STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELANO ELEMENTARY TEACHERS ASSOCIATION, Charging Party, v. DELANO UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4881-E PERB Decision No. 1908 June 6, 2007

Appearances: California Teachers Association by Robert E. Lindquist, Attorney, for Delano Elementary Teachers Association; Atkinson, Andelson, Loya, Ruud & Romo by Salvador O. Holguin, Jr., Attorney, for Delano Union Elementary School District.

Before Shek, McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Delano Elementary Teachers Association (DUESTA or Association) of a Board agent's dismissal (attached) of an unfair practice charge. The charge alleged that the Delano Union Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing matters within the scope of bargaining without first giving the Association notice and an opportunity to bargain the changes. Additionally, the Association alleges that the District violated the Association's representational rights and did so when the District allegedly discriminated against and imposed reprisals against Association officers. Further, the Association alleges that the

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

District interfered with its rights as protected by EERA. The Association alleged that this conduct constituted a violation of EERA sections 3543.1 and 3543.5.

The Board has reviewed the unfair practice charge, the first amended unfair practice charge, the second amended unfair practice charge, the warning and dismissal letters, the appeal of the dismissal and the response to the appeal of the dismissal. In light of its review, the Board adopts the Board agent's factual findings. The Board adopts the Board agent's reasoning and affirms his dismissal and deferral of the four unilateral change allegations consistent with the discussion below. Additionally, the Board adopts and affirms the Board agent's dismissal of the unilateral change allegation pertaining to the grievance process as well as the retaliation allegations subject to the discussion below. Lastly, the Board remands this case to the Office of the General Counsel for issuance of a complaint, as set forth below, regarding the interference issue.

SUPPLEMENTAL FACTS

The following facts supplement the Board agent's finding of facts. There was a collective bargaining agreement (CBA) between the parties that expired on June 30, 2005. The expired CBA contained a grievance procedure that culminated in binding arbitration.

The District and DUESTA negotiated the following matters for a successor contract:

- On October 25, 2005, DUESTA and the District met to negotiate a successor to the CBA. In the course of bargaining, DUESTA made a written proposal to revise Article XII: Teacher Safety and Working Conditions, Section A. The District then made a written counter-proposal.

- On March 16, 2004, the parties re-negotiated Section C, C.I and C.la-3. The parties spent an entire day clarifying the intent of the language.

- On April 1, 2004, the parties again discussed intent at the bargaining session.

Grievances

The Association filed approximately sixteen grievances between April 15, 2005 and November 7, 2005. The grievances were as follows:

- On April 15, 2005, Association President, Mark Kotch (Kotch), with Superintendent, Ronald A. Garcia (Garcia), filed a Level II Grievance on behalf of a teacher regarding the District's denial of her Notice of Unsafe Working Conditions;

- On June 7, 2005, Kotch filed a Level II Grievance with Assistant Superintendent, Diane Cox (Cox), challenging the District's denial of a voluntary transfer to an 8th grade Language Arts position at La Vina Middle School;

- On June 7, 2005, Kotch filed a Level II Grievance with Assistant Superintendent Cox challenging the denial of a voluntary transfer to La Vina Middle School;

- On June 7, 2005, the Association filed a Level II Grievance with Garcia challenging the District's misapplication of the Agreement's Union Release Days provision;

- On June 20, 2005, the Association filed a Level II Grievance by Vice President, Diane Jacobs (Jacobs), with Garcia on behalf of Terrace Teacher, Vicki Wyatt, over the denial of her transfer rights;

- On June 28, 2005, Kotch filed a Level II Grievance with Assistant Superintendent, Rosalina Rivera (Rivera), challenging the District's failure to notify DUESTA of a District-wide Language Arts Committee;

- On July 5, 2005, Kotch filed a Level II Grievance with Assistant Superintendent Rivera challenging the District's failure to notify DUESTA of a District-wide Local Education Agency Addendum Committee;

- On August 16, 2005, Kotch filed a Level I Grievance with site Principal, Martin Bans (Bans), challenging the misapplication of the employee evaluation procedure;

- On August 19, 2005, Jacobs filed a Level I Grievance with site Principal Bans challenging his refusal to accommodate a work-hours modification for Cecil Avenue Middle School Band/Chorus Teacher, Deborah Fata;

- On August 19, 2005, Jacobs filed a Level I Grievance with Terrace Principal, Stephanie Lucas, regarding an evaluation issue for all affected Terrace teachers;

- On September 19, 2005, Jacobs filed a Level II Grievance with interim Assistant Superintendent, Daniel Knapp, over a denial of transfer rights to Terrace Teacher, Ledlie Skidmore (Skidmore);

- On September 26, 2005, Jacobs filed a Level I Grievance with Valle Vista Principal, Rosa Mojarra, on behalf of a teacher over her involuntary transfer to a combination assignment;

- On September 27, 2005, Kotch filed a Level II Grievance with Garcia alleging that the District violated provisions of the Peer Assistance and Review (PAR) memorandum of understanding (MOU);

- On September 30, 2005, Kotch filed a Level II Grievance with Garcia challenging the District's denial of Kotch's right to visit school sites as a Teacher/Member of the Joint PAR Panel;

- On October 21, 2005, Kotch filed a Level II Grievance with Garcia challenging the District's misapplication of DUESTA's contractual right to access all teachers District e-mail addresses;

- On October 24, 2005, Kotch filed a Level II Grievance with Garcia challenging the District's placement of a letter of reprimand;

- On October 27, 2005, Jacobs filed a Level I Grievance with La Vina Middle School Administrator, Lisa Bell, over an evaluation issue that affected all La Vina teachers;

- On October 31, 2005, Jacobs filed a Level II Grievance with Garcia over the placement of a disciplinary letter in a District personnel file of a teacher; and

- On November 7, 2005, Kotch filed a Level II Grievance with Garcia over his refusal to follow contract procedures in an evaluation dispute Kotch had with his principal.

Release Time Requests

On April 27, 2005, the California Teachers Association (CTA) requested release time for Kotch and John Roskell (Roskell), to attend a May 2, 2005, Program Improvement Districts Training. The following day, Garcia denied the request stating, in pertinent part:

> The District will not approve release time for Mr. Kotch and/or Mr. Roskell to attend this activity during the District's crucial California Standards testing period which is designated as April 18, 2005 through May 16, 2005. The students will benefit from the presence of their teachers who are experienced and can utilize this time to prepare for the test. The District is willing to provide Program Improvement training at the District level during an alternative period which will not affect the academic and/or instruction period for our students. In addition, the District will consider release time to attend CTA sponsored

> training in Program Improvement outside of our established testing window.

