STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS WOODLAND CHAPTER #118,	)	
Charging Party,	)	Case No. S-CE-759
v.	)	PERB Decision No. 628
WOODLAND JOINT UNIFIED SCHOOL DISTRICT,	)	June 30, 1987
Respondent.	)	

Appearances; Marcia L. Meyers, Attorney for California School Employees Association and its Woodland Chapter #118; Parham & Associates, Inc. by James C. Whitlock for Woodland Joint Unified School District.

Before Hesse, Chairperson; Craib and Porter, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Woodland Joint Unified School District (District) to the proposed decision of a PERB administrative law judge (ALJ), attached hereto. The ALJ found that the District violated Educational Employment Relations Act (EERA or Act)[1] section 3543.5(a) and (b) when it reprimanded Sandy Rowe, President of

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

It shall be unlawful for a public school employer to:

the California School Employee Association Chapter #118 (CSEA or Association) on April 16, 1984, issued a less-than-satisfactory evaluation of Rowe that included three "needs improvement" ratings, and retained derogatory materials pertaining to Rowe in the District's "working file" and personnel file. The ALJ found that the District violated section 3543.5(a), (b) and (c) when it issued a directive dated May 4, 1984 limiting Rowe's access to the transportation office. Finally, the ALJ also found that the manner in which the District dealt with parent and employee complaints against Rowe violated EERA section 3543.5(a) and (b).

The Board has carefully reviewed the entire record in this case, including the proposed decision of the ALJ, the exceptions thereto and the hearing transcripts. We find the ALJ's findings of fact to be free from prejudicial error and adopt them as our own. With the exceptions noted below, we are also in agreement with and hereby adopt the conclusions of law as set forth in the ALJ's proposed decision.

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

DISCUSSION

The ALJ's proposed decision provides a complete and accurate summary of the pertinent facts describing the protected activity engaged in by Rowe and the District's knowledge thereof. The ALJ's proposed decision also correctly concludes that the District discriminated against Rowe because she engaged in protected activity and that the District interfered with the exercise of rights guaranteed by the Act. Specifically, we are in agreement that the record as a whole supports the conclusion that the reprimand issued on April 16, 1984 and the evaluation of September 1984 would not have issued but for Rowe's protected activity. Similarly, the May 4, 1984 restriction on Rowe's access to the transportation office and the retention of documents in Rowe's working file and personnel file were actions taken by the District in response to Rowe's protected activity. By so acting, the District interfered with Rowe's right to engage in conduct protected by the statute.

While we are in agreement with the ALJ's conclusion that the access prohibition found in the May 4th directive was a violation of section 3543.5(a) and (b) of the Act, we disagree with his conclusion that the District's conduct was violative of section 3543.5(c). Union access to work areas and to the employer's equipment is a negotiable subject under the Act. San Mateo City School District (1984) PERB Decision No. 375a. Nevertheless, the Board has found that in order to constitute

a unilateral change in violation of section 3543.5(c), a change must alter a districtwide policy and exert a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. Modesto City Schools and High School District (1985) PERB Decision No. 541, Oak Grove School District (1985) PERB Decision No. 503, Modesto City Schools and High School District (1984) PERB Decision No. 414, Grant Joint Union High School District (1982) PERB Decision No. 196. In our view, CSEA failed to prove that the directive altered districtwide policy or exerted a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members.

There is no evidence that the directive was intended to limit CSEA access. There is no evidence that the transportation office was closed to other CSEA representatives or employee activists. Since Rowe was singled out by the District and only Rowe's access was restricted, we do not view the directive as changing the policy of allowing unrestricted access to employees in general or to the union. Therefore, in this case, proving only that Rowe's access was limited does not prove that a districtwide policy was modified within the meaning of earlier PERB decisions.[2]

[2]By way of contrast, see Pittsburg Unified School District (1982) PERB Decision No. 199 where, although one employee was affected by the change, it was clear that the District intended to change its overtime policy.

Moreover, as Rowe was allowed access, albeit restricted, it is not clear from the record that the access restriction had a continuing effect on the terms and conditions of employment of bargaining unit employees. We recognize, of course, that access limitations on Rowe, as CSEA chapter president, could have a generalized chilling effect on the exercise of protected rights or inhibit the Association's ability to administer the contract; however, such conduct would properly sustain a violation of section 3543.5(a) and (b), not section 3543.5(c).

With regard to the parent complaints, we note that Georgia Houpt, Rowe's supervisor, wrote Assistant Superintendent Raymond Crawford requesting that he discipline Rowe because of the parents' complaints. Crawford did not do so. Thus, while Houpt's request may evidence animus, nothing in Crawford's actions convinces us that the District acted contrary to its expressed policy of allowing employee input prior to taking action. We disagree with the ALJ that the manner in which Crawford acted, i.e., keeping the names of the parents from Rowe, rises to the level of a violation in this instance. Crawford testified that he left open the possibility that he would disclose the names if needed. Apparently, after discussing the matter with Rowe, however, Crawford concluded that discipline was not warranted and took no further action. Disclosure at that point was therefore not needed.

Finally, we observe that in a case such as this, where subtle factors like motivation must be distilled from a complex

factual record, divergent inferences may be drawn. In this instance, however, Member Porter seems to have spurned the plain meaning of the events that transpired and covered the record with a gloss of innocence and good will not apparent from a fair reading of the record. For example, Member Porter is unwilling to find that Assistant Superintendent Crawford, who authored the April 16th letter of reprimand on the District's behalf, acted contrary to the law. However, the record is replete with evidence demonstrating Crawford's culpability. First, the District failed to introduce any competent evidence to rebut Rowe's version of the events of April 3 and 4. Having failed to do so, it is thus difficult to accept the assertion central to the District's case that Crawford issued the reprimand because Rowe's conduct went beyond the bounds of decorum demanded of the union spokesperson. Furthermore, Crawford departed from the established District personnel procedures when he took the action he did. Contrary to District procedures, Crawford himself failed to conduct even a minimal inquiry of Rowe and, more importantly, failed to ascertain whether Supervisor Houpt had made any inquiries of Rowe.[3] Instead, Crawford was

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[3]We note Member Porter's comments concerning his view that Crawford had no established practice of conducting independent investigations. That may well be, but the fact remains that in this case, Crawford did do an investigation (Tr. 300). Having undertaken this task, he was obliged to conduct it in a fair and impartial manner.

We are also puzzled by Member Porter's disingenuous reliance on Board Policy section 4664 B.(2). While that

willing to rely solely on the written complaints and other documents of Haas and Rogers which were transmitted to Crawford by Houpt. Crawford's utilization of this rather unorthodox procedure, particularly when considered in light of the flagrant anti-union sentiment of Houpt, her persistent involvement in actions against Rowe and Crawford's refusal to permit Rowe to examine the written statements on which he relied, affords ample reason to question the dissent's conclusion that Crawford's conduct was motivated by an innocent desire to maintain a non-disruptive work environment. Indeed, in our view, the facts taken as a whole urge the conclusion that, but for Rowe's protected conduct, the District would not have reprimanded Rowe for her conduct. In sum, we remain convinced that the ALJ drew the appropriate conclusions from the record and, consistent with the foregoing discussion, adopt them as our own.

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section does not require an independent investigation, section 4664 B.(1) provides for a discussion of the employee's shortcomings between the employee and her immediate supervisor, in this case Rowe and Houpt. We fault Crawford for not ascertaining whether a discussion as required by section 4664 B.(1) took place (Tr. 334). We do not find Crawford's testimony to be equivocal.

> Q. Did Georgia Houpt to your knowledge discuss [the events leading to the reprimand] with Sandy Rowe prior to April 16, 1984?
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> A. That I don't know.
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> Q. Did you ask Georgia Houpt whether she had?
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> A. No, I did not.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case and pursuant to subsection 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Woodland Joint Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing reprisals on, discriminating against or otherwise interfering with Sandra Rowe because of the exercise of her rights to form, join and participate in the activities of employee organizations of her own choosing for the purpose of representation on all matters of employer-employee relations;

2. Interfering with the right of the California School Employees Association and its Woodland Chapter #118 to represent bargaining union members in their employment relations with the public school employer.

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

1. Remove from Sandra Rowe's personnel file and her "working file" and destroy the following documents: (1) the April 16, 1984 letter of reprimand and all references thereto; (2) the September 1984 evaluation and all references thereto; (3) the employee complaints and all references thereto; and (4) the May 4, 1984 directive barring Rowe from the transportation office and all references thereto.

2. Return to the pre-May 4, 1984 status quo which permitted Sandra Rowe free access to the transportation office. In the event that Sanda Rowe is no longer president of Chapter #118, provide her access to the transportation office on the same basis as all other employees.

3. Permit Sandra Rowe, upon request, to review the complete working file kept by Dr. Crawford. However, the District need not disclose the names of the parents who signed the parent complaint letter.

4. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

5. Written notification of the actions taken to comply with this order shall be made to the Sacramento regional director of the Public Employment Relations Board in accordance with the director's instructions.

Chairperson Hesse joined in this Decision.
Member Porter's concurrence and dissent begins on page 10.

Porter, Member, concurring and dissenting: I concur with the majority that the District's qualified limitation of Rowe's access to the transportation office and the District's handling of the parental complaint concerning Rowe's bus driving activities did not violate EERA. I respectfully disagree, however, with the majority's adoption of the administrative law judge's conclusions that the District's April 16 reprimand, May 4 directive and the evaluation of Rowe were unlawfully motivated. I would find, instead, that the Charging Party did not meet its threshold burden of producing evidence sufficient to establish that the District personnel decisions concerning Rowe were unlawfully motivated by Rowe's exercise of protected conduct.

The administrative law judge focuses on the District's reprimand of April 16. Indeed, his analytical approach posits that if the April 16 reprimand was unlawfully motivated, so also were the May 4 directive and the September evaluation of Rowe since the reprimand, directive and evaluation all stemmed from the same events occurring on April 3 and 4. It is therefore appropriate to summarize the events occurring on April 3 and 4, as well as the information relied upon by Assistant Superintendent Ray Crawford in his issuance of the April 16 reprimand.

On April 3, while Rowe and other drivers stood in the transportation yard talking, Phyllis Rogers, a part-time

driver/part-time dispatcher who was a fellow member of the bargaining unit represented by CSEA,[1] approached them and announced her need to assign drivers to shuttle students on a field trip. Rowe, expressing surprise that Rogers was not using the previously established method of assigning drivers for field trips, indicated that a grievance would be filed. During this conversation, one of the drivers made the following comment to Rogers, "I thought you didn't know where Houpt (the supervisor) was." The driver's comment was apparently perceived by Rogers to have been a challenging and disparaging one. Rogers left the yard.

Rowe left the group of drivers. Shortly thereafter, Rogers, appearing to be upset, approached Rowe and asked her why the drivers hated her (Rogers), that she (Rogers) was "just doing her job," and that she did not know where the supervisor, Houpt, was. Rowe responded to Rogers that she did not believe the other drivers disliked her and she would ask them to refrain from making comments to Rogers until relations between the District and the drivers were not so tense.

Rowe then followed Rogers into the transportation office and initiated a conversation with Account Clerk Brenda Hass, who was also a member of the bargaining unit represented by CSEA. Rowe

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[1]At the time of all events discussed herein, Phyllis Rogers' position as a part-time driver/part-time dispatcher was within the classified bargaining unit represented by CSEA.

testified that her purpose in initiating a conversation with Hass was to ask her whether she (Hass) had received from supervisor Houpt any special instructions regarding how to handle unruly students.[2] Rowe testified that Hass became extremely upset and during the course of their brief conversation Hass asked Rowe to "quit" talking about the subject, "get lost" and to "bug off." At some point in their conversation Rowe accused Hass of not being able to let "the dying dog lay in the grave."

The next day, April 4, Rowe informed Rogers that she (Rowe) would be unable to drive on a field trip. Rogers told Rowe that her inability to drive would not present any special problems. Rowe then told Rogers that Dr. Watt, the Superintendent, had called CSEA Field Representative Radman the night before to complain that Rowe had harassed Rogers and Hass. Rogers became extremely upset and left, saying that she was "going to cry."

Rogers and Hass complained to Supervisor Houpt concerning Rowe's conduct on April 3 and 4. In a subsequent conversation

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2This refers to an incident which had occurred sometime between November 1983 and February 1984, involving bus driver Esther Baez and an unruly student passenger. Baez allegedly drove her bus into the transportation yard and honked the horn in order to attract the attention of Supervisor Houpt so that the student could be removed. Houpt, however, was not present, and Account Clerk Hass refused Baez' request to remove the student. After the incident, Baez sought the assistance of Rowe to have the policy concerning the District's obligation to provide assistance to drivers in such situations clarified. Rowe accordingly met with Houpt, but at the meeting there was no mutual resolution regarding what the policy should be.

with Assistant Superintendent Crawford regarding the events of April 3 and 4, Houpt was advised by Crawford to have Rogers and Hass place their complaints in writing if they deemed them to be sufficiently important, which they did.[3] Crawford reviewed the complaints submitted by Rogers and Hass and also had brief telephone conversations with the two employees during which time the matters described in the complaints were discussed. Crawford, however, did not discuss the incidents of April 3 and 4 with Rowe.

