STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MITCHELL A. KAADY, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Case Nos. LA-CE-3058 LA-CE-3099 PERB Decision No. 957 November 18, 1992

Appearances: Betty Levering for Mitchell A. Kaady; Ron Apperson, Attorney, for Los Angeles Unified School District.

Before Camilli, Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Mitchell A. Kaady (Kaady) of a proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ dismissed Kaady's complaint which alleged that the Los Angeles Unified School District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by delaying Kaady's return to

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

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

work from industrial injury/illness leave and by issuing three written disciplinary actions.

The Board has reviewed the entire record in this case, including the proposed decision, the exceptions and responses thereto, and the transcript of the hearing, and finding the proposed decision to be free of prejudicial error, adopts it as the decision of the Board itself.

On appeal, Kaady contests the ALJ's rejection of his post hearing brief as untimely. Pursuant to PERB Regulation 32136,[2] a late filing may be excused for good cause only. The Board finds that Kaady has failed to establish good cause to excuse the late filing. Accordingly, this exception is rejected.

ORDER

The unfair practice charge and complaint in Case Nos. LA-CE-3058 and LA-CE-3099 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Camilli and Caffrey joined in this Decision.

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

[2]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32136 states:

> A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MITCHELL A. KAADY, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case Nos. LA-CE-3058 LA-CE-3099 PROPOSED DECISION (5/22/92)

Appearances: Betty Levering and Mitchell A. Kaady, on behalf of Mitchell A. Kaady; Ron Apperson, Assistant Legal Adviser, for Los Angeles Unified School District.

Before W. Jean Thomas, Administrative Law Judge.

PROCEDURAL HISTORY

On January 29, 1991,[1] Mitchell A. Kaady (Kaady or Charging Party) filed an unfair practice charge with the Public Employment Relations Board (PERB) against the Los Angeles Unified School District (District or Respondent). The charge alleged a violation of Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA).[2]

[1]A11 dates herein refer to 1991, unless otherwise noted.

[2]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an

On June 24, the office of the general counsel of PERB, after an investigation of the charge, issued a complaint. The complaint alleged that the Respondent took adverse action against the Charging Party in retaliation for his exercise of rights guaranteed by EERA in violation of section 3543.5(a). On July 22, Respondent filed an answer to the complaint denying all material allegations and asserting an affirmative defense.

On June 24, Charging Party filed a second unfair practice charge against the District, alleging additional unlawful conduct in reprisal for his exercise of various rights guaranteed by EERA, including the filing of Unfair Practice Charge No. LA-CE-3058 and representation by the Union on several occasions.

On July 24, PERB issued a complaint based on these allegations, charging the District with a violation of section 3543.5(a) and (b).

An informal conference was conducted concerning both cases on July 24, but the dispute was not resolved. Respondent filed an answer to the latter complaint on July 26, again denying all material allegations.

A PERB administrative law judge consolidated the two cases for formal hearing on July 29.

The formal hearing was held on October 22 through 24, and recessed. On the second day of hearing (October 23), Charging

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applicant for employment or reemployment.

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

Party filed a request to amend charge No. LA-CE-3099 to add additional adverse actions by the District which allegedly led to his dismissal on October 8. An order granting the request to amend the complaint was issued on November 7, and required Respondent to file an amended answer. The amended answer was filed November 15, denying the allegations raised in the amended complaint.

On December 11, the hearing was reconvened to litigate the amended charges. The hearing was completed on that date.

Post-hearing briefs were filed and the case submitted for proposed decision on February 24, 1992.[3]

INTRODUCTION

In case No. LA-CE-3058, Charging Party alleges that the District delayed his return to work in December 1990 from industrial injury/illness leave because he complained to his supervisors about an unsafe work assignment in October 1990 and exercised his contractual right to take industrial illness leave in November 1990.

In case No. LA-CE-3099, he alleges that the District, acting through his supervisors Victor Parrillo (Parrillo) and Roderick Macdonnell (Macdonnell), took disciplinary action against him,

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[3]Charging Party filed an untimely brief on March 3, 1992, with a request that its late filing be excused. The basis for the request was that neither Charging Party nor his representative, Betty Levering, received notice that the hearing transcript had been issued. Following an investigation of this claim, the request was denied. Thus, Charging Party's brief was not considered in the preparation of this decision.

in the form of three written notices of unsatisfactory service between February and July 1991 that eventually resulted in his termination from employment in October 1991. These latter adverse actions allegedly were in reprisal for Charging Party's exercise of the protected rights cited in case No. LA-CE-3058, the filing of charge No. LA-CE-3058 in January 1991 and the use of Union representation on several occasions between October 1990 and June 1991.

