

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MOUNTAIN EMPIRE FEDERATION OF)
TEACHERS,)
)
Charging Party,) Case No. LA-CE-3634
)
v.) PERB Decision No. 1298
)
MOUNTAIN EMPIRE UNIFIED SCHOOL)
DISTRICT,) October 30, 1998
)
Respondent.)
_____)

Appearances; Gattey, Gilbreath and Hager by James M. Gattey, Attorney, for Mountain Empire Federation of Teachers; Parham & Rajcic by Mark R. Bresee, Attorney, for Mountain Empire Unified School District.

Before Johnson, Dyer and Jackson, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on the Mountain Empire Unified School District's (District) exceptions to a Board administrative law judge's (ALJ) proposed decision (attached). In his proposed decision, the ALJ held that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)¹ when it transferred Fred Kamper (Kamper) from his

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

position at the District's Junior/Senior High School to Jacumba Elementary School (Jacumba) in retaliation for his protected activities.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the District's exceptions and the Mountain Empire Federation of Teachers response 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, consistent with the following discussion.

DISCUSSION

On appeal, the District reiterates its argument that it would have transferred Kamper regardless of his protected activity. This is so, the District contends, because it acted reasonably when it refused to rearrange the Junior/Senior High School master schedule to include Kamper and when it declined to allow Kamper to teach the animal care and woodshop courses. Further, the District contends, it could not have retained Kamper at the Junior High School without compromising the changes it

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.

intended to make to the Title I program.²

The District's exceptions miss the point. In May of 1995, the District informed Kamper that he was scheduled to teach five classes at the Junior and Senior High Schools during the 1995-96 school year. Nonetheless, Junior High School Principal John Keiter (Keiter) chose not to place Kamper on the master schedule of classes for the 1995-96 school year. Instead, Keiter scheduled nine Junior/Senior High School teachers to teach during their preparation periods (the equivalent of 1.8 full-time positions). Subsequently, Keiter decided to eliminate Kamper's position from the Junior High School's Title I program.

Later, on August 10, 1995, the District informed Kamper that it had decided to invoke the emergency transfer provisions of the collective bargaining agreement to transfer him to Jacumba. Kamper requested the opportunity to explore a number of options that would allow him to continue teaching at the Junior and Senior High Schools. The District permitted Kamper to do so, but ultimately rejected all of Kamper's suggestions.

As the ALJ found, the District deviated from its established procedures when it failed to place Kamper on the 1995-96 schedule and undertook a mid-term modification of the Junior High School's

²Pursuant to Title I of the federal Elementary and Secondary Education Act of 1965, the federal government provides the District with funding to supplement the education of students in "high poverty" schools. Prior to the 1995-96 school year, the District used Title I funds to fund a credentialed teaching position filled by Kamper. In addition to Title I courses, Kamper generally taught computer and mathematics courses at the Junior High School.

Title I program without holding a site council meeting. This, taken together with the timing of the District's action, was sufficient to create a presumption that Kamper's protected activities prompted the District to transfer him to Jacumba.

(Novato Unified School District (1982) PERB Decision No. 210 at p. 7; Baldwin Park Unified School District (1982) PERB Decision No. 221 at p. 16.)

In order to rebut the presumption of unlawful motivation, the District must show that it would have made its August 10, 1995 decision to transfer Kamper regardless of his protected activities. (Healdsburg Union High School District (1997) PERB Decision No. 1185, proposed dec, at p. 47.) Instead, the District focuses on the reasonableness of its actions after August 10, 1995. While the ALJ found those actions to be suspect as well, this case concerns the District's decision to transfer Kamper, rather than its purported attempt to find him a new position at the Junior or Senior High School. The mere fact that the District may have made a reasonable attempt to mitigate the effects of its decision to transfer Kamper is insufficient to overcome the presumption that the original decision was unlawfully motivated. Accordingly, the District's exceptions are denied.

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, it is found that the Mountain Empire Unified School District (District) violated the Educational

Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by retaliating against employee Fred Kamper (Kamper) because of his participation in the activities of the Mountain Empire Federation of Teachers (Federation). The District violated this section by transferring Kamper away from the high school and junior high school in August 1995.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Kamper and other employees because of their Federation activities; and
2. Denying the Federation its rights.

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

1. Rescind the transfer of Kamper away from the high school and junior high school. The rescission may be effective at the end of the school year.
2. Pay Kamper the "Chapter 1 Coordinator" stipend for the 1995-96 school year, plus interest at the rate of seven (7) percent per annum.
3. Pay Kamper for his additional mileage in commuting to and from Jacumba Elementary School, from the time of his transfer until his transfer is rescinded, at the rate established by the Internal Revenue Service, plus interest at the rate of seven (7) percent per annum.
4. Within ten (10) days following the date this

decision is no longer subject to appeal, post at all work locations where notices to certificated employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Written notice of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board, in accordance with the regional director's instructions.

Member Johnson joined in this Decision.

Member Jackson's dissent begins on page 7.

JACKSON, Member, dissenting: I dissent. The majority finds that the Mountain Empire Unified School District (District) did not place teacher Fred Kamper (Kamper) on the 1995-96 school year master calendar, scheduled another teacher to teach math classes at the junior high, and eliminated Kamper's position at the junior high in response to Kamper's protected activities. While I agree the unplanned manner in which the District altered Kamper's job assignment may lead to an inference of unlawful motivation (Novato Unified School District (1982) PERB Decision No. 210), I disagree that the District failed in its burden to show that it would have taken the actions it did regardless of any protected activity in which Kamper may have engaged.

(Healdsburg Union High School District (1997) PERB Decision No. 1185 (Healdsburg) .. proposed dec, p. 47.)

The facts in the record before the Public Employment Relations Board indicate that Kamper would have lost at least a portion of his assignment regardless of his protected activity, and the District would have been required to reschedule some or all of his courses to give him a full course-load.

DISCUSSION

The majority held: "The mere fact that the District may have made a reasonable attempt to mitigate the effects of its decision to transfer Kamper is insufficient to overcome the presumption that the original decision was unlawfully motivated." This assertion assumes that the decision to transfer Kamper and

attempt to place him within the District are distinct events and not part of the same process.

Instead, the evidence in the record indicates, for a number of reasons, Kamper was left without a full course schedule. The District never dismissed Kamper or eliminated his position, but instead transferred him to provide him with a full-time schedule. As both the majority opinion and the administrative law judge concluded, the District took reasonable steps to provide Kamper with a full-time schedule. I agree. However, the District proved it would have transferred Kamper regardless of his protected activity due to elimination of some of his duties. (Healdsburg.)

