

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



FRESNO COUNTY OFFICE SCHOOLS  
EDUCATORS ASSOCIATION,

Charging Party,

v.

FRESNO COUNTY OFFICE OF EDUCATION,

Respondent.

Case Nos. SA-CE-2004-E  
SA-CE-2005-E

PERB Decision No. 1674

August 19, 2004

Appearances: California Teachers Association by Ballinger G. Kemp, Attorney, for Fresno County Office Schools Educators Association; Atkinson, Andelson, Loya, Ruud & Romo by Elizabeth B. Hearey and Paul M. Loya, Attorneys, for Fresno County Office of Education.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fresno County Office of Education (COE) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge in Case No. SA-CE-2004-E alleged that the COE violated the Educational Employment Relations Act (EERA)<sup>1</sup> by unilaterally changing the involuntary transfer provision of the collective bargaining agreement (CBA) without notice to the Fresno County Office Schools Educators Association (Association). The unfair practice charge in Case No. SA-CE-2005-E alleged that teachers Tim Nolt (Nolt) and Tim Allison (Allison) were involuntarily transferred in retaliation for engaging in protected activities. The Association

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

alleged that COE's conduct constituted a violation of EERA section 3543.5(a), (b) and (c). In his proposed decision, the ALJ both found that COE violated EERA by unilaterally changing the CBA's involuntary transfer provisions as applied to Nolt and Allison, and discriminated and retaliated against Nolt and Allison because of their protected conduct.

After review of the entire record, including the hearing transcripts, exhibits, proposed decision, COE's exceptions and the Association's response to COE's exceptions, the Board adopts the ALJ's proposed decision as a decision of the Board itself.

### BACKGROUND

The proposed decision is extremely fact-intensive. We find the ALJ's lengthy exposition of facts thoroughly and accurately summarizes the events in this case. A shortened version is set forth below.

Nolt, Association president, and Allison, vice-president and negotiations chair, were involved, over a period of years, in several conflicts with the COE administration, in general, and Superintendent Dr. Peter Mehas (Mehas), in particular. Prior to this time these two men had each maintained the same classroom teaching assignment for many years. In August 2000 they were each given new duties that required them to relocate. Neither man requested, nor wanted, these relocated assignments.

COE operates (1) court schools that provide educational instruction to minors who are either in penal custody or institutionalized as wards of the court, and (2) community schools, that provide instruction to students who do not live on the premises, but rather report each morning and leave at the end of the instructional day. The COE has between 850 and 1100 total employees with approximately 215 certificated employees over various sites. Ken Campbell (Campbell), the administrator for the COE's courts and community schools for the

past fifteen years, supervises 45 and 50 certificated employees. Campbell reports to Don Collins, deputy superintendent for educational services.

Nolt

Nolt has been a COE teacher for 30 years and was president of the Association for thirteen years, until his resignation in May 2000. He was the Association's president when Mehas first ran for superintendent. The Association opposed Mehas' election at that time and in all subsequent elections. Nolt was very politically active in opposing Mehas' various candidacies for superintendent.

During Mehas' superintendency, Nolt filed a number of grievances and unfair practice charges on behalf of either himself or the Association. In September 2000, a PERB ALJ's unfair practice decision, Fresno County Office of Education (2000) PERB Decision No. HO-U-769-E (Fresno COE), directed the COE to remove a letter of reprimand from Nolt's personnel file. Both Nolt and Allison testified during the hearings, which occurred in June 2000 and culminated in that decision. The decision was not appealed.

In March 2000 Nolt, on behalf of the Association, filed another unfair practice charge alleging that the COE was illegally aiding a group of employees who were attempting to decertify the Association. The charge was withdrawn when, after Nolt and Allison resigned from Association office, the decertification petition was withdrawn.

In conjunction with CBA negotiations, Nolt and Allison questioned COE's expenditure of Forest Reserve Fund (Fund) monies, asserting that these allegedly improper expenditures represented a potential teacher salary increase of 4 percent. Nolt and Allison contacted the Federal Bureau of Investigation (FBI), the news media and a local taxpayers' association. They continued with their inquiries for several months, from late 1999 through the spring of 2000.

On November 3, 2000, Cynthia Stovall (Stovall), a COE teacher and the Association's grievance chair, attended third level grievance meetings on Nolt and Allison's relocations. Carolyn Coss, a California Teachers Association field representative, Mehas, and Jan Biggs (Biggs), the administrative advisor to Mehas, and the grievants were present. When the subject of the Fund arose, Stovall stated that Mehas became very agitated. In addition, Biggs "either stood up or was standing, and he got real loud." Mehas eventually stated, "if there is evidence, bring it forth."

COE receives between \$350,000 and \$500,000 annually from the Fund. Allison learned that these monies were being given to various local charitable and nonprofit organizations, i.e., the Fresno Philharmonic, Metropolitan Museum, Tree Fresno, the local Public Broadcasting Channel and Fresno State University. COE claims these discretionary funds can be legally given to these organizations. COE made an unrebutted assertion that this fund is audited on a regular basis and that no problems were found. The year after the FBI was contacted, COE created a "Passport to Knowledge" program, which allows a COE student to receive stamps on a "passport" whenever s/he attends a function sponsored by any of the recipient organizations.

Mehas insisted that he did not take Nolt and Allison's charges personally, and that he "just smiled" when he heard about them contacting the FBI. Campbell asserts that at the time he relocated Nolt and Allison, he was unaware they had contacted the FBI regarding the Fund.

When Nolt was the Association's president, he was either a member of the negotiating team or routinely consulted with it. He was especially critical of a June 2000 COE negotiating proposal that linked a small salary increase to a large increase in health benefit costs and to a discipline policy that did not include an arbitration provision. Nolt asserts that Mehas was

aware of his opposition to this proposal.<sup>2</sup> Shortly after Nolt and Allison's resignations, COE modified its proposal to reflect a 15 percent salary increase.

Nolt criticized Mehas in the local newspapers for hiring an ex-felon, Biggs, as his administrative advisor.

### Allison

Allison has been a COE teacher for twelve years. He became active in the Association in the mid-1990s, when it attempted to stop Mehas from withdrawing tenure from veteran teachers who had already attained this status. He subsequently became the Association's vice-president and negotiating chair. In approximately 1996, Allison stated that he was told by Campbell that (1) Mehas liked him, (2) he was a popular teacher with a bright future ahead of him, and (3) he should not "shoot himself in the foot." He understood this comment to mean that he should not become too active in the Association. Campbell denies making this statement or anything similar to it.

Allison was the Association vice-president for three years, until May 31, 2000, and the negotiating chair for the last three years of the five he was on that committee. During those years he filed numerous unfair practice charges and grievances. He has had various disagreements with COE on negotiations issues. Allison asserted that Mehas was aware of his opposition to these issues. Mehas denied such awareness, saying that Dr. Daniel Pietro (Pietro), deputy superintendent for business and personnel services and COE's chief negotiator supervises the negotiations process and does not discuss individual issues with him. In June 2000, Allison also testified on behalf of Nolt in his successful unfair practice charge regarding

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<sup>2</sup>Mehas denied such knowledge. The ALJ found Mehas not to be credible. Among other items, the ALJ explained that Mehas was the "public school employer" with final decision-making authority for COE over negotiations.

a letter of reprimand placed in his (Nolt's) personnel file. In addition, he was very politically active in opposing Mehas' various candidacies for superintendent.

Both Nolt and Allison grieved the relocations. At the November 3, 2000, third level grievance meeting, the Association representative requested incompatibility documentation as required by the CBA. No documentation was received.

#### Decertification Effort

In the fall of 1999, several COE employees, Pete Lempesis (Lempesis), Neil Morrisseau, Tom Read and Nick Hustedde initiated a decertification effort. The decertification petition was filed with the Board on February 7, 2000 and posted on COE's bulletin board on February 23, 2000. In May 2000, both Nolt and Allison resigned as officers of the Association to end the decertification effort. During the 1999-2000 school year, there was much tension between the teachers on each side of the decertification effort, leading to accusations of harassment and intimidation. Nolt and Allison had asked Campbell to set up a meeting with Lempesis, one of the teachers behind the decertification effort, to clear the air. This meeting never occurred.

#### Alleged Nolt/Allison Improprieties or Deficiencies

Campbell testified that Nolt had a tendency to spread rumors. For example, in October 1999, Campbell was informed by Cecil Thomason, the grievance chair, of two incidents occurring in the employee lounge at Juvenile Hall. The next day Campbell asked Nolt if he knew about the incidents. Nolt refused to discuss the matter and said any response would need to come from his attorney. Then Campbell, by memo, directed Nolt to provide the information. At the same time Allison mentioned the incidents to Pietro. Campbell asked Allison about the incidents and he replied that he had only heard about them. Later, in a meeting that included his attorney, Nolt discussed the matter with Campbell and Biggs.

The incident involved a female classroom aide telling a male teacher to "kiss my ass," after which the teacher proceeded to kiss her clothed buttocks. At another time, another male employee allegedly was observed to "hump" the same female employee's arm and shoulder in the employee lounge. The female employee, who supported the decertification effort, testified that these incidents actually occurred. These incidents came to be referred to by management as the "oral and canine sex" incidents; however, the origin of this phrase was not clear.

Allison and Nolt were further alleged to have interrogated staff who were seen leaving Campbell's office. Campbell acknowledged that he did not talk to Nolt or Allison about these incidents. Employees had complained about Nolt calling one a "pervert" upon passing and "bad-mouthing" the other. Nolt informed another employee of an alleged pending investigation of his conduct by COE, which upset this employee. There were accusations of other insensitive remarks about various COE staff.

#### Biggs Comments at Mandatory Staff Meetings

Biggs addressed two mandatory staff meetings, one in November 1999 at Juvenile Hall, and the second at Boot Camp, in March 2000. At these meetings Biggs stated that accusations about "oral and canine sex" had been made by the "union's leadership" in order to obtain concessions from COE in negotiations. Biggs further stated to the assembled groups that he found the charges to be baseless. These assemblies occurred during the middle of the decertification effort by many of the employees who complained about Nolt and Allison.

### ALJ'S PROPOSED DECISION

#### 1. Unilateral Change

The ALJ found that COE's relocation of Nolt and Allison met the elements for a unilateral change in violation of EERA section 3543.5(c). Under EERA section 3543.2(a), transfer and reassignment policies are matters within the scope of representation. COE's

failure to comply with CBA Article 9.3 altered the status quo and has a generalized effect and continuing impact on employment. COE had argued that a transfer involves a change from one academic discipline to another, such as from a speech pathologist to a classroom teacher. To COE, a position is like a job classification not tied to one location. The Association states that the practice had not been challenged because to its knowledge, there had never before been a non-disciplinary involuntary transfer when the relocated employee's prior program was still in existence. The Association was aware of a disciplinary transfer in 1987. A transfer, in statewide labor relations parlance, is a change in location. However, the ALJ found that the CBA repeatedly uses the term "position" to mean a individual set of duties. The CBA also defines "transfer." The ALJ concluded that under the CBA, the involuntary transfer clause in Article 9.3 must be extended to employees who are involuntarily moved from one position to another. Therefore, COE's failure to comply with Article 9.3 when it transferred Nolt and Allison unilaterally modified a term and condition of employment in violation of EERA section 3543.5(c).

## 2. Discrimination

According to the ALJ, there was no doubt that Nolt and Allison engaged in protected activities, including their Association leadership roles, grievances, unfair practice charges, Fund confrontations with Mehas, and opposition to COE's negotiation proposals. Campbell and Mehas each acknowledged awareness of most of these circumstances. The ALJ also concluded that the involuntary transfers were adverse actions. He found Nolt was harmed by the relocation to Abbey School (Abbey) in that it negatively impacted his life by: (1) decreased security; (2) elimination of his preparation period for an extended time; (3) lowered net income; and (4) a less desirable student population. With regard to Allison, the ALJ found him harmed by: (1) lowered net income; (2) lessened ability to meet family responsibilities

due to change in scheduled hours; (3) longer commute time; (4) diminished access to educational resources; and (5) exacerbation of existing back problems.

Evidence of Unlawful Intent

The ALJ found that COE's continued use of the overstated term "oral and canine sex" long after an investigation showed that these incidents occurred shows an intent to treat Nolt and Allison differently than other employees, particularly the actual participants in these incidents. In addition, the finding that Nolt and Allison were spreading unsubstantiated rumors shows disparate treatment and provides evidence of contradictory explanations, a departure from established procedures in improperly using information to reach a predetermined conclusion in the investigation, and an inadequate investigation. COE's continued insistence that Nolt and Allison were spreading rumors despite the female participant's testimony to the contrary is further evidence of inconsistent explanations. Campbell's failure to follow up on contradictory evidence shows inconsistency in its explanation. Thus, the ALJ concluded that the evidence pertaining to these incidents supports an inference of unlawful motive.

The ALJ further found that the deliberate misrepresentation of an employee's statements regarding Nolt and Allison's questioning of employees after meetings with Campbell was evidence of contradictory explanations, a departure from established practices and thus supports an inference of unlawful motive. Campbell's blind acceptance of employee statements about Nolt and Allison also support unlawful motive. Campbell's selective crediting of another employee's statements except for those in support of Nolt show unlawful motive. Campbell's failure to acknowledge a labor relations motive for the strain in employee relationships and failure to set a meeting to resolve the tension, failure to provide documentation showing Nolt and Allison's incompatibility with other employees as the basis for the transfer, and of strong importance, Biggs statements to employees at two mandatory

employee assemblies in November 1999 and March 2000<sup>3</sup> all support the finding of unlawful motive. The ALJ found Campbell's justification for the simultaneous and coincidental relocations of two Association activists inherently unbelievable. The ALJ did not find credible the fact the Nolt and Allison were the only ones qualified to do the jobs.

The ALJ found particularly egregious Biggs' statements at the two employee assemblies because Nolt and Allison had not made the accusations regarding these incidents, there was no evidence that either Nolt or Allison used the term "oral and canine sex" to anyone but the administrators, the exaggerated lounge incidents were not baseless but were admitted to by one of the participants, and there was no reason to mention the incidents to an assemblage of the entire staff other than to disparage Nolt and Allison before an anticipated decertification election. These statements occurred shortly after the decertification petition was posted. The ALJ thus concluded that Biggs' statements strongly supported an inference of unlawful motive and in fact deemed the timing of these statements as "one of the single most damning pieces of evidence" against COE regarding its unlawful motive.

The ALJ therefore concluded that COE violated EERA section 3543.5(a) and (c) and found a derivative violation of section 3543.5(b).

### DISCUSSION

COE has filed 100 separate exceptions to the ALJ's proposed decision. These exceptions primarily challenge credibility findings and allege bias on the part of the ALJ. We find these exceptions either lack merit or do not affect the Board's decision in this matter. For example, COE alleges that the ALJ in essence coached Nolt during the hearing. We disagree.

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<sup>3</sup>The ALJ wrote that both assemblies occurred in March 2000. However, it is undisputed that the meeting at Juvenile Hall occurred in November 1999, instead of March, 2000. The meeting at Boot Camp occurred in March 2000.

In the section cited by COE, the ALJ advised Nolt merely to answer the question as asked. When the ALJ cut off testimony, in most instances, it was to preclude duplicative testimony. (See e.g., R.T., Vol. V, pp. 130-137.) The Board further does not fault the adoption of findings of the administrative law judge in Fresno COE which involves a related matter between the same parties, included interrelated facts, and is a final decision of the Board.

The Board accords great deference to the ALJ's credibility findings because the ALJ is in a better position to make those findings. (Long Beach Community College District (1998) PERB Decision No. 1278, p. 10, citing Duarte Unified Education Association (Fox) (1997) PERB Decision No. 1220 and Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133.) We have found no evidence in the record to support COE's credibility exceptions here. We find the ALJ's extensive and thorough findings of fact to be free of prejudicial error and adopt them as the findings of the Board itself. We have further reviewed the record and find no evidence of bias or prejudice on the part of the ALJ. (Riverside Unified School District (1987) PERB Decision No. 632.)

#### Discrimination/Retaliation Charge

Looking at the merits, we find that the Association has stated a prima facie case of discrimination. 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 (No. Sacramento)), 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; No. Sacramento.)

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 (1994) PERB Decision No. 864; emphasis added; fn. omitted.]

It is undisputed that Nolt and Allison, as Association officers, were engaged in protected activity, from their responses to Campbell's questioning regarding the employee lounge incidents, the challenge to COE's use of the Fund, their opposition to Mehas' candidacy for superintendent, and their strong objections to COE's proposal in negotiations, to their participation in the hearing over Fresno COE, in which both testified against the conduct of Mehas and Campbell and their resignation as Association officers to prevent the decertification effort.

COE argues that the "reassignment" of Nolt and Allison was not adverse action. COE argues that the ALJ used a subjective test instead of an objective test to make that determination. COE further contends that Nolt and Allison's reduction of income was their choice since they could have worked under supplemental contracts outside of their regular employment agreement to work to earn additional income. We disagree and affirm the ALJ's finding that Nolt and Allison were involuntarily transferred to positions with less favorable working conditions from a reasonable person's standpoint. Reasonable people would believe more lengthy commutes that negatively impact health to new jobs with difficult students and little or no security to be undesirable. A reasonable person would not deem losing a preparation period because of the need to open doors for students because of gangs and neighborhood crime a positive factor in a new job. For Nolt, the new job at Abbey required that he drive to a different location midday to complete his teaching load. For Allison, his new job at Boot Camp requires a work schedule that prevents him from spending quality time with his children, time that his work schedule at Juvenile Hall allowed for the previous 11 years. A reasonable person would not find working in conditions with inadequate heat in the winter and

cooling in the summer, and with swarming flies and wasps, to demonstrate a positive change in working conditions.

