STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH,	)	
	)	Case Nos. LA-CE-2112
Charging Party,	)	LA-CE-2130
	)	LA-CE-2134
v.	)	LA-CE-2143
	)	
RIVERSIDE UNIFIED SCHOOL DISTRICT,	)	PERB Decision No. 622
	)	
Respondent.	)	June 11, 1987
	)	

Appearance; Tony Petrich, on his own behalf.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

CRAIB, Member: These cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the charging party, Tony Petrich, to the attached proposed decision of a PERB administrative law judge (ALJ) dismissing all four of the complaints. Case Nos. LA-CE-2112, LA-CE-2130 and LA-CE-2134 were consolidated for hearing and decision, and Case No. LA-CE-2143 was consolidated with the others for decision. At the close of the charging party's case in chief, the ALJ dismissed Case Nos. LA-CE-2112 and LA-CE-2130 for failure to establish a prima facie case. At the close of the charging party's case in chief in Case No. LA-CE-2143, the ALJ took under submission (pending receipt of the transcript and submission of briefs) the Riverside Unified School District's (District) oral motion to dismiss. The District was required to go forward with evidence in Case No. LA-CE-2134.

We have carefully reviewed the entire record, including the transcript and exceptions filed by the charging party, and, finding the ALJ's findings of fact and conclusions of law free of prejudicial error, we adopt them as the Decision of the Board itself, except as set forth below. We agree that the charging party failed, in all four of the cases before us, to establish a violation of the Educational Employment Relations Act (EERA).[1]

Case No. LA-CE-2134 involves an alleged threat of reprisal during an August 23, 1984 meeting concerning the District's desire to change the charging party's starting time. While viewing it as a close question, the ALJ concluded that, when viewed in light of all the surrounding circumstances, the comments at issue did not constitute a threat. Our review of the record has revealed no basis upon which to disturb the conclusion that no threat occurred. The ALJ's determination relied heavily upon the credibility of the various witnesses and is, therefore, deserving of deference. Santa Clara Unified School District (1979) PERB Decision No. 104 (the Board will give deference to an ALJ's credibility determinations).

Although she found no threat, the ALJ further concluded that even if a threat had been made, it was not in response to protected activity because the charging party had no right to negotiate a change in his starting time. While we agree that

[1]The EERA is codified at Government Code section 3540, et seq.

no threat occurred, we find it unnecessary to address the question of whether the charging party was engaged in protected activity and we do not adopt that portion of the ALJ's analysis. Since there was no threat, it was unnecessary to assume there was in order to consider whether it was in response to protected activity.

ORDER

Case Nos. LA-CE-2112, LA-CE-2130, LA-CE-2134 and LA-CE-2143 are hereby DISMISSED.

Chairperson Hesse and Member Porter joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH,	)	
	)	Unfair Practice
Charging Party,	)	Case Nos. LA-CE-2112
	)	LA-CE-2130
v.	)	LA-CE-2134
	)	LA-CE-2143
RIVERSIDE UNIFIED SCHOOL DISTRICT,	)	
	)	PROPOSED DECISION
Respondent.	)	(2/5/86)
	)	

Appearances: Tony Petrich (in Pro Per), Charles D. Field (Best, Best & Krieger), Attorney for Respondent.

Before Barbara E. Miller, Administrative Law Judge.

I. INTRODUCTORY STATEMENT

The above captioned cases all involve Tony Petrich (hereinafter Charging Party or Petrich), a Gardener for the Riverside Unified School District (hereinafter Respondent or District). The cases reflect an ongoing saga of difficulty between the Respondent and the Charging Party, allegedly because of the latter's protected activity pursuant to the Educational Employment Relations Act (hereinafter EERA)[1] Each case has a somewhat varied and complicated procedural

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

history, which is set forth in detail below.[2]

II. PROCEDURAL HISTORY

A. Case No. LA-CE-2134

This Charge was first filed on February 11, 1985,[3] and investigated by a Regional Attorney. The General Counsel for the Public Employment Relations Board (hereinafter PERB or Board) subsequently issued a Complaint on May 8, 1985. The Complaint issued simultaneously with a partial dismissal.[4] In operative part, the Complaint alleges that Petrich "has had a history of personnel issues with the District since 1982"; the Complaint further alleges that reprimands had been placed in his file on various occasions and that he had utilized the contractual grievance procedure. Moreover, the Complaint alleges that on or about August 23, 1984, Petrich and his CSEA representative, Alan Aldrich, met with representatives of Respondent to discuss a proposed change in Petrich's starting

---

[2]In addition to the cases under consideration here, the Charging Party filed Case No. LA-CE-2097. That was partially settled, a partial dismissal was not appealed, and the case is closed. He also filed Case Nos. LA-CE-2114, LA-CE-2129, and LA-CE-2131. Each case was dismissed and the dismissals upheld, in respectively, Riverside Unified School District (1985) PERB Decision Nos. 511, 512 and 522.

[3]Although this case has a later filing number than some of the cases encompassed by this decision, the events alleged are first in time.

[4]The Regional Attorney's partial dismissal of an allegation pertaining to the change in starting time was upheld by PERB itself in Riverside Unified School District (1985) PERB Decision No. 523, as there actually was no change prior to exhaustion of the negotiation process.

time and that during the course of that meeting the Charging Party was threatened with a reduction in hours and/or replacement if he did not agree to an earlier starting time.[5]

On May 24, 1985, the Respondent filed its Answer and, in a perfunctory fashion, denied all the material allegations in the Charge/Complaint. An informal conference was conducted and when the parties were unable to resolve their dispute, the matter was scheduled for formal hearing. The case was consolidated with Case Nos. LA-CE-2112 and LA-CE-2130 on July 1, 1985. A pre-hearing conference was conducted on July 8, 1985 and the formal hearing on July 15, 16, and 17, 1985.

As in the other cases to be discussed below, on August 16, 1985, the Charging Party filed a document entitled as follows: (1) Request for Decision from the Board Itself; (2) Motion for Reconsideration of Intended Ruling; (3) Notice of Intent to Except; and (4) Brief in Support.[6] Notwithstanding the

---

[5]The Complaint alleges that Assistant Director of Operations Benzor made threatening comments to the Charging Party. During the formal hearing, it was agreed that the Complaint, whether supported or not, erroneously attributed the alleged statements of George Williams to Benzor.

[6]The Request for Decision from the Board itself was denied by the Executive Director on August 29, 1985. On September 8, 1985, Mr. Petrich essentially appealed that determination and on September 18, 1985, the parties were notified that the matter was deemed an administrative appeal. Case Nos. LA-CE-2112 and LA-CE-2130 had the same status. The appeal was denied by the Board itself in Riverside Unified School District (1985) PERB Decision No. Ad-152. The Board's decision also covered issues raised by subsequent motions regarding Case No. LA-CE-2143.

post-hearing briefing schedule, on September 18, 1985, the Charging Party informed the undersigned that he did not intend to file a post-hearing brief, and that the previously referenced document should serve that purpose. Thereafter, the Respondent filed its post-hearing brief addressing Case No. LA-CE-2134 only. Although that brief was technically filed late, given a certain amount of confusion created by not knowing the status of Petrich's Opening Brief, the undersigned accepted the late filing. Time was allotted for the filing of the Charging Party's reply brief and when such brief was not timely filed, unsuccessful attempts were made to contact the Charging Party. Thereafter, although the matter was simultaneously before the Board and the undersigned, on November 12, 1985, it was deemed under submission for proposed decision.

B. Case No. LA-CE-2112

This case was originally filed on December 26, 1984. After an investigation by a Regional Attorney, a Complaint and a partial dismissal issued on April 2, 1985.[7] The Complaint alleges that the Charging Party engaged in activity protected by the EERA and as a result of that activity, on or about December 10, 11, and 19, 1984, the Respondent, acting through its agent, Principal Mary Ann Sund, took retaliatory action

[7]The appeal of the partial dismissal was denied by the Board itself in Riverside Unified School District (1985) PERB Decision No. 510.

against the Charging Party by writing disciplinary letters to be placed in his personnel file. The Respondent filed its Answer on May 4, 1985, denying the operative allegations in the Complaint. An informal conference was scheduled and unsuccessful. Thereafter, the matter was scheduled for a pre-hearing conference and hearing.

Subsequently, on or about June 13, 1985, it came to the attention of the undersigned that the original Complaint alleged that the Charging Party was an employee organization as that term is defined in the EERA. Having reviewed the Charge and finding no evidence to support such an allegation, it was concluded that the allegation was a typographical error or oversight and, accordingly, an order amending the Complaint and deleting the paragraph which referred to the Charging Party as an employee organization was issued on June 13, 1985.[8]

On or about June 18, 1985, the Charging Party moved to amend the Complaints in Case Nos. LA-CE-2112 and LA-CE-2130. The request for amendment was denied by the undersigned on June 19, 1985, and appealed by the Charging Party on June 26, 1985. The appeal of the denial of the amendment was upheld by the Board in Riverside Unified School District (1985) PERB

[8]Matters pertaining to the order amending the Complaint and a unit modification petition filed by the Charging Party as a result of the original Complaint were disposed of by the Board in Riverside Unified School District (1985) PERB Decision No. Ad-148.

Decision No. 553.[9]

Thereafter, on July 3, 1985, the Charging Party filed a document pertaining to Case Nos. LA-CE-2112 and LA-CE-2130 entitled, in relevant part, as follows: (1) Disqualification of Board Agent; and (2) Motion for Continuance. At the pre-hearing conference conducted by the undersigned on July 8, 1985, the undersigned set forth the reasons why the Charging Party's request for disqualification was denied. At that same pre-hearing conference, the Charging Party indicated that he was no longer seeking a continuance.

The formal hearing in Case No. LA-CE-2112 convened on July 15 and ended on July 16. At that time, the Charging Party indicated that he had no further evidence to present. The undersigned then advised the parties that, in my opinion, the Charging Party had failed to establish a prima facie case and, accordingly, the Respondent was not required to go forward; the case was being dismissed.

