

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



TIMOTHY G. SIMERAL,)
)
Charging Party,) Case No. SA-CE-1858
)
v.) PERB Decision No. 1334
)
MADERA COUNTY OFFICE OF EDUCATION,) June 25, 1999
)
Respondent.)
_____)

Appearances; Timothy G. Simeral, on his own behalf; Stroup & de Goede by Raymond W. Dunne, Attorney, for Madera County Office of Education.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Timothy G. Simeral (Simeral) to a proposed decision (attached) by a PERB administrative law judge (ALJ). In the proposed decision the ALJ dismissed Simeral's unfair practice charge alleging that the Madera County Office of Education (Madera COE) retaliated against Simeral for his exercise of protected conduct in violation of section 3543.5(a) of the Educational Employment Relations Act (EERA).¹

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

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

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

The Board has reviewed the entire record in this case including the proposed decision, Simeral's exceptions and Madera COE's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1858 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TIMOTHY G. SIMERAL,)	
)	
Charging Party,)	Unfair Practice
)	Case No. SA-CE-1858
v.)	
)	PROPOSED DECISION
MADERA COUNTY OFFICE OF)	(4/15/99)
EDUCATION,)	
)	
Respondent.)	
_____)	

Appearances: Timothy G. Simeral, on his own behalf; Stroup & de Goede, by Raymond W. Dunne, Attorney, for Madera County Office of Education.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On August 10, 1998, Timothy G. Simeral (Simeral) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Madera County Office of Education (Madera COE). The charge alleged violations of Educational Employment Relations Act (EERA or Act).¹

On September 28, 1998, the Office of the General Counsel of PERB, after an investigation, issued a complaint against the respondent, alleging violations of subdivision (a) of section 3543.5.² On October 21, 1998, an informal conference was held in

¹The EERA is codified in the Government Code (commencing with section 3540). All section references, unless otherwise noted, are to the Government Code.

²Subdivision (a) of section 3543.5 states:

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

an unsuccessful attempt to reach settlement. On the same date the respondent answered the complaint, denying all material allegations and asserting affirmative defenses.

A formal hearing was held before the undersigned on January 6 and 7, 1999. Both parties briefed their respective positions, with the last brief being received on April 5, 1999. At that time the case was submitted for a proposed decision.

INTRODUCTION

Simeral alleges that his action of protesting an in-service training session concerning the inoculation of insulin into diabetic students caused the Madera COE to discriminate against him. He further alleges that his actions were protected by the EERA and that the Madera COE's subsequent action of (1) issuing him a negative performance evaluation and (2) rejecting him during his probationary period, was a direct result of such protected activity.

The Madera COE states that Simeral's allegedly protected activity was not the cause of its negative personnel action. Rather, it insists, it was based on his own performance.

(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. . . .

FINDINGS OF FACT

Jurisdiction

The parties stipulated that the charging party was a public school employee during the events discussed herein and the respondent is a public school employer, both within the meaning of EERA.

Background

Simeral was a Madera COE probationary school bus driver who was hired on February 24, 1997, after having previously worked as a substitute for a year and a half. The classified employee collective bargaining agreement (CBA) requires a twelve-month probationary period for bus drivers. Simeral worked out of the Madera COE's mountain area bus barn, which is located at the Coarsegold School in the Coarsegold Union Elementary School District (CUESD). CUESD has its own buses, and the two fleets are separate operations, each with its own drivers and buses. The Madera COE's bus barn or garage is located in an area below and behind the school, in a remote area which the employees refer to as the "hole".

The Madera COE transports only special education and/or medically fragile students. The Madera COE uses the mountain area bus barn as its base of operations to transport its students for all mountain area school districts in the county. Because of the special needs of these students, the Madera COE employs bus monitors, also called "riders", to assist students during bus runs. The Madera COE's mountain bus fleet consists of small

buses with limited seating capacity so as to provide the space and equipment necessary to accommodate students using wheelchairs.

Simeral's contention is that his protest of an insulin inoculation in-service was the cause of his rejection. Therefore, this incident will be described first, even though it is, chronologically, one of the later events. After a recitation of this incident, a series of incidents, all involving Simeral, will be described. It is these circumstances the Madera COE relies on to justify its rejection of Simeral.

