STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 318, Charging Party, v. STOCKTON UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2206-E PERB Decision No. 1759 March 28, 2005

Appearances: California School Employees Association by Marcie Bayne, Senior Labor Relations Representative, for California School Employees Association & its Chapter 318; Kronick, Moskovitz, Tiedemann & Girard by Karen N. Daubendiek, Attorney, for Stockton Unified School District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association & its Chapter 318 (CSEA) from a Board agent's dismissal (attached) of its unfair practice charge. The unfair practice charge alleged that the Stockton Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the release time policy for job stewards, and by discriminating against job steward Marilyn Brown (Brown) when it denied her request for job steward release time and transferred her involuntarily to another school.

The Board has reviewed the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, CSEA's appeal and the

[1]EERA is codified at Government Code section 3540, et seq.

District's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Timeliness of Appeal

The District contends that CSEA's appeal of the dismissal is untimely. The Board served the dismissal on the parties by mail on April 6, 2004, and it received CSEA's appeal on May 2, 2004. The District contends that under PERB Regulation 32635(a)[2], CSEA may appeal the dismissal to the Board itself within 20 days of the date of service of a dismissal. The District contends that since CSEA filed its appeal six days beyond April 26, 2004, the due date, the appeal is untimely.

PERB Regulation 32130(c) provides that a "five day extension of time shall apply to any filing made in response to documents served by mail . . ." The District argues that this regulation is inapplicable to the present situation, because the late filing is allowed only when the filing is mailed before the initial deadline, but still received within the five-day allowance for service by mail. In support, the District cites to PERB decisions in Lake Elsinore School District (1986) PERB Order No. Ad-154; and Los Angeles Unified School District (1986) PERB Order No. Ad-155. However, those decisions arose prior to the promulgation of PERB Regulation 32130(c) in 1989. Under PERB Regulation 32130(c), there is no question that CSEA was entitled to an extra five days, or until May 3, 2004[3], to file its appeal. Accordingly, the District's contention that CSEA's appeal is untimely must be rejected.

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[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

[3]With the five-day extension under PERB Regulation 32130(c), CSEA's appeal was due on May 3, 2004, rather than May 2, 2004 which fell on a Sunday.

Release Time Policy – Unilateral Change

CSEA's first contention on appeal is that the Board agent erred in dismissing the charge that the District had unilaterally changed its policy on release time for job stewards by denying Brown's release time request on May 8, 2003. However, the Board finds the Board agent's dismissal well supported by the facts and the law.

Pursuant to the language of Article 5.2 of the parties' collective bargaining agreement (CBA), the District has the discretion to deny job stewards' release time requests. The District alleges that it previously exercised its discretion in denying Brown's release time request on April 29, 2003, and that CSEA did not challenge such a denial.

CSEA counters that the District had a past practice of always granting release time requests. However, CSEA has not supported this legal conclusion with any specific facts. PERB Regulation 32615(a)(5) provides that a charge shall contain a clear and concise statement of the facts and conduct alleged to constitute an unfair practice. In the absence of a clear and concise statement of facts showing the District has a past practice of always granting release time requests, the Board is inclined to give more weight to the District's evidence than to CSEA's conclusory allegation. The Board therefore adopts the Board agent's finding that the District had in fact denied release time requests in the past, and that its denial of release time to Brown on May 8, 2003, did not constitute a change in policy.

Involuntary Transfer - Unilateral Change

CSEA's second contention on appeal is that the Board agent erred in dismissing the charge that the District had unilaterally changed its policy on involuntary transfers. CSEA argues that in practice, involuntary transfers have been utilized mainly to avoid layoffs or disciplinary actions. In the present case, the District transferred Brown involuntarily to another school beginning the next school year due to a lack of funds and/or a lack of work.