The District denies that any of the alleged unlawful conduct violated EERA, and asserts that all personnel actions taken against the Charging Party were for good cause.

FINDINGS OF FACT

Jurisdiction

Charging Party is an employee within the meaning of section 3540.1(j) and Respondent is a public school employer within the meaning of section 3540.1(k). The Los Angeles County Building & Trades Council (Union) is an employee organization within the meaning of section 3540.1(d)' and is the exclusive representative of Unit E, a bargaining unit of skilled crafts employees of the District. This unit includes the classifications of electrician and senior electrician.

Background and Employment History

Kaady was employed by the District for nine years as an electrician. For the five years prior to October 1989, he worked as a "troubleshooter" in District maintenance area 2 under the supervision of Vernon Green (Green). The troubleshooter is

responsible for detecting and repairing a variety of electrical problems that require a short period of time to correct. These duties include repairs to fire alarm and bell systems that do not require major construction or underground electrical work. Kaady described his working relationship with Green as "mostly harmonious."

In October 1989 Kaady transferred to maintenance area 19 (Area 19) and became a member of the newly-created fire alarm inspection crew. This transfer represented a reduction in the scope of Kaady's duties as a troubleshooter.

Initially, the crew consisted of six employees—three electricians (Kaady, Joel Miller and John Newman [Newman]) and three maintenance workers. Prior to commencing their new assignment, the electrician members of this crew were given an examination and some instructions that certified their preparation as fire alarm inspectors. Otherwise, their tasks on the crew were within the scope of typical duties contained in the District's class description for electrician. The first line supervisor of this crew was Bill Bourland (Bourland), a senior electrician. The second level supervisor was Macdonnell, the electrical/technical supervisor for Area 19.

The duties of the fire alarm inspection crew were to inspect fire alarm and bell systems at all school sites in the area and make necessary repairs and corrections, if possible, to insure that these systems were in good working condition. When an inspection was completed, they were to sign an inspection sheet

certifying that the inspection had been done. These forms were eventually submitted to the city fire department for review. The fire alarm inspection crew frequently worked on weekends to minimize the disruption to regular school programs.

A few months after commencing work as a fire alarm inspector, Kaady experienced difficulties in his working relationship with Bourland. Kaady attributed the problems to a lack of adequate instructions and guidelines about performing his duties, and the failure to provide him with the necessary assistance to perform the job. Kaady described Bourland as "verbally abusive, intimidating and pugnacious," at times, when he asked for assistance with a job, or objected to the way Bourland wanted him to do the inspections.

Kaady's first major dispute with Bourland occurred in January or February 1990 during an inspection at Crescent Heights Elementary School. The disagreement arose over whether Kaady should repair or have replaced malfunctioning electrical switches for the school's alarm and bell system. Bourland felt that Kaady should try to repair the switches and Kaady felt that they should be replaced. After that incident, Kaady and Bourland met with Victor Parrillo, the Area 19 maintenance and operations facilities director, to iron out their differences.

The Lassen Elementary School Incident

On March 23, 1990, Kaady was given an assignment to survey and prepare a written report for service switchboards at several school sites in his maintenance area. Prior to beginning this

assignment, he received a list of the schools, which included Lassen Elementary School (Lassen), and instructions about how to conduct the survey and prepare the reports. On March 23, Kaady went to Plummer Elementary School (Plummer) instead of Lassen, as directed, but submitted a switchboard survey for Lassen.

On March 29, 1990, Kaady was assigned to conduct a test of the fire alarm system at Lassen. Again he went to Plummer, instead of Lassen, and carried out the assignment. Kaady's reports showed that the work had been done at Lassen when, in fact, it had been done at Plummer. Although these two schools are located in the same vicinity, each is clearly identified by name on the exterior of the buildings.

This error led to a corrective conference with Macdonnell on April 2, 1990, about Kaady's failure to follow instructions. A written memorandum regarding the conference was placed in Kaady's personnel file.