COE excepts to the ALJ's finding of unlawful intent. Again we disagree and affirm the ALJ's findings. First, the transfers occurred within a short time after the end of the school and after Nolt and Allison resigned their positions as Association president and vice-president, which placed them in a more vulnerable position. The transfers occurred during the summer immediately before the beginning of the school year. Mehas had stated that he mistrusted Nolt. The evidence shows that Nolt and Allison were the only Association activists to be involuntarily transferred for non-disciplinary reasons from continuing programs and positions. Mehas and Campbell were aware of Nolt and Allison's resignations. Mehas was aware of Nolt and Allison's challenge to the use of the Fund. Mehas and Campbell were aware of Nolt and Allison's negative testimony at the hearings in Fresno COE.

Campbell also gave shifting justifications for Nolt and Allison's transfers given by. For example, in the letter to Nolt informing him of his new duties, Campbell stated that the relocation was due to Nolt's experience with educational technology, that Nolt had previously started a new program, Nolt's ability to handle difficult students, and his incompatibility with other staff and administration. No examples of the last item were provided in the letter. At a grievance meeting over the transfer, Campbell focused on Nolt's incompatibility. At the hearing, Campbell testified that the Abbey position required self-contained classroom experience, experience in starting a new program, and experience in the use of educational technology. However at the hearing, Campbell also admitted that he had previously switched

teachers from self-contained to departmentalized programs and vice versa,<sup>4</sup> and had required Carter Johnson, a teacher with no new program experience, to start a new COE program.

Campbell further testified that sufficient educational technology experience included:

[t]he ability to operate technology-related equipment, including a computer, a VCR, and related software and applications to those, and also the ability to use the Internet and on-line resources and such. (R.T., Vol. III, p. 16.)

Campbell also acknowledged that teachers were required to take a computer course to obtain their credentials. He also testified that interstaff disharmony was not a critical factor in making his decision. (R.T., Vol. II, p. 132.)

Pietro testified regarding Mehas' involvement in the relocation of Nolt and Allison, because "only the superintendent can dole out discipline." (R.T., Vol. II, p. 11.) Pietro believed the matter to be disciplinary because the legal office was involved, a practice not common for relocations of employees. (R.T., Vol. II, pp. 25-26, 29.)

At the grievance meeting, Campbell stated Allison's relocation to Boot Camp was due both to incompatibility with other employees and programmatic needs. At the hearing, Campbell testified that the Boot Camp position required a teacher with experience in a self-contained classroom and a tough student population. Allison worked with violent students at A Unit at Juvenile Hall. A new teacher replaced him, however, Campbell testified that there would be no impact by such a replacement. On the other hand, Campbell stated that replacing Allison with a new teacher at Boot Camp, which had a similar student population, would have a negative impact. With regard to the alleged incompatibility, Campbell mentioned Allison's part in the investigation of the employee lounge incidents. However, Allison's participation

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<sup>4</sup>Self-contained classrooms require one teacher to teach all core academic areas; whereas, in a departmentalized program, the teacher teaches one subject matter. (See e.g., R.T., Vol. II, p. 174.)

consisted of admitting to Campbell that he had heard about them and of telling Pietro that something needed to be done. During a decertification campaign when emotions ran high among employees at Juvenile Hall, Nolt and Allison were the only individuals deemed by management to be incompatible.

The most telling evidence of unlawful intent involves the circumstances surrounding the employee lounge incidents. Campbell's investigation of the incidents are suspect particularly given his change of testimony after one of the participants testified that the incidents did indeed occur. (See R.T., Vol. V, pp; 147-149.) Under these circumstances, it is interesting that Nolt and Allison, as witnesses to the incidents, received reprimands, when the transgressing employees did not.

Most compelling is Biggs' presentation at Juvenile Hall and Boot Camp staff assemblies in November 1999 and March 2000, respectively, in which Biggs denounced "union leadership" as spreading false rumors about employees regarding "oral and canine sex" in the employee lounge. These presentations occurred during the events surrounding the decertification campaign.

COE argues that even if unlawful motive is found, programmatic requirements justified the transfers. COE cites Fall River Joint Unified School District (1998) PERB Decision No. 1259 (Fall River) and Scotts Valley Union Elementary School District (1994) PERB Decision No. 1052 in support of its contention that incompatibility is a valid business justification for transferring employees. In both of these cases, there existed a high level of tension between the teacher and the teacher's supervisor at an individual school.

We find this argument without merit and the cases cited inapposite. As discussed above, the shifting justifications for the transfers belie this argument, as do the simultaneous involuntary, non-disciplinary, transfer of two union activists whose positions still existed and

were backfilled. The tension among staff occurred as a normal part of a decertification campaign in which the leaders of the campaign were the same employees making the complaints; none of these employees were identified by COE to be incompatible. This is coupled with the findings in Fresno COE, adopted in the proposed decision, regarding Mehas' long-term hostility toward Nolt. Most of these issues were never discussed with Nolt and Allison. There was insufficient proof of incompatibility between Nolt, Allison, and Campbell, their immediate supervisor. Campbell continued to be their supervisor after the transfers.

### Unilateral Change

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

COE does not dispute that transfers are within scope. COE argues that the relocations are reassignments and that it has retained the right to assign under the Employer Rights clause of the CBA.<sup>5</sup> COE argues that transfers occur between classifications, e.g. librarian and

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<sup>5</sup>CBA section 3.1 states, in pertinent part:

[T]he Employer retains the right to hire, classify, assign, evaluate, promote, and terminate employees.

teacher. This definition does not make sense and is not found in the CBA.<sup>6</sup> We agree with the ALJ's finding that the relocations of Nolt and Allison fit more closely under the Involuntary Transfer provision of the CBA.<sup>7</sup> Assignments are neither specifically defined nor

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<sup>6</sup>COE argues that county offices of education need more flexibility than school districts in this regard and must be able to make assignments to different facilities without procedural constraints. COE stated that it attempted to provide evidence in this regard but because of the ALJ's bias, was not allowed. The ALJ heard testimony from a retired Association negotiator regarding his experience of the difference between a reassignment and a transfer. Later in the hearing, COE attempted to introduce declarations of officials from other county offices of education regarding the meaning of those terms in their respective CBAs. The ALJ marked these documents for identification but did not admit them, stating that what other county offices do in their negotiations was not relevant to the instant matter. We have reviewed these declarations with the attached CBA provisions and without fail, they specifically define the term reassignment. This is not true in the instant matter. Therefore, even if these declarations should have been admitted, this omission is not prejudicial and does not affect the Board's decision in this matter.

<sup>7</sup>Section 9.3 of the CBA provides, in pertinent part:

#### Involuntary Transfers

Involuntary transfers shall be based exclusively on the legitimate, educational related needs of the Office. Involuntary transfers shall not be made arbitrarily, capriciously, or without a basis in educational need.

a. Involuntary transfers may be made for the following reasons:

4. Improvement of instructional program, operations of the organization, and/or staffing requirements such as teaching experience, specialized skills and talents, male-female and ethnic balances.

6. Incompatibility and/or improvement of performance.

b. Unit members shall be involuntarily transferred no more than one time every two years.

c. When an involuntary transfer is necessary to fill a vacancy due to conditions noted in 9.3 (a), the selection will be based on the following criteria:

1. Proper credential.
2. Major or minor fields of study.

distinguished from transfers in the CBA. "Positions" are also not defined, but "vacancies" are.<sup>8</sup> Apparently assignments can be made to vacant positions. "Transfers" are defined.<sup>9</sup> A transfer is from one position to another. The CBA provisions regarding "assignments" pertain to conventional versus year-round schools and special education employees. From the evidence, no employees have been involuntarily relocated for non-disciplinary reasons while their programs were still in existence until Nolt and Allison. COE contends that Nolt was previously relocated to the county jail facility; however, Nolt consented to that relocation. We therefore conclude that COE's relocation of Nolt and Allison comprise an involuntary transfer under the CBA.

COE further claims that the Association knew of previous reassignments because the notice was sent to the employees who were Association members. However, notice to the union must be made to a union official. (State of California (Board of Equalization) (1997)

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3. Instructional program needs which require specialized talents. When two or more Unit Members meet the criteria, the Unit Member with the least seniority shall be selected.

d. A Unit Member to be transferred involuntarily due to 9.3 (a) 5., shall be given a preference from a list of vacancies and the Employer shall honor such requests on the basis of office wide seniority and the required credentials.

An involuntary transfer shall not result in the loss of compensation, seniority, or any fringe benefit to the Unit Member transferred.

(Assn. Ex. 3.)

<sup>8</sup>Under CBA section 9.4, "a 'vacancy' is defined as a position declared vacant and funded by the Employer for any of the following reasons . . . .No assignments to fill a vacancy shall be made until after the posted closing date."

<sup>9</sup>Under CBA section 9.1:

A transfer refers to any action by the Employer which results in the movement of a Unit Member from the position held immediately preceding such action.

PERB Decision No. 1235-S; see also, Fall River, holding that notices to teachers of a teacher swap program did not constitute adequate notice to the exclusive representative.) COE argues that Nolt and Allison both received these letters. However, notice to Nolt and Allison were received after COE had made the decision to implement the involuntary transfers. Thus, there was no prior notice or opportunity to bargain before the change took effect.

Under the CBA, COE must follow specified procedures to involuntarily transfer employees. A unit member must be given a preference from a list of vacancies. When the transfer is made for incompatibility, it may only occur after the evaluation processes have been followed and the employee and supervisor have attempted to resolve the problem. The involuntary transfer shall not result in loss of compensation. Under CBA section 9.4, Announcement of Vacancies, COE must post a vacancy before filling it.

These procedures were not followed in this case. Nolt and Allison received notice of the transfers in August 2000 immediately before the school year was to begin. There was no posting of vacancies. Evaluation procedures were not followed regarding incompatibility. Compensation was affected in the form of additional mileage and wear on personal automobiles and loss of supplemental teaching opportunities.

We therefore conclude that COE unilaterally changed the CBA involuntary transfer provisions without giving the Association prior notice or opportunity to bargain in violation EERA section 3543.5(c). We further find that COE's actions concurrently violated EERA section 3543.5(a) and (b).

#### ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that Fresno County Office of Education (COE) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

Pursuant to EERA section 3541.5(c) and PERB Regulation 32325<sup>10</sup>, it is hereby ORDERED that COE, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Tim Nolt (Nolt), because of his exercise of rights guaranteed by EERA.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Tim Allison (Allison), because of his exercise of rights guaranteed by EERA.

3. Denying to the Fresno County Office Schools Educators Association (Association), rights guaranteed to it by EERA.

4. Unilaterally modifying its past practice with regard to the procedures followed when involuntarily transferring its employees.

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

1. Return Nolt to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Nolt, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.

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<sup>10</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

2. Return Allison to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Allison, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.

3. Remove and destroy from Nolt and Allison's personal employment records all memoranda, notes, evaluations, or any other documents, either partially or in total, that have been adjudged to be unlawfully motivated. These records shall include both their official personnel files, any "supervisory" or "working" files, or any other source of information that could be used in the future to support either (1) a comment or a rating in an evaluation of, or (2) discipline against, either of them.

4. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

5. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

It is further Ordered that the proposed decision in Case No. SA-CE-2004-E and Case No. SA-CE-2005-E is hereby AFFIRMED.

Chairman Duncan and Member Neima joined in this Decision.

**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 Nos. SA-CE-2004-E and SA-CE-2005-E, Fresno County Office Schools Educators Association v. Fresno County Office of Education, in which all parties had the right to participate, it has been found that the Fresno County Office of Education (COE) violated the Educational Employment Relations Act (EERA), Government Code section 3540, et seq. by unilaterally changing the involuntary transfer provision of the collective bargaining agreement without notice to the Fresno County Office Schools Educators Association (Association) and by involuntarily transferring teachers Tim Nolt (Nolt) and Tim Allison (Allison) in retaliation for engaging in protected activities.

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

**A. CEASE AND DESIST FROM:**

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Nolt, because of his exercise of rights guaranteed by EERA.
2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Allison, because of his exercise of rights guaranteed by EERA.
3. Denying to the Association, rights guaranteed to it by EERA.
4. Unilaterally modifying its past practice with regard to the procedures followed when involuntarily transferring its employees.

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

1. Return Nolt to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Nolt, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.
2. Return Allison to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Allison, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.



3. Remove and destroy from Nolt and Allison's personal employment records all memoranda, notes, evaluations, or any other documents, either partially or in total, that have been adjudged to be unlawfully motivated. These records shall include both their official personnel files, any "supervisory" or "working" files, or any other source of information that could be used in the future to support either (1) a comment or a rating in an evaluation of, or (2) discipline against, either of them.

Dated: \_\_\_\_\_ Fresno County Office of Education

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 WITH ANY OTHER MATERIAL.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



FRESNO COUNTY OFFICE SCHOOLS  
EDUCATORS ASSOCIATION,

Charging Party,

v.

FRESNO COUNTY OFFICE OF EDUCATION,

Respondent.

UNFAIR PRACTICE  
CASE NOS. SA-CE-2004-E  
SA-CE-2005-E

PROPOSED DECISION  
(6/14/02)

Appearances: Ballinger G. Kemp, Attorney, for Fresno County Office Schools Educators Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo by Paul M. Loya and Elizabeth Hearey, Attorneys, for Fresno County Office of Education.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

SA-CE-2004-E

On December 6, 2000, the Fresno County Office Schools Educators Association, CTA/NEA (Association), filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Fresno County Office of Education (COE). The charge alleged violations of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> with regard to an alleged unilateral modification of a matter within the scope of representation.

On December 21, 2000, the general counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a), (b) and (c) of section 3543.5.<sup>2</sup>

<sup>1</sup> All section references, unless otherwise noted, are to the Government Code. EERA is codified at section 3540, et seq.

<sup>2</sup> Subdivisions (a), (b) and (c) of section 3543.5 state:

On January 9, 2001, the COE answered the complaint denying all material allegations and propounding affirmative defenses.

SA-CE-2005-E

On December 8, 2000, the Association filed a second unfair practice charge with PERB against the COE. This charge alleged various violations of the Act with regard to COE teachers Tim Nolt (Nolt) and Tim Allison (Allison.). On December 27, 2000, the general counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a) and (b) of section 3543.5.

On January 9, 2001, the COE answered the complaint denying all material allegations and propounding affirmative defenses.

Consolidated Case

On March 1, 2001, an informal conference was held in an unsuccessful attempt to arrive at a mutually agreeable solution. On June 5, 6, and 7 and September 26, 27 and 28, 2001, a formal hearing was held before the undersigned. With the filing of briefs by each side, the matter was submitted on April 3, 2002.

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

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter....
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

## INTRODUCTION

Nolt, Association president, and Allison, vice-president and negotiations chair, were involved, over a period of years, in several conflicts with the COE administration, in general, and Superintendent Dr. Peter Mehas (Mehas), in particular. Prior to this time these two men had each maintained the same classroom teaching assignment for many years.

In August 2000 they were each given new duties that required them to relocate. Neither man requested, nor wanted, these relocated assignments. The COE contends the moves were not punitive, although it proffered considerable evidence regarding questionable behavior on the part of each man. The two men contend they were relocated in retaliation for their protected activities. The COE insists that the relocations were not retaliatory and were justified by supportable educational motives.

The collective bargaining agreement (CBA) has a provision governing involuntary transfers. These provisions were not followed. The COE insists the moves were not transfers, but were merely reassignments. The Association complains that the COE unilaterally modified its interpretation of the CBA provision regarding involuntary transfers.

## FINDINGS OF FACT

### Jurisdiction

The parties stipulated, and it is therefore found, that the Association is both an employee organization and an exclusive representative, and the COE is a public school employer within the meaning of the Act.

### Background

COE operates (1) court schools that provide educational instruction to minors who are either in penal custody or institutionalized as wards of the court, and (2) community schools,

that provide instruction to students who do not live on the premises, but rather report each morning and leave at the end of the instructional day. The COE has between 850 and 1100 total employees with approximately 215 certificated employees over various sites. Ken Campbell (Campbell), the administrator for the COE's courts and community schools for the past fifteen years, has between 45 and 50 certificated employees under his direction. Campbell reports to Don Collins (Collins), deputy superintendent for educational services.

### Nolt's Protected Activities

#### Background

Nolt has been a COE teacher for 30 years and was president of the Association for thirteen years, until his resignation in May 2000. He was the Association's president when Mehas first ran for superintendent. The Association opposed Mehas' election at that time and in all subsequent elections. Nolt was very politically active in opposing Mehas' various candidacies for superintendent.

#### Grievances and Unfair Practice Charges Prior to the Relocations

During Mehas' superintendency, Nolt filed a number of grievances and unfair practice charges on behalf of either himself or the Association. In September 1999 a PERB administrative law judge's (ALJ) unfair practice decision, HO-U-769-E, directed the COE to remove a letter of reprimand from Nolt's personnel file. The decision was not appealed.