The complaint Crawford received from Account Clerk Hass, describing the events as she perceived them to have occurred on April 3, read as follows:

> At approximately 10:00 A.M. on April 3, 1984 Sandra [Rowe] came up to the office door. She asked me if I had direction on how to handle the situation regarding Esther if it should happen again. I told her I would do exactly what I did before. She continued with her questing [sic]. I asked her why she was doing this. But she did not answer me. She said all the drivers did not like Phyllis [Rogers] & myself but they did respect Phyllis that's [sic] why they ask her advise [sic]. She also said I hold a grude [sic] & that I make my own problems in this yard. I asked her to leave the office more than three times (trying to answer

[3] The District attempted to introduce these into evidence. However, since the District called neither Hass nor Rogers to testify, and Crawford, who was called, had no personal knowledge of the events described in the letters, the hearing officer admitted them into evidence for the limited purpose of showing that they were written by Hass and Rogers, and relied upon by Crawford in his decision to reprimand Rowe.

> phone calls during this time very upsetting for me) & I had work to do but she continued harassing me. I called Sherri ext. 15 & asked her who was there to help me. I feel Sandra verbally attacked me . . . .

Driver/Dispatcher Rogers' complaint concerning the events of April 3, submitted to Crawford, read as follows:

> Georgia [Houpt] was out of the office this day . . . . Brenda [Hass] and myself were trying very hard to take care of the issuing of field trips through the week. . . . Sandy [Rowe] came in walked to the office door and said "what directions do you have Brenda?" Brenda said "what?" Sandy said "What would you do if you had another incident like Esthers [sic] to handle?" Sandy went through the problem Esther had with a Community High student. Brenda said, "the drivers have been instructed about how to handle a problem like that, are you telling me the union would help me with a problem like that?" Sandy said, "Brenda, you know the girls don't like you, you know you hold grudges and cause all of you [sic] own problems in the yard. Sandy said "I want to know your direction if something should happen.["] Brenda said, ["]leave me alone, I have work to do."
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> I had listened to this point with my head bowed, I couldn't believe that this was happening. I said, "you say the girls don't like Brenda because she holds grudges and causes her own troubles in the yard; they probably don't like me either["], to that Sandy said, "they don't like you, but they do respect you." I said, ["]how can that be, what to you mean they respect me?" She said, ["]because they come to you with their questions . . . ."
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> She ended our conversation and went back to Brenda, again wanting to know her direction. Brenda . . . dialed a number and said "Sandy leave, leave us alone."
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> . . . . . .

> I started crying, I was so upset, I looked at Sandy, her face was beet red. I got up, . . . and went outside the shop, . . . and felt seriously of leaving, but thought of the work to be done; I thought I can't let her do this to me; decided to return to the office, Sandy was just leaving. I felt terrible the rest of the day, had a horrible headache. I was unable to sleep that night.

Crawford also received the following written account from Driver/Dispatcher Rogers describing her conversation with Rowe of April 4:

> . . . as I was walking toward the office to report for work, Sandy approached me saying . . . she could not do the shuttle . . . . Sandy said "have you had a conversation with Watt," [Rowe said] "Brenda called him and said I was yelling at her yesterday. . . ." I told her she was out of order yesterday, I felt. With that she started to say something else and I asked her please not now . . . . I was extremely upset, especially after what had happened yesterday from the statements regarding Brenda carrying a grudge and her statement regarding most of the drivers not liking me, but respecting me. I completely lost my control . . . . After route went to see the doctor . . . . He listened to my story and said I would have to make some decisions, possibly quit my job . . . .

In addition to the written complaints of Hass and Rogers, Crawford also received the following report[4] of a physician whom Rogers saw on April 4, for treatment for stress allegedly caused by her interactions with Rowe.

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[4]The physician who examined Rogers was not called as a witness to testify. Therefore, the hearing officer accepted his report for the purpose of showing that the physician made the report, and that it was relied upon by Crawford.

> Patient states that she is having problems with her union and is having a hard time handling it emotionally and has requested to see a Doctor about it.
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> The patient goes into some detail elaborating the situation with her assistant supervisor programming schedules and routes in the Woodland Joint Unified School District. The management of the school district is currently in negotiation with the transportation bus driver union to clarify some of past practices and hours in reimbursement which is producing stress in the total department and the union chief has been pressurizing [sic] the office workers, and interfering with there [sic] function in doing their job assigned [sic] drivers. She has been under increasing stress with this person over the last several days, and broke down, got quite shaken, and tearful, and emotional this morning. She said she is almost driven back to smoking by this woman. Several methods of approach to this woman on an ordinary basis of stating her need to get her job done and not be hassled by the outside person are outlined to her, and she will endeavor to do [rest of sentence illegible], I have stressed to her that I do not feel that medications will be helpful in dealing with this.

Following his receipt and consideration of the above items, Crawford issued Rowe a letter of reprimand dated April 16, which read as follows:

> 1. On April 3, 1984, during the clerical office hours of Brenda Hass and Phyllis Rogers, you repeatedly questioned them as to how they would handle another situation like Esther's. They, of course, are not under your supervision and have no obligation to explain their actions to you. You were persistent and interrogative.
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> 2. You then made statements that the drivers do not like Phyllis and Brenda, that

> Brenda holds a grudge and, that she causes her own problems in the yard.
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> 3. Brenda asked you to leave at least three times and to leave them alone because they had work to do. Both Brenda and Phyllis were becoming very upset and were having trouble continuing with their work.
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> 4. The following day, on April 4, 1984, in the early morning, you began questioning Phyllis if she had called Dr. Watt to report your actions of the day before. Phyllis eventually told you that she was too upset to talk about it. Phyllis then drove her morning route even though she was emotionally upset.
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> 5. Immediately after completing her route, Phyllis went to the doctor's office for possible treatment of her anxiety and stress. Dr. Clark saw her and suggested she either quit her job as clerk or go to the N.L.R.B. or School Administration for help in relieving the pressure she was receiving from you. I have received a doctor's verification of the office visit.

Still believing themselves to be harassed by Rowe, even after she received the reprimand, Hass and Rogers sought a meeting with Superintendent Watt and Assistant Superintendent Crawford. The meeting culminated in the following directive, signed by Assistant Superintendent Robert Kibby and dated May 4, 1984, issued to Rowe:

> You are hereby directed not to enter into any of the Transportation Offices unless invited by Georgia Houpt, Supervisor of Transportation. This directive is being conferred upon you because of the numerous problems that arise when you are in these offices.

Also, in the spring of 1984, the District received a letter

of complaint regarding Rowe's conduct as a bus driver from a group of parents. The District sent Rowe a memo requesting a meeting concerning the complaint. After meeting with Rowe, the District did not take disciplinary action against her, but retained the memo requesting the meeting in Rowe's personnel file.

The following fall, upon Rowe's return from an extended leave of absence, she received an evaluation for her work performed up until her leave of absence. In the evaluation, signed by both Houpt and Crawford, Rowe received two "excellent" ratings, seven "satisfactory" ratings and three "needs improvement" ratings. The "needs improvement" ratings were in the areas of "dependability," "cooperation" and "personality."[5]

The majority affirms the ALJ's analysis that the District's issuance of the April 16 letter, the May 4 directive and the three "needs improvement" ratings in Rowe's evaluation were unlawfully motivated, and violated EERA section 3543.5(a). In addition, the majority affirms the ALJ's conclusion that the

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[5]Supervisor Houpt placed short comments under each of the three "needs improvement" ratings. Under "dependability," Houpt commented, "Sandy has been lax in turning in paperwork for field trips. Has to be asked for trip sheets." Under "cooperation," Houpt wrote, "Sandy does not cooperate well with some of the Department employees." Under the category, "personality," Houpt wrote, "Due to actions against other employees (office) Sandy cannot at this time be considered to have a good relationship with others.

District violated EERA section 3543.5(a) by placing in Rowe's personnel file the memo in which the District requested a meeting with Rowe to discuss the parents' letter of complaint concerning Rowe's conduct as a bus driver.

EERA section 3543.5 provides that it is 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. (Emphasis added.)

In Novato Unified School District (1982) PERB Decision No. 210, the Board adopted, for purposes of deciding charges alleging unlawful conduct under EERA section 3543.5(a), the standard applied by the National Labor Relations Board (NLRB) in its decision in Wright Line, Inc. (1980) 251 NLRB 150, enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. In California State University, Sacramento (1982) PERB Decision No. 211-H, a decision that was issued the same day as Novato, the Board summarized its newly adopted test of discrimination in the following manner:

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of

> the protected conduct. As noted in Novato, this . . . must operate consistently with the charging party's obligation to establish an unfair practice by the preponderance of the evidence.

Thus, the Novato test of discrimination requires the trier of fact to weigh both direct and circumstantial evidence for purposes of determining whether an action was motivated by the exercise of protected rights. (Wright Line, Inc., supra, 108 LRRM at 2519-2520; see also Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 729, 730.) In adopting such a rule, this Board recognized that direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Thus, the Board has concluded that unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. (Novato Unified School District, supra, p. 6; Carlsbad Unified School District (1979) PERB Decision No. 89.) The Board in Novato Unified School District went on to establish that in order to justify such an inference:

> . . . the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. [Citation.] Knowledge along with other factors may support the inference of unlawful motive. The timing of the employer's conduct in relation to the employees' performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or

> contradictory justifications for its actions are facts which may support the inference of unlawful motive. In general, the inference can be drawn from a review of the record as a whole.[6]

The ALJ concluded that the record contains a "substantial amount of evidence from which an unlawful motive may be inferred. He relied upon the following: (1) Houpt, at some point in time before her reemployment with the District, allegedly said that she would "try her best" to help the drivers oust Rowe; (2) Houpt allegedly asked a driver to report on Rowe's union activities and told the drivers that if they "got involved with Sandy," they would lose their jobs; (3) all complaints about Rowe emanated from Houpt or from Hass or Rogers, bargaining unit members who worked closely with Supervisor Houpt and regarded themselves as "allied" with Houpt; (4) the reprimand of April 16 took place at a time of tension between CSEA and the District; and (5) Crawford, in his issuance of the reprimand, failed to ask Rowe for her version of the events.

Unlike the ALJ, I would give little, if any, weight to the first two factors enumerated above. This is so because I do not believe that they were established by competent evidence,

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[6] (Novato, supra, pp. 6-7, emphasis added.) Evidence of "cursory investigation" is another factor by which an employer's unlawful motivation may (see fn. 10, infra) circumstantially be established. (Baldwin Park Unified School District (1982) PERB Decision No. 221.)

nor were they otherwise probative in establishing circumstantially the District's motivation. Concerning the first, the ALJ would find that the record established that Houpt was reemployed by the District with a preconceived plan to get rid of Sandy Rowe. Yet, the only evidence in the record of such a plan is in the testimony of bus driver Maria Reyes. Reyes testified that she phoned Houpt and requested her to return to the District to oust Rowe. Houpt allegedly responded to Reyes' request by telling her that she (Houpt) would "try her best" to get rid of Rowe.[7] I do not consider, however, Reyes' testimony very probative. It is probably hearsay[8] and was given in response to a leading question asked on direct by counsel for Charging Party. The relevance of her testimony

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[7]The pertinent portion of the transcript reads as follows:

(Counsel for Charging Party, on direct examination of witness Reyes.)

Q. Now, what did Georgia tell you about coming back to work in Woodland? Did she say she was willing to do it?

A. What she said at the school district, we'll pay you more money, then she would.

Q. Did Georgia ever tell you that if she did come back she would get rid of Sandy Rowe?

A. She would try her best.
(Emphasis added.)

[8]Houpt's statement does not appear to fall within the admission exception to hearsay since, at the time that it was made, Houpt was not employed by the District.

is also dubious in view of the fact that it offers no insight into when Houpt's conversation with Reyes took place revealing Houpt's "plan," other than the fact that it occurred at a time when Houpt was living out of state and was not even an employee of the District. More importantly, Reyes' vague testimony does not reasonably establish whether Houpt's response was motivated by her dislike of Rowe personally or her dislike of Rowe due to her involvement in the affairs of CSEA. Rather than helping to establish the latter, it may more reasonably be inferred from the nature of Houpt's comments that she merely sought to placate her friend Reyes, who had initiated the contact by telephone and requested Houpt to return and oust Rowe.

Nor does the record contain competent evidence that Houpt, through Reyes and other bargaining unit members, initiated surveillance of Rowe's CSEA activities. Reyes' testimony arguably relevant to this issue was again made in response to counsel's leading question asked on direct. Further, it does not clearly establish whether Houpt asked Reyes to watch Rowe and report her activities, or if Reyes offered to do the same.[9]

Finally, as to Houpt's "threat" to bargaining unit members that if they became involved with Rowe, their job security would be in jeopardy, the pertinent testimony of Reyes reads as

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[9]The relevant portion of the transcript is:

(Counsel for Charging Party, on direct examination of witness Reyes.)

follows:

> A. . . . Sandy used to have meetings with us about CSEA and she would tell us all this stuff about what we can do, what we can have, like we don't have to wash buses and stuff like that, you know. They can buy us uniforms and, you know, it sounded real good. And then Georgia would come and say, Hey, don't you think you're going to get all that. The school district doesn't have any money to buy all that. If you get involved with Sandy, you guys are going to lose your jobs.

