any further need for lead attorneys.

The PKU incident occurred during the month of November 1983. Phenylketourea (PKU) is a progressive disorder which can result in serious and irreversible brain damage in children if not controlled by diet. Babies are routinely given blood tests shortly after birth to identify the potential existence of the disease. The case that gave rise to the criticism of Ms. Johnston involved an Orange County child whose blood test was inconclusive. The child's parents had refused to allow a repeat blood test, reportedly on religious beliefs.

Ms. Johnston was asked to review a draft of correspondence to the parents encouraging them to permit the second blood test.

After reading the materials on the case. Ms. Johnston raised the question of whether the parents might be guilty of the crime of child endangerment. She suggested that their action be reported to law enforcement agencies in Orange County. After several days of discussions among Department administrators. Ms. Johnston was advised that Department officials had concluded it was not yet appropriate to refer the matter to law enforcement. She was directed to prepare a stronger letter to the parents, urging their consent to the second blood test.

The next day. Ms. Johnston telephoned the office of the Orange County District Attorney and reported the information she had about the potential criminal activity. Ms. Johnston made the telephone call from her home and advised the District Attorney's office she was reporting the incident as an individual. She subsequently informed both Mr. Tousignant and Mr. Koppes of the action she had taken. Ms. Johnston told her supervisors that she had researched her legal and ethical obligations under the situation and concluded that neither the attorney-client privilege nor confidentiality rules regarding medical information relieved her of the duty to report the suspected crime.

Mr. Koppes testified that given the religious convictions of the parents, he and other attorneys in the Department did not believe that the parents' objection to testing could be considered a crime. He said the consensus within the Department was to send the parents a letter and approach the case "one step at a time." He said he was concerned that Ms. Johnston had used information gained in the attorney-client relationship. He said he challenged her action on this ground but was unable to reach an agreement with her about her action.

The PKU incident was not mentioned in an evaluation Ms. Johnston received on April 2. 1984. She was marked "outstanding" in every rating classification and she was specifically praised by Mr. Tousignant for earning "the respect and trust of your co-workers and supervisor." To this comment Mr. Koppes appended the remark, "excellent and well deserved report."

Regarding the expression of political opinions. Mr. Koppes testified that he had received complaints from employees about Ms. Johnston's "strong, vocal, widely announced beliefs." He testified that the employees "either felt intimidated, or upset, or pressed, or whatever, offended by the remarks." He said she also posted political commentaries on her office door and circulated newspaper articles. He asked Mr. Tousignant to counsel Ms. Johnston about such expressions of opinion in the work place.

Mr. Tousignant met with Ms. Johnston sometime prior to April 1984 and asked her not to talk so much in the common area of the office about political matters. Mr. Koppes testified that by April 1984 he was satisfied that she had made progress in controlling her expressions of opinion. He said that after that conversation, "she seemed to have gotten . . . her views . . . under control." The evidence also establishes that Ms. Johnston was not alone in placing editorial cartoons on her door or in circulating articles about political subjects. These practices were rather common and Mr. Koppes himself circulated articles about the issue of abortion.

Mr. Koppes also cited two situations in which he was advised by persons outside of the Department that Ms. Johnston had been difficult during negotiations. In early 1984, some licensing problems developed at San Francisco General Hospital that were sufficiently serious that the State could have closed the hospital. Because of the importance of the hospital, the Department director did not want to take that step, so Ms. Johnston and a chief deputy were assigned to negotiate about desired changes. Mr. Koppes testified that it was reported to him that Ms. Johnston did not believe negotiations were appropriate and that the hospital should have been closed. However. Mr. Koppes never complained to Ms. Johnston about this position she supposedly had taken.

Moreover, in Ms. Johnston's April 2, 1984, evaluation. Mr. Tousignant specifically cited her work in the San Francisco General Hospital negotiations as an example of her handling of a difficult case "in a timely and expert manner." He testified that he had not heard about the criticism at the time he wrote the evaluation.

The other situation in which Ms. Johnston was accused of being difficult in negotiations involved legislation pertaining to nursing homes. In August and September 1984. the Department had been directed by the Governor's Office to explore every possible method of reaching a legislative compromise over some nursing reform bills. Ms. Johnston was one of the senior attorneys working in the area of nursing home licensing and she was assigned to work on the negotiations toward a compromise. For various reasons, the negotiations did not produce a compromise. In September 1984. Mr. Koppes was advised by a lobbyist from the nursing home industry that "Ms. Johnston had not been very helpful in negotiations."

