STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, CTA/NEA, Charging Party, v. ROCKLIN UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2562-E PERB Decision No. 2376 June 12, 2014

Appearances: California Teachers Association by Laura P. Juran, Attorney, for Rocklin Teachers Professional Association, CTA/NEA; Kronick, Moskovitz, Tiedmann & Girard by Michelle L. Cannon, Attorney, for Rocklin Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Rocklin Unified School District (District) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint and underlying charge allege that the District violated section 3543.5, subdivisions (a), (b) and (c), of the Educational Employment Relations Act (EERA)[1] when it: (1) took adverse action against four registered nurses employed by the District (school nurses)[2] by issuing each a final notice of dismissal based on layoff on or about May 12, 2010, in retaliation for engaging in protected activities; (2) removed/transferred work exclusively performed by the school nurses from the bargaining unit during the 2010-2011 school year without prior notice and opportunity to

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

[2] The four nurses are lead nurse Jennifer Hammond (Hammond), Genevieve Sherman, Susan Firchau (Firchau) and Jennifer Bradley (Bradley).

negotiate in or about August 2010; and (3) subcontracted work from the bargaining unit for the 2010-2011 school year without prior notice and opportunity to negotiate in or about August 2010.

The Office of the General Counsel issued the complaint on April 5, 2011. The District answered the complaint on April 21, 2011, denying the substantive allegations and asserting affirmative defenses. The parties participated in a settlement conference on May 4, 2011, but were unable to reach a resolution of their dispute. A formal hearing was held January 17-20, 2012, and following the filing of written argument, the case was submitted for decision on March 16, 2012.

On September 26, 2012, the ALJ issued a proposed decision, finding a violation based on the retaliation allegations, but dismissing the allegations of removal/transfer and contracting out of bargaining unit work. On November 7, 2012, the District filed exceptions and a supporting brief, arguing that the ALJ erred in finding the retaliation violation. On December 11, 2012, the Rocklin Teachers Professional Association, CTA/NEA (Association) filed its response to the District's exceptions. As the Association did not except to the ALJ's findings and conclusions of law regarding the removal/transfer and contracting out of bargaining unit work allegations, those issues are not before us.[3] The only issue on appeal is whether the ALJ erred in finding that the District retaliated against the four school nurses for engaging in protected activities by issuing each a final notice of dismissal based on layoff.

The Board has reviewed the entire record in this matter, including the complaint and answer, the hearing record, the District's exceptions and the Association's response thereto.

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[3] *City of Sacramento* (2013) PERB Decision No. 2351-M is the Board's most recent decision covering the duty to bargain where removal/transfer of bargaining unit work is at issue. Consistent with the decision in *City of Sacramento*, the ALJ correctly found that the District had a duty to bargain the removal/transfer and the contracting out of bargaining unit work. As the ALJ also correctly found, the Association waived its right, a finding to which the Association did not except.

Based on that review, we find that the ALJ's findings of fact are adequately supported by the record. We also find that the ALJ's conclusions of law are well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by a discussion of the District's exceptions.

DISCUSSION

The District filed 21 exceptions. They are based on three main arguments. In its first two arguments, the District contends that the Association has not satisfied its prima facie burden, taking issue with the protected activity and nexus elements of the ALJ's retaliation analysis. In its third argument, the District asserts that notwithstanding the deficiencies in the prima facie case, the District has satisfied its burden of proving, as an affirmative defense, that it would have taken the same adverse action against the four school nurses even if they had not engaged in protected activity, i.e., that the District had a legitimate, non–discriminatory reason for terminating the nurses' employment with the District. We address the District's arguments in turn below. In addressing the District's arguments, we have determined the District's exceptions to be without merit.

The Association's Burden of Proving the Prima Facie Elements of Retaliation

Public school employees have the right to "form, join, and participate in the activities of employee organizations of their own choosing." (EERA, sec. 3543, subd. (a).) A public school employer violates this right when it imposes reprisals on employees because of their participation in protected activities. (EERA, sec. 3543.5, subd. (a).) To demonstrate that an employer retaliated against an employee in violation of EERA section 3543.5, subdivision (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; (3) the employer took adverse action

against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Protected Activity

In its first of three arguments, the District asserts that the proposed decision erroneously "relies on the school nurses' participation in the layoff hearing for the required element of protected activity." As the District's argument goes, because the layoff hearing is provided for under the Education Code, and not EERA, a finding of retaliation based upon attending a statutorily prescribed layoff hearing is not "sufficient for a prima facie case of retaliation under EERA."

This argument might have some credence if the nurses' participation in the layoff hearing was the only basis for the Association's retaliation charge. As recounted in great detail by the ALJ, however, the four nurses engaged in a continuous course of protected activity dating back to February 2008, when they first started collectively raising issues with District administrators regarding staffing, workload, safety, etc. As the nurses' protected activities continued, they frequently sought the Association's assistance in their communications with District managers. In February 2010, the nurses met with District Superintendent Kevin Brown (Brown), at the suggestion of School Board Member Camille Maben with whom they had met in December 2009, to discuss their concerns. At the end of February 2010, three of the nurses met with School Board Member Wendy Lang. Soon thereafter, on March 4, 2010, the District issued the initial notices, i.e., the "Notice of Intent to Dismiss." Pertinent to the District's argument on appeal, the proposed decision states that the "nurses' protected activity continued by participating in the RIF hearing held April 6-7, 2010."

We do not read this statement in the proposed decision regarding the nurses' participation in the layoff hearing to mean that the conduct of the layoff hearing is itself

protected activity under EERA. If each nurse's attendance at the layoff hearings had occurred in isolation, outside the context of a continuous course of concerted and protected activity, and if the District had taken adverse action against each nurse on that basis alone, we might agree with the District that such facts would not support a finding of retaliation under EERA. As summarized above, and as fully drawn out in the proposed decision, however, that is not what occurred.

The nurses' collective invocation of their right to participate in the layoff hearings, as communicated in an e-mail[4] sent by the nurses to their supervisor, Betty Di Regolo (Di Regolo), on April 2, 2010, cannot be parsed from the continuous course of concerted and protected activity in which they had been engaged since 2008. The protected activity for purposes of the retaliation analysis is not found in each individual nurse's attendance at the layoff hearing per se. Rather, it is found in the collective joining together of the four nurses as they, with the assistance of their exclusive representative, continuously stood up to the District in raising workplace issues such as workload, assignments, scheduling, poor communication, lack of support for the lead nurse and safety concerns, and defended themselves against the District's actions leading to the termination of their employment effective June 30, 2010. (See

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[4] The e-mail stated:

> Just a courtesy note to alert you that all four of the nurses will be attending the RIF hearings on Tuesday and Wednesday of this coming week. Per our union attorney, Andrea Price, we have the right to attend uninterrupted and in their entirety on both days, so the district will be without nurses on those two days. We will not be answering or [sic] phones or responding to e-mail during the hearings. It will fall to you to arrange for nursing coverage and in particular, coverage for our little first grade diabetic at Antelope Creek on those days.

Brown responded as follows:

> Your concern for the well-being of our student's [sic] health is regrettable. We will definitely find a way to cover in your absence.

Oakdale Union Elementary School District (1998) PERB Decision No. 1246, pp. 17-19 [charging party's report of safety issues to third party safety inspector was consistent with the parties' collective bargaining agreement and an extension of attempts to resolve issues through the union and school district].)