The findings the majority adopts include: (1) Kamper would no longer have continued to teach classes and serve as the "Chapter 1 Coordinator" at the high school (proposed dec, p. 35); (2) It was "understandable" that the District would not make extensive changes to the Master Schedule at the high school and junior high school so close to the commencement of school (proposed dec, pp. 35-36); and (3) Kamper was transferred within the same time period the Chapter 1 program was eliminated at the high school.

In addition to these findings, the superintendent, Dr. William Wong (Wong), testified why the ultimate decision to transfer Kamper occurred. In considering Kamper for a wood shop and animal care course at the high school, Wong had determined there may be credential issues and he had more qualified

individuals experienced in those areas to teach the classes. Further, the District did not wish to upset the master schedules which would have required rescheduling a number of teachers in addition to Kamper.

Based upon the forgoing evidence in the record, I would find that the District, in an effort to meet the demands of the 1995-96 school year and replace the "Chapter 1" courses which were eliminated, scheduled Kamper to teach at the elementary school as a portion of his assignment. Under Healdsburg, the District proved by a preponderance of the evidence that it would have transferred Kamper regardless of any protected activity.

APPENDIX



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

After a hearing in Unfair Practice Case No. LA-CE-3634, Mountain Empire Federation of Teachers v. Mountain Empire Unified School District, in which all parties had the right to participate, it has been found that the Mountain Empire Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by retaliating against employee Fred Kamper (Kamper) because of his participation in activities of the Mountain Empire Federation of Teachers (Federation), in transferring Kamper away from the high school and junior high school in August 1995.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against Kamper and other employees because of their Federation activities; and
2. Denying the Federation its rights.

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

1. Rescind the transfer of Kamper away from the high school and junior high school. The rescission may be effective at the end of the school year.
2. Pay Kamper the "Chapter 1 Coordinator" stipend for the 1995-96 school year, plus interest at the rate of seven (7) percent per annum.
3. Pay Kamper for his additional mileage in commuting to and from Jacumba Elementary School, from the time of his transfer until his transfer is rescinded, at the rate established by the Internal Revenue Service, plus interest at the rate of seven (7) percent per annum.

Dated: _____ MOUNTAIN EMPIRE UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MOUNTAIN EMPIRE FEDERATION OF)	
TEACHERS,)	
)	
Charging Party,)	Unfair Practice
)	Case No. LA-CE-3634
v.)	
)	PROPOSED DECISION
MOUNTAIN EMPIRE UNIFIED SCHOOL)	(3/3/98)
DISTRICT,)	
)	
Respondent.)	
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Appearances: James M. Gattey, Attorney, for Mountain Empire Federation of Teachers; Parham & Rajcic, by Mark Bresee, Attorney, for Mountain Empire Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union of certificated employees alleges a school district retaliated against a union activist. The school district denies any retaliation.

The Mountain Empire Federation of Teachers (Federation) filed an unfair practice charge against the Mountain Empire Unified School District (District) on December 20, 1995, alleging the District had retaliated against union activist Fred Kamper (Kamper). The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the District on April 29, 1996, alleging the District had retaliated against Kamper on or about August 10, 1995, by removing him from his position at the District's high school and junior high school and transferring him to an elementary school. The District filed an answer on May 21, 1996, denying any retaliation.

PERB held an informal settlement conference on June 19, 1996. After three continuances requested by the parties, PERB held a formal hearing on April 23, 24, and 25, June 30, and July 1, 1997. After the filing of post-hearing briefs, the case was submitted for decision on October 8, 1997.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).¹ The Federation is an employee organization under EERA and is the exclusive representative of the District's certificated employee bargaining unit.

The District is relatively small in numbers of students and employees, but it is spread over a large area in the southeast corner of San Diego County. The District's high school, junior high school and headquarters are located next to each other somewhat west of the geographic center of the District, and that is where the largest portion of the District's students and employees are. A number of teachers teach classes at both the high school and the junior high school, and sometimes the two schools have shared a single principal. One of the District's smaller and more remote schools, Jacumba Elementary, has just three certificated employees and is located in the southeast corner of the District.

¹EERA is codified at Government Code section 3540 and following. Unless otherwise indicated, all statutory references are to the Government Code.

At the District's elementary schools, the classes are self-contained; the students receive instruction in multiple subjects from a single teacher in a single classroom. At the District's high school and junior high school, the classes are departmentalized; the students receive instruction in different subjects from different teachers in different classrooms.

The high school and junior high school each have a master schedule showing which teachers will teach which subjects during which periods. The two master schedules are coordinated, because of the teachers who teach at both schools. A full schedule for a teacher normally consists of five teaching periods and one preparation period. Teachers who teach six periods, teaching on what would otherwise be their preparation periods, receive an additional 20 percent of their regular salaries.

There is a collective bargaining agreement (Agreement) between the District and the Federation. When this case arose, the Agreement provided for advisory arbitration of grievances. At all relevant times, Article 10 of the Agreement (Subject and Grade Level Assignments) provided:

- 10.1 To the extent known at the time of notification, the Superintendent or his designee shall inform the certificated employee of his/her projected subject area, specific course assignments(s), and grade level(s) assignments prior to May 15 for the ensuing year.
- 10.2 A second notice of projected assignment shall be sent to certificated employees on or about August 15, in those circumstances where it is determined that

staffing conditions require an amendment to the first notice.

- 10.3 When possible, the certificated employee shall be notified a minimum of thirty (30) days prior to any changes in course or grade assignment.

Article 18 (Transfers and Reassignments), Section 18.3 (Involuntary Transfers), provided:

- 18.3.1 Involuntary transfers shall be based exclusively on the education-related needs of the District. They will be initiated and effected within the discretion of the Superintendent. They shall not be punitive or disciplinary in nature, and shall not be based on arbitrary, political, or vindictive reasons.

- 18.3.2 The following procedures will be used for involuntary transfers:

- (a) The Superintendent shall schedule a conference with the certificated employee to discuss the involuntary transfer. Upon request, the Superintendent shall provide the certificated employee with a written statement giving all reasons, including parental complaints, if any, for the impending transfer. This procedure shall be scheduled as soon as a decision has been made to effect an involuntary transfer.
- (b) The certificated employee may schedule a conference to discuss the transfer with the Federation President and the Superintendent.
- (c) Certificated employees who are involuntarily transferred shall have the right to

indicate reassignment preferences from a list of available vacancies. If the certificated employee being involuntarily transferred indicates a preference for a vacant position, the Superintendent may transfer that certificated employee to such vacant position whether or not the selection process for such vacant position is continuing. In such case, the District may terminate continuation of the selection process for that previously vacant position.