I do not view this narrative as necessarily establishing that Houpt was threatening the drivers with the loss of their jobs were they to become involved in union activities. One may reasonably infer from Reyes' summarized version of Houpt's comments that they were made within the context of her sarcastic assessment of CSEA's demands of the District as being unnecessarily costly.

In inferring circumstantially the District's unlawful motivation in its actions concerning Rowe, the ALJ also relied on the fact that the chief complainants against Rowe's conduct were Hass and Rogers, employees who worked closely with Houpt and regarded themselves as "aligned" with Houpt. The

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> Q. (By Mr. Janiak) Did Georgia ever ask you to keep track of Sandy or report to her when Sandy was doing things that . . . .
>
> A. In so many words she did. I told her, "Georgia, I know you're tougher and I know you'll hold on and I will let you know what goes on. . . ."

administrative law judge, it seems, would impute any "anti-union animus" of bargaining unit members Hass and Rogers to the District.

I have a basic conceptual problem in finding that the "anti-union animus" of one or two bargaining unit members can be imputed to management. But even assuming that Hass and Rogers harbored anti-union animus and that their "philosophical alignment" with management is a proper analytical basis upon which such animus may be imputed to management, I am unable to draw such inferences from this record.

First of all, the record does not convincingly show that Hass and Rogers were truly philosophically aligned with management with respect to labor issues, and I disagree with some of the inferences in this regard drawn by the ALJ from the record. For example, he drew an inference that Hass was philosophically aligned with Houpt from Hass' suggestion to Rowe that she (Rowe) did not "like them (referring to drivers) any better than we do." (Proposed Dec, pp. 36-37.) This, however, is not a rational inference to be drawn. Why would a bargaining unit member, even one "aligned" with management, accuse a union president of not really "liking" those persons whom she represents? More plausibly, this comment flows from racial tensions which are evidenced elsewhere in the transcript. Also, I find no evidence showing that bargaining unit members Hass and Rogers harbored anti-union animus. That they found Rowe's

conduct objectionable is readily apparent, but this standing alone does not show that they disapproved of her conduct due to her advocacy of union matters.

More significantly, assuming arguendo that Hass and Rogers, together with Houpt, were tainted with anti-union animus, these individuals were not responsible for the issuance of the reprimand. On these facts, I would have to find in the record that Assistant Superintendent Crawford, who actually issued the April 16 letter, knew or reasonably should have known that Houpt, Hass and Rogers harbored anti-union animus and made their complaints because of such animus. However, the record is totally devoid of such evidence. Accordingly, unlike the majority, I would find that the ALJ erred by reflexively imputing any alleged anti-union animus of Hass, Rogers and Houpt to Crawford.

The ALJ also relied on the fact that Crawford, prior to issuing Rowe the letter of April 16, failed to ask Rowe for her version of the events, although he did discuss the matter with Houpt, Hass and Rogers. This, the ALJ suggested, shows that the District was "more interested in issuing the letter of reprimand than in an open and fair investigation." I do not dispute the fact that the existence of a "cursory" investigation is one factor by which unlawful motivation may be circumstantially inferred from the record as a whole. (Baldwin Park Unified School District, supra, PERB Decision No. 221; North Sacramento School District (1982) PERB Decision No. 264.) Perhaps as a

matter of good personnel practice, Crawford should have elicited Rowe's version of the events of April 3 and 4. However, in my opinion, his failure to do so does not establish a cursory investigation from which unlawful motivation may be inferred in absence of evidence showing that the District's handling of the Rowe matter was different from its disposition of other employee incidents involving the same general type of conduct (e.g., that which apparently warranted only minor disciplinary action).[10] The District's failure to meet some idealized standard in its personnel policies is not to be equated with anti-union animus.

My analysis of the above would probably differ if the discipline imposed had consequences more severe than that of the letter of reprimand at issue, which, under the District's personnel policies was the first of four such letters required before Rowe could be suspended. In other words, as the gravity of the discipline imposed becomes more severe, management's failure to conduct a comprehensive investigation becomes increasingly more probative in circumstantially establishing

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[10]The ALJ cited North Sacramento School District, supra, for the proposition that a "cursory" investigation is one factor by which unlawful motivation may be inferred. In North Sacramento, however, the Charging Party demonstrated not only management's failure to conduct a meaningful investigation prior to its imposition of discipline, but also showed that the employees allegedly unlawfully disciplined had been reprimanded for engaging in conduct for which other employees had not previously been disciplined. In the instant case, however, Charging Party failed to introduce evidence of disparate treatment.

unlawful motivation.[11]

Finally, the ALJ relied upon the timing of management's action against Rowe. In this regard, the April 16 reprimand was issued at a time of extreme labor related tension within the transportation department. However, while our precedent deems timing to be probative evidence of unlawful motivation, it also establishes that timing alone is insufficient to establish a nexus from which an employer's unlawful motivation may be inferred. (Charter Oak Unified School District (1984) PERB Decision No. 404.)

In summary, I disavow most of the factors relied upon by the ALJ to show the District's anti-union animus. On the contrary, I do not believe that they, even when considered in their totality, rise to the status of indicia from which the unlawful motivation by the employer can reasonably be inferred. Thus, the Association did not meet its initial burden of establishing that Rowe's protected conduct was a motivating factor in

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[11]In this respect it should be noted that in Baldwin Park Unified School District, supra, this Board concluded that the District's firing of two union activists with lengthy and unblemished employment histories was unlawfully motivated. In reaching its conclusion, the Board found that the discipline sought by the district, the employees' terminations, was incongruously harsh in light of their purported offenses and good employment records. Also, the severity of the discipline sought highlighted deficiencies in the District's investigation, namely, its failure to solicit the accused employees' version of the events. Hence, the proposition for which Baldwin stands — that a cursory investigation is one factor by which an employer's unlawful motivation can be inferred — cannot be divorced from its factual context involving the termination of two employees.

Crawford's decision to issue the April 16 letter.

Inasmuch as in my view the Charging Party did not establish its threshold burden, I do not have to reach the issue of whether the District successfully met its burden of showing that it would have disciplined Rowe even in the absence of protected activity. However, even assuming arguendo that Charging Party met its burden of showing that Rowe's protected activity motivated, in part, the letter of April 16, I would find that the District demonstrated that the relatively minor action taken against Rowe was a reasonable response to the situation and would have been taken even in the absence of Rowe's protected activities.

In concluding that Crawford's issuance of the letter of April 16 was unlawfully motivated, the ALJ applied the following analysis: since the District did not offer evidence to rebut Rowe's account of events occurring in April, and in the absence of some rational basis for disbelieving Rowe's testimony, Rowe's uncontradicted version must be accepted as true. Assuming the truth of Rowe's account, the District's act of issuing the reprimand was unjustified. It was therefore "pretextual" and unlawful under EERA.

I would instead find that the record as a whole does provide a rational basis for questioning Rowe's testimony that she in no manner disrupted the activities of the clerical staff on the dates in question, and that her explanation concerning

the April 3 episode with Hass, that she intended only to ensure that Hass had guidance should a similar situation occur in the future, was not plausible. Rowe's demeanor was described as aggressive by both District and Association witnesses. Rowe, herself, testified that her relationship with Hass was not good and that Hass did not "like her." Yet, she nonetheless initiated a conversation with Hass on April 3 and, once Hass told her that she didn't have special instructions from Houpt, Rowe still doggedly pursued the matter. It seems to me that had Rowe's intentions really been to offer assistance to Hass, she would have left her alone once requested to do so, and would instead have pursued the subject again with Houpt, the supervisor logically responsible for giving Hass direction on the subject. Instead, Rowe persisted in questioning Hass about something Hass indicated she knew nothing about and, in the course of their interchange, Hass told Rowe to "get lost," "bug off" and "quit," words which Rowe admitted she understood to mean her presence was not welcome. Unlike the ALJ, I would not characterize this episode as a "run-of-the-mill shop floor exchange of a union president, aggressively pursuing an employment-related matter . . . ." While it is to be expected that a union president would champion her union's cause with forcefulness in dealing with supervisory and management personnel, this does not give such an individual a license to thrust herself on fellow employees who have made it clear that they do not welcome such advances.

Perhaps, more fundamentally, the ALJ erred by reasoning that because Rowe's testimony remained uncontradicted, her version of the events – that she did not behave disruptively – must stand, and it necessarily follows that the District's discipline of her was unreasonable and "pretextual." Under such an analysis, the fact that the District was unable to, or chose not to, call witnesses to rebut Rowe's testimony absolutely precludes a finding that the District acted reasonably in issuing Rowe the April 16 letter. Yet, this analysis is flawed in that the proper focus of our inquiry in determining whether the District was unlawfully motivated is not whether Rowe's conduct was actually disruptive but, rather, whether at the time of the letter's issuance the District had reasonable cause to believe that it was, and whether the April 16 letter was a reasonable response to problems within the office.[12]

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[12]This position, too, is supported by precedent of this Board, namely Baldwin Park Unified School District, supra. In Baldwin Park, the district defended a charge alleging that its efforts to terminate two union activists were unlawfully motivated (see fn. 10, supra) on the basis that the employees would have been disciplined regardless of their history of union activism. In evaluating the district's defense, the Board considered unnecessary the determination of whether the employees sought to be disciplined actually committed the conduct of which they were accused. Instead, the Board concluded that dismissal of the charge against the district was proper "if it is shown that the District reasonably and in good faith believed" that the employees did engage in misconduct and, that any district employee believed to have engaged in the same conduct would have been disciplined in the same fashion. (Supra, p. 17.)

When Crawford wrote the letter, he had had a discussion concerning Rowe's conduct with her immediate supervisor, Houpt. It seems to me that it is reasonable for an Assistant Superintendent, without conducting his own independent examination, to rely on his subordinate's perceptions of personnel problems concerning employees under that subordinate's immediate supervision. This is especially so where there is no evidence showing that the administrator had reason to doubt his subordinate's judgment or motivation, and also where, as here, the discipline to be imposed is relatively minor.

In his decision to reprimand Rowe, Crawford also considered a report from a physician whom Rogers saw on April 4, for treatment of an anxiety condition allegedly precipitated by Rowe's conduct, as well as three written complaints concerning Rowe's conduct submitted to Crawford by Hass and Rogers. In their complaints, Rowe, in explicit detail, is described as interrupting their work, asking numerous questions, and refusing to leave when asked to do so. While Hass[1] and Rogers' complaints depict two employees who are perhaps unduly sensitive to Rowe's overtures, this was a period of high tension in the transportation department, and that employees would react to departmental tensions is understandable. Moreover, for purposes of discerning whether Crawford was reasonable in relying on the complaints, it is important to

note that Hass' and Rogers' complaints for the most part are mutually corroborative and even, to a large extent, corroborate Rowe's very own testimony.

In concluding that the District's action in reprimanding Rowe was unreasonable, the ALJ relied on the fact that Crawford, while he solicited Rogers' and Hass' version of the events, did not do the same with respect to Rowe. An idealized investigation would have involved hearing from Rowe her version of the events of April 3 and 4. However, since this was merely the first of a series of warnings required before Rowe could be suspended, Crawford's need to make further investigation prior to taking the action is substantially reduced. In light of his conversation with Rowe's immediate supervisor, Houpt, and in view of the complaints of Hass and Rogers and the physicians' report, I would find that Crawford could reasonably conclude, without further investigation, that Rowe's behavior was disruptive. In any event, I find no persuasive evidence in the record which would tend to demonstrate that Rowe was disciplined due to her participation in protected activities.

Issuance of the May 4 Directive

The ALJ concluded that Assistant Superintendent Kibby's directive, dated May 4, 1984, prohibiting Rowe's entry into the transportation office without supervisory approval, violated EERA section 3543(a) and (b). As the ALJ correctly noted, the

District's reason for limiting Rowe's access was its perception that Rowe's presence had a disruptive effect on the transportation department's clerical staff, and that the latter needed protection from Rowe's alleged harassment. The ALJ went on to establish that the legitimacy of the District's justification for limiting Rowe's access must depend upon evidence in the record demonstrating that Rowe was actually disruptive on April 3 and 4. Since no such showing was made at the hearing, concluded the ALJ, the directive was "pretextual."

I disagree with the ALJ's analysis for essentially the same reasons as previously discussed in the portion of this dissent dealing with the April 16 reprimand. In my view, the May 4 directive, like the April 16 letter, was the District's response to a perception--one which I would describe as reasonable—that Rowe's presence had a disruptive effect on Hass and Rogers. Therefore, I would not find the directive "pretextual" merely as a consequence of the District's failure to contradict Rowe's testimony concerning the events of April 3 and 4.

I also disagree that the directive tends to place a chilling effect on Rowe's protected conduct and CSEA organizational access rights. It was demonstrated at the hearing that none of Rowe's requests for information on transportation matters were denied. More fundamentally, I disagree with the ALJ's analysis that Rowe was treated

differently in that no other employee was denied unfettered access to the office, and that this "disparate treatment" otherwise tended to interfere with Rowe's rights under the Act. That Rowe was treated differently from other employees cannot persuasively support a finding of disparate treatment in the absence of evidence showing that the presence of other employees in the transportation office had an effect similar in nature to Rowe's presence. There was no such showing. Accordingly, I would find no violation of section 3543.5(a) and (b) based on the District's May 4 directive.

I would further conclude that the District, by its issuance of the May 4 directive, did not violate EERA section 3543.5(c). Concerning this issue, I therefore concur with the majority.