CSEA's argument is inconsistent with the provisions of Article 13.6, section 13.6.1 of the CBA. Pursuant to the language of Section13.6.1, the District may initiate involuntary transfers "based exclusively on the work-related needs of the District and will not be for disciplinary or capricious reasons." Nothing in the language of Section 13.6.1 can be construed to limit the utilization of involuntary transfers to the avoidance of layoffs or disciplinary actions.

Even if one were to assume that the District has limited its past application of Section 13.6.1, it still maintains the right to adhere to and enforce the contractual language of the CBA. In Marysville Joint Unified School District (1983) PERB Decision No. 314, the Board held that "where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain the meaning." Notwithstanding any past practice, the District was therefore within its rights to transfer Brown involuntarily provided that it complied with Section 13.6.1. Since the record indicates that the District complied with the provisions of Section 13.6.1, the Board finds no support for CSEA's contentions.

Involuntary Transfer - Discrimination

CSEA's third contention on appeal is that it has demonstrated sufficient nexus to state a prima facie case of discrimination. Specifically, CSEA argues that the District violated EERA by involuntarily transferring Brown to another school because of her protected activities. To establish the required nexus, CSEA points to the close timing of the layoff notice and the involuntary transfer. CSEA also points to Brown's activities on behalf of the union during this time period.

It is well settled that although the timing of an employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not,

standing alone, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (North Sacramento School District (1982) PERB Decision No. 264; Moreland Elementary School District (1982) PERB Decision No. 227.) The party alleging discrimination must make a prima facie showing of unlawful motivation. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Under Novato, unlawful motivation occurs where an employer's action against an employee was motivated by the employee's participation in protected conduct. Motivation is determined by a review of direct and circumstantial evidence to see whether, but for the exercise of protected rights, the disputed action would not have been taken against the employee.

The evidence in the present matter shows that Brown's involuntary transfer to another school was a result of the elimination of her position due to budget reductions. The record is devoid of any information to show that Brown's position was selected for elimination because of her union activities. CSEA has failed to demonstrate an unlawful motive in the transfer of Brown. Accordingly, the Board affirms the dismissal of this allegation and the remainder of the charge.

ORDER

The unfair practice charge in Case No. SA-CE-2206-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Whitehead joined in this Decision.

STATE OF CALIFORNIA — ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 6, 2004

Marcie T. Bayne, Senior Labor Relations Representative
California School Employees Association
5375 West Lane
Stockton, CA 95210

Re: California School Employees Association & its Chapter 318 v. Stockton Unified School District
Unfair Practice Charge No. SA-CE-2206-E
DISMISSAL LETTER

Dear Ms. Bayne:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 5, 2003. The California School Employees Association & its Chapter 318 alleges that the Stockton Unified School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the release time policy for job stewards and by discriminating against Marilyn Brown when it denied her release time and involuntarily transferred her to Garfield School.

I indicated in the attached letter dated January 27, 2004, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that unless you amended the charge to state a prima facie case or withdrew it prior to February 4, 2004, the charge would be dismissed. Your request for an extension of time was granted and an amended charge was filed on February 17, 2004.

As amended, the charge continues to allege that the release time policy was to always grant verbal requests for release time to represent employees in disciplinary meetings. On May 8, 2003, the District denied Chief Job Steward Marilyn Brown's request for release time. The charge also states that the District denied Ms. Brown's prior release time request on April 29, 2003. The amended charge attempts to distinguish the April 29th release time request from the May 8th request. Following the denial of release time on April 29, CSEA discovered that the meeting was neither for disciplinary action or for a grievance. Thus, the Union did not challenge the denial of release time. However, the fact remains that the District has previously denied release time requests. Thus, the facts do not demonstrate an established policy of always granting verbal release time requests.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Furthermore, Article 5.2.1 states that, "A job steward shall be granted a reasonable amount of time . . ." This language suggests that at times the District has the discretion to deny release time requests. Accordingly, the allegation that the District unilaterally changed the release time policy when it denied Ms. Brown's May 8, 2003 request does not state a prima facie case and is hereby dismissed.

