

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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|----------------------------|---|-------------------------|
| VICTOR JOHANN WIGHTMAN, |) | |
| |) | |
| Charging Party, |) | Case Nos. LA-CE-1736, |
| |) | LA-CE-1765, LA-CE-1767 |
| |) | LA-CE-1769, LA-CE-1771, |
| v. |) | LA-CE-1773, LA-CE-1774, |
| |) | LA-CE-1781 |
| LOS ANGELES UNIFIED SCHOOL |) | |
| DISTRICT, |) | PERB Decision No. 611 |
| |) | |
| Respondent. |) | January 28, 1987 |

Appearances; Victor Wightman and Jules Kimmett for Victor Wightman; O'Melveny & Myers by Brenda K. Haines for Los Angeles Unified School District.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

HESSE, Chairperson: This case is an appeal of the attached proposed decision of an administrative law judge (ALJ), holding that the respondent, Los Angeles Unified School District (District or LAUSD), threatened the charging party, Victor Wightman (Wightman), with dismissal for his exercise of rights protected under the Educational Employment Relations Act (EERA).¹

¹ EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part, as follows:

It shall be unlawful for a public school employer 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.

LAUSD excepts to the finding that the conduct of Supervisor Max Barney constituted a threat of dismissal or other adverse action. Wightman excepts to the remedy proposed by the ALJ, a cease-and-desist order, and argues that he should be reinstated to his former position with the District. For the reasons set forth below, we sustain the District's exceptions, but find that Barney's actions did constitute interference with Wightman's protected rights under EERA section 3543.5(a). Accordingly, we order the District to cease such interference.

DISCUSSION

Neither party filed exceptions to the findings of fact made by the ALJ.² Finding them free from prejudicial error, we adopt the findings as set forth in the attached proposed decision.

Although Wightman has attempted to litigate a number of issues he claims are related to the events of December 1982, the Public Employment Relations Board (PERB or Board) previously ruled upon all of those issues by virtue of their inclusion in earlier charges filed by Wightman in response to the activities of LAUSD on and after December 3, 1982.³

²Although LAUSD excepted to the ALJ's characterization of Barney's question to Wightman (about how the latter got to the meeting) as a "threat," it is clear that the District does not deny that the question was asked. Thus, although the District referenced page 27 of the proposed decision in its statement of exception, its objection is actually to the ALJ's characterization on pages 51-52 of the Proposed Decision.

³see Los Angeles Unified School District (1984) PERB Decision Nos. 412, 425, 426 and 473.

Thus, the sole, unresolved issue before the ALJ was the nature of Barney's conduct at his meeting with Wightman on December 3. The ALJ ruled that Barney threatened Wightman while Wightman was engaging in the protected activity of pursuing his grievances and those of other bus drivers.

The ALJ further ruled, however, that Wightman was not entitled to reinstatement because the Board had already dismissed an allegation that Wightman was fired in retaliation for his protected activity.⁴ Thus the ALJ ruled that, viewed alone, the threat could be remedied only by a cease-and-desist order.

Wightman vigorously argues that if a threat of firing was made, it is anomalous not to remedy the result of that threat, his firing. A cease-and-desist order is useless, he argues, if the employee threatened is no longer an employee of the District because the District has fired him.

The District's argument is that a threat was never made, that Barney's comments were reasonable under the circumstances, and that the ALJ should be overruled on this issue.

Whether Barney's conduct constituted a threat cannot be examined in a vacuum. His words and actions are the product of the events and personalities leading up to the December 3

⁴PERB Decision No. 473, supra. While the ALJ stated that Wightman had failed to appeal that decision, we would note that EERA section 3542(b) specifically precludes the appeal of a Board decision not to issue a complaint.

meeting, as well as what happened in the meeting on that day. The record reveals several significant aspects of the entire scenario.

First, Barney reasonably believed that Wightman was not a steward for Local 99. Although Wightman represented himself as such, Barney and the District had been informed by the union that Wightman was no longer a steward.⁵ Thus, Barney believed, correctly, that he had no duty to meet with Wightman to discuss the grievances of any employee other than Wightman himself.⁶

At the same time, Barney was not contractually obligated to meet with Wightman because the grievance procedure in the contract provided for a meeting with the grievant's immediate supervisors prior to any meeting with Barney. Further, the contract required the filing of the written grievance within 15 days of discovery of the incident, even though the employee was attempting to resolve the issue informally. No evidence was presented to show that Wightman had completed either of those steps of the grievance procedure. Indeed, the record reflects that Wightman usually bypassed the contractual steps in favor

⁵The ALJ took official notice of a final ALJ decision, PERB Decision No. HO-U-164, dated January 27, 1983, which concluded that, at the time in question here, Wightman was not a steward for SEIU, and SEIU had so notified the District. Wightman had not appealed that decision.

⁶EERA section 3543 permits an individual employee to seek redress on his own behalf prior to a dispute reaching arbitration.

of a direct meeting with higher-ranking District personnel. Barney saw himself as under no personal obligation to meet with Wightman, nor did he perceive Wightman to be anything other than an individual employee, not a representative of the exclusive representative. Barney's conduct was not so much that of a supervisor who threatened Wightman as it was the conduct of a supervisor who chose – to his probable regret – to meet with a vociferous employee in order to try and resolve some of Wightman's complaints.

Given this background, it becomes easy to understand why Barney's comments to Wightman just "popped out." Wightman arrived at the meeting seeking to present not only his own "grievances," but also those of other unit employees and even the grievance of a non-employee. Wightman's conduct at the meeting was forceful, and even intractable. We do not wonder that Barney, in frustration, sought to end the meeting any way he could. To that end, he focused on Wightman's use of his bus, effectively ending the meeting. Given the conduct of all the parties, we do not interpret Barney's comment to Wightman as intending a threat of reprisal. It was instead the reaction of a frustrated man trying to end an unpleasant meeting.⁷

⁷We disagree with our dissenting colleague's characterization of the testimony of District officials. Although one official stated that, had Wightman not shown up at the December 3 meeting, disciplinary proceedings would not have been initiated, we interpret that to mean not that the meeting in and of itself was the cause for the discipline, but rather, that Wightman's insubordination in using his school bus to drive to the meeting was the precipitating, but not sole, reason James

We do believe, however, that Barney's actions and comments, by "de-railing" the "grievance" meeting, did interfere with Wightman's right to pursue his grievances. Under the test articulated in Carlsbad Unified School District (1979) PERB Decision No. 89, Barney need not be shown to have had an unlawful intent to interfere with Wightman's rights. As noted above, we found no such intent to discriminate or threaten. Rather, to make a prima facie showing of interference, charging party need only show that the employer's conduct tends to or does result in interference with an employee's rights. Here, the facts indicate that Barney's comments and actions did interfere with Wightman's right to pursue his "grievance." Indeed, the meeting essentially came to a halt after the question was raised about Wightman's transportation. Thus; LAUSD, through Barney, did violate EERA section 3543.5(a) by interfering with Wightman's rights. The District's justification for Barney's actions is not sufficient to counterbalance the harm to Wightman's rights.

Srott recommended dismissal. The evidence revealed a continuing pattern by Wightman of disregarding rules and directives concerning his use of the bus. In applying progressive discipline for this misuse, the District previously suspended Wightman, and a verbal reprimand had been given in the months prior to December 3.

On December 7, in fact, he again used his bus without authorization to attend a Soto Street meeting. Indeed, the hearing officer decision adopted by the personnel commission that resulted in his dismissal reveals that Wightman testified he would continue to use his bus whenever he deemed it appropriate. It was primarily this cavalier and recalcitrant attitude toward supervisory directives upon which the hearing officer relied in determining that dismissal was appropriate.

Accordingly, we impose the appropriate remedy for the interference violation of December 3, a cease-and-desist order. (See, e.g., Palm Springs Unified School District (1982) PERB Decision No. 249.) We thus reject Wightman's demand for reinstatement.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Los Angeles Unified School District violated EERA section 3543.5(a). Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

Interfering with the protected rights of employees to pursue grievances and seek to improve their working conditions.

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

(1) Within thirty-five (35) days of the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The notice must be signed by an authorized agent of the employer indicating that the employer will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this

Notice is not reduced in size, altered, defaced or covered by any other material.

(2) Provide written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board, in accordance with his instructions. All reports to the Regional Director shall be served concurrently on the charging party herein.

It is further ORDERED that all other portions of the unfair practice charge and complaint are DISMISSED.

Member Porter joined in this Decision.

Member Craib's concurrence and dissent begin on page 9.

CRAIB, Member, concurring and dissenting: I agree with the majority that Barney's conduct interfered with Wightman's right to pursue grievances and that a cease and desist order is the appropriate remedy. However, I cannot agree that Barney's comments at the December 3 meeting, when viewed in light of all the surrounding circumstances, did not constitute a threat of disciplinary action in retaliation for protected activity.

The ALJ made numerous factual findings, all supported by the record, that are sufficient to establish the intent on the part of the District to threaten Wightman. For example, the ALJ found the District did not have a policy on the use of buses by which Wightman could have been disciplined or, if there was such a policy, it was discriminatorily enforced. The taking of Wightman's bus, leaving Wightman without a vehicle for his afternoon route, the extraordinary bus inspection, and the testimony of a District official that but for the events of the December 3 meeting disciplinary proceedings against Wightman would not have been initiated lend additional support for finding a threat of disciplinary action. Further, the District's explanation of the chain of events is less than credible.