Unlawful Motive

In the District's second argument, the District asserts that the proposed decision's reliance on three nexus (unlawful motive) elements was in error. We disagree. Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. "[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, ... unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." *(Novato, supra,* PERB Decision No. 210, p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.)[5]

Timing

The proposed decision concluded that the imposition of the adverse action close in time to the nurses' participation in protected activities satisfies the timing element. The District erroneously states that the proposed decision "found the attendance at the layoff hearing on April 6-7, 2010 to be the protected activity which motivated the District's decision to layoff [sic] the nurses." Based on that erroneous statement, the District argues that at the time the school board adopted Brown's recommendation and voted to send out the initial Notice of Intent to Dismiss on March 3, 2010, "there is little to no evidence of 'unlawful motive'." The

[5] When construing California public sector labor relations statutes, California courts and PERB rely on National Labor Relations Board decisions and judicial decisions construing similar language in the National Labor Relations Act. *(San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

District cites to a very productive meeting between the nurses and Brown in February 2010 as proof of the absence of unlawful motive. It is unclear whether the District is arguing that the adverse action was not preceded by protected activity or that there is no evidence of unlawful motive linking the protected activity to the adverse action. In either event, the District misconstrues the proposed decision.

As already explained above, the proposed decision found a continuous course of protected activity dating back to February 2008. Also, at the same meeting between the nurses and Brown cited by the District as proof of the absence of unlawful motive, Brown told the nurses that they were increasingly being seen as more adversarial toward the District because of their involvement with the Association. Brown cites to the mere attendance of Association representatives at nurses' meetings with District administrators as evidence of what Brown perceived to be this adversarial quality to their relationship. By equating the Association's assistance as the exclusive representative with something negative attributable to the nurses themselves, Brown's statement provides evidence of unlawful motive, i.e., that the District bore animus toward the nurses' protected activity.

The District also contends that the timing of the layoff was dictated by a "*very strict statutory timeline.*" (District's brief, p. 7, italics in the original.) Thus, as the District argues, the timing of the layoff was "merely a function of the District meeting its statutory deadline for layoffs." (*Ibid.*) That the timing of the adverse action in relation to the protected activity coincides with the District's statutory timeline for layoff does not mean that timing cannot be considered in the determination of unlawful motive. If that were the case, anytime an employer uses a statutory layoff procedure as the mechanism by which to carry out a retaliatory dismissal, PERB would be precluded from considering timing as an element of unlawful motive. Limiting the analytical construct in that way serves no purpose, especially

given that timing alone is generally not sufficient to support a finding of unlawful motive. (*North Sacramento School District* (1982) PERB Decision No. 264 and *Moreland Elementary School District* (1982) PERB Decision No. 227 [although the timing of the employer's action in close temporal proximity to the employee's protected activity is an important factor, it does not, without more, demonstrate the necessary nexus between the employer's action and the protected activity].)

Disparate Treatment

The proposed decision concluded that while Brown notified the school board that the nurses would not be available to work due to their attendance at the layoff hearings, the District did not take similar action with respect to the teachers or counselors who attended the hearings. The District argues that "[a]ny 'disparate' treatment was due to the unique duties and responsibilities of school nurses."[6] The District also argues that the school board was notified about the nurses' participation in the layoff hearings because all of the nurses were being laid off, which was not true for the teachers or counselors. Neither the uniqueness of the nurses' duties nor the scope of the loss explains why Brown disclosed to the school board only that the nurses would be attending the layoff hearings, with no mention of the teachers or counselors also slated for layoff. Moreover, that Brown found the nurses' concern "regrettable," while refraining from commenting negatively about the teachers and counselors, is further evidence that the nurses were singled out. The District relies on Brown's testimony that he copied the school board on his e-mail response to the nurses to apprise the board of

[6] We find this argument disingenuous. While the District describes the duties and responsibilities of the school nurses as "unique," the District had little difficulty initiating a process on March 3, 2010, to terminate their employment with no alternate plan in place. In fact, Di Regolo made a presentation to the school board on April 21, 2010, describing several alternative options for the delivery of health care services. The presentation concluded that the best health care delivery scenario was "the status quo," i.e., retention of the nursing team slated for layoff.

potential liability that might result from the nurses' attendance at the layoff hearings. The ALJ, however, did not credit this testimony, nor do we. As the proposed decision states:

> Brown's response to the nurses indicated only that the District would "definitely" make sure the necessary health services would be covered. Nothing in Brown's email alerts the school board members that the District might not be able to obtain substitute nurses and that it could potentially be liable for the lack of nursing services.

Animus

As mentioned above, the nurses informed Di Regolo by e-mail that they would be attending the layoff hearings and that the District would need to make alternate arrangements for nursing coverage during their absence on those two days. Brown, not Di Regolo, responded, and he did not respond with a message of appreciation for the advance notice, as would be expected. Instead Brown responded by characterizing the nurses' concern for the students' well-being as "regrettable," and copying the entire school board on his e-mail response. He thought the nurses' plan to attend the layoff hearing would convince one undecided board member to vote in support of finalizing the layoff. He also thought that it would provide the 3-2 vote to approve eliminating the nurses' positions altogether.[7] As the ALJ stated, "Brown's email appears to have had the desired effect." At the school board meeting later that month, School Board Member Todd Lowell specifically credited the nurses'

[7] In a conversation with Di Regolo, Brown communicated that his intent in forwarding the nurses' e-mail message to the school board members was to sway their vote. This conversation was overheard by Marsha Wussow (Wussow), assistant to Di Regolo, who was called by the Association to testify at the PERB formal hearing. In his testimony, Brown denied making the comment. He testified that he copied the school board members to make them aware of potential liability. The ALJ found Brown's testimony to be inconsistent with his e-mail response to the nurses and therefore credited Wussow's testimony over his, to which the District excepts. The Board operates under a long established principle not to overrule a credibility resolution made by the trier of fact absent evidence to support overturning such resolution. (*Lake Elsinore School District* (2012) PERB Decision No. 2241.) We have carefully examined the record and find no basis for reversing the ALJ's credibility determination.

e-mail, even holding it up and reading it aloud, as "solidifying" his support for an alternate health care delivery system. The proposed decision found, and we agree, that these actions suggest animus and support a finding of nexus.[8]

The District argues that the ALJ overlooked the fact that "the nurses' email, Superintendent Brown's conversation with DiRegolo, and the Board member's statement at the April 21, 2010 Governing Board meeting all occurred well after Superintendent Brown recommended the school nurses be laid off and well after the Governing Board took action by a vote of 5-0 to eliminate the school nurse positions." The District's argument is premised on the notion that the layoff of the nurses was a done deal at the time the school board voted on March 3, 2010, to eliminate the positions and send out the initial Notice of Intent to Dismiss; and that the school board vote taken on May 7, 2010, to finalize the layoff and send out termination notices was a mere procedural technicality.