The May 1990 Incident Regarding Bourland

In late April 1990 Kaady and Bourland had another disagreement over the misplacement of a set of keys at Millikan Junior High School during a weekend assignment. As a consequence, Kaady and the maintenance worker assigned to assist him were unable to get into the school clock room and complete the fire alarm inspection at that site.

Kaady testified that Bourland became verbally abusive toward him during a heated exchange between them about the "lost" keys. Anthony Brown (Brown), the maintenance worker, was present when

the dispute occurred. Brown testified that Bourland spoke in a loud voice while expressing his frustration about the situation, but was not abusive toward Kaady. Brown denied that Bourland used profanity in addressing Kaady.

Kaady unsuccessfully attempted to discuss the matter further with Bourland the next day, which was April 30, 1990.

A few days following this attempted discussion, Kaady made remarks on three separate occasions, between May 3 and 11, to several co-workers, including Newman, Kurt Machtolf (Machtolf) and Brown, words to the effect that he was so angry with Bourland about their dispute that he:

> . . . felt like going home . . . getting his gun . . . and coming back to shoot Bourland, but instead went to my psychiatrist to calm down.

Later, Machtolf, believing that Kaady was serious and that his comments were "unusual and out of the ordinary," informed Bourland about them and the fact that similar comments were made to other crew members.

Bourland told Macdonnell about Machtolf's report of Kaady's remarks. Bourland was concerned, but not actually frightened by the comments. Neither Bourland nor Macdonnell took further action to question Kaady about his reported comments.

Bourland continued to supervise Kaady after this incident; however, he described the work environment as "tense" at times because of the reluctance of other crew members to work with Kaady. Bourland viewed Kaady as poorly organized, which contributed, in part, to his difficulty in completing

assignments. Some members of the fire inspection crew felt that Kaady was a frequent complainer, with an annoying attitude and behavior on the job.

Sometime in 1990 Newman once witnessed Kaady lose his temper and beat a chair against a door in a "volatile, explosive" manner after he had difficulty reaching a fire alarm bell at a school where they were conducting an inspection. Machtolf also saw him become very upset, using profanity and screaming over a minor alarm wiring problem at another inspection site. Also, Kaady and Brown, who was assigned to assist Kaady, had frequent work-related disagreements over how the assignments should be completed.

The October 18, 1990, Incident

On October 18, 1990, Kaady was temporarily assigned to the Area 19 boiler crew to supply the transformer boilers at Jordan High School with electrical power. His work was supervised by Fernando Sanchez (Sanchez), the heating, ventilation and air conditioning supervisor for Area 19. Sanchez gave Kaady verbal instructions about how to complete the assignment. However, before he began, Kaady requested a written job plan, a material list and the assistance of a second electrician to "pull" the electrical wire to the transformer. Sanchez took Kaady the job ticket and sketches made by the planner for his review.

After surveying the work site, Kaady told Sanchez that the working conditions were unsafe because the job involved the use of metal scaffolding and contact with what he believed was 480 volts of energized electricity.

Later that day, Bourland and Parrillo visited the job site and Kaady renewed his complaint to them about what he regarded as an unsafe work situation. The supervisors provided Kaady with a ladder, additional verbal instructions and informed him that no additional electrician was available or needed for assistance in pulling the wire. Once the ladder was provided, the supervisors felt that they had adequately responded to Kaady's complaint. Kaady was directed to use one of the three electrical maintenance workers assigned at the site to "pull the wire" to complete the job. Kaady still objected to completing the job without a second electrician present, and stated that he was going to call the State Division of Occupational Safety and Health Administration, (OSHA) to report a safety problem. Kaady testified that he did call OSHA, but never filed a written or formal safety complaint about this situation with OSHA, the District or the Union.

The collective bargaining agreement (CBA) between the Union and the District[4] contains a provision on safety conditions. It states as follows:

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[4]PERB Regulation 32120 (Cal. Code of Regs., tit. 8, sec. 32120) requires employers to file copies of their CBA with exclusive representatives with the appropriate PERB regional office. A true and accurate copy of the 1986-1992 Unit E CBA between the Union and the District is maintained in the PERB Los Angeles Regional Office. Official notice may be taken of the contract under PERB precedent. (Antelope Valley Community College District (1979) PERB Decision No. 97; John Swett Unified School District (1981) PERB Decision No. 188; Compton Community College District (1988) PERB Decision No. 704.)

The Union and the District have been parties to a CBA in effect, by its terms as modified by successor reopener negotiations, from 1986 to September 15, 1992.