As previously noted, the Charging Party asked that his post-hearing, pre-transcript pleading be considered his brief in this case, notwithstanding the fact that the undersigned requested points and authorities setting forth why the case should not have been dismissed based upon the evidence

---

[9]The proposed amendments were, however, remanded to the General Counsel for processing as new charges.

presented at the hearing. Similarly, the Respondent failed to file a brief setting forth why the dismissal was appropriate. Nevertheless, based on the briefing schedule established in these consolidated cases, this case was considered under submission on November 12, 1985.

C. Case No. LA-CE-2130

This Charge was originally filed on February 4, 1985, and subsequently amended on March 25, 1985. On April 10, 1985, a Complaint and partial dismissal were issued by the Regional Attorney.[10] The Complaint alleges, in relevant part, that certain negative memoranda were placed in Mr. Petrich's personnel file because he engaged in protected activity. The Complaint further alleges that the dismissal of Mr. Petrich was recommended following a pre-disciplinary hearing on January 17, 1985, and that on January 30, 1985, Mr. Petrich was sent a memorandum indicating that he would automatically be docked pay for any day he was absent from work because of illness without written verification by a physician.

An Answer, substantially denying the allegations in the Complaint, was filed on May 8, 1985. In all other respects, the procedural history of Case No LA-CE-2130 parallels that of

[10]The Regional Attorney's dismissal of the remainder of the Charge was sustained by the Board in Riverside Unified School District (1985) PERB Decision No. 513.

Case No. LA-CE-2112 and, accordingly, the matter was submitted for proposed decision on November 12, 1985.

D. Case No. LA-CE-2143

Case No. LA-CE-2143 was filed on March 1, 1985. After an investigation by the Regional Attorney on May 31, 1985, a partial dismissal regarding an alleged illegal transfer and other matters, and a Complaint were issued. As of this writing, the appeal of the partial dismissal is still pending before the Board itself.

The allegations in the Complaint which did issue pertain to the District's initial recommendation of dismissal and its subsequent recommendation for a 30 day suspension of Mr. Petrich, a suspension which the District admits was of unprecedented duration. The matter eventually was submitted to advisory arbitration, the arbitrator found all the District's allegations to be of merit, but found the suspension to be too severe and recommended a 10 day suspension. The District eventually accepted the arbitration award.

The Answer was filed on June 6, 1985 denying the allegations in the Complaint and the Informal Conference conducted on July 8, 1985 was unsuccessful. The formal hearing was conducted on September 18, 1985. After the Charging Party rested its case, the District orally made a Motion to Dismiss. A schedule was established for the filing of Points and Authorities in Support of the Motion and the District's written

pleading was filed on November 14, 1985.[11] 11

In the meantime, on October 18, 1985, Petrich filed a document with the Board called: (1) Request for Decision from the Board Itself; (2) Response to Motion for Dismissal, Case No. LA-CE-2143; and (3) Request to Effectuate Consolidation of Case Nos. LA-CE-2112, LA-CE-2130 and LA-CE-2134 with Case No. LA-CE-2143 for Decision from the Board Itself. Because the undersigned thought Mr. Petrich might have been withholding a response to the District's Motion until the Board itself ruled on his various previously mentioned pleadings, extra time was given for him to file a responsive pleading. When no request for such extension of time was received and no document actually received, the case was deemed under submission on January 6, 1986.[12]

Based upon Petrich's belated request for consolidation

---

[11]Again the pleading was not timely filed, a matter brought to my attention by Mr. Petrich in an ex parte telephone conversation he initiated on January 7, 1986. Accordingly, it should not be considered. Given the latitude extended to Mr. Petrich, however, it would be unfair to impose a different standard on the Respondent. In any event, whether the written Motion is considered or not, an oral motion was made at the hearing and, the undersigned has the independent authority and responsibility to determine whether the Charging Party established a prima facie case.

12A Senior Legal Secretary at the Los Angeles Regional Office of PERB tried contacting the Charging Party to see if he intended to file additional pleadings. Her phone calls were not returned. During the previously mentioned telephone conversation with Mr. Petrich on January 7, he was asked if he wanted to file a responsive pleading and indicated he did not.

before the Board, and based upon Board precedent which suggests that numerous cases should be looked at in their entirety, Case No. LA-CE-2143 was consolidated with the others pending before the undersigned on January 6, 1986. Los Angeles Unified School District (Wightman) (1984) PERB Decision No. 473.

III. FINDINGS OF FACT

A. The Major Cast of Characters

At all times relevant hereto, Tony Petrich has been a Gardener at Woodcrest Elementary School in the Riverside Unified School District.[13] He has been employed by the District for approximately 16 years. There is no dispute that he has consistently and vigorously pursued what he perceived to be his rights under the EERA or under the collective bargaining agreement between CSEA and the District. Petrich was president of the local CSEA chapter in approximately 1980 and, although the record is not entirely clear, had filed several grievances prior to the events giving rise to any of the four unfair practice proceedings under consideration. Petrich, as will be described below, did not have a good employment record dating back to at least the 1982-1983 school year. Petrich was not a

[13]Petrich was briefly reassigned to North High School over the winter holidays since, according to Sund, she was not going to be around and believed it best to separate Petrich and Magana, the lead custodian. After the events described in the cases under consideration, Petrich was permanently reassigned to North High School.

witness in the instant proceedings and, with the exception of Case Nos. LA-CE-2134 and LA-CE-2143, he tried to establish his position through the use of adverse witnesses only. Accordingly, no observations can be made about his demeanor or credibility as a witness and no judgments will be made based upon his method of advocacy.

As a Field Representative, Alan Aldrich has been active in CSEA affairs at the District since sometime in 1981. Prior to the instant proceedings, he knew Tony Petrich as the result of a series of requests made by Petrich for representation by CSEA. Over the years, Aldrich estimated that he had been involved in between five to seven grievances concerning the Charging Party. As a witness in the instant proceedings, Aldrich was calm, composed, and precise. He presented himself as perceptive, capable, and intelligent. Although he was not officially retained to represent the Charging Party in these unfair practice proceedings, he did serve as an aide and, based on the precision of his testimony and the careful consideration given prior to each response, tried to assist his constituent as far as practicable.

George Williams is a personnel administrator for the District who works with the classified employees. He has been employed by the District since 1974. The record does not reflect that he has any decision making authority with respect to Petrich and the imposition of discipline, transfers or reprimands. The record does reflect that Williams is only

involved in Case No. LA-CE-2134 and that historically he has had a professional, but contentious relationship with Aldrich. Aldrich characterized their relationship as follows:

> George and I regularly get into more contentious disputes than I get into with other managers, we seem to have a continuing professional difference of opinion as to what's appropriate conduct and what's lawful conduct. (Transcript from hearing commencing July 15, 1985, p. 44.)[14]

During the course of his testimony it was clear that Williams is intense and earnest and takes his District responsibilities seriously.

Mary Ann Sund is a primary actor in the series of events to be described below. At the time of the hearing, Sund had been employed by the Riverside School District for a total of eight years. She has a doctorate in education and prior to her tenure as Principal at Woodcrest Elementary School, she was the Principal of Highland Elementary School for two years and Pachappa Special School for three years. Sund has been the Principal at Woodcrest Elementary School since July 1983, and it appeared to the undersigned that she is forthright,

---

[14]Hereinafter references to the hearing in Case Nos. LA-CE-2112, LA-CE-2130, and LA-CE-2134 will be noted as 1-Tr:_. References to the hearing from September 18, 1985 in Case No. LA-CE-2143 will be noted as 2-Tr:___. Transcript citations will not be made in all instances, where, however, information relevant to one case was introduced in another, efforts will be made to provide all such citations. References to Exhibits in the first hearings will be noted as 1: Exh.____and from the second as 2: Exh.___. Unless otherwise indicated, all citations will be to the Charging Party's Exhibits.

energetic, and professional. She has responsibility for 22 certificated employees and approximately 8 classified employees. Although prior to the years in question in these cases most of her time was spent with the delivery of educational services and the quality of the educational program at the schools where she was the principal, she testified that as time progressed at Woodcrest, a disproportionate amount of her time was spent dealing with events concerning Mr. Petrich; sometimes as much as 50 percent of her time a week. (1-Tr: 220.)

At all times relevant herein, Frank Tucker was the District's Assistant Superintendent of Personnel; he served the District in that capacity for 11 years. Effective June 28, 1985, Tucker has an ongoing relationship with the District as a manager emeritus, and he will serve in that capacity as a part-time employee for the District for five years. Tucker presented himself, through his testimony and his body language while on the witness stand, as an extraordinarily affable and competent manager, although apparently reluctant to initiate firm rapid disciplinary action. Throughout his testimony, Tucker did not demonstrate frustration, contentiousness, or a disagreeable attitude toward the Charging Party notwithstanding the ongoing disputes between Mr. Petrich and the District's personnel administration.

B. Background

Although each of the cases under consideration will be

discussed separately, in order to fully appreciate the discussions which follow, it is necessary to provide some background information regarding Petrich's relationship with the District and the various supervisors for whom he worked.

Mary Ann Sund testified that during her tenure at Woodcrest Elementary School, she had innumerable problems or difficulties with Mr. Petrich. Sund, when asked whether Petrich was documented more than other employees, and when asked whether she spoke to Frank Tucker regularly about the Charging Party, responded as follows:

> I would say that in the period of the last year and a half to two years your behavior on the school site caused more difficulties with more employees than anyone else on the site and I refer to him [Tucker] very often in terms of what course of action would be appropriate to remedy many of the problems that were created. (1-Tr: 190-191.)

(See also 1-Tr: 229-230.)

Sund was also asked if she spoke to Tucker with a focus toward finding a way in which to terminate the Charging Party and responded as follows:

> Certainly not in the beginning. When I first began to talk to Mr. Tucker about remediation, that was really the focus of our intent and a lot of that material was not documented. I believe that there was concerted effort to make the expectations clear to you and to communicate to you what was needed in terms of changed [sic] your behavior and some of the inappropriateness of things that you had done. None of that is really documented, when in fact it became clear to me that we were not communicating verbally, it became necessary

> to put many things in writing so that I was assured that you understood what I was trying to communicate, and when I began doing that, I began to talk with Mr. Tucker more frequently about how that needed to be done. And it wasn't really until that was done for an extended period of time that any question of dismissal came up. (1-Tr: 191.)