As amended, the charge adds the allegation that the District unilaterally changed the involuntary transfer policy set out in Article 13.6 of the parties' CBA.

As previously noted in the attached letter, Ms. Brown is employed by the District as an Instructional Assistant. In addition to serving as a Chief Job Steward, Ms. Brown is Chair of the bargaining team. Ms. Brown has been very active in the Union, participating in negotiations and meetings with District officials, representing unit members, investigating grievances and participating in arbitration hearings and PERB proceedings.

On June 11, 2003, Ms. Brown was notified of the District's intent to lay her off due to lack of work/lack of funds. After receiving the seniority roster for the positions being laid off, CSEA notified the District that the seniority list was incorrect. During our discussions of this charge, you told me that the only error on the list was the inclusion of an individual who intended to retire at the end of the school year. The District corrected the seniority list and provided a corrected copy to the Union. Under the revised seniority roster, Ms. Brown was not subject to layoff.

In a letter dated July 15, 2003, the District rescinded Ms. Brown's notice of layoff. The letter also informed Ms. Brown that she was "scheduled to report to work at Garfield School as an Instructional Assistant."

In an August 13, 2003 letter, the District formally notified Ms. Brown that she would be involuntarily transferred to Garfield School. Ms. Brown was instructed to report for the new school year on August 25, 2003. The letter explained that the involuntary transfer resulted from the elimination of instructional assistant positions due to a lack of funds and/or lack of work for 2003-2004. The letter provided the name of a contact person in the Human Resources Department if Ms. Brown had any questions regarding the transfer.

Article 13.6 of the parties' CBA authorizes involuntary transfers. This provision states:

> 13.6.1 An involuntary transfer may be initiated by the District and shall be based exclusively on the work-related needs of the District and will not be for disciplinary or capricious reasons. A bargaining unit member shall not have his/her assigned hours reduced, or shift changed, as result of the District-initiated transfer, but shall be constituted only by mutual agreement with the Association and concurrence of the bargaining unit member.

INTENT

The above language is intended to permit the District to transfer an employee, without the employee's consent, unless the transfer would reduce the employee's hours or change his/her shift.

13.6.2 In the event that circumstances require that a bargaining unit member be transferred on an involuntary basis, the bargaining unit member and the Association shall be informed of the reason(s) in writing prior to such action and shall be afforded an opportunity to meet with the Personnel Department regarding the proposed transfer.

The charge alleges that by practice the involuntary transfer policy is utilized in only two limited circumstances. The first is when the District transfers bargaining unit employees who have been notified of layoff to vacant positions in order to avoid a layoff. The second circumstance is when employees are transferred to avoid situations where the employee could be subject to discipline if not transferred to a new position. Further, the charge alleges that transfers are not implemented until the employee is informed in writing of the reason for the transfer and given an opportunity to meet with personnel department representatives regarding the transfer.

As discussed in the attached letter, unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The charge alleges that the District departed from existing policies and practices when it transferred Ms. Brown even though she was not subject to layoff or involved in a situation which could lead to discipline. In addition, Charging Party asserts that the District implemented the transfer without providing the reason for the transfer in writing and an opportunity meet with personnel department representatives.

Even assuming the District's practice in utilizing involuntary transfers were limited to the two circumstances described above, Article 13.6 authorizes the District to make involuntary transfers based on the work-related needs of the District. Under the rule in Marysville Joint Unified School District (1983) PERB Decision No. 314, an employer does not make an unlawful change in policy if its actions conform to the terms of the parties' agreement. Thus, because Article 13.6 provides the District with broad discretion to initiate involuntary transfers and does not limit involuntary transfers to the two previously described circumstances, the District did not depart from the established policy set forth in the parties' CBA when it transferred Ms. Brown due to a lack of funds and/or lack of work.