ARTICLE XVII

SAFETY CONDITIONS

> 1.0 The responsibility for providing for reasonably safe working conditions which are in conformance with the applicable law and which are within fiscal constraints shall be the District's. Employees shall be responsible for complying with safety procedures and practices and for reporting to the immediate supervisor as soon as possible any unsafe condition, facility, or equipment. At each Maintenance Area and major work site, there shall be posted the name of an individual designated by the District to receive employee reports of unsafe conditions. There shall be no reprisal against an employee for reporting an unsafe condition, facility or equipment.

Macdonnell was the person designated to receive employee reports of unsafe working conditions in Area 19; however, Kaady never reported his concerns directly to Macdonnell.

Macdonnell described the Jordan assignment as a "relatively superficial job" that did not involve Kaady's exposure to energized 480 voltage. Sanchez also testified that Kaady was never exposed to live 480 voltage on this assignment because the electrical supply to the transformer was disconnected and the job was never completed.

While working on this assignment, Kaady failed to establish a temporary bypass electrical system that would allow him to supply the power to the transformer without disruption to the electrical power for the school's bell system. As a result, the bell and public address system was disconnected and inoperable for approximately 10 to 15 minutes.

Following this incident, Kaady took job-related stress leave, as provided for by the CBA, from October 18 to approximately November 2, 1990.[5] The record does not establish whether Kaady took permissive or mandatory leave.

Shortly after Kaady returned to work, he had a corrective conference with Macdonnell, Parrillo and Joe Vaughn (Vaughn), the Union business representative, on November 16. At this meeting, Kaady's overall performance during the previous few months was discussed, and corrective measures were established for his improvement. A written memorandum of the conference was later given to Kaady.

On the day of this conference, Kaady complained of insomnia, headaches, stomach pains, nightmares and other physical symptoms. Effective November 16, he was allowed to extend his industrial illness leave.

Before Kaady returned to work, he spoke with Macdonnell in late November about his general medical condition. Because of Macdonnell's reservation about Kaady's fitness to resume his duties, with Kaady's permission, Macdonnell telephoned his psychiatrist. The doctor's reference to Kaady's possible "self-destructive or inappropriate behavior" unless his work location

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[5]Article XII governs leaves of absence. Section 1.0 defines "leaves" as either "permissive" or "mandatory." If a leave is "permissive," ". . .the District retains discretion as to whether they are to be granted and as to the starting and ending dates of the leave." The District has no discretion as to whether "mandatory" leave is to be granted to a qualified employee. Section 12.0 et seq. contains language pertaining to paid industrial injury/illness leave.

was changed, alarmed Macdonnell. Macdonnell discussed the matter with his supervisors and it was decided that Kaady should be examined by an independent psychiatrist. Parrillo notified Kaady of this decision by letter, on or about November 26.

When Kaady attempted to return to work on December 10, 1990, the District refused to authorize his return until he was examined by a counselor selected by the District. Despite clearance by his private psychiatrist, according to the District, it wanted another evaluation to insure that Kaady did not present a danger to himself or his co-workers.

Kaady appealed the District's medical disqualification from his return to service with the District personnel commission. The personnel commission received the evaluation from the independent medical examiner on or about December 26, stating that Kaady was fit to resume work, and recommending that he be given a requested transfer and continue therapy for nonwork-related problems. The personnel commission adopted these recommendations on or about January 30, 1991. Kaady was allowed to return to work on February 1, 1991.

The Notices of Unsatisfactory Service Issued February 1, 1991

On February 1, the day that Kaady returned to work from his leave of absence, Parrillo issued him two notices of unsatisfactory service. One notice, covering the period from May 3 through May 11, 1990, charged him with "discourteous, abusive, or threatening treatment of the public, employees, or

students . . . ." The conduct which formed the basis for this notice were the statements Kaady made in early May 1990 to co-workers Newman, Machtolf and Brown about his anger toward Bourland. This notice recommended no disciplinary action.

According to Sue Campbell (Campbell), the District personnel representative for classified employees, the personnel office did not learn about Kaady's "threat" statements until several months after they were made. She personally interviewed the three employees, who wrote statements in early December 1990, before deciding to issue a notice. Though she considered the statements serious enough to warrant dismissal, no disciplinary action was recommended as an accommodation of Kaady's illness. Instead, the notice was issued as a warning.