The District's argument is flawed in two respects. First, as the District points out, under the Education Code, a resolution must be adopted and *initial* layoff notices sent by March 15 in order to effectuate a layoff for the following school year. This action does not

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[8] Further evidence of unlawful animus can be found in a number of the findings of fact. For example, in the spring of 2009, Di Regolo told Bradley, during her performance evaluation, "it's going to get worse, its' going to get ugly." In August of 2009, Di Regolo told Hammond, during a meeting at a Starbucks coffee shop concerning the lead nurse position, amongst other topics, that she "needed to be careful" and she "better watch out." Days after the April 21, 2010, school board meeting, Rocklin Elementary School Principal Jim Trimble (Trimble) stopped by the nurses' office and told Firchau that if anyone other than Hammond was lead nurse, the terminations would not be happening. In his testimony at the PERB formal hearing, Trimble denied making this comment. The ALJ credited the testimony of Firchau and Bradley, who overheard the conversation between Firchau and Trimble, because their recollection was specific and consistent whereas Trimble's recollection was not. The District excepts to the ALJ's credibility determination. As stated, *ante*, we generally defer to the credibility determinations of the trier of fact and find no reason in the record not to do so here. The District alternatively argues that any comments made by Trimble to the nurses cannot be attributed to the decision-maker. The evidence was not offered, however, to support a finding of subordinate bias liability, but rather to confirm that the nurses were being targeted because of Hammond.

preclude a school district from reversing course and finding an alternative to layoff prior to sending out *final* termination notices by May 15. Given the severity of a layoff, the pursuit of alternatives during this two month time period would be expected. In this sense, if one of the two prescribed statutory actions necessary to implement a layoff may be seen as a procedural technicality, it is the first action. By sending out initial notices, a governing body has preserved the option of implementing a layoff in the event that the fiscal issues besetting a school district cannot be resolved in some other, less drastic, way. A governing body can always forego a layoff once it takes this first action, but it cannot go back in time to satisfy this requirement if it subsequently decides that a layoff is necessary.

Second, the evidence demonstrates that the layoff decision was by no means final. Brown told Di Regolo in April 2010 that he thought the nurses' e-mail would convince one undecided board member to vote to finalize the layoff. Brown said that the nurses' e-mail would provide the 3-2 vote to approve eliminating the nurse positions. Accordingly, even Brown understood that the vote taken by the school board on May 7, 2010, was not a mere procedural technicality.[9] The District's overt and open animosity toward the nurses lends further support to the inference that the nurses' protected activities were a motivating factor in the District's decision to lay them off.

The District counters that Brown valued the school nurses and worked with them to resolve their concerns. This negates, according to the District, any inference of unlawful motive. While we appreciate Brown's recognition of the nurses' value and his willingness to meet with them to attempt to resolve issues, this does not absolve the District of liability for

[9] Furthermore, Di Regolo's presentation to the school board about health care delivery options occurred on April 21, 2010. If a final decision to lay off the nurses had already been made at the March 3, 2010, school board meeting, Di Regolo's presentation, which included as an option (if not *the best* option) the retention of the nurses, would not have been necessary.

the retaliatory termination of the nurses' employment. We agree with the ALJ that the Association has proven all four elements of the prima facie case.[10]

The District's Affirmative Defense

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to prove it would have taken the same adverse action even if the employees had not engaged in protected activity. (*Novato, supra,* PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra,* 29 Cal.3d 721, 729-730.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) The employer must prove that it had both an alternative non-discriminatory reason for its challenged action, and that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

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[10] Further evidence of unlawful motive can be found in the manner in which the District handled the elimination and subsequent restoration of the lead nurse position and associated stipend.

As fully described in the ALJ's factual findings, Hammond was outspoken in her advocacy around workplace issues on behalf of the school nurses in her position as lead nurse. The District's decision to remove her from that position, then allow her to continue to perform the duties of lead nurse without pay, then restore the position and stipend, then refuse to consider Hammond for the position and then fail to fill the position despite the obvious need that it be filled is further evidence of unlawful motive. These actions present as highly irregular and animosity-driven. They served no ostensible programmatic purpose and no rationale for them can be discerned. Along with the other nexus factors of close temporal proximity, disparate treatment and animus, the facts concerning the elimination and restoration of the lead nurse position shed further light on the District's unlawful motive for the layoff of the nurses.

The District's position has been that the nurses would have been laid off for budgetary and restructuring reasons even in the absence of the nurses' protected activity. Regarding the budgetary reason, the proposed decision found that the Association and the District reached an agreement to address the shortfall through the implementation of six furlough days in late May 2010.[11] The proposed decision states that there is nothing in the record to show that the District still faced a shortfall requiring layoff of the nurses. Regarding the restructuring reason, the proposed decision observes that Di Regolo concluded during her presentation to the school board on April 21, 2010, that the best option for providing health services was "the status quo," i.e., maintaining the existing system with school nurses. The proposed decision concludes that the record does not support the District's claim that a fiscal shortfall or the desire to restructure health services "precluded the nurses' return from layoff status."

In its third and final argument, the District contends that, contrary to the conclusion reached in the proposed decision, it met its burden of proving its affirmative defense. The District asserts that the state budget crisis was real and the layoff was necessitated by the shortfall. The District does not dispute the conclusion reached in the proposed decision that the collective bargaining negotiations had a positive fiscal effect. Specifically, the District confirms that "[a]fter the certificated layoff was complete in May 2010, the District and the Association negotiated concessions and reached agreement on furlough days which saved the District enough money that it could bring back many of its laid off employees." The District argues, however, that the ALJ was wrong to focus on the District's failure to return the nurses from layoff status rather than on the District's decision to subject them to a layoff in the first place. Moreover, according to the District, there were not enough concessions to restore all of the positions that had been subject to the layoff. The District also asserts that the existing

[11] Thereafter, 71 of the laid-off full-time equivalent (FTE) certificated positions were restored.

health services system required restructuring to address and resolve issues of communication, workload and leadership. The District claims that those difficulties made the system dysfunctional.

We have no reason to question whether the District's budgetary problems were "real" or that they required some action. Our task is to discern the true motive behind the layoff of the four nurses in question. In the burden-shifting framework described above, the District prevails only if it can prove that it had a legitimate, non-discriminatory reason for the layoff *of the four nurses* and that it took the action it did because of that reason, and not because of the nurses' protected activity. When conducting the "but for" analysis, "PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) When evaluating the employer's justification, the question is whether the justification was "honestly invoked and was in fact the cause of the action." (*The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98, citing *Framan Mechanical Inc.* (2004) 343 NLRB 408.) As discussed below, in conducting this analysis, we conclude that neither of the District's proffered justifications withstands scrutiny.

Regarding the District's proffered budgetary reason for the nurses' layoff, the only evidence in the record is from a power point presentation by Di Regolo to the school board on April 21, 2010, regarding health services delivery options. One of the screen shots in the power point presentation states that the projected cost for the 2010-2011 school year of 4.1 FTE school nurses and 6.22 FTE health aides was $461,117. According to another screen shot in the power point presentation, in the proposed alternate health services delivery system, the four school nurses would be replaced by a health services specialist, three licensed vocational nurses and a contracting out arrangement for mandated health screenings, all at a savings to the

District of $100,920. This figure in the power point presentation appears out of thin air in that the elements of the alternate health services delivery option are not costed out. The District does not dispute that it is required by the state to provide health services for the care of children. Despite this mandate, the school board replaced a seemingly successful system of health services delivery with another on the basis of limited information and unsubstantiated representations. For this reason, we cannot agree that the District's claim of "cost savings" was honestly invoked and was in fact the true cause of the nurses' layoff when weighed against the evidence of retaliatory motive.

The District's alternate justification, that the existing health services system required restructuring because of all the difficulties encountered by the District in dealing with the school nurses on issues of communication, workload and leadership, does not add up either. This argument stands in contrast to Di Regolo's representation to the school board that, absent economic considerations, the best health care delivery option was "the status quo," meaning retention of the school nurses. Considering that the very issues at the heart of the nurses' protected activities – communication, workload and leadership – are the same issues cited by the District as justification for terminating the nurses' employment, we are all the more persuaded that the District's justifications were pretextual, not the true reason for the layoff of the school nurses, and that the District's affirmative defense is wholly without merit.

