STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RUSSELL HATCHER, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-1774 PERB Decision No. 1185 February 24, 1997
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS HEALDSBURG CHAPTER NO. 314, Charging Party, **v.** HEALDSBURG UNION HIGH SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-1818

Appearances: Russell Hatcher, on his own behalf; School and College Legal Services by Lawrence M. Schoenke, Attorney, for Healdsburg Union High School District; Arnie R. Braafladt, Attorney, for California School Employees Association & its Healdsburg Chapter No. 314.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on exceptions filed by both Russell Hatcher (Hatcher) and the Healdsburg Union High School District (District) to a Board administrative law judge's (ALJ) proposed decision (attached). In his decision, the ALJ found that the District did not violate section 3543.5(a) and (b) of the

Educational Employment Relations Act (EERA)[1] when it took certain adverse actions against Hatcher.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, Hatcher's exceptions, the District's exceptions, and the responses thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The complaint and unfair practice charge in Case No. SF-CE-1774 are hereby DISMISSED.

The complaint and unfair practice charge in Case No. SF-CE-1818 are hereby DISMISSED.

Chairman Caffrey and Member Garcia joined in this Decision.

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[1]EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 reads, in relevant 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

RUSSELL HATCHER, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. SF-CE-1774
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS HEALDSBURG CHAPTER NO. 314, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. SF-CE-1818 PROPOSED DECISION (8/9/96)

Appearances: California School Employees Association, by Arnie Braafladt, for Russell Hatcher and California School Employees Association & its Healdsburg Chapter No. 314; School and College Legal Services, by Lawrence M. Schoenke, for Healdsburg Union High School District.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

This proposed decision results from two unfair practice charges filed against the Healdsburg Union High School District (District).[1] The first unfair practice charge, SF-CE-1774, was filed by Russell Hatcher (Hatcher) on March 8, 1995. After

[1]The Healdsburg Union High School District and the Healdsburg Elementary School District merged to became the Healdsburg Unified School District on July 1, 1995.

investigation, and on June 5, 1995, the general counsel of the Public Employment Relations Board (Board or PERB) issued a complaint against the District. The complaint alleged that Hatcher exercised rights guaranteed by the Educational Employment Relations Act (EERA or Act)[2] from 1988 to the present time by acting as a job steward; and from 1991 to 1993, by acting as head negotiator for the California School Employees Association and its Healdsburg Chapter No. 314 (CSEA), the exclusive representative of the District's classified employees. The complaint alleged that on or about December 12, 1994, the District took adverse action against Hatcher by issuing a statement of charges against him and seeking his dismissal. It was alleged also that further adverse action was taken against Hatcher by the District when it issued him written reprimands on or about October 21, November 7 and 17, 1994. The complaint alleged that the District took the adverse actions against Hatcher because of his protected activities, and in violation of the EERA.

The District filed its answer to SF-CE-1774 on June 13, 1995, in which it denied any violation of EERA.

The second unfair practice charge, SF-CE-1818, was filed by CSEA on July 21, 1995. Again, after investigation, PERB issued a complaint on October 6, 1995, against the District. The complaint alleged the same facts as SF-CE-1774, set forth above,

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

regarding Hatcher's alleged protected activity. The complaint additionally alleged that on June 23, 1995, the District took adverse action against Hatcher by suspending him without pay from his last day in paid service through June 23, 1995, and demoting him to probationary status. The District took the action complained of because of Hatcher's protected activity in violation of section 3543.5.[3]

The District filed an answer to SF-CE-1818 on October 18, 1995, denying violation of the EERA and raising factual and legal assertions that will be addressed in this proposed decision.

Settlement efforts were not successful and formal hearing was held on November 13 through 15, .1995, and February 6 through 8, 1996, in Healdsburg, California. The parties agreed to consolidate the two complaints for formal hearing. With the filing of post-hearing briefs on April 30, 1996, the matter was deemed submitted for proposed decision.

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[3]At the formal hearing, the complaint was amended to allege a violation of section 3543.5(a) and (b), which states, in relevant part, that it shall be an unfair practice for the public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

FINDINGS OF FACT

CSEA is the exclusive representative for classified employees of the District, and the District is a public school employer, both within the meaning of EERA. Hatcher is an employee of the District within the meaning of EERA.

Lawrence Machi (Machi) was superintendent until sometime in the early fall of 1994 when Sharon Robison (Robison) was designated interim superintendent. John Rich (Rich) was business manager and served as interim superintendent between Robison and Nicholas Ferguson who was chosen superintendent in the spring of 1995.

Loretta Peterson-Strong (Strong) has been director of personnel since 1990 and also served as director of curriculum. Andrea Harris (Harris) served as director of transportation from 1991. At the same time she also served as principal of Mountain View High School.[4]

Until 1991, Richard Whitehurst (Whitehurst) served as transportation director, and Donna Robbins (Robbins) was transportation supervisor. A reorganization during that year resulted in Whitehurst being reclassified to supervisor and Robbins to dispatcher/trainer. Whitehurst left sometime in the summer of 1994.

Harry Smith (Smith) has been the CSEA field representative for the District for five years.

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[4]At the time of formal hearing in this matter, neither Strong nor Harris were employees of the District. Harris was laid off as a result of the merger.

Hatcher has been employed as a bus driver since 1986. Since 1990, he has also been employed as a custodian for one and one-half hours per day at the Healdsburg Junior High School.

Hatcher Activities

Hatcher became a CSEA shop steward in 1988. He then became lead steward and a member of the CSEA negotiations team in the 1990-91 school year. Ron Brown was chief negotiator for CSEA, but after a few months into the school year, Hatcher became the chief negotiator for CSEA.

While Hatcher was on the negotiations team, Strong was a member of the District's negotiation team. The District chief negotiator was Bob Latchaw (Latchaw), and the other District member was Rich.

Initially, there were two bargaining teams; one for the elementary district and the other for the high school district. Hatcher was chair for both teams in the 1990-91 and 1991-92 school years although during Hatcher's membership the bargaining teams were merged. Hatcher testified that he attended two to three dozen bargaining sessions. Strong was very conservative in her estimates of the number of times she encountered Hatcher at the negotiations table. She said he may have been at the table twice. Her estimate was contradicted by sign-in sheets that reflect Hatcher was at the negotiations table at least some 15 times.

According to Smith, Robbins was Hatcher's supervisor for the entire time he was chair of negotiations.[5] Smith said Robbins called many times trying to get Hatcher relieved as negotiator because they were short of drivers. Hatcher stopped going to negotiations towards the end, he said, because of Robbins' harassment.

Hatcher made four presentations to both school boards on the status of negotiations over the two year period. After the first presentation, and at the next negotiations meeting, Latchaw objected to Hatcher's presentation in that it was making an end run around the District negotiators.[6]

Hatcher served on a CSEA budget analysis committee and a reclassification committee. Strong was a District representative on both committees.[7] Smith said no other classified members on those committees were ever disciplined.

Hatcher was a strong advocate for interest-based bargaining and tried to get it implemented at the District level sometime after he assumed a position on the CSEA bargaining team.

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[5]This is not precisely accurate. As noted, Whitehurst was made transportation supervisor and Robbins the dispatcher/trainer in 1991. However, documents in the record make it evident that Robbins was actively participating in managing the department.

[6]Smith testified that Strong asked to meet with him about Hatcher meeting directly with Machi. She was unhappy when anyone, including Smith, did it, he said.

[7]Despite the picture Hatcher has of Strong's views on collective bargaining, Strong wrote Hatcher in March of 1991 congratulating him on his new role as head negotiator for CSEA. This letter followed one of the board presentations Hatcher had made.

Smith testified that scheduling problems delayed the program. He said Strong objected to a program that required five days off site; she didn't want to be away from her family that long and the District had concerns about a lot of employees being absent for five days.

The program was held in the spring of 1993 after Machi, who supported the concept, authorized it. Hatcher did not attend because he was no longer on the negotiations team.

Hatcher was critical of Strong's position in collective bargaining.[8] However, Machi always had an open door policy with Hatcher.

Grievances By Hatcher

During the time he was steward and lead steward, Hatcher said, he handled 12 to 18 grievances, including those in the transportation department. Some four to six grievances got beyond the informal conference. Hatcher said he resolved a number of grievances at the informal level with Whitehurst who was then director of transportation.

Hatcher's first grievance was in 1988 and involved an alleged non-posting of a position. The grievance went to level two after the first level with Whitehurst and then on to the personnel director.

[8]Hatcher also testified that Strong complained her schedule was too busy. Every time he talked to her she seemed to be stressed. As noted, Strong also served as director of curriculum.

In 1991, Hatcher was involved in a grievance regarding a reduction in his hours from five and three-quarters to five and one-quarter hours. After pursuing the matter through Harris, and completing levels one and two, Hatcher wrote to Machi on December 16, 1991. Later, in February 1992, Hatcher, Harris, Strong and Smith met at two meetings and worked out an agreement whereby Hatcher's workday would be increased by 15 minutes with retroactive payment to the previous September. The increase was to be 1.25 hours per week and would be spent in landscaping at the transportation yard.[9] This was expressed in a written letter to Hatcher from Strong.

Smith said Strong expressed dismay that she had to negotiate reduction in hours when the bidding process was in place.

On May 8, 1992, Hatcher wrote to Strong regarding a grievance filed by Mercedes Capwell (Capwell). Hatcher indicated that he was submitting the grievance with the understanding that the District would waive issues of timeliness. He was agreeing to rewrite Capwell's April 15, 1992, grievance and had re-submitted the grievance to Belen Lee. If this was not acceptable to the District, Hatcher wrote, then CSEA wanted to go to arbitration.

Strong did not take the memo as indicating Hatcher was representing Capwell. In any event, she said an amended grievance was never filed and the "matter just went away."

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[9]As noted, Hatcher was already doing landscaping at the junior high school.

Hatcher said he continued to pursue grievances in the transportation department until December of 1994. He represented Evelyn Carson in 1992-93 and 1993-94 and Kathy Zerbe sometime between 1989 and 1992. He also represented Robbins in a grievance in 1991 regarding a reclassification.