- (d) Except in cases of emergency, as determined by the Superintendent, involuntary transfers shall not be effected until at least three (3) weeks following the Superintendent's conference with the teacher.

The Agreement has also provided a modest amount of extra pay (less than \$300 per semester) for a teacher in the position of "Chapter 1 Coordinator."

"Chapter 1" refers to Chapter 1 of the federal Elementary and Secondary Education Act of 1965, which has provided federal funds to supplement the education of students in "high-poverty" schools. The federal government has offered various formulas by which school districts could rank their schools to determine which ones are "high-poverty" and therefore eligible for Chapter 1 funds. In the District, the choice of the formula is made initially by a District Advisory Council and ultimately by the Governing Board. The allocation of specific amounts of funds to eligible schools is made in the same way.

How Chapter 1 funds are actually spent at a school is determined by the individual school site council; such funds are supposed to be spent in accordance with a three-year plan for the school. Each three-year plan is developed by the school site council, reviewed by the District Advisory Council, and ultimately approved by the Governing Board. The District's high school had a three-year plan for 1992-1995, approved by the Governing Board on August 4, 1992. The District's junior high school had a three-year plan for 1994-1997, approved by the Governing Board on May 18, 1994. With regard to Chapter 1, both three-year plans stated in part:

Each Chapter I [sic] class will have a credentialed instructor and a full time adult aide. Students have access to the Chapter I computer lab throughout the day on an as needed basis.

Scheduled classes meet five periods per week with a Chapter I teacher, assisted by an adult instructional aide, to provide individualized and small group instruction for target students.

Computers to assist instruction, appropriate language, reading, and math programs are utilized.

Neither three-year plan mentioned staff development in connection with Chapter 1.

In the 1994-95 and 1995-96 school years, Anna Sullivan (Sullivan) was the District's Director of Consolidated Programs, responsible for making sure the District was in compliance with various state and federal programs, including Chapter 1. She chaired the District Advisory Council and tried to keep herself informed about what was happening at all the school sites.

In the 1994-95 school year, Fred Kamper (Kamper) served as Chapter 1 Coordinator at the high school and junior high school. He taught all the Chapter 1 classes himself, two at the high school and three at the junior high school, and his salary was paid with Chapter 1 funds. The 1994-95 school year was the first year Chapter 1 funds were actually allocated to the high school, so Kamper had not previously taught Chapter 1 classes at the high school. In previous years, since about 1990, he had taught up to four Chapter 1 classes at the junior high school, with the remainder of his schedule being filled with other classes. Usually these were computer classes, but at least one year he taught an English development class for Spanish-speaking students. From 1988 to 1990, before Kamper started teaching Chapter 1 classes, he had taught mathematics and computer classes at the junior high school.

Kamper has a multiple subject teaching credential, which authorizes him to teach in "any self-contained classroom," including "grades 1 to 12." He also has a supplementary mathematics credential, which authorizes him to teach mathematics in "departmentalized classes in grades 6, 7, 8 and 9." He also has an administrative credential, which authorizes him to serve as a principal or assistant principal. When he first came to the District, he taught third and fourth grade at an elementary school for five years. He then spent one year as assistant principal and two years as principal at the high school and junior high school, before he returned to the classroom.

Both before and after his years as a principal, Kamper was very active in the Federation. He had served as the Federation president and was its chief negotiator and main processor of grievances. He was well known in the District; Governing Board member Ralph Davis (Davis), called as a witness by the Federation, testified, "It is generally perceived that Mr. Kamper is one of the most litigious people that ever lived." Davis testified he himself shared that perception, although not because of Kamper's employee rights presentations.

There are three more people at the center of this case. John Keiter (Keiter) became principal of the District's junior high school on July 1, 1995. In 1994-95, he had been principal of two elementary schools in the District; neither school had a Chapter 1 program, and Keiter had no previous responsibility for such a program. Keiter testified he was aware Kamper was a leader in the Federation but did not recall having dealt with him.

Dr. Mark Lindsay (Lindsay) became principal of the District's high school, also on July 1, 1995. He had previously been an administrative assistant principal in a high school in another district, where he had some responsibility for a Chapter 1 program but was not the lead administrator. Lindsay testified he did not know Kamper was active in the Federation "probably until sometime after school started" in August 1995.

Dr. William Wong (Wong) became superintendent of the District in December 1994. He had previously been an

administrator in other school districts. In one district, he had spent two years as director of special programs, with responsibility for a Chapter 1 program. Wong testified he was aware Kamper was an officer of the Federation and a member of its negotiating team.

Sometime in 1994, Congress amended the Elementary and Secondary Education Act of 1965 by passing the Improving America's Schools Act of 1994. Chapter 1 was reauthorized as "Title I," and there were changes in the emphasis of the program. As the District's Director of Consolidated Programs, Sullivan monitored the reauthorization and reported to the District Advisory Council. According to the minutes of a meeting on January 20, 1995, Sullivan reported in part:

Chapter I [sic] **reauthorization** has changed many of the old ways things used to be done. This will take effect on July 1, 1995. Chapter I will now be called Title I. Chapter I is earmarked for the economically disadvantaged. The district selects the poverty index method. We use free and reduced lunch counts as do most districts. Once the index is determined the ranking process is the next step in getting the money to the sites. There are many rules and regulations that must be followed in the ranking and funding of school sites. Several practices are being frowned on: Pull-out programs (except those shown to be successful according to research, such as Reading Recovery), programs delivered by aides rather than teachers. Several ideas are being put forth as being models and ideals: extended time, parent education, parent contacts, heavy staff development.

Sullivan testified she made a similar report around the same time to a management meeting, which Wong as superintendent would have

conducted, and which Keiter as an elementary school principal would have attended.

Wong testified he looked at the goals of the reauthorization and concluded school districts across the country would have to change their plans. While the Chapter 1 program had emphasized remedial education in language arts and mathematics, the Title I program emphasized all the core courses, including science and social studies. Keiter testified he too looked at the goals of the reauthorization and concluded changes would be necessary. He understood the intent was to bring supplemental education closer to the regular classrooms, rather than to have separate classes. He further understood "a portion of the funds would have to be directed towards staff development for all of the teachers that worked with Title I kids in core classroom settings." It does not appear, however, that the District took any steps toward changing its programs before August 1995.

