STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAMPBELL EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1230
v.	)	PERB Decision No. 701
CAMPBELL UNION HIGH SCHOOL DISTRICT,	)	October 12, 1988
Respondent.	)	

Appearances: Ronald R. Filice, on his own behalf; Littler, Mendelson, Fastiff & Tichy, by Patricia P. White, Attorney, for Campbell Union High School District.

Before Hesse, Chairperson; Porter, Craib and Shank, Members.

DECISION AND ORDER

This case is before the Public Employment Relations Board (Board) on appeal by Ronald R. Filice of a Board agent's dismissal, attached hereto, of the charge that the Campbell Union High School District violated section 3543.5, subdivisions (a) and (b) of the Educational Employment Relations Act (codified at Gov. Code, sec. 2560, et seq.). We have reviewed the dismissal and, finding it free of prejudicial error, we adopt it as the Decision of the Board itself.

The unfair practice charge in Case No. SF-CE-1230 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

By the Board, except for Member Craib, whose dissent begins at page 2.

Member Craib, dissenting: For the purposes of evaluating the sufficiency of a charge, the factual allegations are deemed to be true. San Juan Unified School District (1977) EERB Decision No. 12.[1] Moreover, while it is appropriate to consider undisputed facts in determining whether a prima facie case is stated, disputed facts may not be resolved at this stage in the proceedings. Riverside Unified School District (1986) PERB Decision No. 562a. Here, the Board agent engaged in extensive and critical factual determinations involving various elements of the charging party's retaliation claim. By labeling the dismissal as "free of prejudicial error," the majority compounds this error.

The charge, on its face, states a prima facie case. The charging party engaged in protected activity by filing a grievance over his first reassignment. The respondent's knowledge of that activity is not disputed. The charging party asserts that, in retaliation for protesting his first reassignment, he was subject to a series of acts of harassment which affected his terms and conditions of employment, including a second reassignment in June 1987. Factors which establish a nexus between the protected activity and the adverse actions include timing and disparate treatment of the

[1]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

charging party,[2] both in comparison to other employees and in comparison to how he was treated prior to filing his grievance. See Novato Unified School District (1982) PERB Decision No. 210.

It was only after receiving the respondent's version of events, and requiring what in essence was an offer of proof from the charging party, that the Board agent concluded that the charge was insufficient. There are two things wrong with this approach. One, as noted above, the Board agent resolved a myriad of factual disputes in favor of the respondent. Two, the amount and type of information required from the charging party was excessive. A party need only state a prima facie case in its charge. A party should not be required to provide evidence in support of its allegations during the charge processing stage. Evidence is required to be submitted at a hearing after issuance of a complaint and not before.

While the attached dismissal letters from the Board agent reflect the resolution of facts that were obviously in dispute, the Board agent did occasionally assert that certain facts he relied on were undisputed. However, the appeal places even this in doubt, for the charging party denies that critical facts were undisputed and claims that he gave the Board agent

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[2]In his appeal, the charging party claims that he provided information to the Board agent which raises factual disputes as to whether the other employees were "similarly situated" (the Board agent concluded that they were not).

information which demonstrated the disputed nature of those facts. This information is not included in the dismissal letters. For example, the charging party disputes the Board agent's description of the qualifications and status of himself and other named teachers which the Board agent relied on in rejecting the notion that there was anything irregular about the charging party's reassignment and the terms and conditions of his employment thereafter. The charging party also claims the Board agent ignored his allegations that the Central Counties Occupational Center acted as the agent of the respondent district in its dealings with him. In addition, the charging party asserts on appeal that the Board agent erred in stating that no dates were provided as to critical events (the appeal notes the dates the charging party claims he provided to the Board agent).

In sum, the Board agent obviously, and improperly, resolved numerous factual disputes. On appeal, the charging party has brought into question the Board agent's assertions that certain critical facts were undisputed and lists in the appeal the information he claims to have provided that was not included in the dismissal letters. This matter boils down to one rather simple conclusion, which is that this case is extremely fact sensitive, as well as factually quite complicated, and it cannot be dismissed at this point in the process without improperly resolving factual disputes. Consequently, I would reverse the dismissal and issue a complaint.

PUBLIC EMPLOYMENT RELATIONS BOARD

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May 31, 1988

Priscilla S. Winslow
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Jay Russell, Superintendent
Campbell Union High School District
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Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Campbell Education Association CTA/NEA v. Campbell Union High School District, Unfair Practice Charge No. SF-CE-1230

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the Educational Employment Relations Board (EERA)[1] for the reasons which follow.

On December 8, 1987, the Campbell Education Association, CTA/NEA (Association) filed an Unfair Practice Charge against the Campbell Union High School District (District) alleging violation of the EERA section 3543.5(a) and (b). Specifically, Charging Party alleges that the District retaliated against employee Ron Filice by involuntarily transferring him in September 1987 to a full time assignment at the Vocational Center because he filed a grievance in June 1986. That grievance challenged the District's action in June 1986 when it involuntarily transferred him to a .60

(full time equivalent) assignment at the Vocational Center.

On March 30, 1988, the regional attorney wrote to Priscilla Winslow, attorney for Charging Party, and indicated that the charge failed to state a prima facie violation of EERA sections 3543.5(a) and (b). The letter (attached and incorporated by reference) discussed the facts alleged and information provided, set forth the applicable legal principles, and explained the deficiencies in the charge as written. The letter concluded by stating that if the allegations were not amended or withdrawn by April 11, 1988, they would be dismissed.