In justification for removal of Ms. Johnston from the lead attorney position. Mr. Koppes contended that lead attorneys were no longer needed in the Department. He testified that at one time the Department's legal staff was much larger and each assistant chief counsel had responsibility for some 12 to 13 attorneys. At that time, he said, lead attorneys were necessary to assist in the supervision of a portion of the work

force in each section. When the legal office was made smaller, he continued, the assistant chief counsels could carry out the supervisory responsibilities without the assistance of lead attorneys.

Gradually, most of the lead attorney positions were eliminated. Ultimately, the Preventive Health Section was the only unit which continued to have a lead attorney position. Mr. Tousignant had complained to Mr. Koppes that he did not have enough work to keep him busy but he rejected the elimination of the lead attorney position held by Ms. Johnston because of his friendship with her. Mr. Koppes testified that the removal of the position from Ms. Johnston merely brought the Preventive Health Section into line with the practice in the other sections.

Neither the removal of the lead attorney's designation nor the transfer of Ms. Johnston from Preventive Health to Medi-Cal caused any loss of pay. She likewise did not lose any other benefit such as a window office or favorable working conditions.

On October 17. 1984. Mr. Koppes retroactively granted Ms. Johnston's request for two hours vacation on September 11. Her time reporting form was changed to reflect that she no longer would be charged with two hours absence without leave for that day. He testified that he restored the lost time because he "did not want to be punitive" and "taking away two hours from someone, I think, is serious." In restoring the

hours. Mr. Koppes reviewed his version of the incident but noted the high quality of work performed by Ms. Johnston and her willingness to work long hours.

LEGAL ISSUE

Did the State by its removal of Joyce C. Johnston from the position of lead attorney and subsequent transfer of her to another job thereby retaliate against her for the protected filing of a grievance?

CONCLUSIONS OF LAW

State employees have the protected right.

> . . . to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.[2]

It is an unfair practice under subsection 3519(a) for the State to "impose . . . reprisals on employees [or] to discriminate . . . against employees . . . because of their exercise of [protected] rights." In an unfair practice case involving reprisals or discrimination, the charging party must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct. Novato Unified School District (1982) PERB Decision No. 210. adopted for SEERA in State of California (Department of Developmental Services) (1982) PERB Decision

[2]SEERA section 3515.

No. 228-S. See also. State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

To meet its burden of establishing a prima facie case, the charging party must first show that the conduct in which the employee engaged was protected and that the employer had actual or imputed knowledge of the employee's participation in the protected activity. Moreland Elementary School District (1982) PERB Decision No. 227. An employer cannot retaliate against an employee for engaging in protected conduct if the employer does not even know of the existence of that conduct.

The charging party then must produce evidence of unlawful motivation to link the employer's knowledge to the harm which befell the employee. Indications of unlawful motivation have been found in an employer's: general animus toward unions, San Joaquin Delta Community College District (1982) PERB Decision No. 261. disparate treatment of a union adherent. State of California (Department of Transportation) (1984) PERB Decision No. 459-S, inadequate explanation to employees of the action. Clovis Unified School District (1984) PERB Decision No. 389, timing of the action. North Sacramento School District (1982) PERB Decision No. 264, failure to follow usual procedures, Santa Clara Unified School District (1979) PERB Decision No. 104 and shifting justifications for the action. State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would have been the same despite the protected activity. If the employer fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of subsection 3519(a) will be found. See generally. Baldwin Park Unified School District (1982) PERB Decision No. 221.

Ms. Johnston contends that she engaged in the protected conduct of filing a grievance. This action was known to the State, Ms. Johnston continues, because a copy of the conditional grievance was given to Mr. Koppes prior to the time she was removed from the lead attorney position. The formal grievance was filed on October 2, the day before Ms. Johnston was transferred from Preventive Health to Medi-Cal. Therefore, in both instances, Ms. Johnston argues, the State knew of her protected conduct prior to the action taken against her.

Ms. Johnston finds evidence of unlawful motivation in the timing of the State's action, in disparate treatment, in a departure from established procedures and standards and in contradictory and inconsistent justifications for the State's actions. Ms. Johnston argues that her actions in filing a grievance and in attending the legislative hearing are so completely entwined that they cannot be viewed as separate

matters. Thus, if it is found that the State retaliated against her for attending the legislative hearing, that in itself would constitute a retaliation for filing a grievance. Ms. Johnston argues that the actions are linked because the timing involved made it impossible for her to follow the normal maxim of "obey now and grieve later." Had she not attended the legislative hearing. Ms. Johnston continues, no later remedy from the grievance could have redressed the injury. Thus, she argues, pursuing the grievance and attending the hearing are indivisible.