The following day, Kotch sent Garcia an e-mail stating:

> Apparently you misunderstand the testing schedule at [Cecil Avenue Middle School] CAMS. We are not testing on Monday, May 2, 2005. We are testing Tuesday, Wednesday and Thursday of that same week.
>
> My students will be taking an open book/open note short answer test on the novels their respective sections are reading, on May 2, 2005. They will also begin an essay assignment.
>
> We have completed our review for CAT 6/CST and I anticipate no difficulties in attending the workshop. In fact, it would be wise if a district administrator atended [sic] this workshop too—it would facilitate better communication between management and teachers and improve our chances at surviving the years ahead.

In response, Garcia stated, in pertinent part:

> Let me reassure you, that I am not confused in regard to the testing schedule for Cecil Avenue Middle School on Monday, May 2, 2005. Prior to responding to Mike Ford's request (see attached response), I spoke with both Jason Kashwer, Principal, and Marty Bans, Vice-Principal, to verify the testing schedule/period and to obtain their input regarding the request. The decision stands as communicated to Mr. Ford in writing and per our discussion by phone today. The District's support for training opportunities involving you and Mr. Roskell are stated and would apply to other teachers at Cecil Avenue Middle School as appropriate.

The District also denied Kotch's May 11, 2005, leave request stating:

> The purpose of this communication is to inform you that your notice did not meet the two day notice as per Article XIV, Rights of the Exclusive Representative. In addition, our records indicate, (see attached) that you and 'certain teachers', have exceeded the 18 days paid leave per school year. While you may purchase additional days at the daily substitute rate, this has not been authorized or approved by this office. We continue to have concerns regarding the loss of instructional time especially at our Program Improvement sites incurred by our students when the regular classroom teacher is absent. For your benefit, a copy of the Absence Analysis by Type for 'CTA Barg/Neg', is enclosed.

ASSOCIATION'S APPEAL

The Association appealed the Board agent's determinations that:

1. The unilateral change allegation pertaining to the grievance procedure be dismissed;
2. The four remaining unilateral change violations be deferred to arbitration; and
3. The Association failed to present sufficient evidence to establish a prima facie case of discrimination against the Association's president.

The Association first argues that the Board agent erred in determining that the Association failed to establish a prima facie case regarding a unilateral change to the grievance process.[2] The Association asserts that the Board agent "ignored EERA's application of the Duty to Bargain in good faith to grievance processing by public school employers." The Association further states:

> [T]he [Board agent] failed to credit the [Association's] allegations that the [District] had changed the prevailing policy under the Agreement's article XV, abandoned the parties prior practice of engaging in meaningful steps to settle grievances. Similarly, the [Board agent] failed to credit the [Association's] allegations that the [District] had changed the prevailing policy under the Agreement's article XV, by failing to sign eight knowledge months [sic] of the filing of a grievance as had been the parties prior practice.

Second, the Association argues that the Board agent erred in deferring the four remaining unilateral change allegations to arbitration because: (1) "[T]he dispute did not arise within a 'stable collective bargaining relationship'"; (2) "[T]he [District] exhibit[ed] enmity

[2]The Board agent found that the Association established a prima facie case regarding the following four unilateral changes to the procedure for: (1) reporting unsafe conditions; (2) requesting transfers to other schools; (3) requesting leave time by requiring the union to make a request 48-hours in advance; and (4) requesting leave time by giving itself the authority to reject requests for operational reasons. These alleged unilateral changes are discussed in further detail below.

and animosity toward the [Association] and the EERA right of public employees;" and (3) The "contract and its meaning" did not lie at the "center of the dispute".

The Association states that the unstable collective bargaining relationship is evidenced by "the extraordinary frequency of grievances the [Association] has been forced to file over its violations of the [CBA], numbering 'about 25 pending at level three, mediation.'" The Association argues that the 2006 decision by an administrative law judge (ALJ), Delano Union Elementary School District (2006) PERB Decision No. HO-U-889 (Delano), demonstrates enmity. The ALJ held that the District violated EERA section 3543.5(a) by retaliating against Kotch because of his exercise of protected rights. The Association also argues that the Board agent's "own determination regarding the merits of the four unilateral changes alleged in the Second Amended Charge also stands as compelling evidence of the [District's] animosity to its Duty to Bargain in good faith, in violation of EERA subdivision 3543.5(c)." The Association states that the District "failed to demonstrate the absence of an enmity or animosity toward the [Association] or towards the EERA rights of public employees."

The Association argues that the unilateral change allegations should not be deferred because its claim involves two critical organizational rights: (1) "[t]he reporting of unsafe working conditions by union officials and the representation of unit members affected by these unsafe conditions" and (2) "the [Association's] right to use released time the [sic] conduct union business." The Association also argues that the District's unilateral change allegations amounted "to a change of policy, not merely a default in a contractual obligation."

Third, the Association asserts that the Board agent erred when he determined that the Association failed to establish a prima facie case of discrimination or reprisal against the Association president. The Association states that it "demonstrated more than 'some evidence'

of the [District's] unlawful motive." In support, the Association directs the Board to the following excerpts from Kotch's declaration:

- Garcia's admission that he took action adverse to Kotch's employment interests "because of my [Kotch's] position as a Union president and my union activities."
- Garcia feeling that Kotch's union activities were too "high profile" and "had been too public."
- Garcia's admission that he interfered with union representation related to PAR because the Association's President was "attempting to usurp and/or undermine the authority of District Principals."

The Association further argues that "[t]he Second Amended Charge also pleaded and evidenced circumstantial evidence of the [District's] unlawful motive through reliance on PERB's own recent findings of discrimination and retaliation against the [Association's] Union's President" in the Delano decision.

THE DISTRICT'S RESPONSE

First, the District argues that the Association failed to "state clear, concise and sufficient facts with specificity to allege a prima facie case that the District abrogated the grievance procedures of the CBA." The District notes that Delano does not make any findings regarding the grievance procedure. The District further notes that nothing in the record demonstrates that it refused to process the 16 grievances. The District points out that the grievances are being held in abeyance at the requests of both parties. The District also notes that one grievance was settled while DUESTA withdrew three others.

Second, the District argues that the dismissal and deferral to arbitration of the four unilateral change allegations is appropriate. The District states that the Association failed to demonstrate that the "grievance procedure would be futile."

Third, in regards to the retaliation allegations, the District argues that:

> [T]he Association fails to state what the specific protected activity that led to the alleged adverse employment action. Instead, DUESTA relies on the general proposition that [Kotch] is the President of the Association and engaged in general representation of DUESTA members, including most often filing grievances on their behalf. [The Association] set[s] forth a litany of things he has done as DUESTA President, but fail[s] to connect any of them as the nexus leading to the District's placement of a memorandum concerning complaints of his unprofessional conduct towards [Hunter] into his personnel file, for his denial of his transfer request, or for the District's refusal of his demand to treat him differently from other teachers and forego evaluating his performance for three years.