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[1]References to the are to Government Code sections et seq. PERB Regulations are codified at California Administrative Code, Title 8.

On April 13, 1988, PERB received a First Amended Unfair Practice Charge in the above-referenced matter. The Amended Charge was accompanied by a two-page letter providing information in support of the allegations. Subsequently, there was an exchange of inquiries and responses which culminated in a two and one half hour discussion held at the San Francisco PERB office on May 12, 1988 among Ms. Winslow, Mr. Filice and the undersigned.

The First Amended charge is essentially identical to the original charge. Charging Party alleges that: employee Filice was assigned during 1986-87 to teach a .40 FTE position in the ACE-East Program at Ross School and a .60 FTE position at the Vocational Center; in September 1987, he was involuntarily transferred from the ACE-East assignment at Ross School and assigned full-time to his previously .60 FTE position at the Vocational Center; by the 1987 transfer, the District retaliated against Filice because he filed the grievance in June 1986; and, the unlawful motivation is evident from the circumstances of his transfer as well as several incidents which occurred during the 1986-87 school year at the ACE-East site.

Charging Party also alleges, for the first time in the First Amended Unfair Practice Charge, that the District imposed onerous conditions upon employee Filice when it assigned him to teach full-time at the Vocational Center: he was required for the first time to teach six classes (1987-88) whereas he had taught five classes during his previous, split assignment (1986-87); he was denied a preparation period; and he was exposed to health and safety hazards.

To demonstrate a violation of EERA section 3543.5(a) the charging party must show that: (1) the employee exercised rights under the EERA, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.

Although timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it is not, without more, sufficient to demonstrate a violation of the EERA. Moreland Elementary School District (1982) PERB Decision No. 227. Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee, (2) the employer's departure from established procedures and standards when dealing with the enployee, (3) the employer's inconsistent or contradictory justifications for its actions, (4) the employer's cursory investigation of the employee's misconduct, (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, or (6) any other facts which might demonstrate the employer's unlawful motive. Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264. As presently written this charge fails to demonstrate any of these factors and therefore does not state a prima facie violation of section 3543.5(a).

The allegations of the amended charge and the information contained in the letter which accompanied it do not cure the deficiencies contained in the original charge. They are analyzed below.

District's Unlawful Motivation Evident from the 1987 Involuntary Transfer:

Charging Party alleges that circumstances surrounding the September 1987 transfer indicate unlawful animus on the part of the District. First, Charging Party intimates that the District failed to follow its own rules. Charging Party alleges that Filice was transferred twice within the two preceding years in contravention of the contract clause which discourages involuntary transfers of such frequency.

The charge does not allege facts to support this assertion. Instead, the transfer appears consistent, at least, with the terms of the contract. As stated in the letter addressed to Charging Party, dated March 30, 1988, the contract provision pertaining to involuntary transfers contains an exception: the second transfer within two years is allowed when it is occasioned by the closure of the school at which the teacher was previously assigned. Mr. Filice does not dispute that the ACE-East facility at Boss School was closed and that he, as well as the other ACE teachers at the ACE-West and ACE-East sites had to be transferred.

Second, Charging Party suggests that the District's justification for the transfer does not withstand scrutiny. Charging Party's challenges the District's claim that it was necessary that Mr. Filice fill, on a full-time basis, the position previously held by recently retired Dick Davis. The Association points out that Filice filled Davis' position, as a .60 FTE employee, when he was first transferred to the Vocational Center in September 1986. The Association argues that if the formerly 100 percent FTE position could be filled by a 60 percent FTE employee during 1986-87, it could continue to be filled in that manner during the 1987-88 school year. Any other decision gives rise to an inference of unlawful motivation.

This argument is not persuasive, (a) That the vacancy was filled by a 60 percent FTE employee during one year does not render it unreasonable for the District to make a different staffing decision the following year. For example, the District could conclude after its experience in 1986-87 that filling a formerly 1.0 FTE position with a .60 FTE employee was inadequate, (b) The District claims that, beginning in 1987-88, it wanted to fill the position with a full-time employee even though it had assigned Mr. Filice, during the previous year, to the position as a 60% FTE employee. Pointing out that the District managed during 1986-87 with a .60 FTE employee does not suggest that its decision to assign Filice full-time to the Vocational Center is based on illogic and is a pretext for an unlawful act.

Third, Charging Party advances an additional argument that the District's reasons for the transfer are spurious. Charging Party, in its letter of April 9, 1988, argues that it would have made "more education sense for the District to assign Paul Morrill to the CCCC slot because he has a credential

in Industrial Arts and has taught work experience." Charging Party explains that Mr. Filice, in contrast, does not have a credential in Industrial Arts, and, further, "the nature of instruction in that assignment lends itself better to an industrial arts background."

However, aside from bare assertions that Paul Morrill is more qualified simply because he holds a degree in Industrial Arts, Charging Party's allegations and information do not suggest the missing nexus between Filice's protected conduct and the District's assignment of him, on a full-time basis, to the Vocational Center. (a) Charging Party has not alleged facts nor provided information suggesting that Mr. Merrill's background is necessary, or better-suited than that of Mr. Filice, to carry put the assignment at the Vocational Center. Mr. Filice states that his assignment is to tutor, on a one-to-one basis, as many students as he can fit into his daily schedule. He teaches reading, writing and arithmetic. Sometimes he uses the technical manuals of the different trades classes: automatic transmissions, small engines, auto parts, air conditioning, and diesel engines. The books are effective teaching devices even though Filice has no specialized knowledge of their contents. Even Mr. Filice, who has no Industrial Arts background, admits that he is competent to carry out the assignment at the Vocational Center. That assertion is not disputed by the District.