The September Evaluation

The ALJ found that, inasmuch as the negative ratings contained in the September evaluation were based on the events of April 3 and 4, the evaluation was "tainted by the same unlawful motive that rendered the April 16 letter unlawful." The evaluation, concluded the ALJ, was therefore issued for discriminatory reasons. I disagree.

At the outset, it should be noted that the ratings in the evaluation were not consistently negative at all; Rowe's

conduct for the most part was rated "satisfactory," and she even received two "excellent" ratings. Moreover, I would reverse the ALJ's conclusion that the evaluator's written comments were not justified. By Rowe's own admission, she indeed failed to turn in a field trip report until a month after the date on which it was due, so the evaluator's (Houpt's) comment, "Sandy has been lax in turning in paper work for field trips," hardly seems unfair. Also, in light of the problems occurring in the transportation office during the course of Rowe's unrequested "assistance" to bargaining unit clerical staff therein, that she would receive "needs improvement" ratings in "personality" and "cooperation" hardly seems unwarranted. In short, I question whether this evaluation is "adverse" at all, and would not find that the "needs improvement" ratings were motivated by unlawful consideration. Accordingly, I would find no violation of EERA section 3543.5(a) and (b).

Parents' Complaint

Finally, I agree with the majority that Crawford's disposition of the parents' complaint concerning Rowe did not violate the Act. I disagree, however, with the ALJ's conclusion that Crawford, by putting the memo in Rowe's personnel file requesting a meeting with him, violated

EERA.[13] AS the majority notes, Crawford acted in conformity with the newly adopted policy of discussing parental complaints against drivers with the drivers before responding to such complaints. The memo merely documents the fact that Crawford did indeed hold such a meeting. I would, therefore, not infer that it was placed in Rowe's file in retaliation for her protected activity.

Finally, apart from their adoption of the Proposed Decision, my colleagues assert that I have not fairly read the record which is "replete with evidence demonstrating Crawford's culpability." In response thereto, I would comment that I agree that proving unlawful motivation is seldom a straightforward matter. The mind works in mysterious ways, and establishing why an individual took an action is not a question particularly well-suited to the processes of a quasi-judicial forum. And, as observed by the majority, the challenge of deducing motivation from subtle factors is further exacerbated by a complex factual record such as that in the present case. However, in my view, these realities only serve to strengthen this Board's obligation to find violations of our statute based

[13] I further disagree with the ALJ that the District violated EERA merely because Hass' letter of May 3 was found in Rowe's personnel file. According to Crawford's uncontroverted testimony, the placement of this letter in Rowe's file was inadvertent. Even if the letter's placement in Rowe's file was intentional, there is insufficient evidence in this record to infer unlawful motivation.

only on the evidence and reasonable inferences drawn therefrom, and to not attempt to reduce a complex web of events to a "plain meaning," which, in reality, does not exist.

Unlike the majority, I do not view the record as being "replete" with evidence demonstrating the District's "culpability." The District's failure to introduce evidence to rebut Rowe's version of the events of April 3 and 4 does not constitute "evidence" relevant to this Board's determination of whether or not Crawford's issuance of the April 16 reprimand violated EERA. Our own precedent, in fact, has disavowed the relevance of such to questions concerning unlawful motivation. (Baldwin Park Unified School District, supra.) The issue before us is not whether the April 16 reprimand should be sustained, which, in turn, would necessitate an inquiry into whether the District's action was a legitimate response to an actual disciplinary problem presented by Rowe.[14] The issue,

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[14]Indeed, this Board has held that:

> . . . the lack of "just cause" [for the employer's imposition of discipline] is nevertheless not synonymous with anti-union animus. By itself it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy. [Charging Party] bore the burden of producing evidence which would permit the conclusion that the injustice here was an

instead, is whether Crawford's motivation in issuing the reprimand was unlawful, and the resolution of this depends in part upon whether, at the time of its issuance, Crawford reasonably and in good faith believed that Rowe's behavior was disruptive.

Moreover, the majority's assertion that "Crawford departed from the established District personnel procedures" by failing to personally "conduct even a minimal inquiry of Rowe" is simply wrong. The record not only fails to support such an assertion, it is in fact directly contra thereto.[15] The District's Policy Statement which sets forth procedures for the discipline of classified employees does not require an

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act of employer retaliation against Doe for his organizing efforts. (Moreland Elementary School District (1982) PERB Decision No. 227, p. 15.)

Therefore, whether Crawford had just cause to issue the April 16 reprimand is not an issue properly before the Board, and the District's failure to rebut Rowe's version of the events of April 3 and 4 does not constitute evidence in support of a nexus.

[15]The record similarly fails to support the majority's assertion regarding Crawford's "refusal to permit Rowe to examine the written statements on which he relied" (e.g., those of Hass and Rogers). While Rowe had, at one point, requested to see the parents' complaint filed with the District, the record contains no evidence that she requested of Crawford to see the statements of Hass and Rogers. Indeed, Rowe only became aware of the existence of such statements a few weeks before the date of the hearing in the course of examining her personnel file. In it, Rowe found a letter by Hass which referred to an earlier letter she had written to Crawford concerning the events of April 3 and 4. Hass[1] letter had been inadvertently placed in Rowe's personnel file.

independent investigation conducted by the Director of Classified Personnel whenever the latter disciplines a classified employee.[16]16

Further, Crawford had no established practice of conducting an independent investigation. In fact, the record contains evidence precisely to the contrary. During the hearing officer's examination of Crawford, the latter testified that he has written approximately seven reprimands and, in so doing, has always relied on the recommendation of the supervisor, and has never, prior to the issuance of a reprimand, conducted an independent investigation of the grounds therefore. The relevant portion of the transcript reads as follows:

> Q. Okay. The April 16th reprimand letter which I believe is CSEA 1, did you draft

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16The Policy Statement, which was formally adopted by the Board of Trustees and in effect at the time of the issuance of the April 16 reprimand, provides at section 4664 B.(2) in pertinent part:

> When there is evidence of unsatisfactory performance of duties and responsibilities assigned which involves any of the causes for suspension or dismissal, the immediate supervisor shall so notify the Director of Classified Personnel who will prepare written notice to be delivered to the employee. . . .

The portion of the Policy Statement upon which the majority relies, section 4664 B.(1), describes procedures to be undertaken by the employee's immediate supervisor, Houpt. Inasmuch as Houpt did not issue the April 16 reprimand, her alleged failure to follow the District's procedures does not constitute a basis of inferring nexus.

that yourself? The one that outlines all the incidents?

A. Yes, I drafted it with the use of an old letter just for form.

. . . . . .

Q. Georgia [Houpt] didn't draft it?

A. No.

Q. Now, have you ever issued any other letters of reprimand in your current position?

A. Yes, I have.

Q. As an example, how many would you say you've issued? Five or more?

A. Probably seven.

Q. In those instances, were they based upon recommendations of a supervisor?

A. Hm-hm.

Q. Is the answer yes?

A. Yes, I'm sorry.

Q. And in those instances, did you — have you ever directly interviewed the employee who is going to be reprimanded?

A. Only afterwards at the request of Mr. Radman — asked that I meet with three custodians to talk to them about the letter.

[Emphasis added.]

The majority argues that even though Crawford may have had no established practice of conducting an independent "investigation," upon his undertaking to conduct one, he was obliged to conduct it in a fair and impartial manner. I must

first question whether Crawford, merely by asking Houpt to have Hass and Rogers put their complaints in writing if they deemed them to be sufficiently serious, thereby conducted an independent "investigation." Even assuming that this did constitute Crawford's investigation, and also assuming that it was not conducted fairly and impartially because Crawford did not ask for Rowe's version of the events, merely showing "unfair" personnel practices does not constitute unlawful motivation. (Moreland Unified School District, supra.) Nor is there any evidence in the record showing that Crawford's alleged failure to conduct a fair investigation constituted disparate treatment of Rowe.

It should additionally be recognized that, unlike the majority's broad assertions to the contrary, Crawford's testimony did not contain unequivocal statements that he did not ask Houpt whether she discussed the events with Rowe leading to the April 16 reprimand of Rowe. His testimony was that he simply could not remember whether he had or had not.[17]

17The majority mistakenly relies on that portion of the transcript dealing with whether Crawford asked Houpt if she had specifically discussed District Exhibit 3 with Rowe, which was one of the four statements considered by Crawford in his issuance of the April 16 reprimand. The relevant portion of the transcript, however, is on the preceding page of the record wherein Crawford is questioned in general terms regarding whether he asked Houpt if she discussed with Rowe the events leading to the reprimand. It reads as follows:

In short, Crawford's issuance of the April 16 reprimand was entirely consistent with the District's formal policies and actual practice. That being the case, it is not the proper function of this Board to sit as final arbiter of the question whether a District's policies and procedures are "orthodox," and to find violations of EERA based upon such subjective assessments.

I would dismiss the complaint in its entirety.

Q. Did you ask Miss Houpt whether she discussed this matter with Sandra Rowe?

A. I don't recall whether I did or not.

Q. Did Miss Houpt tell you that she had discussed this matter with Sandra Rowe?

A. I don't recall her telling me that and I don't recall if I asked her anything either. I don't know if I did or not.

APPENDIX

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

After a hearing in Unfair Practice Case No. S-CE-759, California School Employees Association and its Woodland Chapter #118 v. Woodland Joint Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

1. Imposing reprisals on, discriminating against or otherwise interfering with Sandra Rowe because of the exercise of her rights to form, join and participate in the activities of employee organizations of her own choosing for the purpose of representation on all matters of employer-employee relations;

2. Interfering with the right of the California School Employees Association and its Woodland Chapter #118 to represent bargaining unit employees in their employment relations with the public school employer.

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

1. Remove from Sandra Rowe's personnel file and her "working file" and destroy the following documents: (1) the April 16, 1984 letter of reprimand and all references thereto; (2) the September 1984 evaluation and all references thereto; (3) the employee complaints and all references thereto; and (4) the May 4, 1984 directive barring Rowe from the transportation office and all references thereto;

2. Return to the pre-May 4, 1984 status quo which permitted Sandra Rowe free access to the transportation office. In the event that Sanda Rowe is no longer president of Chapter #118, provide her access to the transportation office on the same basis as all other employees;

3. Permit Sandra Rowe, upon request, to review the complete working file kept by Dr. Crawford. However, the District need not disclose the names of the parents who signed the parent complaint letter.

Dated: _____ WOODLAND JOINT UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS WOODLAND CHAPTER #118,	)	
Charging Party,	)	Unfair Practice Case No. S-CE-759
v.	)	
WOODLAND JOINT UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION (5 /9/85)
Respondent.	)	

Appearances; Marcia Meyers and Peter Janiak, attorneys for Charging Party; James C. Whitlock, attorney for Respondent.

Before; Fred D'Orazio, Administrative Law Judge

PROCEDURAL HISTORY

The charge which commenced this action was filed on April 16, 1984, by the California School Employees Association and its Woodland Chapter #118. (hereafter CSEA, Union, or Charging Party) against the Woodland Joint Unified School District (hereafter District or Respondent). On August 14, 1984, the Sacramento regional attorney for the Public Employment Relations Board (hereafter PERB or Board) issued a complaint against the District. The District filed its answer to the complaint on August 30, 1984. The administrative law judge granted the charging party's motion to amend the complaint at the hearing, and the District lodged its answer to the amended complaint on the record at that time.

The charge, as amended, alleges that the District: (1) committed a series of discriminatory acts against the CSEA chapter president in violation of section 3543.5(a) and (b); (2) unilaterally changed the practice of permitting the Union president access to the transportation office in violation of section 3543.5(c); and, (3) interfered with the administration of CSEA in violation of section 3543.5(d).[1]

An informal settlement conference was held on September 18, 1984, but the dispute was not resolved. A hearing was held on November 19 and 20, 1984. The parties submitted post-hearing

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[1]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA or Act) is found at section 3540 et seq. In relevant part, section 3543.5 provides 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

briefs on February 6, 1985, and the case was submitted. By letter dated March 29, 1985, the parties were notified that this case was transferred to the undersigned for decision. See California Administrative Code, title 8, part III, section 32168(b).

STATEMENT OF FACTS

Background of Events.

Sandy Rowe began working for the District as a bus driver in 1979, and has been a Union member since that time. About three years ago she became the CSEA chapter president, having served as the chapter secretary and negotiating team member prior to that.

Rowe's activities since becoming chapter president frequently brought her into direct confrontation with practically all members of the management team in the District, and for this reason she was well known as an outspoken Union advocate. She has handled grievances and represented employees on a variety of employment-related issues. And she has spoken publicly at school board meetings on employment-related matters.

Georgia Houpt is Rowe's immediate supervisor. Maria Reyes has been a bus driver in the District since 1977, when Georgia Houpt was her supervisor and friend. Houpt eventually quit the District and went to Seattle. Although Reyes is currently a CSEA supporter, she has not always been so. At one point in time, when Rowe was very active in CSEA affairs, Reyes and two other employees, Lupe Hernandez and Lydia Lopez, called Houpt

in Seattle to ask her if she would return to the District. The reason for the request was that, in the view of these employees, Rowe was not adequately representing the interests of bus drivers, and Houpt, whom they trusted, would be welcomed back as a supervisor who would look after their interests. More specifically, Reyes testified that these above-named employees sought Houpt's return so she could "help [them] get rid of Sandy Rowe." (TR:190.) Reyes' unrebutted testimony is that during the course of this conversation Houpt was asked if she would get rid of Rowe if she came back to the District, and Houpt said she would "try her best." (TR:190.)[2]

Houpt returned to the District in summer 1983. Upon her return, according to Reyes[1] unrebutted testimony, Houpt asked Reyes to keep track of Rowe. Reyes said that she fulfilled the request, and, along with Phyllis Rogers, a driver and dispatcher, reported the events of CSEA meetings to Houpt.

