STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT HIDALGO and EDWARD COLLINS, Charging Parties, v. SAN LEANDRO UNIFIED SCHOOL DISTRICT, Respondent. SAN LEANDRO TEACHERS ASSOCIATION, CTA/NEA, Real Party in interest.	Case No. SF-CE-477 PERB Decision No. 288 February 24, 1983

Appearances; Andrew Thomas Sinclair, Attorney (Sinclair & Clancy) for Robert Hidalgo and Edward Collins; Melanie M. Poturica, Attorney (Liebert, Cassidy & Frierson) for San Leandro Unified School District; Diane Ross, Attorney for the San Leandro Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Tovar and Morgenstern, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Leandro Unified School District (District) to a proposed decision holding that the District violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1] by discriminatorily transferring

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

Subsection 3543.5(a) provides as follows:

Edward Collins[2] (Charging Party) in retaliation for protesting the issue of extra duty assignments (EDA), an action protected by EERA.

The San Leandro Teachers Association, CTA/NEA (Association) filed an application for joinder and was designated as a Real Party in Interest. In that capacity, it filed a reply to the District's exceptions.

The Board has considered the entire record in this case in light of the exceptions. We affirm the hearing officer's findings of fact as being free from prejudicial error and incorporate them by reference herein. We also affirm his conclusions of law to the extent they are consistent with this opinion.

DISCUSSION

Where the allegation is of a reprisal against an employee as in the instant case, the charging party must prove that the

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> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]The hearing officer concluded that Mr. Robert Hidalgo's transfer was sufficiently justified by the District on operational necessity grounds, but that the District was not able to prove the same for Mr. Collins' transfer. Mr. Hidalgo did not except to this conclusion; thus the matter of his transfer is not before the Board.

employee was engaged in protected activity and that the employer's conduct was motivated by that participation. Thus, unlawful motive is the specific nexus required in the establishment of a prima facie case. Novato Unified School District (4/30/82) PERB Decision No. 210, at page 6; Radio Officers Union v. NLRB (1954) 347 U.S. 17 at pp. 43-44 [33 LRRM 2414].

The threshold question in this case, then, is whether Charging Party was engaged in protected activities under the Act. Section 3543 states that:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in

> effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

The District contends that the activities of Collins and the other employees were not protected, arguing that they were attempting to bypass the exclusive representative in negotiations with the District in direct contravention of section 3543. The Charging Party maintains that the employees were, in fact, only protesting the District's implementation of the negotiated EDA policy.

The collective bargaining agreement (CBA) between the Association and the District provided that unit members shall participate, attend or perform assigned duties, including "supervision of student activities," but also provided that EDA's were to be reasonable in terms of their type, the amount of time they required, and their distribution among teachers.[3]

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[3]Article VII, paragraph B states that:

> Bargaining Unit Members shall participate, attend and/or perform reasonable duties assigned, included, but not limited to, the following: faculty meetings, pupil guidance meetings, curriculum and in-service meetings, committee assignments consistent with this agreement, open house, back-to-school night, supervision of student activities. Other meetings or functions mutually agreed upon by the Bargaining Unit

The EDA policy had been a subject of controversy at San Leandro High School for several years. The controversy came to a head in the fall of 1979 because of the manner in which Principal Walter Vassar posted the EDA sign-up sheet and his attempt to change past policy and increase the number of assignments per teacher from three to four, despite the fact that there had been an increase in the number of faculty. As a result, there was widespread teacher dissatisfaction with Vassar.

Collins wrote a letter of protest to Vassar on December 5, 1980, and circulated a petition signed by the faculty protesting the unreasonableness and unfairness of the District's EDA policy and sign-up sheet.[4]

> Employees and the principal or the immediate supervisor.

However, paragraph I states that:

> The length of time that each Bargaining Unit Member spends on required nonteaching duties shall be reasonable, and fairly distributed among the school staff.

[4]The Petition read:

> Dear Mr. Vassar:
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> In regard to the following announcement in the Faculty Bulletin of November 27, 1979:
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> > "If you did not sign up for Activity Supervision yesterday, please do so today. The sign-up sheets will be posted on the bulletin board in the Teachers' Cafe. If you do not volunteer

On January 29, 1980, Collins held a meeting of the ad hoc committee established to develop what they perceived to be a fair and reasonable EDA policy (Proposal C). District Superintendent Lewis Holden instructed Thomas Cruza, the

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> to supervise, it will be assumed you have no preference and assignments will be made as needed."
>
> J. Vassar
>
> We would like to inform you that your assumption concerning extra duty sign-ups is incorrect. We did not sign up for extra duties as a protest to your announcement for the following reasons: (emphasis supplied)
>
> (1) Teachers are the only people involved in these activities who are not compensated.
>
> (2) The number of duties were increased despite an increase in faculty members this year and continued declining student enrollment.
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> (3) We are being forced to supervise activities that didn't require supervision in previous years.
>
> (4) The administration has added activities since the beginning of the school year that violates the long established policy of listing all activities for the entire year on the initial sign up list.
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> (5) We are now forced to supervise community events, such as the Police Charity, without compensation.
>
> (6) The administration capriciously increased the number of duty assignments by disregarding the recommendations of the Advisory Committee (Article 71).

director of administrative services, to transfer Collins in mid-February 1980. On February 26, 1980, the majority of the faculty voted in favor of Proposal C. The ad hoc group met informally throughout the spring to finalize Proposal C, and on June 9, 1980, set up a meeting with Vassar to discuss it.