Insulin In-Service Session

In early January 1998, Mary Besharse (Besharse), Erin Ballou (Ballou) and a teacher at Coarsegold School requested the Madera COE's nurse, Laura Agah (Agah), to present information regarding special needs for students with diabetes. A student, who was regularly transported by the Madera COE, had recently been diagnosed as having diabetes. Agah decided to conduct the session because she felt it was needed to "meet the needs, and try to . . . educate, and therefore relieve some of the fear and anxiety" The session was held on the morning of January 8, 1998, after the morning bus runs were completed.

Simeral was told by his fellow employees that it was a mandatory session for all bus drivers. Although he agreed to attend, he made it very clear that he did not have the education or skills to be giving insulin shots to a student when his bus is loaded with other students. He believed that in such an

emergency situation, it would be more effective to take the child to the nearest medical facility. It was at this session that he admittedly "lost his cool"³ and walked out of the program. He called the transportation department headquarters to complain to his supervisor about being required to attend the session.

It was from Simeral's complaint that Margo Ford (Ford), the Madera COE's transportation supervisor, first learned of the in-service. Ford was not as concerned with the meeting's content as she was about an in-service session for her drivers being held without her approval. At a meeting to review his complaint, Ford said that Simeral's objection to the meeting was legitimate. She told the women that they were wrong in dragging "Tim in there . . . and [making] him think that it was a mandatory in-service." During the meeting she advised the women that no credit or overtime pay would be given them for their in-service attendance because it had not been approved in advance. Ford also called nurse Agah and verbally reprimanded her for failing to secure approval before offering the training to the drivers.

Edward W. Dorn (Dorn), the Madera COE's division administrator of business and administrative services, who acts as the Madera COE's personnel director, is the person who ultimately decided that Simeral should be terminated. He said that although he heard about the in-service incident from Ford, it was not until he read the unfair practice charge that he

³The term "lost his cool" was never defined, but seems to mean raising his voice and otherwise displaying anger in a loud and provocative manner.

learned Ford was first apprised of the incident by a complaint from Simeral.

Madera COE's Justification for its Actions Regarding Simeral

Erin Ballou

Ballou, a Madera COE bus monitor, believed she saw a lack of professionalism in Simeral. She cited one instance in which she believed he was a bit short with a nine year-old student. She also believes he failed to keep his bus as clean as other drivers. In addition, she believed he left the bus on one occasion with the motor still running, which is against the Madera COE policy. Ballou temporarily worked as a monitor for Simeral when he drove Besharse's bus while she was on medical leave. She eventually began to document his behavior and subsequently reported her concerns to Ford. She admits that he was the only bus driver she documented.

Simeral questions Ballou's singling him out for such documentation and her selective memory. He points to her very precise recollection of every one of his alleged misdeeds and compares it to her extreme reticence regarding the details of an incident in which a student-occupied wheelchair toppled over in a bus driven by Besharse and monitored by her.

Mary Besharse

Besharse complains about Simeral's reluctance to accept her assistance in demonstrating the use of student wheelchair tie-downs. However, she admits his "reluctance" was limited to some facial expressions which she could not describe in any detail.

In addition, she said that "he would look at [her] in a certain way. And I have never noticed that from anyone else, not even my own husband." Because of this, she changed to a more conservative style of dress despite the summer heat. She also said that on one occasion she saw him look at Dewie, an attractive teacher's aide, "with such lust in his eyes." She discussed her concerns with Ballou, who felt the same way. Eventually, she began to report her concerns to Ford. She believes she reported negative aspects of Simeral's actions to Ford on an average of once a week.

Simeral points out the inconsistency of her complaints about his not observing her tie-down technique, when it was a wheelchair student in her bus that toppled over. He complains that her period of observation of him each day was so limited that her testimony regarding "lust in his eyes" was contrived. However, this particular observation was made in the "motor" room when Besharse was on limited duty during medical recuperation. He insists such an observation is extremely subjective and that she has no special training or educational background that would qualify her to accurately draw such conclusions from fleeting observations.

Ford initially discounted the women's complaints. She told Simeral not to let them get to him and advised him that he was better off avoiding them. She even called him at home one day telling him that she was tired of these women complaining about him and that she was going to speak to them about the matter.

Ford even asked Simeral if he got a big laugh from the fact a wheelchair tipped over on a Besharse/Ballou bus after they had complained about his inadequacies regarding tie-down skills.