The second notice, covering the period from October 18 to November 16, 1990, charged Kaady with "incompetency, inefficiency and inattention to or dereliction of duty." This notice referenced five instances of Kaady's unsatisfactory performance between February and November 1990 (some of which is described supra) during which time he worked on the fire alarm inspection and the boiler crews. This notice recommended a five-day suspension.

Kaady, Vaughn, Parrillo, Macdonnell and Campbell met on February 9, 1991, for an administrative review of the two unsatisfactory notices. Kaady also submitted written rebuttal to the charges on or about February 11. In April, the five-day suspension was imposed on Kaady.

Effective February 1, Kaady was assigned permanently as an electrician to the boiler crew, working under the supervision of Sanchez.

The March 1991 Incident at Abram Freidman Occupational Center (AFOC)

Between March 18 and March 22, Kaady was assigned to AFOC to install a fuse disconnect switch for a chiller to increase the voltage from a transformer. Before he started this assignment, Sanchez gave Kaady oral instructions about how to complete the job. Even so, Kaady again asked for a written job plan, a material list and an assistant journeyman electrician, since he again believed that he would be working with high voltage. Sanchez told him that there were workers at the site who could assist him, but the assistant did not have to be a journeyman electrician.

After a few days, it became apparent to his supervisors that Kaady was having problems completing this assignment, so Macdonnell prepared a detailed set of written installation instructions. These instructions were given to Sanchez, who delivered them to AFOC and posted them on the transformer itself. They were never personally handed to Kaady. Kaady completed the installation, but incorrectly wired the transformer, thereby decreasing the voltage (to 240 volts), instead of increasing it to 480 volts as directed.

At the hearing, Kaady admitted seeing the instructions, but testified that he did not understand that they were for him to use to complete the assignment.

The May 31, 1991, Incident with Sanchez

On or about May 28, Kaady was assigned to install an electrical conduit at Sunland Elementary School. On May 31, Kaady had a telephone conversation with Sanchez about his progress in completing the assignment. Sanchez felt that Kaady was taking too long to do the job since it was not complicated. Sanchez told Kaady that it was a simple job and should have been completed. Kaady responded to Sanchez as follows:

> You know, I'll tell you what is simple. What is simple is what you're doing over there sitting on your ass telling me what to do. That is simple.

Sanchez told Kaady that he did not appreciate being spoken to that way, and, in response, Kaady said that he was not serious, but just joking. Sanchez did not regard the remarks as insignificant. He reported them to Parrillo and asked him to have Kaady "written up."

On June 13, Parrillo and Macdonnell met with Kaady and Vaughn in a predisciplinary meeting. Kaady was presented with a written list of several instances of improper conduct or performance between March 18 and June 7. The details of those incidents are set forth supra, except for allegations that he failed to report directly to his Sunland school assignment on May 28, and read a newspaper for 20 minutes before the end of the work day on May 31. The meeting was brief because Kaady refused to discuss the allegations without his attorney present, even though Vaughn was there as his Union representative.

Parrillo received a letter, on or about June 25, from attorney Alene Games, responding, on Kaady's behalf, to the allegations presented at the June 13 meeting and accusing the District of harassing him. Parrillo notified the classified personnel office that he had received the June 25 letter; however, the District did not respond to it. Kaady also submitted written rebuttal to these allegations.

The Notice of Unsatisfactory Service Issued July 12, 1991

Kaady received a third notice of unsatisfactory service on July 12, charging him with "abusive behavior, inefficiency and inattention to or dereliction of duty." This notice was based on the items presented at the June 13 predisciplinary meeting.

On August 2, the District sent Kaady a notice of intended discipline, recommending his dismissal from service. The recommendation for dismissal was based on: (1) a notice of unsatisfactory service issued January 29, 1986, for similar causes, with no recommended discipline; (2) the notice of unsatisfactory service issued February 1, with a five-day suspension; (3) the interim counseling that Kaady received in 1990; and (4) the July 12 notice of unsatisfactory service.

The District board formally dismissed Kaady from employment on October 8.

Kaady appealed his dismissal with the District personnel commission and, at the time of the hearing, was scheduled for an appeal hearing on January 22, 1992.

ISSUES

Whether the District's actions against Kaady, between December 1990 and October 1991, were taken in reprisal for his exercise of protected rights in violation of section 3543.5(a) and (b)?