The District also notes that, if anything, all the Association alleges is temporal proximity which is insufficient to establish a prima facie case.

DISCUSSION

Unilateral Change Allegations

Section 3541.5(a)(2) of EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

This section essentially codifies the policy developed by the National Labor Relations Board (NLRB) regarding deferral to arbitration proceedings and awards. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek)[3].) In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] (Collyer) and subsequent cases, the

[3]"While there is no statutory deferral requirement imposed on the [NLRB], that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations." (Dry Creek.)

NLRB articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are:

1. The dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party;

2. The respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and

3. The contract and its meaning must lie at the center of the dispute.[4]

The Association argues that deferral is inappropriate because there is enmity on behalf of the District as well as an unstable collective bargaining environment. Specifically, the Association alleges the following in support of its position:

- The "[c]harge presents a pattern of bad faith bargaining by the [District] extending from approximately 7 September 1990 to date."

- The Delano decision "which held that the Employer violated EERA section 3543.5(a) by retaliating against Union President Kotch because of his exercise of protected rights."

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[4]The Board notes that the expired CBA contained a binding arbitration clause. In State of California, Department of Youth Authority (1992) PERB Decision No. 962-S, the Board held that an arbitration clause does not generally continue in effect after expiration of a CBA except for disputes that: (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement. In the case before us, all disputes involve facts and occurrences that arose before the agreement expired. The CBA expired on June 30, 2005. The Association claimed that the District made unilateral changes to the CBA on the following dates:

(1) Article XII, Teacher Safety and Working Conditions beginning on April 13, 2005;
(2) Article XI, Vacancies/Transfers/Reassignments beginning on May 11, 2005;
(3) Article XIV, Rights of the Exclusive Representative beginning on May 24, 2005; and
(4) Article XV, Grievance Procedure beginning on April 15, 2005.

Because the events arose before the expiration of the contract, the fact that the contract expired does not prohibit deferral.

- "[T]he extraordinary frequency of grievances the [Association] has been forced to file over [the District's] violations of the Agreement, numbering 'about 25 pending at level three, mediation.' Clearly, the parties have no collective bargaining relationship, they merely have repeated disputes regarding its violation";

- The "express admissions of anti-union animus by officials of the [District], including but not limited to, the admission that the [District] refused to 'consider deferring' President Kotch's evaluation because of his 'high profile.'"

- The District's reprimanding the union president "as a result of the [Association's] exercise of its EERA subdivision 3543.2(a) right to represent unit members regarding work load and the evaluation of the employees and its EERA subdivision 3543.2(a) right to consult with a public school employer regarding the definition of educational objectives, the determination of the content of courses and curriculum, and other curriculum-related issues. Specifically, [the District] reprimanded President Kotch's representation activities as 'unprofessional and inappropriate.'"

- The District sought an impasse determination by PERB which PERB denied on November 10,2005.

The Association also cites the following alleged violations of its right to represent unit members as further support of the District's enmity and an unstable collective bargaining environment:

- Skidmore regarding "unsafe, hazardous, unhealthy, or potentially dangerous condition" related to noxious odor present in classroom 12 of the Terrace School. "Garcia failed and refused to accept and to process the written report of an 'unsafe, hazardous, unhealthy, or potentially dangerous condition' in her classroom . . . which Union President Kotch unsuccessfully attempted to file on her behalf."

- Data regarding a reasonable accommodation for a physical disability.

- "Denying unit members at the Almond Tree and La Vina Middle Schools the right to be represent[ed] by the [Association] and to confer with the [Association] regarding [PAR]. Specifically, on or about 27 September 2005 Respondent Garcia prohibited Union President and teacher member of the District's Joint [PAR] Panel from visiting the Almond Tree and La Vina Middle School sites."

Our research of PERB case law revealed that the Board has yet to fully address the issue of a stable collective bargaining environment necessary for deferral. Because EERA

section 3541.5 is modeled after the NLRB deferral standard, it is appropriate to look to the private sector. (See Dry Creek.)

Generally, the NLRB will not defer "[w]here there is no stable collective bargaining relationship, or where the respondent's conduct indicates a rejection of collective bargaining and organizational rights of employees." (Hardin, Developing Labor Law Fourth Ed., Vol. 1, pp. 1391-1394.)[5] In determining whether there is a stable collective bargaining environment,

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[5]In United Aircraft Corp. (1972) 204 NLRB 879 [83 LRRM 1411], the NLRB stated:

> It is true that in Collyer, supra, we noted, as one of the factors supporting our decision to defer to the parties' available grievance and arbitration machinery, that there had been a long relationship between the company and the union and a lack of any employer hostility towards unions in general. We continue to believe that an exploration of the nature of the relationship between the parties is relevant to the question of whether in a particular case we ought or ought not defer contractually resolvable issues to the parties' own machinery. Where the facts show a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation, there is serious reason to question whether we ought to defer to arbitration.
>
> However, the nature and scope of the acts currently alleged to show such hostility, together with a measure of the current impact of any past such acts, must all be evaluated and then together be weighed against evidence as to the developing or maturing nature of the parties' collective-bargaining relationship and the proven effectiveness (or lack thereof) of the available grievance and arbitration machinery. Upon a totality of those facts, it must then be determined whether the parties' agreed-upon grievance and arbitration machinery can reasonably be relied on to function properly and to resolve the current disputes fairly.
>
> If the conduct here complained of, viewed in the context of serious past unlawful conduct, appears to establish a continuing pattern of efforts to defeat the purposes of our Act then, particularly if the evidence also should indicate that the parties' own machinery is either untested or not functioning fairly or smoothly, it would seem obvious that we could not reasonably rely on the parties' voluntary machinery fairly and promptly to

the NLRB looks at the following two factors: length of an amicable bargaining relationship between the parties, and whether the respondent's conduct interferes with collective bargaining rights. With regard to the length of the bargaining relationship, the NLRB, in Westinghouse Learning Corp. (1974) 211 NLRB 19 [86 LRRM 1709], refused to defer because unlike Collyer where the parties had for 35 years, mutually and voluntarily resolved the conflicts which inhere in collective bargaining, "the two collective-bargaining agreements [were] 'first' contracts . . ." [Emphasis added.] There was no "long established . . . stable and productive bargaining relationship." In Jos. T. Ryerson & Sons, Inc. (1972) 199 NLRB 461 [81 LRRM 1261] (Ryerson), the NLRB deferred a written reprimand because the parties bargained and contracted amicably for 30 years.