While it did not rise to a grievance, Hatcher spoke to Harris in mid-September 1994 about Ruby Sylvia, who Hatcher had encountered crying. She was crying because other bus drivers were chastising her for not coming to work the day before and causing more stress on other bus drivers. Hatcher said he went to Harris to discuss the safety issue in not having enough substitute bus drivers. Harris told him she was getting a bus driver's license herself. Hatcher complained to her that the lack of substitutes had existed for the last two years.

Harris started driving in late September 1994.

Performance Evaluations

Hatcher's most recent evaluation, covering the period February 1, 1993 to February 1, 1994, by Whitehurst, noted two "needs improvement"; one in "Thorough in work performed" with the notation that he needed to keep his bus cleaner. The other "needs improvement" was in "Complies with District policies and procedures," with the notation that he needed "to work on assigned times given by [the] District." All other ratings were either "satisfactory", "good" or "excellent", including one in the latter on "Observes safety rules".

The prior year evaluation (1992-93), again by Whitehurst, rated Hatcher with a preponderance of "excellent" with "good" for "Thorough in work performed" and "Observes safety rules".

Robbins rated Hatcher, for the 1990-91 evaluation period, as "excellent" in all areas, save for "Thorough in work performed", "Pupil contact", and "Observes working hours", where she rated him a high "good".

In the next preceding evaluation (1989-90), Robbins noted that Hatcher had "shown improvement in the area of tardiness of work which is extremely important for a bus driver."

Performance Memos

On January 27, 1988, Whitehurst caused to be issued a memo concerning Hatcher's failure to show for work on January 27, 1988. Hatcher responded, complaining the letter was unfair and reflected "another bit of harassment" by Robbins. He went on to say Robbins "seemed to get great delight" in the incident, it was "not the first time" and that she did it with other employees. He expressed the opinion that he felt "her immaturity and spitefulness is a major cause of 90% of all problem [sic] in the bus shop."

In May of that year, Whitehurst again gave Hatcher a written memo regarding his failure to appear for his afternoon run. Whitehurst noted "This has been a problem in the past either with calling in at the last minute about not coming in or being late for the morning route."

On June 20, 1988, Rich met with Hatcher, a CSEA representative and Whitehurst about Hatcher's absence on January 27, May 16 and June 14, 1988, without notice to the District, and about unauthorized bus stops.

In May of 1991, Robbins wrote to Hatcher about his failure to turn in absence slips.[10]

In April of that year, Robbins wrote to Hatcher about prompt reporting of on-the-job injuries.

All these documents went into Hatcher's personnel file.

In February of 1991, Stewart Fox (Fox), principal at the junior high school, gave Hatcher a performance evaluation for his custodial duties at that school. Fox rated Hatcher as "needs improvement" in several areas and included a narrative that those ratings referred to Hatcher not coming to work at times agreed upon and that sometimes he was absent with out notice.

Hatcher testified that after the 1990-91 evaluation, he offered to resign, but Fox wanted him to do the work. They agreed Hatcher would not work the one and one-half hour per day, but he would work his own hours averaging seven and one-half hours per week. During the winter and rainy season he could not work so he worked during the summer even though he was not a year round employee.

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[10]Robbins' memo referred to negotiation sessions. She noted that he was supposed to hand in slips before negotiations sessions. Hatcher said he started doing that after the memo was given to him.

The April 1993 Letter

Hatcher's child has a renal condition that requires him to wear a bag that has to be emptied every half hour. The District provided the child with a watch and beeper to remind him to empty the bag. The child is a student at Fitch Mountain Elementary School.

Around March 22, 1993, his child told him he had to spend the whole morning in the office because he did not have the watch on.

Hatcher went to talk to the lad's teacher, Norine Crnich (Crnich). He was, he said, addressing her as a parent.[11]

On April 26, 1993, Machi issued a letter to Hatcher. The letter stated in part:

> Pursuant to Article XX of the CSEA Collective Bargaining Agreement . . . your conduct at Fitch Mountain Elementary School on March 23, 1993, constitutes "discourteous, offensive or abusive language, or conduct towards another employee" . . . .[12]

The letter stated that "while on duty as bus driver," Hatcher drove a school bus to the school. He did not seek prior authorization to stop and leave the bus at the school. While at the school, and on duty, Hatcher approached Crnich and began to

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[11]On April 5, 1993, Hatcher wrote to the elementary school board of trustees concerning his son Jackie and the problems he was having with the school. Hatcher was critical of Crnich, Principal Nancy Baker (Baker) and Machi. This was acknowledged by the board in another exhibit.

[12]At this time, Hatcher was an employee of the high school district, but the transportation department was providing service to the elementary district.

yell at her and she felt physically intimidated. Hatcher's conduct was so disruptive that Scott Richardson felt compelled to intervene by stepping between them and asking Hatcher to leave the school grounds. The letter stated that statements of four named witnesses were enclosed, describing the incident "in further detail." The letter closed with:

> Pursuant to Section 20.4.1 this is to warn you that any further instances of offensive, abusive, or assaultive behavior will lead to disciplinary action up to and including dismissal from your position.[13]

According to Smith, Hatcher was not on duty at the time and was acting as a parent.

Regarding the incident, Hatcher testified that he was questioning Crnich why his son was not being allowed in the classroom without a watch. He testified that she immediately became agitated and started yelling that if he wanted to talk

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[13]Section 20.4.1 of the July 1986 to June 1989 CBA provides:

> Except in those situations where an immediate suspension is justified under the provisions of this Agreement, an employee whose work or conduct is of such character as to incur discipline shall receive an oral or written warning from the supervisor. If the problem persists, the employee shall be specifically warned in writing by the supervisor and the employee shall be given a reasonable period of advanced warning to permit the employee to correct the deficiency without incurring disciplinary actions. Such warning shall state the reasons underlying the intended disciplinary actions and a copy or notice of the warning shall be sent to the CSEA president.

about it, that he should take it to Dr. Baker, the principal of Fitch Mountain School.

Yet, in his letter to the board of trustees on April 5, 1993, he attributed no such behavior to Crnich. Rather, he wrote, she said if the child did not have the watch, he would not be allowed in the classroom.

Smith contended that Machi's letter did not constitute discipline. He stated that only harm to the employee constitutes discipline and letters of warning do not constitute discipline.

Hatcher also testified the letter is not discipline, as Machi and the District's lawyer confirmed with Hatcher's lawyer that the letter was not discipline. Machi told him, Hatcher testified, that the letter was necessary to avoid liability.

Hatcher first testified that the first he learned of the April 26 letter with attachments was when he got the December 12 statement of charges in the dismissal matter, described below.[14] He later testified that the first time he saw the cover letter and materials was when Smith brought his personnel file to him in February of 1995. Hatcher testified that he simply got the letter itself and there was no cover letter or attachments (his copy has no staple marks).

[14]Included as an attachment in Charging Party Exhibit No. 12 the letter with a cover form noting it was going into Hatcher's personnel file, and the right to review and attach written response. Memos from Baker, Scott Richardson (custodian), Mary Delfino (secretary) and Crnich regarding the incident are attached as well as provisions of the CBA on discipline.

Hatcher ways he would have responded had he known the letter was going into his personnel file. I note that the letter asserts there were attached statements of four named witnesses, including Crnich, explaining the incident in detail. Hatcher did not explain why, though the letter he did get contained reference to statements, he did not follow-up to ascertain the contents of those statements.

The In-Service Hours Memo

Each bus driver is required to obtain ten hours of in-service training each year by their birth date.

In 1992, Hatcher failed to complete his in-service requirements by his birth date of September 18. He had to get an extension of time to acquire the necessary ten hours.

In discussions with Harris in 1993, the in-service hours issue emerged. Harris wrote to Hatcher on September 14, 1993, four days before his time was up to get the in-service hours in, stating, in relevant part:

> As of September 24, 1992, you were short 3 3/4 hours of in-service and that you were given a 60 day notice to make-up the time. You completed those hours in December of 1992. Your annual ten hours of in-service are due annually on your birthday, September 18.
>
> By September 1, 1993, there still had been no in-service hours submitted. This was in spite of the printed postings of due time, . . .
>
> On Friday, September 10, you told me that you had done your hours. I asked to then submit them so that the issue could be resolved. When you submitted the hours on Monday, September 13, 1993 - you submitted

> 7 hours . . . done in August, 1993 and again submitted the December, 1992. The December hours cannot be used since they were used to "make-up" the missing hours from 92-93.
>
> It is my understanding that these hours must be done by September 18, 1993, . . .

In the letter, Harris noted hours of training that were provided by the District to which Hatcher had not availed himself. She concluded with the statement, "It is expected that you will take more advantage of the hours offered in our department and fulfill your in-service needs in a more timely fashion."

The memo had a cover letter indicating that it was to go into his personnel file ten days from the date with the right to review the original and file a response. A copy went to Smith.

Smith said he called Hatcher and Hatcher said he had already done the hours at West County Transportation Agency. At the time the memo was written Hatcher still had time to get the hours in. Smith did not understand the memo to be discipline.

The September 26, 1994, Memo

On September 26, 1994, Harris issued a memo to Hatcher regarding the bus check out, tardiness and routine paper work.

She wrote that "[w]e continue to receive calls from Fitch Mountain that you are late for the K Run and your afternoon run," on September 15, 1994, when he was a half hour late, and September 14, 1994, when he was 15 minutes late. She stated she had observed him in the morning just before leaving and taking coffee and chatting without taking the proper amount of time on

bus safety checkup. She stated he was expected to come in and do the proper bus checks and leave 15 minutes before he was due at his three pickup points.

Harris also stated her expectation that Hatcher would clean his bus at the end of the day, put up the windows, and return the fire extinguisher and keys to the main building. She noted that on September 20, 1994, both his keys and extinguisher were left on the bus.

Harris noted that Hatcher had not submitted absence slips for the week prior to school (August 26 to 29, 1994), and two days during the week of September 19, he had submitted no log sheets for the last three weeks nor had he provided the list of students from the K-run.[15]

Harris closed with the expectation that Hatcher would correct the above concerns regarding his duties and responsibilities as a bus driver.

There was no notice that this memo was going into Hatcher's personnel file or that he had the right to respond.

Harris had placed the memo in Hatcher's mail box. She later found the memo on the CSEA bulletin board. Hatcher had written

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[15]August 26 and 29, 1994, were in-service training days. Hatcher was at the first date for the first two hours. He bid and got his route. While he was there, there was no discussion of a log requirement.