Nevertheless, I must agree with the ALJ that reinstatement and back pay, which would remedy not the threat per se, but the carrying out of the threat (i.e., Wightman's termination), are simply not available in this case. While it may be anomalous to adjudicate a dispute over an alleged threat but not consider the alleged carrying out of the threat, we are forced

to do so by the peculiar history of Wightman's charges. As noted in the majority decision, the Board has already dismissed the allegation that Wightman was fired for engaging in protected activity.¹ Regardless of the merits of that decision, it is a final one to which the parties are bound. There is no statutory, regulatory, or other authority which would allow the Board to reconsider that decision at this
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time.

Nor would it be proper to give Wightman the relief he sought by way of his dismissed allegations of unlawful firing

¹Los Angeles Unified School District (1984) PERB Decision No. 473. The Board found that the only allegation which stated a prima facie violation was the threat allegation that is now before us. Thus, a complaint issued solely on that allegation.

²It should be noted that it is only through hindsight that the propriety of Decision No. 473 is called into question. The dismissal of Wightman's allegations of retaliatory firing was based in large part upon Wightman's failure to allege facts which have only come to the Board's attention by way of the present appeal from the ALJ's proposed decision. The later emergence of such facts (chiefly concerning protected activity and the circumstances surrounding disciplinary action taken against Wightman), of which Wightman was surely aware of at the time he filed the charges in question, does not excuse his failure to allege them.

I would also note Chairperson Hesse's concurrence and dissent in Decision No. 473, in which she argued that the charges should be dismissed because Wightman had earlier filed charges (Nos. LA-CE-1715, 1716, 1717 and 1718) based on the same events which underlie the present case. These charges were dismissed by a PERB regional attorney and the dismissal was not appealed to the Board. The dismissal thus became final. Based on a review of official PERB records, I find merit in Chairperson Hesse's argument. Nevertheless, as stated above, Decision No. 473 is final and binding and may not be disturbed.

under the guise of remedying a threat of disciplinary action. Such a sleight of hand approach, which Wightman urges, would simply ignore the binding nature of Decision No. 473.

Therefore, a cease and desist order, however pointless it may seem in view of Wightman's later firing, is the only available remedy for the District's unlawful threat.

For the reasons stated above, I would affirm the proposed decision.

APPENDIX

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



After a hearing in Unfair Practice Case Nos. LA-CE-1736; LA-CE-1765; LA-CE-1767; LA-CE-1769; LA-CE-1771; LA-CE-1773; LA-CE-1774; and LA-CE-1781, Victor Wightman v. Los Angeles Unified School District, in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act, section 3543.5(a). The District violated this provision of the law by interfering with unit member Victor Wightman's exercise of his protected right to pursue complaints against his employer designed to better working conditions.

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

CEASE AND DESIST FROM:

Interfering with the protected rights of employees to pursue grievances and seek to improve their working conditions,

Dated: LOS ANGELES UNIFIED SCHOOL
DISTRICT

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



VICTOR WIGHTMAN,)
)
 Charging Party,) Unfair Practice
) Case Nos. LA-CE-1736;
) LA-CE-1765;
) LA-CE-1767;
 v.) LA-CE-1769;
) LA-CE-1771;
) LA-CE-1773;
 LOS ANGELES UNIFIED SCHOOL DISTRICT,) LA-CE-1774;
) LA-CE-1781.
 Respondent.)
)
) PROPOSED DECISION
) [Pursuant to PERB
) Decision No. 473]
) (7/26/85)
)

Appearances; Victor Wightman and Jules Kimmett, representing Charging Party; Elaine Lustig, attorney (O'Melveny & Myers), representing Respondent.

Before Manuel M. Melgoza, Administrative Law Judge.

I. PROCEDURAL HISTORY

The above-enumerated cases were consolidated by the Public Employment Relations Board (hereinafter PERB or Board) itself after an appeal was filed by Victor Wightman to the dismissal of each of the charges by a PERB Regional Attorney.

Originally, these and several other unfair Practice Charges were filed individually by Victor Wightman making various allegations.

The allegations included in the above-enumerated charges included the following:

1. Director of Transportation Max Barney threatened Wightman with dismissal on December 3, 1982, for pursuing five

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

issues that were the subject of a grievance meeting on that date.

2. Max Barney removed Wightman's school bus¹ and his personal property on December 3, 1982.

3. On January 12, 1983, Supervisor James Srott informed Wightman that pre-disciplinary charges would be read against him and that he was to respond.

4. On about January 31, 1983, Srott attempted to schedule another pre-disciplinary meeting with Wightman, but upon being informed that Wightman's representative (Jules Kimmett) was unable to attend, Srott announced that he would send out a letter of termination.

5. On about February 1, 1983, a Mr. Simpson handed Wightman a letter recommending dismissal, based in part upon the events of December 3, 1982.

6. On February 12, 1983, Wightman received a letter from the District Transportation Branch recommending his dismissal.

7. On April 19, 1983, Wightman was fired from his job because of his union activity, which involved, among other things, the filing of charges with PERB. The discharge took place prior to a "Skelly proceeding."

8. On September 7, 1982, Deputy Director of Transportation Ralph Jacobs, "intervened" and harassed Wightman's previous supervisor, Mary Smith, because she had

¹Wightman was a school bus driver for the District.

intervened on Wightman's behalf during his reinstatement hearing in April 1982.

9. Since September 1982, Ralph Jacobs has refused to supervise Bill Hamm, leading to an aborted firing of Wightman.

10. Ralph Jacobs tacitly supported Max Barney's "illegal directive" to have Wightman's bus removed during negotiations. Later, in response to Wightman's inquiries, Jacobs said "good, take us to court then."

11. Ralph Jacobs failed to intervene while Max Barney made threats toward Wightman's status as an employee of the District.

12. Ralph Jacobs has overseen and Ok'd all of Bill Hamm's actions in reprisal against Wightman for his use of PERB procedures.

13. On January 12, 1983, during a meeting between Wightman and District supervisory and managerial personnel, James Srott refused to provide a list of pre-disciplinary allegations concerning Wightman.

14. On May 6, 1982, Eleanor Jones of the District testified against Wightman at an Unemployment Insurance Appeal Hearing using a copy of a Personnel Commission Decision that had not yet been provided to Wightman.

15. On May 5, 1982, the above decision was used at a PERB hearing by Howard Friedman, yet Wightman, the subject of the decision, had not yet received a copy.

16. On April 18, 1983, Larry White, Personnel Commission

Director, allowed the Commission to pass on a motion to have Wightman dismissed despite the protestations of Wightman, Kimmett and Howard Watts that a "Skelly proceeding" had not yet taken place.

17. James Srott was hired into the District's transportation branch sometime in 1982 without bargaining with Service Employees International Union, Local 99 (hereinafter Local 99), causing significant changes in working conditions. "This unilateral move soon resulted in unwarranted spying, false and manufactured charges, and finally one dismissal after another."

18. On several occasions during 1983 Mr. Srott has followed Wightman into school board meetings at times he was scheduled to address the board.

19. On March 14, 1983, Srott drew up an unsatisfactory notice against Wightman based upon information Srott obtained from "public speaker's card forms."

20. By February 1, 1983, Srott delivered "garbage" charges against Wightman in an attempt to process his dismissal, which ultimately became effective on April 19, 1983.

21. At a meeting on March 25, 1983, Ralph Jacobs denied Wightman's and Kimmett's request to present witnesses.

22. Wightman was fired on April 19, 1983 with no intervening action taken by Ralph Jacobs to notify school board members that a "Skelly" hearing had not yet taken place.

23. On April 29, 1983, Wightman received a letter from Ralph Jacobs indicating that, in a meeting held on April 22, 1983, no evidence had been presented to show that Wightman's Notice of Unsatisfactory Service was in error or that he had been unfairly treated.²-

In addition to the above allegations consolidated by the Board, Wightman filed several related charges, some of which were disposed of by an administrative law judge and some of which were dismissed on appeal from a Regional Attorney's dismissal. In LA-CE-1455, an administrative law judge dismissed an allegation by Wightman that the District denied union access to unit members when it removed notices that he, acting as union agent, had posted on the union's worksite bulletin board. The decision (H-O-U 164) became final on January 27, 1983 when Wightman failed to file exceptions with the Board itself.

In a separate charge, Case Number LA-CE-1770, Wightman alleged that four District employees conspired to terminate him from employment, and succeeded in having him removed on

²Paragraphs 1 through 6 were included in Unfair Practice Charge Numbers LA-CE-1736 and LA-CE-1767. These two charges were identical. Paragraph 7 was alleged in Case Number LA-CE-1765. Paragraphs 8 through 12 were alleged in Case Number LA-CE-1769. Paragraph 13 was alleged in Case Number LA-CE-1771. Paragraphs 14 through 16 were alleged in Case Number LA-CE-1773. Paragraphs 17 through 20 were alleged in Case Number LA-CE-1774. Paragraphs 21-23 were alleged in Case Number LA-CE-1781.

April 19, 1983. The PERB upheld the dismissal of the Charge by a Regional Attorney in Wightman v. Los Angeles Unified School District (1984) PERB Decision No. 412.³

In another charge, Case Number LA-CE-1766, Wightman made allegations of certain conduct related to the District's attempts to deliver disciplinary notices to him in 1983. The Regional Attorney's dismissal of the Charge was upheld by the Board in Wightman v. Los Angeles Unified School District (1984) PERB Decision No. 425.