In March 2000 Nolt, on behalf of the Association, filed another unfair practice charge alleging that the COE was illegally aiding a group of employees who were attempting to decertify the Association. The charge was withdrawn when, after the resignations from Association office of Nolt and Allison, the decertification petition was withdrawn.

### Forest Reserve Fund

In conjunction with CBA negotiations, Nolt and Allison questioned COE's expenditure of Forest Reserve Fund (Fund) monies, asserting that these allegedly improper expenditures represented a potential teacher salary increase of 4 percent. Nolt and Allison's inquiries included contacts with the Federal Bureau of Investigation (FBI), the news media and a local taxpayers' association. They continued with their inquiries for several months, from late 1999 through the spring of 2000.

On November 3, 2000, Cynthia Stovall (Stovall), a COE teacher and the Association's grievance chair, attended third level grievance meetings on Nolt and Allison's relocations. Carolyn Coss (Coss), a California Teachers Association (CTA) field representative, Mehas, and Jan Biggs (Biggs), the administrative advisor to Mehas, and the individual grievants were present. When the subject of the Fund arose, Stovall stated that Mehas became very agitated. In addition, Biggs "either stood up or was standing, and he got real loud." Mehas eventually stated, "if there is evidence, bring it forth."

COE receives between \$350,000 and \$500,000 annually from the Fund. Allison learned that these monies were being given to various local charitable and nonprofit organizations, i.e., Fresno Philharmonic, Metropolitan Museum, Tree Fresno, the local Public Broadcasting Channel and Fresno State University. The COE claims these discretionary funds can be legally given to these organizations. In addition, the COE made an unrebutted assertion that this fund is audited on a regular basis and no exceptions have ever been taken.

The year after the FBI was contacted, the COE created a "Passport to Knowledge" program, which allows a COE student to receive stamps on a "passport" whenever s/he attends a function sponsored by any of the recipient organizations.

Mehas insisted that he did not take Nolt/Allison's charges personally, and that he "just smiled" when he heard about them contacting the FBI. Campbell asserts that at the time he relocated Nolt and Allison, he was unaware they had contacted the FBI regarding the Fund.

### Negotiations

When he was the Association's president, Nolt was either a member of the negotiating team or he routinely consulted with it. He was especially critical of a June 2000 COE negotiating proposal, which linked a small salary increase to a large increase in health benefit costs, and which had a discipline policy that did not include an arbitration provision. Nolt asserts that Mehas was aware of his opposition to this proposal.

Shortly after Nolt and Allison's resignations, COE modified its proposal to reflect a 15 percent salary increase.

### Biggs

Nolt criticized Mehas in the local newspapers for hiring an ex-felon, Biggs, as his administrative advisor.

### Mehas' Rebuttal

Mehas denied that he was aware of Nolt and Allison's opposition to his proposals. Mehas stated that Dr. Daniel Pietro (Pietro), deputy superintendent for business and personnel services and COE's chief certificated employee negotiator, represents the COE in the negotiations process and does not discuss individual negotiation team members' views on the issues with him (Mehas). He also said he only has a "very little involvement" in negotiations until the process reaches the "ultimate decision to go or no[t] go in an agreement." He buttressed this statement by stating that Pietro's negotiation team does "[n]ot generally" contact him in the course of getting to a final agreement, except "[m]aybe in the beginning" regarding priorities and budgetary constraints.

When asked if the unfair practice charges or the grievances filed by Nolt and Allison made him angry, Mehas replied:

A I have learned after being over 38 years in this business that anger does not serve anybody well, and you learn also, and it's very difficult, not to take it personally. So I accepted it as a course of action, as a course of doing business, particularly since there have been so many of these from these individuals.

When asked if there were any other charges brought by Nolt and Allison, Mehas replied:

A Very much so. I've been aware of a number of statements credited to Mr. Nolt, disparaging remarks about my family, about my reputation, and this has been disturbing.

#### Allison's Protected Activities

Allison has been a COE teacher for twelve years. He became active in the Association in the mid-1990s, when it attempted to stop Mehas from withdrawing tenure from veteran teachers who had already attained this status. He subsequently became its vice-president and negotiating chair. In approximately 1996, Allison stated that he was told by Campbell that (1) Mehas liked him, (2) he was a popular teacher with a bright future ahead of him, and (3) he should not "shoot himself in the foot." He understood this comment to mean that he should not become too active in the Association. Campbell denies making this statement or anything similar to it.

Allison was the Association vice-president for three years, until May 31, 2000, and the negotiating chair for the last three years of the five he was on that committee. During those years he filed numerous unfair practice charges and grievances. He has had various disagreements with COE on negotiations issues. Allison asserted that Mehas was aware of his opposition to these issues. Mehas denied such awareness, saying that Pietro supervises the negotiations process and does not discuss individual issues with him. Allison also testified on

behalf of Nolt in his successful September 1999 unfair practice charge regarding a letter of reprimand placed in his (Nolt's) personnel file. In addition, he was very politically active in opposing Mehas' various candidacies for superintendent.

#### Alleged Nolt/Allison Improprieties or Deficiencies

##### Juvenile Hall Employees' Lounge Incidents

##### Campbell's Initial Testimony

Campbell was adamant that one of his concerns about Nolt was his spreading rumors that were not true. As an example, he told of an incident regarding "oral and canine" sex. He states that in October 1999, Cecil Thomason (Thomason), a community school teacher, and the Association's grievance chair, told Campbell about two incidents that occurred in the Juvenile Hall lounge some time earlier. The next day Campbell asked Nolt what he knew about the incidents. Nolt refused to discuss the matter and said that any such information would have to come from his attorney. Campbell gave him a memo requiring him to provide this information.

At about the same time Allison mentioned the incidents to Pietro, stating something should be done about them. Campbell asked Allison what he knew about the incidents. Allison replied only that he had heard of them.

Eventually, in a meeting that included his attorney, Nolt discussed the matter with Campbell and Biggs. He said that the oral sex reference was to a male teacher, Richard Scott (Scott), while in the Juvenile Hall lounge, osculating the clothed buttocks of Jodi Ruacho (Ruacho), a female COE paraprofessional II (classroom aide) for 23 years, in response to Ruacho telling him to "kiss my ass." The canine sex reference was to a second male teacher (who was never identified), in the same location but at a different time, making pelvic thrusts

on Ruacho's arm/shoulder in the lounge. Nolt asserted that both of these incidents occurred in front of other staff employees.

The evidence does not clearly explain who first used the terms, "oral" and "canine" sex, Thomason or Nolt. Campbell stated that Nolt used the terms when he set forth the above description of the incidents. The evidence clearly shows that all future references to these two terms, after Nolt's meeting with Campbell, were made by administration personnel. In other words, there was no evidence that Nolt continued to use this obviously overstated terminology to describe the incidents, but there was ample evidence that the administration continued to use these terms when describing its subsequent investigation of the incidents.

Nolt told Campbell that he witnessed the first incident and heard about the second. Campbell admits that Allison's connection to these incidents was merely his recital to Pietro of the rumors he had heard and his response to Campbell's inquiries. Allison had no first-hand knowledge of the events.

When Nolt told Biggs and Campbell what he knew or had heard of these incidents, he was assured that the matter would be kept confidential. Biggs failed to maintain such confidentiality. Campbell justified this failure by stating that if a subsequent investigation fails to substantiate a charge of sexual harassment, confidentiality is not required.

Campbell stated that he and Biggs investigated the matter and "made absolutely every effort" to interview "everyone that was possibly named or involved or in knowing anything about it." Campbell said that the purpose of the investigation was to determine if any sexual harassment or other impropriety had occurred. He initially stated that they interviewed "a dozen" people over a period of three to four weeks and that every lead was followed.

Campbell insisted that his investigation determined that the allegations were unfounded, that there was no truth to them. He cited this incident as support for his belief that

Nolt was spreading false rumors. He added, "The staff was very, very concerned about such a gross allegation." In a letter of reprimand given to Nolt, this incident was cited when Campbell wrote that "we could not substantiate any such activity on the part of our staff, and have therefore concluded that the allegations are totally false."

#### Nolt's Contentions

Nolt contended that the subject incidents did occur, and the administration's investigation was cursory. He stated that (1) only a few employees were interviewed, and (2) several persons who had witnessed the events told him that no one from the administration had spoken to them.

#### Gonzalez's Observations

Linda Gonzalez (Gonzalez), a COE classified employee, while in the Juvenile Hall lounge, observed Scott and his good friend, Ruacho, amicably bantering, as they often did. At one point Ruacho told him, "Richard, just kiss my ass," and he just bent down and osculated her clothed buttocks. Gonzalez did not speak to anyone else about what she saw, but the other employees who were in the lounge at the time also saw it and said something like, "I can't believe what I saw."

The next day there was a potluck meal in the lounge; she believes that it was for something like Secretary's Day in the spring of 1999. Campbell was speaking to the assembled employees, lauding the merits of his secretary, when she (Gonzalez) saw Scott bend "down and gave her [Ruacho] a kiss on her backside." She is certain that physical contact was made. She does not believe that Campbell was in a position to see this conduct. She was shocked,

. . . because I didn't think anybody would do that in front of your supervisor,. .. And to do that in the first place. I was just shocked, I didn't ~ I couldn't believe what I saw.

She believes the pre-potluck incident was seen by fellow employees Sandy Curd (who has since died)<sup>3</sup> and Alice Reed, and possibly Richard Raley. She believes there were a lot of people that saw that incident.

Gonzalez was never contacted by anyone from the administration about what she saw. When she was asked if she heard of anyone else being questioned about this matter, she replied, "Oh, no. I don't think it was ever brought up, to tell you the truth."

#### Sierra's Observations

Carol Sierra (Sierra), a COE teacher, while on a break in the Juvenile Hall lounge, observed Scott come in and "he knelt down on his hands and knees and acted like he was kissing her [Ruacho's] rear end." She did not like seeing that type of conduct. She stated that there were a lot of other people who observed the incident who were also upset about it and discussed their negative feelings with her. She is not aware of any investigation by the administration into this incident. No one from the administration spoke to her about it. She acknowledged there was a lot of tension from about the time of this incident until the new CBA was signed.

#### Ruacho's Observations

In Ruacho's testimony she admitted that she had, on one occasion, told a co-worker to "kiss my ass" and that he had osculated her buttocks. Ruacho insisted the entire incident had been in jest, but that it had, in fact, occurred.

Ruacho also admitted that, on a separate occasion, during an employee potluck luncheon in the lounge, a male co-worker came up behind her and reached over and leaned on her. Later, another employee told her that the leaning employee was "humping me when he

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<sup>3</sup> The COE checked its personnel records and determined that Sandy Curd died on February 10, 1995, approximately four years before the buttocks osculation incident.

was leaning on me." Ruacho said that she could feel the employee leaning over her, but did not feel him "humping" her.

Ruacho stated that she was interviewed by Campbell, Biggs and COE's attorney regarding these incidents and she told them the same things that she testified to in the hearing. Ruacho is an aide who has worked for teacher Peter Lempesis (Lempesis), a COE teacher, for the past two and one-half to three years. Lempesis was a leader in the decertification effort and an open and avowed opponent of Nolt and Allison.

#### Campbell's Recitation of Murdock's Observations

Campbell stated that the only substantiation of the "humping" incident was a statement made to him by Ed Murdock (Murdock), a COE instructional aide at Juvenile Hall. Campbell described Murdock's comments as follows:

A Well, I think Mr. Murdock, if I understand correctly, alluded to that [the "humping" incident] being the appearance, but we could not get any other substantiation from anyone else as far as anything happening or occurring, that indeed we just had one person, the teacher, leaning over to get something off the table with the instructional aide in front of him.

Campbell admitted that Murdock told him that he (Murdock) described the incident to Nolt. Campbell did not ask Murdock to memorialize his observations in writing, nor did either party, at the hearing, ask Murdock to describe what he observed in the lounge.

#### Campbell's Recitation of Anne Mullen's (Mullen) Observation

Campbell was asked, by COE's attorney,

.... did any employee complain that there was some kind of activity that should be stopped related to this kind of sexual activity,... or the specific allegations?

Campbell answered:

A No one other than, ... it was Mr. Nolt and Anne Mullen had the incident that had occurred when they had walked in and there were two people in there. And Anne shared his concern.

Campbell's Rebuttal Testimony

After Ruacho admitted, in her testimony, that both the buttocks osculation and the "humping" incidents actually occurred, Campbell resumed the stand and testified that "fifteen plus" people were interviewed, but the investigation could only substantiate that (1) the "kiss my ass" statement was made, and (2) an osculating "gesture" was made toward Ruacho's buttocks, but it was not determined whether actual contact occurred. Although Campbell admitted that the employee conduct in the lounge was "inappropriate," the record is devoid of any indication as to whether Ruacho, Scott, or any other employee(s) were admonished regarding their behavior. In fact, the only evidence proffered regarding the administration's official reaction to the incident was to very publicly admonish Nolt and Allison for bringing it to its attention.

Campbell does not equate clothed buttocks osculation with the term "oral sex." He admits that it is not appropriate, but it does not constitute oral sex.

Interrogations of Staff by Nolt and Allison

Campbell testified that Ruacho told him that Nolt and Allison would interrogate, intimidate, and harass anyone who was seen leaving Campbell's office and, as a result, staff was hesitant to share issues with him (Campbell). Campbell personally observed Allison talking to people coming out of his (Campbell's) office and believed, from their demeanor, that they were talking about him. Campbell admitted that he did not speak to either Nolt or Allison about Ruacho's allegations.

In her testimony, Ruacho did not directly confirm Campbell's assertions. She said only that she told Campbell that employees in the lounge were uncomfortable and did not want to talk in front of Nolt because they were afraid their words would be twisted and somehow used against them.

She did say that Allison would ask her about meetings she had with Campbell, but this did not make her uncomfortable. She believes that she and Allison were and are friends, although she does not have the same attitude toward Nolt.

Murdock<sup>4</sup> stated that he (Allison), "... would inquire if he heard or seen me, you know, go in to Mr. Campbell's office."

#### Ruacho and Stallard

On or about October 7, 1999, Ruacho came to Campbell and claimed that Nolt, five weeks previously, called her a "pervert." At Campbell's direction, she prepared and gave him a two page handwritten memo describing this and other similar incidents. She said that because of Nolt's alleged comment, she was upset, confused, hurt and afraid. Campbell met with Nolt to discuss Ruacho's charge. Nolt denied making the statement.

At his meeting with Nolt, Campbell produced a nine-month old (January 13) memo from Steve Stallard (Stallard), a probation department employee, which described a rather benign negative run-in he had with Thomason, regarding whether a door should have been unlocked. Stallard complained that later the same day, Nolt (described by Stallard as a "teacher and union activist") was "bad mouthing" him to other staff. The rest of his complaints consisted of little more than conclusionary negative comments about Nolt. Nolt denied "bad mouthing" Stallard.

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<sup>4</sup> Murdock no longer works for COE and is presently a legal assistant with the Fresno County Public Defender's Office.

Based on these two incidents, Campbell gave Nolt a memo stating that he was in violation of COE's policy against workplace harassment. This negative memo was placed in his personnel file. This is not the memo that was the subject of the prior ALJ's unfair practice decision, HO-U-769-E.

### Jackson

An offer of proof was accepted that Willie Jackson (Jackson), a COE employee who delivers materials from COE site to site, was upset by Nolt's telling him that the administration was investigating his behavior. According to the COE, no such investigation was underway. However, there is no objective substantiation of this statement.

Nolt insisted that he did no more than discuss, on his own time and outside of the COE building, rumors he had heard about an impending administration investigation involving Jackson. He clearly labeled such information as rumors when he related them to Jackson. Nolt stated that his intent was to let Jackson know about the rumors, so that if there was any truth to them, he could properly defend himself.

### Nolt's Annual Evaluation

Nolt received a September 1999 to June 2000 evaluation, completed by his supervisor, Steve Sasaki (Sasaki), the Juvenile Hall coordinator (principal). In that evaluation he received two ratings for the category of "Climate, Working Relationships." One "X" was placed in the "meets expectations" box, and another was placed in the "below expectations" box. Sasaki was not asked why there were two ratings. In his narrative Sasaki said,

You maintain a good climate in your room for learning.  
However, at time [sic] your relationship with staff appears strained.

This second sentence was written in a manner that suggests it may have been added after the original sentence was written, in that it was not proportionally in the assigned space.

However, the document entered into evidence was not the original, so possible physical differences in the two notations were not readily apparent. If the notation were added at a later time, this could explain the two contradictory ratings.

### Murdock

Murdock, who worked as Allison's aide for the 1999-2001 school years, complained to Campbell that Allison told him that you had to be Greek to get ahead at COE. He said that Allison insisted that Lempesis and Steve Natsues (Natsues) were hired or treated differently because they were of Greek ancestry. He told Biggs that he heard Allison make this statement. Murdock also said that he asked Sasaki to reassign him from Allison's classroom for the 2001-2002 school year, because he did not like Allison's negative comments about Mehas, Lempesis, and Natsues.

Campbell admitted that he never discussed the matter with Allison, nor did he document the incident in any manner. He admitted that he knows of no other instances of Allison making racial or ethnic comments.

On March 10, 2000, Murdock wrote a letter stating that Lempesis refers to Nolt and Allison as "Frick and Frack" and that he also refers to them "as 'rednecks' who are prejudice [sic]." He completed his written statement with an assertion that neither Allison nor Nolt ever used a racial slur or epithet, and both were "very sensitive to the diversity in the classroom as well as with their fellow employees."