(b) Charging Party has not alleged facts nor provided information which suggests that Mr. Morrill has specialized knowledge of the material taught in the five technical classes. Such knowledge is not a necessary component of an Industrial Arts background. And, as has been intimated above, even if there were evidence that he had such specialized knowledge, it would not suggest that he would be more competent than Mr. Filice to carry out the tutorial duties.

Fourth, Charging Party suggests on an additional ground that the transfer is suspicious. During the discussion held on May 12, 1988, Charging Party suggested that an inference of unlawful motivation arises from the fact that only the District among the five Districts participating in the CCCP assigns one of its full-time employees to the Vocational Center. The other tutors at the Center are hired directly by the CCCP and are paid considerably less than the District pays Filice. Charging Party suggests that the District has "gone out of its way" to send Mr. Filice to a remote and undesireable location.

This argument is not persuasive. No allegations nor information suggest that the District developed a special assignment to get rid of Filice because he filed a grievance in June 1986. (a) Mr. Filice was assigned to the Vocational Center on a 60% FTE basis prior to filing the grievance which allegedly gave rise to the retaliatory full-time assignment in September 1987. (b) Dick Davis, his predecessor, employed at least during the 1985-86 year, was assigned to the Vocational Center on the same basis. He too received a salary from the Campbell District and it was higher that the salaries paid to the other tutors employed by the CCCP. These facts are not in dispute.

Fifth, Charging Party asserts that employee Filice was treated disparately.

The charge alleges that other work experience teachers at ACE East were not re-assigned to other programs, but, instead, were moved "intact to another site." During the discussion of May 12, 1988, Mr. Filice clarified his objection. He objects to being singled-out from the other ACE-East and ACE-West personnel and, unlike the others, not being transferred to either of the two remaining ACE facilities: Westmont ACE or Del Mar A*CE.*

Charging Party, however, fails to allege sufficient facts to suggest that he was treated disparately. He concedes that Dave Peterson was transferred from ACE-East to Blackford High School to teach art. Peterson, according to Filice, was an art teacher whose assignment to the ACE program was temporary. He also acknowledges that George Flemming and Bill Mathiason, who taught work experience on a one-to-one basis to the special-need-type student in the ACE program and therefore were his counterparts at the ACE-West facility before it closed down, were not transferred either to Del Mar ACE or Westmont ACE. Flemming was assigned to teach at the Prospect and Westmont High Schools. Mathiason was assigned to the Del Mar and Blackford High Schools.

Sixth, Charging Party alleges that employee Filice's current assignment has been made more onerous than the previous year's assignment. He is now required to teach 6 instead of 5 periods per day. He has effectively been denied his prep period. Additionally, he has been assigned to work in the middle of the District Auto Shop Facility, which causes him to be exposed to noxious fumes and unhealthy levels of noise. He complained to Cal-OSHA about the conditions, which resulted in the District being cited for several health and safety violations. The charge alleges further that the District could have placed Filice in a work location other than the Auto Shop.

However, for several reasons, Charging Party's allegations and information do not support his claim that the conditions he describes were imposed to make his assignment more onerous. (a) Charging Party has presented no information to suggest that the Campbell District, not the CCOP, either assigned Mr. Filice to a particular classroom at the Vocational Center or controlled the allegedly unhealthy working conditions which prevailed there. There is no dispute concerning the distinction between the District's program and that of the Vocational Center. . The Vocational Center is administered by the Central County Regional Occupational Program (CCCP), a joint-powers entity of which the District is a part. Charging Party has conceded the error of its allegation that the District, rather than the CCCP, was the recipient of an OSHA, citation.

(b) Charging Party has not alleged facts nor provided information to suggest that the District requires him to work a longer day than other employees at the Vocational Center or than was required of Davis, his predecessor at the Vocational Center. There is no dispute concerning the schedule at the Vocational Center. There is a three hour session in the morning and one in the afternoon.

(c) Charging Party has not suggested that only Mr. Filice has been deprived of a preparation period. Certain facts are not disputed. Other teachers

employed by the CCCP do not have a preparation period structured into their schedule. These conditions prevailed during Mr. Filice's assignment at the Vocational Center during 1986-87. They existed as well during the tenure of Dick Davis, the Campbell District teacher previously assigned to the Vocational Center.

(d) Mr Filice concedes that this is not the first year he has been without a preparation period. During 1986-87, as well, there was no preparation period structured into his daily schedule. Then, he was assigned to work at the Vocational Center during the morning three hour period as well as to work .40 FTE in the ACE program. He was at the ACE-East facility for three hours two days a week and he did field work, primarily visiting employers, on behalf of the ACE students during the other three days. Nevertheless, he managed informally to take a "preparation period" during the two days per week he conducted student contact hours at the ACE-East facility.

(e) Mr. Filice concedes that he has not attempted to structure a "preparation period" into his work day at the Vocational Center during either 1987-88 or 1986-87. He explains that he senses an expectation by Center personnel that teachers maintain student contact continually throughout the two three-hour sessions.

The allegations discussed above do not suggest that the District assigned Bon Filice on a full-time basis to the Vocational Center beginning in September 1987 because he filed a grievance in June 1986. In the following portion of this dismissal letter, we discuss Charging Party's contention that events between June 1986 and September 1987 reveal the unlawful motivation.