We do not agree with the District that the ALJ was wrongly focused on the District's failure to return the nurses from layoff status rather than the District's justifications for the layoff. Although final layoff notices were issued on May 7, 2010, the nurses' termination did not take effect until June 30, 2010. In February 2010, the Association and the District opened negotiations because the District was anticipating a $6-8 million budget shortfall for the following school year. In late May 2010, the Association agreed to accept six furlough days

and 71 FTE certificated positions were restored out of the 77 FTE certificated positions noticed for layoff.[12] That the District returned that many positions from layoff status but none of the school nurse positions, despite the state mandated need to provide health services for the care of children and Di Regolo's assessment that the maintenance of the status quo was the best option available to the District, simply confirms, but does not form the basis for, the conclusion that the District's budgetary and restructuring justifications were neither honestly invoked nor the true cause for laying off the school nurses.

In sum, we have weighed the District's justifications for the layoff of the nurses against the evidence of the District's retaliatory motive. Given the evidence reasonably warranting a conclusion of unlawful motive, all of the District's proffered justifications are unconvincing. Thus, we conclude that the District has failed to satisfy its burden to prove that it would have discharged the four nurses even in the absence of their protected activities.[13]

ORDER

Based on the foregoing discussion, the administrative law judge's findings of fact and conclusions of law, and the entire record in this case, it is found that the Rocklin Unified School District (District) violated the Educational Employment Relations Act (EERA),

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[12] Apart from the school nurses (4.1 FTE), the only other positions not returned from layoff status were two counselors and two part-time teachers. School Board Resolution No. 09-10-23 of March 3, 2010, which authorized the reduction or elimination of services, shows the number of positions noticed for layoff as 77.65. The District excepts to the ALJ's finding that 71 out of 77 FTE certificated positions noticed for layoff were restored, leaving only four nurses, two counselors and two part-time teachers on layoff status. For this exception, the District relies on Brown who testified that there were ten to twelve certificated employees who were not returned from layoff status. As the Association points out, however, in referring to ten to twelve positions, Brown was including approximately three administrative positions not in the Association's bargaining unit. Whatever numerical discrepancy exists in the record, it is slight and immaterial to the issues presented.

[13] Because we find that the District's exceptions and argument in support thereof lack merit, we pass on the issue raised by the Association regarding the timeliness of the District's filing.

Government Code section 3540 et seq., in Case No. SA-CE-2562-E. The District violated EERA by laying off Jennifer Hammond, Genevieve Sherman, Susan Firchau and Jennifer Bradley because they engaged in activity protected by EERA. All other allegations are dismissed.

Therefore, pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

Retaliating against employees because of their participation in activities protected by EERA.

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

1. Make whole Jennifer Hammond, Genevieve Sherman, Susan Firchau and Jennifer Bradley by offering them reinstatement, and provide back pay with interest at the rate of 7 percent per annum for wages lost from the date of layoff to the date the offer of reinstatement is made.

2. Within ten (10) workdays after service of a final decision in this matter, post at all locations where notices to employees in the District are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site, and any other electronic means customarily used by the District to regularly communicate with its employees in the bargaining unit represented by the Association. (See *City of Sacramento* (2013) PERB Decision No. 2351-M.)

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Rocklin Teachers Professional Association, CTA/NEA.

Members Huguenin and Banks joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-2562-E, *Rocklin Teachers Association, CTA/NEA v. Rocklin Unified School District*, in which all parties had the right to participate, it has been found that the Rocklin Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

Retaliating against employees because of their participation in activities protected by EERA.

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

Make whole Jennifer Hammond, Genevieve Sherman, Susan Firchau and Jennifer Bradley by offering them reinstatement, and provide back pay with interest at the rate of 7 percent per annum for wages lost from the date of layoff to the date the offer of reinstatement is made.

Dated: _____ ROCKLIN UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROCKLIN TEACHERS PROFESSIONAL ASSOCIATION, CTA/NEA Charging Party, v. ROCKLIN UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2562-E PROPOSED DECISION (09/26/2012)

Appearances: California Teachers Association by Laura P. Juran, Attorney, for Rocklin Teachers Professional Association, CTA/NEA; Kronick, Moskovitz, Tiedemann & Girard by Michelle L. Cannon, Attorney, for Rocklin Unified School District.

Before Robin W. Wesley, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges four school nurses were laid off by their employer in retaliation for their participation in protected activities. The union also alleges the employer transferred work and contracted work out of the bargaining unit without providing notice and an opportunity to bargain. The employer denies committing any unfair practices.

On July 9, 2010, the Rocklin Teachers Professional Association (Association) filed an unfair practice charge against the Rocklin Unified School District (District). The Association filed amended unfair practice charges on November 22, 2010 and March 11, 2011. The District submitted position statements in response to the original charge and each amended charge.

On April 5, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint that alleged the District retaliated against four school nurses for exercising rights guaranteed by the Educational Employment Relations

Act (EERA)[1] by issuing each of them a final notice of layoff. The complaint also alleged the District transferred the work of the school nurses to non-bargaining unit employees without providing the Association with notice and an opportunity to bargain. Additionally, the complaint alleged the District contracted out school nurse work without prior notice to the Association and an opportunity to bargain. By this conduct, the District is alleged to have violated EERA section 3543.5(a), (b), and (c).

The District answered the complaint on April 21, 2011, denying the substantive allegations and asserting affirmative defenses.

The parties participated in a settlement conference on May 4, 2011, but the matter was not resolved.

A formal hearing was held January 17-20, 2012. Following the filing of briefs, the case was submitted for decision on March 16, 2012.

FINDINGS OF FACT

The Association is the exclusive representative, within the meaning of EERA section 3540.1(e), of a bargaining unit of certificated employees of the District, including school nurses. The District is a public school employer within the meaning of EERA section 3540.1(k).

The Association and the District are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011. In the 2010-2011 school year, the Association and the District agreed to extend the contract one year through June 30, 2012. CBA Article IV covers District Rights and states, in part:

> 1.1 It is understood and agreed that the District retains all of its powers and authority to direct, manage and control its operations

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

to the full extent of the law except as specified in provisions of this Agreement.

1.2 Except as provided for in this Agreement, those duties and powers are the exclusive right to: determine its organization; direct the work of its employees, determine the times and hours of operations, determine the kinds of levels of services to be provided, and the methods and means of providing them; establish its educational policies, goals and objectives; ensure the rights and education opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine the curriculum; build, move, or modify facilities; establish budget procedures and determine budgetary allocations; determine the methods of raising revenue; and take action on any matter in the event of an emergency.

1.3 Except as provided for in the Agreement, the Board retains the right to hire, classify, assign, reassign, transfer, evaluate, and promote.

School Nurse Duties

School nurses are employed by the District to provide health services to students. In the 2009-2010 school year, the District had approximately 11,000 students and 4.1 full-time equivalent (FTE) school nurse positions.[2]

The school nurses are registered nurses (RN) and hold a school nurse services credential. Prior to 2010-2011, the school nurses exclusively performed certain work. School nurses participated with others as part of a team that prepared individualized education plans (IEPs) for certain students. An IEP determines whether a student is eligible for special education or other services. The school nurses exclusively prepared the initial student health assessment portion of the IEP, gathering and summarizing information to assess whether there were any educationally related health issues. Other individuals, including parents, special

[2] In the prior year, 2008-2009, the District had 5.2 FTE school nurse positions. The District did not fill the position of a retiring school nurse in 2009-2010 due to funding reductions.

education teachers, psychologists, speech pathologists and occupational therapists also contribute to an IEP. Collectively, the nurses wrote about 500 IEP health assessments each year.