As the District's new superintendent, Wong had as one of his goals an improvement in the District's relationship with the Federation. One problem in that relationship was a pending lawsuit the Federation had filed against the District in 1994. On May 15, 1995, Wong and the Federation president signed a tentative agreement settling the lawsuit, amending the Agreement, and resolving some other issues. Wong testified Kamper had "a major impact" on the lawsuit and its resolution. Wong also testified he thought the tentative agreement was a very fair compromise, going a long way to improve the relationship.

In the latter part of the 1994-95 school year, the District's high school and junior high school shared a principal, Michael Miller (Miller). In accordance with Section 10.1 of the Agreement, Miller informed teachers by May 15, 1995, of their projected assignments for the 1995-96 school year. Miller informed Kamper he was projected to teach five Chapter 1/Title I classes. Presumably, two of those classes were to be at the high school, as in the previous year.

Sometime after Miller gave Kamper this projected assignment, the District received information the high school would not be eligible for Title I funds. In response to this information, the District Advisory Council recommended the new computers at the high school, which had been purchased with Chapter 1 funds, be dispersed to schools eligible for Title I funds. In response to the same information, the new three-year plan for the high school, as approved by the Governing Board on June 27, 1995, had no Chapter 1/Title I section. Kamper testified he did not receive this information, and Wong testified neither he nor Sullivan nor Miller thought about its effect on Kamper's assignment. Sullivan, however, testified Kamper was part of the process of deciding to disperse the computers. She understood Kamper would not teach Title I classes at the high school but would still teach them at the junior high school.

Sullivan, Keiter and Lindsay were all on vacation in the month of July. Around this time, Wong became aware of a federally-approved formula under which the high school could

again be eligible for Title I funds. He hoped the District Advisory Council would support the use of this formula, and the allocation of funds to the high school, even though it would mean less money for other schools. When Sullivan returned from vacation, Wong asked her to set up a meeting.

Keiter returned from vacation before Lindsay and started working on the junior high school master schedule. Although Kamper and his Chapter 1 classes had been on the 1994-95 schedule, Keiter did not put Kamper or any Title I classes on the 1995-96 schedule; Keiter testified he did not remember making the decision not to do so.

When Lindsay returned from vacation, Wong told him about the prospect of Title I funds for the high school. Wong also told Lindsay, however, the new computers at the high school had been committed to other schools. Wong asked both Lindsay and Keiter to think about the Title I programs at their schools. One of the first things Lindsay and Keiter discussed was staff development; according to Keiter, the two reached "almost a simultaneous conclusion" to eliminate separate Title I classes in favor of staff development.

Lindsay was especially enthusiastic about a staff development program he had used in another school district. Wong testified he remembered telling Lindsay to "make sure" to have a school site council meeting to approve it. Neither Wong nor Lindsay nor Keiter discussed the impending change with Sullivan or Kamper.

The events most central to this case took place in August 1995. Some of the events were scheduled in advance: the District Advisory Council was scheduled to meet on August 8; Wong was scheduled to have surgery on August 16; the Governing Board was scheduled to meet on August 22; teachers were scheduled to report for work on August 23; and classes were scheduled to begin on August 28.

As Wong had advised, Lindsay took action to hold a school site council meeting. Lindsay believed it was necessary for the school site council to add a Title I section to the school's three-year plan and submit it to the District Advisory Council, which was meeting on August 8. Lindsay had a secretary type a meeting notice, post it on the doors of the high school, and take it to the District headquarters for further posting. The notice announced an "Emergency School Site Council Meeting" on August 4 to "[e]valuate and revise the Title I Program at Mountain Empire High School." Sullivan and Kamper did not see the notice and were not aware of the meeting.

At the August 4 meeting, Lindsay told the other members present the high school might be allocated \$62,000 in Title I funds and needed a plan to submit to the District Advisory Council on August 8. After discussion, a tentative budget was approved, with \$34,000 for instructional aides, \$15,000 for staff development, and \$13,000 for equipment and materials, but with no funds to be spent on a credentialed instructor. When the minutes were distributed, attached to them were two additional pages,

appearing to be a proposed Title I section for the high school's three-year plan, describing a program with instructional aides, staff development, and computers, but without a credentialed instructor. It is not clear from the minutes or the testimony, however, whether these two pages were discussed at the August 4 meeting itself.

The District Advisory Council met as scheduled on August 8. Before the meeting, Wong suggested the Federation president tell Kamper to attend, because Wong wanted Kamper's support for the allocation of funds to the high school. The Federation president did call Kamper, who did attend. Sullivan and Wong explained how the high school could receive an allocation; Kamper explained how the Chapter 1 program had been run and how it had benefitted students. The consensus at the meeting was to allocate funds to the high school. There was also discussion of whether the new computers at the high school should still be dispersed to other schools; the consensus was to let the high school keep them.

Even though Lindsay and another member of the high school site council were present, and even though the site council had acted specifically in order to be able to submit its plans to the District Advisory Council, no one mentioned the high school's plans for a Title I program without a credentialed instructor. Keiter was also present, but he did not mention any new plans for the junior high school either.

According to Wong, it was immediately after the District Advisory Council meeting he first realized Kamper might be

transferred. Lindsay and Keiter told Wong about their plans, and Wong realized those plans had implications for Kamper. He told Lindsay and Keiter they would not have enough Title I money for their staff development plans and for Kamper's salary. Lindsay and Keiter told Wong they would rather proceed with their plans; Wong said that would cause him to "surplus" Kamper.

Wong began studying the issue of Kamper's possible transfer. He reviewed Kamper's credentials and the language of Section 18.3 of the Agreement (Involuntary Transfers). He determined Section 18.3 did not require him to consider Kamper's seniority in deciding whether to transfer him. On August 10, Wong heard Kamper was on his way to District headquarters on other business, and Wong decided he should go ahead and talk to Kamper about the transfer.

Part of Kamper's business on August 10 was to meet with Lindsay and Keiter about the Title I program. At the District Advisory Committee meeting, Kamper had offered to meet with Lindsay, and on August 10 Lindsay called Kamper and set up a meeting for later that morning. At the meeting, Kamper was telling Lindsay and Keiter about the computers at the high school when Lindsay remarked to Keiter, "He doesn't know yet." Lindsay then told Kamper the new computers would be dispersed to other schools after all; Wong later testified he had made this decision, despite the consensus at the District Advisory Council, because the principals who expected to receive the computers had been calling him and "essentially whining." Lindsay also told

Kamper he was developing a Title I program with aides but no credentialed instructor. Kamper responded that the junior high school still had its computers and that perhaps he could be scheduled to teach several Title I classes there and also to coordinate the aides at the high school. Kamper understood from Lindsay and Keiter this was a possibility.