Alleged Acts of Harassment Directed Towards Employee Filice Throughout the 1986-87 School Year;

Charging Party has alleged that the District harassed Mr. Filice in specific ways during 1986-87 because he filed the grievance in June 1986 and that such manifestations of animus culminated in his being transferred, commencing in September 1987, to a full-time position at the Vocational Center. However, the incidents do not, alone or in combination, suggest a connection between the filing of the grievance and the District's decision to transfer Filice involuntarily to the full-time position at the Vocational Center beginning in September 1987.

Book Orders: Charging Party alleges that Mr. Filice's request for book orders for his ACE class were denied without explanation by his immediate supervisor, Mr. Zelina. Zelina works directly under Estrada. Zelina was offended by Filice's grievance against Estrada in June, 1986.

During the discussion of May 12, 1988, Mr. Filice stated that neither he, nor, to his knowledge, any other teacher ever had submitted and obtained a book order for work experience classes. Mr. Filice's objects to his request being denied without comment and states that the justification now communicated by the District's attorney—that the particular book is old-fashioned—is a

typically vague and unfounded response. He answers the additional District response—that he ordered 45 books for 22 students—by stating that he knew the District would divide whatever it was willing to give him by one half.

Let us examine whether the District's conduct reveals unlawful motivation. First, Charging Party states that his book order was denied in February 1987, between seven and eight months after he filed the June 1986 grievance. The two events did not occur in close temporal proximity to one another.

Second, no disparate treatment is suggested here. No allegation suggests that other ACE or work experience teachers submitted or were granted book orders.

Third, Charging Party complains that Supervisor Zelina denied the order without explanation, yet Mr. Filice concedes that he at no time asked for one.

Fourth, there are no facts alleged nor information provided to support the conclusion that Zelina was offended by employee Filice's grievance.

Fifth, the charge does not allege any of the other indices of unlawful motivation. Novato Unified School District (1982) PERB Decision No. 210.

These allegations do not suggest that district officials who decided to transfer Filice to a 1.0 FTE position at the Vocational Center were motivated by an antagonism toward him because he filed a grievance in June 1986. Even assuming, for the sake of argument, that denial of book orders imposes a burden on his terms and conditions of employment, there is no "nexus" suggested here.

Keys; Charging Party alleges that Mr. Zelina, Filice's supervisor, denied him keys. Zelina is a good friend of the District Superintendent, who ultimately rejected Filice's grievance in June, 1986. Other teachers at the site had keys and Filice had been given keys in connection with previous assignments.

On May 12, 1988, Mr. Filice provided additional information concerning this aspect of the charge. He describes his assignment at ACE-East as consisting of three hours, two days a week, in a classroom conducted and shared by ACE instructors Bob Wilson and Rudy Whitmer. He had a desk in the corner which he surrounded by a shield to create an office in which he could work one-to-one with his work experience students. Wilson and Whitmer worked full-time at the facility and both had keys. Supervisor Zelena originally issued keys to Filice, but then took them away, promising to return them. Filice explains that, without keys, he was unable to gain access to the classroom prior to 8:00 a.m., during lunch or after school hours. He states that he was unable to go to the restroom through the classroom area without wedging the access door in an "open" position.

Let us examine whether any of the other Novato indicators of unlawful motivation are present. First, no dates are alleged. It is not clear when Zelena took the keys which were originally given to Mr. Filice. Consequently, the allegations do not suggest that the alleged adverse act occurred in close

temporal proximity to the exercise of EERA rights.

Second, the allegations do not suggest that Filice was subjected to disparate treatment. Neither the allegations nor the information presented by Charging Party describe employees who are similarly situated. Mr. Filice states that he is unaware whether Messrs Flemming and Mathieson, his counterparts at the ACE-West facility, were issued keys. Although it is alleged that Whitmer and Wilson were issued keys, they were not situated similarly to Mr. Filice. They were assigned to ACE-East as full-time employees; he was to be there for three hours, two days a week. A room was assigned to them; a desk, shared with another woman teacher, was assigned to Mr. Filice.

Third, Charging Party does not allege that the District refused/failed to follow its own rules or departed from past practice. That Filice had been provided keys at previous work sites does not suggest a past practice without facts which at least suggest a similarity between the ACE Bast and previous assignments. Mr. Filice was differently situated during the prior year. He had a split assignment at Leigh and Branham High Schools teaching work experience.

Fourth, Charging Party has failed to allege any of the other indices of unlawful motivation. Novato, supra.

These allegations do not suggest a nexus between Filice's exercise of rights in June 1986 and either the District's denial of keys or his transfer to a 1.0 FTE position at the Vocational Center.

Term Paper;- Charging Party alleges that Filice assigned a term paper to his work experience students and District Administrator Mel Estrada, who was named in the first grievance, severely criticized him. Estrada told Filice that the assignment was too demanding for ACE students. Charging Party also alleges that Filice had assigned term papers of the same type and level of difficulty to similar work experience students in the past and had not been criticized by management. Filice, during the discussion on May 12, 1988, described the criticism as an insult and embarassment which took place in the presence of his collegues. Additionally, he argues that the criticism was unfounded. His students had all completed their assignments and done very well. It clearly, in his opinion, was not beyond their level of competence.

Let us examine whether the facts alleged and the information provided support Charging Party's claim of nexus. First, no dates are provided. As discussed previously. Charging Party is therefore unable to suggest suspicious timing between the allegedly adverse criticism and the filing of the grievance in June 1986.

Second, there are no allegations of disparate treatment. Charging Party has not alleged facts nor provided information describing the standard imposed on other ACE teachers.