Further, Charging Party's claim that the District failed to provide Ms. Brown with written reasons for the transfer and an opportunity to meet with personnel department representatives, is not supported by the facts provided. In the August 13, 2003 letter to Ms. Brown, the District explained that the involuntary transfer resulted from the elimination of instructional assistant positions due to lack of funds and/or a lack of work. These statements represent a written explanation for the transfer. The letter also invited Ms. Brown to contact the Human Resources Department if she had any questions. These facts do not demonstrate a change in the policy set out in Article 13.6. Thus, this allegation does not demonstrate a prima facie case of an unlawful unilateral change and is hereby dismissed.

Finally, the charge alleges that the District discriminated against Ms. Brown when it denied her May 8th request for release time and involuntarily transferred her to Garfield School. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.) The charge alleges that the nexus necessary to demonstrate unlawful motivation was established by the District's unilateral change in the release time and involuntary transfer policies. As discussed above, however, the charge does not demonstrate a unilateral change in these policies. Further, as addressed in the attached letter, the charge does not provide any other evidence of nexus. Therefore, the discrimination allegations are also dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Regulations 32135(a) and 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 Regulation 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. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

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

Final Date

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

Sincerely,

ROBERT THOMPSON
General Counsel

By _____
Robin W. Wesley
Regional Attorney

Attachment

cc: Karen Daubendiek

STATE OF CALIFORNIA)))LD SCHWARZENEGGER, Governor
PUBLIC EMPLOYMENT RELATIONS BOARD

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January 27, 2004

Marcie Bayne, Senior Labor Relations Representative
California School Employees Association
5375 West Lane
Stockton, CA 95210

Re: California School Employees Association & its Chapter 318 v. Stockton Unified School District
Unfair Practice Charge No. SA-CE-2206-E
WARNING LETTER

Dear Ms. Bayne:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on November 5, 2003. The California School Employees Association & its Chapter 318 alleges that the Stockton Unified School District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the release time policy for job stewards and by discriminating against Marilyn Brown when it denied her release time and involuntarily transferred her to Garfield School.

Investigation of the charge revealed the following relevant information. Ms. Brown has worked for the District for over 20 years. Ms. Brown has a disability which limits her ability to walk long distances. Sometimes she uses a wheelchair and sometimes she walks with a cane. In 2002, Ms. Brown was working in the library at the Webster Middle School as an Instructional Assistant. Ms. Brown did not have a need to file a reasonable accommodation request while working at Webster School because she was located in a single building and did not have to walk long distances.

Ms. Brown also serves as a Chief Job Steward for CSEA and is Chair of the bargaining team. Ms. Brown has been very active in the Union, participating in negotiations and meetings with District officials, representing unit members, investigating grievances and participating in arbitration hearings and PERB proceedings.

In 2002, a new principal was assigned to Webster Middle School. On September 4, 2002, Principal Sonya Arellano gave Ms. Brown a memo concerning her use of release time. The memo stated, in part:

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

> In order to insure that we have a successful year, it is important that you understand the protocol for leaving our campus, and my expectations. This is important for you because I am aware that you hold a position with the local CSEA chapter. Therefore, I am informing you of the following:
>
> 1. CSEA related calls and business should be limited to before or after school, your breaks, and your lunch hour.
>
> 2. Job steward responsibility shall be carried out consistent with Article 5.2.1 of the Unit B contract, in short, prior notification is required if you are required to leave our campus to carry out your role as job steward.
>
> 3. It is your responsibility to complete the necessary forms if you are fulfilling your role as job steward.

CSEA Labor Relations Representative Dan Morris responded to the memo in a letter dated September 11, 2002. Mr. Morris reiterated the authority for job steward release time under Article 5.2.1, stating, in part:

> Article 5, Section 5.2.1 requires Ms. Brown to secure a mutually agreeable time with the grievant's supervisor and submit the leave utilization form upon her return, and that the request for job steward release time be in writing prior to the time away from work.

On February 13, 2003, the Webster School Site Council met to consider Webster School's proposed budget for the 2003-2004 school year. Among other items, Principal Arellano proposed the elimination of one instructional assistant position. At the time, the school site council members were not informed that the position was held by Ms. Brown. The Council's approval of the proposed budget is advisory to the school board.