The nurses also exclusively prepared individual student health care plans for students with severe medical conditions such as diabetes or asthma. The school nurses gathered medical histories, met with parents, and developed a health care plan.

State law mandates that students at specified grade levels receive vision, hearing, and scoliosis screening. The school nurses exclusively performed the vision and scoliosis screenings. For many years, the District contracted with an outside agency to perform the hearing screenings. The nurses conducted hearing screenings for students absent for scheduled screenings, needing follow-up screenings, or were evaluated for an IEP. The District also contracted for nursing services, when needed, to accompany students on an overnight field trip. In addition, the District contracted with a physician to provide training to high school staff on the use of a defibrillator.

The nurses performed many other duties, although not exclusively, including providing first aid; administering medication (the nurses exclusively administered insulin); training staff in CPR, first aid, health procedures and administration of medication; counseling parents; collecting data for mandated immunizations and health physicals, and submitting required reports; maintaining health records; providing input for health curriculum; making classroom presentations; developing staff and student health information and newsletters; and, with the school principal, supervising health aides.

The District designated one school nurse as a "lead nurse." The lead nurse received a stipend for performing additional duties. In addition to the above duties, the lead nurse coordinated and scheduled staff training and the vision, hearing and scoliosis screenings; met

with the nurses to coordinate training, student screenings, assignments, and implement District policies; provided feedback to the nurses' supervisor and advised her of new health requirements and policies; provided input on the budget; ordered supplies; served as the contact for inquiries of the nursing staff; and acted as the liaison between the District office and the school nurses.

Each school nurse was assigned responsibility for several schools. The nurses attempted to visit each school site at least once a week. There was one health aide assigned to each school. Health aides work approximately 3.25 hours each day, typically during the middle of the school day. The health aide positions are not included in the certificated bargaining unit.

Health aides are supervised primarily by the school principal. The school nurses supervised the health aides' medical work and trained them in first aid and administration of medication. The health aides provide routine student care and emergency first aid; maintain student and health office records; follow up on referrals for vision and hearing care; and implement health office procedures.

The school nurses were supervised by Betty Di Regolo (Di Regolo), director of special education and special services. Jennifer Hammond (Hammond) started working for the District as a school nurse in the Fall of 1998. During the 2005-2006 school year, Hammond was designated as the lead nurse. Genevieve Sherman (Sherman) was hired as a school nurse by the District in August 2004. In August 2006, Susan Firchau (Firchau) was employed as a school nurse. Jennifer Bradley (Bradley) began working for the District as a full-time school nurse in Fall 2007.

Office Space

In 2008, the nurses requested office space where they could use a computer, make confidential phone calls, write reports, and keep resource materials. As a group, the nurses first met with the Association president at the time, Mary Dick (Dick). In February 2008, the nurses and Dick met with Di Regolo and District Superintendent Kevin Brown (Brown) to discuss the office space request. After a productive meeting, the District provided the nurses with office space at Rocklin Elementary School.

Bus Driver Training

In August 2008, Director of Transportation Kim Thomas (Thomas) asked Hammond to train a bus driver on how to suction a student's trachea tube. Hammond reviewed the student's medical records, visited with the parent, and talked with the bus driver. Hammond concluded that training the bus driver was probably not safe. Hammond discussed the matter with Di Regolo several times, letting Di Regolo know she had difficulty with the request and did not think she should train the bus driver. Hammond then informed Thomas she would not be able to train the bus driver to perform the procedure. Thomas told Hammond that she needed to do what she was told and her opinion did not matter. Hammond did not train the bus driver.

ROP Medical Assistant Students

Also in August 2008, Di Regolo informed the nurses that medical assistant students from a county Regional Occupational Program (ROP) would volunteer in the health offices. Di Regolo asked the nurses to supervise the student medical assistants and train them to perform certain tasks, including emergency medical procedures. The nurses questioned whether they could supervise and train the ROP students because licensed medical assistants work under the supervision of a physician. Hammond did some research and contacted the Board of Registered Nursing. The nurses concluded they could not supervise or train the

student medical assistants because there was no physician on site and because the medical assistant students were not school employees.

Hammond spoke to Di Regolo and Deputy Superintendent Linda Rooney (Rooney), telling them the nurses could not train or supervise the medical assistant students. Hammond indicated the students should be limited to nonmedical tasks in the health offices. Di Regolo and Rooney said they would develop a list of approved tasks for the ROP students and that the school principals would supervise them.

In November 2008, Bradley became aware that a medical assistant student at one of her school sites had treated a student with a head injury. Bradley was concerned because the ROP student had not been trained in the District's procedures for treating head injuries. Bradley also learned that the student was filling in for the health aide and seeing other students who came to the health office. Bradley was unaware of the student's training and judgment and felt this could be an unsafe situation. Bradley sent an email to Di Regolo expressing her concerns. Rooney responded, stating she was developing a list of appropriate clerical tasks for the students and had provided a draft for Hammond's review.

In December 2008, Firchau became concerned about the medical assistant student assigned to one of her school sites. Firchau concluded the ROP student had made many documentation errors and had also given medical advice to parents. Firchau expressed her concerns to Di Regolo and Rooney in a December 15, 2008 email.

Elimination of Lead Nurse Position and Stipend

At some point, Hammond reduced her work time by one day per week to take a position with the infant development program in Placer County. Another school nurse, Judy Allen (Allen), added Hammond's day to her work schedule. In late December 2008, Assistant Superintendent for Human Resources Dave Pope (Pope) informed Hammond that the lead

nurse position had been eliminated and her stipend would stop at the end of the year. Allen was notified that the extra day she was working had also been eliminated.

Hammond met with Di Regolo and the other nurses to discuss the lead nurse duties. They decided Hammond would continue to serve as the lead nurse through the end of the school year without the stipend.

The four school nurses continued to discuss the lead nurse issue with Di Regolo and Rooney through the remainder of the school year, asserting the lead nurse position needed to be maintained. The nurses stressed the importance of having a lead nurse and stated they supported Hammond for the position.

CPR Training

During Spring 2009, the four nurses raised concerns with Di Regolo regarding scheduling the annual CPR training for the upcoming 2009-2010 school year. Prior to 2009-2010, the nurses provided CPR training to teachers on the afternoons of short instructional days. As the lead nurse, Hammond consulted with the other nurses about their work schedules, set dates at various school sites, and teachers would sign up for available slots. The nurses taught CPR to nearly 400 teachers and staff.

In Spring 2009, Rooney informed the nurses that afternoons on short instructional days were no longer available for CPR training, and they would have to start training sessions at 4:00 p.m. This time was outside the nurses' regular work hours as their work day ended at 3:30 p.m. The nurses complained to Di Regolo and Rooney that they had family obligations and other commitments that conflicted with the new CPR training schedule. The nurses said they could not teach the CPR classes after their work day ended.

School nurse Jo Froehlich (Froehlich) was retiring at the end of the 2008-2009 school year. Froehlich offered to teach CPR classes for the 2009-2010 school year. The District

agreed and contracted with Froehlich to teach the CPR classes.

Field Trip Forms

When students participate in extended or overnight field trips, parents are required to complete field trip forms with information about student medical conditions and medications. Prior to 2009, if the forms were not completed correctly, the teachers were responsible for contacting the parents to obtain the complete information.

In Spring 2009, Rooney revised the field trip form without consulting the nurses. The new form required a nurse's signature, which implied a nurse had reviewed a doctor's order and the medication a student brought for the field trip. When a teacher brought Bradley a large stack of forms and asked her to call parents to obtain complete information, Bradley complained to the school principal and Di Regolo that she was too busy performing health services to call parents about deficiencies on the field trip forms.