In his testimony, Murdock retracted his written statement, although he admitted that both he and Lempesis routinely use the term "Frick and Frack," as well as "Crackers," in referring to Nolt and Allison. In his retraction he stated that Allison made him write his original statement and sat next to him while he wrote it. Murdock said that Allison asked him to prepare this statement "during the time of something to do with the union. " Allison denies

dictating this statement, telling Murdock what to write, or sitting next to him when he wrote the statement. He also denies making any sort of racial statement(s) to Murdock.<sup>5</sup>

Christopher Takahiro Hudson (Hudson) currently teaches near Allison at Boot Camp. His ancestry is one-half Japanese-American and one-half British Isles. He states that he never heard Allison make any kind of racial remarks. He agreed that the population, staff and students, at Boot Camp are all fairly diverse.

Murdock noted that Allison's interactions with other teachers deteriorated during the time he was his aide and that at the time Allison left the Juvenile Hall, his relationship with the other teachers was hostile. He believes the change and resultant hostility had "something to do with union activity. . . To me I felt that was the main thing." Once Nolt and Allison left Juvenile Hall, Murdock believes "things [interpersonal relations] improved."

#### Charges and Counter Charges re Harassment

Campbell said that he became aware of internal disharmony surrounding Nolt and Allison because of complaints by Ruacho, Lempesis, Stallard , Neil Morrisseau (Morrisseau), Tom Read (Read) and Nick Hustedde (Hustedde), all of whom were either decertification leaders or closely aligned with such leaders.

#### Ruacho

Ruacho was at the forefront of much of COE's case against Nolt and Allison. She (1) was an admitted participant in the "buttocks osculation" and "humping" incidents, (2) told Campbell employees were afraid to talk in front of Nolt, (3) said Allison would ask her about meetings in Campbell's office, and (4) complained, five weeks after the alleged incident, that Nolt called her a pervert.

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<sup>5</sup> The record reflects that Murdock is of African-American descent and Allison's wife has a Hispanic heritage.

She was Lempesis' classroom aide and was openly antagonistic towards Nolt. The conclusions of law in PERB Decision No. HO-U-769-E ( see p. 48, no. 6, below), states that Ruacho's testimony "has been found to be tainted with bias against Nolt and not reliable."

Ruacho, when asked if Nolt and Allison had an effect on the atmosphere at Juvenile Hall, stated:

A     Yeah, I do have an opinion. I think that with all the union stuff that was going on, it ended up being a very negative effect on the people around them. I just think they had a real negative effect. Once the union thing got going on and it was just a big problem, people were guarded, people were afraid to say what they thought, just a lot of negativity.

She states the atmosphere in the lounge atmosphere improved after Nolt and Allison left.

#### Morrisseau

Morrisseau, a COE teacher for six years, had difficulties with Allison about "supporting school programs." He contends that whenever this subject came up, Allison got "pretty angry." He mentioned two incidents, in particular. The first occurred when he became upset with Allison because he (Allison) had not attended an employee's retirement party. Allison replied that he did not feel comfortable attending.

The second occurred when Morrisseau told Allison that he believed he was not supporting the school campaign to win WASC<sup>6</sup> accreditation. Allison took offense at Morrisseau's comments. However, in his 1998-99 evaluation, Allison was graded as "Exceeds Expectations" in the category of "Other Duties or Professional Responsibilities," with the following written comment appended, "The administration would like to thank you for your

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<sup>6</sup> WASC is an acronym for the Western Association of Schools and Colleges.

work on the WASC Accreditation." Allison did admit, however, that he backed off on school events the last year he was at Juvenile Hall because of the hostile environment.

Nolt filed a grievance against Morrisseau in 2000, alleging harassment. Morrisseau believes Nolt and Allison created the hostile environment.

Morrisseau admitted that he made negative comments about Nolt and Allison on one occasion in front of students and staff. He explained that he had merely responded to a classroom aide's question "about what was going on" by giving his viewpoint. He asserted that his response was intended "simply to give somebody information about what was happening with the decertification and the process."

Morrisseau resigned as an Association site representative at about the same time that the decertification petition was filed (February 7, 2000). In his resignation letter, Morrisseau cited the "mentioning [of] unsubstantiated accusations of sexual misconduct" and "major differences" with Nolt as the reasons for his action. Morrisseau stated that it was common knowledge that Nolt and Allison filed an unfair practice charge alleging that the COE was aiding and abetting the decertification effort.

### Lempesis

In the 1999-2000 school year Lempesis, a COE Juvenile Hall teacher, worked in Unit B, a self-contained classroom in which the teacher works with one student at a time, on a cell-release system. Once that student's instruction is completed, he is returned to his cell and the next student enters the classroom.

When Lempesis first began working at COE he spent one day with Nolt in his classroom. Lempesis reflected, "somewhere between the first six days and the first six weeks, the relationship deteriorated and I just quit talking to him." He said that Nolt told him he

believed that he (Lempesis) was getting special privileges because his family and Mehas' have known each other since 1949.

He contended he has no personal or social relationship with Mehas other than at occasional church functions. However, he admits socializing with Mehas' uncles, aunts, sister and father-in-law. Lempesis contended that, to his knowledge, he has never received any special treatment from Mehas. Lempesis has a one-year emergency teaching credential that has been renewed, on an annual basis, for each of the five years he has been at COE.

His relationship with Allison is the same as it is with Nolt. He does not like or speak to either one of them. He believes both of them think that he was hired to get rid of the union leadership.

Campbell testified that he was told by Lempesis that he was harassed, intimidated, and called names by Nolt, Allison and Ed Castanon (Castanon), a COE teacher. Lempesis testified only that he complained to Campbell that he felt hostility from Nolt and Allison.

Campbell spoke to Nolt and Allison about the matter. They both denied harassing Lempesis. Campbell obviously did not believe them. He told them "we just could not have harassment of another individual taking place."

Nolt and Allison asked Campbell to set up a meeting with Lempesis to clear the air, but this meeting never occurred. On June 14, 2000, Allison also filed a grievance against Lempesis for harassment and asked that he be transferred from Juvenile Hall.

Campbell admitted that he had no personal or direct knowledge of anything that supported a belief that either Nolt or Allison was harassing fellow employees.

#### Request for Incompatibility Documentation

In Nolt/Allison's first two relocation grievance meetings, CTA field representative Coss asked Campbell and Collins to provide whatever documentation COE had to support its

charges of incompatibility on the part of either man. On November 3, 2000, at a third level relocation grievance meeting with Biggs and Mehas, Coss again asked for this documentation. Each of the administrators said that they would look into the matter and all such material would be sent at a later time. No documentation was ever received.

#### Attempted Association Decertification

In the fall of 1999 several COE employees, i.e., Lempesis, Morrisseau, Read and Hustedde, started a movement to decertify the Association. The decertification petition was filed with PERB on February 7, 2000. The decertification petition was posted on COE's bulletin board on February 23, 2000.

#### Biggs' Address to Assembled Staff

In March 2000 shortly after the decertification petition was posted, Biggs addressed two mandatory general employee meeting(s), one at the Juvenile Hall, the other at Boot Camp. He told the assembled employees that accusations about oral and canine sex had been made by the "union's leadership" in an attempt to blackmail the administration into making CBA concessions. He said that the charges had been investigated and found to be baseless. There is no evidence that Ruacho, even though she knew the incidents had actually occurred, challenged the accuracy of Biggs' assertions.

Hudson attended one of these meetings and said that his fellow employees were

kind of stunned as a group that anybody would make those kind of allegations if they weren't true. My perception was, and a lot of people said they didn't want people like that to be representing us in negotiations.

When Campbell was asked why the administration would create such a public discussion of this matter, he variously answered:

... I have problems coming up with a reason why if that, indeed, was just a terrible rumor that someone wanted to throw out against our staff. ...

[and]

[t]here's a lot of people that have given their hearts and souls to a program that serves terribly disadvantaged kids, and to have something like that thrown out there is grossly unfair

[and]

It was one more instance of false allegations against our program. And I think our staff got to the point where they were sick and tired of the false allegations constantly trying to demean our program that we were pouring our professional lives into,. . .

When reminded that the question did not ask about the actions of the staff, but rather those of the administration, Campbell replied, ". . . it's our staff. We're all in the boat together, you know."

### Interpersonal Tensions

The decertification process obviously raised interpersonal tensions among the COE employees. Ruacho testified that "with all the union stuff that was going on, it ended up being [sic] a very negative effect on the people around them [Nolt and Allison]."

Campbell testified that he believed students were affected by the lack of good relations between Nolt and the other teachers. There was no evidence proffered as to how the students were adversely affected.

Mehas initially asserted that Nolt admitted he had difficulties getting along with other members of the staff or administration. After further questioning, he admitted that instead of Nolt telling him this directly, it came to him as comments from other members of the administration or staff.

In addition, there was an uncorroborated statement in Mehas' response to Allison's relocation grievance, which stated:

.. . Your incompatibility with fellow employees at the Juvenile Hall school were matters acknowledged by you at the time of your appeal....

Morrisseau related several times that there was a hostile environment for all the Juvenile Hall employees. He believed that Allison and Nolt were part of the reason the atmosphere was hostile. When asked whether the decertification movement played a part in the creation of a hostile environment, he answered,

. . . yes and no. You could separate the two issues in a lot of areas where they had nothing to do with the decertification.

Saski was aware of the decertification effort. He believed that it could have caused a strain among the employees, and that this strain could have taken the form of pro-decertification employees complaining about Allison.

Sasaki said that there seemed to be a conflict between Nolt and his fellow staff members, in addition to the decertification issue. He believed that Nolt was not talking to them, and they were not talking to him. Various members of the staff told Sasaki that their relationship with Nolt was "strained."<sup>7</sup> Sasaki indicated that Allison also had a strained relationship with other staff members, although he did not personally observe any disagreements. He based his comments on ". . . just the way that the teachers were acting among themselves, the atmosphere of the place."

Lempesis, when asked to describe his negative interactions with Allison that were separate and apart from his Association (decertification) activities, replied that he did not know

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<sup>7</sup> From the context of Sasaki's testimony, and from his use of the word "strained" in Nolt's 1999-2000 evaluation, it is held that the transcriber (Reporter's Transcript, Vol. IV, p. 162, line 17) erroneously substituted the word "strange" for "strained."

"if you could separate it." He said that aside from Association activities, the only contact he had with Nolt and Allison was in the hallways or the teachers' lounge and those "were not interactions. I just saw them and walked right by." He said the decertification was finally dropped "[b]ecause the union leadership said that they would resign if we stopped the decertification."

#### Lempesis' Decertification Efforts at Craycroft

Jean Najarian (Najarian), a COE teacher at the Craycroft School (Craycroft), said that in January 2000, she was visited at her school by Sasaki, her immediate supervisor, and Lempesis at the beginning of her break or lunch period (her students were about to leave the classroom when the two men arrived). Sasaki told her that Lempesis wanted to talk to her and Estela Flores (Flores), the other Craycroft teacher. Najarian was surprised by this visit, because Lempesis' teaching assignment would never require him to be at Craycroft.

At Sasaki's request, Najarian went to Flores' classroom to listen to Lempesis. Sasaki did not accompany them. Lempesis asked each of them to sign a decertification card. They had only heard about the decertification through information they received in the mail from petition supporters. When they told him that they had not made a decision yet, Lempesis said that Nolt and Allison were not taking care of the teachers and they were dishonest. He suggested that they contact either Shirley Rasmussen, another COE teacher, or Pam Coranado, who Najarian identified as another COE teacher who has since become an administrator. After Lempesis left (the conversation lasted approximately ten minutes), the two women felt confused and wondered why Lempesis had been there .

Najarian said that no computers were delivered to Craycroft on that day. On the following day, or shortly thereafter, Lempesis came back to Craycroft with Ed Carter (Carter), who installed several computers.

Sasaki denied telling Najarian to talk to Lempesis, although he admitted taking him with him on a trip to Craycroft to help unload computers. He also admitted that Lempesis has no computer knowledge or skills.

Lempesis denied ever having Sasaki direct the two teachers to talk to him about the decertification. In addition, he denied talking to any staff members during work hours about the possible decertification of the Association.

#### Nolt's Resignation of the Association Presidency

In May 2000, Nolt resigned his Association presidency in the middle of a two-year term. When asked why he resigned, he stated:

A Because there were a group of employees who wanted to decertify the union and were unhappy with the way - what I was doing in the union, and I felt that we need to have a vote and get behind somebody who would unite the union and keep it strong. I felt I could no longer do that with the division that we had going.

The last District bargaining proposal, before Nolt left office, consisted of a small raise, an employee discipline clause that did not include binding arbitration, and a substantial increase in the employees' cost of medical benefits. After he left the Association presidency, the COE added a 15 percent salary increase to its proposal, but the discipline-without-arbitration and medical cost increases proposals were retained.

The increased salary proposal was made when the parties were in mediation. The new employee negotiating team rejected the proposal, but agreed to let the bargaining unit members vote on the matter. Nolt continued to be against this proposal and made his opposition known to the other employees. However, the vote was in favor of COE's modified proposal, and a new CBA was signed and implemented.

Mehas testified that after the resignation of Nolt and Allison he has "enjoyed, with the current leadership, an excellent relationship."

#### Allison's Resignation of the Association Vice-Presidency

Allison resigned as the Association's vice-president on May 31, 2000. He said that he resigned because Morrisseau told him that he needed to leave office in order for the staff to support the Association. He believed that this opinion was apparently the "consensus among some of the teachers."

Even though he resigned as vice-president, he retained his negotiations chair position. At that point Allison said Morrisseau told him:

... that he and his compatriots would not be satisfied as long as I [Allison] was still on the negotiating team, because they had been told by downtown, meaning the County Office, that Dr. Mehas would not negotiate as long as I was on the team, ..

Morrisseau admitted that he advised Allison to resign from the negotiating team "because of the animosity that existed between the administration and Tim [Nolt] and Tim [Allison]."

Based on Morrisseau's statements, Allison resigned from the negotiating team. However, he continued to oppose the District's modified proposal, since, due to his distrust of Mehas, he considered the lack of available discipline appeal procedure dangerous. He believes that Mehas was aware of his continued opposition to COE's modified proposal.

#### Nolt's Relocation to Abbey

Nolt first learned of his impending transfer to Abbey on August 8, 2000, when Campbell called him and asked him to consider a new assignment at Abbey. He asked Nolt to go to the site and see what he thought of it and report back to him. Nolt went to Abbey and

then faxed Campbell, stating that he was pleased that he had been considered, but he had decided to decline the new assignment.

On August 15, 2000, Campbell replied by way of a memorandum, stating that he was proceeding with his "assignment" of Nolt to the Abbey site for the 2000-2001 school year. After he was relocated, Nolt's Juvenile Hall classroom assignment continued, unchanged, with a new teacher.

Prior to his move to Abbey, Nolt spent his entire 30-year COE career at Juvenile Hall, except for a one-year voluntary move to the County Jail program. Prior to his acceptance of the County Jail position, Nolt had been asked by Campbell to check out the site and report back to him. Nolt did so and agreed to take the position. As a part of this move, the two men agreed that Nolt would return to Juvenile Hall if the County Jail program closed. After the program closed a year later, Nolt returned to Juvenile Hall.

In late August 2000 Nolt began his new duties at Abbey. Campbell told Nolt he would be implementing a new program, and while Nolt would still be teaching in a self-contained classroom,<sup>8</sup> he would have students attempting to pass their GED<sup>9</sup> test, and he would help create something called Cyber High. This new computer class necessitated Nolt receiving additional technological training, which was given after he arrived at Abbey. This program was only in the formulation stage when Nolt was relocated.

Campbell described Cyber High as a "rather advanced computerized curriculum that would work well for students that need to be on a fast track." The program has not gone well

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<sup>8</sup> In a self-contained classroom assignment, the teacher is responsible for all subjects taught to one group of students. In a departmentalized classroom assignment, a teacher only covers specified academic subjects with several different groups of students.

<sup>9</sup> GED is an acronym for General Education Development.

due to difficulties in obtaining proper electronic hook-ups at Abbey. As of the date of the formal hearing, one school year after Nolt's relocation, it is still not fully operational.

Nolt had no students when he first arrived at Abbey. He received his first student about one month later. The mandated maximum number of students was eight, but at the end of the 2000-2001 school year he averaged only four or five.

### Desirability of Relocation to Abbey

#### COE's Position

Campbell did not consider Nolt's move to be negative in terms of working conditions, career, or promotional opportunities. He thought Abbey was as good or better a work location than Juvenile Hall because it was more modern, with windows and a courtyard. Nolt's teaching hours were the same and security was adequate. No one had ever complained about Abbey being in a high crime area or about theft. Nolt's new teaching load was lighter than at Juvenile Hall.

Dr. Lou Telesmanic (Telesmanic), the COE Director of Community Schools Program, stated that he viewed the Abbey site as slightly a more favorable and safer location than Juvenile Hall. His car had been damaged several times while parked at Juvenile Hall.

Campbell said that Allison told him that "he would not mind being assigned to Abbey." However, in his cross-examination, Campbell admitted this was only in the context of his (Allison) requesting a transfer from Boot Camp.