With respect to the K-run list, the evidence is minimal. Hatcher testified that he kept the list on the bus and did not understand what else was to be done with the list.

across the top, "This is what our boss finds to do with her spare time. Instead of?"

Harris never asked him about the items included in the memo. Hatcher did not respond to the September 26 memo, he said, because it did not ask for a response and Harris was not in the shop from the beginning of September until October. He knew Harris' observations about morning spots were not true as he knew she did not come in so the memo was not factual.[16] His excuse for the late starts was that his bus battery was dead and he had to have a jump start by the District mechanic. He did not tell Harris or Robbins this excuse.

Hatcher testified that he never skipped the safety check, and cleaned his bus "as needed." He "usually" puts up his windows. The bus drivers often switched buses, he said.

Regarding the fire extinguisher incident on September 20, 1994. Hatcher said he was not at work on that date, but had submitted a doctors excuse and signed absence certificate.

Harris testified she saw the fire extinguisher on September 20, and that Hatcher had been the last person to drive the bus, on September 19.

The October 17, 1994, Memo

Harris issued another memo on October 17, 1994, regarding bus check out, tardiness and routine paper work.

[16]Hatcher and other bus drivers complained that Harris never arrived before 7:00 or 7:10 a.m.

In this memo, Harris noted that after the September 26, 1994, memo there was some improvement, but on October 6, 1994, Hatcher was more than ten minutes late leaving the yard.[17]

Harris set forth seven dates in August and September for which absence slips needed to be completed and signed.[18] She noted there were more absences in October. She noted that to date there were no weekly log sheets filled out since the beginning of school.

Harris noted the practice of the department to not fuel buses with students on board unless in an emergency. She said "[i]ndications . . . are that you often fuel with students on board." Although fueling with diesel was acceptable, she expected him to follow the practice of fueling without children on board. Harris cited an October 6, 1994, incident where he could have fueled between his elementary and secondary run, rather than after having picked up the high school students.

Harris noted that a sign directs drivers to fuel at the nontaxable pumps, yet Hatcher's last two fueling slips indicated he fueled at the taxable pumps.

Harris expected the items listed to be done no later than October 21 and noted that failure to comply would result in disciplinary action as prescribed by the classified contract.

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[17]Harris wrote to Hatcher on October 6, 1994, indicating that Hatcher spoke to both Harris and Robbins as he was leaving for his run that day. The note does not mention a tardy departure.

[18]Among the dates listed was September 20, 1994, the date Harris said she found the keys and fire extinguisher on Hatcher's bus.

She wrote that the memo was going into his personnel file and he had five days to respond.

Harris put the memo into Hatcher's mailbox.

Hatcher confirmed there were two blackboards in the drivers building but he didn't pay much attention to the board. Hatcher also admitted there was notice posted on the door that reminded drivers to bring keys and fire extinguishers in.

Hatcher testified that the bus mechanic had told him the fuel gauge on his bus was defective and he should not let the tank get low. Somewhat incredibly, he did not tell Harris or Robbins of the defect. It would have been the head mechanic's job to tell them, he testified. The mechanic informed Hatcher of the problem.[19]

At the formal hearing, Hatcher asked why would Robbins be informed. Although he acknowledged that Robbins was the dispatcher and the trainer, she was not the mechanic, he said. This attitude seemed to permeate his relationship with Robbins and Harris, and is further reflected in the absence of any written responses by Hatcher to notices, where such notice that matters were going into his personnel file were given.

The October 21, 1994, Memo

Harris issued a revision of the October 17 memo on October 21, 1994, as Hatcher had not picked up the first one in his mail box. She expanded on the absences in October, from

[19]There is a standard form for drivers to signal malfunctions on buses. Hatcher did not submit such a form.

October 13 through October 21, the date of the memo. She noted that Hatcher told her on October 13 that he was going to the doctor, and then he told Robbins that the doctor said he needed more time off. The District had not yet received the doctor's verification of why and how long he would be off work. The memo had a deadline of October 28 to comply.

There is some contradiction in the record about when Hatcher returned to work. A doctor's note reads that he was to be absent from the afternoon of October 13 until October 25, and that he could return to work on October 26. Hatcher testified he was unsure of when he returned.[20] In fact, later documentation submitted by Hatcher (the logs described below) reflect that he worked on both October 25 and 26, and was absent on October 27.

After he got the letter he questioned Robbins about the log requirement.[21] She told him there was an amendment to the bus drivers' manual. He asked her for copy and she never got it to him. The manual, he says, states bus drivers are exempt from log requirements.

Hatcher testified that Harris did not talk to him about the issues raised in the September 26, 1994, memo before or after she

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[20]Further undermining Hatcher's credibility is his defense paper presented at a Skelly (Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14]) hearing on his suspension described below. Written within six weeks of the October time period, the paper asserted that on October 19, Harris questioned Hatcher about the logs while passing through the yard.

[21]Yet, in his statement submitted in the Skelly hearing before Robison, he wrote that Robbins questioned him in late September about the log sheet requirement.

issued it.[22] He was on jury duty beginning September 26 until October 3, 1994.

Hatcher testified that Harris did not talk to him about the issues in the October 21 memo before writing it.[23]

Hatcher admitted that he fueled his bus with children on board and may have done it twice. The bus he drove is a diesel bus and the fuel gauge is defective and his route is through the country. The bus mechanic told him of the defect and he tried not to drive the bus with less than half a tank of fuel.

Hatcher testified that before the October 21 memo he was not aware of the nontaxable pump. They had added pumps, but he didn't understand what was required. He had not noticed any blackboard notices.

Hatcher didn't get the notice until after October 27 when he returned to work. The deadline was October 28, one day later.

The October 21 Memo From Strong

On the same date of the second memo, October 21, Strong sent to Hatcher, at his home, the Harris memo with a cover letter.

Strong's cover letter stated that it was Hatcher's responsibility to inform the supervisor of any absence or illness that would prevent him from carrying out assigned duties. If he was under a doctor's care, he was to get a note from the doctor

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[22]As noted, however, Hatcher wrote to Robison that Robbins had questioned him in late September about submitting logs.

[23]Again, Hatcher wrote that Harris questioned him on October 19, 1994, about the logs. This is contrary to his testimony about prior discussions with Harris, about issues within the memos.

verifying the condition and anticipated date of return to work. She noted they had no absence slips from him on file.

Strong advised Hatcher that under Article XXI, Discipline, of the contract, the District was going to dock his pay effective with the October 31 warrant.[24] Hatcher was invited to submit any information to Harris immediately.

Smith said the memo did not meet the contract requirements of discipline in that it states discipline is going to be imposed but failed to set forth the right to hearing or other notice requirements.

Section 21.5 of the CBA provides for notice of imposition of discipline including the right of appeal to the board of trustees and for a hearing.

Strong testified, however, that payroll deductions do not require Skelly hearings and the District practice in this instance was consistent with other deductions.

The November 7, 1994, Memo

Harris wrote another memo on November 7, 1994. In this memo, Harris wrote that after the October 21 letter Hatcher continued to not leave his bus in good order after the last run. She stated that on October 26 his bus was not properly idled

[24]Strong cited sections 21.7.11 and 21.7.14 of the CBA. The former section addresses unauthorized or unexcused or excessive tardiness. The latter section addresses "abandonment" of position. In the latter instance, Strong said she would always attempt to secure the employee's explanation of the absence before taking action, but not with Hatcher.

down, ten windows were left down and he did not return the fire extinguisher.

Harris further wrote that on November 3 and 4, 1994, Hatcher's bus was observed parked on Grant Street at approximately 2:55 p.m. and 2:45 p.m., respectively. There was no notice to the department of this parking at a location other than at the terminal. She expected him to return the bus to the yard at the end of any run. She noted there had been many instances of his leaving the bus on the side of the shop instead of returning it to the stall.

Harris further wrote that on November 3, 1994, Hatcher made "inappropriate use of the bus radio by transmitting a derogatory remark about another driver over the air." He was expected to cease such behavior.

The memo was copied to go to the personnel file. The memo does not contain notice of Hatcher's right to respond in writing. Nor was the memo signed or initialed.

Hatcher first saw the memo when he got a packet of charges received on December 12, 1994, described below. Hatcher testified that no one discussed the alleged deficiencies listed in the memo with him.

Hatcher testified that his bus was on Grant Street on both days. His is the last bus to pick up students at the high school. The junior high school did not have minimum day. He was waiting for other buses to go to the junior high school and since that location would not hold all buses he had to wait for his

slot. Both days were minimum days. Hatcher testified that he was lying down in the bus. Harris personally saw the bus but did not see Hatcher.

Harris testified she had complaints that Hatcher parked the bus near his home.

Regarding the inappropriate use of the bus radio, she testified Robbins was discussing a discipline problem with a driver over the radio. Hatcher came on the radio and indicated there were always problems with discipline on that driver's bus. Hatcher had no need to use the radio and his manner of interruption, which all drivers could hear, was derogatory to the driver and embarrassed her. The driver almost quit, and was shaken when she returned to the yard. It also became a safety issue, said Harris.

At the hearing in this matter, Hatcher admitted making the comment. His defense appears to be that bus drivers often listen to chatter among drivers and other vehicles that use radios on board vehicles. His failure to acknowledge any wrongdoing undermines his credibility.

Harris testified that the failure to give Hatcher the November 7 memo before its inclusion in the December 12 dismissal charges as, "Just a slip up. No big deal, the intent was to get it to him."

The District Practices

Several witnesses including incumbent or former bus drivers for the District, testified about the various responsibilities

which Hatcher was cited for not performing properly. A detailed analysis would of necessity include possible bias, which may be found in either because witnesses admittedly did not favor Robbins as a supervisor, or because they had been aided by Hatcher in connection with CSEA representation or otherwise.

The evidence shows that it is the responsibility of the bus drivers to return their keys and fire extinguisher to the bus shop at the end of each day's run. Windows are to be up and the bus swept clean. Drivers are expected to perform a bus safety check each morning before commencing the run. While there is variation, drivers also are expected to complete a safety check, including a special effort to check the brakes, requiring some 10 to 15- minutes.

As a general rule, drivers are prohibited from fueling a bus with children on board. An exception was recognized for diesel buses, in an emergency situation. However, the District preferred that there be no exceptions for either gas or diesel buses. A practice which commenced in the fall of 1994 was to fuel buses at the newly installed nontaxable pump.