Throughout her testimony, Sund tried to describe the nature of the difficulty that she had with Mr. Petrich. She testified that on numerous occasions she would give him an order, or Mr. Lewis, the prior head custodian, or Mr. Magana, the new lead custodian, would give him instructions and Mr. Petrich would deny that such directives had been issued. On other occasions, Sund testified that Petrich claimed that he did not understand the instructions that had been given or that he was following the instructions that had been given and that Sund was mistaken about what was required of him. (See, e.g., 1-Tr: 215-216, 222.)

In terms of documentation, the record reflects that on August 9, 1983, Sund sent Petrich a memorandum expressing concern about his inattention to his duties and responsibilities and alleging that he took a two hour and thirty minute break when he ought to have been performing his duties and responsibilities as a gardener. At that time, Sund attempted to arrange a meeting for August 10, 1983, a time Petrich subsequently claimed was inconvenient. Petrich also denied the material allegations in the memo from Sund. However, Petrich, having failed to take the witness stand,

never denied, under oath, the material allegations in the memorandum.[15] (1-Exh. 15.)

On August 18, 1983, Petrich received a formal letter of reprimand from George Williams, detailing the incident complained of in the memorandum sent by Sund. Moreover, in his memorandum, Williams noted that when Petrich was evaluated on June 30, 1983, by Mrs. Ginwright, then the school principal, he was advised that he must decrease his propensity to visit with others during working hours and that he must learn to take direction without debate. (1: Exh. 16.)

The next written documentation in evidence[16] relates to a reprimand sent by Sund to Petrich dated May 17, 1984, wherein Petrich was reprimanded for failing to properly prepare waterbasins for eight recently transplanted tree., Sund testified that Petrich had been told how to properly prepare the basins and take care of the trees, but had not followed the

---

[15]A11 the documents introduced are hearsay and the parties were advised that they were not being admitted for the truth of the matters asserted. The Charging Party stated he understood what that meant and apparently the consequences thereof. (1-Tr: 59, 129; 2-Tr: 116-117.) Nevertheless, some of the documents are relevant, even when unaccompanied by testimony, to show that the District expressed dissatisfaction with Petrich prior to the time he engaged in the protected activity alleged herein.

[16]No evidence was presented as to whether or not Petrich received other written reprimands between August 1983 and May 1984, although Sund testified that she spoke with him or attempted to speak with him frequently.

directions and, as a consequence, three of the trees where he allegedly cut the main roots to within six to eight inches of the tree trunk, died. (1-Tr: 199-202; 1-Exh. 17.)

On August 7, 1984, Petrich received a memorandum from Sund which set forth a variety of complaints she had with Petrich's job performance. She complained of his extended coffee breaks and the fact that he was not authorized to alter the time when he took his breaks. Principal Sund also complained about the way in which Mr. Petrich was trimming bushes around the school. By way of background, Sund testified that the school site is rather unattractive and she was trying to enhance its appearance by letting the shrubbery grow to a certain level. Mr. Petrich, however, had a propensity to cut the bushes down to a level that she considered unacceptable. Accordingly, samples were prepared by Sund herself and Magana to show Mr. Petrich what was expected. Sund alleged that Petrich deliberately altered the samples and cut them down to an unacceptable level. Finally, the August 7, 1984 memorandum complains of Petrich leaving work four times in the previous week for doctor appointments at noon and not returning before the end of his shift at 4:00 p.m. She advised Petrich that he would be required to advise his supervisor, Mr. Magana, in writing, if he planned to continue that medical appointment schedule so necessary substitutes could be employed. (1-Tr: 202-203; 1: Exh. 18.)

Next, on August 21, 1984, Petrich received a memorandum from Sund summarizing the following concerns. Number one, his failure to take direction from Mr. Magana with respect to when he was supposed to perform certain tasks. Moreover, Sund showed her disapproval for the way in which Mr. Petrich related to Mr. Magana since it was alleged that Petrich simply laughed and walked away while Mr. Magana was trying to give him directions. As a second item, the memo again complains about Petrich's refusal to follow direction from Mr. Magana and his watering of trees when he was told to mow the lawn. And last, the memo complains about an extended break when, at 10:30 a.m., Mr. Petrich was sitting in the teacher's lounge although his scheduled break time was between 9:00 a.m. and 9:15 a.m. (1: Exh. 1 at pp. 4-5.)

At the close of the August 21, 1984 memorandum, Sund indicated to Petrich that there would be a meeting in her office on August 22, 1984, at 3:00 p.m. to review his work schedule and his responsibilities. It is that meeting that led to the events which gave rise to the first case now under consideration, Case No. LA-CE-2134. Prior to that meeting, there is no evidence that Petrich filed any grievances or unfair practice charges concerning Sund.

Before the events in the next case, LA-CE-2112, the record reflects that the Charging Party received numerous written reprimands. On September 12, 1984, after first asking Petrich

for an explanation, Sund reprimanded Petrich for leaving his work site 1 hour and 35 minutes early to attend a meeting which was only 15-20 minutes away. (1-Tr: 204; 1: Exh 19.)

On October 1, 1984, Petrich received a reprimand for allegedly arriving late and not following the directions of Mr. Magana and being rude to his supervisor. In a 15 page response, Petrich denied the charges and accused Sund and Magana of "conspiring" against him and subjecting him to "spite, malice, embarrassment, ridicule, put-down, humiliation and mortification." (1: Exh. 21.)

Again on October 1, the Charging Party received a memorandum from Sund complaining that he had, without notification or justification, removed the calendar of a bilingual aide from her "mini-classroom." In his response, the Charging Party complained that although he did remove the calendar, upon notification that it was being used, he replaced it. Moreover, he pointed out that the facility in question was unsafe for the teaching of children. (1-Tr: 206; 1: Exh. 20.)

On October 26, 1984 Sund wrote to Petrich complaining that he removed the bars from the Kindergarten teeter totters without first checking with his supervisor. In response to Petrich's complaints about Magana's new rules for the storage of tools, she stated she approved. (1: Exh. 2 at p. 3.)

On November 15, 1984, Sund wrote a memorandum describing a meeting she held on November 14 with Petrich and Aldrich. In

that memorandum, Sund reviewed written complaints from another employee, dated October 15, October 26, and November 5. Dr. Sund indicated that if those written complaints were true, the behavior described therein was "inappropriate and unacceptable and must not be repeated." (1: Exh. 23.)

On November 21, 1984, Sund wrote a memorandum to Petrich setting forth eight instances when he had been late and reminding him that he had previously received memoranda regarding adherence to established work hours. In his response, Petrich "emphatically and profoundly denied" the allegations. (1: Exh. 24.)

According to the documentation attached to and incorporated by Riverside Unified School District (1985) PERB Decision No. 513, Mr. Petrich filed five grievances in 1982. Grievances were also filed on September 25, 1984, November 13, 1984, and February 7, 1985. In addition to the Unfair Practice Complaints under consideration, he filed Case No. LA-CE-2097 on November 27, 1984, Case No. LA-CE-2114 on January 2, 1985, and Case Nos. LA-CE-2129 and LA-CE-2131 on February 4, 1985. See footnote 2, supra.

C. Case No. LA-CE-2134

Sometime during the summer of 1984, Principal Mary Ann Sund determined that it would be beneficial if the ground watering schedule at Woodcrest Elementary School were modified. In the past, Tony Petrich, who had arrived on campus at 7:00 a.m., was

directed to water the grounds upon arrival. As a result, when the children arrived at school the grounds were still damp and, after playing before the commencement of classes, they then tracked mud into the classrooms. In order to avoid that problem, Sund proposed changing the watering schedule to 6:00 a.m. rather than 7:00 a.m.. In order to accomplish that, it would be necessary to either change the Charging Party's starting time, or employ someone to do the watering in his stead.

To discuss that matter with Petrich and also to discuss certain changes or clarifications in the duties and responsibilities of his gardener position and the memoranda from August 7 and 21, a meeting was arranged for August 22, 1984, at 3:00 p.m. The meeting was attended by Sund, George Williams, Ernie Benzor, the Plant Manager, and David Magana, the Lead/Head Custodian at Woodcrest.

At the beginning of the meeting, Sund distributed copies of the proposed changes in duties and discussed the proposed change in starting time. At that time, Petrich indicated that he did not want the meeting to progress further unless and until he had union representation. After a brief discussion, it was agreed that the meeting would reconvene at a time convenient for Petrich and his representative.

On August 23, 1985, the parties again met but on this occasion Petrich was accompanied by CSEA representative Alan

Aldrich and his site grievance representative Joe Gandara. Management explained to Aldrich the perceived need to change Petrich's hours and Aldrich indicated that he considered the matter negotiable.[17] According to Aldrich, he and Williams then engaged in an animated discussion. He specifically denied it was a heated argument and stated, "I consider it to be a course of conversation of the day." Aldrich further testified voices were raised "as people will do when they attempt to make a point vigorously" but he did not believe there was any shouting.

Williams was admittedly frustrated over the resistance to changing Petrich's starting time in order to benefit the children of the District and the condition of the school site. During their exchanges, according to Aldrich, Williams told Aldrich that if Petrich was unwilling to join Dr. Sund's team, they would find someone who would. Although the discussion was predominantly between Aldrich and Williams, Aldrich said that Williams looked at Petrich when the former statement was made. There was no testimony as to whether Petrich and Williams made

---

[17]The collective record implies that there was no uniform starting time for gardeners throughout the District. At North High School, for example, Petrich himself suggested that the starting time was from 6:00 a.m. - 3:00 p.m., over Christmas in school year 1984-1985. (2-Tr: 71.) Tucker indicated that crews at different sites apparently worked different hours. (2-Tr: 70.) In another Petrich case, it was noted that the District had changed hours during the summer for 20 years. Riverside Unified School District (1986) PERB Decision No. 562.

eye contact. Aldrich also said that Williams threatened a reduction in Petrich's hours if he would not agree to change his starting time.

Williams admits stating that if Petrich did not join the team they would get someone who would, but denies that he meant that any retaliatory action would be taken against Petrich. Rather, Williams explained that he meant that they would simply find some other way to get the watering accomplished earlier in the morning.[18] Aldrich interpreted the statement as one designed to get Petrich to agree to a change in his starting time. At worst, he thought Petrich might be transferred to a different site. (1-Tr: 65-66.)

