STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO VERDE TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2313
v.	)	PERB Decision No. 689
PALO VERDE UNIFIED SCHOOL DISTRICT,	)	June 30, 1988
Respondent.	)	

Appearances; Schwartz, Steinsapir, Dohrmann & Sommers by Michael D. Four for Palo Verde Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo by Ronald C. Ruud for Palo Verde Unified School District.

Before Porter, Craib and Shank Members.

DECISION

SHANK, Member: This case is before the the Public Employment Relations Board (PERB or Board) on exceptions filed by the Palo Verde Unified School District (District) to the attached proposed decision of the hearing officer. The Administrative Law Judge (hereafter ALJ) found that the District violated the Educational Employment Relations Act (EERA or Act),[1] section 3543.5(a), by discriminatorily relocating the extra-duty office location of James Brown, a

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

member of and negotiator for the Palo Verde Teachers Association, CTA/NEA (Association, PVTA, or Charging Party), at the commencement of the 1985-86 academic year. The ALJ further found that Charging Party's allegations asserting the District's unlawful interference with employee rights and constructive discharge of Brown in violation of section 3543.5(a)[2] are unsupported by the record and, accordingly, dismissed those portions of the complaint.[3] 3

For the reasons set forth below, we reverse the ALJ's finding that Brown's relocation constituted unlawful discrimination in violation of section 3543.5(a).

FACTUAL SUMMARY

We find the ALJ's lengthy findings of fact to be free from prejudicial error and, to the extent they are consistent with the following summary and discussion, we adopt them as our own.

James Brown began work for the District as a classroom teacher in 1971. During the course of his employment, he was an active member of the Association, having served as its

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2section 3543.5(a) states:

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.

[3]Charging Party has filed no exceptions to this partial dismissal of the complaint. Therefore, we need not review the merits of the proposed decision in these regards.

president and vice-president, and periodically having been a member of its negotiating committee. Brown also served as state council representative for the California Teachers Association (CTA) and vice-chair and chair of the service center council, as well as on several CTA committees for the past five years. Brown's union affiliation and activism were well-known to the District.

At all times relevant to this proceeding, Brown's regular assignment entailed teaching reading and computer science at Blythe Junior High School. However, as of the beginning of the 1983-84 school year, he was given the extra-duty assignment of District computer coordinator, a position in which the design and establishment was largely attributable to Brown's own efforts. This assignment, for which he was provided additional compensation, entailed two additional hours of work in the afternoon, four days per week.

As computer coordinator, Brown was provided with an office at the District's Administration Center (Center), situated approximately 14 feet from that of the superintendent, Dr. Leamon Hanson. The Center is about a ten-minute drive from Blythe Junior High School. From his office, Brown was in a position to see and hear much of what transpired in and about Dr. Hanson's office. Furthermore, the key to Brown's office also provided Brown with access to an exterior entrance to the superintendent's personal office. The record does not reflect that Brown ever attempted to use such access.

Contemporaneously with his extra-duty assignment, Brown again served on the Association's negotiations committee, again with full knowledge of the District. During this time, bargaining was both ongoing and difficult. The parties had failed to reach agreement on a contract for the 1984-85 school year and, as of May 1985, the prospects of achieving a contract for the forthcoming year were not promising. On May 25, 1985, members of the unit staged a one-day strike.

At about this time, the Association formed a crisis committee which was charged with planning for further concerted action.[4] Brown was not included in this group. During the summer months, the Association released public statements threatening a strike if agreement on a contract could not be reached by the resumption of classes in the Fall. A strike vote had been scheduled for August 19, 1985 (the day before teachers were to report back for duty following summer vacation), but was postponed. Two other strike votes were scheduled for shortly thereafter but also did not in fact take place.

Anticipating a strike by the Association, the District was engaged in actively planning for emergency operations and continued instruction as of the time Brown and other unit employees returned to duty on August 20, 1985. The District's

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[4]See this Board's decision in Palo Verde Unified School District (1987) PERB Decision No. 642.

planning efforts, which were headquartered at the Center, included arranging for substitutes, conferring with law enforcement personnel and coordinating contingency plans with site administrators and others.

On August 29, 1985, Dr. Hanson advised Brown that he had determined to relocate Brown's office as computer coordinator to Brown's regular classroom at Blythe Junior High School. Dr. Hanson explained that, under the circumstances, he and others were uncomfortable with Brown's presence adjacent to the superintendent's office. Although Brown was allowed to address the governing board on this issue, the relocation was thereafter implemented over Brown's objections.

Although relations remained strained between the Association and the District for much of that school year, no strike in fact occurred. Brown, however, resigned as computer coordinator in January 1986, citing what he perceived to be intolerable working conditions.

DISTRICT'S POSITION

The District excepts generally to the hearing officer's ultimate findings that Brown's transfer was motivated by his protected activities and that it failed to establish that the transfer would have occurred in any event. It insists here, as it did at hearing, that Brown was transferred solely due to the Association's threat of strike activity and not because of his long-standing and well-known union activism.

Specifically, the District argues that the Association failed to make out a prima facie case of unlawful discrimination in that no evidence was presented to establish that the Association's efforts to promote a work stoppage were protected under the Act. Accordingly, it contends that the matter should have been dismissed due to the Association's failure to prove up the necessary element of protected activity. In the alternative, the District claims that it had a right to effect Brown's relocation as a reasonable precautionary measure even if the Association's strike threats were protected. It further argues that the record fails to permit an inference of unlawful motivation in that the Association has failed to present evidence of a nexus between Brown's own protected activities and his relocation. Finally, the District insists the relocation was in any event justified by operational necessity.

ASSOCIATION'S POSITION

The Association contends James Brown was relocated because of his Association activity and therefore, under Novato Unified School District (1982) PERB Decision No. 210, discrimination has occurred and he is entitled to be restored to his position and work location and receive back pay from the date of his resignation.

ISSUES

The issues presented are whether the District's relocation of James Brown's extra-duty work place from the District's Administration Center to his classroom at Blythe Junior High

School constituted an "adverse action" and, also, whether such action was unlawfully motivated by Brown's participation in protected activities.

DISCUSSION

In reversing the ALJ we hold that James Brown did not suffer any adverse consequences as a result of his relocation to his classroom to perform the duties of computer coordinator for the District, thus failing to satisfy an essential element in support of a claim of discrimination under the Novato standard.

While a prima facie showing of some adverse action is not clearly expressed as such in Novato, it is nonetheless essential. In Novato we cited, with approval, Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169], enforcement granted (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513], cert. den. (1982) 455 US 989 [109 LRRM 2779]. In Wright Line the National Labor Relations Board (NLRB) required a ". . . showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." (Id., 105 LRRM at 1175.) The United States Supreme Court expressly adopted the NLRB's Wright Line analysis in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], revd. (1st Cir. 1982) 674 F.2d 130 [109 LRRM 3291]. In so doing, the Supreme Court stated:

> As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in

> part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. (Emphasis added.) (113 LRRM at pp. 2860-2861.)

Furthermore, in issuing its Petition for Enforcement, the First Circuit acknowledged that in its earlier cases it

> . . . came to recognize that the existence or not of a causal link between union activity and the employee's injury . . . was most accurately determined by asking whether the discharge would have occurred "but for" the protected activity, it is clear no unfair practice existed since a bad motive without effect is no more an unfair labor practice than an unexecuted evil intent is a crime. (Emphasis added.) (Wright Line (1st Cir. 1981) 108 LRRM 2513, 2516.)

Just as federal courts reviewing the NLRB's standard in Wright Line have expressly acknowledged the need to make a prima facie showing of adverse action, we too expressly acknowledge that while a showing of harm has always been a requisite, it has not heretofore been expressed as such. We are now doing so. Since this case turns on whether or not Brown's relocation was an "adverse action," the nature of his duties and the circumstances under which he was relocated must be examined in detail.

As computer coordinator, Brown was responsible for the facilitation, introduction and use of computers in the classroom. He was required to operate computers and keep District employees and members of the school board apprised of computer programs which were available or obsolete. He was required to maintain contact with the Teacher Education Computer

Center which coordinated the use of computers within the two counties of San Bernardino and Riverside. Brown, as computer coordinator, discharged his duties in two-hour increments, four days a week. His workday ended at about 5:00 p.m. on the four days he spent in the Center. His office was originally located in the District's Administrative Center because there was a vacant office which accommodated his needs. The latter included access to a computer, telephone, and xerox machine. These were available in the Center, which was about a ten-minute drive from the classroom where he performed his full-time teaching duties.