A longstanding practice required drivers to submit absence slips to reflect time not worked. Hatcher was advised early on to do this, and other drivers, in the fall of 1994, were also given written instruction to complete absence slips.

Also started in the 1994-95 school year was the completion of log sheets reflecting the hours worked for each week. This

requirement was announced at the in-service sessions in August of 1994, when Hatcher was not present.

It is likewise clear that individual bus drivers at various times, or for various reasons, did not comply with these expectations. Likewise, it is clear that, in individual cases, no reprimands were imposed.

An example is bus driver Bruce Smith, who, in addition to abbreviating the bus check, skipped four weeks of submitting logs. According to Harris, he completed the logs in a timely fashion, but had not submitted them upon completion.

The Suspension for Log Sheets

On November 17, 1994, Robison, then interim superintendent, issued a letter entitled "Disciplinary Action" to Hatcher.[25] The memo provided, in part:

> There have been repeated offenses by you regarding your tardiness to work, your unwillingness to submit absence slips, your inability to follow appropriate bus procedures, the inappropriate use of radio equipment, and most importantly, the continual refusal to submit logs. This has been repeatedly called to your attention by your supervisor, Andrea Harris. I would specifically refer you to the letter of October 21, 1994, written by Loretta Petersen Strong. This failure to provide the logs is a violation of Article 21.7.13 of the California School Employees Association, No. 314, collective bargaining agreement. An intentional persistent refusal to obey the rules and regulations applicable to the

[25]On this same day, according to Hatcher, there was posted a master composite consisting of a grid showing all drivers who had and had not submitted log sheets by each week from the beginning of the school year. The document facially shows Bruce Smith had not filed logs for the month of October.

> District and its employees is a cause for discipline.
>
> Because your refusal to complete required highway patrol logs places the entire Healdsburg Transportation System in jeopardy of being placed on an "inactive status" by the California Highway Patrol, thus denying hundreds of children access to home-to-school transportation, I consider this an emergency situation. Under the provision of Article 21.8.3 of the California School Employees Association No. 314 Agreement, I am placing you on an un-paid suspension for a period of ten (10) working days beginning November 21, 1994 and ending December 6, 1994. This suspension will be lifted prior to the ten days if all logs dating back to August 30, 1994, are submitted and meet the approval of your supervisor. Failure to submit the required logs could result in your termination from the Healdsburg Union High School District.

Robison notified Hatcher of his right to appeal and right to a hearing before the board. She also advised him that he could meet with her within five days to present information and possible alternative solutions. She also informed him that the District intended to present further notice of discipline which could include further suspension or dismissal.

Hatcher received the memo the next day.

Hatcher testified that after the September 26 and October 21 memos regarding the bus logs requirement, he would pass Harris and assert that bus drivers were exempt from such a requirement. Harris would say that she would check it out. However, she never rescinded the memos. He complained to Robbins in September, he said. She told him there had been a revision to the rule, but she did not have a copy.

Hatcher said the exemption is clear. I disagree. The state regulations were changed in 1993, and operative the next year. In essence, the log requirement was a District response to the regulation change. Moreover Hatcher's position with regard to Robbins further undermined his credibility. Because, he said, Robbins was not his supervisor he took issue that she had responsibility for California Highway Patrol (CHP) requirements. The regulations state, he said, that it is the responsibility of the director of transportation. Robbins never told him that the state required him to have bus logs. Yet as noted, documentation presented at hearing by Hatcher reflect Robbins asked him in late September about the logs. He told her about the exemption. Hatcher's testimony on this point is inherently inconsistent. If Robbins had no role in the enforcement of driver log requirements, why would he insist that she provide him with documentation of the requirement?

Hatcher was suspended a day and a half. He completed the logs and turned them in the following Tuesday, and was allowed to make the afternoon run on November 22, 1994.[26]

Hatcher appealed the suspension. There was a Skelly hearing on November 29, 1994, regarding the suspension where Smith represented Hatcher.[27]

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[26]Harris conveyed the logs to Strong on November 22 with the notation that they were "in order and complete . . . The only question are the dates of October 25 and 26, as a Doctor's note indicates that he was off thru the 26th of October."

[27]Hatcher's written statement (Charging Party Exhibit No. 38) in conjunction with this Skelly hearing, presents a clearer

On December 8, 1994, Robison responded to the November 29, 1994, Skelly hearing. Robison sustained the suspension and responded to inquires made by Hatcher during the hearing. She noted that the CHP confirmed that drivers logs are required notwithstanding an exemption for drivers driving within a 100-mile radius. She found that Hatcher had been given sufficient verbal and written directions that logs were to be filed and finally, that the transportation department's CHP rating was satisfactory at the time.

Hatcher appealed to the board and a hearing was held on January 20, 1995. This will be described below.

Hatcher complained that he had never been given written instructions to complete the logs, and he was never told it would place the department in jeopardy. Nevertheless, it is clear that both Robbins and Harris had verbally counseled him about doing the logs, and that Harris had written him twice on the subject.

Hatcher acknowledged the "work now grieve later principle," but in this case he chose to refuse submission of logs until the District proved to him that the logs were required.

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picture than his testimony at the hearing on the unfair practice complaints. There he stated, he was asked by Robbins in late September about the logs, and again on October 19, 1994, by Harris, about the logs. He claimed the exemption. He said he received a letter from Harris on October 21 asking about the logs. He questioned Robbins on October 21 about the revision to the rule. He learned about a week later that the logs were a carrier requirement. He said he then told Robbins what he had learned and that he would be submitting the logs.

In fact, he did not submit them until November 22, 1994, after the notice of suspension had been served upon him.

Hatcher also took issue with Strong's interpretation of section 21.8.3 of the CBA on the meaning of "emergency." He contended the CBA reference to "harm" to the supervisor or fellow employee means "physical harm."

As noted, section 21.8.3 of the CBA provides for immediate suspension when "the continued presence of the employee at work may result in harm to the supervisor, another employee, staff or students." The section, however, also goes on to provide that any employee may be suspended immediately without pay for ten days.

Harris testified that although the CHP evaluations of the transportation department show a satisfactory rating, two CHP representatives advised her that the District could be in danger of losing its certification if it did not comply with the log sheet requirement.

The December 12, 1994, Dismissal Charges

On December 12, 1994, Hatcher was meeting with Rich on a grievance relating to his pay dock. Rich asked him what remedy he wanted and Hatcher said "cease and desist." Rich replied "maybe this will make it moot" and gave him a packet of papers.[28]

The packet of papers consisted of a cover memo from Robison describing the recommendations of the director of personnel and director of transportation that the board of

[28]At the end of the meeting, in the presence of his CSEA representative, Rich told Hatcher that in all the years Hatcher was with the District, the District did not feel he was a good employee.

trustees dismiss Hatcher.[29] The dismissal was supported by the following:

-- The issues cited in the September 26, 1994, memo from Harris set forth above.

-- The alleged performance deficiencies set forth in the October 21, 1994, memo for stopping and fueling his bus with students present.

-- A November 7 notification from his supervisor that he had failed to secure the bus, that the bus was in an unauthorized location on November 3 and 4, and that he had made a derogatory-remark about another bus driver.[30]

Noting that Hatcher had been subject to "prior disciplinary action" the dismissal listed the following:

-- The April 26, 1993, letter from Machi (styled "letter of reprimand") to Hatcher as a result of a verbal confrontation with a teacher at the union elementary school.

-- The September 14, 1993, memo, styled "letter of reprimand" to Hatcher for allegedly failing to maintain required in-service hours for his bus driver's license.[31]

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[29]The notice also indicated what rights Hatcher had for review of and/or settlement of the dismissal recommendation and further that he was being placed on paid administrative leave, effective December 12, 1994, pending a board hearing.

[30]As noted, Hatcher had not been given this document before December 12, 1994.

[31]Strong testified at hearing that the April 26, 1993, memo was a warning and the September 14, 1993, memo was "documentation" and neither constituted discipline. Yet, she testified both were used as a basis for the recommendation to terminate Hatcher.

-- The November 17, 1994, letter regarding his failure to turn in the bus logs and the suspension.

Hatcher did not respond in writing to the December 12, 1994, charges, because, he said, he was "consulting lawyers."

Smith was critical of the charges as they include reference to Hatcher's failure to maintain drivers log, which at the time were under appeal to the board of trustees. The charges include the Harris memo of November 7, 1994, which was not given to Hatcher before December 12, 1994, and none of the charges occurred after the October 28, 1994, deadline given by Harris on October 21.

Further, the director of transportation is listed as one of the parties recommending Hatcher's dismissal. Section 21.3 of the CBA indicates the recommendation of the director of transportation "shall be in writing." In fact, Harris did not submit a written recommendation until March 3, 1995.

The January 17, 1995, Skelly Hearing

Robison notified Hatcher on January 4, 1995, that there was going to be a Skelly hearing on January 17, 1995.

Smith was to represent Hatcher at the January 17, 1995, Skelly hearing. Smith was ill on that day and had his secretary call and leave a message on two answering machines at the District.

Neither Smith nor Hatcher attended the meeting.

Rich, who had been designated by Robison to preside at the hearing of January 17, 1995, wrote to Hatcher that day.

Rich stated he waited until 11:25 a.m. for Hatcher's appearance. Rich received no telephone call and Hatcher did not appear at the hearing. Rich then stated:

> As a result, under the provisions of the CSEA Agreement, you are hereby suspended without pay pending your hearing before the Governing Board on Friday, January 20, 1995.

Smith testified there is no provision for this form of discipline in the CBA. He and Hatcher both read the letter as suspending Hatcher for failing to appear at the Skelly hearing.

The CBA does provide for a ten day suspension without pay, but does not address an indefinite suspension without pay.

Hatcher attended a meeting on January 18, 1995, with Strong. She told him he was suspended because he did not attend the Skelly hearing. He explained about the telephone messages and she said "have your lawyer talk to my lawyer."

After January 20, 1995, the District offered Hatcher, through James Bertoli (Bertoli) an attorney in private practice, another Skelly hearing set on February 1, 1995.[32] Smith testified that he was aware that Bertoli, on behalf of Hatcher, declined a second Skelly hearing.[33] Rich was unable to say why, if a second Skelly hearing was to be scheduled, the District suspended Hatcher after January 17, 1995.