Third, the charge does not allege that the District failed to follow its procedures. His claim that he was justified from an academic point of view in

making the same assignment as he did in previous years is not persuasive. He admits to teaching in a different program and at a different level during the prior year. When he was at Leigh and Branham High Schools he was a teacher in the general work experience program. The ACE program, in contrast, is directed to students with special needs. Consequently, his past practice of assigning term papers of the same type and level of difficulty is of no apparent relevance. Estrada's criticism may have turned out to be wrong, given Filice's claim that the students managed to complete the assignment and did "very well". But, it cannot be said that Estrada's claim was inconsistent or illogical in the context of the general academic program.

Fourth, none of the other indices of unlawful motivation are alleged. Novato, supra.

For the reasons stated above, the allegations and information doe not suggest unlawful motivation.

Use of Copy Machine; Charging Party has alleged that throughout the 1986-87 school year employee Filice was constantly scrutinized and reprimanded for alleged misuse of the District's copy machine. At the same time, one of Filice's colleagues used the machine for his private real estate business "with the apparent condonation by District management". Supervisor Zelena sat twenty feet away from the machine.

Let us examine whether these allegations fail to suggest a nexus between the exercise of rights by Filice and the District's alleged adverse acts. First, no dates are alleged. The charge merely alleges vaguely that the scrutiny and reprimands occurred "throughout" the year. Even if such allegations could be construed to suggest "suspicious timing", timing, alone, is insufficient to establish unlawful motivation. Moreland, supra.

Second, Charging Party does not allege that the District failed to follow its own rules. On the contrary, the allegations intimate that Filice was reprimanded for unauthorized use of the copying equipment. Apparently, the District's rules were enforced against him.

Third, the allegations are insufficient to suggest disparate treatment. The allegation that Zelina sat about 20 feet from the machine, however, even if proven at an eventual hearing, could not establish that the District knew of the co-worker's improper use of the machine. Mr. Filice concedes that he has no knowledge that Zelina knew of his co-worker's abuse of the District rule against using the copy machine for any other task besides ACE-East business. Mr. Felice believes that, given the proximity of Zelina's desk, the supervisor "must have known" of the co-worker's conduct. This speculation is insufficient to establish the elements of a prima facie violation.

Staff Meetings; Charging Party alleges that throughout the 1986-87 school year Filice was not notified of, nor invited to, staff meetings for work experience teachers. It is alleged that Filice participated in these meetings in the past. Charging Party also alleges that neither Estrada nor Zelina

arranged for alternate times for Filice to obtain information concerning District and state policies, changes therein, and management expectations.

During the discussion with Mr. Filice and Ms. Winslow, on May 12, 1988, Mr. Filice stated that the District meetings involved three full-time work experience teachers, the District's contact person at the Vocational Center (George Cluff who "drops in from time to time") and the supervisor. In his view, the meetings could have been changed so that they did not conflict with his obligation to be at the Vocational Center. He complains that he was deprived of the collegial interaction with collegues as well as unspecified information. He is unable to recall an instance in which he learned too late of information of which he would have been apprised had he been invited to the bi-monthly meetings. He states that he assumes, however, that there must have been information communicated and discussions which would have been useful to him in the course of his work as an ACE-East work-experience teacher.

Let us examine whether these allegations raise an inference of unlawful motivation on the part of the District. First, Charging Party has not alleged on what date Mr. Filice was first excluded from the bi-monthly staff meetings. However, even assuming that it occurred at the outset of the 1987-88 year, and it followed closely the filing of the June 1986 grievance, suspicious timing, alone, is insufficient to establish unlawful motivation. Moreland, supra.

Second, Charging Party does not allege that he was treated disparately. Neither the allegations nor the information provided by Charging Party compare the circumstances of Filice with those of similarly situated employees. It is undisputed that, commencing in September 1986, employee Filice: ceased to participate in the regular work experience program; had a split assignment; teaching 60 percent of the time at the Vocational Center and 40 percent at the ACE East Program at Boss School; and, was required by his schedule to be at the Vocational Center on Friday mornings, when work experience staff meetings were held. Charging Party has not suggested that there were other employees similarly situated and that they, in contrast to Filice, were notified of and included in the staff meetings for work experience teachers.

Third, neither the allegations nor the information provided suggests that the District failed/refused to follow its rules or adhere to its past practice. There is no description of a past practice applicable to Filice's present circumstances. His situation had changed since he participated while assigned to Leighand Branham High Schools in meetings scheduled for work experience instructors. Additionally, there is no claim that Mr. Davis, Filice's predecessor, participated in work experience staff meetings during his tenure as a Campbell District employee assigned to the Vocational Center. Davis retired in June 1986.

Fourth, Charging Party has not alleged facts nor presented information describing other indices of unlawful. motivation. Novato, supra.

These allegations do not suggest a nexus between employee Filice's exercise of rights in June 1986 and the District's alleged adverse acts.

Annual Luncheon; Charging Party alleges that Mr. Filice and the ACE students were not invited to an annual luncheon held for work experience teachers and students. Charging Party claims that in past years he and ACE students had been invited and honored at such luncheons.

During the conversation with Mr. Filice and Ms. Winslow on May 12, 1988, he suggested that the ACE students were not invited to attend the annual luncheon as a means of excluding him. He is unable to estimate the number of ACE work experience students at the four ACE facilities, but states that there were approximately 22 students at the ACE-East location.