In early 1984 the Reyes-Houpt friendship evaporated. Reyes said she was trying to become more active in CSEA, and began to respond more favorably to Rowe's advocacy of Union and employee rights. In regard to specific issues like working out of classification, and collective bargaining in general, Rowe strongly asserted CSEA's rights. For example, Reyes testified that Rowe took the position in meetings with drivers that they

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[2]"TR" refers to the transcript.

didn't have to wash buses, and that the District should buy their uniforms. In contrast, according to Reyes[1] unrebutted testimony, Houpt told Reyes that the District didn't have the money to keep up with Rowe's demands, and she stated that if,

> you get involved with Sandy, you guys are going to lose your job. (TR:191.)

The events which led to the allegations in this case began in September 1983, shortly after Houpt returned. The District proposed to lay off bus drivers. Although the layoffs never materialized, there occurred a heated debate involving changes in the establishment of bus routes and the bidding procedure for those routes. In essence, under the old system drivers who were assigned a particular route could, based upon seniority, keep that route indefinitely. Under the new system, however, there was uncertainty each year as to which route a driver would receive, and drivers could be forced to bid for their routes each year. Also, it appears that drivers were unhappy because the District had not provided other specifics, such as starting times and route schedules, about the newly-assigned routes. The debate continued into early 1984. Because these matters were of paramount importance to drivers, Rowe, in February 1984, filed a grievance on behalf of the drivers. It had been the District's intent to implement the changes on March 29, 1984.

Between February and March 29, Rowe met several times with bus drivers on buses and in the drivers' room, which was

located adjacent to the transportation office. Georgia Houpt, who supervised the drivers, had an office located in the transportation office.[3] It was common knowledge around the transportation yard and in the transportation office that this important matter was ripe for resolution.

It was against this background that the parties in early 1984 commenced what became protracted negotiations about, among other things, establishing new routes and bidding procedures. Robert Radman, the CSEA field representative assigned to the Woodland District, described the atmosphere during the meetings as hostile and tense. The District does not dispute this characterization. A tentative agreement was reached in late March, and the bidding scheduled to take place on March 29. However, there arose a dispute over the implementation of the agreement, and the matter continued into April.[4]

The dispute spilled over into other arenas as well. Meetings were held among drivers, the District, the Union and neighborhood organizations. For example, at one heated school board meeting after the tentative agreement was reached, these

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[3]Phyllis Rogers and Brenda Haas, a unit employee who performed clerical functions, worked closely with Houpt in the office. As will be explained in more detail below, these employees, although in the unit, were more philosophically aligned with Houpt's view of Rowe.

[4]The bidding eventually took place on April 6. Another tentative agreement was reached on August 22, 1984. Although the record is unclear on this point, the second agreement apparently covered routes for the upcoming school year.

working conditions were addressed by representatives from a community organization: Eva McClain, director of field operations for CSEA, Radman, and several drivers also spoke. It cannot be disputed that by the end of April the situation in the transportation department was tense and hostile. Rowe, as CSEA president, was in the center of the dispute.

Meanwhile, another significant issue, unrelated to these negotiations, developed in regard to a student who became unruly on a bus driven by Esther Baez. According to Rowe, in such an event it was the practice to drive into the bus yard and honk the horn to alert the supervisor that there was an unruly student on the bus. It was the responsibility of the supervisor, according to Rowe, to take the student from the bus and deal with him or her as appropriate.[5] In this particular instance, Baez honked her horn but supervisor Houpt was not in the office. Brenda Haas came into the yard, but resisted taking responsibility for the student, claiming it wasn't her

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[5]The only District witness to testify about this practice was Raymond Crawford, who is in charge of classified personnel. Because Crawford admittedly had no first-hand knowledge of the past practice on this point, prior to the hearing he asked Brenda Haas, an employee in the transportation office, what the practice had been. Haas apparently described to him a procedure somewhat at variance with that described by Rowe at the hearing. However, since Crawford's testimony on this point is hearsay and not corroborated by other competent evidence, Rowe's testimony regarding this past practice stands uncontradicted. (Calif. Admin. Code, tit. 8, part III, sec. 32176; see also Stockton Unified School District (11/3/80) PERB Decision No. 143, p. 9.)

job to do so. While Baez and Haas debated this matter, the student walked away.

After discussing the matter with Baez, Rowe talked to Houpt. According to Rowe, Houpt claimed the correct procedure was for a driver to send another responsible student to call the transportation office and seek assistance from the supervisor. Rowe disputed the wisdom of using a student in such circumstances to call for assistance to control yet another student. In any event, there arose a heated dispute regarding the procedure for handling unruly students on school buses.

In a conversation with Houpt a few days later, Rowe again explained that the unruly student matter was a serious issue for Baez and for CSEA. Rowe explained that Baez, in particular, was concerned for her safety and, equally important, she was concerned that Houpt would conclude that she (Baez) could not control students on her bus. The question about the unruly student procedure was not clarified during this meeting.

At about this time yet another major incident occurred in the transportation department. On April 1, 1984, in response to contacts made by bus drivers Maria Reyes and Nellie Ney, a crew from a local TV station arrived at the bus yard to do a story about the stressful working conditions of drivers, and about safety issues in the transportation department. The crew filmed several drivers who talked about stress on the job and

unsafe buses. This media attention caught the District off guard, and apparently was the cause of some embarrassment. Dr. Robert Watt, superintendent, was particularly upset, for the next day he told Radman that he (Watt) believed Rowe set the whole thing up. Radman's uncontroverted testimony is that Watt was "very angry and very upset." (TR:234.)[6] In fact, Rowe had nothing to do with the incident. Her only participation was watching the report on the evening news.

The level of activity apparently subsided during the summer when Rowe was on extended sick leave.[7] In August the parties again found themselves negotiating for an agreement to cover the upcoming school year. An issue arose as to the kind of seniority to be used in bidding for routes. Two options presented themselves. Under the first option Rowe had enough seniority to entitle her to a regular route. Under the second option she would have had the right to only a relief route.

During a caucus District negotiators expressly recognized the possibility that they could be accused of discrimination against Rowe if they insisted on the option which would place

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[6]In late April or early May, Radman had another exchange with Watt about the TV incident. Radman testified that Watt at that point remained upset about the incident, and again accused CSEA of going to the media. Radman's testimony about this discussion was unrebutted.

[7]Due to a stress-related condition Rowe went on extended sick leave in mid-May 1984. She returned to work in September of that year.

her in a relief role. The matter was openly discussed and the District negotiators decided to let CSEA choose the option it desired, thus avoiding any hint of discriminatory intent. This was done when the negotiations resumed, and CSEA chose the option which gave Rowe a regular route.

The April 3 Incident.

On April 3, 1984, as Rowe stood in the bus yard discussing the TV incident with several drivers, Phyllis Rogers, then a dispatcher and bargaining unit employee, arrived to discuss the assignment of drivers to shuttle several hundred students to an annual concert. In the past, according to Rowe's unrebutted testimony, overtime assignments such as these were made by choosing drivers, based on seniority, from a list of volunteers. Rowe immediately questioned Rogers as to why the assignments were not being made under the established procedure. In response to Rogers' statement that supervisor Houpt had told her to do it this way, Rowe said she would file a grievance. Rowe's unrebutted testimony is that there was no acrimony or hostility in this routine conversation.

A few minutes later, Rowe went into the drivers' room to make a phone call. She was confronted by Rogers, who asked Rowe why drivers hated her (Rogers). Apparently, based on something said during the earlier exchange in the yard, Rogers' previously established perception that drivers hated her was reinforced. Rowe responded that drivers didn't hate her and that she (Rowe) would try to keep things calmed down until some

of the hotly contested outstanding issues in the department were resolved.

The two employees drifted into the adjacent transportation office where Haas was located. Because Rowe had been approached by several drivers about the unruly student issue, she was anxious to have the matter ironed out.[8] Rowe asked Haas if Houpt had left any instructions about what to do with unruly students on buses. According to Rowe's uncontroverted testimony, Haas flew off the handle at this question, saying she wasn't responsible for Baez' students. Haas then turned her comments to broader subjects. According to Rowe, Haas questioned Rowe about why she was pursuing the unruly student issue. In reference to the drivers, Haas said,

> I don't know why you're doing this, you don't like them any better than we do. (TR:62.)

Presumably, the use of the word "we" referred to Haas, Houpt and Rogers. Haas asked Rowe why she didn't "quit it," and when Rowe responded, "quit what," Haas said,

> . . . quit talking about this. You know how much this upsets all of us. (TR:62-63.)

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[8]The unruly student issue had been festering since February, but apparently had not been resolved because the parties were enmeshed in the negotiations described above. Baez, in particular, remained concerned about safety and about the possibility of being disciplined or, alternatively, viewed as a driver who couldn't handle students. Rowe testified that Baez did not want a meeting in Houpt's office to discuss this matter because it was her opinion that Haas would listen at the door.

At this point Rowe described Haas as "aggressive." (TR:63.) After an unsuccessful telephone attempt to call a management representative, Haas told Rowe that she was interfering with work, and ended by telling Rowe to "get lost." At some point in this conversation, Rowe accused Haas of being the one who would not "let the dying dog lay in the grave." (TR:63.)

Rowe described Haas[1] demeanor during this conversation as hysterical and aggressive. Rogers, who was present during the exchange, stood by shaking her head. After saying, "I think I'm going to cry," Rogers picked up her coffee cup and left. The entire conversation in the transportation office lasted about three minutes.

The next day Rowe approached Rogers to tell her that she wouldn't be able to drive on the special trip. A 10:00 a.m. doctor's appointment to receive the results of a leukemia test on her husband had slipped Rowe's mind. Rogers told Rowe her inability to drive that day presented no problem. At the end of this conversation Rowe told Rogers that Watt had called Radman the night before to complain that Rowe had harassed Rogers and Haas. Apparently Rowe's inquiry was aimed at finding out if Rogers had reported the conversation to Watt. Rogers immediately became upset and, after starting to cry, went into her office. Rowe went out on her run. Rogers was so upset that she later went to see a doctor.[9]

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[9]It is worth noting here that there was no love lost

On April 16, 1984, Rowe was given a letter of reprimand. Based on the April 3 incident, Ray Crawford, the assistant superintendent for personnel, accused Rowe of verbally harassing Rogers and Haas. The charges in the letter read as follows:

> 1. On April 3, 1984, during the clerical office hours of Brenda Haas and Phyllis Rogers, you repeatedly questioned them as to how they would handle another situation like Esther's. They, of course, are not under your supervision and have no obligation to explain their actions to you. You were persistent and interrogative. (Underlining in original.)
>
> 2. You then made statements that the drivers do not like Phyllis and Brenda, that Brenda holds a grudge and, that she causes her own problems in the yard.
>
> 3. Brenda asked you to leave at least three times and to leave them alone because they had work to do. Both Brenda and Phyllis were becoming very upset and were having trouble continuing with their work.
>
> 4. The following day, on April 4, 1984, in the early morning, you began questioning Phyllis if she had called Dr. Watt to report your actions of the day before. Phyllis eventually told you that she was too upset to talk

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between Rowe and Rogers. Radman's uncontroverted testimony is that, aside from any pure personality conflicts these two may have had, Rogers and Rowe had a sharp disagreement about Rowe's (and CSEA's) role in the District. On one occasion in the Red Line restaurant, Rogers told Radman that the tension in the transportation department was due solely to Rowe's activities on behalf of CSEA. Also, again according to Radman's unrebutted testimony, Rogers was upset with Rowe's persistent efforts to negotiate certain provisions in an employee handbook. Rogers was of the opinion that the handbook negotiation was out of scope.

about it. Phyllis then drove her morning route even through [sic] she was emotionally upset.

5. Immediately after completing her route, Phyllis went to the doctor's office for possible treatment of her anxiety and stress. Dr. Clark saw her and suggested she either quit her job as clerk or go to the N.L.R.B. or School Administration for help in relieving the pressure she was receiving from you. I have received a doctor's verification of the office visit.

Crawford testified that before issuing the letter he discussed the matter with Houpt and told her that Haas and Rogers should put their complaints in writing if they felt strongly about them. Both Haas and Rogers presented written complaints to Houpt, who passed them on to Crawford. These were placed in a working file--as opposed to Rowe's official personnel file--in Crawford's office.[10] Rowe had no knowledge that this file was kept.[11]

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[10]In a related matter, a written complaint dated May 3, 1984 about Rowe from Haas was placed in Rowe's personnel file without her knowledge. Rowe discovered the complaint while reading her file in preparation for the hearing in this case. The subject of the complaint involved Rowe's attempt to be timely reimbursed for money she had advanced to take children on a field trip to Oakland. Rowe claimed that she should not have to wait for reimbursement, as her personal financial condition did not lend itself to advancing the District money. Additionally, the May 3 memo referenced an April 9 complaint by Haas about Rowe. Rowe was never shown a copy of the April 9 complaint. Crawford testified that Haas' May 3 complaint memo was mistakenly placed in Rowe's personnel file. He said it should have been placed in his working file instead.