#### Nolt's Position

Nolt described many of the negative impacts of the Abbey move. Security at Abbey was well below the standard of Juvenile Hall. At the Hall, security had been provided by Probation Department correctional officers. At Abbey, there was only a private security guard, and even s/he was not available until April 6, 2001. Due to the lack of adequate security, Nolt

had to act as a policeman as well as a teacher until early April, when the security guard arrived. The Abbey students are the same cross-section of offenders as populate Juvenile Hall.

According to Nolt, Abbey is located in downtown Fresno, a dangerous, high-crime area. His hours at Juvenile Hall were 7:30 a.m. to 2:45 p.m. and while his Abbey hours were the same, he received a half-hour preparation period at the Hall. At Abbey, due to the dangerous neighborhood, he had to let the students in at 7:30 a.m. until April, when the security guard was employed. This caused him to lose his one-half hour preparation period. Once Nolt's Abbey classes ended at 12:15 p.m., he had to drive two miles to the House of Hope site to teach another class until 2:45 p.m.

At Juvenile Hall, Nolt had the opportunity to teach an extended year. The end of the regular COE school term would routinely be extended for approximately 25 days. Each regular classroom teacher could request, and receive, an assignment to teach these extra days. This extended assignment provided extra income at the teacher's pro rata daily rate. At Abbey, Nolt was not given an extended session.

At Juvenile Hall, Nolt had a self-contained classroom with six separate and distinct periods. At Abbey, he teaches GED courses to 17- and 18-year-olds, who have little in the way of prior educational training. He insisted that the Abbey program is totally different from his prior duties at Juvenile Hall.

### Summary

There was a considerable amount of evidence at the hearing devoted to whether or not the transfer to Abbey was a desirable move for Nolt. "Desirability" is a very subjective term, which makes it subject to a multiplicity of interpretations. However, a finding of unlawful motivation requires evidence that the employee is "harmed" by the employers' action. In this case we have an employee that neither requested nor wanted the relocation. He made this very

clear from the beginning and maintained this stance at the hearing. He insisted that it negatively affected his life in several ways: (1) decreased security, (2) an extended hiatus of his preparation period, (3) lowered net income, and (4) a less desirable student population.

It is determined that as Nolt did not want to be relocated, and supported this opinion with credible and objective reasoning, it is found that a reasonable person under the same circumstances would consider the relocation as adverse and constitute harm to him.

#### Allison's Relocation to Boot Camp

Allison spent his entire COE career<sup>10</sup> teaching in A Unit, a maximum security unit. This unit is limited to California Youth Authority (CYA) parole violators, "violence to persons" felons, and persons who have been convicted and sentenced to CYA. After he was relocated Allison's Juvenile Hall classroom assignment continued, unchanged, with a new teacher. He is an excellent teacher who has received "exceeds expectations" in all categories in every evaluation since his first year with COE. He was sent to Boot Camp at the beginning of the 2000-2001 school year.

#### Desirability of Relocation to Boot Camp

##### COE's Position

Campbell, Mehas, and Lempesis all believe that Allison's move from Juvenile Hall to Boot Camp was not negative. The COE administrators stated that Juvenile Hall is much more in need of facility maintenance and improvements than Boot Camp.

On direct examination Campbell testified that Allison himself admitted that he liked working at Boot Camp, and that he spoke of it as a positive environment.

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<sup>10</sup> Allison did teach one three-week summer session at the Boot Camp, when it housed less violent students.

### Allison's Position

At Juvenile Hall, Allison had eleven students and the assistance of an aide. At Boot Camp he has had as many as twenty students, and there is no aide available. However, a TAC, or uniformed enforcement officer, is present in the classroom at all times. At the time of the formal hearing he had seventeen students. Boot Camp has no library; Juvenile Hall has a good library, as well as a resource center.

On cross-examination, Campbell retracted his "Allison liked working at Boot Camp" statement by admitting that Allison merely said it was a good environment and they were doing good things there. In the same conversation, Allison requested a transfer to Abbey.

For eleven years at Juvenile Hall, Allison worked from 7:30 a.m. to 2:45 p.m. His Boot Camp hours are 10:30 a.m. to 5:45 p.m., which causes him to return home at approximately 6:30 p.m. As a result, he has less time with his family, and especially (1) his new-born daughter is awake for a very short period of time after he arrives at home, (2) he cannot act as an assistant coach for his youngest son's Little League team, and (3) he misses his middle son's football games. In addition, he has been unable to participate in Association activities since his transfer, as its meetings are held at 4:00 p.m.

His drive from home to Juvenile Hall was approximately 10 miles each way. His drive to Boot Camp is 29 miles each way. His round trip driving time has increased by about 35 minutes per day, and the extra time in the car bothers the two ruptured discs in his lower back. This has resulted in a directive from his neurologist to see a physical therapist.

At Boot Camp, the District has to pay substitute teachers \$15 more per day than at other sites in order to entice them to work there. This higher rate affects Allison, because he has exceeded his allocated sick days. He must, therefore, pay \$15 more per day for his substitute differential. He has exceeded his sick leave allotment because of the effect the extra driving

has on his back. Even though he receives an annual stipend for the extra mileage, Allison still loses money because he must now drive an extra 6,000 miles per year. These extra miles are not adequately compensated by the \$780 stipend, which computes to approximately 13 cents per mile.

At Juvenile Hall, Allison worked supplemental hours for ten months of the year, earning an extra \$10,000 in salary. This extra income is not available at Abbey, however, on May 1, 2001, he started to receive a supplemental assignment of three-quarters of an hour, to be worked prior to each regular workday. However, this still results in considerably fewer hours (and dollars) than he enjoyed at Juvenile Hall. Campbell stated that supplemental work on Saturday is available to Allison.

Immediately upon his relocation from Juvenile Hall, Allison's supplemental hours were given to Morrisseau. As the school term wore on, they were distributed among various teachers. There was no evidence as to how long Morrisseau benefited from those extra hours, or if he ultimately retained some of them.

Allison complained of a series of difficulties with the physical plant at Boot Camp, stating that it is a much less comfortable environment than Juvenile Hall.

Campbell insisted that COE is attempting to cure these difficulties and is currently remodeling Allison's classroom. Sasaki stated that the remodeling has been completed.

### Summary

The earlier findings regarding the subjectivity of the term "desirable," and the necessity of proving "harm," are also applicable here. Allison similarly clearly and consistently stated that he neither requested nor wanted the relocation. It negatively affected his life in several ways: (1) lowered net income, (2) lessened his ability to meet his family responsibilities,

(3) increased his portal-to-portal work time, (4) diminished his access to educational resources, and (5) exacerbated some existing health sensitivities.

It is determined that as Allison did not want to be relocated, and supported this opinion with credible and objective reasons, it is found that a reasonable person under the same circumstances would consider the relocation as adverse and constitute harm to him.

#### COE's Explanation for Employee Moves

##### Nolt

##### Notification Letter

In the letter informing him of his new duties, Campbell told Nolt that his skills and ability would make him well-suited for the new assignment. He specifically stated that (1) Nolt's experience with educational technology, (2) the fact that he had started a new program before, and (3) his ability to handle the type of students who would be at Abbey were important factors in the decision to move him.

Campbell's finished his letter to Nolt with the following paragraph:

In addition to the above, your constant focus and preoccupation on negative issues and your negative interactions with staff has created an unpleasant and stressful environment for other members of the school staff and the administration at the Court Schools. This incompatibility present a hindrance to programming and program improvement and therefore impacts services to students. Therefore, I am proceeding with your assignment to the new classroom. (See FCOE/CTA Agreement, Article 3.<sup>11</sup>) [Emphasis added.]

Campbell's letter cited no examples of such "hindrances" or "impacts." Nor was there any evidence proffered at the hearing on either these topics.

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<sup>11</sup> CBA Article 3 is entitled "Employer Rights."

### Relocation Grievance Meeting

Although Campbell insisted that CBA Article 9.3 (see pp. 40-41, below) regarding grounds for involuntary transfers did not apply, his reasons for Nolt's move closely paralleled language found in that article. Stovall, who attended Nolt's relocation grievance with Campbell, recalled that reasoning for the move "was more of a statement that it was basically due to incompatibility with other members of the work site."

### Campbell's Relocation Contentions

Campbell testified that the Abbey site position required (1) self-contained classroom experience, (2) experience in starting a new program, and (3) proficiency in the use of educational technology.

#### Self-Contained Classroom Experience

Campbell admitted that, in the past, he has switched teachers from departmentalized to self-contained programs, as well as from self-contained to departmentalized programs.

#### New Program Experience

Campbell cited Nolt's experience in setting up a new program at the County Jail in 1995 or 1996 in support of his relocation decision. Campbell explained that special skills were necessary to start up a new program. However, when asked if the only way a teacher would get experience in initiating a new program is to actually initiate a new program, Campbell replied, "[t]hat's an important part of it." He did admit, however, that he had previously directed Carter Johnson, a teacher with no initiating programmatic experience, to start up a new COE program.

### Proficiency in Use of Educational Technology

Campbell defined sufficient "educational technology" as the

ability to operate technology-related equipment, including a computer, a VCR, and related software and applications to those, and also the ability to use the Internet and on-line resources and such.

Campbell admitted he did not know to what extent many of the teachers under his direction could use a computer. He did say that he is "somewhat familiar" with how the teachers use technology in their classrooms, and because of that, he has "some idea of their abilities." He bases this familiarity both on observations and conversations with Carter (COE's computer resource person), and the number and type of requests for technology received from the various teachers. Campbell acknowledged that certificated employees must take some computer courses to get a teaching credential. He also admitted that one of Carter's duties is to provide computer training for the teachers, with an emphasis on educational technology.

In addition, in a COE newsletter, the Digital High School Bytes (Volume 8), the staff is told that training and remuneration will be provided for computer training. The newsletter goes on to state:

By participating in appropriate inservice training, all staff members will acquire a working knowledge of word processing, e-mail utilization, internet, and presentation software applications.

Nolt testified that his technological expertise consisted of little more than knowing how to (1) use a computer, (2) teach someone to use a computer, (3) run a VCR, and (4) use the VCR as an educational tool. However, Campbell said that Nolt taught him how to use a computerized spreadsheet and database.

### Other Employees' Failure to Meet Manifested Criteria

Campbell discussed the abilities of seventeen (17) COE teachers other than Nolt. He concluded that only four of them had self-contained classroom experience, only three had the requisite educational technological skills, and none of them had ever initiated a new COE program. Therefore, he testified that Nolt was the only COE teacher that could be assigned to Abbey.

### Nolt's Perceived Incompatibility with Other Employees

Campbell said that while incompatibility or disharmony was a factor in his decision to relocate Nolt, it was not the critical factor, and he would have initiated the move even without such incompatibility.

### Possible Disciplinary Reason for Relocation

Pietro was asked if he knew whether Biggs had a discussion with Mehas about the relocation of Nolt/Allison. He answered that he assumed that Biggs had such a discussion, because "only the superintendent can dole out discipline."

His response generated the following exchange between charging party's attorney and Pietro:

Q [by CTA Attorney Kemp] Dr. Pietro, in your discussions with Mr. Campbell and Mr. Biggs about this matter, prior to it coming across your desk, was there anything that they said to you in those discussions that led you to believe that this matter was disciplinary?

A Again, it was being handled by our legal office. I was informed that it was happening, and my recollection is they reviewed the contract and determined they were going to do it based on the incompatibility clause, is my recollection. Again, I didn't -I didn't write the letter, I don't - you know, I think Ken and Mr. - you know, our legal office dealt with that and I got a copy of it after it was done. So I don't really know the specific details, I think that was more Campbell and our Cary Gernhalt

(phonetic), who's our lawyer, was handling that, and they wrote it all up and did what they did.

Pietro admitted that although it was not common for COE's legal department to handle employee relocations, it was common for it to be involved in any matter concerning Nolt and Allison.

### Allison

#### Relocation Grievance Meeting

At Allison's grievance meeting regarding his relocation to Boot Camp, Campbell relied on both incompatibility with other employees and programmatic needs as his justification for the move.

#### Campbell's Relocation Contentions

He insisted that the Boot Camp position needed a teacher with experience with a (1) self-contained classroom and (2) a tough student population.<sup>12</sup> He admitted that Nolt "possibly" could have been given the Boot Camp position, but he needed Nolt's technological background at Abbey.

#### Other Employees' Failure to Meet Manifested Criteria

Campbell discussed the abilities of twelve (12) COE teachers other than Allison. He concluded that eight of them had violent student population experience, but only three of them had any recent self-contained classroom experience. One of these three, Lempesis, taught only one student at a time in a cell pull-out program. With regard to the remaining two, Hilma Mitchell (Mitchell) and Mullen, he decided not to assign either of them, adding that Mitchell

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<sup>12</sup> Delta barracks at Boot Camp was converted to high-risk students towards the end of the 1999-2000 school year. There is a TAC officer in each classroom while it is in use. In Juvenile Hall's A Unit, the classroom is integrated with the living unit. Ten feet away from the classroom there is a counselor station with three staff members. Therefore, a TAC officer is not necessary.

has taught a departmentalized program the past few years. He also stated that Allison's ability to "integrate across the curriculum" is better than either Mitchell or Mullen.

#### Tough Student Management Skills

When asked what was the effect of replacing an effective long-term teacher, like Allison, with first-year teacher in A Unit (a unit that housed a violent student population), Campbell replied there was no impact. When asked if replacing Allison with a first-year teacher at Boot Camp would also have no impact, he disagreed, stating that the impact would be a negative one. Campbell explained that the difference in his answers was because the teacher that replaced Allison in Juvenile Hall A Unit had a business background and had student-taught in a general school (non-correctional system) population, whereas a replacement teacher at Boot Camp would not have these assets.

When asked if the Delta barracks students were considered a harder population than his students, Hudson, another Boot Camp teacher, replied,

They're not really much different than the GED special needs guys that I have. You know, I think they've been—they're in for probably more serious crimes, but because they know it's their last chance they don't act up a lot, because they know this is it. If they blow it here, they're going to CYA for a length of time, however long their sentence is.

#### Allison's Perceived Incompatibility with Others

With regard to Allison's alleged incompatibility difficulties, Campbell mentioned his part in the investigation of the (Ruacho) buttock's osculation and humping incidents. However, Allison's total contact with those incidents consisted of merely (1) admitting to Campbell that he had heard about them, and (2) telling Pietro that something needed to be done about them.

Campbell admitted that incompatibility was an issue in the Allison move, but he insisted that his teaching skills were the primary reason for his selection. Campbell insisted that he would have relocated Allison even if there had been no incompatibility factor.

Campbell said that a new teacher at Boot Camp was necessary due to Tim Riche's (the previous teacher) resignation and the opening of the new Delta barracks. The expansion of the new Boot Camp barracks was important to the COE, because these were the first additional beds in COE's juvenile system in twenty-five years.

### Relevant CBA Provisions

CBA Article 3, Employer Rights, in pertinent part, states:

3.1 Except as otherwise provided in this agreement, it is understood and agreed that the Employer retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in, but not limited to, those duties and powers is the exclusive right to : . . . direct the work of its employees; . . . determine staffing patterns;... In addition, the Employer retains the right to hire, classify, assign, evaluate, promote and terminate employees.

3.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Employer,. . . shall be limited only by the specific and express terms of this Agreement,...

CBA Article 9, in pertinent part, states:

#### 9.1 Transfers

A transfer is any action by the Employer which results in the movement of a Unit Member from the position held immediately preceding such action.

a. A transfer may be Unit Member-initiated (voluntary) or Employer-initiated (involuntary).

#### 9.2 Voluntary Transfers

c. All requests for voluntary transfers shall be considered on the basis of three criteria:

1. Credentials to perform the required services,
2. Office-wide seniority,
3. Unique, individual merits

### 9.3 Involuntary Transfers [<sup>13</sup>]

Involuntary transfers shall be based exclusively on the legitimate, educational related needs of the Office. Involuntary transfers shall not be made arbitrarily, capriciously, or without a basis in educational need.

a. Involuntary transfers may be made for the following reasons:

1. Resignations received after July 1.
2. Fluctuations in pupil enrollment.
3. Placement of personnel commencing or returning from leaves.
4. Improvement of instructional program, operations of the organization, and/or staffing requirements such as teaching experience, specialized skills and talents, male-female and ethnic balances.
5. Opening and closing of schools, classes or programs.
6. Incompatibility and/or improvement of performance.

b. Unit members shall be involuntarily transferred no more than one time every two years.

c. When an involuntary transfer is necessary to fill a vacancy due to conditions noted in 9.3(a), the selection will be based on the following criteria:

1. Proper credential.
2. Major or minor fields of study.
3. Instructional program needs which require specialized talents.

When two or more Unit Members meet the criteria, the Unit Member with the least seniority shall be selected.

d. A Unit Member to be transferred involuntarily due to 9.3 (a) 5., shall be given a preference from a list of vacancies and the Employer shall honor such requests on the basis of office wide seniority and the required credentials.

e. No Unit Member shall be involuntarily transferred to fill a vacancy if there is a qualified Unit Member who applies for the vacant position.