Let us examine the facts alleged and information provided to ascertain whether Charging Party has suggested a nexus between the District's adverse conduct and Mr. Filice's grievance of June 1986. First, no dates are alleged and therefore it is not possible to determine whether the failure to invite employee Filice occurred in close temporal proximity to the date on which he filed a grievance in 1986.

Second, the allegations and information presented do not suggest that the District refused/failed to follow its own rules or departed from past practice. That Filice, in the past, had been invited as a work experience teacher to such a luncheon is insufficient to suggest that he was entitled to such an invitation as an ACE-East work experience teacher. While at Leigh and Branham, he was a teacher in the District's regular work experience program. Additionally, Charging Party claims that in past years ACE teachers were invited to the luncheon. Perhaps ACE teachers were -invited in the past- because they were simultaneously teaching in the regular work-experience program. No allegations or information presented by Charging Party discount such an explanation. Finally, even if the District did invite teachers in past years who taught exclusively in the ACE program, a decision not to invite them or their students during the 1986-67 school year does not ipso facto raise an inference of unlawful motivation.

Third, Charging Party has not suggested that Filice suffered disparate treatment. Charging Party does not allege that other teachers who taught exclusively in the ACE program were invited to the annual luncheon during the 1986-87 year.

For the reasons set forth above, these allegations do not suggest that the District was discriminatorily motivated against employee Filice because he had filed a grievance in 1986.

Pay for Extra Eight Days": Charging Party alleges that he was denied 8 days pay which is accorded to work experience instructors. It is alleged that the contract entitles Mr. Filice to such compensation.

During the discussion on May 12, 1988, Mr. Filice stated that he had a conversation with management representative Estrada on June 12, 1987, the last day of the ACE-East session. Estrada announced to Filice that the District would not assign him to work extra days beyond the end of the ACE-East work

year. Subsequent to that announcement, Mr. Filice worked for five days and on June 25, 1987 grieved the District's refusal to pay him for eight days work under the contract.

Supervisor Estrada replied in writing to Mr. Filice's grievance explaining the District's position: the relevant contract language was permissive; the provision is intended to apply primarily to full-time work-experience teachers; and, Mr. Filice's circumstances distinguish him from other work experience teachers who have been given additional work assignments. Estrada listed several differences: Filice's assignment was only .40 FTE; Filice had the previous week in which to complete work experience duties because his other assignment, at the Vocational Center, had ended a week earlier; Filice was not scheduled to participate in, and therefore did not need to prepare for, next year's work experience program; his work experience assignment was totally devoted to ACE students who typically do not continue in the following year's program; and, due to the nature of the A*CE* work experience program, he had none of the classroom instruction responsibilities required of the full-time work experience teachers during the entire school year. Estrada concluded that for the reasons listed above he saw no reason to assign extra days work to Mr. Filice and resolved that any work left undone "can and will be picked up by the person assigned for next year."

Let us examine whether the facts alleged and information presented suggest unlawful motivation on the part of the District. First, the allegations are insufficient to suggest "suspicious timing". The denial was made by Mel Estrada on June 12, 1987, approximately one year after he filed the grievance contesting the September 1986 transfer. A date one year later does not qualify as close temporal proximity.

Second, the allegations do not suggest that the District failed to follow its own rules. Charging Party's allegation that work experience teachers are contractually entitled to this compensation is flawed in two regards. (a) The applicable section of the collective bargaining agreement Art. XVI, Section G, item 1) states that the District "may" be required to work a maximum of 8 week days after the last work day in the calendar. The contract does not state that all work experience teachers, including those teaching the A*CE* East Program, "shall" receive a days pay for a days work. (b) Charging Party admits that he was denied an assignment by Estrada prior to working an extra five days on work Estrada apparently felt could be done by someone else during the 1987-88 year.

Third, the allegations and information presented by Charging Party do not suggest that Mr. Filice was treated disparately. Charging Party does not compare Filice's situation with that of other persons similarly situated.

Fourth, no allegations nor information suggests other indices of unlawful motivation. Novato, supra.

These allegations are insufficient to suggest a nexus between Filice's grievance of June 1986 and either the denial of eight days' pay or the

involuntary transfer to the 1.0 FTE assignment at the Vocational Center in September 1987.

Conditions at New Assignment (6 periods, prep period, noxious fumes); The adverse conditions at the new assignment were allegedly imposed within the six month period immediately preceding the filing of the unfair practice charge. Therefore, they are not time-barred. EERA Section 3541.5 (a)(2). The allegations, if sufficient, could state a separate violation as well as support Charging Party's claim that the transfer of Filice to the 1.0 FTE position was unlawfuly motivated.

During the discussion with Mr. Filice and Ms. Winslow, the regional attorney stated that, by the District's account, the Vocational Center is administered by the CCCP, not the Campbell District. For that reason, the OSHA Complaint initiated by Mr. Filice was issued against the CCOP, not the District. The latter did not control the facility to which Mr. Filice was assigned.

Charging Party, however, does not allege facts nor provide information suggesting a nexus between the alleged imposition of more onerous working conditions and the exercise, by Filice, of protected activity. (a) Charging Party has not alleged that the allegedly adverse acts can be attributed to the Charged Party. There is no indication that the District had anything to do with his assignment to the particular location he found offensive or his reassignment. (b) Charging Party has not alleged that whoever made decisions affecting employee Filice at the Vocational Center had any knowledge of the grievance filed by him against the District in June 1986. (c) There are no allegations suggesting close temporal proximity between the protected activity and the adverse acts. The conditions imposed in September 198? followed the filing of the June 1986 grievance by more than fifteen months. (d) There are no allegations suggesting that the District failed to follow its own rules, diverged from past practice, refused to explain the reason for the imposition of the conditions, and/or imposed the conditions on Filice and not on teachers similarly situated. There are no allegations suggesting any of the other indices of unlawful motivation. Novato Unified School District (1982) PERB Decision No. 210.