As previously noted, Brown was active in the Association and had been a member of the bargaining team for a number of years. In Palo Verde Teachers Association, supra, this Board adopted the ALJ's findings concerning the Association's threat of strike activity in the summer of 1985, and into the school year of 1985-86. While some of the same facts were presented in the instant case, a more extensive discussion is contained in PERB Decision No. 642. It is clear in both the instant record and the Board's decision in Palo Verde Teachers Association, supra, that there was sufficient activity on the part of the Association to justify the District's preparations for a possible strike. It was this situation that led to the decision of the superintendent to relocate Brown to his classroom to perform the duties of computer coordinator.

Upon being informed of the relocation of his work site, Brown was understandably upset and prepared the following memorandum detailing his objections to the change:

1. This will be seen by everyone as a "slap in the face" for me personally.

2. The idea of a district computer program will be dealt a severe blow.

3. The school personnel (administrators and teachers) who tend to like to 'go their own way' will have a greater tendency to do so having sensed weakness in a district directed program.

4. The facilities at the junior high school are much less satisfactory then those at the district office.

    a. I have no phone in my classroom and there is no office space available on the junior high campus.

    b. Teachers and administrators, who drop by while doing other errands at the District, would be much less likely to do so at the junior high.

    c. There is no microwave phone in the junior high school campus.

    d. Even if copying facilities were made available to me at the junior high school (which as I understand it, they would not), they would be three locked doors and three hundred yards away instead of 20 steps away as they are at the District office.

    e. Instead of down-the-hall convenience to educational services assistance, it would be across town.

5. An arbitrary decision to shove aside a qualified and hard working employee on the feeling of discomfort by the Superintendent hardly moves the District toward well-planned presentations of its educational program.

6. A move (which can be viewed as retaliation for serving on the teachers negotiation team) will hardly promote the 'problem-solving' approach so badly needed at the negotiation table.

The arrangements for performing his duties as computer coordinator in his classroom were as follows. Brown's workday during the four days he worked the additional two hours now ended at 4:30 p.m. rather than 5:00 p.m. as it had been at the Center. He had available the same model computer, printer and disc-drives as he had had. A copy machine was available in the principal's office at the junior high until 3:30 p.m. and secretaries were available to run the copies. The classroom had space for filing and storage which had not been available to him before. His classroom office did not have a phone but the junior high principal was in the process of obtaining a portable phone which would have been available to Brown had he remained on the job. There were phones available for his use in the teacher's lounge, his wife's classroom which was next door to his, and in the principal's office if needed. A microwave phone was available in the counseling office at the junior high also. All of the telephones were within 100 paces or less from Brown's classroom.

In addition to Brown's objections concerning inadequate access to phones and copying facilities, they also go to lack of "foot traffic" and his perceived inaccessibility. There was no evidence that the "foot traffic" was important or essential

to the performance of his duties and he was not inaccessible in his classroom after normal school hours.

While some aspects of the job arrangements in Brown's classroom were certainly not as convenient as had been the case in the Center, a number of improvements were obvious. His workday was shortened by a half hour, more space was available for storing materials, and there were fewer distractions and less noise in his new location.

It is apparent that Brown's main objections were to what he perceived as a downgrading of the computer program in the District and an accompanying diminishing of the prestige of his position as coordinator. There was, however, no evidence to support his subjective reactions.

We apply an objective test in determining whether the changes made as a result of the relocation actually resulted in injury to Brown.[5] His duties remained the same, his compensation remained the same and his workday was actually shortened. While telephone communication was more difficult, the evidence indicated this was temporary and would have been corrected. In fact the ALJ found that working conditions did not change substantially enough to constitute a constructive discharge.

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[5]While the employee may reasonably have felt that he was in fact injured by the relocation, as the dissent argues, his reaction is still a subjective one if, as here, the facts do not support the alleged injury.

In light of our conclusion that Brown was not adversely affected, the Novato analysis may properly end. However, even assuming, arguendo, that the District's decision to assign Brown a different office constituted an adverse action, we find that it was not motivated by his participation in protected activities.

The District contends that Brown's presence in close proximity to the superintendent's office made the superintendent and his visitors "uncomfortable." Indeed, Superintendent Hanson testified that he felt inhibited in his ability to function effectively in his primary work site because of the immediate proximity of a member of the PVTA bargaining team during a time when the Association was threatening strike activity. It is, thus, obvious from the record that Brown's position on the PVTA's bargaining team during the time of an imminent strike was instrumental in the District's decision to relocate his office. In the strictest technical sense, then, the relocation of Brown's office resulted from his participation in protected activities.

In this instance, however, we believe that the District rebutted any inference of unlawful motive. Brown's participation in protected activities, as a factor motivating the District's relocation of his office, was inextricably tied to the threatened strike. The record clearly showed that Brown's office would not have been reassigned at the beginning of the 1985-86 school year were it not for the District's

reasonable perception of an imminent strike. In this regard, it is critical to note that, when Brown was originally assigned an office next door to that of the superintendent, he was extensively involved in activities of PVTA, a fact then known to the District. It can thus be inferred that it was the strong possibility of a strike which provided the true impetus for the relocation of Brown's office.

The ALJ and the Association, we believe, placed undue reliance on the fact that no strike actually occurred. While this is true, the threat of the strike was very real, and the District was nonetheless required to make preparations in response thereto. Just as a school district has an inherent interest in preserving the security of its facilities, so also does it have an interest in protecting the integrity of its managerial communications. (See Modesto City Schools (1983) PERB Decision No. 291.) We are persuaded by the record in this case that the District's decision to relocate Brown's office was a reasonable measure in response to the exigent circumstances then confronting the District.

In this instance the charge is DISMISSED.

Member Porter joined in this Decision.

Member Craib's dissent begins on page 15.

Member Craib, dissenting: On its face, the transfer of a union negotiator away from close proximity to the superintendent's office, especially in light of ongoing strike preparations, does not seem unreasonable. However, as discussed below, the District's failure to present evidence to rebut the charging party's prima facie case of discrimination requires a finding of a violation. That is the real issue in this case, an issue the majority seeks to avoid by finding that the transfer was not adverse. In order to reach that result, the majority has been forced to create a misguided rule of law whose implications I trust the majority does not appreciate.

I agree with the majority that an objective test must be applied in determining whether an action is adverse; however, the majority's test goes far beyond what is necessary to be termed "objective." A subjective test would consider only the employee's perception of whether the action was adverse, while an objective test would require that the perception be reasonable, i.e., could the action reasonably be viewed as adverse? The majority instead requires that the action cause a substantial change in working conditions. Such analysis improperly blurs the distinction between constructive discharge issues and issues of discrimination or retaliation. Only where a constructive discharge is at issue is it relevant to consider whether the changes in working conditions make the job difficult or impossible to perform. Further, whether the action's effect upon protected rights is relatively slight is a

proper consideration only in interference cases, where a balancing of interests is an integral part of the analysis applied. See, e.g., Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.

In a discrimination case the inquiry is whether there was some harm (caused by unlawfully motivated conduct), though no particular quantum of harm is required. The reason for this is rather obvious. While very serious unlawfully motivated adverse actions, such as discharges, would naturally have the greatest chilling effect upon the exercise of protected rights, relatively minor adverse actions also have a chilling effect.[1] The difference is quantitative, not qualitative. If such actions could be taken with impunity the potential interference with the exercise of protected rights is significant. For example, an employer could harass and

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[1]The NLRB has consistently found discrimination violations where the adverse action was relatively minor and had no significant effect upon the employee's ability to perform job duties, nor affected wages, hours or other major conditions of employment. See, e.g., Advertisers' Manufacturing Co. (1986) 280 NLRB No. 128 [124 LRRM 1017] (personal telephone use policy, use of receiving dock area for breaks and lunch, restrictions on employee conversations, allowing only supervisors to park in first row of parking lot, pattern of harassment against newly-elected chief steward; La Reina, Inc. (1986) 279 NLRB No. 103 [123 LRRM 1235] (more stringent enforcement of all-white clothing work rule); Inductive Components, Inc. (1984) 271 NLRB 1448 [116 LRRM 1207] (more stringent enforcement of work rules and transfer of employee to isolated work location). The focus in these cases is on the evidence of unlawful motive, not on the seriousness of the action taken.

intimidate employees through a series of relatively minor actions, effectively discouraging protected activity. Under the majority's analysis, such an employer would not violate the law as long as the adverse action did not "substantially" affect terms and conditions of employment. That such an approach does not effectuate the purposes of the Act is manifest.[2]

Having established that the proper test is whether the employee could reasonably view the action as adverse, I now turn to consideration of the action taken in this case. According to the testimony, Brown's transfer out of the Administration Center affected his job in three ways. One, he no longer had access to the foot traffic that regularly passed through the Center, which Brown testified was very helpful in making the contacts necessary to maintain and expand the District-wide program he oversaw as District Computer Coordinator. Second, Brown viewed the transfer as denigrating the status of the program, which he feared would also hinder his efforts. Lastly, he had less convenient access to telephone and copying services.