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[32]Lawrence Schoenke, the District's attorney, wrote to Bertoli on January 27, 1995, expressing willingness to reschedule the Skelly hearing of January 17. He proposed a hearing date of February 1, 1995.

[33]Incredibly, Hatcher testified that he knew nothing about the District's offer or of Bertoli's waiver, even though Smith knew of both events.

Hatcher was inconsistent on the matter of a Skelly hearing. At one point he said he did not ask for a Skelly hearing, and then, on cross examination, he stated he did request the hearing.

The January 20 Hearing

On January 19, 1995, the District advised Hatcher that it intended that at the January 20, 1995, meeting, the board of trustees would hear both the suspension appeal and the dismissal charges. At that hearing, Smith was there to represent Hatcher on the suspension appeal. Smith stated at the time that he did not represent Hatcher on the dismissal matter and that Bertoli was representing Hatcher on that issue.

The board granted a continuance of the dismissal hearing during the hearing.

On March 7, 1995, Bertoli wrote to Rich, by then interim superintendent, regarding the suspension for failing to attend the Skelly hearing of January 17. Bertoli demanded Hatcher's reinstatement and back pay.

In August 1995, Hatcher challenged the suspension with a writ of mandate, contending the board was without power to suspend Hatcher from January 17, 1995. The matter is pending.

The Unexcused Absence Audit

Sometime in December 1994, the administration determined to review Hatcher's attendance records. Harris used Robbins' calendar along with substitute slips indicating who substituted on certain runs and compiled a two-year audit of Hatcher's attendance. Harris said it took several days to do the audit.

She shared her concerns with Hatcher and he picked up several errors. She had to repeat the audit.

On February 17, 1995, Lois Olds (Olds), the administrative assistant in the personnel department, sent Hatcher a cover memo typical for material going into an employee's personnel file.

The attachments consisted of audits of Hatcher's reported and unreported absences for the 1992-93 and 1993-94 school years, compiled by Harris. The documentation concluded, based upon the audit, that Hatcher owed the District $2,374.05 for hours paid but not worked for the two years covered by the audit.

Hatcher testified he received this material when he got the amended charges, on February 17, 1995, described below. He went to Olds' office on February 18 or 19, 1995, and asked to see the original material upon which her letter was based.

Olds said she did not have to talk to him. Hatcher sent a letter to the superintendent complaining that Olds was not acting in professional manner and was using abusive language towards him.[34] Hatcher got no response from the District.

Hatcher denied he asked Olds to interpret any provision of the CBA. In the District's petition for a restraining order against Hatcher (described below), Olds declared that he tried to get her to interpret certain provisions of the contract. Hatcher denied asking her any questions stating that she was a

[34]Olds was candid in her testimony that she, in effect, lost her cool with Hatcher.

probationary employee that had just started with the District and would have no knowledge of the CSEA agreement.[35]

The Amended Charge

On February 17, 1995, Hatcher was issued an amended charge by Rich, by this time, acting superintendent. The amendment added two more accusations to the basis of the recommendation for dismissal. The first was that in the November 22, 1994, compilation of log sheets for the period of August 30 to November 18, 1994, Hatcher had listed working at the Healdsburg Junior High School every workday from 9:00 a.m. to 10:30 a.m. The amended charge alleged that, in fact, Hatcher rarely worked during that time period. In addition, the amendment included the absence slips audit revealing unauthorized absences in 1992-93 and 1993-94, served officially on that same day.

Smith complained about the amended charge in that it included the allegations set forth in Old's memo of that date, which stated that the material is to go into the personnel file in ten days, yet was included in the amended charge.

Hatcher admitted that on the bus logs he submitted on November 22, 1994, he stated he worked every day from 9:00 a.m. to 10:30 a.m. on duty days. His explanation again strains credibility. He said he went to Robbins' office to double check the dates. He said he explained to her the situation at the junior high school, and asked her how to document that. She said

[35]Yet, Hatcher testified that he did ask her about provisions of the CBA regarding who logged material into the personnel file.

just put in from 9:00 a.m. to 10:30 a.m., so he then took them to Harris.[36]

Again, the amended charge indicates the director of transportation is making a recommendation for dismissal, but as of February 17, 1995, there was no written recommendation by Harris, as required by the CBA.

The Custodian Position Application

On March 7, 1995, Hatcher wrote to Strong applying for the custodian position at Mountain View High School. He was originally at the high school but had transferred to the Healdsburg Junior High school, and he was requesting his original position in the application.

Hatcher said he spoke to Strong and felt the CBA gave him a preference as a custodian to the position.

Strong said she did not get involved in the appointment for this type of position. Harris was principal at Mountain View High and she interviewed candidates. Hatcher was not considered for the position as he was under suspension at the time.

Two days after he submitted the application, the District expressed desire that Hatcher stay away from District property. This action is described below.

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[36]Robbins does not recall directing Hatcher to place the hours as Hatcher did. I find Hatcher's inquiry to Robbins on this point in direct contrast to his position that she was not his supervisor with respect to other issues. It further strains his credibility that so important an issue would be resolved in such short fashion.

The District Property Ban

On March 9, 1995, Strong wrote to Hatcher.[37] She wrote she had been informed that Hatcher was on District property at the bus yard and made inappropriate and threatening comments to other employees and "generally impeded the transaction of district business." Hatcher was noticed that while he was on administrative leave he was not to enter District property. With the exception of letting off or picking up his child at a school site, if he were to appear on District property or boarding a school bus, the police would be called and he would be physically removed.

Strong noted that Hatcher had retained Bertoli as counsel. All communications were to be with him. Hatcher was advised to immediately take heed of the notice.

The document was copied to several District administrators and the CSEA co-presidents.

There is no evidence of other employees being excluded from District property. However, Smith testified there was an incident involving an employee where there is a threat of violence but the employee resigned before the District obtained the order.

Hatcher's testimony presented an innocent visit to the yard. Yet in a written description of the event, Hatcher described his

[37]This letter to Hatcher followed by one day his having filed the initial unfair practice charge against the District. There is no evidence, however, that the District was aware of the unfair practice on March 9, 1995.

discussion with other drivers about his entitlement to a vacant position with more hours. He wrote that he then confronted Robbins, who was filing the position, contending that he was entitled to the position if another driver with more seniority did not opt for the position. They also discussed Hatcher's efforts to get the custodial position at Mountain View and again they had a difference of opinion on who should get the position. Hatcher wrote that Robbins was not happy about his taking the vacant position.

The Restraining Order

The District sought a temporary restraining order against Hatcher on March 10, 1995. The matter was addressed by the court on March 14, 1995. Based upon affidavits, the court issued a temporary order. After hearing on May 1, 1995, Hatcher was enjoined from coming within 10 feet of any District school bus, except to deliver or remove his child from the bus, or from speaking to students or drivers while they were on District buses.

The Board Dismissal Hearing

The board of trustees held the dismissal hearing on April 24, June 12, 22 arid 23, 1995, and issued a decision on June 23, 1995. Hatcher was represented by Bertoli.

The hearing was presided over by Paul Loya (Loya), an attorney employed by the District for this purpose, who commenced the hearing with the following comments on the proceedings.

Loya was designed by the board to make procedural decisions in the course of the hearing. All board members were present at the hearing. The District administration was represented by counsel. Although Loya was acting as hearing officer, the board, had the authority at anytime to overrule any decision the hearing officer made, and would make the final decision with regard to disposition of the matter.

The board's decision, dated June 23, 1995, included findings of fact that Hatcher was late for the Fitch Mountain pick up on September 14 and 15, 1994.[38] That from August 30 to September 26, 1994, he failed more than ten times to do the required safety check, and failed to clean his bus and close the windows on numerous occasions. He failed to turn in the keys and fire extinguisher at the end of the day prior to September 20 and failed to turn in absence slips for August 26 through August 29, and for two days in the week of September 19. He further failed to turn in his K-run list in a timely fashion after more than one request to do so. The board further found that during the period of September 26 to October 17, 1994, Hatcher did not complete the necessary absence slips for time off in August and September. The board found he fueled a bus while students were on board, contrary to the recommended practice of the District, and he fueled at a taxable fuel pump when the bus was eligible for the nontaxable pump. He continued to fail to do adequate bus safety

[38]Only one bus driver testified for Hatcher at this hearing. That bus driver had been terminated from the District in fall 1995.

checks, failed to turn in his keys and fire extinguisher, and failed to clean his bus and put up the windows on numerous workdays.

The decision expressly stated that the board did not base its action on the events described in this paragraph. The board further found that Hatcher continued to not leave the bus in good order by failing to idle down at the end of the day, failing to close windows and failing to bring in the fire extinguisher. This was after written confirmation of his misdeeds. On October 26, 1994, he failed to secure the bus and turn in the keys and fire extinguisher. His bus was seen in an unauthorized location on November 3 and 4, 1994. Hatcher also made a derogatory remark about a fellow bus driver over the radio.

The board further found that Hatcher submitted log sheets on November 22, 1994, for the August 30 to November 18, 1994, period, in which he stated that he worked every workday from 9:00 a.m. to 10:30 a.m. at the junior high school as groundskeeper, but in fact, he performed those duties at other times. Again, the board expressly stated that it did not rely on this finding, as it was related to the prior suspension.

The board further found that Hatcher failed to file absence certificates on numerous occasions in 1992-93, after December 12, 1992, and on many occasions in 1993-94.

The board also found that Hatcher had been subject to prior disciplinary action, making reference to the April 26, 1993, letter from Machi. The letter was called a "letter of

reprimand." The board referred to the September 14, 1993, memorandum from Harris regarding the in-service hours. The board further considered the November 17, 1994, letter suspending Hatcher for failing to turn in the logs. The board's decision then noted that the disciplinary actions were considered only with regard to mitigation or the level of penalty to be imposed.

The board further found that discipline was not initiated because of union activities or filing workers compensation claims.

The board then found that Hatcher was inefficient in performance of duties; refused to do assigned work; careless in performance of work; and had unauthorized absences.

The final decision of the board was that Hatcher was to be suspended without pay through June 23, 1995, from his last day in paid service (January 17). He was further demoted to probationary standing from the end of the summer recess and was directed to attend the drivers in-service at the beginning of the next school year.