Finally, in another separate charge, Case Number LA-CE-1775, Wightman charged that Superintendent Handler failed to correct the "mishandling of the case to terminate [Wightman]," including his failure to remedy a denial of a "Skelly" hearing prior to perfecting his discharge. The Board upheld the Regional Attorney's dismissal of that Charge as well in Wightman v. Los Angeles Unified School District (1984) PERB Decision No. 426.

With respect to the charges consolidated by the Board that are the subject of this decision, the PERB affirmed the Regional Attorney's dismissal on all the allegations except one, in Wightman v. Los Angeles Unified School District (1984) PERB Decision No. 473. Specifically, the Board held that Wightman had failed to establish a prima facie case that his

³There is no indication that an appeal was filed with the Court of Appeal in this case.

termination was motivated by his engaging in protected activities, including filing charges with PERB and pursuing a grievance on December 3, 1982. The Board found a prima facie case was established only as to the allegation that Wightman was threatened with dismissal on December 3, 1982 for pursuing a grievance. The case was remanded to the General Counsel for disposition consistent with the Decision.⁴ On January 10, 1985, the General Counsel issued a Complaint pursuant to PERB Decision No. 473. The charging paragraph reads as follows:

4. On or about December 3, 1982, Respondent, acting through its agent, Director of Transportation Max Barney, threatened Mr. Wightman with dismissal if he pursued a grievance against the Respondent.

After an informal conference (held March 18, 1985) failed to result in a settlement of the Charge, the case was set for formal hearing. A pre-hearing conference was conducted by the undersigned on April 15, 1985. Thereafter a formal evidentiary hearing before the undersigned was held April 19, April 30, May 10, and May 13, 1985. Per agreement, post-hearing briefs were submitted by both parties by June 13, 1985, and the case was then submitted for Proposed Decision.

II. FACTS

A. Background

Victor Wightman was hired as a bus driver for the District

⁴Wightman did not appeal PERB Decision No. 473.

sometime in 1978. After a break in service during which Wightman performed services as a VISTA Volunteer, he was re-employed by the District in 1980. His years of employment with the District have been marked by a number of incidents and confrontations with supervisory and managerial personnel.

Beginning with his attempted return to service in 1980, Wightman experienced reemployment difficulties, and after several attempts, had to obtain the help of his Union, SEIU Local 99. After the union was successful in obtaining his re-employment, Wightman discovered that his name on the seniority list did not reflect his 1978 seniority date. He attempted, unsuccessfully, to convince Ralph Jacobs, District Deputy Director of Transportation, that, according to his (Wightman's) interpretation of the collective bargaining agreement, his 1978 seniority should be retained. According to Wightman's testimony, he grieved the denial of the request through union representative Frank Loya. He was unsuccessful in those efforts as well, causing him a disadvantage, vis-a-vis other drivers, when it came time to bid on preferred driving routes.⁵

⁵Wightman, although reemployed in July 1980, actually started work during September 1980, about the time school started. It is also at that time that the District's many drivers (over 1000) bid for their preferred routes. Routes are awarded in order of seniority. Therefore, prior to bidding, the drivers are customarily sent a copy of an updated seniority list. This apparently was the time when Wightman discovered a

In January of 1981, Wightman discovered that his bus had been damaged, as though hit purposely with a sledge hammer. He made attempts to report the incident and to seek an investigation by his superiors. He was called into Supervisor Bill Hamm's office and suspended for two weeks in connection with those attempts.

In response to Hamm's proposed discipline, Wightman stated that he would grieve the "threat" and would also continue to grieve his failure to win his September (1980) bidding route. Hamm then allegedly told Wightman that he would also involuntarily transfer him to another location because of some complaints he had received from a school principal.

Thus, after Wightman served his two weeks' suspension from driving, he was transferred to an area under the supervision of Paul Bronstein.⁶ According to Wightman, he began to have problems with Bronstein almost immediately. Some two months later, Wightman was transferred again.

Prior to 1983 Wightman persevered in his employment despite two attempts to terminate him. in early 1981, Vic Quiarte, a

possible discrepancy in his placement on the list. The discussion below regarding seniority further illuminates this topic.

⁶Mid-year involuntary transfers are considered undesirable because, among other things, it usually means that drivers must commute a greater distance to their assigned sites and have to adjust to the local practices of each supervisor.

supervisor, drew up dismissal charges alleging, inter alia, that Wightman had failed to attend a pupil management course and that he had not worn a proper uniform (shirt). Through negotiations with Wightman's union representative, the recommendation was changed to a recommendation for suspension, and, by the summer, dropped entirely. Wightman claims that this struggle to keep his job prevented him from being given summer employment in 1981.

Upon returning to work in the fall of 1981, Wightman was unable to drive a bus for 1-2 weeks because the District had allegedly lost documents that it ordinarily kept and which were required to be filed with the California Highway Patrol in order for Wightman to be issued a driver certificate.

At about the same time, in September 1981, Wightman had a confrontation with his supervisor when he posted union notices on a District bulletin board. The District removed these notices because they were not "official" union communications and because they had received calls from a union official, Howard Friedman, that there were unauthorized notices on the board.⁷ Wightman's supervisors called Wightman into their office to discuss the circumstances of the incident and to discuss Wightman's alleged and unauthorized use of his bus.

⁷These incidents were the subject of an Unfair Practice Charge (LA-CE-1455) which was ultimately dismissed (H-O-U 164).

There is no evidence that Wightman was disciplined for either posting union notices or for unauthorized use of the bus at that time.

However, beginning in about December 1981, the District again attempted to discharge him. In this attempt, his prior conduct, including Wightman's previous failure to complete a pupil management course, his failure to wear a proper uniform, improperly parking his bus during the "sledge hammer incident," and his improper use of a District bus (parking bus between shifts near Pierce College rather than assigned lot in order to attend classes) alleged during the notice-posting incident, were considered. The hearing officer conducting the eventual dismissal hearing for the District's Personnel Commission, refused to accept the District's recommendation for termination, but found sufficient evidence of insubordination to reduce it to a two-month suspension, effective from March 1982 to May 1982.

Although Wightman's tenure as a bus driver was marked by such incidents as the above, his actual job performance as a driver has been praised not only by some of his supervisors, but recognized in the decision of the Personnel Commission hearing officer noted above. That hearing officer characterized the events thusly:

The striking element of the entire episode is that appellant has demonstrated the ability to more than adequately perform his

assigned duties and when faced with the ultimate insistence of his supervisors, has performed admirably.

This troubled employment history cannot be fully appreciated without reference to Wightman's union and other activity taken on behalf of his fellow drivers. During a period of his employment, Wightman was an officially recognized and elected steward of Local 99, the exclusive bargaining agent for the bargaining unit which includes bus drivers. However, since about September 1981 there was a dispute between the District and Wightman and between Wightman and some Union officials as to whether he was a steward. For example, during the 1981 meeting with supervisors at which Wightman was questioned about his posting of unofficial union notices, the supervisors asked two union officers present whether Wightman was a steward of Local 99. One of them answered "yes" and the other answered "no." In Administrative Law Judge Jean Thomas' decision (H-O-U 164), she found that, although Wightman was elected as a steward in mid-May 1981, by September of 1981 he was no longer a steward by virtue of his reassignment to another location and pursuant to Local 99's steward policy.

In any event, even though Wightman had not been officially recognized by the District as a steward after September 1981, he continued to act as a de facto steward up to the time of his discharge. He held himself out as a steward and wore a steward badge. He represented several drivers in pre-disciplinary and

investigatory meetings with supervisors. He and Jules Kimmett, who also purports to be a shop steward for Local 99, have filed grievances on behalf of bus drivers and have made many attempts, either in meetings with supervisors, or during school board meetings, to better the working conditions of bus drivers. Indeed, many drivers thought Wightman was a union steward up to the time of the termination.

That Wightman holds himself out as a labor representative and that he is outspoken about the rights of employees is hardly a secret within the District, In his original decision reducing a termination recommendation to a suspension, Personnel Commission hearing officer Bicknell Showers, made the following observation:

Appellant is active in the affairs of his union and is a member of a faction which opposes the present administration. He has been active in attempting to depose the incumbent Executive Secretary.

B. Wightman's "Grievances" of December 3, 1982

In the allegation that is pertinent to this case, Wightman claims that the District's threat of dismissal occurred during a meeting which was set up for the purpose of discussing five pending grievance issues: (1) the procedure of determining seniority of bus drivers; (2) the lack of drinking water for bus drivers in the business division freeway parking lot; (3) involuntary transfers; (4) the improper repositioning of Wightman's name on the seniority list; and (5) \$3,000 in

backpay allegedly owed to Wightman.

1. Seniority

During the fall of 1982, the District directly employed some 1000-1100 bus drivers.⁸ Usually about two weeks before the first day of each school year, and pursuant to a collective bargaining contract procedure, drivers bid on the route they desire. Since the bids are awarded in order of seniority, the District attempts to notify drivers of scheduled bid meetings and provides updated seniority lists some time prior to the bidding procedure.

The "bidding seniority" is also important in the area of transfers because, if a vacancy becomes open during the school year, the driver with the highest seniority who bids on the position is awarded the assignment. Since bus parking locations are located at different sites throughout Los Angeles, drivers usually try to bid for a route in an area within a short commuting distance from their residence.

Because of the many drivers, there is a recurring problem regarding discrepancies or inaccuracies in the lists, It is common for drivers' names to be moved up or down on the list, and there are constant complaints and gripes from drivers who feel either that their names were wrongly placed or that the

⁸**This** does not include the several hundred drivers employed through a contractor, ARA Transportation.

seniority procedure was unfair.⁹ Although there is a contractual procedure for "clarifying" the list prior to bidding, that has failed to alleviate the recurrent problems.