Williams adamantly denies threatening to change Petrich's hours or reduce them in any fashion. Sund supports Williams' version of the meeting. Although, ordinarily, I found the testimony of Aldrich to be candid and credible, in this instance there is some basis for crediting Williams' account of that aspect of the meeting. The reason for reaching this conclusion is that on August 28, 1984, Aldrich wrote a letter

---

[18] In his pleading filed August 28, 1985, at page 19, Petrich takes the following position:

> I assert that the statements made by Mr. Williams were not in relation to any protected activity; they were merely an instrument of simple intimidation, the result of instructions, given to him by Sund prior to the meeting in question.

to Frank Tucker complaining or summarizing a meeting the two had regarding the negotiability of the change in Petrich's starting time and setting forth a summary of what took place at the meeting on August 23, 1984. In that letter, Aldrich stated as follows:

> I explained to Ms. Sund and Personnel Administrator George Williams that such a change was negotiable and should not be implemented independent of the bilateral process. At which time Williams responded that CSEA and Petrich "did not wish to get with the program" (and apparently agreed to this change) that "they would find someone who would." Clearly inappropriate, and perhaps unlawful comments in relationship to Petrich's clearly established rights to seek representation, and engage in appropriate protected activities. (1: Exh. 39.)

Given Aldrich's precision, the undersigned finds it difficult to believe that he would have ignored the threat to reduce hours in his letter. On the other hand, Aldrich did testify that he did not take the threat to reduce hours seriously, he recognized Williams was upset, and knew that Williams knew that a reduction in hours would not be lawful under the contract or otherwise. Nevertheless, in this instance, I find it necessary to resolve this credibility issue in Williams' favor.

The Complaint further alleged that Sund threatened to find someone else to perform Petrich's job unless he agreed to sign the revised work schedule. Aldrich testified that he did not recall Sund making such a statement, and Sund denied making such a statement. Thus, it must be concluded that the

Complaint either should not have issued regarding Sund or it should have attributed the comment to Williams.

D. Case No. LA-CE-2112

Specifically, in one of its more recent cases involving Mr. Petrich, the Board itself characterized the allegations in this case as follows:

> 1. Placement of a letter from Principal Mary Ann Sund, regarding work keys, in Charging Party's personnel file on December 10, 1984.
>
> 2. Placement of a letter from Sund, regarding Charging Party's absence from work, in his personnel file on December 11, 1984.
>
> 3. Placement of a letter from Sund, regarding obtaining work keys prior to beginning work, in Charging Party's personnel file on December 19, 1984.[19]

Riverside Unified School District (1985) PERB Decision No. 553.

Because the Charging Party failed to call anyone other than adverse witnesses during the presentation of his case, it is not precisely clear what happened with respect to each of the memoranda in question. As previously noted, Sund did say that it had become necessary, over the years, to communicate with Mr. Petrich in writing because of his failure or refusal to respond to verbal commands. Although Sund did testify that it was sometimes necessary to communicate in writing because Mr.

---

[19]The dates referenced in the Board's summary are the dates the letters were written, not the dates each was placed in the Charging Party's personnel file.

Petrich refused to speak with her without a union representative, there is no evidence that the communications she wanted to make were the type which required such representation; they were usually simple work related directives. As evidenced by a memorandum she wrote on October 29 to Petrich when she wanted to discuss serious job deficiencies, she asked him to arrange for union representation. (2: Exh. 1.) Moreover, the record supports the conclusion that during her brief tenure at Woodcrest, Sund had placed approximately 20 memoranda in other employees' files and that given the relatively small size of the staff, the placement of material in personnel files was not an extraordinary, or unusual event. Aldrich testified that he observed and believed, Sund was generally vigorous in the documentation of what she considered employee misconduct. (1-Tr: 68-69.) (See also, 1-Tr: 189; 2-Tr: 77.)

In any event, the December 10 memorandum reads as follows:

> It has been reported to me that you were late as follows:
>
> November 23 - arrival time 7:15 a.m.
> December 3 - return from lunch 12:15 p.m.
> December 5 - arrival time 7:05 a.m.
>
> I am compelled to say that your repeated few minutes lateness appears to me to be a way for you to upset Mr. Magana and to delay starting work both for him and for you. You have received memo's regarding lateness from me, dated June 19, October 1 and November 21, 1984. I repeat, you are to adhere to established work hours.

> There has also been some confusion in the morning about your picking up your keys. You are expected to be at the head custodian's office exactly at 7:00 a.m. every morning to receive your keys from Mr. Magana. This will be your first responsibility upon arrival at work. You will be expected upon receiving your keys to begin work immediately. I repeat you are to begin your duties immediately upon receiving your keys. Mr. Magana will be in his office at 7:00 a.m.
>
> This memo is to be placed in your District Personnel file. You have the opportunity to review and comment hereon, if you so desire. Ten working days from the date of this memo (December 27, 1984) this memo and your written response (if any) will be placed in your District Personnel file. (1: Exh. 6.)

Sund's memorandum seems entirely consistent with her testimony regarding the difficulties in communicating with Mr. Petrich. She also testified that she relies upon her supervisory or lead personnel for information, a practice which seems consistent with good managerial techniques. Beyond this, there is nothing to be said about the December 10 memorandum because no appreciable testimony was elicited regarding it.[20] Although the document and Mr. Petrich's response to it

[20]After Case No. LA-CE-2112 and LA-CE-2130 had been dismissed, Aldrich did claim that the attitude toward Petrich soured dramatically after Petrich refused to begin work earlier. Aldrich based this conclusion on a claim that Magana admitted being frustrated. Even if considered evidence in Case Nos. LA-CE-2112 and LA-CE-2130, Magana's alleged frustration, whether justified or not, does not, by itself, support a conclusion that he would then be dishonest in reporting to his superior, Sund, nor does it support a finding that Sund would then be less than candid about her own observations or those of other staff members.

were admitted into evidence, neither was admitted for the truth of the matter asserted. Accordingly, nothing more can be said about this aspect of Case No. LA-CE-2112.

There was testimony regarding the second allegedly inappropriate letter placed in Petrich's personnel file. Again, however, to fully appreciate the dynamics of the interactions between the parties it is necessary, although perhaps tedious, to quote from the December 11, 1984 memorandum in its entirety.

> On the morning of December 6, 1984 it was reported to me by Mr. Magana that:
>
> 1. On the morning of December 5th Mr. Magana saw that you had removed seats from the school tricycles. Mr. Magana told you you were not to work on playground equipment without specific instructions from him or from me. One of the seats you removed appears to be damaged.
>
> 2. On the morning of December 6th Mr. Magana found you drilling into the seats you had removed from the bikes. You told him you were going to put them on the teeter totters. Mr. Magana instructed you to stop. You ignored him and continued. Mr. Magana came to my office.
>
> I spoke to you about these incidents. At that time you were working on part of the teeter totter outside the custodian's room. When I asked you about Mr. Magana's instructions you said you could not remember what he had said yesterday about the equipment. I instructed you to follow Mr. Magana's directions about work to be done today.

I asked you, on behalf of Mr. Tucker, for clarification of your request for November 27th as personal necessity leave. You responded that you would not clarify the request without representation. I repeated that Mr. Tucker only wished to be clear as to the request before approval was given. You repeated that you would say nothing without an official representative with you. I will convey this message to Mr. Tucker.

We have met on several occasions and you have received written instructions regarding your responsibilities and following Mr. Magana's instructions, dated August 21, in meeting summaries of August 22 and 23, on October 1st and on October 26, 1984. I feel that your recent actions were in deliberate defiance of these instructions.

Again, I cannot emphasize more strongly to you, that you are not to deviate from your regular duties unless instructed by Mr. Magana. You are to follow his instructions and directions as you would mine. Should you not do so it will be my recommendation that appropriate disciplinary action beyond a reprimand be initiated.

On Friday, December 7, I received a number of complaints about your behavior:

1. Mr. Magana reported that you had left your tools out overnight. When he asked you about it, you said they did not look like yours and gave him no further explanation. They were identified by Mr. Magana as tools you had been using.

2. It has been reported that on December 6, you ignored Mr. Magana while he was giving you directions in the lunch area. This was observed by a lunch supervisor and she reports that one of the kindergarten students pointed out to you that "it was rude to not answer people when they talk to you."

3. Staff reported that you were in the teachers' lounge on December 7, from 8:50 a.m. until after 9:30 a.m. putting notices on the CSEA bulletin board. During about five minutes of that time you left to assist Mr. Magana in moving a piano, at the repeated insistence of the music specialist. You were conducting union business on time other than your break, lunch period or before or after your work hours. Your break time is from 9:00 a.m. to 9:15 a.m.

4. On December 7, Mrs. Lisby, the music specialist, during the time described above while you were in the lounge, asked you to help Mr. Magana to move a piano for her upcoming class. She reported that you ignored her request until she persisted. You left to assist Mr. Magana about 20 - 25 minutes after she asked for immediate assistance.

It appears that your behaviors are deliberately intended to cause difficulties at this work site. They demonstrate a lack of cooperation, rudeness in dealing with others and affect the morale of staff. This is unacceptable.

Again, should your actions continue, I will be compelled to recommend disciplinary action beyond a reprimand.

This memo is to be placed in your District Personnel file. You have the opportunity to review and comment hereon, if you so desire. Ten working days from the date of this memo (December 28, 1984) this memo and your written response (if any) will be placed in your District Personnel file. (1: Exh. 7.)

During the course of the hearing, there was no evidence that any of the allegations set forth in Dr. Sund's letter were

incorrect. Mr. Petrich did challenge the extent of her investigation into the matters discussed in the letter, and Dr. Sund responded by saying that she verified the incidents through her own observations and by discussing the matter with other members of the staff.[21]

Mr. Petrich took particular exception to Dr. Sund's inclusion in the memorandum of the matter relating to his personal necessity leave. Dr. Sund's explanation was, in the opinion of the undersigned, acceptable. Also, the evidence supports a finding that it was not out of the ordinary for the District to place documents or communications in personnel files that were unrelated to employee job performance. (2-Tr: 68.) Finally, based on her deteriorating relationship with Petrich, she had made it a point to try and memorialize in writing everything that transpired between the two of them. Based on her demeanor while being questioned, it is found that no ill or illegal intent led to the inclusion in the memorandum of the reference to Petrich's request for union representation; it was a statement, nothing more.