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[2]EERA section 3543 states, in pertinent part:

> Public school employees shall have 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 . . . .

The above changes in working conditions may not have substantially impaired Brown's ability to perform his duties, but they are hardly de minimis. To some, it may appear as if Brown has made "much ado about nothing," but such a subjective assessment does not reflect the proper inquiry. When the issue is properly framed as whether Brown could reasonably view the transfer as adversely affecting his working conditions, the answer is a clear yes. Whether the adverse effect upon working conditions was severe, critical, or even substantial, is simply irrelevant.

When considering whether an employee is adversely affected, it is important to remember that working conditions involve both intangible as well as tangible elements. Involuntary transfers, perhaps more than any other actions, bring to light this simple fact. Though tangible working conditions, such as wages, hours or equipment may not vary from one site to another, it is quite common for one location to be preferable to another. This might range from one job site being that particular employer's "Siberia" to the desire to remain in a positive work environment that has resulted from building productive relationships with fellow employees, students, or administrators. Nor should the status that might come with assignment to a particular location be easily dismissed. If the change in working conditions is reasonably perceived as adverse and occurred due to protected activity, there will indeed be a chilling effect upon the exercise of protected

rights. That is what the prohibition on discrimination is designed to prevent and that should be the focus of our inquiry.

While a discrimination claim should not be upheld where the action taken may not be reasonably viewed as adverse (because it is not likely to have any chilling effect), that is not the situation faced here. Nor is it likely that an involuntary transfer would fail to meet the requirement of being objectively adverse. By definition, an involuntary transfer is seen by the employee as punitive. The only remaining question is whether that perception is reasonable, and in the vast majority of cases a reasonable basis for the perception is beyond dispute. That is why it is so rare that anyone argues that such a transfer is not adverse. In the past, this Board has not found it necessary to address the issue of whether an involuntary transfer is indeed adverse. See, e.g., Riverside Unified School District (Petrich) (1986) PERB Decision No. 571; State of California (Dept. of the Youth Authority) (1985) PERB Decision No. 535-S; Santa Paula School District (1985) PERB Decision No. 505; San Leandro Unified School District (1983) PERB Decision No. 288. In fact, Member Porter, who joins in the majority opinion in the instant case, in his concurrence and dissent in Riverside, stated:

> The regional attorney dismissed the reprisal issue on the ground that Charging Party failed to show how the transfer was adverse. However, I believe that an involuntary transfer is itself sufficiently adverse, and nothing further need be shown in that respect.

I now turn to the evaluation of the discrimination claim as a whole. A prima facie case of unlawful discrimination is established by showing that (1) the employee engaged in protected activity, (2) the employer had actual or constructive knowledge of the employee's exercise of protected rights, (3) the employer thereafter took adverse action against the employee, and (4) a nexus existed between the employer's complained-of action and the employee's protected activity. In essence, it must be established by a preponderance of the evidence that the employer's conduct was motivated at least in part by the employee's exercise of rights. Accordingly, unlawful motivation is the specific nexus necessary to establish a prima facie case of discrimination. Novato Unified School District, supra.

Brown clearly engaged in protected activity by being a union member and, more importantly, by being a member of the negotiating team. Santa Paula Unified School District (1985) PERB Decision No. 505. It is not disputed that the District was aware of Brown's protected activity. As discussed above, the element of adverse action was also clearly established.[3]

While most often a finding of unlawful motivation rests upon an inference drawn from circumstantial evidence (timing,

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3While the majority is certainly free to address the issue, I nonetheless find that it is revealing that the District did not argue on appeal that the transfer was not adverse.

disparate treatment, shifting justification, deviation from established procedures, etc.), here there is substantial direct evidence of the District's motivation in effecting Brown's transfer. For example, Brown's contemporaneous notes of the August 29, 1985 conversation with Superintendent Hanson, during which Brown was first apprised of his transfer, clearly indicate the superintendent's discomfort with the presence of a high level union official in the midst of the District's strike contingency planning. Hanson himself acknowledged the general accuracy of Brown's notes of this conversation:

> . . . [A]nd so it seemed to me that to have someone who was very active in the whole business of PVTA relationships with the District from the negotiations standpoint and from the strategizing standpoint, right in my own office, was ludicrous almost.
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> . . . It just didn't make any sense to me to allow, to continue, any more than I, and as I suggested to Jim [Brown], any more than during this whole thing, if I were sitting over in the corner of the PVTA office down there on Hobson Way while they were doing their strategizing and planning and so on. I felt the same way as I thought he would feel by, as I relayed that analogous situation.

Hanson also testified as to his discomfort with Brown's role as a "prime functionary in the union" and the attendant risk of union access to sensitive District information through Brown. On cross-examination, he offered further explanation for the transfer, as follows:

> The whole reason for the transfer was out of concern for having him as very instrumental in the way that the union was conducting its affairs being right in the middle of the District operation. That was the reason for it.
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> . . . [A]nd here we are getting ready to start the year, and the teachers have come back and Mr. Brown is beginning to come down here as we are, you know, making telephone calls with the clerical staff and, you know, doing all, you know to line up substitutes and to do our preparations. And the last thing I needed was to determine whether or not Mr. Brown, as a unit member and negotiations long-time, you know, member of that committee and very instrumental in the way things functioned with that group, in my perception, right in my midst, you know, in the middle of everything going on. Even the board had felt uncomfortable in coming in and talking to me, and looking over their shoulder a little bit. (Emphasis added.)

In sum, though the record makes it abundantly clear that the precipitating event in the transfer was the District's perception of the threat of an imminent strike, it is equally clear from the record as a whole that Brown's union activities were also a motivating factor in the decision to relocate his office. Thus, under Novato, supra, the burden properly shifted to the District to show that its actions would have been the same regardless of Brown's union affiliation and activism.

I have no trouble concluding that the District had a legitimate interest in maintaining confidentiality during its contingency strike planning, and that such planning was a motivating factor in transferring Brown. However, the District's genuine need for confidentiality would have required

the transfer of any unit member out of close proximity to the superintendent's office. Thus, in order to rebut Brown's prima facie case, the District need only have shown that Brown would have been transferred regardless of his status as a union negotiator. Under these circumstances, this would not seem to have been a terribly difficult burden to meet, but the record is devoid of such evidence.[4] Instead, the record repeatedly reflects that the transfer was initiated because of the District's need for confidentiality in preparing for a strike and because of Brown's relationship with the union.

If Hanson had found it necessary as part of the District's contingency planning to relocate any nonexempt employee stationed within sight and earshot of his office, he could have expressly stated as much during the course of his testimony. Furthermore, assuming this was the case, testimony as to why the District would have transferred any nonexempt employee under the circumstances would have been helpful. Little more would have been required than to point to the fact that only managerial and confidential employees owe the District a legally cognizable duty of loyalty and confidentiality; thus, the mere presence of any nonexempt individual would, under the

[4]The District asserts in its Brief in Support of Exceptions that it ". . . had a right under the circumstances to transfer Brown or any other unit member officed next to the Superintendent. . . ." However, abstract arguments made on appeal are no substitute for a failure to present the necessary evidence at the hearing. The Board is, of course, restricted to deciding a case based on the record before it.

circumstances, pose an inherently unacceptable risk of leaking sensitive labor relations information. Finally, it would have been appropriate to offer evidence that the only workers who remained within sight and hearing of the comings and goings in and about the superintendent's office after the transfer were those in managerial or confidential classifications.

Since the District failed to establish that Brown would have been transferred regardless of his union activities, I must conclude that it has not discharged the burden properly shifted to it upon Charging Party's prima facie showing of unlawful discrimination. Accordingly, I would find the transfer to have constituted discrimination within the meaning of section 3543.5(a) and, therefore, affirm the ALJ's finding of a violation.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

PALO VERDE TEACHERS ASSOCIATION, CTA/NEA Charging Party, v. PALO VERDE UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-2313 PROPOSED DECISION **(12/31/86)**

Appearances; Schwartz, Steinsapir, Dohrmann & Sommers by Michael Four for Palo Verde Teachers Association, CTA/NEA; Atkinson, Adelson, Loya, Ruud and Romo by Ronald C. Ruud for Palo Verde Unified School District.

Before: W. Jean Thomas, Administrative Law Judge.

I. STATEMENT OF THE CASE

This case concerns allegations that the employer discriminatorily transferred the work site of a unit member for the performance of an extra-duty assignment because of the member's participation in protected activities, namely, membership on the Association's negotiating committee. It is further alleged that the unit member was eventually forced to resign from the extra-duty position because the lack of adequate facilities at the new site made it difficult for him to effectively perform the duties of the assignment.