The State mounts a variety of defenses. Initially, the State argues that as of the time Ms. Johnston was relieved of the lead attorney function and transferred to Medi-Cal she had not exercised any protected rights. The State rejects the contention that the handwritten note given by Ms. Johnston to Mr. Koppes on September 10 qualifies as the filing of a grievance under the contract. The State argues that Ms. Johnston did not file a contractual grievance until October 2. 1984. and as of that date the decisions to relieve her from the lead attorney position and to transfer her to Medi-Cal had been long made.

Alternatively, the State continues, both decisions were made without knowledge by the chief counsel of any grievance by Ms. Johnston. The State contends that Mr. Koppes did not recognize the September 10 note to him as a grievance and

because both decisions affecting Ms. Johnston were made prior to October 2, they were made without Mr. Koppes' knowledge of protected conduct even if the September 10 note be deemed as a grievance.

The State next argues that Ms. Johnston's removal from the lead attorney position and reassignment to Medi-Cal were based upon valid business reasons and were not in response to the filing of a grievance. The State contends that the elimination of the lead attorney function was due to a staff reorganization unrelated to Ms. Johnston's conduct. The transfer, the State urges, was compelled by Ms. Johnston's lack of professionalism.

Finally, the State contends, the removal of the lead attorney position and the transfer of Ms. Johnston to the Medi-Cal section caused no adverse consequences. The State argues that Ms. Johnston incurred no loss of pay or other tangible benefit and the manner of the State's actions was such as to preclude even the possibility of embarrassment.

It is concluded initially that Ms. Johnston had participated in protected activity prior to the time she was removed from her position as lead attorney and later transferred to the Medi-Cal section. Before her removal from the lead attorney position, Ms. Johnston had advised Mr. Koppes that her September 11 communication to him should be considered a grievance if her request for two hours of vacation were denied. Before her transfer to the Medi-Cal Section,

Ms. Johnston had written both the September 11 communication and had filed a formal grievance on October 2. The filing of grievances pursuant to a negotiated contract is a protected right. North Sacramento School District (1982) PERB Decision No. 264.

The State's argument that the September 11 communication cannot be considered as the filing of a grievance was waived long ago. Ms. Johnston's September 11 note to Mr. Koppes was referred by him to Mr. Tousignant, Ms. Johnston's immediate supervisor. On the advice of the Department's labor relations office. Mr. Tousignant accorded face value to Ms. Johnston's description of the note as a grievance. He met with her and responded to her request within five days as is required under the State's contract with the Association of California State Attorneys and Administrative Law Judges. The State treated Ms. Johnston's communication as a grievance at the time it was filed. There is no justification for the State's effort here to retreat from what it earlier acknowledged to be a grievance.

There likewise is no question that Ms. Johnston's supervisors knew of her grievance prior both to the removal of Ms. Johnston from the lead attorney's position and her transfer. The State argues that although Mr. Koppes received Ms. Johnston's September 11 communication prior to transferring her from the lead attorney's position, he did not read the document. Mr. Koppes' testimony that he did not read the

document is hard to accept. As Ms. Johnston argues in her brief, "it is difficult to believe that a Departmental chief counsel would not at least scan a document handed to him by an employee on a subject which the chief counsel admittedly had very strong feelings." Mr. Koppes' testimony on this point is not credited.

The key question in this case is one of motivation. The Charging Party contends that her removal from the position of lead attorney and subsequent transfer were motivated by a desire to retaliate against her for the filing of grievances. The evidence much more strongly suggests that she lost her lead counsel position and was transferred in retaliation for attending the legislative hearing. The filing of a grievance was irrelevant to these actions.

The entire flow of events links the motivation for the actions against Ms. Johnston to her attendance at the hearing. Mr. Koppes directed that Ms. Johnston be removed from her lead attorney position immediately after he returned from the legislative hearing on September 11. He did not give that instruction earlier that morning when he received Ms. Johnston's note advising him that she would grieve the denial of the two hours of vacation. The proximity of his action to his return from the legislative hearing suggests that he was acting in response to her presence at the hearing. This conclusion is bolstered by Ms. Johnston's own testimony that

she had been advised that Mr. Koppes was "livid and pounding on the desk." The reason for this anger, according to what Ms. Johnston was advised, was her attendance at the hearing. It was not her filing of a grievance.