> resolve the underlying problem. In such a situation, therefore, the Act's purposes could best be served by our taking jurisdiction in the first instance.
>
> But if, on the contrary, there is now effective dispute-solving machinery available, and if the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile, then we ought not depart from our usual deferral policies.
>
> As we said in National Radio Company, Inc., 198 NLRB No. 1:
>
> 'The question whether, in fact, the policies and purposes of the Act will be furthered by abstention here and in similar cases is more complex. The crucial determinant is, we believe, the reasonableness of the assumption that the arbitration procedure will resolve this dispute in a manner consistent with the standards of Spielberg. [Emphasis supplied.]'
>
> In cases such as this, therefore, it is incumbent upon us to review the past conduct and the present allegations of misconduct so as to test whether it appears sufficient to rebut the reasonableness of our fundamental assumption that the parties' own procedures will effectively resolve the current disputes in a prompt and fair manner.

In regard to the respondent's conduct the NLRB will not defer if "the violation with which [the] Respondent is charged, if committed, strikes at the foundation of that grievance arbitration mechanism. . . " (Ryerson.) For example, the NLRB did not defer where the respondent: withheld negotiated wage increases, attempted to rescind the contract, and discontinued making vacation pay and checkoff contributions to trust funds required by the contract. (Capitol Roof & Supply Company, Inc. (1975) 217 NLRB 1004 [89 LRRM 1191].). Similarly, the NLRB did not defer when the employer dismissed all unit employees, terminated the CBA midterm, and refused the union's request to negotiate a successor agreement. (Tel Plus Long Island (1993) 313 NLRB No. 47 [145 LRRM 1158].)

Here, the Association fails to demonstrate that there is unstable collective bargaining environment. First, the parties have a history of amicable negotiations as evidenced by Kotch's declaration. For example:

- [C] 14. On October 25, 2005, DUESTA and the District met to negotiate a successor to our collective bargaining agreement. In the course of bargaining, DUESTA made a written proposal to revise Article XII: Teacher Safety and Working Conditions, Section A.

  15. The District made a written counter-proposal. The District's counter-proposal contained restrictive language and allowed only the 'affected classroom teacher' to file an Unsafe Notice. . . .

- [D] 26. DUESTA revisited the Voluntary Transfers provision of the contract in anticipation of numerous transfer requests to a new District school. . . .

  27. The parties re-negotiated Section C, C.1 and C.la-e on March 16, 2004. An entire day was spent clarifying the Intent of the language. The District agreed that C.la-e represented an objective procedure for processing transfer applications, and seniority within the District (C.le) was the tiebreaker.

  28. The Intent of the language was clarified once again at an April 1, 2004 bargaining session, and the parties once again

agreed that C.la-e represented a neutral procedure for processing transfer requests, with C.le defining the tiebreaker, seniority within the District.

30. Once away from the bargaining table the District repudiated the agreements of March 16, 2004 and April 1, 2004, by denying Voluntary Transfers to qualified, senior applicants. DUESTA filed Level II Grievances on behalf of Ellen Garcia, Mike Radsick, Sylvia Henninger, Jennifer Bork, Andrea Crosby, Roberto Villa, Michael McKinzie and Georgia Martin. In response to the District's bad faith actions, during the second and third weeks of May 2004.

31. The Level II Grievances were settled aft] Level III of the Grievance Procedure, with a Mediation Agreement negotiated by Mike Ford-CTA and Carl Lange of School Legal Services, during our summer Intersession of 2004. The Grievance Settlement validated the intent of the language of Section C.la-e, as agreed to at the March 16, 2004 and April 1, 2004 bargaining sessions.

- [E]3. . . This issue has been visited at the bargaining table, where DUESTA has made proposals to increase the number of release days, per H, so as to reflect actual usage by the Union. The District has rejected our proposals to increase days authorized by Section H, but also acknowledged its contractual responsibility to account for and bill days purchased as per H.3 (2002-2003 & 2003-2005 negotiations.)

Additionally, the District, on repeated occasions, agreed to allow Kotch union representation even though he was not being disciplined.

Second, the District's conduct did not sufficiently interfere with the Association's collective bargaining rights to warrant the denial of deferral in this case. As set forth above, the NLRB deferred cases where the employer terminated employees, withheld wage increases, attempted to rescind the contract, refused to bargain, etc. In this case, there is evidence that the District continues to engage in negotiations, grievances have been settled, and others continue to move through the grievance process. The Association president has not been terminated. Kotch only received a notice of intent to discipline and a refusal to defer his evaluation to

subsequent years. We, therefore, find that there is an effective dispute-solving machinery available, and the combination of past and presently alleged misconduct does not appear to be of such character as to render the use of that machinery unpromising or futile.

The remaining two elements necessary for deferral are also met. The District is ready and willing to proceed to arbitration and has waived contract-based procedural defenses. Additionally, the contract and its meaning lie at the center of the disputes. Thus, deferral is appropriate. We therefore dismiss and defer to arbitration the four unilateral change allegations.

Following the arbitration of the four unilateral change allegations, the DUESTA may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661[6]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek, supra.)[7]

Interference

While the Association failed to establish a prima facie case of retaliation, the Association did establish a prima facie case of interference in regards to the verbal and written admonishments by Principal Bans.

Unlike retaliation where the charging party must establish unlawful motive, establishing a prima facie case of interference under EERA requires only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

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

[7]Pursuant to Government Code section 3541.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. [State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.]

Under the above-described test, a prima facie case may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

The Association alleges that the District interfered with its rights when Principal Bans admonished Kotch both verbally and in writing for interviewing another employee off school grounds and before contract hours on October 31, 2005. Telling Kotch not to conduct an investigation in regards to a grievance during his off duty time interferes with the Association's rights granted under EERA. We therefore believe that a complaint for interference regarding the verbal and written admonishment in conducting an investigation should issue.

The Office of the General Counsel shall issue a complaint regarding this allegation.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. LA-CE-4881-E regarding interference and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Shek and McKeag joined in this Decision.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213) 736-2907
Fax:(213)736-4901

May 17, 2006

Robert E. Lindquist, Attorney
California Teachers Association
11745 E. Telegraph Rd.
Santa Fe Springs, CA 90670

Re: Delano Elementary Teachers Association v. Delano Union Elementary School District
Unfair Practice Charge No. LA-CE-4881-E
NOTICE OF DISMISSAL AND DEFERRAL TO ARBITRATION

Dear Mr. Lindquist:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 19, 2005. The First Amended Charge was filed on November 3, 2005. In the First Amended Charge, the Delano Elementary Teachers Association (Union) alleges that the Delano Union Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by changing its policies on: (1) filing notices of unsafe conditions; (2) rejecting release time requests; (3) the required notice for leave time requests; and (4) applying for transfers, and by disciplining Kotch unfairly.