[11]Included in Rowe's working file were the letters by Rogers and Haas complaining about Rowe's conduct on April 3, a letter from Rogers complaining about the exchange with Rowe on

Crawford justified the existence of the working file on the basis that he needed backup information if a disciplinary action were ever challenged. Also, the material was needed, in his view, if a second disciplinary action was necessary. If neither of these events occurred, he said he would shred the material.

Prior to preparing the letter of reprimand, Crawford talked briefly with Haas and Rogers. He relied primarily on this conversation and their written complaints in issuing the letter of reprimand.[12]

As background support for the letter, Crawford gave sketchy testimony about other events involving Rowe. He said that Houpt had informally told him in the fall of 1983 that there was "probably a lot of split" among the drivers. Although the record is unclear on this point, apparently the situation was

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April 4, and Dr. Clark's report. On the other hand, Rowe's official personnel file contained only the actual letter of reprimand. In short, Rowe's personnel file contained only the letter of reprimand, while the working file to which Rowe had no access contained all the evidence upon which Crawford based the discipline.

[12] Crawford testified that he also relied on a medical report given by Dr. R. G. Clark, whom Rogers visited on April 4. In essence, the statement is a recitation of Rogers' perception that she worked in a stressful situation and this stress was caused by Rowe. Neither Haas, Rogers, Houpt or Clark testified at the unfair practice hearing. Thus, the written statements (by Haas, Rogers and Clark) are hearsay as to the truth of the matters contained therein, and, absent corroboration by competent evidence, cannot be used to support a finding. (Calif. Admin. Code, tlt. 8, part III, sec. 32176; Stockton Unified School District, supra.)

such that some employees, including Hass and Rogers, requested a meeting with Dr. Watt and CSEA officials to discuss Rowe's conduct. Rowe was not in attendance. At the meeting, according to Radman, employees (particularly Haas and Rogers) voiced their "frustration and anger" at Rowe. It was concluded that the complaints raised were internal union matters and as such should be processed through CSEA's internal procedures. Crawford further testified that on another occasion (he couldn't remember the exact date) Houpt wrote a letter about Rowe's "discourteous" conduct and wanted Crawford to place it in her personnel file. After a meeting with Rowe and Houpt, Crawford destroyed the letter. Because the District presented no concrete evidence about the so-called "split," the meeting with the CSEA official, or the letter about "discourteous" conduct, no findings can be made on these points.

Neither Crawford nor Houpt asked Rowe for her description of the April 3 incident. Nor was Rowe, despite her request, ever permitted to see the reports upon which Crawford based the letter. The first time Rowe learned of the existence of these documents or of the April 16 letter itself was when she received it.[13]

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[13]The written complaints prepared by Haas and Rogers were introduced into the record solely for the purpose of demonstrating that, in fact, Crawford had relied on these two documents in issuing the letter. Because these statements were not introduced to show the truth of the matters stated therein, Rowe's first-hand account of the April 3 incident stands uncontroverted.

Parent Complaints.

By a memo dated April 30, Crawford asked Rowe for a meeting to discuss a letter of complaint signed by eight parents. In essence, the parents accused Rowe of "yelling" at children, refusing to let a boy off the bus to go to the bathroom, driving "much faster" than other drivers, and generally not being "nice." (Dist. Ex. 8.) The meeting was attended by Crawford, Radman and Rowe. The three discussed the parent complaints. Despite her request, Crawford would give Rowe a copy of only the letter with the parents' signatures deleted. He refused to reveal the names of the parents who complained.

Rowe claims she received a "verbal reprimand" during the discussion because Crawford said he didn't want drivers going around "yelling and screaming" at the children. Crawford, on the other hand, denied this. He testified that his words to Rowe should not be construed as a reprimand. Although the District contemplated further action against Rowe, she went on extended leave and the matter was never pursued.

The parents' letter of complaint was not placed in Rowe's personnel file. What remained in her file as evidence of the complaints was Crawford's April 30 memo asking for a meeting to discuss the matter. However, the complaint letter itself, including parent names, was placed in Crawford's working file.

In the past, according to Radman, it was the District's practice for the supervisor to get employee input before responding to a parent complaint. Radman said he knows of only

two deviations from this practice. The first involved the complaint against Rowe discussed above. The second involved placing a letter of reprimand, based on a parent complaint, in the personnel file of Lupe Hernandez before the District investigated the matter, and before Hernandez had a chance to respond. After a meeting with Radman, and an investigation, the District removed the letter from Hernandez' file.

The procedure for handling such complaints was apparently a matter of great interest to the parties. During a meeting in April 1984, a specific procedure was adopted. The District, during this meeting, committed itself to informing drivers of complaints when they were received by the District, and to not take action until a driver had a chance to respond.[14]

On April 27, soon after the District had committed itself to the policy of securing employee input before taking action on a parent complaint, Houpt wrote Crawford the following letter:

> Please draft a letter of disciplinary action for Sandra Rowe based on the enclosed letter from eight parents concerning Ms. Rowe's actions that are unacceptable for a Woodland Joint Unified School District employee. (CSEA Ex. #15.)

This memo, openly requesting disciplinary action against Rowe with no regard for Rowe's input, is contrary to the

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[14]This meeting was attended by CSEA representatives, District representatives, several drivers, and representatives of a community organization.

newly-established procedure for processing parent complaints.

Access to the Transportation Office.

On May 3, 1984, the day of Haas' complaint about Rowe's claim for reimbursement of field trip money (see fn. 10, supra), Crawford met with Haas and Rogers to discuss Rowe. The next day, May 4, Robert Kibby, assistant superintendent for business, presented Rowe with the following memo:

> You are hereby directed not to enter any of the transportation offices unless invited by Georgia Houpt, supervisor of transportation.
>
> This directive is being conferred upon you because of the numerous problems that arise when you are in these offices. (CSEA Ex. #5.)

Other drivers are permitted free access to the transportation office without permission. Located in the office are route descriptions, schedules, field trip books, etc. Also, since Rowe became president of CSEA in 1981, she has had open and free access to the typewriter and Xerox machine in the office for grievance-related matters. Neither Radman nor any other CSEA official was put on notice before the memo barring Rowe from the office was issued.

Crawford testified that it was never the District's intent to bar Rowe from the transportation office completely. He said that the real aim of the memo was to protect Haas and Rogers from Rowe by restricting Rowe's entrance to the office when she had no legitimate business there. According to Crawford, under the terms of the memo Rowe could get supervisory permission (presumably from Houpt) to enter the office if she had a

legitimate business reason, and he communicated this to Radman on May 10. In fact, on occasion after the May 4 memo was issued, Rowe asked for and was granted access to the office to review route schedules and other materials.

The Evaluation.

Sometime during the middle of May 1984, Rowe went on extended sick leave due to stress. Over the summer she substituted as a driver infrequently. Upon her return in early September, she received her written evaluation.[15] The evaluation was prepared by Houpt. Crawford's role is normally limited to a final cursory review. However, in this case he talked briefly with Kibby and Houpt before signing it. He testified that at that time he assumed the negative aspects of the evaluation (to be more fully explored below) were the result of the April 3 incident.

The evaluation contained either "satisfactory" or "excellent" ratings in nine categories. In three other categories "needs improvement" ratings were accompanied by Houpt's written comments. It was these three categories that Rowe discussed with Houpt during a meeting on September 4.

In the category "dependability" Houpt wrote that,

> Sandy has been lax in turning in paperwork for field trips. Has to be asked for trip sheets. (CSEA Ex. #6.)

[15]Because of Rowe's extended sickleave, the evaluation was based on her performance prior to May 15, 1984.

According to Rowe's unrebutted testimony, this was Houpt's entire justification for the "needs improvement" rating in this area. While the comment is written in the plural, Rowe testified without contradiction that there was only one incident where she lost a field trip sheet. She admitted losing the sheet at the time, but later found it among her Union papers.

In the category "cooperation" Rowe received a "needs improvement" rating. To support the rating, Houpt wrote that,

> Sandy does not cooperate well with some (office) of the department employees. (CSEA Ex. #6.)

Again, Rowe's uncontroverted testimony at the hearing was that as a result of the discussion with Houpt, it became clear that the sole basis for this rating was the April 3 incident.

In the category "personality" Rowe received another "needs improvement" rating. Houpt wrote that,

> Due to actions against other employees (office) Sandy cannot at this time be considered to have a good relationship with others. (CSEA Ex. #6.)

Once again, Rowe's unrebutted testimony is that during the discussion with Houpt it became clear that this rating was based on the April 3 incident, and the fact that Rogers went to a doctor after her encounter with Rowe on April 4.

ISSUES

1. Whether the District, by any of the following acts, discriminated against and/or interfered with Sandra Rowe's

exercise of protected activities in violation of section 3543.5(a)?

a. The issuance of the April 16 letter of reprimand;

b. The issuance of three "needs improvement" ratings in Rowe's September 1984 evaluation;

c. The May 4 directive regarding access to the transportation office; or

d. The handling and retention in Rowe's personnel file of parent and employee complaints.

2. Whether the District unilaterally prohibited Rowe from entering the transportation office in violation of section 3543.5(c)?

DISCUSSION

A. Introduction.

Section 3543.5(a) of the Act prohibits interference with protected activity and discriminatory action against an employee for engaging in conduct protected by the EERA including,

> . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Sec. 3543.)

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board set forth the test for determining when employer actions interfere with the rights of employees under the Act. That test is summarized as follows. Where there is a nexus between the employer's acts and the exercise of employee

rights, a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer's acts are inherently destructive of employee rights; however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record. Under this test, unlawful motive is not necessary to sustain an interference charge. See also Santa Monica Community College District (9/21/79) PERB Decision No. 103.

Subsequently, in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board clarified Carlsbad by setting forth the standards by which charges alleging discriminatory conduct under section 3543.5(a) are to be decided. The Board summarized its test in a decision under HEERA issued the same day as Novato;

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by the

> preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 727-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169] enf., in part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].[16]

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the Board determines that the

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[16]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3543.5(a) of the Act with section 8(a)(1) and (3) of the NLRA, also prohibiting interference and discrimination for the exercise of protected rights.

> employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

These tests will be used to resolve the interference-discrimination issues presented by this case.

It is undisputed that prior to February 1984 Rowe was a highly visible CSEA chapter president. Beginning in February she found herself at the center of several employment-related issues which caused her to intensify her union activity. The parties were engaged in heated negotiations about bidding procedures and bus routes, thus requiring many meetings between drivers and District representatives, as well as presentations before the school board. The unruly student problem emerged as a significant matter which Rowe took on as chapter president. Drivers perceived working conditions to be so bad they sought media exposure to help alleviate the conditions. Though Rowe played no part in drawing the TV cameras to the bus yard, it is significant that Watt believed she did. Coincidentally, the instant unfair practice charge was filed on April 16, 1984, the day Rowe received the letter of reprimand, and many of the events complained of in this charge, as amended, occurred shortly after that date. Therefore, it is well established in the record that Rowe, in her role as chapter president during the first part of 1984, was engaged in a considerable amount of protected activity. And it cannot seriously be disputed that District representatives were aware of this activity.

The record also contains a substantial amount of evidence

from which an unlawful motive can be inferred. Perhaps the most telling piece of evidence is Houpt's statement to Reyes that she would "try her best" to get rid of Rowe if she returned to the District. While this comment was made at a point somewhat remote in time (when Houpt was in Seattle), it is nevertheless significant, for Houpt did not change her tune after returning to the District. Upon her return she enlisted Reyes and Rogers as informants, and told employees that involvement with Rowe could result in job loss. These clearly anti-union actions and statements by Houpt take on added weight when one considers that she was the main conduit through which all information used against Rowe was channeled to higher District officials.

Also of significance is the fact that the chief complainants against Rowe, Rogers and Hass, though bargaining unit members at the time, were by virtue of their strong disagreement with Rowe's CSEA activities aligned with Houpt against Rowe.[17] Additionally, the timing of the April 16 letter of reprimand, during Rowe's most intense period of protected activity, suggests an unlawful motive. Novato

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[17]My reasons for concluding that Haas and Rogers were aligned with Houpt against Rowe are more specifically set forth at pp. 343-36, below. Also, the examples of anti-union animus cited here are only for the purpose of establishing a prima facie case within Novato's analytical framework. Other evidence from which an unlawful motive is inferred will be addressed at the appropriate junctures later in this decision.

Unified School District, supra, p. 7; San Diego Community College District (12/22/83) PERB Decision No. 368, p. 19.

This anti-union motive, when viewed in conjunction with Rowe's protected conduct, provides sufficient nexus to support the existence of a prima facie case that the complained-of adverse actions were taken against Rowe because of her protected activities. Novato Unified School District, supra, p. 6. A prima facie case having been established, the burden of coming forward with evidence to substantiate its actions shifts to the District.

The April 16 Letter of Reprimand.

The central issue to be addressed in this case is the April 16 letter of reprimand. As the linchpin of the charging party's case, the determination that this letter was issued for discriminatory reasons will impact on the other adverse actions.