Smith testified that he had never heard of the board involuntarily demoting a classified employee. He has seen "last chance" agreements negotiated to that end. The CBA does not provide for demotion to probationary status, but does provide for demotion in class.

Smith has never heard of a classified employee being disciplined for failure to maintain drivers logs, failure to submit absence slips, failure to take fire extinguisher off bus,

parking bus between office and bus garage, inadequate time on bus check outs, leaving keys in bus, not putting up windows, fueling a diesel bus with students on board or fueling a bus at the nontaxable rather than taxable fuel pump, or for interjecting a comment in a radio conversation on the bus radio.

The CBA Provisions on Discipline

The parties' CBA, effective July of 1992 to June of 1994, in Article XXI defines discipline as a "personnel action which results in the dismissal, demotion, suspension or involuntary reassignment to another classification."

Recommendation for discipline comes from the immediate supervisor to the director of personnel. The CBA also provides that the director of personnel will investigate the charges and make a recommendation to the superintendent.

Section 6.1.2 of the CBA provides:

> Employees shall be provided with copies of any derogatory written material ten (10) workdays before it is placed in the employee's personnel file. The employee shall be given an opportunity during normal working hours without loss of pay to initial and date the material and to prepare a written response to such material. The written response shall be attached to the material.

Section 6.1.5 provides:

> Any person who places written material or drafts written material for placement in an employee's file shall sign the material and signify the date on which such material was drafted. Any written materials placed in a personnel file shall indicate the date of such placement.

Strong testified that the District adheres to progressive discipline. Employees are first counseled verbally about alleged performance deficiencies, then given written warning before discipline is imposed.

From sundry documents placed into evidence, it appears that a standard practice for placement of materials into an employee's personnel file existed. A cover letter was placed on the material which indicated the date the material was to be placed into the file and that the employee had the right to review the material and to attach written comments. The notice also provided that the employee could review the material during business hours and that the employee would be released from duty for the review with no salary reduction. The cover memo also noted who placed the document in the personnel file.

Regarding suspension of an employee, section 21.8.3 of the CBA provides:

> Employees may be suspended immediately by written order under emergency procedure when, in the opinion of the Superintendent or designee and the supervisor recommending disciplinary action, the continued presence of the employee at work may result in harm to the supervisor, another employee, staff or students. Any employee may be suspended immediately, without pay, by written notice from the Superintendent or his designee, for a period not to exceed ten (10) working days. An employee receiving an emergency suspension shall be entitled to all rights contained above.

ISSUES

The issue in this case is whether the actions of the District when it (1) served upon Hatcher the recommendations for

dismissal on December 12, 1994, (2) issued the written reprimands of October 21, November 7 and November 17, 1994, or (3) ordered the suspension and demotion in June of 1995, were in retaliation for his participation in negotiations or grievance processing in violation of the EERA?

CONCLUSIONS OF LAW

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions

(State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) Once employee misconduct is demonstrated, the employer's action,

> . . . 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 to other protected activities. [Ibid.]

The record shows that Hatcher was engaged in protected activity. It is well established that the filing of grievances and unfair practice charges is protected activity. (North Sacramento School District, supra, PERB Decision No. 264.) Hatcher filed grievances in 1988 and 1991, appeared in a grievance on behalf of Capwell in 1992, and spoke to Harris about the lack substitutes in September of 1994. In addition, Hatcher served on the CSEA negotiations team from 1990 through the 1992 school year and made four appearances before the board of trustees during that time. He also served as CSEA's chief negotiator for some of that time. Aside from the discussion with Harris in September of 1994, however, there is no indication that Hatcher was active in grievance filing after 1992. Hatcher

testified that he continued to serve as steward in the transportation department, but there is no evidence of any activity between the Capwell matter in May of 1992 and the September 1994 discussion with Harris.

The District was aware of the activities Hatcher undertook. Strong sat across the table from Hatcher during negotiations and served on two committees with him. She was involved in Hatcher's 1991 personal grievance and the Capwell grievance in 1992. Harris was involved in the 1991 grievance, and Hatcher spoke to her in September about the shortage of substitutes. Hatcher spoke directly to the board of trustees in the 1990-91 and 1991-92 school years.

The District first argues that CSEA is collaterally estopped from pursuing this matter here in that the dismissal hearing before the board of trustees addressed the issue of retaliatory action, relying on State of California (Department of Developmental Disabilities) (1987) PERB Decision 619-S and Kern County Office of Education (1987) PERB Decision No. 630.

Specifically, the District argues that Hatcher was represented by counsel, and had an opportunity to call and to cross-examine witnesses. The board made a determination on the merits, found Hatcher deficient in work performance, and further that no reliance on his union related activities were made. Collateral estoppel should therefore preclude PERB from re-litigating the retaliatory allegation, according to the District.

CSEA argues that PERB's ruling in Trustees of the California State University (1990) PERB Decision No. 805b-H, compels the conclusion that the discriminatory adverse action was not properly before the board of trustees. In that case, PERB refused to apply collateral estoppel principles to a ruling of the State Personnel Board (SPB), where the latter proceeded to decision with full knowledge that PERB was adjudicating the discriminatory charge, a matter PERB held exclusively and initially within its jurisdiction.

In addition, CSEA argues that the issues are not the same as those before the board of trustees in that CSEA's rights were not litigated. In State of California (Department of Corrections) (1995) PERB Decision No. 1104-S, PERB rejected a collateral estoppel contention on the grounds that the employee organization's interference claim was not litigated before the SPB. In this case, CSEA has a separate claim of interference with its rights as the exclusive representative.

Finally, CSEA attacks the nature of the termination hearing, in that the presiding officer was not a "neutral and detached judicial officer unaffiliated with any of the parties." Relying on a concurring opinion in San Diego Unified School District (1991) PERB Decision No. 885, CSEA contends that the proceeding before the board of trustees should not be given collateral estoppel.

In State of California (Department of Developmental Disabilities), supra, PERB Decision No. 619-S, PERB adopted an

administrative law judge's analysis of collateral estoppel where he stated:

> Collateral estoppel traditionally has barred relitigation of an issue if (1) the issue is identical to one necessarily decided at a previous proceeding; "(2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." [Citation.]

PERB predicated its position on this matter on People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77] (Sims) in which the court cited United States v. Utah Const. Co. (1966) 384 U.S. 394 [16 L.Ed.2d 642] where it was held that collateral estoppel might be applied to decisions made by administrative agencies "[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." In Sims the court said:

> To ascertain whether an agency acted "in a judicial capacity," the federal courts have looked to factors indicating that the administrative proceedings and determination possessed a "judicial character." [Citations.]

In those cases where collateral estoppel has been considered by PERB, the decision under review for application of the doctrine, has involved a third party. (See San Ysidro School District (1980) PERB Decision No. 134; Kern County Office of Education (1987) PERB Decision No. 630 and San Diego Unified School District (1991) Perb Decision No. 885 (San Diego); Trustees of the California State University, supra, PERB Decision

No. 805b-H.) In San Diego, the PERB majority decision declined, for lack of necessity, to address the question of whether a hearing officer hired by the district to alone conduct a hearing was quasi-judicial.

I decline to give collateral estoppel to the board of trustees termination hearing because the board itself was the presiding body at that hearing. The hearing officer served only to assist the board in procedural decisions. Otherwise, the board itself presided at the termination hearing. The board itself, a party to the PERB proceeding was to make the final decision regarding the adverse actions sought by the administrative staff. Such a setting, where one of the parties to the proceeding is presiding at the proceedings, does not strike me as "judicial in character."

The District urges the complaints be dismissed because, it contends, there is no connection between the District's action against Hatcher and his protected activity. It contends the board's action was independent of the administration and should be dismissed under the authority of Konocti Unified School District (1982) PERB Decision No. 217 (Konocti). The District contends that the record in this case is devoid of any shifting or contradictory reasons for the board's action. The District further argues that there was no departure from standard procedures in the actions taken by the District against Hatcher.

In Konocti, the hearing officer imputed union animus of the school superintendent to the school board which had held a

hearing on the dismissal recommendation of the superintendent. The PERB found that the board conducted an independent hearing and rejected the superintendent's recommendation for dismissal. Thus, the District argues here that since the board of trustees held its own hearing and rejected the dismissal recommendation, no imputation of animus can be imputed to the board.

The facts of Konocti are different than in this case. First, the information relied upon by the board in this case consisted solely of information gathered and supplied by District administrators, Harris, Strong and Rich. Secondly, the same basis for drawing an inference of unlawful motivation on the administrators' part is reflected in the board's decision for imposing discipline on Hatcher. The decision to impose discipline on Hatcher relied on information that did not comply with legal requirements, some of which had not been discussed with Hatcher before being placed into written form (being late and leaving keys and fire extinguisher on bus, pumping diesel fuel with children on board or pumping at nontaxable tanks). In addition, the board's decision expressly labeled two documents given to Hatcher as prior discipline, when in fact, the District's own personnel director testified that such documents were not discipline. Thus, for the same reasons that Harris' and Strong's actions might be suspect, so could the board of trustees decision, and action, be suspect for unlawful motivation.

CSEA urges a finding of retaliatory adverse action imposed

upon Hatcher on the basis of timing. Shortly after discussing with Harris the shortage of drivers in September of 1994, Hatcher received the September 26 memo from Harris regarding his work deficiencies. Then, while presenting a grievance on the pay dock on December 12, 1994, Hatcher was handed a package of documents justifying a recommendation for his dismissal.[39]

The District discounts Hatcher's meeting with Harris in September on the grounds that she agreed with him about the shortage of drivers, and in fact, did secure a bus driver's license so that she could take on a route. It contends the December 12, 1994, meeting could not have prompted the dismissal recommendation because the charges had been prepared before that date.

The District discounts Hatcher's activities as a negotiator for CSEA, as that was two years before the District's action, relying on Central Union High School District (1983) PERB Decision No. 324 (one year between protected activity and adverse action was one factor in declining to find unlawful motivation).

Here, however, I think CSEA is correct in focusing on the September meeting between Hatcher and Harris as a reference point.[40] There is no dispute that Hatcher did speak to her about

[39]With regard to the December 12 grievance meeting, Hatcher had already been put on notice that the District was considering further adverse action. Robison had told him so in the letter of November 17, 1994, when she advised him of the suspension for failing to submit drivers logs.