I indicated in the attached letter dated December 28, 2005, that this charge was subject to deferral to arbitration. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that unless the charge was amended or withdrawn prior to January 9, 2005, it would be deferred to arbitration and dismissed. That deadline was extended until January 29, 2006. On January 29, 2006, you filed the Second Amended Charge.

In addition to re-alleging and clarifying the facts raised in the First Amended Charge, the Second Amended Charge alleges several new allegations. Each of the allegations in the Union's latest charge will be addressed under the appropriate heading.

1. Unilateral Change of Grievance Procedure:

As discussed in more detail in the December 28, 2005 letter, unilateral changes are a per se violation of EERA when (1) the employer implements a change in policy concerning an issue within the scope of representation, and (2) the change was implemented before notifying the exclusive representative and affording the opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160.)

[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 this case, the latest charge alleges two unilateral changes to the grievance procedure. The Union filed approximately sixteen grievances between April 15, 2005 and November 7, 2005. Starting with the first grievance filed on April 15, 2005, the District declined to take steps to agree with the Union on issues or facts or to take any meaningful steps to settle the grievances. Beginning on October 24, 2005, the District ceased its practice of accepting and signing acknowledgements for grievances submitted by the Union. The Union contends that the District's conduct in each instance constitutes a change in policy from the parties established grievance procedure. The grievance procedure is contained in Article XV of the parties' most recent Collective Bargaining Agreement (CBA). According to the grievance procedure, if the employer declines to respond to a grievance filed at level one, the grievant may appeal the grievance to the second level. (CBA Article XV(J)(4).) If the employer does not respond to the level two appeal, the grievant may proceed to the third level, mediation. (CBA Article XV(K)(3).) Finally, if the grievant is not satisfied with the results at level three, the grievant may advance the grievance to the fourth level, binding arbitration. (CBA Article XV(M).)

The allegations in the charge do not establish that the District abrogated the grievance procedure contained in Article XV of the CBA. The grievance procedure does not obligate the District to respond to a grievance filed by the Union. In fact, the grievance procedure outlines what steps to take if the District declines to cooperate.

The grievance procedure does not require the District to sign acknowledgements. Accordingly, the District's decision not to sign these statements is not a change to the grievance procedure. Therefore, because the charge does not provide sufficient information to state a prima facie case for a unilateral change to the grievance procedure, it is dismissed.

2. Discrimination and Reprisal of Mark Kotch:

The latest charge alleges that the District discriminated against Union president Mark Kotch, after he engaged in protected union activity. As stated in the December 28, 2005 letter, an employer violates EERA section 3543.5(a), when (1) the employee exercised rights protected under EERA; (2) the employer had knowledge of those rights; and (3) the employer imposed or threatened to impose reprisals or adverse actions on the employee because of the exercise of those rights. (North Sacramento School District (1982) PERB Decision No. 264.)

The charge alleges that Kotch engaged in several acts protected by EERA. Kotch filed a grievance on April 15, 2005, then a ten others from June 7, 2005 to November 7, 2005. Kotch also filed a Notice of Dispute with Evaluator on October 4, 2005.[2] Next, the charge alleges: (a) that the District discriminatorily denied Kotch's request for transfer to another school on May 11, 2005; (b) that District discriminatorily denied Kotch's leave time requests on April

[2] It should be noted that ten of the eleven grievances and the Notice of Dispute with Evaluator were filed after the District denied his request for leave time and his request for transfer. Therefore, the denial of Kotch's transfer request and the denial of Kotch's released time request could only possibly be in reprisal for the grievance filed on April 15, 2005.

28, 2005 and on May 24, 2005; (c) that the District improperly issued Kotch a reprimand letter on October 19, 2005; and (d) that the District refused to accommodate Kotch's alternative evaluation proposal on October 25, 2005. Each allegation is discussed under the appropriate heading.

I indicated in my December 28, 2005 letter that the charge failed to state an adequate nexus between any adverse action on the part of the District and Kotch's activity. In order to establish such a connection PERB Regulation 32615(a)(5) requires "[a] clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In drafting the charge '"mere speculation, conjecture, or legal conclusions are insufficient.'" (Regents of the University of California (2005) PERB Decision No. 1771-H (quoting United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944).) Here, the charge alleges that the District's decision to transfer Kotch fits several of the nexus categories described in my December 28, 2005 letter. The charge alleges that each of these District actions were in response to Kotch's protected activity because (1) the District treated Kotch disparately from other employees and departed from its usual practices; (2) the District failed to offer an explanation for its actions; (3) the District offered shifting explanations for its actions; and (4) the District offered vague reasons for its actions. However the latest charge fails to connect actual facts to these legal conclusions. Without this connection, the allegations that the District denied Kotch's leave time and transfer requests lack nexus to the alleged protected activity and accordingly do not state a prima facie for discrimination.

a. Denial of Kotch's Transfer Request:

Kotch applied for and was denied a transfer request on May 11, 2005. The District denied Kotch's request because it believed that Kotch's experience was best suited for the school where he currently taught. The District informed the Kotch that it believed it had the discretion to deny transfer requests under Article XI(C)(1) of the CBA. According to the CBA, the District has the discretion to grant or deny transfer requests "based on the educational needs as determined by the District[.]" (CBA Art. XI(C)(1).) Nothing in the charge indicates that this provision should be interpreted in a way other than its plain meaning. The charge does not dispute that Kotch was one of six applicants who were denied transfers out of a total of ten applicants.

The charge does not establish that the District denied Kotch's transfer because Kotch filed the April 15, 2005 grievance. The charge states no facts establishing that Kotch was treated differently from the other five applicants who were denied transfer requests, nor does it demonstrate that the other five applicants engaged in protected activity before having their transfer requests denied. For this reason, there is insufficient information to conclude that Kotch was treated disparately because of his alleged protected activity.

The charge also does not support the allegations that the District's denial was without reason, or that the reasons were shifting or vague. The District stated that it denied Kotch's transfer request because it believed it had the discretion to do so under the CBA. The District explained the reason behind exercising its discretion. This explanation was reasonably clear

and accordingly, the charge does not establish a nexus between the denial of Kotch's transfer request and any of his protected activity.

b. Denial of Leave Time Requests:

Kotch and another Union officer, John Roskell, requested released time on April 27, 2005 for May 2, 2005. The District denied requests on April 28, 2005, stating it had the authority to deny requests for leave time if the District needed personnel to be present that day. Kotch and Roskell requested leave time again on May 23, 2005, for May 25, 2005. The District denied this request as well, stating that the Union failed to provide 48-hours notice for the request, as required by the CBA. The District later added that the May 23, 2005 request was also denied because the District has discretion to deny leave time requests if the Union had already exhausted its 18 days of District compensated released time under the CBA.