2. Wightman's "Wrongful" Placement on the List

The beginning of Wightman's own problem with the seniority list occurred at the time of his re-employment after a break in service when he was a VISTA volunteer. According to Wightman's interpretation of the contract in effect at that time, he should have been credited with a 1978 hire date and his seniority should only have been reduced by the length of time he was at VISTA. Apparently the District felt he should not be credited with service prior to his re-employment in 1980, because Wightman's name was moved toward the bottom of the list upon being rehired.

In part, because of this, Wightman experienced problems in securing preferred bids during the subsequent annual bidding meetings.

3. Water Problem

At a bus parking location under a freeway near the business division, the District provides no drinking water and no

⁹Wightman and his supervisors had disagreements regarding the proper interpretation of contract language - whether seniority should be calculated by date of hire and subtracting only breaks in service, or whether it should be calculated solely upon number of hours worked, or a combination of these factors.

running water for toilets, instead, drivers have had to walk what they believe is a considerable distance to a garage in the District's service center. Portable toilets without running water are provided at the freeway site. The lack of drinking and running water has been of general concern among drivers.

4. Involuntary Transfers

Partially as a result of the bidding process, and sometimes because of other factors, drivers are transferred during the work year to locations for which they have not bid and which are often located inconveniently. According to Wightman, it has been a concern for him and for many drivers who believe that the District abuses the involuntary transfer mechanism in the contract.

In spite of Wightman's protests, the District has relied upon a contract provision which gives it the discretion to involuntarily transfer drivers at any time. This has been referred to by Wightman as the "Good of the District" clause. (See Respondent's Exhibit C, page 25.) Because Wightman has been involuntarily transferred himself several times, and was unable to bid to a better location because of his status on the seniority list, he has had constant problems with the District's use (or alleged "abuse") of that policy.

5. Backpay Problem

After the District's attempt to terminate Wightman was reduced to a suspension in the spring of 1982, the District

failed to reinstate him after the suspension period expired. The District claimed that it was not its fault, since it had not been officially notified by the Personnel Commission of the decision to suspend. The Personnel Commission acknowledged some blame, and its director indicated to Wightman that \$3,000 might be a fair figure to compensate him for the loss of work resulting from a failure to reinstate. Later, however, the District and its Personnel Commission could not agree on who was responsible for making compensation.¹⁰

C. The October 1982 Meeting

In about mid-October 1982,¹¹ Wightman and Jules Kimmett arranged a meeting with Max Barney. The meeting was scheduled to take place at the Transportation Department's headquarters office on Soto Street, in attendance were Kimmett, Wightman, Barney, Ralph Jacobs, James Srott (Personnel Services Manager), and a bus driver, Donald Roper. Wightman arrived by means of his school bus without incident.

The discussion during the meeting mainly centered around seniority problems in general, lack of water, backpay,

¹⁰Although the record is not precise regarding dates, it appears that Wightman was eligible for reinstatement in May 1982 and possibly could have obtained a summer driving assignment in addition to resuming his duties for the remainder of the school year. He was eventually reinstated in the fall of 1982.

¹¹The testimony differed regarding the exact date of this meeting. References were made to October 11 and October 13 as the date. Undisputedly, the meeting took place in October.

involuntary transfers, and Wightman's alleged wrongful placement on the seniority list. Ralph Jacobs, in testifying, recalled that Wightman made allegations that the seniority list, in general, was incorrect, and that Wightman mentioned the fact that he had lodged a complaint on behalf of 30 drivers who had lost their places on the list. He also recalled Wightman's accusations that drivers were complaining about being transferred against their will from one area to another, and that the issue of lack of water for drivers was raised. In addition, he recalled that Wightman raised concerns about himself, including his claim that the District owed him backpay, that he had been incorrectly placed on the seniority list, and that he had been involuntarily transferred on different occasions.

According to Srott's testimony, what Wightman was expressing at the October meeting, was what he had already heard over and over again from other drivers. Srott explained that seniority was a constant question among them, and that he knew at the time that it was an area of common concern. His explanation of the cause of the concern was that the seniority computations were very confusing, that the drivers did not fully understand the process, and were constantly upset about what they believed were inadequacies in the system. Srott acknowledged that he did find some errors in the list on occasion, but corrected those.

There was no resolution of the items discussed. Max Barney listened to Wightman's presentation, announced that he would investigate the concerns, and would get back to Wightman. According to Donald Roper's testimony, Wightman told Jacobs that he also wanted some time to gather (supporting evidence from) other drivers in order to try to straighten out some of the problems they were having. Jacobs, according to Roper, responded that that would be okay. And, although Kimmett asked for a reply date, no specific date was set for a response or for a future meeting.

On or shortly after the date of the meeting, Max Barney asked Srott to look into Wightman's concern regarding seniority and the backpay claim. Ralph Jacobs was asked to investigate the water situation.

Sometime after the October meeting, Jacobs reported to Barney that he had checked with his maintenance department and the District's real estate office and determined that it would be too costly to pipe water into the location under the freeway where it was lacking. According to Jacob's testimony, the District supervisors told the drivers that they would have to go to the business garage and get drinking water there.¹²

¹²See Reporter's Transcript, pages 390-391. Although Jacobs had his people so inform drivers on a haphazard basis, it is undisputed that no formal response was given to Wightman and Kimmett regarding their inquiries until their subsequent December 3, 1982 meeting.

Similarly, within two to three weeks after the October meeting, Srott reported his findings on the seniority and backpay issues. According to his testimony, he found that the seniority list was correct and, based upon conversations with Personnel Commission staff, concluded that Wightman was not deserving of any backpay money.

Although the findings were reported to Barney, no attempt was made to set up another meeting or to communicate the findings to Wightman and Kimmitt. Barney surmised that it was the heavy schedule and workload of the department that was the cause for the delay, inasmuch as they were in the process of making many changes in the routes.

D. The Meeting of December 3, 1982

No written grievance was filed by Wightman regarding the topics discussed at the October meeting. Rather, he and Kimmitt waited for Barney to schedule a future meeting to discuss the outcome of their investigation and studies. Although Max Barney did not take steps to initiate a future meeting, his testimony indicates that he had planned to schedule one on his own initiative. When asked why he decided to meet with Wightman on December 3, 1982, although he believed he was not required to, he responded thusly:

A. I didn't have to meet with him. I met with him because in the October meeting I had agreed to - and I thought about it, I'm behind, that I need to schedule a meeting with Mr. Wightman or need to arrange

something. Then I saw on my calendar, well,
good good, he's arranged that, and I will be able
to give him the response.¹³ (RT p. 203,
emphasis added.)

After Barney noticed that the meeting had been arranged, he made sure that Jacobs and Srott had followed up on their assignments and were ready to attend. Between Wightman's call and the December 3 meeting there were no communications from Barney, Srott, Jacobs or Wightman's supervisor to Wightman concerning the logistics and/or arrangements of the meeting.

Because Wightman was working a "split shift," he arrived at the meeting at about 11:00 a.m., the scheduled time. His work schedule was such that he had an afternoon route ("run") at 1:30 p.m. Therefore Wightman drove his bus to Soto Street as he had done for the October meeting and as he had done many times in the past.

At the Soto Street office, he met Jules Kimmett, who was also scheduled to be present for the meeting. Lee Hunter, a bus driver who had been recently discharged by contractor ARA Transportation Company also accompanied Kimmett and Wightman.¹⁴

¹³Wightman initiated the call that led to the meeting. He called Barney's secretary, who selected a date when Barney was free. That date happened to be December 3. She put the date on Barney's calendar and arranged to have Ralph Jacobs and Jim Srott set the date aside for the meeting as well. The meeting site was to be the Soto street office, the same as the previous meeting.

¹⁴Hunter was not a member of Wightman's bargaining unit,

At the outset, Wightman announced that he wished to obtain a hearing for Hunter inasmuch as he had been dismissed without some form of due process, and at the recommendation of the District. Max Barney refused Wightman's request and told him that Hunter had no contractual rights to a pre-discharge hearing, was not an employee of the District, and would refuse to talk further regarding a disciplinary hearing for Hunter. Wightman insisted upon a hearing. Barney refused and asked Hunter to leave the room. The testimony conflicted regarding whether Hunter remained or left.¹⁵

Those present at at the December 3 meeting, not including Lee Hunter, were Wightman, Kimmett, Barney, Jacobs and Srott. After the exchange regarding Hunter, the topic changed to one where Wightman announced that he hoped to achieve a resolution to the topics discussed in October because there had been too many reprisals in the department, such as his loss of money,

nor was he covered under any collective bargaining agreement of the District or represented by any exclusive employee organization.

¹⁵Those present on behalf of the District testified that Hunter left the office. Hunter, Kimmett and Wightman testified that he remained until the meeting's conclusion. Hunter's memory was so poor and his answers so equivocal that I discredit his testimony as to what happened after he was asked to leave. The testimony he gave regarding the substance of the meeting after that point was almost entirely in response to extremely leading questions and/or questions repeated over and over again. He seemed very unsure of his answers. He either was not present for the whole meeting or his memory is so poor that his testimony is entirely unreliable.

the loss of his paperwork, and the adverse attitude of supervisor Bill Hamm.