The hearing officer found that it was unnecessary to decide the specific question of whether the activities of the charging party constituted a grievance because he found those activities to be "subsumed in the broader category of 'employment relations' in section 3543" and therefore within the scope of representation. Instead, we find that the Charging Party was engaged in protected activity by presenting a grievance against perceived violations of the collective bargaining agreement and organizing in support of that grievance within the meaning of section 3543.

The protest over the EDA's was the type of informal presentation of grievances encouraged by the collective bargaining agreement.[5]

5Article V, A.1, B.1 and 2 provide in pertinent part:

> 1. A "grievance" is a formal written allegation by a member of the bargaining unit that he or she has been adversely affected by a violation or misinterpretation of a provision of this agreement. Appeal of any law, district policy, or administrative decision not covered by this agreement shall not be

Relying primarily on Emporium Capwell v. Western Addition Community Organization[6] (1975) 420 U.S. 50 [93 S.Ct. 974], the District argues that the Charging Party was attempting, notwithstanding the existence of an exclusive representative for his negotiating unit, to bypass the exclusive

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subject to the grievance procedure.

. . . . . .

B. Informal Procedure

1. Before filing a formal written grievance, the grievant will attempt to resolve the problem by at least one private conference with his immediate supervisor. All discussions and problem resolution reached through this process shall be deemed to have preceded the formal grievance procedure and shall not be subject to intervention or response of the Association.

2. If the problem is not resolved at the informal level, then the grievant may declare that a grievance exists and invoke the following formal procedures:

A copy of the Association newsletter, SLATE, was introduced into evidence. It states that faculty members should grieve whatever problems they may have, but encourages them to first try to solve those problems at the informal level.

[6]In Emporium Capwell, minority employees attempted to negotiate directly with the employer and conducted a picket line and consumer boycott of the employer. The court held that, if employees bypass their exclusive representative, conduct which otherwise would have been protected by the National Labor Relations Act may lose its protected status. See San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

representative and meet and negotiate directly with the public school employer. Since the decision to transfer Collins was based on his protected activity which took place in December 1979 and January 1980, and not on subsequent events, it is therefore unnecessary for us to determine whether the meeting set for June 9, 1980, with Vassar was an attempt by the grieving employees to negotiate a new policy. Therefore, this case is distinguishable from Emporium Capwell primarily because here the Charging Party was engaged in presenting a grievance, a protected activity under the Act. Further, the Association did not oppose the activities of the ad hoc committee and, in fact, the work of the committee was supported by the Association's building representative. Also, the activities of the Charging Party did not undermine the union's status as bargaining representative. Consequently, the statutory principle of exclusivity is not abridged in the instant case.

Having established that Collins was engaged in protected activity, the Charging Party must demonstrate that it was a motivating factor in the District's decision to transfer him. Unlawful motive may be established by circumstantial evidence and inferred from the record as a whole. Novato, supra, at page 6; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].

As part of the prima facie case, it must be demonstrated that the employer had actual or imputed knowledge of the

employee's protected activity. Novato, supra.

At the hearing, Superintendent Holden was questioned as to why no action was taken against other teachers in view of the widespread dissatisfaction over the change in the EDA policy. In response, Holden admitted that Mr. Collins was "more of a leader in the dissention [sic]." This statement indicates that Holden was precisely aware of Collins' protected activities. Holden was also aware of the newspaper articles about the EDA controversy in which Collins was specifically quoted protesting the EDA policy at the school. In the second of those newspaper articles, Holden is quoted as saying that "the administration is aware of the problem and is working on it." In addition, Holden visited the school regularly and spoke with Collins at the school cafeteria in January and suggested that, if he was not happy, he could arrange a transfer for him. Collins also met with Holden to complain about a particular EDA assignment which he felt Vassar assigned as retribution for his protest. We thus conclude that the District was aware of Charging Party's protected activity.

However, Holden denies that Collins' protected activity was a motivating factor in the decision to transfer him. This denial is not persuasive. Holden's statement that Collins was more of a leader in the dissension not only corroborates Holden's knowledge of the protected activity, but is also an admission against interest demonstrating Holden's unlawful

motivation. See Moreland Elementary School District (7/27/82) PERB Decision No. 227.

The timing of the employer's conduct in relation to the employee's performance of protected activity is a factor which may support the inference of unlawful motive. Novato, supra, p. 7. Here, friction between Vassar and Collins had allegedly existed for ten years. Yet Holden did not take action against Collins until he began his vocal protest over the EDA issue.