Charging Party, by its representative Ms. Winslow, has at times stated to the regional attorney that the incidents described above are unprecedented: he was not subjected to this type of treatment during his preceding years of employment. Ms. Winslow suggests that the difference owes to Mr. Filice having filed the June 1986 grievance.

Charging Party has provided a copy of the June 1986 grievance. In it, Mr. Filice objects to his transfer from Leigh and Branham Schools to the .60 FTE assignment at the Vocational Center and .40 FTE assignment at ACE-East. Mr. Filice claims that the transfer was made for punitive reasons and in order to get him out of the District. He contends that the 1986-87 transfer constitutes retaliation far his having: made reports against other work experience teachers; been involved in a controversy over a student's grade; been engaged in a conflict with a particular counselor concerning a particular student; been part of an incident several years earlier with the principal at

Del Mar High School; been blamed possibly for a number of program changes or corrections; and been party to disputes concerning student awards. He also complains that he was mistreated when others in the Department were informed before he was of his possible transfer to another site within the District.

The text of the grievance indicates that, even prior to its being filed, Mr. Filice, rightly or wrongly, perceived himself to be mistreated and retaliated against by the District, and, further, that the suspected reasons for the District's retaliation consisted of conflicts in which he was involved with collegues and management personnel. Evidence presented by the Charging Party cast doubt on the assertion that events following the filing of the June 1986 grievance represent a change in the relationship among Mr. Filice, his co-workers and management personnel or the way Mr. Filice perceived himself to be treated by the District.

Conclusion:

The new allegations contained in the Charging Party's First Amended Unfair Practice Charge and the information provided by letter, dated April 9, 1988, and discussion on May 12, 1988, do not cure the deficiencies of the original charge, which were described in the regional attorney's letter of March 30, 1988. The First Amended Unfair Practice Charge contains allegations of additional protected activity and additional adverse acts directed against Filice. But these allegations do not provide the missing element: a nexus between the filing of the grievance by Filice in June 1986 and the decision of the District to assign Filice as a full-time employee to the Vocational Center commencing September, 1987. Nor do the allegations suggest a nexus between the filing of the grievance or any other protected activity and the imposition of allegedly onerous conditions at the Vocational Center in September 1987.

Accordingly, for the reasons stated in the letter of March 30, 1988, attached and incorporated here by reference, and those stated above, the allegations are dismissed. No Complaint will be issued.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph or certified or Express United States mail postmarked not later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)j.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof-of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specific time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

JOHN SPITTLER
Acting General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
177 Post St., Suite 900
San Francisco, CA 9410-4737
(415) 557-1350

March 30, 1988

Priscilla S. Winslow
436 14th Street, Suite 1302
Oakland, CA 94612

Re: Campbell Education Association, CTA/NEA v. Campbell Union High School District, Unfair Practice Charge No. SF-CE-1230

Dear Ms. Winslow

On December 8, 1987 the Campbell Education Association, CTA/NEA (Association.) filed an Unfair Practice Charge against the Campbell Union High School District (District) alleging violation of the EERA section 3543.5(a) and (b). Specifically, Charging Party alleges that the District retaliated against employee Ron Filice by involuntarily transferring him in September 1987 to a full time assignment at the Vocational Center because he filed a grievance in June 1986. That grievance challenged the District's action in June 1986 involuntarily transferring him to a 60% assignment at the Vocational Center.[1]

Charging Party has also alleged that the District subjected Mr. Filice to harassment and disparate treatment. During Summer 1986, employee Filice was not given sufficient time to make a presentation of his grievance to the Board of Education. Throughout the 1986-87 school year, the District: (a) denied Filice's request for book orders for his work experience class; (b) denied him keys to one of the two sites to which he was to report during the week; (c) criticized him for assigning a particular term paper to his work experience students; (d) constantly scrutinized and reprimanded him for allegedly misusing the District's copying machine; (e) failed to notify and invite him to the staff meetings held for work experience instructors; (f) failed to invite him and his work experience students to an annual luncheon; and, (g) denied

[1]I am sending this letter because we have had difficulty reaching each other by telephone.

him the eight days of pay which work experience instructors are contractually entitled to receive.

The investigation in this case has revealed the following undisputed facts. Prior to September 1986, Mr. Filice was teaching work experience courses at the Leigh and Branham High Schools. In September 1986, he was transferred to teach 60 percent of his time at the Vocational Center and 40 percent at the ACE-East Program located on the Ross School campus. He was assigned to teach students with special needs at the Vocational Center (also known at the Central Counties Occupational Center, or CCOP) and work experience classes at ACE-East. The ACE work experience teaching assignment was not part of the District's regular work experience program. Filice grieved the involuntary transfer on the ground that he had no experience working with students with special needs and therefore did not wish to work at the Vocational Center.

ACE-East work experience staff meetings were held on Friday mornings at the Ross School site. However, Mr. Filice's schedule required him to be at the Vocational Center on Friday mornings. Therefore, Mr. Filice was scheduled to attend staff meetings at the ACE-East site at another time and with non-ACE staff.