Their complaints did not impact her ratings in Simeral's six-month evaluation. On September 15, 1997, Simeral received his first evaluation. All of his marks were in the highest category, "Satisfactory - Meets Standards of Expectations."

Improper Student Drop-Off

In mid-November 1997, Ford received a parent complaint that Simeral had dropped off a special education pre-school student without verifying there was a parent or caregiver present to accept custody. In actuality, the parent was home, but she did not believe Simeral could see her when he dropped the student off. This practice is prohibited for obvious safety reasons.

Day Care Center Complaint

In mid-November Ford received a telephone complaint from Indian Springs, a day care center adjacent to the Oak Creek Intermediate School. Simeral was accused of making their personnel very uncomfortable each day by his practice of driving slowly by the center, stopping and opening the bus door or windows and staring at staff and students in the day care playground area. Ford was told that a harassment complaint would be made if this did not stop.

Ford went to the day care center and surreptitiously observed Simeral as he passed by. She saw him drive by very slowly in his loaded bus with his window open and stare at the

day care center. After dropping off students at the school, he drove by the day care center again. This time Ford observed him staring, for thirty seconds, in the direction of the children and a pretty, blond teacher in the play area. Ford believed that the manner in which Simeral looked at them seemed to her like "stalking." She believed, from her own observations, that the day care's complaints were valid.

She testified that she was convinced that Simeral's behavior presented a potentially serious safety risk for the day care personnel and possibly for the Madera COE's own students. She described her reaction as one that created a rage inside of her. She decided to fire him immediately and discuss the matter later with Dorn.

Unauthorized Personal Use of the Bus

After her day care observation, Ford attempted to contact Simeral at the mountain area bus barn. It was mid-day, between his morning and afternoon routes. When she was not able to find him there, she went to the Oakhurst gym. She had previously given him permission to drive his bus to the gym, so he could work out during his duty-free time. She could not find either him or the bus at the gym. Later that day she calmed down and discussed the matter with Dorn.

Simeral insists this testimony is not credible, stating that she could have located him at any time at any student's stop on his route or contacted him on his bus radio. She also could have

spoken to him at the Coarsegold School, when he started his afternoon route.

Oral and Written Reprimand

The next morning, before his morning routes, she met with Simeral at the mountain area bus barn. She told him about her observations of his day care center drive-by behavior and explained that the center's personnel were very uncomfortable with his actions. She told him to stop this behavior immediately. She stressed that a repetition of this conduct could result in his dismissal. She also warned him about both unsupervised student drop-offs and his unauthorized bus use the previous day.

Simeral explained that he and his wife own a day care center and that he did not intend to make the children or anyone else uncomfortable.

On November 21, 1998, she memorialized her verbal admonitions in a written reprimand, which she gave him, with a copy to his personnel file. In this reprimand she cited all three areas of her concern.

Second Day Care Complaint

Approximately two weeks later, shortly before the holiday break, Ford again received a complaint from the Indian Springs day care center, stating that Simeral had resumed his staring behavior. Without going back to the center, Ford changed his route, so he no longer would pass the day care center. She did not discuss this new complaint with him.

Simeral points out the inconsistency in Ford wanting to fire him on the spot the first time she learned of this behavior and merely changed his route the second time it occurred.

Simeral's Second Evaluation

Simeral's probationary period was due to expire on February 23, 1998. According to the CBA, the Madera COE is required to conduct a final evaluation and conference with Simeral prior to the completion of his probationary period. Because the mountain schools would have their two week mid-winter break during the last two weeks of his probationary period, Ford met with Simeral on the morning of February 10, 1998, for his evaluation conference. She presented him with his final written evaluation. At the time she presented it to him, she explained to Simeral that this was not a good evaluation and that the personnel office might decide to terminate him upon its review. Simeral's attitude towards his possible termination was an expression of incredulity. He questioned who the Madera COE could get to take over his route, insisting that the most likely candidate, a Madera COE substitute driver, would be unable to complete it.

The Madera COE classified evaluation form is used for both permanent and probationary employees. In the "Overall Employee Performance" category, Ford had two initial choices. One choice was to mark the box that states she does not recommend continued employment, in effect a recommendation of rejection in probation. Her other choice was to rank Simeral in one of the three

performance levels. She chose the second alternative. Her next choice was to rank him in one of three decreasingly effective levels. She rated him in the lowest of these three levels, but modified the printed text, as follows:

The employee's performance needs improvement and is deficient in meeting lacking in some of the standards and requirements of the Madera County Office of Education. The employee exhibits potential for improvement. The level of performance will be re-evaluated no later than 4/23/98. An "Employee Improvement Plan" must be completed and attached. [Ford deleted the strike-out language and inserted the underlined language.]