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<sup>13</sup> Subsection 9.3 has been the CBA since at least 1990.

f. A unit Member who is to be involuntarily transferred shall be given the reason, in writing, for the impending transfer as soon as possible, but no later than July 15 except when the reasons are those listed in 9.3 a (1), (2), (3) of this Article. Transfers for reasons of incompatibility or improvement of performance shall not occur unless the evaluation processes have been followed and employee/supervisor conferences have been held in an attempt to resolve the problems.

g. Unit Members transferred involuntarily after September 1, shall be given reasonable release time with a substitute provided and appropriate assistance provided for the transition.

An involuntary transfer shall not result in the loss of compensation, seniority, or any fringe benefit to the Unit Member transferred.

#### 9.4 Announcement of Vacancies

The Employer shall post in the County Schools Office a list of all known vacancies. . . . For the purposes of this policy, a "vacancy" is defined as a position declared vacant....

e. All Unit Members meeting the job specifications as announced, who complete an application, shall be considered for the position; . . .

9.8 Each vacancy announcement to existing personnel shall designate the vacancy as one with either a conventional school year calendar position or as a year-round school position. Each announcement assigned to a year-round school shall, to the extent possible, indicate the starting and ending dates for the position.

9.9 Employees wishing to transfer from a school operating on a conventional school year schedule to a school operating on a year-round schedule, or from a school operating on a year-round schedule to one operating on a conventional school year schedule, shall apply for open positions under the procedures . . . .

9.10 Each new employee shall be informed, . . . whether the position being offered is at a school following a conventional school year calendar, or at a school that operates year-round. Each new employee who is offered a position at a school that operates year-round and by tracks shall be assigned to a specific track as soon as practicable after the track assignment is known. [Emphasis added.]

### Nolt's Contentions re COE's Failure to Follow Section 9.3

Nolt contends that he received no (1) preference from a list of vacancies, (2) reason in writing prior to July 15, nor (3) an evaluation process or a sufficiently precise supervisory conference(s).

In addition, he contends even though Nadine Ramos (Ramos) volunteered for the Abbey position she was not accepted. Ramos was less senior than Nolt. Campbell admitted that Ramos initially requested a move to Abbey, but she retracted it the next day. On the third day she reinstated it, but eventually said that she did not want to go to there. In addition, according to Campbell, she did not have the technological skills, she had no self-contained experience, and she had not started a new program.

### COE's Contentions re Inapplicability of CBA Article 9

Campbell has been in charge of the court and community schools for fifteen years. In this position he has assigned and reassigned approximately 20 to 25 teachers without following the transfer procedures set forth in CBA Article 9. During these fifteen years, no one has objected to their new assignments by claiming that the CBA transfer procedures should have been followed. However, he admitted there were no "involuntary transfers" for non-disciplinary reasons during that time.

Campbell described his procedures for filling positions. He said that if there were vacancies after reassignments were completed, they were filled with transferees or new hires. New positions were advertised as generic teacher positions. On all of COE's employment advertisements, the location is shown as merely the COE's court and community schools, with no specific location included.

The special education division, headed by Debra Davis (D. Davis), is also subject to the provisions of CBA Article 9. She supervises thirty-three certificated employees and relocates

them in the same manner as Campbell. She routinely moves them from one site to another without following the CBA transfer policy. She has never posted a relocation, nor has she ever used seniority as a basis for a relocation decision. The Association has never challenged her authority in this regard. However, she has never had an employee oppose a potential relocation to the extent that the eventual move could be classified as involuntary. Even if the involved employee initially declined to move, s/he eventually acquiesced.

Both Campbell and D. Davis insisted that a transfer is only a move from one discipline or internal division to another. An example of this interpretation would be an employee move from a speech pathologist position to that of a teacher, or vice-versa.

Pietro has been with COE for seven years, but was previously an administrator and a negotiations' spokesperson in a school district in Reedley, California. He has over fifteen years experience in public school employment negotiations. When he first arrived at the COE, he was surprised by the manner in which employees were relocated from site to site with no posting or adherence to the CBA's transfer provisions. He asked about this unusual situation and was told that they had been doing it that way for years.

#### Association's Contentions re Applicability of CBA Article 9

Nolt said that during his thirteen years as Association president he was never informed that a teacher had been moved involuntarily from one site to another while the teacher's program was ongoing. Allison said that, based on his experience, the Association would not know if a teacher was opposed to his/her relocation unless s/he specifically brought the matter to it. Even if the Association received a copy of a reassignment/transfer document, it would not know if it had been created with or without the teacher's consent. In Allison's eleven years at Juvenile Hall, no court school teacher left the Juvenile Hall against his/her will. He is aware of some employees being moved from court to community schools, but each of these

employees were part-time teachers who were willing to move in order to become full-time employees.

William Davis (W. Davis), a CTA professional labor relations representative and negotiations specialist, has negotiated teacher contracts in three states for almost 30 years, the last twenty in California. He reviewed CBA Article 9 and testified that, in the educational field, the movement of a certificated employee from one site to another is considered a transfer, while a change of duties at the same site is considered a reassignment. W. Davis states that a position is the teaching job that you hold, i.e., if there were four first grade teachers, there would be four separate and distinct positions.

#### COE's Rebuttal to W. Davis' Testimony

COE's representative offered a number of declarations from administrators of nearby County Offices of Education, stating that their CBAs and practices were similar to those of the Fresno COE. The undersigned declined to admit the exhibit as CBA provisions, interpretations and past practices are unique to each employer. This was reinforced when an examination of the proffered CBAs showed that each of their CBAs, unlike that of the Fresno COE, clearly set forth the distinction between a transfer and a reassignment. The subject CBAs were offered to rebut W. Davis' testimony.

#### Summary

However, the parties, in their CBA, often use the term "position" in the same manner it is used in the labor relations field, i.e., each individual teacher occupies a separate "position." For example, in CBA section 9.4, a "vacancy" is defined as a position declared vacant. In Exhibit G, an exemplar of a COE notice of a vacancy for a court/community school teacher, the applicant is directed to "submit one application per position." CBA section 9.4.e states that employees "shall be considered for the position." CBA section 9.8 states that vacancy

announcements are required to designate the vacancy as one with either a conventional or year-round school position. CBA section 9.9 states that employees wishing to effect a specified transfer "shall apply for open positions." CBA section 9.10 states that new employees shall be informed whether the position being offered is at a year-round or conventional school and an employee "who is offered a position" at a year-round school shall be assigned to a specific track as soon as practicable.

PERB Decision No. HO-U-769-E

On September 14, 2000, PERB ALJ Gary M. Gallery issued a proposed decision in Fresno County Office Schools Educator's Association, CTA/NEA v. Fresno County Office of Education, Case No. SA-CE-1925-E, which, when it was not appealed, became final and binding on the parties as PERB Decision No. HO-U-769-E. In that decision, he made various findings of fact and conclusions of law. The findings and conclusions that are pertinent to this case, are as follows:

Findings of Fact

Judge Gallery generally found that Nolt, in a duly called Association meeting, discussed both Mehas' personal relationship with a new employee, and the potential negative repercussions if it became necessary for the Association to represent this employee for improper behavior. Nolt read from a newspaper article describing behavior problems that this employee had experienced in the past.

1. Pages 7 and 8 of HO-U-769-E include the following findings of fact:

Hustedde attended the [Association] meeting to speak on aiding the [Fresno County] Office [of Education] to get more funding. After the meeting he spoke with co-employees about Mehas' actions. Later, Collins contacted him by telephone and asked if he would put into writing what he had heard. Within a few days, Hustedde signed a statement prepared by Jan Biggs (Biggs) administrative advisor to Mehas. [Fn. omitted; emphasis added.]

2. Page 10 of HO-U-769-E includes the following finding of fact:

Hustedde admittedly did not respect Nolt, thought him a negative person and expressed frustration in responding to that negativism by proposing a slate of officers to replace the incumbents. Then he learned that the Association's bylaws were such that the only people who could run for office were the incumbents. He further evidenced frustration in that an announced election was not observed by him. Finally, a request to rewrite the bylaws was forestalled by the incumbents, and Hustedde was part of a decertification effort. These revelations reflect much bias by Hustedde, which, when coupled with his vague assertions about what Nolt did say, do not support findings that Nolt did say those things about Mehas attributed to him in the letter of reprimand, save perhaps that Natsues was Mehas' cousin....

3. Page 14 of HO-U-769-E includes the following finding of fact:

Mehas has no respect for Nolt and does not trust him. There have been other instances, including prior to March 1999, where Nolt acted "improperly" that caused Mehas to "look very, very carefully when allegations were made." Mehas was unable to discern if Nolt's position in the meetings in question were as union president or as an individual.

#### Conclusions of Law

1. Page 20 of HO-U-769-E includes the following conclusions of law:

The letter of reprimand was issued to Nolt for alleged expressions he made at a union meeting. He was accused of suggesting Natsues' hiring was an embarrassment, and likely to result in unnecessary expense for the union. Further, he was accused of stating that Natsues' teaching credential was reinstated only after Mehas agreed to sign a special document on Natsues' behalf, and that Natsues was Mehas' cousin.

This reprimand was based solely on the observation of Hustedde, a witness clearly biased against Nolt and whose testimony was extremely vague about what Nolt had actually said at the union meeting. He testified that he thought Nolt had said Natsues was Mehas "something like cousin." Against this very vague testimony was the absolute denial by Nolt, and the corroboration by Prince and Allison that Nolt did not say anything about Natsues being Mehas' cousin.

Along with this evidence, is the nature of the investigation conducted by the Office [COE]. Hustedde did not go to the administration to complain about the alleged statements by Nolt, rather the administration, in the person of Collins, came to Hustedde and requested him to make a statement. Although he agreed, Hustedde did not write down a statement, but rather signed off on one prepared by the administration.

Hustedde's further description of the nature of Nolt's alleged remarks as maybe joking, or sarcastic in a setting of a union meeting where the atmosphere was "chummy" removes the alleged comments from the denigration of the superintendent conveyed in the letter of reprimand and Mehas' own reaction reflected in his testimony at the hearing.

The fact that what Nolt related was reported in the Fresno Bee six years before weakens the "defamatory" nature of the alleged statements. [Emphasis added.]

2. Page 22 of HO-U-769-E includes the following conclusions of law:

Notably, Collins was not called to testify at the hearing. Without explanation for his absence, the Office presents no evidence of the extent of his investigation before issuing the letter of reprimand regarding Nolt's alleged statement. Inadequate justification for its action raises an inference of unlawful motivation for the employer's action. [Citation.]

The letter of reprimand suggested that Nolt was telling teachers to not file child abuse reports. Once again, the evidence suggests the accusation was unfounded.

3. Page 23 of HO-U-769-E includes the following conclusions of law:

.. . Nolt was reprimanded for telling teachers to not file reports when the underlying evidence, such as it is, does not support such an accusation. [Emphasis added.]

4. Pages 23-24 of HO-U-769-E include the following conclusions of law:

The letter of reprimand asserted that Nolt's alleged advice to not file reports "clearly advocates a violation of law," and "is incomprehensible." It raised "serious questions" about Nolt's honesty and fitness. Yet, despite the alleged seriousness of Nolt's alleged statement, Campbell did not ascertain if, in fact, any teacher had been advised by Nolt to not file the report. He

did not issue any memo to the teaching staff to overcome such alleged direction by Nolt.

Finally, Mehas contended the investigators, meaning Collins and Campbell, had in fact ascertained that teachers had been told by Nolt not to file the reports. This is directly contrary to Campbell's testimony.

Underlying this strong inference that the reprimand for Nolt's alleged statements was unfounded is the evident hostility Mehas has for Nolt. As a part of his justification for the letter, Mehas contended that Nolt has said that Mehas had paid money to enable Natsues to regain his credential. Such an accusation did not appear in the letter of reprimand. Had the Office felt secure in making that accusation, it would appear to have been a part of the letter or reprimand. Save for Ruacho's testimony there is no evidence that Nolt ever made such a suggestion to anyone. The Office must not have believed Ruacho's version of what Nolt said, as it did not include that accusation in the letter of reprimand. [Emphasis added.]

5. Page 24 of HO-U-769-E includes the following conclusion of law:

The evident distaste manifested by Mehas against Nolt, along with Mehas' failure to distinguish between Nolt's activities as president of the union and his alleged non-union status, the total absence of any connection between Nolt's alleged conduct and his role as a teacher, the questionable nature of the investigation undertaken by the employer, the very vague testimony of Hustedde, the only Office witness of the February 25 incident, the contradiction between the principal witnesses, Campbell and Sasaki, to the March 3 incident justifies an inference of unlawful motivation. [Fn. omitted.]

6. Page 25 of HO-U-769-E includes the following conclusion of law:

The Office attacks Nolt's credibility based upon his denial of having made remarks in and out of the meeting concerning Natsues and Mehas. The Office relies on the testimony of Morrisseau, Ruacho and Read. Their testimony has been found to be tainted with bias against Nolt and not reliable.... [Emphasis added.]

7. Page 26 of HO-U-769-E includes the following conclusion of law:

Mehas testified that the investigators, Collins and Campbell, had told him they had talked to teachers and confirmed Nolt had urged them to not file reports. This is directly contrary to Campbell's testimony.

It is concluded that the letter of reprimand was issued to Nolt in retaliation for his activities on behalf of the Association.

### Credibility Findings

#### Campbell

Mr. Campbell is an intelligent, personable and responsible gentleman. Unfortunately, much of his testimony is contradicted by the weight of the evidence produced at the hearing.

For example:

1. The most glaring of these contradictions concerns the buttocks osculation and "humping" incidents, and the resultant "investigation." These contradictions, set forth in the same order described supra, are as follows:

a. Initially, there is no evidence as to whether the term, "oral and canine sex" was first used by Holt or by Thomason. Secondly, the only reference to the use of this term that can be imputed to Nolt is Campbell's testimony that Nolt used this term in response to Campbell's directive to explain what he knew of the incidents. There was no evidence that Nolt ever used the term, other than at his meeting with Campbell. Yet, Campbell and COE continued to refer to these incidents by the use of these obviously overstated terms.

b. Campbell's insistence that Nolt was "spreading unsubstantiated rumors" regarding the buttocks osculation and "humping" incidents is totally without evidentiary support from the record. There was not one shred of evidence that Nolt ever told any one about the incidents, other than Campbell and Biggs, and then only in response to their demand.

Allison's only instance of "spreading" rumors concerned his comment to Pietro. Neither of these two instances justifies a negative response of any kind.

c. Campbell insisted that his "extensive" investigation followed all leads and resulted in a finding that the allegations were "totally false." This testimony was directly contradicted by the testimony of Ruacho, Gonzalez, and Sierra, as well as Campbell's own testimony with regard to statements that were made to him by Murdock and Mullen. An analysis of the evidence produced at the hearing leads to an inescapable conclusion that, in direct contradiction to Campbell's assertions, the allegations were actually "totally true."

d. Campbell's testimony that the events never occurred was most glaringly found to be without credibility when contrasted with the testimony of Ruacho, the person who was the recipient of the osculation and "humping." The entire question of the scope of Campbell and Biggs' investigation was rendered moot, in large part, by Ruacho's testimony. She admitted that both incidents, although in jest, did actually occur.

e. Campbell's failure to follow up on Murdock's comments regarding his observation of the "humping" incident undermines his assertion of an in-depth investigation. At the very least, Campbell should have verbally questioned Murdock, and more reasonably, requested a written statement from him. The failure to elicit this additional information strongly suggests that the "investigation" was not to learn the truth about the incidents, but to provide support for negative personnel actions against Nolt and Allison.

f. Campbell and Bigg's failure to follow up on Mullen's comments is further support for finding the investigation was improperly motivated. (See preceding no. 1.e.)

g. Even after hearing Ruacho's testimony, Campbell continued to insist that the incidents had not occurred because there was no proof of actual contact. This assertion

provides strong evidence in support of a finding of a lack of credibility of Campbell's testimony.

In summation, Campbell's testimony with regard to the buttocks osculation and "humping" incidents and the resultant "investigation," supports a finding of a lack of credibility.

2. Campbell's testimony, that Ruacho told him Nolt and Allison would "interrogate, intimidate and harass" anyone seen leaving his office, was unsupported by Ruacho's testimony. She said that (1) employees in the lounge were afraid to talk to Nolt because he would twist their words and use them against them, and (2) Allison asked her about her conversation with Campbell, but this did not make her uncomfortable. This deliberate misrepresentation of Ruacho's statement supports a finding of a lack of credibility of Campbell's testimony.

3. Campbell unquestioningly accepted Ruacho's five-week old complaint that Nolt called her a pervert. He obviously knew Ruacho was antagonistic towards Nolt and aligned with Lempeis. This blind acceptance of her complaint, his disbelief of Nolt's denial, and the use of her complaint to support the placing of a negative letter in Nolt's personnel file, supports a finding of a lack of credibility of Campbell's testimony.

4. Campbell unquestioningly accepted Stallard's complaint that documented no more than an uncorroborated assertion that Nolt was "bad mouthing" him to anonymous staff members. This blind acceptance of Stallard's complaint, especially in light of his identification of Nolt as a "union activist," and the use of the complaint to place a negative letter in Nolt's personnel file, also supports a finding of a lack of credibility of Campbell's testimony.

5. Nolt's alleged impropriety with regard to Jackson is based on COE's unsubstantiated assertion that there was no contemporaneous investigation into Jackson's behavior. Given the biases against Nolt and Allison manifested at the hearing, this assertion cannot be fully credited. If there was a ongoing investigation of Jackson at the time of Nolt's comments, he was doing no more than any good union leader would, attempting to warn a fellow employee of a potential harm to his employment status. However, without additional objective documentation regarding the existence of such an investigation, this testimony does not provide support for a lack of credibility of Campbell's testimony.