An annual luncheon is held for participants in the regular work experience program. ACE-East and ACE-West students, although involved in work experience programs, were not considered to be part of the regular program. Neither Vocational Center teachers nor ACE students and teachers have ever been invited to the luncheon held in connection with the regular work experience program. Mr. Filice was never invited to attend.

Some work experience teachers have been paid an extra eight (8) days of work at the end of the school year. Article XVI, section G1 of the contract provides in pertinent part:

> Individual work experience teachers <u>may</u> be required to work a maximum of eight (8) week days immediately after the last work day in said calendar.(Emphasis Added.)

The District explained to Mr. Filice reasons it did not offer him eight extra days work at the end of the 1986-87 school year. First, Mr. Filice only had a 40 percent assignment at the ACE-East Facility. Second, he had been re-assigned to teach full-time at the Vocational Center beginning in September

1987. Consequently, he had no need to prepare for the next year's work experience program. Third, the ACE-East work experience curriculum is different from the regular work experience program. Mr. Filice had none of the classroom instruction responsibilities required of the full-time work experience teachers at the regular comprehensive high schools during the school year.

In June 1987, the District, claiming budgetary constraints, closed both the ACE-East and the ACE-West sites. All of the teachers assigned to the two sites were involuntarily transferred effective the beginning of the 1987-88 school year. Dave Peterson, Mike Ruiz, Bill Perkins, Rudy Whitmer, and Bob Wilson had, like Filice, been transferred effective September. 1986 when the ACE-East and West sites opened.

Beginning September 1987, Mr. Filice was transferred to the Vocational Center to fill a full-time assignment teaching students with special needs. The change in assignment did not result in appreciable differences in work hours, duties and commuting distance.

The District-presented three reasons to Mr. Filice for transferring him to a full-time assignment at the Vocational Center: it needed to replace a full-time teacher who recently retired at the Vocational Center; he (Filice) was the only District teacher who had experience teaching at the Vocational Center; and, it caused the least disruption within the teaching staff.

The Association and District are parties to a collective bargaining agreement effective between September 1, 1985 and August 31, 1988. Article XV (Transfer), section d, (district-initiated transfers), paragraph 1 states in pertinent part:

> No teacher will be involuntarily transferred more than once during the school year, and the District will make every effort not to involuntarily transfer a teacher more than once every two (2) years, exclusive of transfers made necessary by the closure of schools. (Emphasis added)

To demonstrate a violation of EERA section 3543.5(a) the charging party must show that: (1) the employee exercised rights under the EERA, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or

threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. Novato Unified School District T1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.

Facts establishing one or more of the following factors must also be alleged to suggest a "nexus" between the employee's protected activity and the District's adverse act.: (1) the employer's disparate treatment of the employee, (2) the employer's departure from established procedures and standards when dealing with the employee, (3) the employer's inconsistent or contradictory justifications for its actions, (4) the employer's cursory investigation of the employee's misconduct, (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons, (6) close temporal proximity of the adverse act to the protected conduct, or (7) any other facts which might demonstrate the employer's unlawful motive. Novato Unified, School District, supra; North Sacramento School District (1982) PERB Decision No. 264.

The allegations of the charge, as presently set forth, are insufficient to state a prima facie violation of EERA section 3543.5(a). First, the allegations do not suggest that the transfer of Mr. Filice to a full time position at the Vocational Center was adverse to his interests. He continues to have the same duties, hours and commute time. The involuntary transfer was consistent with the terms of the contract. The transfer was generated by the District's closure of the ACE-East site.

Second, the allegations do not suggest a nexus between the District's involuntary transfer and Mr. Filice's June 1986 grievance. (a) The temporal proximity between the alleged exercise of rights and the District's allegedly adverse action is remote. The transfer, effective September, 1987, was made at least one year after the June 1986 grievance was filed. (b) There are no allegations of disparate treatment. On the contrary, it appears that similarly-situated teachers were also transferred from the work experience programs at ACE East and ACE West commencing September 1987. At least five other teachers in the ACE Program were transferred involuntarily on two occasions within the preceding two year period. (c) The

allegations do not suggest that the District failed to follow its own rules. On the contrary, the transfers appear consistent with the terms of the collective bargaining agreement. By its terms, it is permissible for the District to transfer an employee involuntarily twice within a two year period when the facility at which she/he was teaching has been closed down. (d) The allegations of harassment of Mr. Felice during his 1986-87 assignment at the Vocational Center and ACE-East do not suggest a discriminatory motive. No facts are alleged to connect the alleged acts of harassment and the filing of the June 1986 grievance. Novato, supra. See discussion, infra.

Third, the incidents of alleged harassment during the 1986-87 school year are not intended to state independent discrimination violations.[2]. Further, the incidents could not be alleged as separate violations because they are not alleged to have occurred within the 6 month period preceding December 8, 1987, the date on which the Unfair Practice was filed. EERA section 3541.5(a)(2).

For the reasons stated above, the charge as presently written does not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty

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[2]On March 3, 1988, you and I had a lengthy discussion concerning the allegations of the above-referenced charge. You stated that the alleged incidents of harassment are intended merely to provide background information which is probative of the employer's unlawful motivation in transferring Filice to a full time position at the Vocational Center. They are not intended to serve as the basis for independent violations of EERA section 3543.5. You explained that the charge does not contain allegations describing the date on which each incident occurred because it is not necessary to demonstrate that background incidents occurred within the 6 months period preceding the filing of the Unfair Practice Charge.)

of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 11, 1988, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557 1350.

Sincerely,

PETER HABERFELD
Regional Attorney