The charge does not provide facts to support its claim that Kotch was treated any differently from other employees. Rather, it appears from the facts provided by the charge that Kotch was treated equally to Roskell, who is not alleged to have engaged in any protected activity. Therefore, the charge has not provided enough information to show that the District treated Kotch disparately after he filed the April 14, 2005 grievance.

The charge also does not support the allegations that the District's denials were without reason, or that the reasons were shifting or vague. The District provided an unambiguous reason for denying each leave request. These reasons are consistent with a reasonable reading of the CBA. Therefore, the charge does not establish a nexus between the denial of Kotch's leave time requests and his protected activity.

c. Letter of Reprimand:

On October 19, 2005, the District issued Kotch a written reprimand for his conduct during a meeting with Suzanne Hunter. According to the letter, the District issued the letter because it found Kotch's conduct in the meeting with Suzanne Hunter unprofessional and inappropriate and that Hunter's was the second complaint received for Kotch's conduct. The charge alleges that this letter was issued in retaliation for Kotch's protected activity as evidenced by the District's inadequate investigation, the District's disparate treatment of Kotch, and by offering an inadequate explanation for the reprimand. The charge does not put forth facts to support these allegations. The charge does not assert how Kotch was treated differently from any other employee before being issued a reprimand, nor does it explain why the explanation in the October 19, 2005 letter was inadequate. For these reasons, the charge does not create a connection between the issuance of the reprimand letter and Kotch's protected conduct.

d. Refusal to Accommodate Evaluation Request:

On October 4, 2005, Kotch filed a Notice of Dispute With Evaluator, concerning a performance evaluation he received. On October 25, 2005, Kotch met with Superintendent Garcia to discuss the dispute. Article IX of the CBA provides that if an employee has a dispute

with an evaluation, that the dispute shall be resolved in a meeting with the District. During this meeting, Kotch proposed that his evaluation be deferred. Garcia stated that he would not accommodate Kotch's request because Kotch was "a high profile" and was too vocal in the dispute. This statement does not indicate that the negative evaluation was in response to Kotch's protected activity. Rather, it indicates that the employer was unwilling to put off the handling of Kotch's evaluation because the Garcia believed it was an important issue to the school. Therefore, there is insufficient information to establish a nexus to Kotch's protected activity.

For these reasons, the Union's discrimination claims are dismissed.

3. Bad Faith Bargaining Under the Totality of the Circumstances:

In addition to the per se violations discussed herein, the Union contends the District engaged in conduct, viewed under the totality of the circumstances, that would be considered bad faith bargaining. In my December 28, 2005 letter, I indicated that the crux of a surface bargaining claim is that one party "indicates an intent to subvert the negotiations process." (Oakland Unified School District (1982) PERB Decision No. 275.) In this case, the charge provides insufficient facts to show that the District intended to subvert the negotiations process, nor does it state clearly what negotiations were being subverted.

The charge references, generally, that the parties were negotiating a successor agreement to the CBA, but the only specific reference to the District's conduct during those negotiations was that the District sought an impasse determination by PERB but that request was denied on November 10, 2005. A request for an impasse determination is a request for PERB to investigate whether future negotiations between the parties without a mediator would be futile. (PERB Regulation 32792-32793.) Filing a request for impasse determination pursuant to PERB regulations is not, by itself, an indicator of bad faith bargaining. PERB will not infer bad faith simply because it determined that the parties were not at a genuine impasse. The charge does discuss any other conduct by the District concerning negotiations for the successor agreement. Therefore, to the extent that the Union claims that the District's conduct during negotiations for the successor agreement to the CBA constituted bad faith bargaining, the claim fails to state a prima facie case and is dismissed.

4. Representation Rights Violations:

The charge alleges that the District violated the Union's right of access by prohibiting a Union officer from visiting school campuses to participate in the Peer Assistance Review (PAR) program. Employee organizations have the right to access, at reasonable times, employee work areas. (EERA § 3543.1(b).) Any restrictions by a school district prohibiting solicitation by an employee organization during rest and coffee breaks is presumptively invalid. (Marin Community College District (1980) PERB Decision No. 145.) Such regulations "unduly restrict employees' right to engage in protected activities since the employer has no cognizable interest in prohibiting nondisruptive contact in nonworking areas between employees and their

organizations during duty-free periods of the day." (San Ramon Valley Unified School District (1982) PERB Decision No. 230.)

In this case, the charge states nothing more than that the District violated the Union representation rights by:

> [d]enying unit members at the Almond Tree and La Vina Middle School Schools the right to be represent (sic) by the Union and to confer with the Union regarding Peer Assistance and Review. Specifically, on or about 27 September 2005 Respondent Garcia prohibited Union President and teacher member of the District's Joint Peer Assistance and Review Panel from visiting the Almond Tree and La Vina Middle School sites.

The charge does not provide sufficient information to determine whether the visits would have fallen under the Union's reasonable access rights or whether the District was justified in prohibiting the visit. Therefore the charge does not state sufficient information to state a prima facie case for an access rights violation and is dismissed.

5. Interference with Employee Rights:

The charge alleges that the District interfered with employee rights protected by EERA by: evaluating employees under inappropriate procedures and by denying unit member Deborah Fata accommodation for her physical disability. As stated in my December 28, 2005 letter, an employer interferes with employee rights when its conduct tends to or doe harm employee rights protected by EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S (other citations omitted).)

In this case, the charge states that "[t]he Employer's conduct interfered with, restrain (sic) and coerced unit members from enjoying the benefit of being evaluated under appropriate procedures." The charge further states that "[t]he Employer's conduct interfered with, restrain (sic), and coerced unit member Deborah Fata from enjoying the benefit of reasonable accommodation for a physical disability." These allegations do not set forth sufficient facts from which to conclude that the District's conduct adversely affected protected employee rights and therefore it does not state a prima facie case. Accordingly, these claims are dismissed.

6. Deferral to Arbitration:

After the dismissal of the above charges, the charges that remain are: (1) that the District unilaterally changed the procedure for reporting unsafe conditions by allowing only the teacher affected by the condition to file a report; (2) that the District unilaterally changed the procedure for requesting transfers to other schools by making such transfers at the discretion of the District; (3) that the District unilaterally changed the procedure for requesting leave time by requiring the union to make a request 48-hours in advance; (4) that the District unilaterally

change the procedure for requesting leave time by giving itself the authority to reject requests for operational reasons.