[40]There is no evidence put forward by Hatcher that the meeting with Harris preceded the memo of September 14, 1993, from Harris to Hatcher, regarding in-service time. Thus, no protected

a shortage of substitutes. That she agreed with him does not mitigate his entitlement to speak to the point and not suffer retaliation.

Timing is one factor that may be relied upon in drawing an inference of unlawful motivation, but standing alone will not justify such an inference. (Moreland Elementary School District (1982) PERB Decision No. 227.)

CSEA advances further argument in support of the inference of unlawful motivation in contending that the District failed to follow the CBA requirement that the director of personnel investigate the charges before making a recommendation of adverse action. Here, contends CSEA, the fact that Strong, the director of personnel, did not ever discuss with Hatcher any of the alleged charges constitutes failure to investigate the charges. Furthermore, Harris, the author of all the adverse memos to Hatcher in the fall of 1994 regarding his bus driving deficiencies, never discussed with Hatcher the problems before issuing the memos. Finally, contends CSEA, Robbins did not discuss with Hatcher the problems before the memos were issued.

It is true that Strong never consulted with Hatcher. She relied upon Harris for all her information. However, there is no evidence of an established practice that Strong made independent investigations where a supervisor advanced performance problems.

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activity by Hatcher is shown to have occurred at any time reasonably before the September 14, 1993, memo, to justify an inference of unlawful motivation for that memo, based upon timing.

While Strong did not appear to like Hatcher, and insisted that he deal with the District through his attorney, there is no basis for inferring anti-union animus on her part. There is no reason to infer unlawful motivation from the failure of Strong to conduct an independent investigation of Hatcher's poor job performance.[41] (See Riverside Unified School District (1987) PERB Decision No. 639.)

It is only partially true that Harris did not discuss matters with Hatcher before issuing memos. Both Harris and Robbins asked Hatcher about the bus logs, before Harris wrote memos on the subject.

The District contends that there were no shortcomings in the investigation by either Strong, relying on Harris, or Harris, relying on Robbins.

This argument overlooks the fact that the evidence shows that the District had a practice of progressive discipline, meaning the supervisor would first speak with the employee about a deficiency, before resorting to a written memo. Such practice was not employed in this case. It does not appear that Harris spoke to Hatcher about the fire extinguisher, keys, or the safety check deficiencies before issuing him memos about those matters. Nor did she speak to him about being late on September 14 and 15, 1994, before she issued the memo. Nor did she speak to him about

[41]I did take note of Strong's failure to check with Hatcher about the alleged "abandonment" of position as charged in her October 21, 1994, letter to him. However, it is noteworthy that was not the only charge against Hatcher in that letter.

the fueling of the bus with children on board, or on the use of the nontaxable pump. On the other hand, both Harris and Robbins did speak to Hatcher about the bus logs and absence slips before written memos were produced on those issues.

Another basis for drawing an inference of unlawful motivation, contends CSEA, is the District's failure to follow proper procedures with respect to various documents that were placed into Hatcher's personnel file, without informing Hatcher that such documents were going into his file or that he had a right to respond to the memos. Hatcher was not informed that the September 26 memo was going into his file or that he had a right to respond to it. The October 17 memo was placed into his file but later replaced by the October 21 memo.[42]

PERB has held that the fact that personnel practices were not exemplary is evidence insufficient to raise inference union activities motivated the District to take action. (San Diego Unified School District (1991) PERB Decision No 885 (San Diego).)

CSEA further argues that the District gave Hatcher until October 28, 1994, to correct the earlier deficiencies, and then proceeded to dock Hatcher's pay. This, contends CSEA, was

[42]The October 21 memo notes the existence of the October 17 memo. Harris said she removed the October 17 memo from Hatcher's mail box when she noted he had been absent. Both the October 17 and 21 memos make reference to the placement of the documents into his file and his right to make a response within five days.

clearly disciplinary action yet, Hatcher was not given notice of rights to a Skelly hearing or to appeal the decision.[43]

The District's failure to give Hatcher the November 7, 1994, memo before December 12 was also a failure to comply with procedures.

CSEA attacks the November 17 suspension for failure to turn in bus logs because it was based upon the "preposterous notion" that such failure would place the transportation department in jeopardy of being placed in "inactive status" by the CHP. Robison's response to Hatcher's grievance stated that the District's rating at that time was satisfactory, further denigrating the seriousness of the absence of Hatcher's driver's logs. Finally, the immediate suspension, contends CSEA, violates the CBA as it limits immediate suspension to an emergency when the "continued presence of the employee at work may result in harm to the supervisor, another employee, staff or students."

I disagree with CSEA's analysis of the seriousness of Hatcher's failure to turn in the bus logs and the limit CSEA reads into the CBA on suspensions. Credible testimony of Harris was that the logs were required and that failure to maintain the

[43]CSEA further argues that Harris testified at the termination hearing that Hatcher had done nothing wrong by not turning in his absence slips until after he returned to work on October 26. Yet a fair reading of the District's concern when Strong took the action was that Hatcher had failed to inform the District of the reason of his absence or of an anticipated return date, both factors unrelated to absence slips, and both matters of reasonable concern to the employer.

logs could result in adverse effect on the transportation department.

Furthermore, the CBA does provide for a ten-day suspension that has no conditions attached. Here, Hatcher was suspended for up to ten days, but the suspension was reduced to one and one-half days when he turned the logs in to Harris.

CSEA further cites the inclusion of the November 7, 1994, memo in the dismissal charges, despite the fact that Hatcher had not previously been given the memo, nor given an opportunity to respond to it. In addition, the dismissal charges were brought while Hatcher's appeal of the suspension for failure to submit logs was still pending, and did not contain any conduct by Hatcher after the deadline of October 28, 1994, set by Harris in the October 21, 1994, memo. Thus, contends CSEA, Hatcher was being disciplined for the same conduct for which he was suspended.

The District, contends CSEA, placed Hatcher on an indefinite unpaid suspension on January 17, 1995, for failing to attend the Skelly hearing set for that day. The CBA, contends CSEA, has no provision giving the District such authority.

The District contends however, that provisions of the Education Code and of the CBA necessarily render the District empowered to suspend an employee without pay, pending the termination hearing.

It is not the province of PERB to monitor or enforce compliance with the Education Code. (See Los Angeles Community

College District (1987) PERB Decision No. 623.) The District's argument of interpretation of the CBA does appear to be reasonable. That argument rests on the language of the CBA in section 21.8.2, regarding revocation of suspension and compensation for the period of suspension that was revoked. In Lapp v. Superior Court of Placer County (1962) 205 C.A.2d 56 [22 Cal.Rptr. 839.] it was held that a school board has an inherent power to suspend an employee without pay during investigation and pending the determination of formal charges absent a provision in the Education Code. Moreover, section 45113 of the Education Code empowers the school board to enact rules and regulations governing the management of classified employees. That section expressly provides:

> Any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive.

Finally, in San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800], the California Supreme Court noted that Education Code section 45113 mandates certain procedures, protections and entitlements for classified employees to be disciplined. The

intent of section 3540[44] is to preclude contractual agreements which alter these statutory provisions.

CSEA cites the District's March 9, 1995, exclusion of Hatcher from the District property the day after he filed the unfair practice charge was "extraordinary," and unprecedented.

As the District argues, however, there is no evidence that the District was aware of the unfair practice charge having been filed when it filed its petition for injunctive relief.

Finally, the board of trustees decision was improper and unlawful, contends CSEA, because the board cited as "prior discipline" imposed, the April 26, 1993, letter and the September 14, 1993, memo from Harris regarding in-service hours

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[44]Section 3540 provides in relevant part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

required. Both, insist CSEA, were only warnings and did not constitute discipline. CSEA cites Strong's testimony that neither document constituted discipline within the meaning of the CBA. Thus, the board improperly concluded the letters were prior discipline imposed.

CSEA raises a number of other arguments in support of its claim that District representatives harbored an unlawful motive. I consider it unnecessary to address them all. Suffice it to say that under Novato's analytical approach, the following observations justify an inference of unlawful motivation in the actions taken against Hatcher.

Despite a policy of progressive discipline, whereby employees would first receive verbal notice of performance problems, Harris did not discuss with Hatcher the matters relating to bus check out, tardiness and paperwork, keys and fire extinguishers and windows, as set forth in the September 26, 1994, memo. In that memo she made a specific allegation occurring on September 20, 1994. She had not discussed with him absence slips, bus logs nor the K-run list.

Thus, the District varied from standard personnel practices in the advancement of the September 26, 1994, memo.

Critical to the District's basis for imposing discipline on Hatcher was this September 26, 1994, memo from Harris. Yet the memo did not inform Hatcher that the memo was going into his file and that he had a right to respond to the information therein. Thus, the board relied upon a document that did not conform to

the rules of procedure for placement of documents into the personnel file.

Part and parcel to the administration's determination to move forward towards Hatcher's dismissal is the November 7, 1994, memo. Again, Harris never discussed the incidents in this memo with Hatcher, contrary to the progressive discipline policy. Moreover, the memo which was never provided to Hatcher, prior to going into his personnel file.

In reply briefs, CSEA cites Miller v. Chico Unified School District (1979) 24 Cal.3d 703, 713 [157 Cal.Rptr. 72] (Chico) for the proposition that the District could not rely on the November 7, 1994, memo because of failure to comply with Education Code section 44031. The court held that an employee must be permitted to review and comment on derogatory written material compiled and maintained by a school district, even though the material had not been previously placed in his personnel file. Despite the absence of his right to exercise that review and comment, the administration included the November 7, 1994, document as a basis for recommending dismissal. This would seem to violate Chico. Even though the board itself expressly disavowed the information in the November 7, 1994, memo, the damage was already done.

Moreover, as noted, the September 26, 1994, Harris to Hatcher memo, did not provide for notice of going into his personnel file nor of Hatcher's right to respond. The board did rely upon this document for its findings and decision for the

tardiness on September 14 and 15, the September 20 incident regarding the keys and fire extinguisher, and failure to file absence slips, log sheets and the K-run. Thus, the board of trustees improperly considered the September 26, 1994, Harris to Hatcher memo as grounds for imposing discipline.

The decision of the board relied on two documents as evidence of "prior" discipline, the April 1993, letter from Machi and the September 14, 1993, letter from Harris regarding Hatcher's in-service hours. Strong, the District director of personnel, testified that neither document constituted discipline.