The nurses met with Di Regolo and Rooney about the field trip forms in May 2009. Rooney told the nurses she wanted them to call the parents to have the forms completed correctly. The nurses replied that they did not have time and the task had previously been done by teachers and school site staff. Hammond adamantly refused to call parents to correct the field trip forms.

Also, during the meeting, the nurses again raised the issue of the lack of a lead nurse. They expressed the view that a lead nurse was essential and Hammond was the person best qualified for the position because she had been doing it for years, and she was willing to do it without the stipend.

Bradley's Evaluation

During the Spring of 2009, Bradley received a performance evaluation from Di Regolo. Di Regolo wrote that communication between the District and the nurses had been challenging.

Bradley and Di Regolo discussed ways that communication could improve. Both agreed there had been some tense situations that year. Di Regolo said to Bradley, "it's going to get worse, it's going to get ugly." Bradley believed the comment was directed at Hammond because she had several issues with the District that year, including losing the lead nurse position.

Lead Nurse Discussions

The nurses continued to express their desire for a lead nurse, and that Hammond be appointed to the position. In a meeting with the nurses, Di Regolo indicated the lead nurse position would be restored in 2009-2010 with a stipend. Based on Di Regolo's comments and because the other nurses did not want to serve as lead nurse, Hammond believed she would be the lead nurse for the upcoming school year.

In June 2009, Di Regolo asked Hammond to reduce her assignment by 0.1 FTE so the District could hire a full-time nurse. Thinking she would be receiving the lead nurse stipend for 2009-2010, Hammond agreed to reduce her work time. Shortly thereafter, Di Regolo offered the lead nurse position first to Bradley and then to Sherman; both declined the offer because they believed Hammond was the most qualified.[3]

In late June 2009, Hammond and Di Regolo exchanged email about the lead nurse position. Hammond expressed frustration about how the lead nurse issue was handled and a perceived lack of consideration of the nurses' views on workplace issues. Hammond copied Brown, Pope, outgoing Association President Dick, and incoming Association President Barbara Scott (Scott) on her email.

[3] Di Regolo testified the lead nurse position was not offered to Hammond because she was no longer full-time, working only three days per week. Di Regolo said the lead nurse needed to be available to take care of things as they arose and provide consistency throughout the District. Bradley worked full-time and Sherman worked four days per week. The only other full-time nurse position was filled with a new employee in August 2009.

At the beginning of the 2009-2010 school year, Hammond sought the advice of Scott and California Teachers Association (CTA) staff representative Joella Aragon (Aragon) about the unpaid lead nurse stipend. The Association took the position that Hammond had continued to perform the lead nurse duties after the stipend was stopped in December 2008 and should be compensated for the work. Hammond and Aragon met with the new Assistant Superintendent of Human Resources, Robert Lee (Lee), to discuss the unpaid portion of the lead nurse stipend. The District agreed to compensate Hammond for performing the lead nurse duties for the second half of the 2008-2009 school year.

Further Demands for Lead Nurse and First Responder Training

Rebecca Dittemore-Escalante (Dittemore-Escalante) began working for the District as a full-time school nurse in August 2009. At that time, Hammond and Firchau each worked three days per week, 0.6 FTE. Sherman worked four days each week, a 0.8 FTE position, and Bradley worked full-time, 1.0 FTE. Together the work time made up 4.1 FTE school nurse positions in the District.

Each year, the lead nurse would schedule various trainings at the beginning of the school year addressing first responders, CPR, and transportation. However, with no lead nurse designated for 2009-2010, Di Regolo scheduled the training. First responder training was for the health aides and designated school site staff who respond to a student medical issue if a nurse was not on site.

On August 10, 2009, the nurses sent an email to Di Regolo listing the functions of a lead nurse, and the necessary experience and qualities. They asserted the lack of leadership without a lead nurse could impact their ability to provide quality health services. The nurses copied Scott, Brown, Lee and School Board Member Todd Lowell (Lowell) on the email.

Di Regolo responded to the nurses on August 11, 2009, welcoming them back to school for the new year, encouraging their continued participation as a team, and thanking them for the list of tasks that needed to be accomplished at the beginning of the school year. Di Regolo referenced the first responder training sessions, stating, in part:

> One of the first tasks is the First Responder training. We have had excellent response from the principals and have a full session on each day. For those of you who do not work full time, I am requesting that you arrange your schedules as you have in the past, to assist in making this training successful. If you are unable to do so, please let me know so that we can make sure that the sessions are staffed.

Di Regolo also stated:

> I would like to meet with Jennifer Hammond before I address the issues that you raise below. We have a nurses meeting scheduled for August 26th and I look forward to the discussion.

Hammond individually replied to Di Regolo on August 11, 2009, stating in part:

> Thank you for glossing over a HUGE problem as usual. Thank you for ignoring our concerns and suggestions regarding the Lead Nurse, trainings, and orientation. . . .
>
> I am not, as I have previously indicated available for the trainings. Nor do any of us need to 'adjust our schedules', we have checked. . . .
>
> We have not scheduled any nurse meetings so I am unaware of anything on the 26th. I am not available to meet after school beyond 3:30.
>
> If you would like to meet with me prior I would highly suggest as a professional, that you ask me to do so. Passive e-mails and messages through friends is not acceptable. I am happy to meet with you providing I am the Lead Nurse this school year and that you will support our role as indicated. Anything less is unacceptable to us.

After receiving this email from Hammond, Di Regolo informed her that she would no longer acknowledge email received from Hammond. Hammond reported this to Scott, who suggested the nurses send future emails as a group.

The nurses jointly replied to Di Regolo, again expressing frustration in being without a lead nurse. They also told Di Regolo the first responder training needed to be rescheduled because there were not enough nurses working on the days the training was scheduled. The nurses also stated the lead nurse matter needed to be resolved before the first nurses' meeting.

Di Regolo and the nurses exchanged several more email messages through August 18, 2009. Di Regolo noted that all of the nurses except Firchau were scheduled to work on the days set for training. The nurses continued to demand that the first responder training be rescheduled. In an August 18 email to Di Regolo, the nurses stated, "We need to make it perfectly clear as a group that the First Responder Trainings need to be rescheduled. In order to adequately provide a quality training, we need time to organize and we need the availability of all of our nurses." First responder training was eventually rescheduled.

In August 2009, Hammond and Di Regolo met at a Starbucks to discuss several issues, including the lead nurse, first responder training, and the flu clinic. Hammond felt that Di Regolo needed her help in coordinating the trainings and other activities. Hammond indicated that since she would not be the lead nurse, she was not willing to help coordinate these activities. Di Regolo told Hammond she "needed to be careful" and she "better watch out."

In October 2009, the nurses, Scott, and Aragon met with Di Regolo and Lee to discuss the importance of a lead nurse. The nurses reaffirmed their desire that Hammond be designated the lead nurse. Lee replied that Hammond would never again be the lead nurse in the District. Lee suggested the lead nurse duties and the stipend be divided between two nurses, covering administrative tasks and liaison work. The nurses rejected Lee's proposal and no lead nurse was selected for 2009-2010.

Complaint to Board of Registered Nursing

In October 2009, Dittemore-Escalante made a medication error. Hammond notified Di Regolo and told her she was going to report the matter to the Board of Registered Nursing. Di Regolo asked Hammond to wait, stating the District was conducting an investigation and requesting that Hammond "respect the process that the district has in place." Hammond told Di Regolo she was going to file a complaint with the Board of Registered Nursing, which she did thereafter.