Wightman focused his comments next on the water issue and asked why it was that drivers were denied drinking water at their worksites while other District employees were not. Barney responded that they had done a study, and that the costs of providing running water were too prohibitive. Wightman suggested that the costs could be minimal if the District provided bottled ("Sparkletts") water instead of piping it in. Barney answered that that would not work because the bottles might be stolen. Wightman disagreed, noting that a guard had been hired to patrol the area anyway and that some sort of locked box could be installed to prevent theft after working hours. Barney refused to concede, reaffirming that it had already been decided that there would be no water provided at the business division freeway location.¹⁶ Barney added that he would ask the drivers to get their water at the business division garage.

The seniority issue was discussed next, both as it affected District drivers and as it affected Wightman in particular.

¹⁶**Barney**¹⁶ Barney, Srott, Jacobs, Kimmitt, Wightman and Hunter all testified regarding the events at the December 3 meeting. As is to be expected when several witnesses testify regarding the events of a lengthy meeting, there were some differences. The account described is a distillation of what I believe to be the most accurate account, based upon the credited testimony of all witnesses and their demeanor. Critical disputed areas will be discussed below.

Wightman stated that there were problems every year with the seniority list and the bidding procedure. He explained that it affected the drivers¹ morale because they felt they were at the whim of the Soto Street supervisors, which in turn caused negative feelings and fighting among them in attempts to secure a good position for themselves. Wightman gave the names of other drivers experiencing problems with their seniority positions. He added that the situation was the worst he had seen in his experience, and proposed that Barney work with the Union to draw up one accurate seniority list.

Regarding his own position on the list, Wightman complained that, despite his having worked there fairly steadily since 1978, except for his absence while at VISTA, his name had been placed near the bottom of the list. Wightman explained that, according to his interpretation of pertinent contract language, he should only have been deducted for time at VISTA. He added that, because of a District miscalculation, he had continuing bidding difficulties during the periodic bidding proceedings.

Barney responded that he was not required to meet with the Union. He explained that there was a contract procedure for challenging the seniority list prior to bidding. If a driver objected to the accuracy of the list, he was required to register the complaint and provide supporting evidence. If the list turned out to be inaccurate, it would be corrected. He added that he had had the seniority list checked after Wightman

complained, and was satisfied that it was accurate, and that the matter was settled.

When the topic of involuntary transfers was discussed, Wightman told Barney that he should find a solution to stopping the involuntary transfers of drivers, including himself (Wightman). He suggested that the District meet with Union representatives when any involuntary transfer was contemplated, but prior to its effectuation, pointing out that many drivers faced similar predicaments of being transferred against their will.

The reply from Barney was that, according to the contract, the District had a right to transfer employees whenever it was in its best interests. After Wightman and Barney argued over their differing interpretations of the contract language relied upon by the latter, Barney stated that he was within his contractual rights and rejected Wightman's suggestion to meet with the Union.

Regarding backpay, Wightman reiterated his request that the District reimburse him for money and time lost due to the District's failure to reinstate him after the Personnel Commission reversed the department's recommendation of termination in the spring of 1982. James Srott explained that Wightman was not entitled to backpay because the Personnel Commission could not find him (Wightman) to tell him that he could come back to work. Max Barney stated that it was not

within his power to reimburse Wightman for his reinstatement difficulties.

Next, there was a general discussion regarding the District's relationship with the Union. Wightman complained that the hiring of James Srott was a problem and a threat to the Union's stability inasmuch as he had been setting many people up for dismissal and carrying out disciplinary actions. Wightman and Kimmett complained about the District's bad faith bargaining and declared that there should have been notification and bargaining before Srott was "unilaterally" hired.

Wightman then again brought up some of the specific "grievance" items, noting his own previous difficulties in being involuntarily transferred by supervisors he did not get along with. The "grievance" items were repeated by Wightman, and Jules Kimmett made other allegations regarding the District's historic failure to honor its collective bargaining obligations. Barney reiterated the District's decision, and referred again to the contract's right to transfer when it was for the good of the District.

1. The Alleged Threat

At some point during Wightman's repeated demands and Barney's repeated responses, Max Barney became upset by the dialogue.¹⁷ He abruptly asked, "By the way, Victor, how did you get down to

¹⁷Max Barney denied that he was angry, upset, or

the [Soto Street] office today? Wightman, suspecting that somehow he was being "set up" since that question was unrelated to the meeting, did not respond. Barney asked Wightman the same question again. Again there was only silence from Wightman. Then Barney said, "Victor, I asked you, how you got here. Did you bring your bus today?" Wightman responded, "You know full well how I got here." Barney asked, "why aren't you

irritated. He described his demeanor as one of "frustration." He characterized his own demeanor on December 3 as initially showing great patience, and growing to one of frustration. He testified that he became more frustrated as the meeting progressed because it was taking longer than necessary, there was a lot of work to do, and Wightman kept reiterating his concerns, and was not satisfied with Barney's answers. In Barney's own words: "The continuous reiteration of the same questions over and over again in response to our answers did give me some degree of frustration. I would say a large degree." When asked to define "frustration," Barney explained that it was,

. . . a feeling of concern that we weren't communicating, concern that you (Wightman) were making an effort to change my mind merely by repeating the same questions over, and over, and over again, accompanied with some, as I said - very heavy workload, and items that I had to take care of promptly, and respond, just a relatively minor feeling of discomfort.

In comparison to Barney's characterization of his demeanor, and to his insistence that he was courteous to Wightman, and to Srott's testimony that Barney was "calm" during the entire meeting, Kimmett and Wightman described Barney's demeanor as angry, marked by a "flush" of the face, a strident, boisterous and loud tone of voice, and an "agitated" look. Based upon the demeanor of the witnesses and their entire testimony, I discredit the testimony of Barney, Srott and Jacobs insofar as they claim Barney was not irritated, upset or angry. I find that Barney did become angry toward Wightman.

answering my questions?" In response, Wightman said, "Because you're trying to set me up. It's funny that none of the questions that we've asked have been answered here today, but you want me to answer this question." Barney finally said, "I'm giving you a direct order. Where is your bus?" Wightman refused to answer.

At that moment, Barney asked Ralph Jacobs to go outside and have somebody see if Wightman's bus was nearby. There was a pause in the meeting. In Barney's words "the tempo of discussion had been active, and at that point it was less active. It became quiet." That, in essence, adjourned the meeting. The only comment Barney recalled as perhaps occurring after he ordered Jacobs to locate the bus was Wightman stating that he was dissatisfied with Barney's responses to the workers' concerns.

In questioning Wightman regarding the bus, Barney had potential disciplinary action in mind. During testimony, he initially explained, "to this day I really don't know why I asked him. I just did." When asked why he waited for about one hour into the meeting to ask about the bus, his reply was that he did not think of it at that point and that, "it just all of a sudden popped into my mind to ask him." Barney further explained that it had occurred to him that Wightman had, in the past, been guilty of misusing his bus. AS will be explained further below, Barney testified that it was a

violation of District policy for Wightman to have used his bus to attend the meeting on December 3.

Upon leaving Max Barney's office, Wightman went to complete his afternoon run,¹⁸ and headed for nearby Multnomah Street where he had parked the bus. He shortly discovered that the bus was gone. Pursuant to procedure, he called the dispatch office to report his findings, and requested a spare bus so that he could make his afternoon run. The dispatcher refused to let him use a spare bus and told him he would have to talk to max Barney about that. Wightman asked the dispatcher how he was supposed to get to his parking location or home without the bus. The dispatcher's reply was that he would have to take that up with Barney.¹⁹

What actually happened after Jacobs left the meeting in search of the bus was an unusual set of events. Jacobs asked one of the bus inspectors to locate the bus. The inspector found it nearby and reported it to Jacobs. The inspector left and another inspector was sent supposedly to return the bus to

¹⁸The testimony varied as to the length of the meeting. Wightman estimated it at about 45 minutes, while others estimated its length as 1 hour and 15 minutes to 1 hour and 30 minutes.

¹⁹It is unclear what occurred after this conversation. Apparently Wightman went back to the Soto Street office. He did testify that Barney and Jacobs were no longer there. Wightman contends that the District's spoken words and its conduct, at and after the meeting, constitute the unlawful threat.

the nearest parking lot, at the District's Nutrition Center. Jacobs returned to the meeting as Kimmitt and Wightman were leaving. Jacobs did not mention anything regarding the bus while Kimmitt and Wightman were present.

Wightman's bus was taken by the inspector to the Business Center garage. However, the inspector reported to Jacobs that the bus was in bad condition, and asked whether he would like to see it.²⁰ Thereafter, a bus inspection was performed not only by Noreen Flavin, the inspector who drove the bus to the garage, but also by Kirk Hunter, who was a driver/trainer who teaches bus inspection.

Although bus inspections are routine, and drivers themselves perform them daily, this bus drew unwarranted attention. Instead of conducting the inspection while at the garage, the bus was taken to the Soto Street office and parked next to James Srott's window. Despite the fact that James Srott does not normally watch bus inspections, and testified that it was not a normal occurrence to have an inspection done at the Soto Street office, the spectacle caught his attention and he left his office to observe.

Similarly, Ralph Jacobs, who testified that this was a "one time situation" and that it was not a normal thing, walked

²⁰ The "bad condition" of the bus - torn seats, dirty exterior - is open to question inasmuch as Wightman had reported the torn seats and other pre-existing conditions to maintenance long before December 3.

downstairs, boarded the bus, and observed the inspection. Yet, he also testified that the transportation department was "very busy at the time."