The evaluation form sets forth ten broad work categories. Five of these have from three to five subcategories within them. In general, with regard to the categories of quality/quantity of work, job knowledge, attendance and punctuality, and work characteristics, he received either the highest or the next to the highest ranking.

In the broad category of working relationships he was ranked in five separate categories. Three of these rankings are noteworthy. In "Courtesy and Tact", a checkmark was placed next to "[b]ehavior was sometimes seen as discourteous or tactless; on occasion difficult to work with." In "Relationship with Co-Workers", a checkmark was placed next to "[w]illing to assist co-workers and others when requested to do so. Usually a good team member." In "Relations with Supervisor", a checkmark was placed next to "[u]sually accepted constructive criticism and most suggestions from supervisor."

Under "Work Characteristics", Ford wrote, "Tim needs to keep his cool when dealing with stressful situations regarding his fellow employees."

Under "Working Relationships", Ford wrote, "Tim needs to work on the strained relationship with his co-workers. It is imperative that the drivers work as a team."

An Employee Improvement Plan (EIP) was attached to the evaluation. In it the three areas cited as needing improvement were (1) bus cleanliness, (2) paperwork,⁴ and (3) attitude towards fellow employees.

The only comment in the EIP's "Recommendations and Commendations" section stated:

During this evaluation period a complaint from a private citizen was brought to Tim's attention. Following a conference with Tim, Tim took the appropriate steps to alleviate the concern.⁵¹

Tim has a good relationship with the children and parents on the route. He has behavior management plans with each student, that have worked.

The evaluation was signed by Simeral and Ford on February 10 and by Dorn on February 12, 1998.

⁴Ford explained that bus drivers are required to submit various forms, i.e., daily bus reports, fuel logs and bus route directions. Simeral did not file these reports in a timely manner. She admitted she never mentioned his paperwork deficiencies to him.

⁵She said this comment referred to the day care center incident. She admitted that instead of Simeral taking the appropriate steps, she did, i.e., she changed his route to eliminate any reason to drive by the center.

Simeral alleged a number of inconsistencies in this evaluation. A narrative comment on his bus being dirty was inconsistent with a check mark in the "generally neat and accurate" category. However, Ford did write in a narrative below this category, that Simeral "[n]eeds to sweep bus every day."

Simeral insists the only negative thing that happened between his standard evaluation in September and the negative one in February was his "losing his cool" in the insulin meeting. He complains that all of the rest of the incidents occurred in January and were never brought to his attention prior to receiving the evaluation.

Melinda Boyd

After her conference with Simeral ended, Ford had a chance meeting with Lee Bendz (Bendz), CUESD's then transportation director. Bendz said, "... oh, by the way, I've been meaning to tell you this" He went on to say that one of his drivers, Melinda Boyd (Boyd), reported that on several occasions over the past year, after she entered her parked bus, she had been startled by Simeral suddenly appearing from behind the seats, inside the bus. Boyd told Simeral his behavior scared her, but he continued to enter her bus without being invited. The fact that they worked for entirely separate employers added to her sense such action was improper. Eventually, she locked her bus whenever she left it.

Simeral said he went into her bus to nap and it only happened twice. If Simeral was stretched out to take a nap, he

would have had to extend himself over the aisle, as there was no bus-wide back seat. As such he would have been visible to anyone entering the bus. And yet, Boyd did not see him when she first entered the bus. She insists he came up from behind seats when she started the bus's engine. The CUESD buses are larger and Simeral contends it was easier to nap in them than in the much smaller Madera COE buses.

Simeral questions whether this matter was as important and as much of a safety issue as the Madera COE asserts. If it was that important to Boyd and Bendz, why did Bendz wait almost a year to tell Ford, and then just mention it in passing, telling her, "Oh, by the way, I've been meaning to tell you. . . ."

Ford's Decision to Recommend Simeral's Rejection

Ford states after her conversation with Bendz, she re-evaluated Simeral's recent behavior and decided that he should be rejected. She went to the Madera COE's personnel director, Dorn, and recommended Simeral's rejection during probation. Due to a concern for her personal safety she asked Dorn to advise Simeral of this action.