CONCLUSIONS OF LAW

Section 3543 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 . . . . [and] represent themselves individually in their employment relations with the public school employer, . . .

Section 3543.5(a) prohibits an employer from imposing reprisals or discriminating against employees because of the exercise of such rights.

Cases alleging discrimination or reprisal are analyzed by the test established in Novato Unified School District (1982) PERB Decision No. 210. There, in order to establish a prima facie case of discrimination or reprisal, the charging party must first show that he engaged in conduct that is protected activity within the meaning of EERA. (Novato Unified School District, supra; Pleasant Valley School District (1988) PERB Decision No. 708.)

The record shows that Kaady engaged in several activities that are protected under EERA, including his complaint about

an unsafe working condition at Jordan High School, the use of contractually provided industrial illness leave, the use of Union representation regarding work-related problems, and the filing of an unfair practice charge. The safety complaint and the use of industrial illness leave were not only protected under EERA, but also were an assertion of contractual rights. It is further noted that Article XVII, section 1.0 contains language protecting an employee against reprisal for "reporting an unsafe condition, facility or equipment." (Pleasant Valley School District, supra, PERB Decision No. 708; North Sacramento School District (1982) PERB Decision No. 264.)

Although the District disagrees that an unsafe or hazardous work condition existed with respect to Kaady's Jordan High School assignment, it does not dispute the protected nature of Kaady's conduct in making the complaint or participating in the other activities.

The Novato test next requires that the employer have actual or imputed knowledge that the alleged discriminatee engaged in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) It is undisputed that various District representatives, including several of Kaady's supervisors and District personnel managers, were either present when Kaady engaged in his various protected activities or were notified of such activity in writing.

Kaady personally lodged his complaint about the unsafe work assignment and the threat to call OSHA with his supervisors, Bourland and Parrillo, when they visited the job site to inspect the situation.

Kaady's use of industrial illness leave and his appeal of the District's medical disqualification from return to service were well-known to Macdonnell, Parrillo and Campbell, the personnel representative, because of their personal involvements in processing his case.

It is unclear when Parrillo and other District representatives first learned that Kaady had filed his initial unfair practice charge against the District. The charge was filed with PERB on January 29, 1991.

Kaady's use of Union representation and assistance regarding work-related problems is well-documented and was known to all his immediate supervisors and District personnel managers since several of them met with Union representative Vaughn and Kaady in predisciplinary and administrative review meetings in 1990 and 1991.

Finally, the Charging Party is required to establish a nexus; i.e., that the adverse actions taken by the employer were motivated by his protected activities. Various factors have been employed to determine unlawful motivation in reprisal cases. Statements of, or indicating such motive, are certainly a strong indication thereof. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Since this sort of overt proof is often nonexistent in reprisal cases, circumstantial evidence may

establish the required employer animus. Factors which are considered include the proximity of the adverse action to knowledge of the protected activity (timing),[6] disparate treatment,[7] failure to follow usual procedures,[8] a pattern of union animus,[9] and/or shifting justifications for the action taken and the cursory investigation thereof.[10]

However, the mere fact that an employee is or was participating in union activities does not give him immunity from routine employment decisions or insulate him from discharge for misconduct. (Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) In Martori, the court held that:

> [W]hen it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Id. at p. 730.)

There is no direct evidence demonstrating animus toward Kaady because he engaged in protected conduct.

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[6](North Sacramento School District, supra, PERB Decision No. 264.)

[7](State of California (Department of Transportation) (1984) PERB Decision No. 459-S.)

[8](Santa Clara Unified School District, supra, PERB Decision No. 104.)

[9](Cupertino Union Elementary School District (1986) PERB Decision No. 572.)

[10](State of California (Department of Parks and Recreation (1983) PERB Decision No. 328-S.)

Charging Party argues that unlawful motivation can be inferred from the actions of Parrillo and Macdonnell when they delayed his return to work from industrial illness leave from December 10, 1990, to February 1, 1991. He points to the timing of this delay following his safety complaint in October 1990 and his exercise of the right to take the industrial illness leave starting November 16, 1990. Additionally, Charging Party contends that the explanation presented by the District for the delay is pretextual, since he was not aware that his May 1990 comments about Bourland were an issue or that an investigation was undertaken until he received the notice of unsatisfactory service on February 1, 1991. Kaady also contends that, if his statements about Bourland created such a "threatening environment" as the District claims, the District's delay of almost nine months before taking any action against him raises serious doubts about the validity of the delay and the unsatisfactory notice. Kaady maintains that an inference of unlawful motive can be made from this evidence.