Max Barney, who testified that he was in charge of some 1900 bus routes, some 75 area supervisors as well as other administrators, and over a thousand employees, also found his attention drawn to the scene. When he saw the bus at Soto Street, he asked somebody "what was going on and they indicated it was Mr. Wightman's bus and they're inspecting it." So, Barney decided to go take a look for himself. He, too, boarded the bus and observed the inspection. Neither Barney nor Srott could explain why the bus was brought to Soto Street instead of having the "routine" inspection done at the garage.

An additional unusual occurrence transpired before the end of that December 3 workday. Barney testified that, under circumstances when a driver's bus is removed by inspectors, it is the driver's duty to call dispatch to get a replacement bus until the assigned bus is returned to the driver. In this case, Barney ordered that another driver cover Wightman's afternoon route. Barney testified that Wightman should have called dispatch to get a spare bus if he wanted to complete the run, yet there is no evidence, including from Barney, to indicate that Wightman did not do exactly this.

The end result was that Wightman was left without a bus to complete his workday, without transportation to get back to his

parking location so that he could go home, and without personal belongings that he had left on the bus.

Yet, no disciplinary action was pending at the time. Indeed, Wightman called Barney later that afternoon at about 3:00 p.m. to inquire as to what they had done and to tell them about the personal belongings he had left on the bus. Barney referred his call to Jacobs after informing Wightman that his afternoon route had been covered and that arrangements were being made to make his belongings available, Wightman then expressed to Jacobs his anger at their having taken his "means of making a livelihood [bus], leaving him without transportation, and taking his belongings." Jacobs explained that his belongings would be put in a container and be available at the Business Division garage. According to Wightman, Jacobs told him that if he didn't like it, he "could take us to court."

2. Events of the Week Following the December 3 Meeting

The following Monday,²¹ Wightman was issued a spare bus and resumed his route. His assigned bus was returned to him late that week. His belongings were returned either Monday or Tuesday of that week. Upon receiving his old bus, Wightman noted that none of the alleged "defects" had been corrected.²² ²²

²¹December 3 was a Friday.

²²The District inspectors had allegedly found some loose lug nuts and one missing lug nut to go along with a faltering

E. Wightman's Discharge

On about January 12, 1983, Wightman was called into James Srott's office where the latter made verbal accusations, including, inter alia, that Wightman had violated the District's bus policy by using the District's bus to attend the meeting of December 3, that safety violations, including loose and missing lug nuts had been found on the bus, and that there were other defects discovered on that bus. Wightman refused to answer questions without receiving a written list of the accusations against him. The short meeting ended when Srott refused to provide the written charges and Wightman refused to answer the verbal accusations.

In February Wightman was served with formal written charges and a recommendation for his termination. Included in the accusations was the allegation that he had improperly used his bus on December 3 and the allegations regarding the faulty condition of his bus.

Wightman was discharged effective April 19, 1983. He had a hearing before a District Personnel Commission hearing officer, Edward White, after Wightman appealed his discharge. In his decision issued on July 6, 1983, White concluded that Wightman

dome light, a missing band-aid in the first aid kit, the torn seats, and some missing weather stripping. The loose and missing lug nuts situation was "corrected." Wightman denies that the lug nuts were loose or missing.

should be reinstated, but that he be suspended without pay for four months from April 19, 1983.

After reviewing White's proposed decision, the full Commission wrote a letter to Wightman indicating that some of the tapes of the hearing were not available because parts of the hearing had inadvertently not been recorded. They explained that they had two choices: (1) to adopt White's recommendation; or (2) in the absence of transcripts, to order a new hearing on the original charges. The Commission ordered a new hearing before another hearing officer. The new hearing was held in October 1983. The hearing officer sustained the District's action to dismiss Wightman. The Personnel Commission then adopted that proposed decision.

F. The Bus Usage Policy

As noted above, the Respondent took the position that Wightman violated the District's policy, prohibiting the use of District vehicles for personal business, when he used his bus without authorization to attend the December 3, 1982 meeting. According to its theory, this was the justification Barney had for asking Wightman how he arrived at the meeting.

No other area of testimony shows a more striking contrast between Respondent and Charging Party's version of the events than that regarding what the actual District policy and practice was. Victoria Vargas, a bus driver with the District since 1976, and a former steward for Local 99, testified that

she always used her bus to go to the Soto Street office when she had a grievance to attend to. She added that drivers were never told not to use them for that purpose, and that no one used their personal vehicles to go to the office for those reasons. She gave examples where she had attended meetings (using her bus) at Soto street without being asked about her use of the bus, nor had she ever heard of anyone, except for Wightman, being reprimanded for using the bus to attend meetings with supervisors at Soto Street.

Truman Ellison, also a bus driver and a union steward, testified that he too, has used his bus to go to Soto Street without being asked to attend by District officials. He supported his statement with examples (e.g., to discuss the amount of pay drivers were getting for security bus watching, etc.). Further, he added that, on those occasions when he went to Soto Street with his bus, his supervisor was aware because he would tell him. When asked whether he requested permission or approval on any of these instances, he replied in the negative, and that he was telling his supervisor where he was going and why. He would not, however, use his bus to go to the meetings if it was not on his way to his parking location. But, he maintained, the nature of bus driving was such that, in order to go to Soto Street for meetings, it pretty much required drivers to use their buses.

Ellison has seen Vickie Vargas also use her bus to travel

to Soto Street for grievances. He corroborated Vargas¹ testimony that Wightman was the only one he had ever known to be reprimanded (December 3) for using his bus to go to the office to meet with supervisors.

John Scates, a District driver since 1979, testified that many drivers use their buses to travel back and forth to the Soto street office either to process grievances or to discuss working conditions. This occurred whether or not the drivers were Union stewards. Scates himself has made such use of his bus and knows of other drivers who so use them without being given express permission. He has not seen any individuals use their private automobiles to go to the office for such reasons. Like Vargas and Ellison, Scates had heard of no driver getting reprimanded for using buses to go to Soto Street except for Wightman. He stated that the District practice was for drivers to use their buses to go to Soto Street.

Shiral Nelson, a District bus driver for seven years, testified that she sometimes used her bus to attend meetings at Soto Street, and has seen others do the same even when it was not official Union business. She has not gone with her supervisors' express permission, and testified that it was a standard practice to use school buses to attend meetings at the Soto Street office.

Bobbie Stuggars, another District bus driver, corroborated the above testimony. She added that she was unaware of anyone

ever being reprimanded for taking a bus to the Soto Street office.

Victor Wightman testified that he had used his bus to go to Soto Street in similar circumstances in the past to meet with Barney. Yet, prior to December 3, 1982, Barney (and everyone else) had never objected, nor had he been told that he could not use his bus in that manner. Indeed, during the October meeting where the identical issues were discussed, no one, including Barney, asked him about his usage of the bus or

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indicated that there was a problem with it.²³ Wightman added that other drivers made similar use of their buses, and that it was standard practice to so use them.

In contrast, District supervisors testified that such usage was, under certain circumstances, a violation of policy. Barney explained that the District had a continuing problem with drivers using its vehicles for personal business, like running personal errands. Therefore, a bus driver handbook is distributed to drivers explaining the policy, and a memorandum delineating the policy is periodically disseminated, especially when incidents of improper use of vehicles increase. Regarding use of buses to go to Soto street, Barney explained that, if

²³In his testimony, Barney acknowledged that he did not ask Wightman about his bus in the October meeting. Jules Kimmett also corroborated the testimony that the first time Wightman had ever been asked about his bus in connection with meetings with supervisors was December 3, 1982.

the meeting is on official District business, and if the meeting is initiated by the District official, then the driver may use the bus to attend. If a District official tells a driver to come to a meeting, the driver is allowed to use his bus.

Violation of said policy may result in discipline according to Barney. He explained that, in response to being in the public spotlight in 1978, and in view of the pressure of desegregation, the department had since "re-doubled" its efforts to make sure bus drivers were not "ripping citizens off." Barney acknowledged that he had never had any driver disciplined for taking his bus to the Soto Street office for purposes of discussing working conditions with him (Barney). He has, however, disciplined drivers for such things as using their bus to go to locations, like "McDonald's" Restaurants.

Major Patterson, a supervisor, testified that any time that a driver is not asked, or told by administration, to go to the Soto Street office, it would be a violation of District policy to take the bus anywhere other than its parking location, the appropriate school, or the supervisor's office. Although he testified that he enforced the policy uniformly for drivers under him, he had never disciplined any driver for using a bus to go to Soto Street because, he explained, it has never happened in his area. Wightman's is the only case where he has

ever heard that it happened.²⁴

Ralph Jacobs testified that if administration asks a driver to come to Soto Street, he is usually directed to use his bus, but if the driver comes without being asked, it is not District business, and it is not permissible to use his own bus. When asked whether it was District business for a driver to go to Soto Street for the purpose of complaining about his working conditions, and comes on his own initiative, he answered: "It's not district business unless he makes an appointment, and then it becomes District business."²⁵ Jacobs did not recall any individual ever being discharged for using a bus to go to Soto Street.

Although James Srott testified that, in the one and one-half year period he had been employed by the Transportation Branch, approximately 10 drivers had been disciplined for violation of the bus policy, he was unaware of whether any of those ten had been disciplined for using a bus to go to Soto Street. Indeed, of the individuals named in a document (Respondent's Exhibit "D") who had been disciplined, none had

²⁴Patterson was not Wightman's supervisor.