The Respondent admits making the transfer, but denies that the employee's ability to perform was impaired in any way by the transfer. It is asserted that the relocation was justified

by operational necessity. It is further contended that the unit member was not "constructively discharged," but voluntarily resigned from the extra-duty position.

II. PROCEDURAL HISTORY

This charge was filed with the Public Employment Relations Board (hereafter PERB or Board) on January 15, 1986, by the Palo Verde Teachers Association, CTA/NEA (hereafter Charging Party or Association), against the Palo Verde Unified School District (hereafter Respondent or District) alleging a violation of Government Code section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act) [1]. The charge specifically states that the District violated section 3543.5(a) by involuntarily transferring James Brown, a unit member, on September 6, 1985 from the District headquarters office to Blythe Junior High School to perform the

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

> Section 3543.5 states, in pertinent part, as follows:
>
> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

extra-duty assignment as District computer coordinator. It is alleged that the transfer was made because of Brown's exercise of the right to join and participate as a member of the Association's negotiating team.

On March 10, 1986, the charge was amended to add the allegation that four months after the involuntary transfer, Brown found it so difficult to perform the computer coordinator duties at the new site, without access to the necessary equipment, that he was forced to resign from the position on January 1, 1986, and was thereby constructively discharged in further violation of section 3543.5(a).

On March 10, 1986, the Office of the General Counsel of the PERB issued a Complaint against the District which alleged that the conduct set forth in the charge, as amended, constituted violations of sections 3543.5(a) and, derivatively, section 3543.5(b).

The District filed its Answer on March 28, 1986, denying any violations of section 3543.5 and raising several affirmative defenses to the charge.

An informal settlement conference was held on May 15, 1986, but the parties failed to resolve their dispute.[2]

[2]This case was consolidated for processing with another case involving the Association and the District, LA-CE-2334. However, prior to the pre-hearing conference, the Charging Party withdrew the latter charge and that case was closed.

At the pre-hearing conference, held July 10, 1986, it was agreed that a site visit would be conducted at the District during the hearing by the undersigned to gather evidence relevant to the constructive discharge issue.

The formal hearing was conducted on July 21, 1986, at the District. A recess was called and an on-site visit was made to view the locations where Brown was assigned to work as the computer coordinator prior to, and after, the transfer of his work site on September 6, 1985. Pursuant to the ground rules established for the development of this part of the record, a summary was prepared by this administrative law judge, reviewed by the parties, and became an official augmentation of the hearing record on August 18, 1986.

At the conclusion of the Charging Party's case-in-chief, Respondent made a motion to dismiss the entire charge. Following oral arguments, the motion was taken under submission for a ruling in this proposed decision.

Post-hearing briefs were filed and the case submitted November 10, 1986.

III. FINDINGS OF FACT

A. Background

The parties stipulated that the Charging Party is an employee organization and that the District is a public school employer within the meaning of the EERA. The District, which provides educational services for the community of Blythe,

California, consists of six school sites. These include three elementary schools, one junior high school, one high school and one continuation school. The total student enrollment is approximately 3,578. Dr. Leamon Hanson has been the District superintendent since 1983.

The Association is the exclusive representative of the District's certificated employee bargaining unit which numbers approximately 142 people. The Association and the District were parties to a collective bargaining agreement covering the period from July 1, 1983 to June 30, 1984. Between the period from September 1983 to September 1985, the parties were in almost continuous negotiations. They bargained throughout the 1984-85 school year without reaching an agreement.

In May 1985 the Association established a crisis committee to focus attention on what the Association perceived as a "crisis situation" in its negotiations with the District. At that time the parties were negotiating for an agreement for the 1984-85 and 1985-86 school years. In June and August of 1985, the Association leadership held meetings with its members and the state California Teachers Association representatives

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[3]Official notice is taken of the record established in unfair practice case number LA-CE-2248 which involves the Association and the District. Excerpts of testimony given by the Association president, Robert Jeppson, in that hearing on cross-examination, were received into evidence in this proceeding as an exhibit for the Respondent.

to discuss the possibility of having a strike against the District during the 1985-86 school year if no settlement was reached. During this time the Association also issued statements to the local Palo Verde newspaper to inform the public about the possibility of a strike by the teachers at the beginning of the 1985-86 school year and to elicit community support if no progress was made in negotiations during the summer.

The first duty day for teachers in the fall of 1985 was August 20. On August 19, 1985, the Association held a general membership meeting to discuss the progress in negotiations and take a strike vote. At the meeting it was decided to postpone the strike vote until August 26, 1985, and the negotiating team was instructed to attempt to reach a settlement with the District.

At the August 26, 1985, Association meeting, the unit members were divided on the strike question. No vote was taken. Instead, the negotiating team was authorized to continue negotiations with the District through the month of September, at which time the situation would be reassessed.

B. <u>The Transfer of James Brown</u>

In 1971 James Brown began his employment with the District as a classroom teacher at Blythe Junior High School. During his tenure with the District, Brown taught in the junior high school and the high school. During the last few years of his

employment, Brown taught reading and computing at the junior high school.[4]

Beginning in 1971, Brown was an active member of the Association and held various state and local offices, including the presidency and vice-presidency of the Association. Brown was a member of the Association negotiating team for several years, including the period from September 1983 to September 1985. Membership on the Association negotiating team is not an elective office. Brown was not a member of the Association crisis committee.

Brown first performed computer coordinator work for the District as a temporary assignment during the summer of 1983 under the previous District Superintendent, Harry Roberts. When Superintendent Hanson began his employment with the District during the summer of 1983, he and Brown discussed the possibility of developing a permanent computer coordinator position. That summer they jointly developed the job description for the District computer coordinator which was to be a compensated part-time, non-management, certificated position. The position was posted and interviews were held. At Hanson's recommendation, Brown was hired in the fall of 1983

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[4]At all times relevant to this case, Brown was employed by the District. However, at the conclusion of 1985-86 school year, Brown resigned from employment with the District and accepted a position with another school district.

to perform the extra-duty assignment of District computer coordinator. Brown thereafter organized a District computer resource committee that consisted of representatives from every school site. This committee was used to help Brown maintain contact with each school and formulate a District-wide program.

From September 6, 1983 to September 6, 1985, Brown performed his extra duties following the end of his regular teacher duty day. He had an assigned office for these duties in the District administrative building. Brown's computer coordinator duties were performed from 3:00 p.m. to 5:00 p.m., Monday through Thursday. For these services, Brown received one-fifth of his annual teacher's salary for a total annual compensation of six-fifths of his normal salary.

As the computer coordinator, Brown's primary responsibility was to facilitate the introduction and use of computers in the classroom. Specific duties of this position included gathering, planning, and disseminating computer program information to the teaching staff and training those individuals who needed such assistance. Additionally, he had to oversee the purchasing of hardware and software for the program and the maintenance program for all the computer machinery. In addition, Brown was responsible for insuring that the District computer program policies were in accordance with the State program requirements. This aspect was important in order to insure that the District obtained State revenues allocated for local school district computer programs.

As a part of his coordinator activities. Brown maintained rather constant contact with the Teacher Education Computer Center (TEC), which is located in the city of Riverside. Besides coordinating the use of computers within the two counties of San Bernardino and Riverside, TEC also acted as a liaison between the State and local school districts that applied for computer program grants. Since the TEC is located some distance from Blythe, it was necessary for Brown to spend a portion of his time in telephone communication with TEC personnel. For this contact, Brown primarily used the microwave telephone system which provided phone service at a cost that was cheaper to the District than the regular telephone service.

Brown's office was one of five or six individual offices located in the west end of the headquarters building, and was situated approximately 14 feet away from the superintendent's office. The office was equipped with an Apple II-E computer, a regular telephone system, a microwave telephone, a desk, a filing cabinet and several open book shelves.

During the regular business hours, a switchboard operator was normally on duty to take messages for Brown which he would pick up when he arrived in the afternoon. According to Brown's testimony, he received an average of one to two messages a day related to the computer program.

Brown had easy access to the photocopying equipment which was located close by his office. Brown used this machine

approximately 30 to 45 minutes per day to duplicate materials for dissemination to the teachers involved with the District computer program.

During the on-site visit to this location, it was noted that there is a fair amount of "foot traffic" during the normal business day. With regard to the computer program, this situation provided Brown with fairly easy access to the teachers and members of the general public who came into the administrative offices.