On March 12, 2003, Ms. Brown filed a worker's compensation injury report after she was injured by a falling bookcase. Ms. Brown did not miss work as a result of the injury. Her doctor released her from medical restrictions on March 31, 2003.

On April 7, 2003, Ms. Brown was scheduled to represent CSEA in a meeting with District officials. When she arrived, Ms. Brown learned that the meeting was to be held in a room located on the second floor. Ms. Brown was not able to climb stairs as result of her March 12, 2003 work injury. The charge states that "[District] representatives were very aware of Brown's injury when they scheduled the location of the meeting." The meeting was rescheduled to April 23, 2003 in another location.

On May 7, 2003, Ms. Brown was contacted at home by a unit member and asked to serve as a union representative at a disciplinary meeting the next morning. On May 8, 2003, Ms. Brown verbally notified Ms. Arellano that she needed to attend the disciplinary meeting. Ms. Arellano denied the request for release time.

Mr. Morris called Ms. Arellano on May 8, 2003 regarding the denial of release time. Ms. Arellano stated that release time had been denied by Jess Serna, Director of Human Resources, as a result of Ms. Brown's attempt to use release time on April 29, 2003. The charge states:

> The District denied Brown release time on April 29, 2003. The Charging Party did not challenge the April 29, 2003, denial when it was recognized that an employee failed to follow Brown's direction in scheduling the representation meeting with the site principal and that Brown did not need to attend that meeting.

Mr. Morris pursued the matter and asked Mr. Serna in an e-mail message dated May 9, 2003, for further clarification regarding the denial of release time. Mr. Serna responded by e-mail on May 12, affirming that the District would follow the provisions of the parties' CBA. Mr. Serna continued:

> As we discussed, the CBA requires advanced notice to the respective Administrator, and or manager. We also recognize that special circumstances may require more immediate need. We will evaluate each of the circumstances, and approve release time as appropriate, always with the need of students in mind.

Article 5.2.1, regarding job steward release time, states, in part:

> A job steward shall be granted a reasonable amount of time to participate in the investigation, preparation, writing, and presentation of grievances. The job steward shall arrange with the grievant's supervisor for a mutually agreeable suitable time to conduct such business. The leave utilization form shall be submitted upon return to the worksite when verbal approval is granted. Prior notification to the immediate supervisor/ manager/administrator shall be in writing.

The Charging Party stated that the practice was to grant release time in response to verbal requests for release time.

On June 11, 2003, Superintendent George Ridler notified Ms. Brown by letter of the District's intent to lay her off due to lack of work/lack of funds for the 2003-2004 school year.

On June 25, 2003, CSEA received the seniority roster for the positions being laid off or eliminated. The District planned to retain the ten most senior instructional assistants. Ms. Brown was number 11 on the seniority list. The seniority calculation was incorrect, however, because the list included Juanita Matedne, an instructional assistant who planned to retire at the end of the 2002-2003 school year.

On June 27, 2003, Ms. Brown chaired the CSEA bargaining team in negotiating the effects of the layoff. The Union informed the District that the seniority roster was inaccurate. The District removed Ms. Matedne's name from the seniority list and provided a corrected list to the Union. Under the revised seniority roster, Ms. Brown was number 10 on the seniority list, thus, she was not subject to layoff.

In a letter dated July 15, 2003, the District rescinded Ms. Brown's notice of layoff. The letter also informed Ms. Brown that she was "scheduled to report to work at Garfield School as an Instructional Assistant."

On July 16, 2003, the District and CSEA's bargaining team, with Ms. Brown serving as chairperson, engaged in exit interviews for laid off workers, informing them of their placement opportunities and layoff rights.

In an August 13, 2003 letter, the District formally notified Ms. Brown that she would be involuntarily transferred to Garfield School. Ms. Brown was instructed to report for the new school year on August 25, 2003.