Later that day (August 10), when Kamper met with Wong, the Federation president was also present. Wong handed Kamper a letter bearing the date "August 22, 1995." The letter stated as follows:

Due to the reallocation of categorical funds at the Junior/Senior High School, it has become necessary to restructure the categorical programs at the Junior/Senior High School. As a result, it will be necessary to transfer you to a different position at a different site for the upcoming year. Because categorical funds were not approved by the California legislators until August 3, 1995 and the District did not receive our estimated apportionment until August 8, 1995, I am declaring the transfer to be of an emergency nature in order to complete certificated assignments by the first student school day.

Pursuant to paragraph 18.32 of the Collective Bargaining Agreement (hereinafter "CBA"), a conference with you regarding this transfer was held on August 10, 1995.

Our records indicate that you possess a K-12 self contained multiple subject credential and have appropriate credentials to teach math in grades 6, 7, 8, and 9. It appears that the only vacancies at this time for which you have appropriate credentials are a full time elementary teacher at Jacumba Elementary and a full time Independent Study position at the Continuation High School. Because the Independent Study position requires your consent, you are being

transferred to Jacumba Elementary School. If you wish to provide your consent to the Independent Study position, please notify me in writing by August 2, 1995 [sic].

Please give me a call if you have any questions.

Wong testified the reference to "August 2, 1995" was a typographical error. He did not explain the "August 22, 1995" date on the letter, however, or why the letter referred to the August 10 conference as having already been held, other than to testify he did not remember handing it to Kamper on August 10. The reference in the letter to the need for Kamper's consent for the Independent Study position was apparently a reference to Education Code section 44865, which requires a teacher to consent to a continuation school assignment outside the teacher's credential.

With regard to the letter's reference to the District's estimated apportionment of Title I funds, Wong testified he had called the State Department of Education on August 8 and understood the District would receive less than in the previous school year, which worried him. Ultimately, the District did receive about 10 percent less, \$240,000 as opposed to \$267,000.

After giving Kamper the letter, Wong wrote up a list of all known vacancies in the District, whether or not they were within Kamper's credential. Wong showed the list to Kamper and the Federation president; it included not only the positions at the continuation school and Jacumba Elementary School mentioned in the letter but also one animal care class at the high school,

four woodshop classes at the high school, a full-time speech position, a full-time resource specialist position in special education, and a half-time elementary school position. Kamper had no interest in the speech position and did not think he was credentialed for the resource specialist position. Kamper expressed interest in the animal care and woodshop classes and also in the continuation school position. With regard to the latter, Wong asked Kamper to put his interest or consent in writing; Kamper said he wanted to consider his other options first.

Kamper and the Federation president asked if they could look at the master schedules for the high school and junior high school to find more options. Although teachers do not usually see the master schedules until school starts, and although the Agreement did not provide for an employee facing transfer to review the master schedules, Wong called Lindsay and Keiter and arranged for Kamper and the president to go take a look.

Kamper and the Federation president went to Lindsay's office, where Lindsay and Keiter were present and the master schedules were on view. The first thing Kamper and the president noticed was that nine teachers were scheduled to teach during their preparation periods. Eight of these were high school teachers; one was a junior high school teacher who also taught high school chemistry. This was an unusually high number, and Lindsay was somewhat surprised and concerned when it was brought to his attention.

Another unusual feature of the master schedules was that Craig Matern (Matern) was scheduled to teach two eighth grade mathematics classes. Although Matern had a credential to teach introductory mathematics, he normally taught physical education only. Someone else was assigned to teach two high school physical education classes Matern normally taught.

The master schedules showed the four woodshop classes were to be taught by Robert Jacinski (Jacinski). Jacinski had taught woodshop as a temporary employee on an emergency credential during the 1994-95 school year. He had taken courses and a test to obtain a full credential, but the results of the test were not yet known. The master schedules did not show who would teach the animal care class, but Kamper was told it was to be Kelly Tulloch (Tulloch). Tulloch was an instructional aide with a degree in agricultural business, and education and experience in animal care, but no credential.

Based on the master schedules, Kamper and the Federation president developed several different options permitting Kamper to continue teaching at the high school and junior high school. One option was for Kamper to teach the woodshop and animal care classes. It was not clear from the testimony what any of the other specific options were, but they all affected the schedules for both schools and reduced the number of teachers scheduled to teach on their preparation periods, but they did not leave any teacher with less than a full five-period schedule. Kamper and the president believed some of these options would not require

Kamper or any other teachers to teach outside their current credentials; Keiter recalled there was probably one such option.

Kamper and the Federation president returned to Wong's office along with Lindsay and Keiter. Kamper and the president presented the options they had developed, but Lindsay said he was not sure he wanted to change the master schedule. Wong promised to discuss the matter with Lindsay and Keiter and to call Kamper the morning of August 14. At some point, Wong also told Kamper he could raise the matter with the Governing Board, which was scheduled to meet on August 22.

Wong, Lindsay and Keiter did discuss the options presented by Kamper and the Federation president. Lindsay or someone on his staff prepared a document showing all 48 classes to be taught by the eight high school teachers scheduled to teach during their preparation periods. Wong concluded Kamper's credential did not authorize him to teach any of those courses. Wong concluded in part that Kamper's supplementary mathematics credential for "grades 6, 7, 8 and 9" did not authorize him to teach algebra or geometry, because those classes had tenth and eleventh graders and well as ninth graders. Wong did not make use of the credential information resources of the County Office of Education in reaching this conclusion.

Lindsay and Keiter both thought it unwise to change the master schedules, which they thought represented the best configuration for serving the students. With regard to the woodshop classes, Lindsay thought Jacinski was better qualified

than Kamper, because of Jacinski's experience teaching the class in the 1994-95 school year. With regard to the animal care class, Lindsay thought Tulloch was better qualified than Kamper, because of her educational background in the subject.