Brown had a key to the exterior entrance of the building. This key also provided him with entry to the superintendent's private office through the outside entrance to the office. However, Brown did not have a key to the superintendent's suite of offices from the inside entrance to the offices. It was Brown's unrefuted testimony that he had never used his key to enter the superintendent's office through the exterior door. It was also his undisputed testimony that he had never gone into the superintendent's private office for any reason other than official District business.

In the late afternoon of August 29, 1985, Superintendent Hanson visited Brown's office to inform Brown that he had decided to move the base of operation for the computer coordinator from the District administrative offices to the junior high school. When Brown asked Hanson to explain the

reason for the move, the superintendent told Brown that he felt "uncomfortable" about Brown's presence near his office because of the "adversarial relationship" which had developed between the Association and the District concerning the ongoing negotiations. However, Hanson went on to state that though he was sure that Brown had not abused the accessibility which he had to the headquarter offices, he had begun to feel uncomfortable that Brown has such easy access to the administrative operations. Brown responded that he felt that a change of location from the administrative office would detract from the staff's perception of the computer program as being district-wide in scope. However, Hanson disagreed and refused to change his decision.

Hanson testified that it was his initial decision to house Brown's computer operations at the administrative headquarters and that he never considered transferring Brown prior to August 1985. Although Hanson admitted that he had no reason to believe that Brown had ever used his access to the District administrative offices for the benefit of the Association, Hanson nonetheless began to feel discomfort about Brown's presence in the building. Because of all of the top-level administrative activity that was going on in August 1985 to prepare for a possible strike by the teachers, Hanson testified that he began to feel hampered and "constrained in my own primary work place" because of Brown's presence. For this reason, he decided to change Brown's office location.

Later, during the evening of August 29 at approximately 7:30 p.m., Brown typed out a summary of his afternoon conversation with the superintendent. Brown's memo indicates that he (Brown) expressed his concern to Hanson about the availability of telephones and computers at the junior high school site. It further states that although Gary Tibbits, the junior high school principal, had approved the transfer, Brown feared there would be limited access to the junior high school office and the teachers' lounge for the performance of his computer coordinator duties. According to the memo, the superintendent, however, felt that suitable accommodations would be available and assured Brown of help in making the physical move of his program materials and equipment to the junior high school. At the hearing, Hanson substantiated the accuracy of Brown's summary of their conversation.

Later, at approximately 9:30 p.m. on the same evening, Brown typed a second memorandum which listed six "disadvantages" of the change in location. They were as follows:

> 1. This will be seen by everyone as "a slap in the face" for me personally.
>
> 2. The idea of a district computer program will be dealt a severe blow.
>
> 3. The school personnel (administrators and teachers) who tend to like to "go their own way" will have a greater tendency to do so having sensed weakness in a district directed program.

4. The facilities at the jr. high school are much less satisfactory than those at the district office.

a. I have no phone in my classroom and there is no office space available on the jr high campus.
b. Teachers and administrators, who drop by while doing other errands at the district, would be much less likely to do so at the jr. high.
c. There is no microwave phone on the jr. high school campus.
d. Even if copying facilities were made available to me at the jr. high school (which as I understand it, they would not), they would be three locked doors and three hundred yards away instead of 20 steps away as they are at the district office.
e. Instead of down-the-hall convenience to educational services' assistance, it would be across town. [Sic]

5. An arbitrary decision to shove aside a qualified and hard working employee on the feeling of discomfort by the superintendent hardly moves the district toward well planned presentation of its educational program.

6. A move (which can be viewed as retaliation for serving on the teachers' negotiation team) will hardly promote the "problem solving" approach so badly needed at the negotiations table.

The next day, August 30, 1985, Brown presented the arguments set forth in the 9:30 p.m. memorandum to the superintendent, but Hanson refused to change his decision. Brown then requested, and was granted, the opportunity to present his case directly to the District board.

Brown made both a written and an oral presentation to the board at its meeting on September 3, 1985. The written presentation was a two-page typewritten statement entitled "Plea to the Palo Verde Unified School Board," seeking a reversal of Hanson's decision. During the course of his dialogue with the board, individual members expressed the feeling that Brown's presence in the administrative offices "intimidated" people. Following Brown's presentation and some discussion, the four board members present took a straw vote that indicated that the decision to move Brown's location would stand.

On September 6, 1985, all the computer coordinator equipment and materials that Brown used, with the exception of the Apple II-E computer and the filing cabinet, were transferred from his District administrative office to Brown's classroom at Blythe Junior High School. A representative from the District administration later picked up the headquarters door key that had been issued to Brown.

Brown's classroom at the junior high school, which is called room 22, was a very large room. It was described by Principal Tibbits as a "double classroom." This room was much larger than the office assigned to Brown at the administrative building. The furnishings included, among other things, a large number of desks and computer terminals that are used by the students participating in the computer laboratory taught by Brown. One side of the room was set up as Brown's computer

coordinator work area. It was equipped with a desk, an Apple II-E computer and a printer. Software for the computer was kept in a separate unlocked storage cabinet which was situated near the desk. The room contained two large book shelves that were used by Brown for storing magazines and other computer program library materials. Brown's classroom was not equipped with a telephone for outside dialing. It contained an intercom phone for receiving messages from the principal's office. The intercom phone could not be used for direct communication from one classroom to another or from one school site to another. The junior high school site has two teacher lounges—one for smokers and one for non-smokers—which each contained a regular phone with one line for incoming and outgoing calls. At the time of the on-site visit, the non-smoking lounge also contained a portable telephone which was connected to the same line as the regular phone. There was also a regular telephone with an outside line installed in classroom 8 which is located several feet away from Brown's classroom. Classroom 8, like room 22, is also a double classroom which is used as a computer laboratory. This room is assigned to Joyce Brown, Jim Brown's wife, who is also a teacher for the District.

There are also telephones with two outside lines in the main school office. There is no limit on faculty use of these telephones. Additionally, the principal has a telephone in his private office which, according to Tibbit's testimony, Brown was permitted to use on request.

The teachers' mailboxes are located in the non-smoking lounge. Telephone messages for the faculty are normally placed in their mailboxes. During the course of the usual duty day, Brown would visit the non-smoking lounge at least two to three times a day for various reasons, including the use of the regular telephone from time to time.

The counselling center, which is located in a separate building near Brown's classroom, has seven telephones that are connected to the District's microwave system. Brown testified that, prior to the on-site visit, he was unaware that the microwave system existed in the counselling center. However, this center is used primarily by the high school students and its staff. It is rarely used by the junior high school faculty and students for counselling services.

The main office of the junior high school, which is also referred to as the "inner" office, is located next door to the teachers' lounges. In addition to the telephones mentioned above, this office contained, among other things, a large photocopying machine which can be used by all staff during the regular office hours. However, a brief orientation is required for correct operation of the machine which operates on a "flash copy" method. As their time permits, the school secretaries for the principal and vice principal will, upon request, photocopy materials for the faculty. When the secretaries

leave for the day (usually at 3:30 p.m.)/ they lock the machine behind a large metal; door, which then makes the machine inaccessible.

Following the transfer of the computer coordinator program work site to his regular classroom, Brown began to perform his coordinator duties from 2:30 p.m. to 4:30 p.m., starting and ending one-half hour earlier than he had at the District administrative office. The end of the regular teacher duty day at the junior high school is 2:30 p.m.

Shortly after his transfer, Brown spoke with Principal Tibbits about the District's installing either a microwave telephone line at the school site or placing a regular outside telephone line in his classroom.

The testimony of Brown and Tibbits conflicts with regard to the District's efforts to obtain more convenient telephone service for Brown at the junior high school. Brown admitted that Tibbits informed him that the District could not install another outside telephone line at the junior high school, but that the District was in the process of procuring a portable telephone for use at the school. However, he denies that Tibbits told him that he could use the portable phone for his computer coordinator activities. Tibbits, on the contrary, testified that he informed Brown of his efforts to obtain a portable telephone that he could use for the computer program and he gave Brown progress reports during the fall of 1985.

The record shows that Tibbits started trying to obtain a portable telephone in 1984 for use by the faculty conducting the "Saturday school," which is a special student detention program that is conducted on Saturdays. After Brown presented his need for an outside telephone line in his classroom, Tibbitts decided that a portable telephone would serve Brown's need as well as that of the Saturday school program faculty.

The District purchased a portable telephone on or about October 29, 1985, and it was made available for use sometime in early November 1985. However, this telephone developed problems with excess static and was not in good operating condition until the District installed an external antenna sometime in early February 1986. The portable telephone uses the same outside line as the regular telephone. During the four months that Brown performed his computer coordinator duties at the junior high school, Brown used the regular telephone system, but he never used the portable telephone. In general, he also decreased the number of calls that he made to the TEC and other outside agencies following his transfer.