I thus draw an inference of unlawful motivation from the District's action against Hatcher in making recommendations for his dismissal and the board's decision to suspend Hatcher for a certain time period and to demote him to probationary status, on the grounds that the District failed to comply with its own procedures, i.e., failed to discuss performance problems with Hatcher before issuing written memos (the September 26, 1994 and November 7, 1994, memos); failed to give Hatcher notice of right to review and comment on documents going into his personnel file, (the September 26, 1994 and November 7, 1994, memos); failure of supervisor to put into writing the recommendation of dismissal until long after service of the dismissal notice; and the reliance upon the April 1993 Machi letter and the September 14, 1993, memo regarding in-service hours as "prior reprimands" when in fact neither constituted such reprimand.

The burden now shifts to the District to show or demonstrate that it would have taken the action it took, despite Hatcher's protected activity. (Novato.)

The December 12, 1994, Dismissal Notice

The December 12, 1994, dismissal recommendation was predicated upon Hatcher's alleged deficiencies in the September 26, October 21 and November 7, 1994, memos.

The September 26 memo asserted that Hatcher had been late on September 14 and 15, 1994. Hatcher admitted the charges at hearing. His explanation, at hearing, was that his battery was dead on both days. Astonishingly, Hatcher never told Robbins or Harris what condition prevailed on those days. Until the board of trustees hearing, Hatcher never asserted this defense. The District, Harris or Strong, did not know of that defense at the time the dismissal recommendation was delivered to Hatcher on December 12, 1994. The memo also criticized Hatcher's bus maintenance check up, bus cleanliness, windows in proper place and returning fire extinguisher and bus keys. Specifically, the fire extinguisher and keys were on the bus on September 20, 1994.

Hatcher testified that he was not at work on September 20, 1994.[45] Harris' testimony was that she saw the fire extinguisher and keys on board the bus on September 20, 1994, and Hatcher had been the last driver on the bus.

[45]Hatcher's own bus logs, submitted to Harris in November 1994, assert he was present on September 20, 1994.

The September memo asserted that Hatcher had not submitted absence slips for the week prior to the start of school and for two days during the week of September 19, 1994.

Finally, the memo asserted that Hatcher had not submitted log sheets nor K-run student's lists. As the facts demonstrate, Hatcher continued for some time to refuse to submit the log sheets, and his only defense to the K-run list was that he didn't understand the requirement.

Thus, with the exception of the dispute about bus cleanliness and closing bus windows,[46] the September 26 memo listed performance problems with Hatcher that are factually true.

The second basis of the dismissal recommendation was the October 21 memo from Strong regarding Hatcher's failure to submit absence slips, file bus logs, fuel buses in accordance with the recommended practice of the District, and that he fueled a bus at a taxable pump.

Once again, Hatcher's defense to these assertions carries no weight. He was at the time, refusing to submit the bus logs, he admitted fueling the bus but, at hearing offered an excuse he never advanced to Robbins, Harris or Strong.[47] His defense to fueling the bus at the taxable pump versus the nontaxable pump was that he didn't understand the difference.

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[46]And that dispute is only whether other employees received adverse memos for such conduct.

[47]The excuse was that the bus fuel gauge was defective, creating the potential for running out of gas.

Thus, the deficiencies relied upon by the District for the October 21, 1994, memo were true.

The courts and the National Labor Relations Board has long recognized an employer's right to discharge employees for performance deficiencies, notwithstanding that employee's participation in protected activities. (San Diego.)

The final basis for the recommendation for discharge was the November 7, 1994, memo from Harris to Hatcher. This memo asserted Hatcher continued to not leave his bus in good order, that on October 26, the bus was not idled down, windows were left down and he did not bring in the fire extinguisher.

Hatcher's defense to these charges was that he was not at work on that day. Yet, his own bus log shows that he was present on that day, and his doctor's note to the District authorized him to return on October 26.

The memo further alleged that Hatcher was parked on Grant Street on November 3 and 4, 1994, assertions that Hatcher admitted. The memo also asserted that Hatcher parked his bus in the wrong place at the bus yard. Hatcher disputed that he was the only one who did this, not that he did not park his bus where charged.

Finally, the memo described the radio incident where Hatcher interrupted the conversation between a bus driver and the bus dispatcher and made a derogatory remark about the bus driver. Hatcher admitted the incident.

Thus, in summary, the factual basis for the December 12, 1994, dismissal recommendation was, for the most part, true.

The December 12, 1994, statement also referred to the "prior discipline" citing two documents that were in fact not discipline. While that error contributes to an inference of unlawful motivation, it does not itself, denigrate from the factual deficiencies in Hatcher's performance set forth as the basis for recommending termination.

The discussion relating to the December 12 dismissal charges covered the October 21 and November 7 memos and need not be repeated here.

The complaint alleged that the November 17 reprimand was in violation of Hatcher's rights. The November 17, 1994, reprimand was the suspension for failure to submit drivers logs. Hatcher refused to submit those logs, contending he was exempt. Aside from evidence showing that bus driver Smith missed one month of logs[48] after having filed them for some months, the record shows that all other drivers were filing the driver logs.

Hatcher's own perception of how little influence his failure to file drivers logs on the department's good standing does not mitigate against Harris' testimony that she had been told of the possible adverse action of noncompliance with the District's own requirement, the filing of logs.

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[48]Harris credibly testified that bus driver Smith had prepared the logs, but had failed to timely file them.

According to Harris, the log requirement was announced at the August in-service sessions. Hatcher was present only for the bidding portion of the in-service sessions. Robbins asked Hatcher for the logs in September. Harris wrote to him expressly about the logs on September 26, 1994. Harris asked him about the logs on October 19, 1994. She again wrote to him on October 21 about the logs. Although he may have been absent until as late at October 26, 1994,[49] and may not have gotten the October 21 memo until October 27, he still did not complete the logs and turn them in. From September until October 28, he had been asked four times, twice in writing, for the bus logs. Despite his understanding of the "work now and grieve later" concept, Hatcher defied the requests for the bus logs. Even though he had been told by CHP representatives in late October or early November that the logs might be a carrier requirement, he did not complete and file the logs until the District took the action of suspending him on November 17.

Hatcher's refusal, based upon his understanding of the law, one that had been changed from the previous year, may have justified filing a grievance on the issue, but he should have complied with the requirement in the interim. Even if he did not know of the requirement until September 19, when Robbins asked him about the form, he refused then, and even after Harris wrote him on September 26, 1994, he continued to refuse. Even after

[49]Hatcher's own logs show he was on duty October 19, 20 and 21, 1994.

Harris asked him about the forms in October, he refused. Finally, even after Harris wrote to him in the October 21, 1994, memo, he still refused to complete the forms. No one else in the department refused to complete the form as was required. Even Smith filled out forms from the beginning of the school year, and missed just four weeks in October. He submitted them when asked.

Hatcher's blatant refusal in light of four requests, two in writing, to submit the driver logs, was reasonable grounds for the District taking the action it did. Insubordination may be met with discipline, notwithstanding protected activity. (San Diego.) I conclude the District would have issued the November 17, 1994, memo, notwithstanding Hatcher's protected activity.

The June 1995 Suspension and Demotion

The board of trustees declined to dismiss Hatcher as recommended by the administration, but rather suspended Hatcher from January 17, 1995, to the end of the school year. The board further demoted Hatcher to probationary status for the oncoming school year.

The board's action was predicated upon a summary finding that Hatcher was inefficient in performance of duties, refused to do assigned work, careless in performance of work and had unauthorized absences. These findings were predicated upon specific findings of his being late for runs on September 14 and 15, 1994, failure to do safety checks, bus cleaning and window closing. Further, that he had failed to turn in keys and

fire extinguisher at the end of the day prior to September 20, 1994. In addition, Hatcher did not complete absence slips for August and September, fueled a bus with students on board and fueled at a taxable pump.

Aside from the issues disputed by Hatcher of safety checks, bus cleaning and window closing,[50] the grounds relied upon by the board of trustees were true.

It is concluded that Whitehurst's leave and Harris' assumption of greater supervisorial role over Hatcher, resulted in a close monitoring of Hatcher's job performance. This close monitoring commenced in early September 1994 when Harris reminded Hatcher about the in-service requirements. Harris had just commenced the bus driver supervisorial role without Whitehurst. That memo preceded Hatcher's conversation with Harris about the shortage of substitutes. It followed a long period of time in which Hatcher was not engaged in protected activity.

Consistent with this change in management style, the memos that followed were based largely on events that did in fact occur. Some of the deficiencies noted were of the type about which the District had expressed concern to Hatcher prior to his becoming a job steward, or on the negotiating team. These concerns were about being late, not notifying the employer about absences, and completion of absence slips.

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[50]Recall that only one other bus driver testified at the board of trustees hearing, unlike the several who testified at the formal hearing in this case.

The District administrators failed to comply with District procedures in processing documents. The District administrators and the board of trustees labeled certain memos as letters of reprimand when in fact they were not reprimands.

Despite these errors, the board's underlying basis for taking action against Hatcher was its finding that Hatcher was inefficient in performance of duties, had refused to do assigned work, was careless in assigned work and had taken unauthorized absences. As the foregoing analysis demonstrates, the accusations were for the most part true. Hatcher was late on certain occasions, left his keys and fire extinguisher on the bus, fueled buses with children on board and had pumped fuel at a taxable pump. He had refused to file out the bus logs.[51] It was further true that he had unauthorized absences. Thus, the reasons advanced by the District for imposing discipline were not pretexual.

I conclude that the administrators and the board of trustees would have taken the action they did, despite Hatcher's engagement in protected activity. Accordingly, the complaint in SF-CE-1774 should be dismissed. As there was no unfair practice committed by the District against Hatcher, there could be no unfair practice committed against CSEA. Thus, the complaint in SF-CE-1818 should likewise be dismissed.

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[51]The board decision considered the logs incident only for the purpose of imposing discipline. Obviously the one and one-half day suspension was in fact, "prior discipline."

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charges SF-CE-1774, Russell Hatcher v. Healdsburg Union High School District, and SF-CE-1818, California School Employees Association & Its Healdsburg Chapter No. 314 v. Healdsburg Union High School District and companion complaints are hereby 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 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 (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or

filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Gary M. Gallery,

Administrative Law Judge