On October 14, 2009, the nurses sent an email to Di Regolo expressing concerns regarding Dittemore-Escalante's nursing practices. They suggested that Dittemore-Escalante receive orientation and mentoring support. Di Regolo replied by email stating:

> An email regarding the district mentoring program for new staff will be going out this week. In the meanwhile it is helpful for new staff to have ongoing contact with their district peers on an informal basis, like we did before a mentoring program was established.

Subsequently, Firchau and Sherman provided some mentoring assistance to Dittemore-Escalante.

Instruction to Health Aides

When Hammond served as the lead nurse, she sent informational emails to the health aides a couple of times a year. The memos reminded health aides to turn in mandated reports, reported schedule changes, and provided other news. Although not the lead nurse in 2009-2010, on October 13, 2009, Hammond sent an email to the health aides with similar information. In addition, the email included information regarding the H1N1 flu epidemic, including the following:

> It has come to my attention that some schools are either asking the health office to visually inspect kids they think are sick or have been out sick in order to make a determination of health. This is not practical and more important, not legal. The only

> person who can legally assess is an RN. Please do not do this, you are not licensed to do this. <u>If you are being asked to do this kindly say no and explain why, asking the admin. to contact your school nurse for more information, and let your school site nurse know</u>.

(Emphasis in original.)

On October 14, 2009, Rocklin High School Principal Michael Garrison (Garrison) replied to Hammond's email noting that most of the information sent to the health aides seemed to be helpful. Garrison told Hammond, however, that if she had an issue with the direction provided to health aides, she should discuss it with the school principal before sending such information directly to the health aides.

Hammond responded, with a copy to Scott, stating in part:

> The health aides work under our license. Any decision that is made that impacts the health office and nursing practice also affects the RN's. I would respectfully request that in the future you may want to partner with your school nurse when planning to implement a process that impacts the health office and nursing practice. We had previously told our health aides that they cannot do this.

Garrison replied:

> Let me make myself perfectly clear – IF YOU HAVE SOMETHING TO SAY TO OUR HEALTH AIDES IN REGARDS TO A PRACTICE OR PROTOCOL OUR ADMINISTRATION HAS ESTABLISHED YOU NEED TO TALK WITH MARY ANN KNOX OR MYSELF BEFORE YOU TELL THEM TO DO SOMETHING CONTRARY TO WHAT WE HAVE INSTRUCTED!
>
> If having health aide's [*sic*] talk with students who are not feeling well was an issue for you, you should have contacted us (RHS Admin) and talked with us first. Our aides are not making evaluations or assessments.

(Emphasis in original.)

Hammond continued to defend her position to Garrison, responding, in part:

> I am fortunate at the sites I work at that I am treated as a team member and my nursing expertise is utilized when decisions are made that affect the health office. The school nurse is the only legally recognized medical authority in a school district and is the only person that can make decisions that affect those that work under his/her license in regards to medical/health implications. When something like this has come up at my sites I collaborate as a team member and any issues are easily resolved. Additionally, I feel your e-mails to me are rude and unprofessional. I will not be addressed in this manner. I would prefer to be addressed in the same professional tone I have used with you.

H1N1 Vaccination Clinic

In November 2009, the District began working with the Placer County Health Department (County Health) to hold community flu vaccination clinics at District school sites. Initially, the nurses received some information from County Health. However, at some point, Brown assigned the task of arranging the County Health clinics to Di Regolo. On November 2, 2009, the nurses sent an email to Di Regolo, with a copy to Scott, complaining about being "left out of the loop," and seeking information on their role in the clinics. The nurses expressed concern about a clinic being located at Rocklin High School, believing the principal had been rude to Hammond. The nurses also inquired whether they would be paid for attending the clinics because they were scheduled after work hours.

Brown responded, commenting on the tenor of the nurses' email and noting it was unfortunate the District and the nurses had not been able to restore better communications. Brown stated there was a role for the nurses at the community flu clinics to assist in reviewing permission slips and being available at the site. He indicated, however, the work was voluntary.

A flu clinic was held at Spring View Middle School. Firchau was the only school nurse to participate. She was not paid for her time.

Health Aide Performance Issues

In late 2009, Hammond had concerns about the performance of a health aide at Twin Oaks Elementary School. Hammond discussed the matter with Di Regolo and the school principal, Sarah James (James). James was aware of the concerns and asked Hammond to copy her on any email she sent to the health aide.

In December 2009, the health aide made a significant error. James gave her a reprimand. The health aide complained to Lee that James and Hammond were picking on her.

On January 6, 2010, James told Hammond she had met with Lee regarding the health aide's complaints. James indicated that Lee was going to ask Hammond to "soften" her emails to the health aide.

Hammond met with Lee and Di Regolo on January 6, 2010, to discuss ways to effectively communicate with the health aide. The meeting quickly deteriorated. During the meeting, Lee yelled at Hammond and slammed his hand on the table. Lee told Hammond that she could not send email to the aide as she was not the aide's supervisor. Hammond felt threatened and intimidated, and responded by telling Lee the meeting was over. Hammond was told to "please sit down" to finish the discussion. Lee told Hammond it was his meeting and if she left, he would write her up and have her fired. Hammond said she would continue the meeting when she could have a union representative present. Hammond then left the room.

On January 13, 2010, Hammond sent an e-mail to Di Regolo, Brown and the school board members, listing her concerns about the health aide's performance. Hammond said she would continue to copy James on her email to the health aide.

Hammond's Reprimand and Grievance

On January 14, 2010, Lee gave Hammond a letter of reprimand for leaving the January 6, 2010 meeting. Scott was present when Hammond received the reprimand.

Thereafter, the Association filed a grievance on Hammond's behalf. Both Bradley and Firchau accompanied Hammond to grievance meetings held in February and March 2010.

Training Unlicensed Personnel to Administer Diastat

In January 2010, the parent of a student with a seizure disorder insisted that a number of staff, including classroom aides, be trained to administer Diastat, a rectally administered seizure medication. The school nurses had provided training to unlicensed personnel to administer medications to students. In this case, however, the nurses informed Di Regolo and several other administrators, they could not conduct the training because they believed unlicensed personnel should not administer this medication.

After the nurses objected to training unlicensed personnel in Diastat administration, Di Regolo contracted with a doctor used by the Placer County Office of Education to train unlicensed personnel to administer the medication.

Nurses' Meeting with School Board Member Camille Maben

In December 2009, Scott helped set up a meeting between the nurses and School Board Member Camille Maben (Maben). The nurses expressed concerns about a variety of issues, including the need for a lead nurse and the lack of communication with the District office. Maben advised the nurses to meet with Brown.

Nurses' Meetings with Superintendent Brown

On February 3, 2010, the nurses and Scott met with Brown to discuss many of the nurses' concerns, including communication, poor working relationship with Di Regolo, lead nurse, and nurse staffing. Dittemore-Escalante had just announced she would leave later in February 2010 to take a position in another school district.[4] The nurses were also concerned

[4] Brown testified that Dittemore-Escalante confided that she was disappointed to be leaving, but based on her interactions with the other nurses she felt like an outcast, not appreciated or supported by her colleagues.

that further budget reductions would lead to nurse layoffs.

Brown acknowledged the communication issues and committed to working on building better working relationships. Brown told them there was a perception the nurses were saying "no" to many things and then claiming their nursing licenses would not let them perform the work. Brown cited the nurses' refusal to work with the ROP medical assistant students as an example. Brown indicated that rather than just saying "no," the nurses and the District needed to find a way to collaborate to come up with alternatives. Brown also said there was a perception the nurses were becoming more adversarial toward the District because Scott was attending more of their meetings with administrators. Brown acknowledged the nurses were understaffed, and further budget reductions could mean the District would consider contracting out nursing services or replacing them with licensed vocational nurses (LVNs). Brown suggested the nurses make a presentation to the school board about the work they perform.