Brown testified that, in his opinion, the most significant adverse impact of the transfer upon his performance of the coordinator duties was the marked decrease in his contact with "foot traffic," i.e., the teachers and administrators who would visit the District headquarters office between 2:30-3:30 p.m. each day. The junior high school location was "out of the way"

and provided less accessibility to those individuals whom Brown would like to recruit for participation in the computer program. Brown felt that this lack of contact drastically affected his ability to communicate with and influence District personnel about the program. Aside from the telephone issue, Brown felt that other facilities at the junior high school, such as the availability of the copying machine, were much less adequate and convenient for his use in the program.

Tibbits, who had been a member of the District computer resource committee since it was formed by Brown in 1983, testified that he felt that after the transfer, Brown had a considerably larger work area, more storage space, and quieter surroundings for his computer coordinator work. In addition, he had immediate access to other computers if they were needed. Tibbits did admit that at the junior high school Brown did not have as much exposure to the "foot traffic." However, Tibbits felt that the other facilities, such as the copying machine and the telephone service, were as adequate for Brown's performance of his extra-duty assignment as those at the main District office.

C. The GATE Program

The District has another district-wide program which is based at the junior high school. The gifted and talented education program, known as the GATE program, is coordinated by

a teacher who is assigned to Blythe Junior High School. In addition to teaching one or two classes per day, the GATE program coordinator is responsible for planning and implementing the program for approximately 150 students located at all school sites throughout the District. These students have been identified as being gifted and talented. The coordination of the GATE program includes visitations, on a regular basis, to all of the school sites. The Gate Program coordinator position is considered to be a full-time position.

D. The Termination of Brown's Extra-Duty Assignment

In January 1986 Brown decided to resign from the position of District computer coordinator. He submitted a letter of resignation to Hanson, which was dated January 1, 1986, but he actually resigned from the position, effective January 6, 1986.

According to Brown, nothing special occurred in January to trigger his decision. Rather, the decision represented the culmination of his build-up of frustration during the four-month period following the transfer. Brown felt that he did not have the facilities needed to properly perform his coordinator duties. Additionally, he felt an acute "loss of foot traffic" which he regarded as extremely vital to the success of his program. Consequently, he "felt he had to quit."

Tibbits testified that, in his opinion, Brown lost some of his enthusiasm for the computer coordinator program after the transfer. However, other than their discussion in the fall of

1985 about the telephone situation, Tibbits maintains that Brown never complained to him about problems with the facilities at the school or gave him any indication that he (Brown) intended to resign. Thus, he was very surprised when Brown tendered his resignation.

Superintendent Hanson testified that he also was surprised about Brown's resignation. After the transfer, he was never told by Brown, or anyone else, that Brown was unable to perform his computer coordinator duties because of inadequate working conditions at the junior high school. He did not speak with Brown after receiving his resignation letter, but accepted the resignation without question. At the time of the hearing, the computer coordinator position was still vacant.

IV. ISSUES

1. Did the District's involuntary transfer of James Brown, with respect to the work location for his extra-duty assignment, constitute a violation of section 3543.5(a)? Did this same conduct also unlawfully interfere with the exercise of guaranteed rights by the other unit members in further violation of section 3543.5(a)?

2. Did the District constructively discharge Brown by causing his working conditions to become so difficult that he was forced to resign from the computer coordinator position? If so, did this conduct also violate section 3543.5(a), and derivatively, section 3543.5(b)?

V. CONCLUSIONS OF LAW

A. Positions of the Parties

The Charging Party alleges that the District discriminated against Brown because of his membership in the Association and his participation on the Association's bargaining team. This discrimination took the form of a transfer of his base of operation as the District computer coordinator from the District administrative office to his own classroom at the junior high school. It is further alleged that the District subsequently constructively discharged Brown by providing him with such inadequate facilities for performing his computer coordinator duties that he was forced to resign. Additionally, Charging Party alleges that, by discriminating against Brown, the District also interfered with the exercise of rights by other unit members, thus further violating section 3543.5(a).

Respondent defends its transfer of Brown by arguing that, pursuant to the authority of California Education Code section 44923, certificated employees serve in extra-duty positions at the pleasure of the board and "may be terminated by the governing board of the District at any time." Moreover, school boards have broad power to assign teachers anywhere within the district according to the needs of the district, absent a specific contractual limitation to the contrary. (See Education Code section 35035.) No such limitation is present

in this case. Thus, the authority rests with the superintendent to determine the particular site where duties, such as those described for the computer coordinator, are to be carried out.

Additionally, the District contends that Brown was not transferred because of his Association bargaining team activities. The District had known of his participation as an Association representative for two years prior to the transfer. The District defends its transfer action on the ground that it was necessary as a security precaution in light of the "crisis situation" brought about by the threat of a teachers' strike at the beginning of the school year. The transfer was justifiable since the District needed security and confidentiality in planning and preparing to maintain its instructional program if a work stoppage had occurred.

Finally, the District argues that even if the evidence shows that the transfer was motivated by Brown's participation in the negotiating process, the record will not support a finding of a violation under the Novato rule because there were no adverse consequences to Brown as a result of the transfer.

B. Introduction

The EERA guarantees public school employees 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)

The activities guaranteed by the Act include, among other things, the right to participate in negotiations as a member of the negotiating team of the exclusive representative. (Santa Paula Unified School District (1985) PERB Decision No. 505.)

Section 3543.5(a) makes it an unfair practice for a public school employer to,

> . . . threaten to impose reprisals . . . to discriminate . . . or otherwise to interfere with . . . employees because of their exercise of rights guaranteed by this chapter.

In Carlsbad Unified School District (1979) PERB Decision No. 89, and Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct in violation of section 3543.5(a) are to be decided. The Board summarized this test in a decision 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 a preponderance of the evidence. (California State University, Sacramento (1982) 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 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, 729-730; Wright Line. Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]

To meet its burden of establishing a prima facie case of discrimination or retaliation, the charging party must first show that the conduct in which the employee engaged was protected by the EERA and that the employer had knowledge of the employee's participation in the protected activity.

Next, the charging party must provide direct or circumstantial evidence, from which an inference may be drawn that the protected conduct was a "motivating factor" in the employer's decision to engage in the challenged action. A variety of factors may indicate unlawful motivation, including: the timing of an employer's conduct in relation to the employee's involvement in protected activity, the employer's disparate treatment of employees engaged in such activity, the employer's departure from standard or usual procedures, statements of hostility to the union or general animus toward unions, an employer's inconsistent or

contradictory justification for its actions. (See San Joaquin Delta Community College District (1982) PERB Decision No. 261; North Sacramento School District (1982) PERB Decision No. 264; Santa Clara Unified School District (1979) PERB Decision No. 104 and State of California (Department of Transportation) (1984) PERB Decision No. 459-S.)

Once the charging party has made a prima facie showing sufficient to support an inference that the exercise of protected rights was a motivating factor for the employer's allegedly unlawful conduct, the burden shifts to the employer to prove that its conduct would have been the same, even in the absence of the employee's protected activity. If the employer fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of section 3543.5(a) will be found. (Novato Unified School District, supra); see also, NLRB v. Transportation Management Corp (1983) 462 U.S. 393 [113 LRRM 2857].)

C. The Discrimination Charge

Viewed in its entirety, the preponderance of the evidence presented supports a conclusion that the Charging Party has demonstrated a prima facie case of discriminatory treatment.

The Charging Party must first show, as it has, that Brown was engaged in protected activity and that the employer was aware of Brown's protected conduct. The record amply

demonstrates that Brown had a long history as an activist for the Association and was participating as a member of the Association negotiating team at the time of the transfer of his work site in September 1985.

Additionally, there is no question about the employer's knowledge of Brown's long-time Association activities. The District readily acknowledges awareness of Brown's Association activism during the period immediately preceding the transfer. Respondent, however, argues that since Brown's bargaining team participation had gone on for two years prior to the transfer, the transfer clearly could not have been motivated by Brown's exercise of this protected right. Thus, no nexus exists between the exercise of the right and the transfer.

Although the record reveals that the parties had been in rather difficult and somewhat protracted negotiations from September 1983 to the spring of 1985 without succeeding in reaching an agreement, until the spring of 1985 the Association had never made a public statement suggesting that the teachers were considering a work stoppage if the negotiations failed to be more fruitful. Undoubtedly, this posture caused concern and alarm among the District administration and its governing board. The testimony of Superintendent Hanson on cross-examination provides telling evidence of his reaction to the situation and its link to Brown's transfer.

Q. (By Mr. Four) Let's get a question to that answer. Was the sole reason that you transferred Mr. Brown a result of what you perceived to be a threatened strike? And you can begin by saying whether yes was to that question or not or whether you were just —

A. Yes. The whole reason for the transfer was out of concern for having him as very instrumental in the way that the union was conducting its affairs being right smack in the middle of the District operation. That was the reason for it.