Similarly, according to the uncontested testimony of three witnesses, the decision to transfer Ms. Johnston to the Medi-Cal Section was made at a staff meeting on September 27. It was not until after the Department had scheduled a meeting with Ms. Johnston to advise her of the decision that she even filed her formal, written grievance. Thus, because the filing of the written grievance was made after the decision to transfer Ms. Johnston, it is apparent that the written grievance could not have been a factor in the transfer decision.

The strongest evidence of retaliatory intent was the ambiguous statement of Mr. Koppes near the end of the October 3 meeting attended by Mr. McMaster and Ms. Johnston. After Mr. McMaster stated that if the matter could not be resolved informally. Ms. Johnston would have to pursue other available remedies. Mr. Koppes replied that Ms. Johnston should exercise her rights because he intended to exercise his. While the statement suggests retaliation, there is no way to discern an intent to retaliate for filing grievances. Indeed, the statement could just as easily be understood as a tip that he was about to take action against her because of her attendance at the legislative hearing.

Ms. Johnston finds evidence of unlawful retaliatory intent in disparate treatment and in what she finds to be the State's departure from established procedures and inconsistent and contradictory justifications for its actions. The Charging Party explains the case for disparate treatment by observing that "no other employee in Health Services has suffered the ignominy of having the designation of lead attorney taken away and transferred to another unit against his or her wishes." In addition, she argues, no one else had previously been denied a two-hour vacation request.

In proving unlawful motivation through disparate treatment, a charging party first must show that other persons engaged in conduct similar to that offered in purported justification for the employer's action against the charging party. Then, the charging party must show that the punishment for the conduct in which he or she engaged was different from (and typically more severe than) that administered to the others. The disparate treatment thus raises the inference that the employer's actual motivation for the action taken against the employee was the protected conduct and not the purported reason. See, e.g.. San Joaquin Delta Community College District, supra. PERB Decision No. 261.

There is no evidence here that any other attorney in the Department of Health Services ever attended a legislative hearing over the express disapproval of a supervisor. Nor is

there any evidence of any similar conduct with which Ms. Johnston's attendance at the legislative hearing could be compared. Under such circumstances, it is not possible to make a case of disparate treatment.

Ms. Johnston misses the point entirely with her argument that the State departed from established procedures and standards by not allowing her to attend the legislative hearing on her own time. One cannot show improper motivation in the subsequent retaliation against Ms. Johnston for attending the meeting by showing that she should have been granted the vacation in the first instance. The issue here is not whether the State acted improperly in denying her vacation request. The issue is whether the State acted improperly in punishing Ms. Johnston for attending the hearing even though her vacation request had been denied.

Similarly unpersuasive is Ms. Johnston's contention that the State departed from established procedures and standards by ignoring the "practice of not making involuntary transfers of employees." There was no evidence of a "practice" against involuntary transfers. The evidence shows only that no attorney other than Ms. Johnston had been transferred involuntarily at any recent time. This is not sufficient to establish a practice against involuntary transfers.

Finally. Ms. Johnston argues that her filing of a grievance and her attendance at the legislative hearing are indivisible.

This contention, too. must be rejected. The protection under the North Sacramento line of cases attaches to the act of filing a grievance under a negotiated contractual procedure. It does not attach to the underlying subject of the grievance. The actions which give rise to a grievance might have no relation to any protected matter. To bring the underlying actions into the reach of protected conduct through the filing of a grievance would effectively make all conduct protected. To make an action protected an employee would merely have to file a grievance about that action. Employee rights under SEERA are not so unlimited.

The remainder of Ms. Johnston's arguments are responses to the State's effort to show operational necessity for its actions against Ms. Johnston. The Respondent's burden to show operational necessity arises only after the Charging Party has established a prima facie case of discrimination. Here, the Charging Party has failed to establish a prima facie showing that the removal of Ms. Johnston from the lead attorney position and her subsequent transfer were motivated by retaliatory intent for the exercise of her protected right to file grievances. In the absence of this showing, there is no need to consider the State's evidence of operational necessity or Ms. Johnston's arguments in reply.

For these reasons, it is concluded that the removal of Ms. Johnston from her lead attorney position and her subsequent

transfer to the Medi-Cal section were not motivated by a desire to retaliate against her for the protected filing of grievances. Accordingly, her charge against the State must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CE-246-S, Joyce C. Johnston v. State of California (Department of Health Services) and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III. section 32305. this Proposed Decision and Order shall become final on November 12, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8. part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 12, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of

exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: October 23, 1985

Ronald E. Blubaugh
Administrative Law Judge