---

[21]For the most part, Dr. Sund was reluctant to identify the teachers and other members of staff. She testified that they asked her not to because they were concerned about the Charging Party's reaction; they were afraid of him. (1-Tr: 146.) Absent an evidentiary challenge to Sund's testimony or allegations that the incidents took place, the undersigned did not compel disclosure of the names. Moreover, Petrich did not make a sufficient showing to compel disclosure at the time the issue arose. (See generally, 1-Tr: 141-142; 145-148.)

The third letter in the instant case which was placed in Mr. Petrich's personnel file, allegedly unlawfully, provided as follows:

> At approximately 7:50 a.m. on Wednesday, December 19th you were in the outside lunch area when I arrived. You told me David would not give you your keys. I spoke with David. He reported that he had been in his office prior to 7:00 a.m. until approximately 7:10 a.m. He said that he heard you come into the M.P. room, he heard you enter and leave the restroom and smelled the cigarette you were having outside the doorway to his office. He stated you did not come in for your keys, when he walked out of his office to get you, you were sitting on the stage in the M.P. room smoking a cigarette. Mr. Magana said to you, "aren't you to be in my office to get your keys?" You did not reply. Mr. Magana reports that he politely repeated his statement to you and you told him that you went into his office and did not see him there. Mr. Magana told you that he had been there since 6:55 a.m. You repeated your statement. There was some discussion then, Mr. Magana asked you to "please come into his office for your keys." You did not respond. He repeated the request and again you did not respond. Therefore, Mr. Magana told you he was going to start work and he closed the office and left the area. After receiving this information from Mr. Magana, I then told you to pick up your keys from Mr. Magana and you did so.
>
> Mr. Tucker reported to me that you called Mr. Lantz's office at approximately 7:45 a.m. and stated that you were "locked out" and had also called Mr. Benzor and CSEA.
>
> You were not locked out, but in fact, did not follow directions previously given for getting your keys. You are expected to follow procedures (sic) described in my memo to you of December 10, 1984.

> This memo is to be placed in your District Personnel file. You have the opportunity to review and comment hereon, if you so desire. Ten working days from the date of this memo (January 7, 1984) this memo and your written response (if any) will be placed in your District Personnel file. (1-Exh. 9.)

Again, the record is devoid of evidence that the matters alleged in Sund's memorandum did not in fact take place. Again there is no basis for concluding that Magana would fabricate stories just to get Petrich in trouble, for any reason, let alone the exercise of rights protected by the EERA.

E. Case No. LA-CE-2130

In this case the Board itself characterized the allegations as follows:

> A. Placement of a correction memo by Sund, erroneously dated January 8, 1984 (should be 1985), in Charging Party's personnel file. The memo concerned Charging Party's alleged refusal to follow instructions regarding removal of leaves.
>
> B. Sund's recommendation that Charging Party be dismissed as a result of the January 8, 1985 meeting with Charging Party, memorialized in Sund's January 17, 1985 memo.[22]
>
> C. Assistant Superintendent Frank Tucker's January 30, 1985 letter to Charging Party (placed in the personnel file and sent to

[22]The meeting concerned the January 8 Memorandum, but did not take place on that date.

> payroll) advising him that his pay would be docked for any day he is absent due to illness from February 8, 1985 to June 30, 1985, unless he provided a doctor's written verification of illness.

With respect to the memorandum which was erroneously dated 1984 but subsequently corrected, Dr. Sund described the incident or incidents which led to the writing of the memorandum. She testified that in her presence, she specifically heard Mr. Magana ask Petrich to remove a pile of leaves that were close to the office area. Magana mentioned to Sund that several times thereafter he had asked Petrich to remove the leaves but they remained. Sund herself spoke to Petrich early in the afternoon and directed him to remove the leaves. When she checked at 3:45 p.m., however, prior to Petrich's leaving time, the leaves were still there, and when she began work the next morning at 7:30 a.m., the leaves were still there. Sund testified, as her memorandum indicates, that she considered such actions by Petrich to be insubordination and that she wanted to arrange an appointment with him to give him some opportunity to explain why she should not recommend disciplinary action. (1-Tr: 169-170.)

The second action alleged to be unlawful is Sund's recommendation, after meeting with Petrich and his representative, that he be dismissed. Petrich alleges that the recommendation of dismissal was in retaliation for his protected activity. The uncontroverted testimony of Sund was

that Petrich engaged in repeated acts of insubordination. Her memorandum, dated January 17, 1985 states as follows:

> Following the meeting, I reviewed the issues with the Assistant Superintendent for Personnel. I find it impossible to excuse your failure to follow reasonable directions, repeatedly given. This incident appears to be simply the last of a series of actions indicating your unwillingness to give the minimum cooperation necessary to the effective and efficient operation of this school. This behavior cannot be disregarded. Therefore, I am recommending that you be dismissed. You will hear from the personnel office concerning my recommendation within two weeks, I am sure. (1-Exh. 12.)

As will be demonstrated below, Sund was merely making a recommendation based on her assessment of Mr. Petrich. Throughout the hearing, she testified that she was not experienced in the technical aspects of personnel administration or in contract administration and, accordingly, she frequently relied upon Tucker and other personnel administrators.

In any event, based on the unrefuted testimony of Sund, it is found, as a matter of fact, that her recommendation was not unreasonable and was made in response to her perception that trying remedial action with Mr. Petrich would only be a waste of her time. She had talked to him frequently and written several memoranda which addressed his attitude generally and the need to maintain the school grounds, specifically, in addition, she had written him just one month earlier, on

December 11, 1985, advising him that if he did not follow her directions and those of Magana, she would recommend disciplinary action beyond a reprimand.

Moreover, when Tucker was asked by the Charging Party if discussions of discipline began subsequent to the filing of the first Unfair Practice Charge, Case No. LA-CE-2097, Tucker responded as follows:

> I do not even remember the date of the filing of LA-CE-2097. I don't try to remember that. I look those things up in my file when I need to know them. Mr. Petrich, it has always been my contention, which I have made often with Mr. Aldrich, that the District fires no-one, that in our District the employee has to fire himself. And I'll have to admit that by some time in November I had just about reached the conclusion that you were, regardless of anything we did, somehow or other you would find a way to fire yourself. (1-Tr: 239.)

Tucker's testimony was credible and convincing. Whether discussions of discipline took place before or after the first unfair practice charge, it clearly had no influence on Tucker's stance regarding discipline. Thus, it is found that there was no overt relationship between the recommendation and the Charging Party's protected activity.

The next matter at issue in this particular case, pertains to Tucker's memorandum requiring doctor's verification of illness when Mr. Petrich utilized his sick leave. Tucker testified that he sends out such letters on many occasions and that on each of those occasions a copy of the letter is sent to

that employee's personnel file. Tucker further testified that in sending the letter to Petrich and placing it in his personnel file, he was relying, in part, on Article 13.3.4 of the collective bargaining contract, which provides, in relevant part, as follows:

> A doctor's certificate or other proof of illness or disabling condition may be required by the District for any illness or disabling condition when the classified employee has been informed that verification for future absences will be required.

Tucker testified that he routinely sends such letters to employees and that Petrich was treated in precisely the same manner as all other employees in the District based on the calculation of excessive use of sick leave.

Tucker was asked about his motivation in sending the letter to Petrich and in ultimately recommending Petrich's dismissal prior to the Skelly hearing. (Case No. LA-CE-2143.) Specifically, Tucker was asked about his level of frustration over the extensive negotiations which took place with respect to changing Petrich's starting time. In what the undersigned found to be extraordinary candor, Tucker responded that he did not believe or was unsure whether the subject was even a matter for negotiations, but that out of respect for Alan Aldrich he agreed to negotiate the issue. The negotiations apparently lasted only several minutes because Petrich indicated that there was nothing the District could do to get him to agree to

change his hours. Tucker characterized the sequence of events as a learning experience. (1-Tr: 236-237.) When asked about the extent of his frustration, answered as follows:

> I found it, I thought it was, it frustrated me to this extent, Mr. Petrich, I thought it, I have a great deal of admiration for the procedures that have been created by the State of California to protect employees, but I have to admit I thought this was an abuse of those extensive and well-established procedures. So, to that extent, I was frustrated. But that's the law of the land, Mr. Petrich. (1-Tr: 237.)

As previously stated, Tucker presented himself as a man not easily riled. He may have been irritated with the process, but I cannot find, as a matter of fact, that he would retaliate against Mr. Petrich for his invocation of it. In fact, based upon the record, it appears that he displayed extraordinary restraint in all his dealings and recommendations vis-a-vis the Charging Party. For example, although the memorandum requiring a doctor's verification of illness stated the starting date was February 8, Mr. Petrich was not docked for several subsequent absences when he brought an unacceptable "verification." (2-Tr: 84.)

F. Case No. LA-CE-2143

This case involves Tucker's initial recommendation of dismissal and subsequent recommendation of a 30 day suspension. Both actions are alleged to be in retaliation for Petrich's protected activity. In this hearing, Carlos Corona

testified on behalf of the Charging Party. His recollection was so vague on all material issues that it must be disregarded. He was a newly appointed grievance chairperson who attended several meetings. He testified that he thought Tucker said words to the effect that he would see Petrich disciplined before Tucker retired, but, by itself, even if credited, the testimony sheds little light on the case.

Alan Aldrich was also called by the Charging Party. This witness, who is not an agent of the District, was considered by the Charging Party to be an expert on labor relations. Although technically no proper foundation was laid to find Mr. Aldrich an "expert," he is experienced, intelligent and has worked with District management for four years.

Aldrich testified that Tucker was clearly irritated with Petrich. He testified as follows:

> Well, Frank was clearly extremely irritated by the situation. And his irritation was directly linked to what he perceived as calculated insubordination actions by Mr. Petrich at the Woodcrest site. (2-Tr: 34-35.)

Upon questioning by the undersigned regarding the nature of the alleged acts of insubordination and documented incidents of misconduct, Aldrich was asked if he included the filing of grievances and responded, "No, I don't." When asked if he included the filing of unfair practice charges, he said "[a]bsolutely not." (2-Tr: 35.)