The District first asserts that the letter should be construed as only a warning letter and not a disciplinary letter under its internal policy. Next, the District sets out its main argument, that it has the obligation and the right to ensure a work place where employees can perform their duties without disruption, and the April 16 letter was simply an attempt, untainted by anti-union animus, to achieve this goal. Rowe, according to the District, had exceeded her right to engage in protected activity on April 3. The District also points to the fact that Crawford had ample grounds to issue the letter; that is, the letter was based on written statements by

and conversations with Haas and Rogers, Clark's medical report about Rogers, and conversations with supervisor Houpt. Based on these factors and the "extreme anxiety" experienced by Haas and Rogers, the District insists in its brief that the April 16 letter was justified.

On the other hand, CSEA asserts that Rowe was engaged in protected union activity during the relevant time on April 3, and that her actions in pursuit of this activity did not rise to the level of disruptive conduct. To support this assertion, CSEA contends that the circumstances surrounding the issuance of the letter are replete with examples of evidence from which an unlawful animus must be inferred. In essence, then, CSEA's main argument is that the District's explanation for the letter is pretextual. Under the record developed here, CSEA's arguments are by far more persuasive.

Preliminarily, whether the April 16 letter can technically be defined as a disciplinary measure is irrelevant. It is true that the District's disciplinary policy addresses only suspensions and dismissals. (Dist. Ex. #2.) Nevertheless, this was a derogatory letter which was placed in Rowe's personnel file, potentially to be used in future employment-related actions. In fact, as the record bears out, this was precisely the use to which it was put.

While the District's argument that it has the authority to maintain a work environment free from unnecessary disruption is well taken as a general proposition, this argument is not

persuasive here. CSEA, by its argument that the April 16 letter was a pretext, has put the facts surrounding the April 3 incident in issue. CSEA questions whether, in fact, Rowe's conduct on that day was disruptive. Therefore, in order to resolve this issue, we must turn to the evidence of what occurred on April 3.

Since the District offered no competent evidence to rebut Rowe's version of the relevant events, her description of the events of April 3 and 4 must stand. As the California Supreme Court has observed:

> We are satisfied that when a party testifies to favorable facts, and any contrary evidence is within the ability of the opposing party to produce, a failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some rational basis for disbelieving it. Martori Brothers Distributors v. ALRB, (1981) 29 Cal.3d 721, 728

There is no rational reason presented either by the record in this case or by respondent's brief which warrants disbelieving Rowe's testimony. Simply put, respondent's case with regard to the events of April 3 and 4 is made up solely of hearsay testimony upon which no findings can be made. See Calif. Admin. Code, tit. 8, part III, section 32176; Stockton Unified School District, supra. In contrast, Rowe appeared at the hearing and testified at great length about the events in question, subjecting herself to close scrutiny under cross-examination. For some reason the respondent chose not call its percipient witnesses so that their versions of the

events could be examined under the same light. Therefore, the relevant events of April 3 and 4, as described by Rowe, must be accepted to determine if Rowe's conduct was disruptive.

Viewed in the context of this record, Rowe's actions on April 3 simply do not rise to the level of disruptive conduct. Regarding the first exchange, the record evidence shows that it was Rogers who approached Rowe, not the other way around. And it was Rogers, not Rowe, who was upset about a comment an unnamed employee had made a few minutes earlier in the bus yard. In response, Rowe told Rogers that she (Rowe) would try to keep things calmed down until the obviously tense air in the department became clear. Thus, as to the first exchange on April 3, the record shows that Rowe acted in a sympathetic manner after Rogers, who was already upset by something another employee said, initiated the discussion. It distorts reality to view this brief exchange as harassment.

Things became only slightly more heated when the conversation moved to the transportation office where Brenda Haas was located. Rowe's unrebutted testimony is that a simple question asked by Rowe about the status of the unruly student problem drew a defensive response from Haas to the effect that she was not responsible for Baez' students. When Rowe pressed the matter, the two employees apparently had a sharp exchange; Haas, in effect, told Rowe to quit talking about the issue and to "get lost," and Rowe responded that it was Haas who wouldn't "let sleeping dogs lie." The whole

conversation took no more than three minutes.

This entire episode is more like a run-of-the-mill shop floor exchange between a union president, aggressively pursuing an employment-related matter, and two not-so-sympathetic employees than it is disruptive conduct which warrants disciplinary action. In the absence of some concrete evidence to show that this isolated, three-minute exchange actually interfered with work in some measurable way, it must be concluded that the claim of work place disruption is grossly exaggerated.

Furthermore, the examples of prior conduct by Rowe offered by the District simply provide insufficient evidence from which it can be concluded that Rowe had a history of unacceptable conduct. The so-called "split" among drivers is not surprising, since in the fall of 1983 they were facing layoffs, and in early 1984 they were involved in heated negotiations about important matters. Robust debate within an employee organization about such matters cannot, without more, reasonably be labeled as disruptive conduct and conveniently placed on the shoulders of the union president.

Additionally, regarding the meeting with CSEA officials, the record shows only that a meeting was held and it was suggested that some unspecified complaints be pursued through CSEA's internal procedures. This is not an uncommon occurrence in the labor relations context.

Lastly, it is significant that Houpt's letter, received by

Crawford at some unspecified point in time and accusing Rowe of unspecified "discourteous" conduct, was destroyed by Crawford after a meeting with Rowe. And there is no independent evidence in the record to support the claim that Rowe, on some prior occasion, was discourteous. Therefore, it cannot be concluded on this record that Rowe's prior conduct was such that it supports the District position that the April 16 letter was justified.

Ironically, if forced on this record to label one of these three employees as disruptive, it would probably be Haas, for while there is no competent evidence to suggest that Rowe was disruptive, Rowe's unrebutted testimony is that it was Haas who became aggressive and hysterical as the result of a simple question.

Similarly, Rowe's conduct during the exchange with Rogers during the morning of April 4 evidences no inappropriate behavior. It appears that she approached Rogers primarily regarding her husband's appointment to receive the results of a leukemia test. The question about Watt's call to Radman seemed to come up only secondarily, and even then the inquiry was unremarkable. Rowe simply wanted to know if Rogers had reported her to Watt. The fact that Rogers may have overreacted simply does not transform Rowe's conduct into employee harassment.

Nor is the doctor's visit by Rogers persuasive evidence that Rowe acted improperly. The claim that it was Rowe's

conduct that sent Rogers to a doctor strains credulity. Given the findings above about the nature of the meetings on either April 3 or 4, it appears more likely that Rogers may have been overly sensitive to Rowe, or the real reasons for consulting a doctor may have been completely unrelated to Rowe's conduct. It is a further irony in this case that it was Rowe who only a few weeks later sought and received extended sick leave due to a stress-related condition.

Since the District has come forward with no competent evidence to rebut Rowe's version of the April 3 and 4 events, it must be concluded that the shifting burden under Novato has not been met. The April 16 letter, therefore, is found to rest on "unsubstantiated allegations" and is therefore pretextual. San Joaquin Delta Community College District (1/20/83) PERB Decision No. 261, p. 9.

Aside from the strictly pretextual nature of the April 16 letter, there is other evidence that suggests an unlawful motive was at work.[18] It is noteworthy that neither Crawford

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[18]The District strenuously argues that its actions during the August negotiations effectively rebut any inference of unlawful intent. I disagree. The conclusion that an unlawful motive exists in this case is not undermined by the fact that, during the August negotiations, the District permitted CSEA to choose the option which would place Rowe in a regular route. While the District action on this occasion in August shows a concern for rights protected by the Act, it falls short of completely rebutting the many other pieces of evidence in the record which point clearly in the other direction. In fact, since the unfair practice charge had been filed only a few months before, one would expect the District to be on its guard

nor Houpt made an attempt to ask Rowe for her version of the complaints. Failure to do so suggests that they were more interested in issuing the letter of reprimand than in an open and fair investigation. North Sacramento School District (12/20/82) PERB Decision No. 264, pp. 9-10. Moreover, Rowe was never given a copy of the written statements presented by Haas and Rogers. Despite her request, she was kept in the dark about the specific content of the primary evidence Crawford used in issuing the letter, thus hampering her ability to present an informed rebuttal, even after the fact. This, too, suggest an unlawful motive. Baldwin Park Unified School District (6/38/82) PERB Decision No. 221, pp. 16-17.

The failure to contact Rowe and the refusal to produce the written Haas-Rogers complaints when Rowe asked for them, while evidence from which an unlawful motive may be inferred, are not by themselves the most damaging evidence against the District. Crawford, a management official, certainly has the right to rely heavily on staff for information regarding personnel matters. This is apparently what he did in this case. However, it cannot be ignored that the source of the information—Houpt, Rogers and Haas—as a result of the anti-union animus attributed to them in the record, is most damaging.

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and avoid actions which might give rise to discriminatory inferences.

Houpt, for her part, was on record as saying she would do her best to get rid of Rowe. Upon returning to the District, she enlisted Reyes and Rogers as informers, and she let it be known that involvement with Rowe may affect one's job security. Also, as more fully described below, she sought to have Rowe disciplined for the parent complaints, in violation of District policy. That Crawford could have gotten an unbiased version of Rowe's conduct from Houpt seems highly unlikely.

Haas' heated statements to Rowe on April 3 to the effect that Rowe should stop pursuing the unruly child policy suggests that she (Haas) was similarly annoyed by Rowe pursuing employment-related matters in her capacity as chapter president. Furthermore, Haas' May 3 complaint about Rowe, although made after the April 16 letter, sheds light on this point. In the May 3 complaint, Haas again displayed her annoyance at Rowe's attempt to seek timely reimbursement for money advanced for a field trip.[19] Haas had apparently

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[19] Haas' complaint regarding the field trip money underscores the exaggerated nature of the complaints against Rowe. A fair reading of the written complaint submitted by Haas suggests no more than Rowe asserted her right to be reimbursed. The fact that, in Haas' view, Rowe's actions somehow rose to the level of "harassment" or that she (Haas) did "not feel Sandra can or should question my office procedure" does not, under any objective standard, transform Rowe's action into employee harassment. (See CSEA Exh. #3.) Significantly, Rowe was not the only driver who had a problem with reimbursement. Since other drivers had the same problem,

submitted yet another unspecified complaint on April 9, but the subject matter of that complaint is not in the record. All of these examples show that Haas had serious disagreements with Rowe's aggressive pursuit of employment-related matters. Like the earlier Haas-Rogers complaints, it is significant that Rowe was never shown a copy of any of these later complaints.

Rogers had a similar reaction to Rowe's protected conduct. As Radman testified without rebuttal, on at least one occasion Rogers expressed to him her strong disagreement with Rowe's protected conduct in relation to the handbook negotiations, and on another occasion she told Radman that Rowe was the cause of tension in the department. Along with Rogers' service as a management informant, the facts compel one to seriously question her view of Rowe's conduct.

Lastly, as the above makes clear, it cannot be overlooked that Haas and Rogers, although bargaining unit employees, were aligned with Houpt in their beliefs about CSEA in general, and about Rowe in particular. Both employees worked closely with Houpt and, aside from their feelings about Rowe, appeared to be alienated from drivers in general. For example, on April 3 Rogers asked Rowe why drivers disliked her (Rogers). And on the same day Haas suggested to Rowe that she (Rowe), "don't like them (drivers) any better than we do." Under the

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Rowe's pursuit of this matter falls directly within her duties as chapter president.

circumstances, it is reasonable to conclude that Haas, in using the word "we," must have meant Rogers, Houpt and herself.

It is therefore concluded that the three employees who generated the complaints on which Crawford relied were tainted by an unlawful motive. In addition to the failure to contact Rowe or show her the letters of complaint, this is ample evidence which supports the conclusion that the April 16 letter was pretextual in substance and unlawfully tainted by anti-union animus in other respects. It is up to the Board to,

> . . . consider facts and incidents compositively and draw inferences reasonably justified therefrom. Santa Clara Unified School District (9/26/79) PERB Decision No. 104, pp. 14-15.

Given the totality of the circumstances surrounding the April 16 letter, one is drawn inescapably to the conclusion that but for her protected activity Rowe would not have received the letter. Based on the foregoing, it is concluded that the April 16 letter was issued in violation of section 3543.5(a). Since Rowe was a union official, the letter concurrently violates section 3543.5(b). San Joaquin Community College District, supra, p. 9.

Access to the Transportation Office.

Only a few weeks after the letter of reprimand was issued, Kibby sent Rowe a memo restricting her previously free access to the transportation office. It is the District's position that it had the prerogative to take this action in order to prevent disruption in the work place. In fact, Crawford

testified that the purpose of the memo was to "protect" Haas and Rogers from Rowe.

Although the memo refers to "numerous problems" that have arisen as a result of Rowe being in the office, the record reflects only two. The first is the April 3 incident, and the second is the May 3 complaint by Haas that Rowe had harassed her in requesting reimbursement for field trip money.

In addressing these two complaints, it bears repeating that the only competent evidence in the record supports the conclusion that Rowe did not act inappropriately on April 3. And I have already found that Rowe was justified in seeking reimbursement of money she advanced for a field trip. (See fn. 19, supra.) Moreover, it cannot be overlooked that the May 4 directive followed by only one day Crawford's meeting with Rowe's antagonists (Haas and Rogers) to hear complaints about Rowe. Since the District has introduced no concrete evidence to show that Rowe otherwise harassed Haas and Rogers, its claim that these employees needed to be protected from Rowe must be viewed as an "unsubstantiated allegation." San Joaquin Delta Community College District, supra, p. 9. Therefore, the May 4 directive must be viewed as an unlawful pretext to take action against Rowe.