Simeral states that throughout his Madera COE employment, Ford called him at home, had private meetings on his bus, arranged to meet with him at her house and held ten hours of one-on-one in-service with him in January to assist him in renewing his bus license. After all of this contact, with no intervening threat or intrusive behavior, she now states she is afraid to meet with him alone. He insists the only thing that occurred

between her meeting with him on February 10 in the dark at 6:15 a.m. in the "hole" and her alleged fear of him on February 12, was the second hand comments from Boyd. Simeral insists this testimony is illogical and internally inconsistent.

Simeral's Termination Meeting with Porn

Dorn had been given Simeral's evaluation for review, and based on it alone, he insists he had determined to reject him in probation. He bases this decision on the fact a performance improvement plan was deemed necessary after almost twelve full months as a probationer. He insists that Ford's request and the information regarding Simeral's actions on Boyd's bus only reinforced his determination to reject Simeral. The next afternoon, February 13, 1998, after the last bus run was completed, Dorn met Simeral at the mountain area bus barn area and told him his employment was terminated, effective that day.

When Simeral asked him why he was being terminated, Dorn said he "could see no reason to advance a person to permanency who had an improvement plan." Simeral questions this logic. He had been a Madera COE bus driver for two and one-half years. Granted, most of that time he was only a substitute, but it still gave Dorn and Ford sufficient time to determine whether or not he deserved permanent employment status. He does not believe that after all of this time it is logical that he would be terminated because an evaluation included a performance improvement plan.

Parental Letters of Support for Simeral

Entered into evidence were sixteen letters of support for Simeral. Seven were from either parents or care providers of students transported by Simeral. Four were from other Madera COE bus drivers or monitors. Two were from county professional educators and one each was from a teacher's aide and a local district bus driver that transferred students to and from Simeral's bus. The letters spoke of his dependability, courteousness and interest in the children's welfare.

ISSUE

Did the Madera COE reject Simeral during his probationary period because of his protected activity, in violation of subdivision (a) of section 3543.5?

CONCLUSIONS OF LAW

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of subdivision (a) of section 3543.5 of EERA:

1. A single test shall be applicable in all instances in which violations of section 3543.5 (a) are alleged;
2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board clarified the Carlsbad test for retaliation or discrimination in light of the National Labor Relations Board decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. In Novato, unlawful motive must be proven in order to find a violation. In addition, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case, the charging party must first prove the subject employee engaged in protected activity.⁶ Next it must establish that the employer had knowledge of such protected activity. Lastly, it must be proven

⁶Section 3543 grants public school employees:

. . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

that the subject adverse action(s) were taken, in whole or in part, as a result of such protected activity.

Protected Activity

Simeral has a problem in establishing protected activity. He insists his protest of the "mandatory" insulin in-service was protected by the EERA. The evidence shows, however, that (1) it was not mandatory, (2) it was not a product of, nor even sanctioned by the Madera COE, and (3) his "protest" seemed to center on his personal reluctance to give insulin inoculations, which would suggest its primary impetus was on behalf of himself rather than other employees. Protesting a training session created by fellow employees would not fall within the usual parameters of "protected activities."

In addition, PERB has held, in State of California (Department of Developmental Services) (Monsoor) (1982) PERB Decision No. 228-S, that the subject action must either be on behalf of an employee organization or a group of employees, not just the complaining party alone, to qualify as protected activity.

In this case, no allegations were propounded by Simeral that his motivation in complaining or protesting the in-service had anything to do with other bus drivers. In fact, there was no evidence proffered that there was not even one other bus driver that agreed with Simeral's view of the in-service.

However, Simeral's complaint could support an argument that his action was an attempt to exercise his right to represent

himself individually in his employment relations regarding a proposed working assignment. Under these circumstances it would be considered activity protected by the EERA. (Pleasant Valley School District (1988) PERB Decision No. 708.)

Employer' Knowledge of the Protected Activity

In establishing employer knowledge, Simeral again has a problem. Although there is no doubt Ford knew of his protest, she agreed with him that there should not have been such a session, at least not without her approval. In addition, she chastised Besharse and Ballou for creating it and then telling Simeral he was required to attend.

Dorn seems to be the primary decision-maker with regard to the rejection. He admitted he knew of the in-service conflict, but insists he was not aware of Simeral's participation in it until he read this case's underlying charge.