As I explained in the December 28, 2005 letter, Government Code section 3541.5(a) and PERB Regulation 32620(b)(5)[3] require a Board agent to dismiss a charge where the dispute is subject to final and binding arbitration pursuant to a collective bargaining agreement. (Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81; State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.) As noted in the December 28, 2005 letter, the conduct in the Union's remaining allegations is arguably prohibited by the parties' collective bargaining agreement, the Respondent has agreed to waive any procedural defenses, and there is no evidence that the dispute arises in other than a stable collective bargaining environment. Accordingly, these allegations must be dismissed and deferred to arbitration. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)[4]

Right to Appeal

Pursuant to PERB Regulations, 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

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

[4] Pursuant to Government Code section 3541.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

FAX: (916) 327-7960

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
Eric J. Cu
Regional Attorney

Attachment

cc: Salvador Holquin

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 1435
Los Angeles, CA 90010-2334
Telephone: (213)736-2907
Fax:(213)736-4901

December 28, 2005

Robert E. Lindquist, Attorney
California Teachers Association
11745 E. Telegraph Rd.
Santa Fe Springs, CA 90670

Re: Delano Elementary Teachers Association v. Delano Union Elementary School District
Unfair Practice Charge No. LA-CE-4881-E
WARNING LETTER

Dear Mr. Lindquist:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 19, 2005. A first amended charge was filed on November 3, 2005. The Delano Elementary Teachers Association (Union) alleges that the Delano Union Elementary School District (District) violated the Educational Employment Relations Act (EERA)[1] by changing its policies on: (1) filing notices of unsafe conditions; (2) rejecting release time requests; (3) the required notice for leave time requests; and (4) applying for transfers, and by disciplining Kotch unfairly.

The Union is the exclusive representative for teachers in the District. At all relevant times, there was a Collective Bargaining Agreement (CBA) in effect between the Union and the District. The CBA has a grievance procedure that culminates in binding arbitration.

In January 2005, Ledlie Skidmore, Union member and teacher at Terrace Elementary School reported an unpleasant odor in her classroom to her school's administration. The maintenance department investigated the odor and called in specialists from the county Health Services Department. On April 1, 2005, the investigators found two dead bats in abandoned ducts attached to Skidmore's classroom. On April 5, 2005, Skidmore and her class were relocated to another room.

On or around April 12, 2005, Union president and teacher Mark Kotch filed a formal report of a potentially hazardous condition in Skidmore's classroom. The report was filed with District Superintendent Ronald Garcia. The portion of the CBA pertaining to reporting hazardous conditions provides in pertinent 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.

> A. Teachers shall be responsible for making a written report to the District Safety Administrator or designee regarding any unsafe, hazardous, unhealthy, or potentially dangerous conditions. Within 24 hours of receipt of it, the District will make a determination as to the report and respond in writing to the reporter, the Exclusive Representative, and the site administrator.

On April 13, 2005, Garcia sent Kotch a letter stating that it would not accept the unsafe condition report because it was not submitted by the affected teacher, Skidmore. Kotch is a teacher at a different school from Skidmore.

On April 14, 2005, Kotch filed a grievance over the matter. On April 25, Skidmore filed a notice of unsafe conditions regarding her classroom. The District responded by providing her with the information gathered during its investigation and steps it took to mitigate the situation.

On or around April 27, 2005, CTA regional executive director Mike Ford wrote to Garcia requesting that Kotch and John Roskell be given release time to attend a training event in May 2, 2005. The CBA section discussing released time requests states:

> H. The President of the Exclusive Representative may designate certain teachers to have a complete total of up to 18 days paid leave per school year for use for local, state, or national conferences or for conducting other business pertinent to the Exclusive Representative.
>
> 1. Leave may be taken on one-half day blocks.
>
> 2. Such representatives shall be excused from school duties upon two days' advanced notice to the Superintendent by the President of the Exclusive Representative.
>
> 3. Upon exhaustion of paid leave per school year, the Exclusive Representative may purchase additional days at the daily substitute rate.

On April 28. 2005, the District denied the Union's request, stating that that Kotch's and Roskell's presence was necessary because the students were taking special exams that week and students could benefit from having teachers available to them. In the past, the District denied requests for leave time because it claimed to have the discretion to deny such requests and because the District interpreted the two-day notice requirement as a 48-hour notice requirement.

On or about May 11, 2005, Kotch filed a transfer request seeking reassignment from Cecil Avenue Middle School to La Vina Middle School. The CBA's provision on voluntary transfer provides:

> H. Any teacher may apply to fill a posted vacant position. The request shall be on a form designed and supplied by the District and shall be dated, signed, and filed with the District office.
>
> 1. All applications fulfilling posted qualifications requirements will be judged on their merits, and any decision thereon shall be based on educational needs as determined by the District, according to all of the following:
>
> a. Credential(s) held by the applicant(s);
>
> b. Qualifications as posted;
>
> c. The performance of the applicant(s) in the District as measured by administrative evaluation conducted prior to the application and supporting materials placed in the personnel file(s) of the teacher(s) pursuant to the appropriate provisions of this Agreement;
>
> d. Federal, state, or court mandated hiring/promotional plans, if applicable; and
>
> e. Length of seniority in the District. (Where all other considerations are substantially equal between applicants, length of service will be the deciding factor.)

The Union's position is that Kotch has all the qualities the District is entitled to consider under the CBA. The Union maintains that Kotch holds special teaching certifications which conform to the needs of students at La Vina Middle School. On or around May 6, 2005, the District denied Kotch's transfer request and instead hired Karen Slayton to the La Vina position. Slayton's specialized certification closely conforms to the needs of students at Cecil Avenue. Slayton had no seniority in the District. On May 11, 2005, Kotch received notice that his transfer request was denied.

On or around September 22, 2005, Kotch met with Suzanne Hunter, who holds a quasi-supervisory position with the District, to discuss the terms and conditions of seventh and eighth grade language teachers in the District.

On or around October 4, 2005, Kotch filed a Notice of Dispute With Evaluator, stating that his ongoing grievance filed against Cecil Middle School Principal, Martin Bans, prevented the District from giving an unbiased evaluation. The Notice of Dispute further states that after Kotch filed the grievance against Bans, the District began building his class sections with students of mixed ability, rather than grouping students of similar ability levels together. The Notice notes that mixing students of different ability levels creates a more difficult teaching environment.

On or around October 19, 2005, Kotch received a written reprimand for his conduct during his meeting with Hunter. The reprimand states that Kotch "had the impact of making [Hunter] feel embarrassed, intimidated and degraded." The memo further stated that "[f]ailure to conduct

yourself in a professional and appropriate manner with co-workers will result in a notice of unprofessional conduct."

Discussion:

A. **Bad Faith Bargaining.**

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.)