The Charging Party further questioned Aldrich trying to ascertain if there was something unusual regarding the procedures which ultimately resulted in the imposition of discipline. The Charging Party suggested that the District "negotiates" with CSEA prior to making its pre-Skelly recommendation and that failure to do so in this instance constituted a deviation from past practice, an indicia of unlawful motivation. Aldrich responded that there was no contractual obligation or rigid past practice requiring the employer to enter into informal negotiations in an attempt to reduce proposed disciplinary action. He testified as follows:

> Over the last three years, I would say that informal negotiation had occurred in probably 70 percent of the proposed disciplinary cases. And the other 30 percent, the Employer chose to simply implement the clear language of Article 19. (2-Tr: 46-47.)

At the time of the hearing, however, Aldrich indicated that in 40 percent of the cases, the employer did not meet informally prior to issuance of a disciplinary recommendation.

Finally, Petrich asked Aldrich the following question.

> Mr. Aldrich, in your professional opinion, do you believe that Dr. Sund was to the end of her rope with the Charging Party because of his exercise of rights, continuing grievances, and unfair practice charges?

Aldrich responded as follows:

> My professional opinion is that Doctor Sund was at the "end of her rope," because of alleged misconduct that the Charging Party

> was engaging in. And its — my firm sense of things is that the Employer had very little concern or regard for the unfair practices, or the grievances that were being filed. And they were concerned with attempting to remediate what they perceived to be a difficult disciplinary situation that was ongoing at the site. That's — my professional opinion. (2-Tr: 61-62.) (Emphasis added.)

Again, Alan Aldrich's candor is to be commended and respected. He is the designated representative of Mr. Petrich and his demeanor on the witness stand clearly evidenced that he did not want to damage his constituent's case. Nevertheless, he found it necessary, under oath, to admit what he as an experienced labor relations specialist perceived, namely, that the District was concerned about behavior and not with alleged protected activity.

Mr. Petrich next called Frank Tucker to the witness stand. He was asked very few questions directly relating to the issues in this case. Although the undersigned is not in a position to determine why Mr. Tucker was called and interrogated in the manner in which he was, the Charging Party apparently wanted to display that he had been subjected to disparate treatment with respect to any number of matters which preceded the disciplinary recommendation.

One had to do with Dr. Sund's rejection of Mr Petrich's Christmas gift. By way of background, Dr Sund's car had apparently lost a hubcap and Mr. Petrich gave her a hubcap as a

Christmas present. Dr. Sund, recognizing the expense of the hubcap, refused to accept it. Tucker had repeated communications with Petrich about the necessity for him to retrieve the hubcap as it could not be accepted. There was no evidence that Dr. Sund accepted gifts costing $50.00 or more from any employees or that her rejection of the hubcap was any form of discrimination against Mr. Petrich. Going further, Mr. Petrich complained about the placement in his personnel file about correspondence regarding the hubcap, again intimating that placement in his personnel file of such documentation was in retaliation for his protected activity.[23] Tucker explained the situation as follows:

> We usually place in the personnel file correspondence between the employee and personnel — or the employee and the personnel office, or management; anything that may be significant in the work relationship. This was apparently significant to you. We tried to return the hubcap. You refused to accept it. We tried to return the hubcap with a — with what I regard as a reasonably courteous letter of explanation. And then finally, on February 20, I am still sitting, holding something that we regard as your property of significant value. So I directed you to come and reclaim your property, and thought, now I had better make a record, certainly in the personnel file where it would withstand

[23] In Riverside Unified School District (1985) PERB Decision No. 513, the Board upheld the Regional Attorney's determination that the hubcap letter did not constitute a reprisal against the Charging Party for engaging in protected activity.

> time, in case there had to be a subsequent reference thereto.
>
> I think its clearly obvious that you failed to follow my direction, that you did not come to reclaim the hubcap, and that instead, you submitted a rather lengthy response. Is this the one in which you direct me to put the hubcap on Doctor Sund's car? (2-Tr: 77.)

It is found, as a matter of fact, that there was nothing offensive in Tucker's communication to Petrich about the hubcap. Moreover, the incident relating to the hubcap bears some relevance to this proceeding because it shows that Tucker had first hand knowledge of what he perceived to be the Charging Party's insubordination and, accordingly, he was not simply relying on his subordinates when he pursued matters genuinely at issue in this proceeding, namely his recommendation of dismissal and his subsequent recommendation of a 30 day suspension.

During the course of the Charging Party's examination of Tucker, he actually asked very few questions germane to the issues in this proceeding. To the extent the matter was explored, it is described below. Tucker admits that he drafted the document dated February 1, 1985, and formally entitled "NOTICE OF INTENT TO RECOMMEND DISMISSAL." Tucker explained that dismissal had been recommended by Petrich's supervisor, Sund, and that the notice was necessary under the contract to give Petrich an opportunity to respond as to whether or not

dismissal was an appropriate recommendation.

Tucker admits to having numerous conferences with Petrich prior to drafting the dismissal recommendation but further admits that he had no specific conference with the Charging Party or his exclusive representative prior to drafting the document. Furthermore, Tucker admits that he did not conduct his own independent investigation to determine whether or not there was merit to some of the allegations which formed the basis of the recommendation. Nevertheless, upon questioning by the undersigned. Tucker indicated that, in his capacity as Assistant Superintendent, when it came to managing personnel matters, he almost always relied upon the judgment of the managers in the field. Moreover, it must be noted that part of the investigatory procedure is the Skelly conference which was to follow issuance of the dismissal recommendation, if Mr. Petrich elected to participate in such a conference.

Tucker also responded to questions about the Skelly conference itself. He related that Aldrich argued that there was a personality conflict at the site which was responsible for the alleged acts of misconduct, that dismissal was overly severe in light of the nature of the offenses, and in light of past practice. Included in that past practice was the fact that Mr. Petrich had never been suspended in the past.

After the Skelly conference, Petrich was notified that the Board of Education was being asked to suspend him for 30

workdays. He was also informed of the method to be followed in appealing that recommendation to the Board of Education. Although not set forth in the letter, such an appeal would result in advisory arbitration.

Tucker freely admitted that a suspension for 30 workdays was a severe recommendation. He was then asked by the undersigned questions regarding the duration of the suspension. The question and response were as follows:

> Question: What was it about the circumstances of Mr. Petrich's case, Mr. Tucker, that persuaded you to conclude that a 30 day suspension was appropriate?
>
> Answer: Mr. Petrich, in my opinion, and speaking from my experience in that District, is what the Canadians call a oner, a unique situation. We had tried, in my opinion, every way we knew how, counseling, warnings, reprimanding, almost endlessly, about what I came to believe were deliberate malfeasances, provocative in nature, calculated harassment of two lead custodians, leading the — in my opinion, causing the former lead custodian to retire earlier than he would simply because the burden of supervision of Mr Petrich was great enough that it encouraged him to retire rather than — running the warfare.
>
> I simply concluded that it took something legitimately severe to convince Mr. Petrich that if he was to continue in the employment of the Riverside Unified School District, that his behavior, that his attitude toward his supervisors had to change. And so, when we — when we changed our recommendation — or in notifying him first, we intended to — dismiss him. And then convinced or persuaded by Mr. Aldrich's representation that that might be too precipitous a move, I recommended a 30 day suspension. (2-Tr: 103-104.)

In the opinion of the undersigned, there is no reason to doubt or question Tucker's decision making process in recommending a 30 day suspension of Mr. Petrich. Most of the events which led to the suspension were uncontroverted during the course of the four formal hearings. Moreover, Sund corroborated Tucker's position or complemented it by her testimony in the previous hearings regarding all the initial attempts to remediate Petrich's behavior before the series of documentation began.

Dr. Mary Ann Sund was next called as a witness by the Charging Party. Dr. Sund was asked about alleged improprieties with respect to the memorandum that she had given to Charging Party that was incorrectly dated 1984 rather than 1985. (Case No. LA-CE-2130.) Petrich seemed upset that Sund failed to give Charging Party a corrected copy of the memorandum prior to its placement in his personnel file, although there was no dispute that a correction had been made. Beyond that, Sund was not asked any questions which were particularly germane to the instant proceedings.

Shortly thereafter, Petrich's examination of Sund concluded and he indicated, after ascertaining that all his exhibits were in evidence, that he was resting. Notwithstanding admonitions regarding the limitations on the use of the exhibits, Mr. Petrich rested his case, and thereafter, the District made its Motion to Dismiss.

IV. CONCLUSIONS OF LAW

A. Case No. LA-CE-2134

Under the circumstances, the undersigned does not believe that the Charging Party or his CSEA representative had a right to negotiate a one hour change in starting time with no other change in hours of work. Nevertheless, the question is sufficiently debatable, there being no definitive Board precedent on a case such as this, that the undersigned finds that the Charging Party had every right to insist on Association representation regarding the matter. Moreover, at the meeting which eventually took place, dissatisfaction with Petrich's job performance was ultimately discussed. In any event, there is no evidence that there was any objection to Petrich's request for Association representation. The District quickly ended the meeting on August 22 and allowed two representatives, Aldrich and Gandara, at a time mutually agreed upon the next day. Williams testified that such requests were normal and the District often interrupted meetings in order to await Aldrich. (1-Tr: 82.)

The evidence disclosed that at an August 23, 1984, discussion of changing the Charging Party's starting time, Williams became agitated. I credit Aldrich's description of Williams as contentious during the meeting in question. I also credit, and in fact it is not denied, that Williams indicated that if Petrich did not accept the change in starting time,

someone else would be obtained to perform the job. I credit Williams[1] account that he did not intend to threaten Petrich with retaliation and simply meant that someone else would do the watering of the school grounds at an earlier hour, a feat that was in fact accomplished by having Magana do part of Petrich's job. Aldrich, however, testified that Williams' manner was threatening and he perceived it as a threat. Aldrich was sufficiently concerned about the tenor of the meeting that he followed up his conversation with Williams by first talking to and then sending a communication to Tucker.