6. Campbell's acceptance of the accuracy of Murdock's assertion that Allison told him he believed employees of Greek ancestry were being favored at COE, without discussing the matter with Allison, supports a finding of a lack of credibility of Campbell's testimony.

7. Campbell's characterization of Murdock's allegation that Allison was accusing Mehas of favoring employees of Greek ancestry as a racial or ethnic impropriety was unsubstantiated, even if the original allegations were true. The evidence clearly shows that neither Allison nor Nolt ever made disparaging remarks about Greeks, or persons of Greek ancestry, but rather they complained of Mehas' alleged favoritism towards a particular group of employees. An allegation that complained of Mehas' favoritism towards Optimists Club members would be analogous to Murdock's complaint. Campbell's interpretation of the complaint which interjected an anti-ethnic/diversity taint, supports a finding of a lack of credibility of Campbell's testimony.

8. Campbell deems Murdock sufficiently reliable to credit his charges of Allison's (1) making ethnic remarks, (2) coercing him into writing supportive statements, and (3) interrogating him after he left Campbell's office. However, Murdock's account of having seen a male employee "humping" Ruacho was ignored, or at the very least, discounted. This

inconsistency with regard to Murdock's veracity supports a finding of a lack of credibility of Campbell's testimony.

9. Campbell testified that Lempesis said he was harassed, intimidated and called names by Nolt, Allison and Castanon. Lempesis' testimony did not corroborate Campbell's testimony; he merely said he felt hostility from Nolt and Allison. Campbell chastised Nolt and Allison when he told them, "we just could not have harassment of another individual taking place." In view of the two men's denial, and in the absence of any independent evidence supporting Lempesis' charge, this incident supports a finding of a lack of credibility of Campbell's testimony.

10. Campbell's failure to cause a meeting with Lempesis, Nolt and Allison to occur, even after the two Association officials requested it, manifests an intent to perpetuate the disharmony, rather than an interest in bringing it to a halt. Admittedly, it is unlikely that such a meeting would have been very fruitful, especially in the absence of a strong directive from Campbell to all three parties to cease their bickering. However, Campbell's failure to create such a meeting supports a finding of lack of credibility in his testimony with regard to the cause of the employee disharmony.

11. Campbell, Collins, and Mehas' failure to provide the "incompatibility documentation" requested by Coss at the relocation grievance meetings suggests both a failure to respond to legitimate inquiries of their employees and a reciprocal interest in perpetuating the disharmony. This failure supports a finding of a lack of credibility on the part of the three administrators with regard to their failure to act.

12. Campbell's failure to explain, justify or even mitigate the reasons (see p. 22, supra) why the administration would create such a public discussion of the buttock's osculation

and "humping" incidents in front of the assembled employees, supports a lack of credibility of Campbell's testimony.

13. There is no doubt that Campbell was aware of the conflict among his staff in the 1999-2000 school year. The very fact that a decertification petition had been filed was obvious evidence of that conflict. Ruacho (p. 18), Morrisseau (p. 23), Sasaki (p. 23), Lempeis (pp. 23-24), Stallard (p. 14), and Murdock (p. 17), all alluded, in varying degrees, to (1) the decertification, (2) the "union thing," and (3) the "union stuff as causation factors of this conflict and disharmony. Campbell's failure to take this incontrovertible fact into consideration, when evaluating charges and countercharges of harassment, strongly supports a finding of a lack of credibility of Campbell's actions and testimony.

14. Campbell's assertion that the only two involuntary non-disciplinary relocations he ever effected occurred simultaneously and involved two recently resigned Association officers, but were based on almost exclusively programmatic and non-disciplinary reasons, is inherently unbelievable. This provides further support for a finding of a lack of credibility of Campbell's testimony.

15. Campbell's recitation of the strengths and weaknesses of the various teachers who may or may not have been alternative relocatees cannot be empirically rebutted by anyone unfamiliar with the involved employees and their educational strengths. However, two inconsistencies in his testimony were obvious.

First, Nolt's educational technological experience was frequently referenced and relied upon by Campbell to support his relocation decision. However, Nolt had no students for approximately one month after he arrived at Abbey, and averaged only four or five for the entire year. It is hard to understand why any one of the other COE teachers could not have received sufficient computer training and practice in that month to teach four or five high

school drop-outs the basic rudiments of a computer's operation. This is especially true due to COE's interest in training all of its employees in computer technology.

Secondly, Campbell's explanation for the necessity of a teacher with Allison's experience in teaching a violent student population was negated, to a significant extent, by his testimony about Allison's replacement teacher at Juvenile Hall's A Unit. Campbell insisted the replacement would have no negative impact on the violent student population in A Unit because the first-year teacher (1) had student-taught in a general (non-correctional system) school population, and (2) had a business background. I profess no experience in the requirements of teaching in a juvenile correctional system, but it is hard to believe that one semester of student teaching in a general education school and a "business background," whatever that means, is sufficient preparation for teaching A Unit's high risk students. However, if Campbell is correct that these qualifications are sufficient preparation to teach in A Unit, then it logically follows that any one of the veteran COE courts and community school teachers would have had no trouble teaching Allison's class of violent students in Boot Camp.

This attempt to use unsupported teacher analyses to support his explanation of why Nolt and Allison were the only teachers who could have filled their respective relocated positions, supports a finding of a lack of credibility of Campbell's testimony.

16. Campbell included, in his involuntary transfer notification letter to Nolt (see charging party exhibit no. 1), a charge that his negative interactions with staff presented "a hindrance to programming and program development." His testimony, in support of such a justification for the transfer, failed to take into consideration the impact of a labor relations cause for such interactions. This failure supports a finding of a lack of credibility of Campbell's testimony.

### Summary

After observing Campbell's demeanor, mannerisms, reaction to hard questioning as well as his personal interactions with both Nolt and Allison during breaks in the hearing and when either he or they were on the stand, I must conclude that he has no personal bias toward the two men. However, the evidence is both clear and overwhelming, and it speaks for itself.

Therefore, I must conclude that his actions, as described, were the result of either direct orders from his employer or his belief that these actions were desired by his employer. In either case, the result is the same. Regardless of his personal motivation, his actions are imputed to the COE, and such actions support a finding of a lack of credibility on the part of both Campbell and the COE.

### Biggs

Biggs did not testify at the hearing. However, his presence was noted in two crucial instances: (1) his involvement in the March 2000 Ruacho "buttocks osculation" and "humping" "investigation," and (2) his two addresses to the assembled COE employees, in which he stated the union leadership had made baseless charges of oral and canine sex in an attempt to blackmail the COE into CBA concessions. These instances are more fully described below:

1. The Ruacho "investigation" has been analyzed, supra. (See credibility findings of Campbell, no. 1.a, b, c, d, e and f, pp. 49-50.) These findings are applicable to Biggs, as well as Campbell.

2. It is a clear and unmistakable fact that an unbiased investigation of the buttocks osculation and "humping" incidents would not have supported a conclusion that the "union leadership" was spreading rumors about oral and canine sex. Biggs' statements to the assembled employees are probably the strongest evidence in support of a finding that COE's explanations of its actions toward Nolt and Allison were without credibility.

The fact that Biggs' made these assertions shortly after the decertification petition was posted clearly shows that their motivation was to put Nolt and Allison in a disadvantageous position regarding the anticipated decertification election.

Biggs' actions are directly contrary to COE's primary defense to this charge, i.e., the relocations of Nolt and Allison were routine educationally-based decisions that had neither a disciplinary cause, nor an improper motivation of punishment for protected activity. Biggs' statements strongly support a finding of a lack of credibility on his part, with such finding being imputed to the COE itself.

#### Mehas

1. Mehas' testimony that he did not get angry about Nolt and Allison's grievances and unfair practice charges is not credited. This testimony, plus his comment that "anger does not serve anyone well" and that he accepted their actions in the "course of doing business," in light of the COE's excesses described in the credibility findings of both Campbell and Biggs, supra, strongly supports a finding of a lack of credibility of Mehas' testimony.

2. Mehas' testimony that he "just smiled" when he heard Nolt and Allison contacted the FBI about the Forest Reserve Fund is equally unbelievable. Any elected official who states that he was so unaffected by a charge of financial misfeasance being brought to the FBI that he just smiled is obviously not very forthright. This supports a finding of a lack of credibility on Mehas' part.

3. Mehas' testimony that he was unaware of Nolt and Allison's opposition to his negotiating proposals, because Pietro represents the COE and he (Mehas) has only a "very little involvement" in negotiations until the process reaches the "ultimate decision to go or no go in an agreement," is equally unbelievable. In addition, he states that Pietro's negotiations' team does "not generally" contact him in the course of getting to final agreement, except

"[m]aybe in the beginning" regarding priorities and budgetary constraints. As the elected head of the COE, Mehas has a direct and personal responsibility for both the organization's financial well-being and its daily administration. Employee' salaries and terms and conditions of employment have a substantial impact on both the finances and administration of a public educational district. Sworn testimony by the head of such a district that he merely gives a subordinate general parameters at the start of negotiations, and is not kept informed of the ebb and flow of the various proposals, is without merit. This testimony supports a finding of a lack of credibility on the part of Mehas.

### Sasaki

Najarian's testimony, regarding Sasaki's arrangement of a meeting between her, Flores, and Lempesis at Craycroft, is in conflict with Sasaki's denial. Lempesis was (1) a primary supporter of the decertification effort, and (2) an openly antagonistic opponent of both Nolt and Allison. He was also the beneficiary of various Campbell determinations with regard to the identity of the aggressor in various charges and counter charges of harassment. Given the above findings and credibility determinations, there is little doubt that Lempesis was a primary functionary in COE's attempt to rid itself of Nolt and Allison's control of the Association. Najarian, on the other hand, was not identified as being involved in the decertification effort.

Therefore, Najarian's testimony is credited over that of Sasaki, and it is found that Sasaki did take Lempesis to Craycroft to facilitate a decertification petition signing solicitation of the two teachers.

Sasaki's double "Xs" in Nolt's 1999-2000 evaluation, plus the possibility of an added comment on Nolt's strained relationships with other staff, raises suspicions that the evaluation was modified at someone else's direction after it had been completed by Sasaki. By itself, this does not support a finding of a lack of credibility on Sasaki's part, however, in conjunction

with his visit to Craycroft with Lempesis to facilitate decertification card signings, it provides some support for such a finding.

#### Murdock

The internal inconsistency of Murdock's (1) letter of support for Allison and Nolt, (2) testimony of repudiation of such letter, (3) support of Lempesis, and (4) admission of joining with Lempesis in the use of derogatory name-calling of Nolt and Allison, made his testimony inherently unbelievable. This supports a finding of a lack of credibility of his testimony. Therefore, any conflict between Murdock's testimony and that of anyone else will be decided against Murdock.

#### Nolt

Nolt is not a tactful man. He neither asks for, nor grants his opponents, any slack. He believed he was under attack by Mehas, Lempesis, et al, due to his Association advocacy and the evidence, to a large extent, supports that belief. His initiation, or acquiescence, of the use of the overstated terms, oral and canine sex, was ill-advised. There is little doubt that he has made intemperate remarks about his opponents at various times. However, these traits do not make him less credible as a witness. His testimonial conflicts with the various decertification proponents and/or Campbell do not support a finding of a lack of credibility on his part. It should be noted that the various credibility findings, supra, were not based on Nolt's higher level of credibility vis-à-vis administrators or other bargaining unit members, but rather on obvious evidentiary conflicts or inconsistencies in the testimony of the other employees.

#### Allison

Allison also believed he was under attack for his Association advocacy. His testimony did not include the purposeful use of the overstated terms, but he did advocate an investigation of the incidents themselves. Neither this advocacy, nor any other evidence proffered at the

hearing, makes him less credible as a witness. As in Nolt's case, his testimonial conflicts with the various decertification proponents and/or Campbell do not support a finding of a lack of credibility on his part. The prior comment regarding Nolt's testimony vis-à-vis administrators and/or other bargaining unit members, is applicable to Allison, as well.

#### Summary of Credibility Findings

It is informative to note that Judge Gallery, in his decision, HO-U-769-E, concluded that COE based a letter of reprimand on a Hustedde statement that was written by Biggs. This statement selectively included only those parts of Hustedde's contentions that were most detrimental to Nolt. Even these skewed statements failed to support Mehas' assertions that Nolt had acted improperly by telling teachers to ignore the law regarding the filing of child abuse reports.

An analysis of this prior decision, coupled with the evidence in this case, dictates a finding that there is a pattern of behavior at the COE of (1) accusing an employee of an impropriety, i.e., (a) spreading false rumors, (b) violating the law, or (c) making negative ethnic statements, (2) conducting an investigation, (3) accepting only the evidence in that investigation that supports its preconceived views, and (4) using the results of the investigation to support negative personnel actions against disfavored employee(s).

The individual credibility decisions described above result in a finding that the testimony of Nolt and Allison is to be credited over that of Mehas, Campbell, Sasaki, Lempeis, Ruacho and Murdock.

#### ISSUES

1. When the COE failed to follow CBA Article 9.3, involuntary transfers, with regard to Nolt and Allison's relocations, did it unilaterally modify a term and condition of employment, thereby violating subdivision (a), (b) or (c) of section 3543.5?

2. When the COE relocated Nolt and Allison from Juvenile Hall to the Abbey site and Boot Camp, respectively, did it discriminate against them for their protected activities, thereby violating subdivision (a) or (b) of section 3543.5?

### CONCLUSIONS OF LAW

#### ISSUE NO. 1.

A unilateral modification of terms and conditions of employment within the scope of negotiations that has a generalized effect or continuing impact is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) PERB has long recognized this principle. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; and Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under subdivision (c) of section 3543.5, the public school employer is obligated to meet and negotiate in good faith with an exclusive representative about matters within the scope of representation. This section precludes an employer from making a unilateral change in the status quo, whether it is evidenced by a CBA or past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

EERA's scope of representation is addressed in subdivision (a) of section 3543.2, which states, in pertinent part:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean . . . transfer and reassignment policies, . . .

Grant Joint Union High School District (1982) PERB Decision No. 196 defined the requirements for establishing a violation of subdivision (c) of section 3543.5, which are:

(1) the alleged change affects a matter within the scope of representation, (2) the employer breached or otherwise altered the status quo, (3) there was no prior notice to the employees' representative, and (4) the change has a generalized effect or continuing impact on unit members' terms and conditions of employment.

Section 3543.2 lists "transfers" as an enumerated item within the Act's scope of representation.

It is clear that COE's refusal to follow CBA Article 9.3 has a generalized effect and a continuing impact on unit members' terms and conditions of employment. The evidence clearly shows that the Association was given no notice of the District's determination that the CBA provisions on involuntary transfers would not apply to Nolt and Allison's relocations until they were each told they were to be involuntarily relocated.

The status quo can be shown by evidence regarding either CBA language or past practice. In this case, the status quo that is the subject of this case is memorialized in CBA Article 9.3.

Prior to August 2000, the Association believed that CBA Article 9.3 required the District, when contemplating an involuntary transfer, to inter alia, (1) notify the involved employee of a list of vacant positions, (2) honor the employee's preference for a vacant position "on the basis of office-wide seniority and the required credential," (3) post all vacancies, (4) refrain from the use of the involuntary transfer process, if there was a qualified unit member who applied for the position, (5) provide the reasons in writing for such transfer to the involved employee, not later than July 15, and (6) refrain from involuntarily transferring an employee for reasons of incompatibility or performance, unless an employee/supervisor conference had been held in an attempt to resolve the problem.

### COE's Contentions

COE contends that the relocations of Nolt and Allison were not transfers, but rather reassignments; therefore, such relocations are not controlled by CBA Article 9.3. It contends that all COE teachers hold the same "position," i.e., court and community schools teacher. Therefore, it continues, the movement of a particular teacher from one set of duties, i.e., a particular classroom, to another, is only a reassignment, not a transfer, even if it is at a different site. COE supports this contention with reference to its consistent practice of describing available employment openings in its job announcements as an opening for a "teacher," without the usual description of location or specific duties to be fulfilled. In addition, it points out that in its evaluations an employee's job title is merely listed as "teacher," with the evaluatee's assignment described as "court schools," and the "Sch/Divn/Dept/Proj" being described as "Court Schools." None of these descriptions specify (1) a generic description of the employee's teaching assignment, (2) a physical location, i.e., Juvenile Hall, Boot Camp, etc, or (3) his/her assigned classroom.

In its brief, it describes the unique requirements of a COE versus a general population school district, as follows:

... the County Office of Education must continually shift its personnel in reaction to rapidly changing enrollment patterns by its students who attend the Court Schools only temporarily. The students' progress through the legal system and their behavioral track record alter their school placement and may result in changes in staffing needs on a frequent basis. School districts do not experience these same concerns. . . .

There was un rebutted testimony by both Campbell and D. Davis that the COE has neither posted a relocation, nor used seniority as a basis for relocations in the past. It made an un rebutted contention that the Association has never challenged this practice.