The timing of these two adverse actions did follow closely after Kaady's involvement in protected activities. The delay of his return to work and the initial investigation of the May 1990 remarks both occurred within two months after Kaady made his safety complaint to Parrillo and Bourland and went on industrial illness leave.

It is undisputed that Macdonnell knew about the rumored comments in May 1990. Yet, when Kaady was counseled by Macdonnell and Parrillo on November 16, 1990, about his

performance deficiencies that lead to the February 1, 1991, notice recommending a five-day suspension, no mention was made of his alleged inappropriate remarks about Bourland. Apparently, this aspect of Kaady's behavior was of no great concern to his supervisors in November 1990.

Kaady's use of union representation at counseling and predisciplinary meetings with Parrillo, Macdonnell and Sanchez (June 13, 1991, meeting only) in November 1990, February 1991 and June 1991, is interwoven with the timing of the July 12, 1991, unsatisfactory notice; the August 2, 1991, notice of intended dismissal; and his termination in October 1991. There is some correlation between the District's knowledge of this protected activity and these adverse actions against him. Timing, along with other factors, can lead to an inference of unlawful motive. Assuming that the element of timing is present in this case, timing alone does not establish unlawful motivation. (Charter Oak Unified School District (1984) PERB Decision No. 404.)

The record fails to establish any of the other indicia of animus, and it is the Charging Party's burden to present such evidence.

Although there is evidence of significant friction between Kaady and Bourland during the time that Kaady was assigned to the fire alarm inspection crew, there is no indication that Bourland, or any of the other supervisors, showed hostility or animus toward Kaady's safety complaint. In fact, Parrillo considered the safety issue rectified when Kaady was provided with a ladder, as requested, and informed that adequate assistance was available

when needed to pull the wire at the Jordan High School assignment. There is no indication that this issue was given any further consideration by the District until the Charging Party raised it in his first unfair practice charge.

No evidence was presented to show that Kaady was subjected to disparate treatment with respect to the frequency or types of disciplinary actions taken against him. Nor was a pattern of union animus demonstrated. Macdonnell testified that he is a union member, as are most employees under his supervision. According to Parrillo, union representation of members of Unit E is quite common in the maintenance and operations division. Thus, Kaady's representation did not engender hostility toward such activity.

Kaady contends that the District failed to follow its usual procedures in that it did not provide him with notice of the allegations of misconduct in May 1990 before imposing discipline. While the almost nine-month delay between his alleged inappropriate behavior and the subsequent discipline present questions as to their propriety, the evidence fails to establish that, in similar cases, the District's policy or practice was to discipline employees more promptly.

Similarly, the evidence also fails to establish shifting explanations for Kaady's discipline and eventual termination from employment or a cursory investigation thereof. There is no basis for inferring unlawful motivation in connection with these adverse actions.

Based on the foregoing, it is concluded that the evidence fails to establish a prima facie case of reprisal for protected activity. While this finding makes it unnecessary to complete the Novato analysis, it is further concluded that the District has rebutted any prima facie case which might have been established by a preponderance of the evidence. The District presented ample reasons to support its belief that Kaady failed to attain and sustain an acceptable level of performance and conduct, despite counseling and the issuance of three notices of unsatisfactory service between February 1 and July 12, 1991. This evidence, coupled with Kaady's prior disciplinary record and evidence of unacceptable performance even prior to his protected activity, establishes that the District would have issued the three 1991 notices of unsatisfactory service and recommended Kaady's dismissal from service, absent his protected activity. (Baldwin Park Unified School District (1982) PERB Decision No. 221.)

There is no evidence, likewise, that the District's actions against Kaady in any way violated the Union's rights under EERA. Thus, there is no basis for finding a violation of section 3543.5(b). (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

Based on these conclusions, both charges and complaints should be dismissed in their entirety.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, and no violations of

the Educational Employment Relations Act having been found:

It is hereby ORDERED that Unfair Practice Charge No. LA-CE-3058 and LA-CE-3099, as amended, and the companion complaints are DISMISSED.

Pursuant to California Code of Regulations, title 8, 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 twenty (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 Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 p.m.) on the last date 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civil Proc., sec. 1013(a) 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: May 22, 1992

W. JEAN THOMAS
Administrative Law Judge