This particular case raises questions as to whether or not there was a violation of the Charging Party's rights, codified in section 3543.5(a) of the Government Code.[24] The case raises questions of retaliation, and questions of interference or threats. Thus, the appropriate tests to use include the one set forth in Carlsbad Unified School District (1979) PERB Decision No. 89, as subsequently modified by more recent Board decisions. The Carlsbad test provides as follows:

---

24 Section 3543.5. provides, in relevant 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.

> To assist the parties and hearing officers in this and future cases, PERB finds it advisable to establish comprehensive guidelines for the disposition of charges alleging violations of section 3543.5(a):
>
> 1. A single test shall be applicable in all instances in which violations of 3543.5(a) are alleged;
>
> 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.

In Novato Unified School District (1982) PERB Decision No. 210, the Board abandoned its single test approach to violations of section 3543.5(a), recognizing that there was a distinction between interference and discrimination cases. In the latter case, the Board found that to establish a prima facie case of discrimination, the charging party must establish that the employee participated in protected activity, the employer had

knowledge of such participation, the employer took action adverse to the employee's interest, and that there was an unlawful motivation for the employer's action such that the employer would not have acted but for the protected activity. Since unlawful motivation is difficult to prove directly, the Board recognized that an inference of such unlawful intent would be created by a variety of factors, including, but not limited to, the timing of the employer's action, disparate treatment of the employee, departure from established procedures and standards, failure to offer justification to the aggrieved employee at the time the adverse action was taken, inconsistent or contradictory justifications for the action, or the employer's proffering of exaggerated or vague and ambiguous reasons for the action.

In the instant case, it is difficult to determine whether this is a case of reprisal, or interference. As noted by the Board in Coast Community College District (1982) PERB Decision No. 251, the distinction between "interference" and "discrimination" cases is often blurred. With respect to interference, notwithstanding the undersigned's belief that Williams meant no ill-will and was simply frustrated by the circumstances of Mr. Petrich refusing to accommodate himself to the needs of the children and the aesthetics of the school site, reasonable minds could differ as to whether his comment should be construed as a threat. But for Aldrich's testimony regarding Williams' level of agitation, the comment could be

considered a neutral statement. With respect to discrimination, there is no evidence that any adverse actions were taken against the Charging Party as a result of this meeting notwithstanding Magana's alleged comment that he became frustrated.

The first question to be determined is whether Williams' statement should be considered a threat. Although it may be a close question, the undersigned concludes that it was not. PERB has long recognized that alleged threatening comments should be viewed in their overall context to determine if they have a coercive meaning. John Swett Unified School District (1981) PERB Decision No. 188. In the instant case, the meeting was not convened to discuss anything related to the Charging Party's protected activity. Among other things, the parties were assembled to try to get the Charging Party's cooperation in meeting the perceived needs of the school. In that context, Williams displayed his frustration in a manner entirely consistent with his temperament and his long standing relationship with Aldrich. Cf. TRW, Inc. v. NLRB (5th Cir. 1981) 654 F.2d 307 [108 LRRM 2641]; NLRB v. Big Three Industries Gas & Equipment Company (5th Cir. 1971) 441 F.2d 774 [77 LRRM 2120] wherein the Courts recognized that whether or not a statement is a threat is not a matter which can be analyzed in a vacuum, but must be considered in light of the circumstances when such language was spoken.

In a different area, namely a libel action, the California

Supreme Court has recognized that different standards should apply with respect to statements made in the context of labor disputes because in passing the Labor Management Relations Act, 29 U.S.C. 141, et seq., Congress wanted to encourage free debate on issues dividing labor and management. Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596.

Based upon the record, it is clear that Aldrich perceived the statement not as a threat to terminate or take adverse action against the Charging Party but rather as a method of getting him to agree to change his hours. This conclusion is based on Aldrich's testimony that he left the meeting believing the District would unilaterally change Petrich's starting time and that once the District agreed to negotiate, CSEA did not pursue any separate action regarding the conduct of the meeting.[25] The conclusion is also supported by Petrich's assertion that Williams' comments were not related to protected activity but were a form of intimidation. (See footnote 18, supra.)

No matter how Petrich or Aldrich perceived the statement, the undersigned concludes that it was not a threat of

---

[25]There is no explanation provided as to why Petrich himself waited nearly six months to file this charge in pro per. Although it was timely filed under the applicable law, having amply demonstrated his ability to file charges, prior to February 11, 1985, it is worth some reflection as to whether Petrich considered Williams' comments to be threatening or whether he merely wanted to add additional evidence of protected activity after receiving notice of the District's recommendation of a 30 day suspension on February 8, 1985.

retaliation or a calculated coercive statement. It was merely an expression of frustration by an administrator who had no authority over Petrich. Under all the circumstances, there was nothing unlawful about the statement.

If one should consider Williams' statement a threat, however, it must then be determined whether the Charging Party was engaged in protected activity when he refused to cooperate with the District and acquiesce in a change in his starting time. Thus, it is necessary to examine whether or not a change in starting time of one hour, with no other change in duties and responsibilities within the job description and no other change in working conditions, constitutes a matter within the scope of representation as that term is defined in section 3543.2. That section provides, in relevant part, as follows:

> The scope of representation shall be limited to matters related to wages, hours of employment and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits, . . . leave, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, . . . procedures for processing grievances, ... All matters not specifically enumerated are reserved to a public school employer and may not be a subject of meeting and negotiating
> • • • •

The question of whether a matter falls within the scope of representation is easy to resolve if the matter directly relates to wages, hours of employment, or another specifically enumerated term or condition of employment. When a matter is

not specifically referenced in the definition of scope of representation, however, the Board has established a test for addressing that question. In Anaheim Union High School District (1981) PERB Decision No. 177, the test was set forth as follows:

> [A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District'smission.

The test established in Anaheim, and upheld by the California Supreme Court in San Mateo City School District (1983) 33 Cal.3d 850, is essentially one which accommodates the interests of employee organizations and the employer and harmonizes those interests with public policy considerations and the legislative intent expressed in the EERA.

The proposed change in the starting and ending time for Petrich was a direct function of the perceived needs of the students and the maintenance of the classrooms. For Petrich, it did not lengthen the "hours of work," alter the distribution of work within the day, or change the relationship of Petrich to his supervisory personnel. The change was not one directly

relating to "hours of employment.[11] Federal courts and the National Labor Relations Board have long recognized, however, that the time of day one is required to work is a mandatory subject of bargaining. In Meatcutters v. Jewel Tea Company (1965) 381 U.S. 676 [59 LRRM 2376], the Supreme Court stated:

> The particular hours of the day and the particular days of the week during which employees may be required to work are subjects well within the realm of wages, hours, and other terms and conditions of employment about which employers and unions must bargain, Id at 691.

See also, Texaco, Inc. (1977) 233 NLRB 375 where a unilateral change in the starting time of a shift was held to violate section 8(a)(5) of the National Labor Relations Act.

In interpreting the Myers-Milias-Brown Act (hereinafter MMB) and regulatory schemes which implement it, the California courts have also recognized that the schedule of hours is negotiable. In Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, citing Jewel Tea with approval, the California Supreme Court held that the matters of hours of work and shift are negotiable. Similarly, in Huntington Beach Police Officers Ass, v. City of Huntington Beach (1976) 58 Cal.App.3d 492, the Court of Appeal found that the employer violated the MMB when it unilaterally modified the weekly work schedule, though the number of hours required per week remained the same. These federal and state authorities often provide guidance in interpreting the language found in the EERA. Unfortunately, in

the instant case, they do not; it is impossible to determine whether the holdings cited in the cases above rest on a finding that the changes in work schedules related to "hours" or "other terms and conditions of employment." In other words, those cases do not provide guidance with respect to scope questions unique to EERA. Similarly, the PERB's decisions do not provide definitive guidance as to whether the starting and ending time of the workday is a matter within the scope of representation when the number of hours per day is not at issue or when the starting and ending time is not being changed dramatically.[26]

In Jefferson School District (1980) PERB Decision No. 133, the Board did not have to reach the precise question of whether or not the starting and ending time of a teacher's day was negotiable. In Jefferson the question was whether a proposal for the publication and mutual agreement to "daily school sessions" was negotiable. Chairman Gluck found:

> The proposal does not define "daily school sessions." To the extent the term embraces the number of hours the teachers are required to be present—the hours between the starting and quitting time—the requirement that it be mutually agreed upon is within the scope and must be negotiated. Id at 36.

Thus, although not directly confronting the question presented

[26]In Pittsburg Unified School District (1982) PERB Decision No. 199, the Board did uphold an ALJ's determination that a change in shift was negotiable. In that case, however, the change in shift simultaneously resulted in a change in hours worked and the availability of overtime compensation.

here, by inference, Jefferson seems to support the proposition that the starting and ending time of the teachers' day falls outside the scope of representation. The undersigned sees no compelling reason to distinguish the school day and thus the starting and ending time of a teacher's day from that of a gardener whose schedule it is necessary to reorchestrate because of the starting time of the school day.

In applying Anaheim standards to the question presented here, it is determined that the starting and ending time of a gardener at Woodcrest Elementary School is not a matter within the scope of representation. It cannot be disputed that starting and ending time is a subject which logically and reasonably relates to hours and that it is a matter of great concern to both management and employees. It is not, however, the type of issue which is particularly conducive to resolution through the "mediatory influence of collective negotiations." Although the District did voluntarily agree to negotiate this matter, the facts disclose that negotiations took about five minutes because Petrich said there was nothing the District could do to persuade him to change his hours. Subsequently, the matter was subjected to mediation and the District agreed to give Petrich a free or extra vacation day. Notwithstanding the resolution of the dispute through what might be characterized as "negotiations," the District's position in this matter was dictated by concern for the children playing in muddy areas and by concern for the condition of the school when

the children tracked in the mud. Thus, a desire to change Petrich's hours was not conducive to negotiations because it was contingent upon when the children came to school, a matter already established.

In addition, with respect to the third prong of the Anaheim test, requiring negotiations on this issue might seriously abridge certain managerial prerogatives or impinge upon matters of educational policy and children safety essential to the achievement of the District's mission. Certainly, Dr. Sund has a right to determine that it was not conducive to the educational environment or the welfare of the school to have it filthy every morning because the children were tracking in mud.[27]

For the foregoing reasons, it is concluded that when Petrich refused to acquiesce to a change in his starting time, he was not asserting a right protected under the EERA. Moreover, it is determined that he was not threatened for asserting the alleged right and there is insufficient evidence to conclude that he was retaliated against for assertion of the alleged right or for seeking union representation.