Q. But how did the strike play into that?

A. Well, the pitch of feeling was probably at the highest point, and it had been developing all summer long, and here we are getting ready to start the year, and the teachers have come back and Mr. Brown is beginning to come down here as we are, you know, making the telephone calls with the clerical staff and, you know, doing all, you know to line up substitutes and to do our preparations. And the last thing I needed was to determine whether or not Mr. Brown, as a unit member- and negotiations long-time, you know, member of the committee and very instrumental in the way things functioned with that group, in my perception, right in my midst, you know, in the middle of everything going on. Even the board had felt uncomfortable in coming in and talking to me, and looking over their shoulder a little bit.

. . . . . .

Q. Okay [By Mr. Four]. Had it not been for what you perceived to be a threatened strike, would you have transferred Mr. Brown?

A. No. I don't think I would have transferred him.

Clearly, by Hanson's own admission, the motivation for his decision to transfer Brown stemmed directly from his perception of Brown's role as an Association leader in the protracted negotiations. The stalled negotiations resulted in an intensely adversarial relationship between the parties during the summer and fall of 1985. Although Hanson was fully aware of Brown's activities with the Association prior to the fall of 1985, had he not perceived Brown's affiliation with the Association to be adverse to the District's interest, he would not have transferred Brown's work site in September of 1985.

The timing of Hanson's decision to transfer Brown, considered along with his admission about his motive, provides clear evidence that Hanson was motivated by animus toward Brown because of his affiliation with the Association.

Unless the District can rebut the inference of unlawful motive, a violation of section 3543.5(a) will be found.

D. Operational Necessity Defense

The burden of rebutting the inference of unlawful motive is placed on the employer in "recognition of the practical reality that the employer is the party with the best access to proof of its motivation." San Diego Community College District (1983) PERB Decision No. 368, at p. 25, citing Wright Line, supra, 251 NLRB at 1087-1088. In this case the District seeks to rebut the inference by relying on the affirmative defense of operational or business necessity.

The District argues that the imminent threat of a teacher strike created exigent circumstances which justified the decision to transfer Brown's work site. It is contended that Brown's presence in the District office during the time of "crisis" caused problems for the superintendent and other administrative staff. Brown's presence allegedly interfered with District operations that were especially critical prior to the opening of school. During this time, the District was making preparations to maintain the normal school program in the event that the teacher work stoppage actually occurred.

Additionally, since Brown had a key to the administrative office building that gave him restricted access to the superintendent's private office, the superintendent was concerned about the need for maintaining confidentiality and security within the facility. Thus, it was felt that the best course of action was to transfer Brown's base of operation for his extra-duty assignment.

Focusing on the strike threat as a valid operational necessity defense, the District analogizes its situation to that found by the PERB to exist in Modesto City Schools (1983) PERB Decision No. 291. In Modesto PERB upheld the right of the District to issue letters of reprimand to teachers for failing to turn in school keys prior to a strike. In that case, the Board stated:

> Even though the request to turn in keys was made in response to protected strike activity, . . . the keys belonged to the District, and it had every legitimate right to require their return as a security precaution. Being required to turn in keys in no way interfered with the strike. . . . Modesto City Schools, supra at p. 20.

However, in this case, the District's reliance on the Modesto ruling is misplaced. The strike situation here is not analogous to that found to exist in the the Modesto case. In Modesto, a strike vote had already been taken by the bargaining unit. The Board concluded, therefore, the District had the right to demand, as a security precaution, that teachers turn in their keys prior to the advent of the strike because turning in keys on request was, by policy, a normal requirement. It was further determined that the demand was not discriminatory and did not interfere with the strike.

Here, although the District maintains that the "threat" of a strike was imminent, the record shows that even though a strike action was publicly discussed, the Association had not taken an actual strike vote of its unit membership prior to Brown's site transfer. The parties were still in a negotiating posture in late August and early September 1985. Additionally, although Brown was a member of the Association bargaining team, he was not a member of the ad hoc crisis committee that was formed in the spring of 1985 to deal specifically with the stalled negotiations and to plan for future activities such as a teacher strike,.

The District makes much ado about the key and Brown's access. However, no evidence was presented to suggest that Brown had ever used or tried to use his access to confidential District information for use by the Association. Nor has it been shown that during the "crisis" period, Brown was ever asked to turn in his key and refused to do so. Although the District claims that Brown presented a potential security risk, it has not established that, given the circumstances, it had no other alternative, but to transfer Brown's work site.

Even if the District had a legitimate concern about Brown's presence in the administrative offices, Brown was physically present in the building for only two hours per day, in the late afternoon. Surely, during that brief time period, the District could have restricted Brown's access to conversations and meetings that it considered top secret.[5]

Although the growing intensity of the negotiations between the Association and the District may have caused some understandable alarm among the District administrative hierachy, the District has failed to demonstrate that the transfer of Brown was the only available alternative and was excusable as a legitimate operational necessity.

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[5]It is further noted that apparently the District took no special precautionary measures when engaging in its "pre-strike" preparations. For example, Hanson testified that he could have, but never did, close the door to his private office when present in the office. He did this because he wanted others to know that he was in the building,.

Likewise, Respondent's arguments relying on Education Code sections 35035 and 44923 are not convincing. In San Leandro Unified School District (1983) PERB Decision No. 288, the District transferred a dissenting union member who had formed an ad hoc committee to protest the District's extra-duty assignment policy. The District argued, among other things, that it had the authority to transfer the employee pursuant to Education Code section 35035. The PERB rejected the District's argument and held that the transfer was unlawful because it was motivated by the employee's protected activity and was not justified by any operational necessity. The Board stated:

> Although Education Code section 35035 and the CBA [collective bargaining agreement] provide for involuntary transfers "when it is in the best interest of the district," the basis for deciding whether it is in the best interest of the district cannot be an employee's involvement in protected activities under EERA. Other legitimate criteria must be advanced for the district to exercise that discretion. San Leandro, supra, at p. 13 (citation omitted)

The burden is on the Respondent to show that Brown's transfer to another site would have occurred absent the protected activity. The Respondent has failed to meet this burden. It has not offered any evidence indicating that Brown would have been transferred absent his union activity, or for any other reason other than the District's perceived threat of a strike by members of Brown's bargaining unit.

Since the District has not proffered any justification for its action beyond the aforementioned, it is found that the District has failed to demonstrate that it would have taken the same action in the absence of protected activity. It is therefore concluded that the District violated section 3543.5(a) of the EERA by transferring the location of Brown's extra-duty assignment because of his participation in activity protected by the EERA. (San Leandro Unified School District, supra.) Accordingly, that portion of the District's motion to dismiss that addresses this charge in the complaint is denied.

E. The Interference Charge

The Charging Party also urges a finding that the District further violated section 3543.5(a) by interfering with the rights of all unit employee. It is asserted that Brown's transfer had a "the chilling effect", on other unit members who feared that a similar fate might befall them if they participated in Association activities.

In Carlsbad Unified School District, supra, the Board set forth the test for determining when employer actions interfere with the rights of employees guaranteed by the Act. Subsequently, in Novato Unified School District, supra, the Board clarified Carlsbad by setting forth a test to be applied in specific cases of alleged discrimination or reprisal against

employees for their participation in protected activities. In Coast Community College District (1982) PERB Decision No. 251, the Board further distinguished between "interference" and "discrimination" cases, which are often blurred.

A prima facie case of interference is established where the charging party shows that the employer's conduct tends to or does result in some harm to employee's rights. Where the harm to employee rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. Where the harm is "inherently disruptive" of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and no alternative course of action was available. In interference cases, proof of unlawful intent is not required. (Carlsbad Unified School District, supra; Novato Unified School District, supra; and Coast Community College District, supra.)

Applying that standard to this case, it is determined that the Association has failed to establish a prima facie case. No evidence was presented which established that the District's transfer of Brown tended to have a chilling effect on the exercise of employee rights by any other members of the bargaining unit, or that the action actually resulted in some specific harm to employee rights. Brown was in a unique situation in that he was the only unit member assigned to

perform an extra-duty assignment at the District administrative office. Moreover, it cannot be assumed that teachers, in general, would conclude that because of Brown's transfer, any future exercise of their rights of participation in the Association was in jeopardy.

For this reason, it is concluded that no section 3543.5(a) or derivative section 3543.5(b) violations have been shown. This part of the complaint must therefore be dismissed. Accordingly, this aspect of Respondent's motion to dismiss the complaint is granted.