Kamper was planning to leave town for a few days on August 14. When Wong did not call him first thing in the morning, Kamper tried to call Wong and then went in to see him. Wong told Kamper the master schedules would not be changed and informed him again of the vacancies listed at the August 10 meeting. Kamper again expressed interest in the woodshop and animal care classes. At first Wong said Kamper could not teach those classes because he did not have the appropriate credential. Kamper pointed out that Jacinski and Tulloch were not fully credentialed and that he himself had the experience to qualify for a vocational education credential. Wong eventually said that if Kamper applied for the vocational education credential he would be assigned to teach the classes, but until then he would be assigned to Jacumba Elementary School. Kamper assured Wong he would go to the County Office of Education that day to start the process.

After talking to Kamper, Wong realized the woodshop classes were general education courses for which a vocational education credential would not be appropriate. Wong testified he called the credentialing supervisor at the County Office of Education and alerted her Kamper was coming in. The credentialing supervisor remembered only that Wong called and asked questions about emergency credentials. Wong apparently also realized

Kamper could still teach the woodshop classes under an emergency credential, as Jacinski had done, but Wong thought it was more appropriate to get an emergency credential for Jacinski, who was working toward a full credential, than to get one for Kamper. Wong discussed these matters with the District business manager, but he did not discuss them further with Kamper.

After talking to Wong, Kamper put off his plans to leave town and went to the County Office of Education. Kamper was referred to the person in charge of vocational credentials, who gave him the paperwork and told him he needed to get a signature from a superintendent, director or principal. If Wong had already called the credentialing supervisor, the call apparently had no effect on how Kamper was treated.

Kamper then called Wong's office, but Wong had left. When Kamper said he needed a signature, the executive secretary told him to meet with the personnel director the next day. When Kamper did meet with the personnel director the next day, August 15, she told him Wong had left her no directions; apparently Wong was already on leave in connection with his surgery scheduled for August 16. The personnel director also told Kamper a vocational education credential was inappropriate for the woodshop classes, but she did not tell him an emergency credential could be appropriate. When Kamper insisted he needed a signature, the personnel director suggested he try Lindsay.

Lindsay was not immediately available, so Kamper called the County Office of Education and was referred to the credentialing

supervisor. She suggested Kamper try to get an emergency-credential, which would require an appropriate declaration from the Governing Board, and she promised to send him the paperwork. Kamper later met with Lindsay and asked him to sign the vocational education credential form, but Lindsay, who had not seen the form before, would not sign it without direction from Wong.

Wong had his surgery as scheduled on August 16. That same day, Kamper wrote a letter to Wong which he also sent to all the members of the Governing Board. Kamper recounted the events of that month and expressed his frustration about "the seeming unwillingness of the district to facilitate a desired teaching assignment for me for the 1995-96 school year." Finally, he requested "to meet with the School Board at the August 22, 1995 closed session per your [Wong's] offer on August 10, 1995."

When the Governing Board met as scheduled on August 22, Wong was still on leave, but Lindsay, Keiter and the business manager were there, as were Kamper and the Federation president. Lindsay and Keiter spoke to the Governing Board about the reauthorization of Chapter 1 as Title I and about their plans to emphasize staff development. Kamper spoke about how he could still teach at the high school and junior high school, especially if the District signed off on the credentials for him to teach woodshop and animal care.

The Federation president testified she remembered board member Davis saying a transfer might be in Kamper's best interest

"since he was such a troublemaker." Kamper testified similarly, but Lindsay and Keiter testified they did not remember such a statement, and the business manager denied it had been made. Davis himself denied making such a statement. Davis seemed to be a candid and outspoken person; presumably that is why the Federation called him as a witness. I credit his testimony, corroborated by the business manager, that he did not make the statement attributed to him by Kamper and the Federation president.

The Federation president also testified she "distinctly" remembered Dr. Joel Levine (Levine), another board member, pointing at Lindsay and Keiter and saying, "If this comes back to bite us in the butt, you guys are going to be held accountable." Kamper testified similarly, but Davis and Lindsay testified they did not remember Levine making such a statement, and the business manager denied Levine made such a statement. Keiter seemed genuinely surprised to hear the statement attributed to Levine; he testified:

Well, I think I'd remember that if he said that because he's saying I would be held responsible, and I don't think Joel uses phrases like bite in the butt or anything. But I think I would remember that just by being my first, you know, one of my first actions as a Principal at the junior high school. If I was being told I'd be held accountable for something, I'd remember that and I don't.

I credit Keiter's testimony, corroborated by the business manager, that Levine did not make the statement attributed to him by Kamper and the Federation president.

The next day, August 23, Kamper was informed the Governing Board had decided to uphold his transfer. On the same day, Wong signed the paperwork for Tulloch to get a vocational education credential to teach animal care. Although Wong was still on medical leave, the business manager brought him paperwork to sign.

August 23 was also the day for teachers to report for work. Matern was surprised to find out he was scheduled to teach eighth grade mathematics. He told Lindsay he did not want to teach mathematics and asked why he was not teaching high school physical education as usual; Lindsay told him it was because "they needed a math teacher."

Around this time, it became known that Jacinski had not passed the test to become fully credentialed to teach woodshop. On August 25, the Friday before classes started, Jacinski was called to teach woodshop as a substitute, rather than as a permanent or temporary employee.

Sometime after the first day of school, there was a faculty meeting at the high school. Because Jacinski had not passed the test, Lindsay mentioned he was looking for a shop teacher. The Federation secretary, who was present, knew Kamper had sought the job and asked Lindsay about it. She testified Lindsay told her, without elaboration, "that it was a political situation and that we should leave it alone." Lindsay testified he did not remember making the statement, but I credit the Federation secretary's testimony that he made it. She also testified Lindsay said there

was an audit coming up and they did not want to use emergency credentials unless absolutely necessary.

As school began, Sullivan became aware of Kamper's transfer. She assumed at first someone had replaced him as a credentialed Title I instructor. When she learned this was not the case, she spoke to Lindsay, telling him it was "frowned upon" (though not illegal) to have a program with aides rather than a credentialed instructor. Lindsay responded that was the way he had done it previously and the way he intended to do it. Lindsay also informed her similar changes were being made at the junior high school.

On September 19, 1995, the junior high school site council held an "emergency meeting" at which it voted "to move in the direction of spending [Title I] funds this way: 30% for staff development, 69% to extend learning time and purchase equipment, and 1% for parent involvement." No funds were to be spent on a credentialed instructor.

About a month into the school year, Jacinski asked Lindsay about getting an emergency credential so he could be paid as a temporary employee. Lindsay told him there would be no emergency credentials that school year. In October 1995, however, the District signed the paperwork for Jacinski to obtain an emergency credential. Jacinski later retook the test for a full credential and passed it.