Additionally, the memo expressly directed her to not enter the office unless "invited" by Houpt. Since Rowe was accustomed to free access to the office for the purpose of obtaining employment-related information and to use the Xerox

machine and the typewriter for grievances, the memo on its face tends to place a chilling effect on her protected conduct and CSEA organizational access rights. Rowe was now required to seek permission from a supervisor who harbored an anti-union sentiment. That Rowe was subsequently permitted access to the transportation office does not change this conclusion. The point is that Rowe was forced to ask for permission to enter when she did not have to do so in the past, and when no other employee had the same requirement imposed. This obviously disparate treatment, in addition to suggesting a specific discriminatory intent, otherwise tends to interfere with her rights under the Act. Since the District's justification for these actions has been found to be pretextual, a violation of section 3543.5(a) has been established. Carlsbad Unified School District, supra. Because the memo was directed at the CSEA president, and had the potential of interfering with the employee organization's representational rights, it concurrently violated section 3543.5(b). See section 3543.1.[20]

The September Evaluation.

The evaluation was prepared by Houpt, who has been shown to possess a strong anti-union bias. Her review of the evaluation

[20]Since there is no independent evidence that the memo otherwise interfered with the formation or administration of CSEA, the section 3543.5(d) allegation will be dismissed.

with Crawford and Kibby seems to have been perfunctory at best, and in any event both administrators, according to Crawford's testimony, deferred to Houpt. Thus, it is established that the substance of the evaluation, obviously subjective in nature, flows from a person with a strong anti-union bias. This alone may be enough to invalidate the evaluation. But there is more.

The record clearly establishes that the negative aspects of the evaluation, like the May 4 memo, were based primarily on the April 16 letter. Rowe's unrebutted testimony established that, based on her conversations with Houpt, the "needs improvement" ratings in the categories of cooperation and personality, along with Houpt's supporting comments, were based solely on the April 16 letter. Crawford essentially confirmed this by his testimony as well. As such, these ratings are fatally tainted by the same unlawful motive that rendered the April 16 letter unlawful.

Additionally, the "needs improvement" rating in the category "dependability" is not supported in the record. Rowe was rated down in this area because, according to Houpt's comments on the evaluation form, she had "been lax in turning in paperwork for field trips," and because she had to be "asked for field trip reports." The evaluator makes it appear as if Rowe had a chronic problem in this area, but Rowe's unrebutted testimony is that, during the one-year period covered by the evaluation, she failed to turn in only one report. This leads one to the conclusion that Houpt's distorted description of

Rowe's work in this area most likely was colored by her anti-union animus.

Since the District offered no other justification for these ratings, or otherwise attempted to rebut Rowe's testimony on these points, it must be concluded that the evaluation was issued for discriminatory reasons in violation of section 3543.5(a). Since the evaluation involved the performance of the CSEA president, it concurrently violated section 3543.5(b). San Joaquin Community College District, supra, p. 9.

Employee/Parent Complaints.

Sometime prior to April 27, the parties agreed to a procedure whereby employees would be given an opportunity to respond to parent complaints before the District took any action. The charging party argues that Houpt, by her April 27 memo calling upon Crawford to "draft a letter of disciplinary action" based on the earlier parent complaints and without benefit of Rowe's input, showed a willful disregard for the policy. Considering the magnitude of concerns over this issue, contends the charging party, Houpt's actions demonstrated an attempt to discriminate against Rowe.

The District, on the other hand, contends that the parent complaint was handled in accordance with its earlier commitment to CSEA. Therefore, this aspect of the charge should be dismissed.

As the District points out, Crawford called a meeting with

Rowe and her representative to permit Rowe to respond to the complaints. This was in accordance with the District's commitment in April to receive employee input prior to taking action based on such complaints. Further, the record evidence does not establish that Rowe was verbally reprimanded, as she claims, by Crawford at this meeting. Even if Crawford stated his concern about drivers "yelling and screaming" at children on buses, this does not rise to the level of a reprimand. This is a matter within his legitimate area of concern as a District manager, and he was justified in calling it to Rowe's attention. Most significantly, the matter appears to have been dropped after the meeting, and no disciplinary action imposed on Rowe. Therefore, no unlawful conduct is attributed to Crawford in this regard.

However, the handling of the parent complaint is suspect in two other respects. First, in view of the fact that the District and CSEA had recently agreed to a procedure to handle such matters, Houpt's memo to Crawford expressly calling for discipline without employee input strongly suggests that she was more interested in disciplining Rowe than she was in following the procedure. Houpt's conduct here is further evidence of the unlawful motive she harbored against Rowe. See Rio Hondo Community College District (11/30/82) PERB Decision No. 260, pp. 12-13.

Second, Crawford refused to give Rowe the names of the complaining parents, while at the same time placing the letter

including the names in his working file on Rowe. This withholding of parent names, although counterbalanced somewhat by the disclosure of the complaints themselves, nevertheless suggests an attempt to impose a degree of secrecy around the complaints, thus denying Rowe a full opportunity to respond. As such, this is evidence from which an unlawful motive may be inferred. See Baldwin Park Unified School District, supra, pp. 16-17.

A similar analysis can be applied to the employee complaints. While Rowe was given an opportunity to respond to the April 16 letter of reprimand, she was never permitted, despite her request, to review the written complaints from Haas and Rogers upon which the letter was based. Nor was Rowe made aware that the Haas complaints dated May 3 and April 9 were placed in her personnel file.

Additionally, included in Crawford's working file were the Haas and Rogers complaints about the incidents on April 3 and 4, the derogatory report from Dr. Clark, and the parent complaint, including the names of the parents. Crawford testified that he maintained this file to respond in future disciplinary actions. But this explanation is suspect, as it was not explained how keeping these documents in Rowe's personnel file (or in the working file), and informing Rowe of their existence in a timely manner so that she could respond intelligently, would hamper the District in any future

disciplinary action.[21]

Additionally, the failure to timely disclose this information to Rowe violated Education Code section 44031.[22]

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[21]Even after the meeting with Rowe and Radman on May 10, Crawford maintained in his working file the parent complaints against Rowe, presumably to pursue a disciplinary action against her. At about the same time he destroyed parent complaints against Lupe Hernandez after meeting with her. This suggests the kind of disparate treatment which the Board in the past has viewed as evidence from which an unlawful motive may be inferred. See, e.g., State of California, Department of Transportation (12/12/84) PERB Decision No. 459-S. However, because there is insufficient evidence in the record to compare the Rowe-Hernandez parent complaints, no such inference is drawn here. Furthermore, the evidence shows that Crawford kept a "working file" on all employees he proposed to discipline. Because of this consistent practice, the administrative law judge at the hearing ruled that there was no disparate treatment and therefore no unlawful animus would be inferred from the fact that Crawford kept the file on Rowe. (TR:400.) Accordingly, the actual keeping of the "working file" on Rowe may not under the circumstances be evidence from which an unlawful motive may be inferred. However, as more fully explained above, the fact that Rowe was not shown copies of the relevant documents kept in the file is evidence from which an unlawful motive may be inferred.

[22]Education Code section 44031 states in relevant part:

> Materials in personnel files of employees which may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> . . . . . .
>
> Every employee shall have the right to inspect such materials upon request, provided that the request is made at a time when such person is not actually required to render services to the employment district.
>
> Information of a derogatory nature, except material mentioned in the second paragraph of

This section plainly states that an employee must be given the opportunity to inspect, review and comment on such material. See also Miller v. Chico (1979) 24 Cal.3d 703 [157 Cal.Rptr. 72]. The fact that the District ran afoul of this Education Code provision is yet further evidence of an unlawful motive. See Novato Unified School District, supra, pp. 11-12.

Based on the foregoing, it is concluded that the District's conduct in handling the employee/parent complaints was in reprisal for Rowe's protected conduct and thus violated section 3543.5(a). Since this action involved a union official, it also violated section 3543.5(b). San Joaquin Community College District, supra, p. 9.

Refusal to Negotiate About Access to the Transportation Office.

There is no dispute that the District, without affording notice or an opportunity to negotiate, changed the procedure under which Rowe, as CSEA chapter president, had unrestricted access to the transportation office. Under the new procedure, even as interpreted by the District, Rowe no longer had free

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this section, shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any such derogatory statement, his own comment thereto. Such review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

access as in the past. In order to enter the office to review employment-related materials, or to use the Xerox machine, or type letters for CSEA business such as grievance processing, she had to seek permission from Houpt. Undoubtedly this was a change in practice.

As CSEA points out, it is the established rule that, absent a valid defense, an employer violates section 3543.5(c) of the Act by unilaterally changing a negotiable term or condition of employment. See San Mateo County Community College District (6/8/79) PERB Decision No. 94. It is also established that union access to work areas and use of the employer's equipment is a negotiable subject under the Act. Healdsburg Union High School District (1/5/84) PERB Decision No. 375, at pp. 16-20. Therefore, it is concluded that the District, by unilaterally implementing a change in the access policy, violated section 3543.5(c). This conduct also violated section 3543.5(a) and (b), derivatively. San Francisco Community College District (10/12/79) PERB Decision No. 105.

REMEDY

Under Government Code section 3541.5(c) PERB is given,

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In this case it has been found that the District unlawfully interfered with, discriminated against and/or took reprisals

against Sandra Rowe by: (1) issuance of the April 16 letter of reprimand; (2) issuance of the September 1984 evaluation; (3) issuance of the May 4 directive barring Rowe from the transportation office; (4) the handling and retention in Rowe's personnel files of the employee complaints; and (5) the handling of the parent complaints. By these acts the District violated section 3543.5(a) and (b). It has also been found that the District breached its obligation to negotiate in good faith by the unilateral implementation of the May 4 directive barring Rowe from the transportation office. By this action the District violated section 3543.5(c) and, derivatively, section 3543.5(a) and (b). Under these circumstances, it is appropriate to order the District to cease and desist from all such conduct.

In addition, it is appropriate that the District remove from all District personnel files and destroy the April 16 letter of reprimand and all references to it. See, e.g., Santa Monica Unified School District (12/10/80) PERB Decision No. 147; North Sacramento School District (12/20/82) PERB Decision No. 264. Because the September 1984 evaluation was in large measure tainted by the April 16 letter, it is appropriate to order the evaluation withdrawn from Rowe's personnel files and destroyed. Similarly, because the May 4 directive barring Rowe from the transportation office was based in large part on the April 16 letter, it is appropriate that that directive be withdrawn and destroyed. Next, because the employee complaints

in this case initially were generated by employees who clearly possessed an unlawful motive, because the handling of these complaints further suggests a similar motive, and because the employee complaints were pretextual, it is appropriate to order all such complaints destroyed. Although the parent complaints were not initially generated by an unlawful motive, the less than forthright handling of such complaint suggests such a motive. However, with regard to the parent complaint letter, only limited affirmative action is warranted under the record developed here. Because there is no evidence of disparate treatment (see fn. 21, supra), and because there is only limited evidence describing the substance of the parent complaint or the May 10 meeting where the complaint was discussed, there can be no finding that the District's retention of such complaint for the possibility of future disciplinary action is inappropriate. Therefore, destruction of the parent complaint letter will not be ordered. However, the District will be ordered to permit Rowe, upon request, to review the entire working file kept by Crawford, including the parent complaint letter containing the names of her accusers. This remedy is consistent with that imposed by the Board in other cases where documentation was unlawfully placed in an employee's personnel file. See, e.g., San Ysidro School District (6/19/80) PERB Decision No. 134; San Diego Unified School District (6/19/80) PERB Decision No. 137; Santa Monica Unified School District, supra, PERB Decision No. 147.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the Woodland Joint Unified School District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and otherwise to comply with the proposed order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Woodland Joint Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing reprisals on, discriminating against or otherwise interfering with Sandra Rowe because of the exercise of her rights to form, join and participate in the activities of employee organizations of her own choosing for the purpose of representation on all matters of employer-employee relations;

(b) Interfering with the right of the California School Employees Association and its Woodland Chapter 118 to represent bargaining unit members in their employment relations with public school employers;

(c) Making unilateral changes in negotiable terms and conditions of employment without prior notice to the exclusive representative and without prior notice to the exclusive representative with the opportunity to negotiate in good faith.

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

(a) Remove from Sandra Rowe's personnel file and her "working file" and destroy the following documents: (1) the April 16 letter of reprimand and all references thereto; (2) the September 1984 evaluation and all references thereto; (3) the employee complaints and all references thereto; and (4) the May 4 directive barring Rowe from the transportation office and all references thereto.

(b) Return to the pre-May 4, 1984 status quo which permitted Sandra Rowe free access to the transportation office. In the event the District proposes a change in the access policy to the office in the future, it must give CSEA notice and, upon request, meet and negotiate in good faith about the change.

(c) Permit Sandra Rowe, upon request, to review the complete working file kept by Dr. Crawford, including the parent complaint letter naming her accusers.

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

(e) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 29, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on May 29, 1985, or sent by telegraph or certified United States mail,

postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: May 9, 1985

Fred D'Orazio
Administrative Law Judge