F. The Constructive Discharge Allegation

Following the transfer of Brown's computer coordinator assignment to the junior high school, the Charging Party claims that the existing facilities at that site were so inadequate that Brown's working conditions became intolerable. The primary complaint about the facility was Brown's alleged inadequate access to telephone service, copying equipment and telephone message service. Additionally, the alleged decrease of "foot traffic" i.e., teachers and administrators coming to the junior high school, adversely impacted the effectiveness of the program. The net effect of the change in conditions caused Brown to be "constructively discharged" when he resigned in January 1986.

The Respondent denies that Brown was constructively discharged. It is asserted that, at the most, Brown suffered minor inconvenience with the telephone situation. Furthermore,

in many respects, the work setting at the junior high school was actually superior to that which existed at the District administrative office. Finally, the District maintains that most of Brown's complaints related to the "image" of the computer coordinator program, as opposed to the actual working conditions.

PERB has passed on the question of constructive discharge in one case, Marin Community College District (1980) PERB Decision No. 145. In that case the Board disagreed with the theory of the hearing officer that, among other violations by the District, a union activist who either quit or abandoned his job was constructively discharged by the District. Instead, the Board found that the employee was unequivocally terminated by the District solely because of his union activities.[6]

The private sector test for finding constructive discharge is set forth in Crystal Princeton Refining Co (1976) 22 NLRB 1068 [91 LRRM 1302]. In that case, the National Labor Relations Board (hereafter NLRB) enunciated the "constructive discharge" standard as follows:

> There are two elements which must be proven to establish a "constructive discharge."

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[6]In Marin, the Board stated that "the doctrine of constructive discharge is applied to situations where an employee is forced to quit his/her employment because of the illegal acts of the employer," citing as authority for this proposition, J.P. Stevens Co (1972) 461 F.2d 490 [80 LRRM 2609], enf. ...183, NLRB 25 [75 LRRM, 1407]; Hertz Corp (1971) 449 F.2d 711 [78 LRRM 2569], enf. 184 NLRB 445 [74 LRRM 1633].

> First, the burden imposed upon the employee must cause, and intend to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.[7]

In Crystal Princeton, no constructive discharge was found because it was not established that the employee was involved in union activity.

The Charging Party argues that, the Crystal Princeton test, is applicable to this case, and that, on this basis, the record clearly supports a finding that Brown was constructively discharged. However, this argument is not supported by the

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[7]The parties have cited a number of federal and state cases that address the concept of constructive discharge. For example, under private sector precedent, it was held in East Bay Properties (1977) 232 NLRB 670 [96 LRRM 1343], that the employer violated section 8A(3) of the NLRA when it constructively discharged an employee by assigning more onerous working conditions to the employee, who was a known union activist, especially since the employer had demonstrated union animus. In Keithly v. Civil Service Board (1970) 11 Cal.App.3d 443 [89 Cal.Rptr. 809], the court stated that "whenever a person is severed from his employment by coercion, the severance is affected not by his own free will, but by the will of his superior. A person who is forced to resign is thus in a position of one who is discharged, not of one who exercises his own free will to surrender his employment voluntarily." In Satterwite v. Smith (9th Cir. 1984) 744 F.2d 1380, 36 FEP Cases 148, [121 LRRM 2424], the court ruled that an employee who resigned after he became convinced that he would not be promoted because of his race was subjected to intolerable working conditions, and was constructively terminated. The Satterwite court held that the test of whether an employee has been constructively terminated involved a determination of whether a reasonable person in the employee's position would have felt that he was forced to quit because of intolerable working conditions. 744 F.2d at 1381.

weight of the relevant evidence.

Brown testified that, following his transfer in September of 1985, the major problems with the new work location were: (1) his decreased access to "foot traffic" — meaning his exposure to teachers and administrators whom he could attempt to recruit into participation in the computer program; (2) the lack of an outside telephone line for communications both within and outside the district; (3) poor message service which was provided primarily by the student workers in the junior high school office; (4) and lack of access to the school photocopying machine after 3:30 p.m.

Brown was particularly unhappy about the fact that he no longer had access to the microwave telephone for contacts with the TEC. He testified that following his transfer he stopped calling the TEC because of the telephone situation. Although he admitted that the regular telephone system was available, it was not as convenient as when he had the two telephone systems in his District headquarters office. Because of this situation, Charging Party vigorously contends that the change amounted to the imposition of more onerous working conditions.

Personal observation of the facilities available to Brown at the junior high school did not reveal the work site to be inadequate. With the possible exception of the inconvenience

of not having an outside telephone line in his classroom, the physical setup in Brown's classroom appeared, in some respects, to have been even better than the physical arrangement of his office at the District administrative office. Although the location of the photocopying machine and the telephone at the junior high school required Brown to walk farther than he had to at the headquarters location, this clearly did not make them inadequate nor did it amount to more onerous or intolerable working conditions.

Additionally, it was shown that following Brown's complaint to Tibbits about his need for more accessible telephone service, consistent with the efforts that Tibbits already had initiated to obtain portable telephone service for the Saturday program, the District attempted to accommodate Brown's need for more convenient access to, an outside telephone service. Unfortunately, by the time that the portable phone service was installed and working properly, Brown had resigned from the position. Despite the Charging Party's assertions that Brown was subjected to intolerable working conditions, other than the complaint about the telephone service discussed above, there is no evidence that Brown ever registered any other complaints about the unsuitableness of his work setting to management

[8]The argument about the necessity of Brown having a microwave telephone system to contact the TEC is overstated. Brown preferred the microwave system. However, he was not required by the District to use only the microwave telephone to communicate with TEC. Aside from some cost-savings, the microwave system offered no actual service advantage over the regular telephone system.

prior to his resignation.

Likewise, there has not been any evidence whatsoever that, after the transfer, the District imposed additional duties or responsibilities on Brown to make the coordinator assignment more onerous or less desirable in some way. Rather, it appears that the "prestige" of having the computer coordinator program housed at the District administrative office was very significant to Brown. Although Brown never explained what he meant by the statement that the transfer was tantamount to a "slap in the face," it is very likely that Brown, more than anything else, was disappointed by the move because he viewed the program as appearing less effective or important after it was transferred to the junior high school. Undoubtedly, the change in location, even more than the changes in the facilities at the junior high school site, contributed to Brown's frustration and disenchantment with the program.

In fact, Brown testified that nothing specific occurred in January 1986 to cause him to resign. He stated that the resignation was "the culmination of frustration" that had built up during the four-month period following the transfer. This frustration ultimately motivated him to resign. There is no indication that either Hanson or Tibbits exerted any coercion or pressure on Brown to force his decision.

For these reasons, it is concluded that the Charging Party has failed to meet its burden of proving constructive

discharge. Therefore, this part of the complaint will be dismissed. Additionally, that part of the Respondent's motion to dismiss that addresses this issue is granted.

VI. REMEDY

Section 3541.5(c) of the EERA states:

> The board shall have 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.

PERB has defined a properly designed remedial order as one which "seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair practice." Modesto City Schools, supra. The usual remedy in a case of unlawful discrimination or reprisal is a cease and desist order and, where appropriate, reinstatement and a back pay award with interest if the employee has been discharged. Santa Clara Unified School District (1979) PERB Decision No. 104. A cease and desist order is intended to prohibit a repetition of the unlawful conduct.

In this instance the only remedy sought by the Charging Party is an order that the District cease and desist from its unlawful conduct.[9]

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[9]Charging Party also sought a make-whole remedy of compensation for monetary losses incurred by Brown because of the District's alleged constructive discharge. However,, since that issue of the complaint is being dismissed, it is not necessary to consider this part of the proposed remedy.

Having found that the District did discriminate against James Brown, in violation of section 3543.5(a), by transferring the work site for the performance of the extra-duty computer coordinator assignment, it is appropriate to order the District to cease and desist from the unlawful conduct of discriminating against Brown because of his exercise of rights protected by the EERA.

It is also 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 at the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size, altered, defaced or covered by any other material. Posting such notice will provide employees with notice that the District acted in an unlawful manner and it is being required to cease and desist from its activity. It effectuates the purposes of the EERA that the 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 (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 the California District, the Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

VII. PROPOSED ORDER

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

A. CEASE AND DESIST FROM:

Discriminating against James Brown because of his exercise of the right to participate in an activity protected by the Educational Employment Relations Act, namely, membership in the Palo Verde Teachers Association, CTA/NEA and participation as a member of the Association negotiating committee.

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

1. 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 the period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

Those parts of the complaint which allege that the District unlawfully interfered with the rights of the members of the certificated bargaining unit by the actions taken against Brown and that the conditions created by the transfer of Brown's work site led to his constructive discharge from the computer coordinator position are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before

the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: December 31, 1986

W. JEAN THOMAS
Administrative Law Judge