Also in October 1995, the new Title I section of the high school's three-year plan was submitted to the District Advisory

Council, which recommended approval. In November 1995, the junior high school site council was still working on a new Title I section for its three-year plan; the District Advisory Council ultimately reviewed it and recommended its approval in March 1996. Although Sullivan had concerns about the new plans, she did not oppose them.

Kamper's transfer to Jacumba Elementary School gave him a significantly longer commute. It also removed him from what had been his professional home and made it more difficult for him to perform his duties in the Federation. The continuation high school is closer to the high school and junior high school, and even closer to Kamper's home, but he regards it as a place for difficult students and "discarded" employees.

ISSUE

Did the District retaliate against Kamper in transferring him?

CONCLUSIONS OF LAW

In order to prevail on a retaliatory adverse action charge, the charging party must establish the employee was engaged in protected activity, the activity was known to the employer, and the employer took adverse action because of the activity.

(Novato Unified School District (1982) PERB Decision No. 210 (Novato)). Unlawful motivation is essential to the 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 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); the employer's departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); the employer's 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].)

In the present case, it is not disputed Kamper engaged in protected activity, nor is it disputed Wong and Keiter had at least some knowledge of his protected activity. Lindsay testified, however, he did not know Kamper was active in the Federation "probably until sometime after school started" in late August 1995. Lindsay was new to the District, and the Federation

does not argue Lindsay in fact knew Kamper was a Federation activist before school started. I credit Lindsay's testimony on this point.

The District argues Kamper was not subjected to an adverse action. The District does not dispute a mandatory transfer to Jacumba Elementary School was objectively adverse, because of the longer commute, but it points out Kamper was offered the alternative of a transfer to the continuation school, which would actually have been a shorter commute. As Wong acknowledged in his letter to Kamper, however, Education Code section 44865 requires a teacher to consent to a continuation school assignment outside the teacher's credential. In California Teachers' Assn. v. Governing Board (1983) 141 Cal.App.3d 606 [190 Cal.Rptr. 453], the court stated:

There is good reason for the [Education Code] requirement of consent if a teacher is assigned outside the scope of his or her expertise. Evaluation is made on the basis of performance of the assigned task. A teacher may be unwilling to risk a critical evaluation while teaching outside the ambit of his or her credential.

Kamper's involuntary transfer to the continuation school would thus have been objectively adverse as a matter of law.

The crucial question is whether Kamper's transfer was unlawfully motivated. In the present case, I have not credited the testimony attributing to board member Davis a statement that Kamper's transfer might be in Kamper's best interest because Kamper was a "troublemaker". I have, however, credited the testimony attributing to Lindsay a statement that Kamper's

request to teach woodshop was a "political situation" that should be left alone. The Federation suggests Lindsay thus admitted he knew of unlawful motivation on the District's part, but there is no apparent reason to interpret Lindsay's statement that way. At the time Lindsay spoke, Kamper's request had already gone before the Governing Board, the District's ultimate political authority. In that sense, Kamper's request was indeed a "political situation," which Lindsay might legitimately choose to leave alone once the Governing Board had spoken.

In the absence of an admission of unlawful motivation, the question is whether such motivation should be inferred from circumstantial evidence. In the present case, Kamper's ultimate transfer was the culmination of a series of decisions: the decision to change the high school program, the decision to change the junior high school program, the decision not to change the master schedules, and the decision not to have Kamper teach woodshop and animal care. For there to be a prima case of retaliation, there must be reason to infer that at least one of these decisions was unlawfully motivated.

With regard to the decision to change the high school program, I find no reason to infer unlawful motivation. When Lindsay came to the District and became high school principal, there was no high school Title I program and no three-year plan for one, because there was no expectation of funding. When funding became a possibility, it is not surprising Lindsay would make plans to move toward a staff development program he had used

and liked in another school district. When Lindsay first shared his plans with Wong, Wong told him to "make sure" he had a school site council meeting to approve them; Wong apparently understood this was the established procedure. Lindsay followed Wong's directive, and on August 4 the high school site council approved a budget reflecting Lindsay's plans. It is odd and unexplained that Lindsay did not share his plans with the District Advisory Council at its August 8 meeting, as Lindsay said he intended to do, but I do not infer unlawful motivation from that oddity; I have credited Lindsay's testimony he did not then know Kamper was a Federation activist.

The situation was different at the junior high school, which was always expected to have funding, and which had a current three-year plan for 1994-1997, approved on May 18, 1994, calling for a credentialed instructor rather than staff development. Like Lindsay, Keiter apparently had legitimate reasons to make plans to move toward a staff development program, but what is striking is how differently Wong responded when Keiter shared those plans. According to Wong, this was immediately after the August 8 meeting of the District Advisory Council, and this was also when Wong first realized Lindsay's and Keiter's plans had implications for Kamper. Although Wong had previously told Lindsay to "make sure" to have a school site council meeting to approve his plans, he apparently said no such thing to Keiter, at least at the time. Instead, Wong apparently simply accepted Keiter's plans for staff development and began studying Kamper's

possible transfer. No apparent attempt was made to involve the junior high school site council until its "emergency meeting" almost six weeks later, on September 19.

It thus appears that when Wong became aware changes in the Title I programs would affect Kamper, Wong departed from the established procedure of requiring prior school site council approval. This departure was not explained by any testimony or other evidence. On the contrary, it appears from the evidence that prior school site council approval should have been more important at the junior high school than at the senior high school, because the changes at the junior high school were inconsistent with the current three-year plan approved the previous year. At the very least, this might have led Wong to raise the issue with Sullivan, who was responsible for the District's Title I compliance, but it did not.

After accepting Keiter's plans to change the junior high school program, and after studying Kamper's possible transfer, Wong produced the letter dated "August 22, 1995." I have credited the testimony of Kamper and the Federation president that Wong handed Kamper the letter on August 10. Wong did not explain the August 22 date on the letter, or why it referred to the August 10 conference as having already been held. The letter declared Kamper's transfer to be of an "emergency nature" because categorical funds had been approved on August 3 and the District had received its estimated apportionment on August 8. Wong testified he did call the State Department of Education on August

8 and understood the District would be receiving less funding, which worried him. Wong did not testify, however, this created any "emergency" situation, nor did he act as if he did. At the August 8 meeting of the District Advisory Council, Wong still sought (with Kamper's support) to allocate funds to the high school, even though it would mean less money for the junior high school and other schools. Overall, it appears from the evidence that Wong's letter was written to make Kamper's transfer seem more urgent and inevitable than it really was.