---

[27]The Respondent also argues that the Collective Bargaining Contract which provides that the District will "determine the hours of District operations" and "maintain the efficiency of District operations" justifies its proposed change in hours. Given the conclusions reached above, it is unnecessary to resolve this argument, or the argument that a modification of Petrich's starting time did not constitute a change given the District's past practice.

Accordingly, whether considered an interference or a discrimination case, he has failed to establish a nexus between the assertion of a right protected by the EERA and the District's conduct, namely the statement of Williams. Thus, Case No. LA-CE-2134 is DISMISSED.

B. Case No. LA-CE-2112

This case also alleges a violation of section 3543.5(a) of the EERA. In this instance, however, the Complaint is clearly one regarding retaliation. In the instant case, there is no basis for concluding that the various allegations articulated in the Complaint were in response to the Charging Party's exercise of protected activity. Although clearly the Charging Party engaged in protected activity by the filing of grievances, alleging contract violations, or by the filing of unfair practice charge, Case No. LA-CE-2097, the uncontroverted evidence is that the alleged unlawful acts were in response to the conduct of the Charging Party and not in response to his filing of grievances or his filing of unfair practice charges.

Alan Aldrich testified in Case No. LA-CE-2143 that he saw no relationship between the filing of grievances and unfair practice charges and the Charging Party's receipt of adverse memoranda placed in his personnel file. Aldrich further testified that Sund was rigorous with respect to documenting at least one other employee and suggested that was consistent with her fundamental style.

Sund testified that, after a considerable period of time wherein she tried to communicate with the Charging Party verbally, it became her practice to commemorate their interactions in writing. She and Tucker further testified that never before had they dealt with an employee who was so totally nonresponsive to directives from the employer.

Accordingly, it may fairly be stated that there was no one similarly situated to the Charging Party to whom his record might be compared. He was, as characterized by Tucker, in a subsequent proceeding, unique. Moreover, Sund testified that although she did not write as many memoranda to other employees, it was her standard practice to place a memorandum regarding either work performance or any other matter concerning an employee in that employee's personnel file. Moreover, it must be remembered, that Sund testified that verbal communication with the Charging Party had become totally unproductive.

As previously noted, there was no specific testimony regarding the December 10, 1984, memorandum and accordingly, based upon Novato, the Charging Party failed to raise an inference of unlawful motivation. Similarly, the December 11, 1984, memorandum does not raise an inference of unlawful motivation. To the extent there was testimony, Sund stated she investigated the allegations. Her practice of writing memos continued as it had begun prior to the filing of any grievances

or unfair practices in evidence in these proceedings. Finally, there was no significant testimony on the December 19, 1984 memorandum. Although the timing of certain documentation corresponds with the timing of the Charging Party's filing of grievances and, at that point, one unfair practice charge, timing alone is not a basis for raising an inference of unlawful motivation. Charter Oak Unified School District (1984) PERB Decision No. 404.

With respect to other indicia of unlawful motivation, as noted above, given the unique behavior of the Charging Party, it cannot be concluded that he was subjected to any deviation in District policy. To the extent Sund was interrogated about the memoranda placed in the Charging Party's file, she credibly testified and justified all of her actions. She further testified that her conduct did not deviate from her pattern generally, but there was simply a greater quantity because of the propensities of the Charging Party.

In terms of the quality of investigation conducted by Dr. Sund which Petrich, through his questioning, implied was inadequate or somehow differential, there is no evidence to support such a conclusion. Sund testified that she spoke with all concerned personnel with respect to the alleged misconduct of the Charging Party and that she was personally satisfied with the conclusions and the information she received from them. In many instances she was a percipient witness. Thus,

again, the evidence presented does not raise an inference of unlawful motivation. In short, there is no evidence that Sund engaged in cursory investigations which might be an indication of unlawful motivation. North Sacramento School District (1982) PERB Decision No. 264.

Moreover, this is not a case similar to North Sacramento where an employee with a previously good record is repeatedly reprimanded after engaging in union activity. Although an employee with a long work history, there is no evidence that Mr. Petrich had a good work record. The previous Principal, Mrs. Ginwright, had noted deficiencies in his attitude and attention to job duties in his 1983 evaluation. Sund warned him repeatedly prior to the events giving rise to this case and the three others. Finally, Tucker testified that working with Petrich was so difficult, it lead to the early retirement of the Charging Party's previous supervisor.

Based upon the evidence presented, the testimony of Sund and Tucker in not only Case No. LA-CE-2112, but in all the cases under consideration, the undersigned is compelled to conclude that the Charging Party did not establish a prima facie case and the matter is properly being dismissed without requiring the Respondent to go forward in what would be, given all the circumstances, unwarranted. Accordingly, Case No. LA-CE-2112 is hereby DISMISSED.

C. Case No. LA-CE-2130

Conceptually, this case is similar to Case No. LA-CE-2112.

That is, it is case in which the Charging Party alleges retaliation and the Novato test must be applied. Again, perhaps because the Charging Party tried to establish his case through the use of adverse witnesses only, he failed to raise an inference of unlawful motivation.

The first alleged unlawful act was the placement in Charging Party's personnel file of a memorandum regarding the removal of leaves. Sund herself testified regarding the events which led to the writing of the memorandum in question. No reasonable manager could perceive the Charging Party's failure to remove the leaves, without explanation, as anything other than an act of insubordination and the undersigned finds it impossible that the writing of such a memorandum could be construed as an unlawful act. It must also be noted that Sund proposed a meeting to give Petrich an opportunity to explain his behavior before she would recommend further action and Aldrich was in attendance at that meeting.

The Charging Party totally failed to raise any inference of unlawful motivation with respect to the writing of the memorandum or its placement in his personnel file. Although he filed a grievance regarding the date of the memorandum and it was subsequently corrected, none of the other indicia set forth in Novato were presented during the course of the hearing.

At that point in time, Sund had come to memorialize all her interactions with the Charging Party and, accordingly, there

was nothing unusual or out of the regular procedure with respect to her writing of the memorandum. Although the timing of the writing of the memorandum was proximate to the Charging Party's filing of grievances and unfair practice charges, as previously stated, timing alone, given the uncontroverted evidence of Charging Party's misconduct, does not establish unlawful motivation. Moreover, these cases looked at in their entirety, clearly demonstrate that a school district cannot be placed in a straight jacket and prevented from taking appropriate disciplinary action simply because an employee utilizes, whether appropriately or not, procedures established pursuant to a collective bargaining contract or pursuant to the EERA.

The second allegedly unlawful act was Sund's recommendation that the Charging Party be dismissed subsequent to a meeting with the Charging Party, the subject of which was discussed in a January 17, 1985 memo. Sund's uncontroverted testimony established that, as the Principal of the school, she could no longer tolerate his "unwillingness to give the minimum cooperation necessary to the efficient operation of the school." Although the recommendation of dismissal was severe, there was in fact no evidence that similar recommendations had been not been rendered in the past. In fact, Aldrich testified in Case No. LA-CE-2143, that dismissal recommendations had been made in the past. Thus, again, the Charging Party failed to sustain his burden with respect to a change in past practice.

The most damaging evidence with respect to this aspect of the Charging Party's case perhaps came from Frank Tucker himself who testified, as previously quoted, supra at p. 36, that the District never fired anyone and only awaited the time when Mr. Petrich was going to make it impossible to recommend anything other than dismissal.

Assuming, arguendo, the severity of the recommendation raises an inference of unlawful motivation, given the use of adverse witnesses, and Aldrich's testimony in Case No. LA-CE-2143, supra at pp. 40-41, the inference was overcome. Sund credibly explained her action and Aldrich stated that the District was not concerned about protected activity but rather behavior. Accordingly, whether the Charging Party met his burden or not, this aspect of the Complaint cannot be sustained.

The final allegation relates to Tucker's request for medical verification of sick leave. As the facts disclosed in the hearing in this case and in Case No. LA-CE-2143, Tucker did not subject the Charging Party to disparate treatment, the letter was a response to excessive use of sick leave and, under the circumstances, was standard practice in the District. Tucker's leniency in enforcing the provisions of the letter further supports the conclusion that there was no unlawful intent or an inference of such intent.

Thus, based upon the entire proceedings before the undersigned, Case No. LA-CE-2130 is hereby DISMISSED.

D. LA-CE-2143

This case involves a challenge to Tucker's initial recommendation that the Charging Party be dismissed and his subsequent recommendation that the Charging Party be suspended for 30 days. Although the unprecedented severity of the initial recommendation for dismissal and the subsequent 30 day suspension is indeed severe, and although severity of punishment and deviation from past practice are indicia or unlawful motivation, in this case, even if the burden of proof shifted to the Respondent, in the Charging Party's case itself the Respondent adequately refuted the allegations set forth in the Complaint.

Tucker more than adequately explained his initial recommendation and why he deviated from the District's past practice of minor suspensions; everything else had been attempted with Mr. Petrich and the recommendation itself was intended to show him how serious the District was about a needed change in his behavior. It must also be noted that Tucker backed off his initial recommendation based on the Skelly conference attended by Mr. Aldrich. Surely, if any anti-union animus were present, Tucker would not have modified his recommendation based upon the intervention of a union representative. Moreover, further supporting this conclusion is the fact that Tucker modified and reduced the proposed penalty after Petrich had filed three additional unfair

practice charges.

There is no need to belabor the issue, given the evidence presented and the fact that none of the allegations against Mr. Petrich were controverted. Given the credible and uncontroverted testimony of Sund and Tucker regarding Petrich's behavior, the escalation of that behavior, and his failure or refusal to take direction, it cannot be found that the District's action was unlawfully motivated. Accordingly, the Motion to Dismiss is granted, and Case No. LA-CE-2143 is hereby DISMISSED.

PROPOSED ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and the entire record in the proceedings concerning Case Nos. LA-CE-2134, LA-CE-2112, LA-CE-2130 and LA-CE-2143, it is hereby ordered that the unfair practice charges and the PERB Complaints filed against the Riverside Unified School District are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on February 25, 1986, 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 February 25, 1986, or sent by telegraph, or certified or Express United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: February 5, 1986

Barbara E. Miller
Administrative Law Judge