### Association's Contentions

The Association contends that the reason the practice has never been challenged is that, in the past, to its knowledge, there has never been a non-disciplinary involuntary COE transfer when the relocated employee's prior program continued to exist.<sup>14</sup>

There was no negotiations' history proffered regarding the parties' intent when Article 9.3 was added to the CBA; although there was testimony that this language has been in the CBA since at least 1990. In statewide educational labor relations parlance, a transfer is a change in location, whereas a reassignment is a change in duties at the same location. However, each district is free to bilaterally assign whatever meaning to this term it wishes.

### Analysis

COE's primary defense to the Association's allegation is that CBA Article 9 only applies to an employee who moves from one academic discipline to another, such as a move from a speech pathologist position to that of a classroom teacher, or vice versa.

COE's arguments that, within its organization, a position is not really a position but a classification, and a transfer is not really a transfer but a reassignment, are disingenuous when contrasted with the language of its own CBA. In the CBA, the term "position" is repeatedly used to describe an individual set of duties. This individualized definition of the term "position" is crucial to the definition of "transfer." The CBA defines a transfer as an employer action which results in the movement of any employee from "the position held immediately preceding such action." Under this definition the benefits of Article 9.3 must be extended to all employees that are involuntarily moved from one position to another.

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<sup>14</sup> In early 1987 Ed Bradley, a COE teacher, was involved in a conflict with the Fresno County Probation Department. This conflict resulted in his disciplinary transfer within the COE.

Therefore, it is determined that COE's failure to follow CBA Article 9.3, when it transferred Nolt and Allison, unilaterally modified a term and condition of employment, in violation of subdivision (c) of section 3543.5.

ISSUE NO. 2. When the COE relocated Nolt from Juvenile Hall to the Abbey site, and Allison from Juvenile Hall to Boot Camp, did it discriminate against them for their protected activities, thereby violating subdivision (a) or (b) of section 3543.5?

### Applicable Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of an employer's duty regarding discrimination against or interference with employees:

1. A single test shall be applicable in all instances in which violations of section 3543.5 (a) are alleged;
2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board (NLRB) decision in Wright Line, Inc (1980) 251 NLRB1083 [105 LRRM 1169] enforced in

part (1<sup>st</sup> Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In order to establish a prima facie case, charging party must first prove that the subject employee engaged in protected activity.<sup>15</sup> Next, it must prove that the person(s) who made the decision that resulted in the harm were aware of such protected activity. Lastly, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right, resulting in harm or potential harm to that right.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad, at page 11:

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

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

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<sup>15</sup> Section 3543(a) grants public school employees:

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

## Analysis

There is no doubt that both Nolt and Allison engaged in protected activities. Their (1) Association leadership roles, (2) grievances, (3) unfair practice charges, (4) Forest Reserve Fund confrontations with Mehas, and (5) opposition to COE's initial, as well as amended, negotiations proposals, provide ample evidence of this.

Campbell and Mehas acknowledge their awareness of most of these circumstances, although (1) Campbell insisted he was not aware of the FBI involvement at the time he relocated the two men, and (2) Mehas contended he was unaware of their negotiations positions. (This alleged unawareness was found to be without credibility. See credibility findings of Mehas, no. 3, pp. 57-58).

Therefore, the remaining element is whether the Nolt/Allison relocations were the result of these protected activities.

The facts in this case are both varied and voluminous. In addition, many of the controlling issues have already been set forth twice, once in the initial findings of fact, and again in the credibility findings. Therefore, when possible, specific events will be incorporated by reference to page and outline designation, rather than by a reiteration of the previous text.

### Buttocks Osculation and "Humping" Incidents

COE's continuous use of the overstated "oral and canine sex" term, long after an objective analysis of its own investigation showed the seminal events had actually occurred, manifests an intent to treat Nolt and Allison in a manner differently than it treated other employees, especially the actual perpetrators of these rather benign events. (See credibility findings of Campbell, no. 1.a, p. 49, and Biggs, no. 1, p. 56.) This also provides evidence of a contradictory explanation of the employer's actions.

COE's inaccurate determination, that its investigation proved that Nolt and Allison had spread unsubstantiated rumors, supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 1.b and c, pp. 49-50.) This also provides evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures,<sup>16</sup> and (3) an inadequate investigation.

COE's determination that its investigation proved the subject events never occurred, even after hearing Ruacho's testimony, supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 1.d and g, pp. 50-51.) This also provides evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures, and (3) an inadequate investigation.

Campbell's failure to follow-up on information received from Murdock and Mullen and thereby credit evidence that was contrary to its predetermined conclusions, supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 1.e and f, p. 50.) This also provides evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures, and (3) an inadequate investigation.

Based on all of the above, the evidence with regard to the buttocks osculation and "humping" incidents and their subsequent "investigation" supports an inference of unlawful motivation on the part of COE.

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<sup>16</sup> An unsubstantiated interpretation of investigative data to reach a predetermined conclusion, which permits it to improperly issue negative personnel documentation to disfavored employees is a violation of a most basic employment procedure, i.e., to treat one's employees with fairness and objectivity.

### Allegation of Interrogating, Intimidating and Harassing Campbell's Visitors

The deliberate misrepresentation of Ruacho's statement regarding Nolt and Allison's actions concerning Campbell's visitors supports a conclusion that COE treated the two men in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 2, p. 51.) This also provides evidence of (1) a contradictory explanation for employer's actions, and (2) a departure from established procedures.

The evidence with regard to the allegation of interrogating, intimidating, or harassing Campbell's visitors supports an inference of unlawful motivation on the part of the COE.

### Ruacho and Stallard Complaints

Campbell's unquestioning acceptance of Ruacho and Stallard's complaints supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, nos. 3 and 4, p. 51.) This also provides evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures, and (3) an inadequate investigation.<sup>17</sup>

The evidence with regard to Ruacho and Stallard's complaints supports an inference of unlawful motivation on the part of COE.

### Anti-Ethnic Statements

Campbell's blind acceptance of Murdock's allegation with regard to Allison's statements, and his unsubstantiated characterization of them as being anti-ethnic, supports a conclusion that the COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, nos. 6 and 7, p. 52.) This also provides

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<sup>17</sup> References and conclusions regarding the presence of an "inadequate investigation" are not limited to COE's inquiry into the buttocks osculation and "humping" incidents. The term also covers COE's failure to adequately investigate various conflicts between its employees.

evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures, and (3) an inadequate investigation.

The evidence with regard to "anti-ethnic" statements supports an inference of unlawful motivation on the part of COE.

#### Campbell's Inconsistent Credibility Determinations of Murdock's Statements

Campbell credited some Murdock statements and used them to support actions against Nolt and Allison. However, his failure to credit Murdock's other statements that would have supported Nolt's contentions regarding the "humping" incident, supports a conclusion that COE treated the two men in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 8, pp. 52-53.) This also provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence, with regard to Campbell's inconsistent credibility determinations of Murdock's statements, supports an inference of unlawful motivation on the part of COE.

#### Campbell's Determinations re the Cause of Employee Disharmony

In many instances, Campbell failed to acknowledge a possible labor relations motive for allegations that Nolt and Allison were the cause of employee disharmony. The most obvious of these instances was his inclusion of a charge that his (Nolt's) interactions with staff presented "a hindrance to programming and program development." His testimony in support of such a justification for the transfer, supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. This is especially true when the evidence clearly shows that Campbell was aware such allegations came from Lempesis and other employees he knew to be leaders or supporters of the decertification petition. (See

credibility findings of Campbell, nos. 9 and 13, pp. 53 and 54.) This also provides evidence of (1) a contradictory explanation for the employer's actions, (2) a departure from established procedures, and (3) an inadequate investigation.

The evidence, with regard to Campbell's determinations regarding the cause of employee disharmony, supports an inference of unlawful motivation on the part of COE.

#### Failure to Create a Meeting Between Antagonists

Campbell's failure to create a meeting with Nolt, Allison and Lempesis, after the two Association officials asked him to do so, manifests an intent to perpetuate the disharmony rather than bring it to a halt. This inaction supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 10, p. 53.) This also provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence, with regard to Campbell's failure to create a meeting between the three employees supports an inference of unlawful motivation on the part of COE.

#### Failure to Provide Incompatibility Documentation

Campbell, Collins, Biggs and Mehas' failure to provide whatever documentation they had to support their incompatibility charges against Nolt and Allison, even after agreeing to do so, supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 11, p. 53.) This also provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence, with regard to its failure to provide the promised incompatibility documentation, supports an inference of unlawful motivation on the part of COE.

### Failure to Explain Biggs' Statements to Assembled Employees

Campbell's failure to explain, justify or even mitigate the reasons why Biggs would create such a public discussion of COE's investigative results, strongly supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 12, pp. 53-54.) This also provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence with regard to Campbell's failure to explain Biggs' statements supports an inference of unlawful motivation on the part of COE.

### Justification for Involuntary Relocations

Campbell's assertion that the only two involuntary non-disciplinary relocations he ever effected occurred simultaneously and involved two recently resigned Association officers, but were based on purely programmatic and non-disciplinary motives, is inherently unbelievable. This assertion supports a conclusion that the COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 14, p. 54.) This also provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence with regard to Campbell's justification for these simultaneous and coincidental relocations supports an inference of unlawful motivation on the part of COE.

### Strengths and Weaknesses of Alternative Relocates

The inconsistencies in Campbell's recitation of the reasons why no other teachers could have been relocated, in light of the multiple instances of unlawful motivation set forth supra, supports a conclusion that the COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Campbell, no. 15, pp. 54-55.) This also

provides evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence with regard to Campbell's recitation supports an inference of unlawful motivation on the part of COE.

#### Biggs' Statements to Assembled Employees

Biggs' statement to the assembled employees was improper for at least four separate and distinct reasons: (1) the union leadership had not made accusations, of any sort, to other employees, (2) there was no evidence that the union leadership had used the term "oral and canine sex" to anyone other than an administrator, in response to an inquiry, (3) the actual incidents referenced by this overstated term were not "baseless," but were admitted by the very person involved, and (4) there was no reason to discuss what was essentially a personnel matter before the entire staff, other than to prejudice Nolt and Allison prior to an anticipated decertification election.<sup>18</sup>

Biggs' actions support a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility findings of Biggs, no. 2, pp. 56-57.) They also provide evidence of (1) a contradictory explanation for the employer's actions, and (2) a departure from established procedures.

The evidence with regard to Biggs' statements strongly supports an inference of unlawful motivation on the part of COE.

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<sup>18</sup> In many ways, the evidence elicited at the hearing provided ample justification for the fears expressed by Nolt and Allison with regard to the proposed CBA disciplinary procedure without an accompanying arbitration appeal provision.

In addition, such untruthful and highly prejudicial statements disparaging two Association officials within a brief proximity of time after a decertification petition was posted, strongly supports an additional inference of unlawful motivation.

PERB has made it clear that timing alone is insufficient to create an inference of a nexus between protected activity and negative personnel actions. (Moreland Elementary School District (1982) PERB Decision No. 227; Charter Oak Unified School District (1984) PERB Decision No. 404.)

In this case, the timing element is not the only evidence supporting an inference of unlawful motivation. However, due to the COE's blatant disregard for the truth and its obvious attempt to influence the anticipated decertification election, it is a crucial piece of such evidence. In fact, it is one of the single most damning pieces of evidence against COE with regard to the question of the lawfulness of its motivation in dealing with Nolt and Allison.

#### Mehas' Testimony Regarding Nolt and Allison's Various Actions

Mehas' testified that he (1) accepted Nolt and Allison's actions as being in the "course of doing business," and (2) "just smiled" when he heard the FBI was inquiring about his Forest Reserve Fund actions. Mehas believed he had been personally attacked by both Nolt and Allison for many years. His claim that this did not bother him is unbelievable and strongly supports a conclusion that he treated the two men in a disparate manner compared with other employees. (See credibility findings of Mehas, nos. 1 and 2, p. 57.) This conclusion supports an inference of unlawful motivation on the part of Mehas and COE.

#### Mehas' Testimony Regarding His Involvement in Negotiations

Mehas' statements regarding his lack of involvement in negotiations with the Association is patently ridiculous, and strongly supports a conclusion that COE treated Nolt and Allison in a disparate manner compared with other employees. (See credibility finding of

Mehas, no. 3, pp. 57-58.) This conclusion supports an inference of unlawful motivation on the part of Mehas and COE.

#### Lempesis' Decertification Efforts at Craycroft

Lempesis' visit (pp. 24-25) to Craycroft to request Najarian and Flores' signatures on decertification cards provides evidence of COE's departure from established procedures. When employees are in a conflict over representation, the employer has a legal responsibility to remain neutral and avoid favoring one side or the other. Sasaki's (1) transporting Lempesis to Craycroft, and (2) directing the two teachers to talk to him about signing a decertification is hardly a neutral action.

This evidence dictates a conclusion that Nolt and Allison were (1) treated in a disparate manner compared with other employees, and (2) COE departed from established standards. This conclusion supports an inference of unlawful motivation on the part of COE.

#### Nolt's 1999-2000 Evaluation by Sasaki

Sasaki's reference to Nolt's alleged "strained relationship with staff," irrespective of whether it was an afterthought mandated by a higher administrator, fails to make a reference to a labor relations motive for such a relationship. Sasaki was aware of such a potential motive and his failure to reference it adds some support to a conclusion that (1) Nolt was treated in a disparate manner compared with other employees, and (2) COE departed from established standards. This conclusion supports an inference of unlawful motivation on the part of COE.

#### Unlawful Involuntary Transfers

COE's failure to follow CBA Article 9.3 when it involuntarily transferred Nolt and Allison supports a conclusion that it (1) treated the two employees in a disparate manner compared with other employees, (2) provided a contradictory explanation for its actions, and

(3) departed from established procedures. This strongly supports an inference of unlawful motivation on the part of COE.

Allegation of Section 3543.5(b) Violation

The evidence clearly shows that the COE objected to the Association, as well as to the two employees that represented it. Accordingly, COE denied the Association representational rights guaranteed to it by the Act. Therefore, it is concluded that COE, by virtue of the unlawful relocations of Nolt and Allison, violated subdivision (b) of section 3543.5.

Section 3543.5(c) Violation

The evidence supports a finding that the COE when it involuntarily transferred Nolt and Allison, without following the provisions of CBA Article 9.3, unilaterally modified a matter within the scope of representation, thereby violating subdivision (c) of section 3543.5.

SUMMARY

Based on the transcript, exhibits and parties' briefs, there is ample evidence to support conclusions that the COE violated subdivisions (a) and (b) of section 3543.5, when it relocated Nolt and Allison at the start of the 2000-2001 school year.

REMEDY

The PERB, in section 3541.5(c), is given:

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

In order to remedy the unfair practice of the COE and prevent it from benefiting from its unfair labor practices and to effectuate the purposes of the Act, it is appropriate to order the COE to cease and desist from (1) discriminating against Nolt due to his protected activities,

(2) discriminating against Allison due to his protected activities, (3) retaining the two men at their relocated work sites, and (4) denying to the Association rights guaranteed to it by the Act.

It is also appropriate that Nolt and Allison's personal employment records be purged of all memoranda, notes, evaluations, or any other documents, either partially or in total, that have been adjudged to be unlawfully motivated. This record shall include both their official personnel files and any "supervisory" or "working" files, or any other source of information that could be used in the future to support discipline against either of them.

It is also appropriate that the COE be required to post a copy of the notice attached hereto as an Appendix, incorporating the terms of this Order at all COE sites where notices are customarily placed for certificated employees. The notice should be subscribed by an authorized agent of the COE, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered, or covered by any other material. Posting such a notice will provide employees with notice the COE has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the COE's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584] the California District Court of Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co., (1941) 312 U.S. 426 [8 LRRM 415].)

#### PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Fresno County of Education (Fresno COE) violated the Educational

Employment Relations Act (Act), Government Code section 3543.5 (a), (b) and (c). Therefore, it is hereby ORDERED that the Fresno COE, and its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Tim Nolt (Nolt), because of his exercise of rights guaranteed by the Act.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing Tim Allison (Allison), because of his exercise of rights guaranteed by the Act.

3. Denying to the Fresno County Office Schools Educators Association, CTA/NEA (Association), rights guaranteed to it by the Act.

4. Unilaterally modifying its past practice with regard to the procedures followed when involuntarily transferring its employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE ACT:

1. Return Nolt to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Nolt, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.

2. Return Allison to his prior teaching position, with the same hours, at Juvenile Hall, or a mutually agreeable alternative. Pay to Allison, upon demand, any salary or other monetary remuneration he may have lost as a result of his unlawful transfer. The

monetary remuneration shall include extended year income, any reasonably expected overtime salary opportunities he may have lost, accompanying seniority, retirement and/or leave credits appurtenant thereto.

3. Remove and destroy from Nolt and Allison's personal employment records all memoranda, notes, evaluations, or any other documents, either partially or in total, that have been adjudged to be unlawfully motivated. These records shall include both their official personnel files, any "supervisory" or "working" files, or any other source of information that could be used in the future to support either (1) a comment or a rating in an evaluation of, or (2) discipline against, either of them.

4. Within ten (10) workdays of service of a final decision in this matter, post at all Fresno COE sites where notices are customarily placed for certificated employees, copies of the notice attached hereto as an Appendix. This notice must be subscribed by an authorized agent of the Fresno COE, indicating that it will comply with the terms therein. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced, or covered by any other material.

5. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions. 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.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 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 California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

  
Allen R. Link  
Administrative Law Judge