The employer's disparate treatment of employees engaged in such activity is also a factor which may support the inference of unlawful motive. Novato, supra, p. 7. In support of his decision to transfer Mr. Collins, Holden indicated: "I felt that he (Collins) was unhappy. I felt that he was making other people very much aware of anything that might be a cause for unhappiness in their situation at the school. I felt this was an attitude that was contagious." This statement reflects the District's concern over the influence that Collins was having as a leader of the protest. In addition, Holden's focus on Collins' unhappiness with Vassar does not take into account the widespread dissatisfaction of the faculty with Vassar over the EDA issue. There was disparate treatment of Collins because he was an effective leader of the protest over the EDA issue in contrast to the other dissatisfied teachers. Holden admitted that "Collins in his unhappiness was more of an enfluence [sic] than Mr. Kobal [sic] was at the school" over other teachers.

Holden reluctantly testified that Koval, building representative for the Association, was not taken seriously by the staff and was laughed at behind his back. We find that these facts support the finding that unlawful intent was a motivating factor in Collins[1] transfer.

Once the Charging Party has made a prima facie showing sufficient to support the inference that the exercise of employee rights granted by EERA was a motivating factor, the burden shifts to the District to prove that its action(s) would have been the same despite the protected activity. Novato, supra, p. 14; Wright Line, A Division of Wright Line, Inc. (8/27/80) 251 NLRB No. 150 [105 LRRM 1169]. The District indicated they were transferring Collins in the best interest of the school primarily for the following reasons: Collins' unhappiness and the effect Collins was having on other teachers; Collins' lack of support for Vassar, a relatively new principal; and, finally, a feeling that Collins could be a more effective teacher elsewhere.

As previously discussed, Holden's rationale in transferring Collins was more indicative of unlawful motivation than legitimate justification. Holden frequently referred to Collins' unhappiness, yet Holden admitted that Collins repeatedly told him that he was happy at the high school. Holden also testified that Collins had a good teaching record and was a very popular teacher with the students. Holden

testified that he could recall the name of only one teacher for sure who suggested to him that the way to improve the school would be to "move Ed Collins because he spent a great deal of time complaining."

Although Education Code section 35035[7] and the CBA provide for involuntary transfers "when it is in the best interest of the District," the basis for deciding what is in the best interest of the district cannot be an employee's involvement in protected activity under EERA. Other legitimate criteria must be advanced for the district to exercise that discretion. Cf. Novato, supra.

Since the District did not proffer additional justification for its action beyond the aforementioned, we find it has failed to demonstrate that they would have taken the same action in the absence of protected activity. We conclude, therefore,

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[7]Education Code subsection 35035(c) provides in pertinent part:

> Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. Such power to assign includes the power to transfer a teacher from one school to another school at which the teacher is certificated to serve within the district when the superintendent concludes that such a transfer is in the best interest of the district.

that the District has violated subsection 3543.5 (a)[8] of EERA by transferring Collins because of his exercise of rights granted by the Act.

REMEDY

We have found that the District violated Government Code section 3543.5 (a) by involuntarily transferring Edward Collins because of his exercise of rights under EERA. Consequently, it is appropriate to order the District to cease and desist from interfering with employee rights, specifically from transferring employees because of their protected activity.

Because the District has violated subsection 3543.5 (a) in discriminatorily transferring Collins, it is appropriate to require the District to reinstate him to his former position or its equivalent at San Leandro High School, at his request, without prejudice to his seniority or other rights and privileges. Novato, supra. However, since the 1982-83 school year is already in progress, and the Board wishes to avoid a disruption of the educational program which might ensue a mid-year switch in assignments, the transfer need not occur until the beginning of the 1983-84 school year.

It is also appropriate that the District be required to post a notice incorporating the terms of the Order.

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[8]The hearing officer correctly dismissed the charges that the District violated subsections 3543.5(b) and (d) since no evidence was presented on these alleged violations.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c), it is hereby ORDERED that the San Leandro Unified School District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Taking reprisals against unit employees, and Edward Collins in particular, because they have grieved the District's application of contractual policy and procedures.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

(a) Upon his request, restore Edward Collins to his former position, or its equivalent, at San Leandro High School effective the beginning of the 1983-84 school year, without prejudice to his seniority and other rights and privileges.

(b) Within five (5) workdays after service of this decision, prepare and post copies of the Notice to Employees, attached as an appendix hereto, for at least thirty (30) consecutive workdays at its headquarters office and in conspicuous places at the locations where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within 20 workdays from service of this decision, give written notification to the San Francisco regional director of the Public Employment Relations Board of the actions taken to comply with this Order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

The remaining allegations respecting Robert Hidalgo and violations of section 3543.5(b) and (d) are DISMISSED.

Chairperson Gluck and Member Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-477, Robert Hidalgo and Edward Collins v. San Leandro Unified School District^ in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a).

As a result of this conduct, we have been ordered to post this Notice, and will abide by the following. We WILL:

1. CEASE AND DESIST FROM:

   (a) Taking reprisals against unit employees, and Edward Collins in particular, because they have grieved the District's application of contractual policy and procedures.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

   (a) Upon his request, restore Edward Collins to his former position, or its equivalent, at San Leandro High School effective the beginning of the 1983-84 school year, without prejudice to his seniority or other rights and privileges.

Dated: _____ SAN LEANDRO UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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