It is true Wong showed some apparent flexibility in allowing Kamper to look at the master schedules, to seek a vocational education credential, and to raise the matter with the Governing Board. The evidence suggests this flexibility was more apparent than real, however. Despite the options presented by Kamper and the Federation president, Wong ultimately told Kamper the master schedules would not be changed. Furthermore, when Wong realized a vocational education credential would not be appropriate for the woodshop classes, he did not discuss the matter with Kamper, nor did he offer the alternative of an emergency credential.

All of these actions were reasonably close in time to the settlement of the Federation's lawsuit against the District, on which a tentative agreement was signed on May 15, 1995. Wong acknowledged Kamper had "a major impact" on the lawsuit and its resolution. Wong testified he thought the settlement was fair and he hoped to improve the parties' relationship, but this testimony is not necessarily inconsistent with a preference on

Wong's part to isolate Kamper, the Federation's reputedly most litigious activist. From the evidence as a whole, I infer that Wong's acceptance of Keiter's plans to change the junior high school program, without the prior approval of the school site council, was unlawfully motivated. Because this was one of the events actually leading to Kamper's transfer, the burden shifts to the District to establish Kamper would have been transferred regardless.

It does not appear that the change in the high school program by itself would have led to Kamper's transfer. Kamper had taught only two Chapter 1 classes at the high school, and without them he apparently would still have had three classes to teach at the junior high school. Furthermore, Kamper had taught the two high school classes for only one year; presumably, as in prior years, Kamper's schedule would have been filled with other classes. One obvious possibility is that Kamper would have been assigned to teach the two eighth grade mathematics classes Matern did not want to teach. As Lindsay explained to Matern, "they needed a math teacher."

The junior high school site council did eventually have an "emergency meeting" at which it approved the plans to change the junior high school program, but this "emergency meeting" was not held until September 19, 1995, over three weeks after classes had begun. By then, Kamper would presumably have already been teaching three Title I classes at the junior high school, as in the previous year, and the remainder of his schedule would have

been filled with other classes, as in prior years. The District did not establish Kamper would have been transferred once the school year began, given the disruption both to the Title I program and to the master schedules that would have been involved at that point. The District also did not establish Kamper would not have continued as the District's "Chapter 1 Coordinator" for the 1995-96 school year, so long as he continued teaching the classes at the junior high school.

The District did establish by a preponderance of the evidence, however, that the junior high school Title I program, as well as the high school Title I program, would have been changed at the end of the 1995-96 school year. By March 1996, the changes in the programs and in the three-year plans had cleared the two school site councils and the District Advisory Council. It thus appears Kamper would no longer would have continued to teach the classes and serve as the "Chapter 1 Coordinator."

It does not necessarily follow, however, that Kamper would have been transferred at the beginning of the 1996-97 school year, rather than placed on the master schedules for the high school and junior high school. The situation in 1996 would not have been the same as it was in 1995. In August 1995, the District was asked to consider whether or not to make rather extensive changes in established master schedules shortly before classes were scheduled to begin, in order to provide Kamper with

a full five-period schedule.. It is understandable the District would be reluctant to make the changes under those circumstances.

In 1996, in contrast, the question would have been whether Kamper would be placed on the master schedules as they were being developed. Kamper had been placed on the master schedules every year since 1988, even before he taught any Chapter 1 classes, and it is not apparent why he would not be placed on them again. If Kamper had taught Matern's two mathematics classes in 1995-96, presumably he would be scheduled to teach them again in 1996-97; it would then be a question of filling his schedule with just three more classes. If there were questions about Kamper's credentials, there would be time for those questions to be thoroughly explored, or even for Kamper to apply for additional credentials, if necessary.

I conclude the District has not established Kamper would have been transferred regardless of his Federation activities. I conclude the District did retaliate against Kamper because of his Federation activities, in violation of EERA section 3543.5(a). This conduct also denied the Federation its rights, in violation of EERA section 3543.5(b).

REMEDY

EERA section 3541.5(c) gives PERB:

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

In the present case, the District has been found to have violated EERA section 3543.5(a) and (b) by transferring Kamper in retaliation for his Federation activities. It is therefore appropriate to direct the District to cease and desist from such conduct. It is also appropriate to direct the District to take affirmative actions to restore the status quo and make Kamper whole.

First, the District should be directed to rescind Kamper's transfer. The Federation has asked the rescission of the transfer to be effective at the end of the school year, and I agree this is an appropriate option for the District. This may minimize disruption to the District's educational program and may also place Kamper in the situation most comparable to the one it appears he would have been in at the end of the 1995-96 school year.

Second, the District should be directed to pay Kamper the "Chapter 1 Coordinator" stipend for the 1995-96 school year, with interest at the rate of 7 percent per annum.

Third, the District should be directed to pay Kamper for his additional mileage in commuting to and from Jacumba Elementary School, until Kamper's transfer is rescinded. The District shall pay the mileage rate established by the Internal Revenue Service, with interest at the rate of 7 percent per annum. Although Kamper could have avoided the additional mileage by accepting a transfer to the closer continuation school, I conclude he was not required to do so, for the same reason I have concluded an

involuntary transfer to the continuation school would have been objectively adverse.

Finally, it is appropriate the District be directed to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice the District has acted in an unlawful manner, is being ordered to cease and desist from this activity and take appropriate remedial action, and will comply with the order. It effectuates the purposes of EERA that employees be informed both of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the Mountain Empire Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3453.5(a) and (b), by retaliating against employee Fred Kamper (Kamper) because of his participation in activities of the Mountain Empire Federation of Teachers (Federation), by transferring Kamper away from the high school and junior high school in August 1995.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Kamper and other employees because of their Federation activities.

2. By the same conduct, denying the Federation its rights.

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

1. Rescind the transfer of Kamper away from the high school and junior high school. The rescission may be effective at the end of the school year.

2. Pay Kamper the "Chapter 1 Coordinator" stipend for the 1995-96 school year, plus interest at the rate of 7 percent per annum.

3. Pay Kamper for his additional mileage in commuting to and from Jacumba Elementary School, until his transfer is rescinded, at the mileage rate established by the Internal Revenue Service, plus interest at the rate of 7 percent per annum.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not

reduced in size, altered, defaced or covered with any other material.

5. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

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 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 of Civ. Pro. 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.)

THOMAS J. ALLEN
Administrative Law Judge