²⁵Later in his testimony, when asked by the undersigned, Jacobs modified his testimony. He stated that if he had talked to an employee about the subject of working conditions before, and he (Jacobs) told the employee to come in, he would make arrangements on how the driver was to arrive. It would be considered District business if he (Jacobs) made the appointment. In other words, it would not be considered District business unless he (Jacobs) initiated the appointment.

been disciplined in connection with using a bus to go to Soto Street.

In spite of Max Barney's testimony regarding continuous problems with drivers making improper use of District vehicles, the driver's handbook and the policy memoranda issued at least yearly (Respondent's Exhibits A, B and E (p. 2)) fail to even mention anything regarding using District vehicles to attend meetings for the driver's benefit at District offices.

The pertinent section of the driver's handbook reads as follows:

OPERATING RULES AND DISTRICT POLICY

1. Using Bus for Personal Business (Memo #25 - 1-10-80).

District buses are to be used only for assigned district related transportation and driver training, not for shopping trips, going to the doctor or dentist and or any other personal errands. Supervisors may not authorize drivers to use buses for personal use.

Anyone using a bus for personal business will be disciplined.²⁶

A bus driver memorandum distributed in 1979 reads as follows:

MEMORANDUM NO. 41

TO: ALL DISTRICT BUS DRIVERS

²⁶Another section of the manual deals with appropriate parking locations for buses. There is no allegation regarding Wightman's improper parking of his bus on December 3 on a public street, however.

FROM: Ralph A. Jacobs
Deputy Director of Transportation
SUBJECT: USING BUS FOR PERSONAL BUSINESS

School buses are not to be used for personal business. We have received several complaints from private citizens that District bus drivers are using buses for personal business such as shopping trips, going to the doctor or dentist and various other personal errands. District buses are to be used only for assigned District related transportation and driver training.

Anyone using a bus for personal business will be disciplined as required.²⁷

It is noteworthy that no District bus drivers were called to corroborate the District's alleged policy regarding use of buses to go to the Soto Street office. There is no evidence of any writing to corroborate the District's version of its policy regarding use of buses to meet with supervisors over work-related problems. And, in light of the claim that there is a constant problem with improper use of buses, the District is unable to explain why it has failed to avail itself of the opportunity, over the years, to spell out that policy in writing.

There were other inconsistencies in the testimony of District administrators that lead me to discredit their version of the policy. For example, according to Ralph Jacobs' version, Wightman would not have been in violation of the

²⁷Identical memoranda, dated January 10, 1980, were distributed in 1980 and 1981.

policy if Barney's secretary had initiated the scheduling of the meeting of December 3. Yet, Barney testified that he had intended to schedule the meeting anyway, but found that Wightman had already gone ahead and set it. Wightman saved him the trouble of doing what he had already intended to do. It was through a fortuity that Wightman and not Jacobs initiated the meeting. It is illogical that a violation of an unwritten and unenforced policy would turn on such a fortuitous event. Additionally, I note the fact that supervisors testified that it was usual practice for them to arrange with drivers the mode of transportation when meetings were scheduled to occur at Soto Street. Yet, no such arrangements were made or attempted with respect to Wightman. Similarly, none of the drivers or administrators ever recall any other instance prior to December 3, 1982, where a driver was questioned about how s/he arrived at a meeting at Soto Street or any other District office, Indeed, Wightman was never asked the question under similar conditions in the past.

Based upon the above, the demeanor of the witnesses, and the entire testimony and evidence, I discredit the testimony of District administrators insofar as it purports to establish that it was against District policy for drivers to use District vehicles to travel to Soto Street on their own initiative in order to meet with supervisory and/or managerial personnel. Even if such a policy existed in some form, I would find that

it was not previously enforced under fact situations similar to those of December 3, 1982.

III. DISCUSSION

The Complaint in this case alleges that the threat made against Wightman on December 3, 1982 constitutes a violation of Government Code section 3543.5(a). The PERB has held that, in unfair practice cases involving an allegation of interference with protected rights, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity.

Sacramento City Unified School District (1985) PERB Decision No. 492 [alleged threats, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Novato Unified School District (1982) PERB Decision No. 210]. The Carlsbad test for 3543.5(a) violations is as follows:

2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was

occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.²⁸

A. Protected Activity

Employee attempts to peacefully compel their employer to adhere to a collective bargaining agreement are protected concerted activities within the meaning of the EERA. Baldwin Park Unified School District (1982) PERB Decision No. 221 at page 11; see also, e.g., NLRB v. City Disposal Systems, Inc. (1984) 460 U.S. 1050 [115 LRRM 3193]. Such conduct would be protected even if Wightman's interpretation of the contract was erroneous or even if his complaints lacked merit. Baldwin Park, supra, at pages 11-12.

Similarly, criticism of supervisors and activity directed against their performance have been found to be protected. State of California, Department of Transportation (1982) PERB Decision No. 257-S. Concerted activities to protest working conditions are protected unless they are unlawful, violent, in

²⁸ It is noted that, in an interference case, it is unnecessary for the charging party to show that respondent acted with an unlawful motivation to establish a violation. Regents of the University of California (1983) PERB Decision No. 305-H. Indeed, the respondent's intent in such cases is irrelevant. Sacramento City Unified School District, supra, page 30.

breach of contract or indefensible. NLRB v. Washington Aluminum Co. (1962) 370 U.S. 9, p. 17 [50 LRRM 2235].

The fact that Wightman had not followed the letter of the collective bargaining agreement regarding grievances does not, as Respondent seems to argue, remove his conduct from its protected status. It is granted that Wightman never filed a written grievance over the enumerated issues discussed on December 3. At least two of those (backpay and specific involuntary transfers), were beyond the time limits set forth in the contract for filing a grievance. His attempt to represent Lee Hunter was arguably unprotected because Hunter was not a District employee and also could not assert any rights under any collective bargaining agreement.

However, the general issue of seniority (separate from Wightman's claim that he had been wrongfully placed on the list) was a continuing problem for most drivers, was not amenable to resolution by individuals attempting to "clarify" isolated lists on a case-by-case basis, and was an attack on management's calculation of seniority and its application of disputed contract language. The contract's grievance article contained a clause that allowed for informal resolution of disputes in an attempt to resolve them prior to the filing of formal grievances. This is exactly what Wightman was attempting to do at the October and December meetings.

The lack of drinking water at a bus parking site was also a

continuing problem of common concern to other drivers. The problem was not addressed in the contract.

Moreover, apart from Wightman's personal concerns regarding transfers, he was attempting to remedy what he believed to be an arbitrary policy of involuntary transfers as applied to all drivers. Contesting the District's interpretation of contract language, he was concerned that the contract was being abused. In addition, he attempted to apprise Barney of related problems, such as worker morale and employee dissatisfaction resulting from perceived arbitrary practices of supervisors and administrators.

In essence, some of the claims Wightman was making in the October and December meetings concerned the subject of the District's adherence to the spirit of its collective bargaining agreement with Local 99, and some of them concerned working conditions not necessarily addressed in that contract. Many of the concerns raised by Wightman, though not inherently grounded on the contract, involved criticism of supervisors and their use or abuse of authority in implementing employment procedures. As cited, supra, both types of activities are protected. The fact that Wightman referred to all the subjects he raised in his charge as "grievances" is not fatal to his case, and determining whether his activity was protected by use of a narrow definition based solely on contract language is unwarranted. The Complaint in this case cannot be read so

narrowly. Atlas Minerals, Division of Atlas Corporation (1981)
256 NLRB No. 22.

Neither can it be argued that Wightman's activity is unprotected because he was not acting on behalf of other employees or that he was acting in derogation of his Union. I discredit Barney's testimony that Wightman never stated that he was acting on behalf of other employees. Indeed, Ralph Jacobs' testimony that Wightman discussed the fact that he had lodged a complaint on behalf of 30 drivers who lost their places on the seniority list indicates otherwise. The testimony regarding the water problem showed that Jacobs' response to Wightman's concerns regarding the water was to have the supervisors tell the drivers (not Wightman himself) to get their water at the business garage. Donald Roper's unrefuted testimony indicated that Wightman indeed was working with other drivers to substantiate the complaints. Further, although there was a dispute about whether Wightman was a union steward on the date of the meetings, he acted de facto as a steward, and other employees believed and acted upon the representation that he was a steward, acting on behalf of the Union.

There is no reliable evidence suggesting that Wightman's activity was in derogation of, or contrary to any position taken by the Union, even if it is assumed that he was not an official Union steward.²⁹ In the absence of such evidence,

²⁹In fact, Frank Loya, a recognized Union official, had attempted to resolve some of the same issues.

his conduct retains its protected status. Roadway Express, Inc. (1979) 241 NLRB No. 63; see also Colony Printing & Labelling, Inc. (1980) 249 NLRB 223, at page 224.

B. Unlawful Threats

Unlawful interference may take the form of threatening or coercive statements. In Antelope Valley Community College District (1979) PERB Decision No. 97, the Board recognized that an employer's communication, although noncoercive on its face, may become coercive, and thus unlawful, when seen as part of a total course of conduct in which the employer engaged. Id., page 21, citing NLRB v. Virginia Electric and Power Co. (1941) 314 U.S. 469 [9 LRRM 405]. Therefore, statements made by an employer are to be viewed in their overall context to determine if they have a coercive meaning. Sacramento City Unified School District, supra, at page 25, citing John Swett Unified School District (1981) PERB Decision No. 188.