In this case, the first amended charge alleges that the Districts conduct amounts to both a "per se" violation of the duty to bargain in good faith and a violation under the totality of the circumstances.

1. Per Se Violation: Unilateral Change.

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.) Furthermore, a violation requires a change in policy which has a generalized effect or continuing impact. (State of California (Department of Mental Health) (1990) PERB Decision No. 840-S.)

The first amended charge alleges four unilateral changes: (1) that the District changed the existing policy regarding reporting unsafe classroom conditions by adding a requirement that only the teacher whose classroom was affected could filed a report; (2) that the District changed the release time request policy by asserting it has discretion to deny release time requests; (3) that the District changed the release time policy by changing the required notice for a leave time request from two days to 48 hours; and (4) that the District changed the existing policy regarding evaluating voluntary transfer requests by claiming discretion in making transfer decisions. The District contends that all its policies comply with the CBA and that the Union failed to establish otherwise. The first two of the Union's allegations appear to state a prima facie case and accordingly, will not be discussed in this section of the letter. The remaining two allegations do not state a prima facie case.

a. Change to the Two-Day Notice Requirement for Released Time.

The Union contends that the District changed the release time request procedure when, in the past, it denied requests for leave time because the Union failed to provide notice 48 hours prior. This allegation is problematic for two reasons. First, the charge leaves unclear what the Union contends is the difference between a two day and a 48 hour notice requirement. Thus,

the charge does not adequately allege that the District initiated a policy change. Second, the charge alleges no specific instance where leave time was denied for failure to provide 48 hours notice. Therefore, even if the charge did allege a policy change, the Union does not provide enough information to determine whether this allegation adequately states a case for a unilateral change within the statutory period.

b. Change to the Voluntary Transfer Procedure.

The Union alleges that the District unilaterally altered the procedure for teachers to transfer voluntarily to other campuses within the District. The CBA provides that transfer decisions be made based on the educational needs of the District, according to a set of five criteria. The Union contends that the five outlined criteria constitute a threshold, where an applicant meeting the minimum requirements of each category (e.g., the applicant has the minimum credentials for the position, each of the qualifications as posted on the job listing, etc.) must be granted the transfer. However, the Union's interpretation of the CBA is not apparent on its face, nor does the Union allege sufficient facts indicating that its interpretation is the established practice between the parties. Rather, the language of the agreement provides that the District may transfer people based on educational needs, as determined by the District, using the five outlined criteria. Accordingly, the first amended charge as written fails to state a prima facie case for a unilateral change. In addition, the charge does not sufficiently allege that the District's conduct constituted a policy change with a generalized effect. The Union alleges no facts that establish that the District's conduct would be applied beyond Kotch's individual transfer request.

2. Totality of the Circumstances

The first amended charge alleges that the employer violated EERA section 3543.5(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The Union also contends that the three unilateral changes also amount to bad surface bargaining, under the totality of the circumstances. To the extent that these allegations do not state a prima facie case for a "per se" violation of EERA, the first amended charge also fails to state a case for bad faith bargaining under a totality of the circumstances, for the same reasons, discussed above.

3. Deferral to Arbitration

In addition, based on these facts and Government Code section 3541.5, each of the four allegations regarding policy changes: (1) that the District changed the policy regarding reporting unsafe classroom conditions; (2) that the District changed the policy regarding the District's ability to deny release time request; (3) that the District changed the policy regarding notice for release time requests; and (4) that the District changed its policy regarding voluntary transfer requests, must be deferred to arbitration under the agreement and dismissed in accordance with PERB Regulation 32620(b)(5).

Section 3541.5(a) of the EERA states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a,[2] the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations.[2] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.[3] [Fn. 2 omitted; fn. 3 to Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.]

In Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931] and subsequent cases, the National Labor Relations Board articulated standards under which deferral to the contractual grievance procedure is appropriate in prearbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

These standards are met with respect to this case. First, no evidence has been produced to indicate that the parties are not operating within a stable collective bargaining relationship. Second, by the attached letter from its representative, Salvador Holguin, Jr., dated December 19, 2005, the Respondent has indicated its willingness to proceed to arbitration and to waive all procedural defenses. Finally, each of the issues raised by the allegations mentioned are

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[2] See, also, State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.

covered by the CBA in effect at all relevant times. The allegation that the District changed its policy regarding reporting unsafe conditions requires interpretation of Article XII, section A; the two allegations that the District changed its policies regarding paid leave time requires interpretation of Article XIV, section H; and the allegation that the District changed its policy regarding voluntary transfer requests requires interpretation of Article XI, section C.

Accordingly, the allegations discussed above must be deferred to arbitration and will be dismissed. Following the arbitration of this matter, the Charging Party may seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See Regulation 32661; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District, supra.)[3]

B. Discrimination for Protected Activity.

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.)

[3] Pursuant to Government Code section 3514.5(a), the six-month limitation on the filing of a charge is tolled during the time required to exhaust the grievance machinery where that procedure ends in binding arbitration.

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.]

The charge contends that Kotch engaged in two acts that qualify as protected activity. First, on September 22, 2005, Kotch met with Suzanne Hunter to discuss the employment conditions of seventh and eighth grade language teachers. Second, the charge contends that on October 4, 2005, Kotch field a Notice of Dispute With Evaluator, claiming his performance evaluation was biased.

The charge next alleges that the four alleged unilateral changes discussed above: (1) that the District changed the policy regarding reporting unsafe classroom conditions; (2) that the District changed the policy regarding the District's ability to deny release time requests; (3) that the District changed the policy regarding notice for release time requests; and (4) that the District changed its policy regarding voluntary transfer requests, were made in retaliation for Kotch's protected activity. Assuming for the moment that the charge adequately alleges the Kotch engaged in protected activity, each of these alleged changes occurred several months before the alleged protected activity. The District's actions cannot be retaliation for subsequent Union action. Thus, these allegations do not state a prima facie case.

The charge also contends that Kotch's October 19, 2005 reprimand was in response to his protected activity. Other than temporal proximity, the charge does not allege sufficient facts establishing a nexus between the alleged protected acts and the adverse action. Without this connection, the charge fails to allege a prima facie case.

C. Interference With Employee Rights.

The test for whether respondent interfered with employee rights under EERA does, not require unlawful motive be established, only that slight harm results from the conduct. (Simi Valley Unified School District (2004) PERB Decision No. 1714.)

The first amended charge alleges no facts establishing any harm to employees as a result of the District's conduct. As a result the charge does not state a prima facie case for interference with employee rights.

For these reasons the allegations discussed above, as presently written, do 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 Second 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 January 9, 2005, I shall dismiss the above-described allegation from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely

'Regional Attorney

EC

Attachment