At Garfield School, Ms. Brown was assigned to work in one or more classrooms. Approximately ten days after she began her assignment at Garfield School, pain from her March 12, 2003 work injury caused Ms. Brown to take a leave of absence. The charge states that the District "knowingly transferred her to a school site in which she could not physically perform her duties."

Article 13.6 authorizes involuntary transfers. This provision states:

> 13.6.1 An involuntary transfer may be initiated by the District and shall be based exclusively on the work-related needs of the District and will not be for disciplinary or capricious reasons. A bargaining unit member shall not have his/her assigned hours reduced, or shift changed, as result of the District-initiated transfer, but shall be constituted only by mutual agreement with the Association and concurrence of the bargaining unit member.
>
> INTENT
>
> The above language is intended to permit the District to transfer an employee, without the employee's consent, unless the transfer would reduce the employee's hours or change his/her shift.

> 13.6.2 In the event that circumstances require that a bargaining unit member be transferred on an involuntary basis, the bargaining unit member and the Association shall be informed of the reason(s) in writing prior to such action and shall be afforded an opportunity to meet with the Personnel Department regarding the proposed transfer.

Based on the facts stated above, the charge does not state a prima facie case.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The charge was filed on November 5, 2003. Thus, the statutory limitations period began to run six months prior to the filing of the charge on May 5, 2003. Accordingly, allegations which occurred prior to May 5, 2003 are untimely filed and will be deemed background information.

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

The charge alleges that the District unilaterally changed the job steward release time policy when it denied Ms. Brown release time on May 8, 2003. The charge alleges that the practice was to grant release time in response to verbal requests for release time. On May 8, 2003, Ms. Brown requested release time from Principal Arellano to represent a unit member in a disciplinary meeting. Ms. Arellano denied the request. The charge also states, however, that the District previously denied Ms. Brown release time on April 29, 2003. This suggests that there was not a practice in which verbal requests for release time were always granted. Thus, the charge does not allege facts which demonstrate a clear policy prior to May 8, 2003. If the charge is alleging that the April 29, 2003 denial of release time represented the first change in

a policy in which verbal requests for release time were always granted, as discussed above, this allegation is untimely filed.

The charge also alleges that the District discriminated against Ms. Brown when it denied her release time and when it involuntarily transferred her to Garfield School.

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

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864; emphasis added; footnote omitted.]

While the charge demonstrates that Ms. Brown engaged in many forms of protected activity, the charge does not provide facts which establish a connection or nexus between the protected activity and adverse action. The charge alleges that the District unilaterally changed the release time policy when it denied Ms. Brown release time on May 8, 2003. As discussed above, the evidence provided does not establish a change in policy. Thus, the charge does not demonstrate the nexus necessary to establish that the District denied Ms. Brown release time because of her protected activity. Furthermore, it is not clear how a change in the release time policy is related to an involuntary transfer which occurred three months later.

The charge also alleges that the District provided an inaccurate seniority list which incorrectly identified Ms. Brown as subject to layoff. The charge states, however, that after the Union informed the District that the list incorrectly included an employee who was scheduled to retire, the District promptly corrected the seniority list and provided the Union with a corrected copy. Under the corrected seniority list, Ms. Brown was not subject to layoff and the District formally rescinded her layoff in a letter dated July 15, 2003. Thus, these facts do not establish the required nexus.

Finally, the charge alleges that the District knowingly transferred Ms. Brown to a school site where she could not physically perform her duties. Ms. Brown did not have a reasonable accommodation request on file before the transfer which would have informed the District of any work limitations. Further, Ms. Brown provided the District with a doctor's note which released her from work restrictions following her March 12, 2003 injury. The charge does not provide facts which demonstrate that Ms. Brown was subject to work restrictions from her doctor due to her March 12 work injury or that the District was given notice of Ms. Brown's physical work limitations prior to her involuntary transfer. Accordingly, these allegations also fail to demonstrate nexus.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 4, 2004, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Robin W. Wesley
Regional Attorney