The fact that an employer statement and/or accompanying conduct may be ambiguous or innocuous on its face does not mean it is lawful, a view supported by private sector precedent. In Murcel Manufacturing Corp. (1977) 231 NLRB No. 80, an employee wore a "Vote Yes" (pro-union) button on the morning of a pending representation election. The employee's supervisor approached her, said "Good morning," stood by her work station, looked at her, took a pad from his pocket after asking for her name, wrote something on it, and left. The Board upheld the

finding and the following rationale of the administrative law judge:

Since Kotkes [supervisor] neither told the employee why he had asked her name or what he wrote on his pad, the incident would have the normal and foreseeable effect of creating a sense of disquiet or unease in an employee. Whether true or not, the normal inference for Colson [employee] from the incident would be that Kotkes was making a note of the fact that employee Colson was wearing a "Vote Yes" button on the morning of the election. . . . The mystery or unexplained nature of the incident and its purpose would add to its disquieting effect and carried with it an implied possibility of reprisal. (Emphasis added.)

Similarly, in international Medication Systems, Ltd. (1980) 247 NLRB No. 190, the NLRB found a violation when, during a conversation regarding an employee's support of a union, an agent of the employer asked the employee: "What if you get put in jail?" In finding that the question constituted an unlawful threat of reprisal, the Board again went beyond the actual wording and considered the context in which the question was asked.

In Norton Concrete Company (1980) 249 NLRB No. 172, the NLRB found that the following employer question/statement made to an employee constituted an unlawful threat: "Well, what else can you do besides haul concrete?" The facts indicated that the employee to whom the question was directed had just informed his superiors that he was going to try to get a union into the company.

The question, "don't you think you have done enough by going down to Akron?" was found to be an unlawful veiled warning in Roadway Express, Inc. (1979) 241 NLRB No. 63. In that case the question was asked by an employee's supervisor in response to that employee's complaint about defective equipment. About two weeks prior to the question, the employee had been involved in a peaceful demonstration at Akron to protest working conditions at the company.

As the above cases indicate, it is not necessary that a statement carry any express words referring to possible adverse action in order for the statement to constitute unlawful interference with employee rights. The cases also indicate that the statement (or question) must have some connection with protected activity. The fact that the employer may have a regulation or policy giving it the purported right to make the statement (or question) does not, however, necessarily detract from its unlawful nature.

For example, in Dependable Lists, Inc. (1979) 239 NLRB 1304, an employee, knowingly active in his union, received an unprecedented written warning threatening discharge if he continued to report late for work. It was conceded that the employee had been frequently late for work. However, other employees were also frequently late and no other employee had ever been given such a written reprimand. The Board found a section 8(a)(1) violation by that threatening warning, noting

that the conduct (tardiness) had been condoned by respondent for a long time.

Applying these principles to the case at hand, I am mindful of the fact that Max Barney's questions to Wightman on December 3 and his subsequent actions regarding his bus did not contain an explicit threat of reprisal. However, they did contain a threat of reprisal viewed in the entire context. Max Barney clearly had in mind, when he asked the questions, potential disciplinary action, evidenced by his testimony that it occurred to him that Wightman had previously been disciplined for improper use of his bus. Wightman had indeed been disciplined before for alleged misuse of his bus in a different type of situation (parking bus near Pierce college to attend classes during his noon break). Wightman had also been the target of previous attempted discharges, two of which he had succeeded in defeating. He was a visible, confrontational, and unrelenting advocate of employee rights and frequently opposed the administration on a variety of issues. Barney's questions regarding the bus came "out of the blue," and were totally unrelated to the issues discussed at the meeting. They also occurred immediately following an antagonistic verbal exchange during which Wightman indicated that he would not relent in pursuing his list of "grievances."

In the context of these, and other facts detailed, supra, Barney's questions would create a sense of disquiet or unease

in an employee. And, viewed in conjunction with the events immediately following the meeting and regardless of whether Wightman actually felt threatened, a reasonable person would feel that Barney was attempting to prevent him from further pursuing the "grievances" by putting an abrupt halt to the session in using an implied threat of discipline and preventing him from finishing his workday.

Barney could simply have rejected Wightman's demands, and terminated the meeting, and then ordered Wightman to return to work. Instead, he chose to end the meeting by resorting to a series of questions that carried implied threats of reprisals.

C. Business Necessity

Consistent with the above findings of fact, the implied threats in Max Barney's inquiry of December 3 are not justified by any legitimate business necessity. Wightman was not using his bus to run personal errands, going on shopping trips, or even utilizing it to attend classes, uses that the written District policy concededly prohibits. He was being accused of violating a non-existent policy, or at the very least, a policy that had never been enforced, and for activity that bus drivers knew had been historically condoned. It is ironic that Barney would threaten to discipline Wightman for conduct that even the administrators would have deemed perfectly proper if Barney had done what he should have done anyway - initiate the scheduling of the meeting of December 3.

Neither can it be seriously contended that a connection between the implied threats and Wightman's protected activity is lacking. Aside from the facts already noted above, James Srott, whom Wightman had criticized at the December 3 meeting, testified that it was only after the December 3 meeting that he initiated the investigation that led to Wightman's discharge in April 1983. He explained that, if Wightman had never shown up at that meeting, he never would have initiated disciplinary proceedings.³⁰

Disciplinary proceedings would not have been initiated, despite the alleged fact that there was already a disciplinary document in Wightman's personnel file from Mary Smith, his immediate supervisor, who accused Wightman of misusing his bus long before December 3. Curiously, no disciplinary action had been taken pursuant to that document.³¹³¹

IV. CONCLUSION

It is therefore determined that Wightman was engaged in

³⁰A claim that the District was merely reacting to Wightman's conduct during the meeting in making the implied threats does not legally excuse such conduct. It is just as unlawful to discipline or threaten to discipline an employee in connection with his conduct during a grievance. United States Postal Service (1980) 250 NLRB No. 156; Illinois Bell Telephone Co. (1982) 259 NLRB No. 167.

³¹The document was not offered into evidence. Wightman was totally unaware of it, and the only evidence about it was Srott's memory of what it contained. I cite it here only to show the unconvincing nature of the District's rationale for threatening Wightman and carrying out the threat.

protected activity on December 3, 1982, and that Barney's questions regarding the bus, viewed in the entire context, constituted an implied threat. It is further found that the threat was made in connection with Wightman's persistence in engaging in protected activities, and that the District did not have a legitimate business justification for making the threat. By its conduct, the District interfered with Wightman's right to engage in activities protected by the EERA in violation of Government Code section 3543.5(a).

V. REMEDY

Victor Wightman requested reinstatement, backpay, and punitive damages as a remedy for the District's unfair practices. He was repeatedly advised by the undersigned that he would be given the opportunity to argue the propriety of such remedies and that he should provide legal precedent or authority in support of such relief. The only relevant legal authority cited was Government Code section 3541.5(c) which states that the Board has the power to order an offending party to take such affirmative action, including, but not limited to, reinstatement with or without backpay as will effectuate the policies of the Act.

During the hearing, Jules Kimmett and Victor Wightman attempted to litigate the merits of all the allegations consolidated in PERB Decision No. 473, irrespective of whether the Board had dismissed them. Accordingly, they sought to

litigate the termination of Wightman and further allegations of threats occurring in January and February of 1983. They were allowed to put on some evidence regarding these areas only for the purpose of giving a context or background to show that what happened on December 3 (words and conduct) constituted an implied threat, and to show that the threat was carried out. They were cautioned that the undersigned did not have the issue of the discharge before him inasmuch as the Complaint did not allege anything other than the threat and that the Board had dismissed the allegations of an unlawful termination in Decision Number 473 and in another case cited above in the procedural history.³²³²

Wightman did not appeal the Board's dismissal of allegations relating to the termination. He may not revive them by way of this proceeding inasmuch as his avenue was reconsideration before PERB or a writ of review to the Courts of Appeal. Charging Party was informed that the undersigned had no jurisdiction to order a remedy for an allegation of a discharge that had been dismissed by the Board. The District put on no defense testimony at all. Although it is understandable that Wightman would feel that the remedy below is inadequate since the threat was such a small "fragment" in a

³²Apparently the allegations regarding the termination were dismissed because of procedural deficiencies in the charges and Charging Party's refusal to amend them with facts necessary to establish a prima facie case.

series of events he believes to be unlawful, he failed to preserve his right to pursue that remedy in properly filing his charges and, later, in failing to seek review through designated channels. Therefore, I must conclude that I am without authority to award backpay, reinstatement, or punitive damages as a remedy.³³ **33**

The appropriate remedy for an interference case is a cease and desist order requiring the District to post a notice incorporating the terms of the order. See, e.g., Sacramento City Unified School District (1985) PERB Decision No. 492. Posting of such a notice will advise employees that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy alleged in the Complaint and the District's readiness to comply with the ordered remedy. Davis Unified School District (1980) PERB Decision No. 116; Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law,

³³It is unnecessary, therefore, to discuss the propriety of awarding punitive damages for a violation of EERA. It is recognized that private sector labor precedent indicates punitive damages are generally inappropriate awards for violations of collective bargaining statutes.

and the entire record in this case, it is found that the Los Angeles Unified School District violated subsection 3543.5(a) of the Educational Employment Relations Act. pursuant to subsection 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

(1) Interfering with the protected rights of employees to pursue grievances and seek to improve their working conditions by making threats to employees who choose to engage in such activities.

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

(1) Within ten 10 workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(2) Within twenty (20) workdays from service of a

final decision in this matter, notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 15, 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 August 15, 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.

MANUEL M. MELGOZA

Dated: July 26, 1985

Administrative Law Judge