This type of employer-knowledge does not satisfy the Carlsbad requirement that the employer was aware of the protected activity when the negative personnel action was taken.

Presence of Unlawful Motivation

However, even if Simeral was able to prove he engaged in protected activities, and that the employer was aware of such activity when he was terminated, the result would be the same. He would lose on the merits, because there is insufficient evidence to prove that the Madera COE's decision to reject him during his probationary period was motivated in whole, or in part, by his protected activity.

Proving the existence of unlawful motivation can be a difficult burden. The Board acknowledged this when it stated the following in Carlsbad:

Proof Of Unlawful Intent Where Offered Or Required

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board, in Novato, set forth examples of the types of circumstances to be examined in a determination of whether improper animus is present and a motivating factor in the employer's action(s). These circumstances are (1) disparate treatment of the affected employee(s), (2) proximity of time between the participation in protected activity and the adverse action, (3) inconsistent explanations of the employer's action(s), (4) departure from established procedures or standards, and (5) inadequate investigation(s). (See also Baldwin Park Unified School District (1982) PERB Decision No. 221 (Baldwin Park).)

Disparate Treatment of Simeral

No evidence was proffered regarding the rejection, or lack thereof, of any other Madera COE probationary employee, nor of any similar actions regarding a contemporaneous bus driver or other employee(s). In the absence of such evidence it is not

possible to determine if Simeral was treated any differently than similarly situated employees who did not engage in protected activities.

Proximity of Time

Simeral's protected activity occurred on January 8, 1998. He was rejected on February 13, 1998, a bit more than five weeks later. If the Madera COE was as upset over his objections to the in-service as Simeral believes it was, it is reasonable to believe this negative feeling would still be present five weeks later.

It is therefore determined that the proximity of time between Simeral's protected activity and his rejection provides some support for an inference of unlawful motivation. However, it has been held by the Board that timing alone is insufficient to create an inference of a nexus between protected activity and negative personnel actions. (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.)

Inconsistent Explanations for the Madera COE's Actions

The Madera COE cited seven reasons for Simeral's rejection. They are: (1) complaints of Ballou and Besharse; (2) improper student drop off; (3) behavior near day care center; (4) unauthorized use of school bus; (5) uncleanliness of bus; (6) untimely paperwork; and (7) Simeral's uninvited intrusion into Boyd's bus. These reasons will be examined separately.

Complaints of Ballou and Besharse

Ballou and Besharse, in both their testimony and demeanor, made it very clear that they were totally opposed to Simeral. Their enthusiastic responses with regard to his alleged failings and their selective memory with regard to anything at all that could be of benefit to him was clearly apparent. Much of their testimony was very subjective, i.e., being short with a student, bus cleanliness, improper wheelchair tie-downs, negative facial expressions, "certain" looks and observations of "lust in his eyes." A serious question arises as to whether the Madera COE put much credence into such obviously slanted views. An investigation into the accuracy of such complaints would undoubtedly evolve into little more than a "he says, they say" conclusion. Even Ford discounted their complaints during much of Simeral's employment. The unfortunate aspect of this type of "evidence" is that even though it was not given much credence initially, it can be used to support similar, but more credible, later evidence.

However, in and of itself, due to the testimony and demeanor of the two witnesses, it is determined that this particular evidence did not provide credible support for Simeral's termination. Therefore, it does give some support to an inference of improper motivation.

Improper Student Drop-Off

There is no doubt that a special education pre-school student should not be dropped off at her home unless it is quite

clear that there is a responsible adult present. In order to determine the weight to be given to Simeral's improper behavior, it would be necessary to determine how often this type of circumstance occurs and what the Madera COE's "usual" reaction is when it does happen.

Irrespective of the weight given to the incident, the Madera COE is entitled to rely on it to support its action with regard to the termination. The incident does not support an inference of improper motivation.

Behavior Near the Day Care Center

There is no doubt that this behavior was improper and could create problems for the Madera COE. Ford's investigation was reasonable and fair. The impropriety of the original action was compounded when it was repeated after a warning.

This evidence supports a conclusion that the Madera COE reasonably relied upon this incident to take its action with regard to the termination.

This incident does not support an inference of improper motivation.

There is, however, an inconsistency in Ford's reactions to the two incidents. When she first was aware of Simeral's behavior, she insisted she was going to fire him on the spot and was "in a rage." The second time it occurred she merely changed his route, without even mentioning it to him. She compounded this laissez faire attitude towards his behavior by commenting, in his evaluation, that "Tim took the appropriate steps to

alleviate the concern." This inconsistency calls into question Ford's credibility with regard to her rage over the first incident. However, it is not the type of inconsistency that would support an inference of improper motivation.

Unauthorized Personal Use of Bus

When Ford was looking for Simeral, after her day care center investigation, she was admittedly upset. Her rage over his behavior at the center may have caused her to overreact with regard to the bus incident. However, she had earlier permitted him to use the bus for personal use under certain specified conditions. He violated those conditions and must be held accountable for his actions. Once again the proper weight to be given to this impropriety is in doubt. However, the Madera COE is entitled to rely on a clear violation of its rules to support its action with regard to the termination.

This incident does not support an inference of improper motivation.

Bus Uncleanliness and Untimely Paperwork

Both of these items are generally low level violations. Absent unusual circumstances or a number of reminders and/or warnings, they are not the type of circumstances that will lend much support to the termination of an employee. However, the Madera COE is entitled to add these charges to other, more serious, ones to support its action with regard to the termination.

These incidents do not support an inference of improper motivation.

Simeral's Actions in Boyd's Bus

Regardless of whether he was napping or had some other motivation, Simeral's actions made Boyd uncomfortable. Her fear was reasonable and there was no justification for it. It happened more than once. Simeral says only twice; Boyd insists it was several times. The Madera COE is entitled to rely on this incident to support its action with regard to the termination.

This incident does not support an inference of improper motivation.

Departure From Established Procedures or Standards

The only departure from established procedures or standards cited by Simeral concerns the Madera COE's decision to wait until the end of a year-long probationary period to reject him. Dorn's explanation that the Madera COE was hoping he would succeed, and therefore gave him every opportunity to do so, is logical and supported by the evidence. Most of the incidents under discussion occurred within the last three months of Simeral's employment. These incidents created an ever-increasing collection of damaging evidence. This evidence reached its peak in early February, and when the revelation regarding his uninvited entries into Boyd's bus was added, the rejection decision resulted.

Under these circumstances, his rejection late in his probationary period is not found to be a departure from established procedures or standards.

Simeral also points to the fact that he was not told of at least three of the matters now being held against him. They are (1) uncleanliness of his bus, (2) Untimeliness of paperwork, and (3) Boyd's bus intrusions.

Although Ford, in replying to a specific question, insisted that the cleanliness of a driver's bus was important, it is difficult to believe that, absent repeated warnings, it would be a major reason for a driver's termination. The fact that it was not discussed with him is understandable.

The same conclusion must be drawn from the paperwork Untimeliness issue. There were no specifics discussed, but general slowness in submitted paperwork, unless it was in direct defiance of repeated reminders and warnings, would not reasonably be a major justification for a driver's termination. The fact that this was not discussed with him is understandable.

The Boyd bus intrusions, although very serious, were made known to Ford and Dorn no more than two days before the rejection. Under these circumstances, it is understandable that this matter was not discussed with Simeral prior to his termination.

Therefore, the evidence with regard to bus uncleanliness, paperwork Untimeliness or the Boyd bus intrusions do not support

a conclusion that they were departures from established procedures or standards.

Inadequate Investigation

There could be an issue regarding inadequate investigations in the matter of (1) the complaints of Ballou and Besharse or (2) Simeral's intrusion into Boyd's bus. However, these matters were discussed, at length, in the above examination of allegedly inconsistent explanations of the employer's actions, and were disposed of at that time.

Summary

The examination of the Novato and Baldwin Park circumstances lead to a conclusion that there is insufficient evidence to support an inference of unlawful motivation on the part of the Madera COE. Therefore, it is determined that the Madera COE did not reject Simeral in his probationary period because of his protected activity.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Madera County Office of Education did not violate the Educational Employment Relations Act, Government Code section 3543.5(a), when it rejected Timothy G. Simeral during his probationary period. It is ORDERED that all aspects of the complaint and underlying unfair practice charge in Case No. SA-CE-1858, Timothy G. Simeral v. Madera County Office of Education, 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 within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

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. (Cal. Code 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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service,

in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135 (c).)

Allen R. Link
Administrative Law Judge