Brown and the nurses discussed the need to cover Dittemore-Escalante's workload. Brown stated that since it was late in the school year and layoffs were a possibility, it could be difficult to quickly recruit a replacement. Brown offered the part-time nurses the option to pick up some of Dittemore-Escalante's time. The part-time nurses declined to take on more hours. The nurses did agree to work on a plan to cover the additional work, and Brown said the District would compensate them for their extra work time, including time they worked from home completing paperwork.

On February 9, 2010, the nurses submitted a plan to Brown to address the additional work. Brown found the plan reasonable and later met with Hammond, Sherman and Firchau to clarify responsibilities under the plan.

During a school board meeting on April 7, 2010, Brown erroneously informed the school board members that the nurses were receiving overtime pay for the additional work.

Brown admitted that he misspoke when trying to explain the arrangement to the school board.

Nurses' Meeting with School Board Member Wendy Lang

Hammond, Firchau and Sherman met with School Board Member Wendy Lang in late February 2010, to discuss the same concerns they raised with Maben and Brown, covering communication, staffing and workload, lead nurse and poor relationships. The nurses also expressed a concern the District would "get rid of" the nurses and contract out the work or form a consortium with other school districts to provide nursing services.

Reduction in Force (RIF)

As a result of state school funding reductions, on March 3, 2010, the school board adopted a resolution approving the reduction of 77.65 FTE certificated positions for the 2010-2011 school year, including all school nurse positions. On March 4, 2010, all four school nurses received a Notice of Intent to Dismiss. The notice advised employees they could request a RIF hearing.

On March 17, 2010, Firchau, Sherman and Bradley attended a school board meeting and made a presentation, including presenting a video, showing the services provided by the school nurses.

A RIF hearing was scheduled to be conducted by an administrative law judge on April 6-7, 2010. On April 2, 2010, the nurses sent Di Regolo an email:

> Just a courtesy note to alert you that all four of the nurses will be attending the RIF hearings on Tuesday and Wednesday of this coming week. Per our union attorney, Andrea Price, we have the right to attend uninterrupted and in their entirety on both days, so the district will be without nurses on those two days. We will not be answering or [*sic*] phones or responding to e-mail during the hearings. It will fall to you to arrange for nursing coverage and in particular, coverage for our little first grade diabetic at Antelope Creek on those days.

Superintendent Brown replied to the nurses on April 5, 2010, and copied the school board members, stating:

> Your concern for the well-being of our student's health is regrettable. We will definitely find a way to cover in your absence.

The District contracted with a service and had an RN in the District during the RIF hearing.

Marsha Wussow (Wussow), Assistant to Di Regolo, testified that she overheard Brown tell Di Regolo he thought the nurses' email would convince one board member who had not yet decided, to vote to layoff the nurses. Wussow further testified that Brown said the email would provide the 3-2 vote to approve eliminating the nurse positions.

Brown admitted having a conversation with Di Regolo about finding replacements to cover the nurses' absence. He denied, however, commenting on how the school board members would vote because the board had already voted 5-0 to provide layoff notices to the four nurses and other certificated employees.[5] Brown testified that he routinely informed the school board of matters that could escalate to their level, and copied the board members with his email to make them aware of the potential liability to the District if they were unable to find substitute nursing services.

I credit Wussow's testimony. Brown's response to the nurses indicated only that the District would "definitely" make sure the necessary health services would be covered. Nothing in Brown's email alerts the school board members that the District might not be able to obtain substitute nurses and that it could potentially be liable for the lack of nursing services.

Brown and Di Regolo testified during the April 6-7, 2010 RIF hearing that the District was considering another method for providing health services, such as joining a consortium

[5] The school board subsequently approved the final layoffs by a 5-0 vote.

with the Placer County Office of Education, contracting for health services, or obtaining LVNs.

On April 12, 2010, the nurses sent three separate emails to the school board members. First, the nurses provided the school board with a "position statement" explaining why unlicensed personnel should not be allowed to administer the Diastat medication. In the second email, the nurses expressed concern that administrators were defaming them for exercising their right to attend the RIF hearings. Finally, the nurses sought to correct Brown's statement that the nurses were charging the District overtime for covering Dittemore-Escalante's work. The nurses asserted they were saving the District money, charging only for the extra hours they worked to complete assignments.

April School Board Meeting

During a school board meeting on April 21, 2010, Di Regolo made a presentation about options for providing health services in 2010-2011. Firchau, Sherman, Bradley and Scott attended the school board meeting. Di Regolo's presentation included a discussion on restructuring health services to cover only mandated services, eliminating things like the nurses' participation in curriculum development and classroom presentations. Di Regolo described several options, including maintaining the existing system of health services provided by school nurses. Other options were eliminating either the health aides or the nurses, contracting out health services, or joining a consortium. The presentation indicated that the option to hire a health services supervisor and LVNs to replace the nurses would save the District $100,920. An option to reduce nursing staff by 1.0 FTE, saved the District $64,709. The presentation concluded that the best option for providing health services was "the status quo." With reduced funding, however, the presentation recommended restructuring

health services. The presentation was for information purposes and the school board did not vote on any changes to the provision of health services.

After Di Regolo's presentation, school board member Lowell stated, in part:

> The budget situation drives us to evaluate everything we do and find greater efficiencies and savings. And so I was interested to hear what the details were to support alternative structure for delivering our health services, but what also helps inform me is e-mail that was sent by the [school nurses].

Lowell then read the April 2, 2010 email the nurses sent to Di Regolo notifying her they planned to attend the RIF hearing. Lowell continued:

> This has solidified for me the need to look in an alternative, more cost-effective way to deliver health services in the District. So, I still support the change.

Firchau and Sherman testified that Lowell appeared angry when he read the email. Brown testified that Lowell did not appear angry, instead he was disappointed.

Within days after the April 21, 2010 school board meeting, Rocklin Elementary School Principal Jim Trimble (Trimble) stopped at the nurses' office, located on his school site. Firchau and Bradley were in the office. Firchau asked Trimble what he thought about Lowell's comments at the school board meeting. Firchau testified that Trimble said it was a shame what was happening, and if anyone other than Hammond was the lead nurse, none of it would be happening. Bradley testified that she overheard the conversation between Firchau and Trimble.

Trimble testified that he did not stay for the entire school board meeting, and did not recall hearing Lowell's comments about the nurses. He denied making the comments about Hammond, or having heard any other administrator say that the nurses would not be laid off if not for Hammond. Trimble knew Hammond was the lead nurse in 2008-2009 but did not know she was not the lead nurse in 2009-2010. He believed Hammond was the nurse assigned

to his school. Trimble admitted he and Brown were friends, and had golfed together. Trimble stated that he and Brown did not discuss personnel issues or budget matters while golfing, only during work time.

I credit the testimony of Firchau and Bradley. Their recollection of the conversation with Trimble was specific and consistent. Trimble's recollection about attending the school board meeting was vague, stating in part:

> I think I was there because I think that was my time I needed to be there to serve for the time and was there and then left. So, when I'm there, I'm just sort of seeing what's happening in the general aspect and not anything specific.

Trimble also did not know that Hammond was not the nurse assigned to his school site.

Furlough Negotiations

In February 2010, the Association and the District opened negotiations because the District was anticipating a $6-8 million budget shortfall for 2010-2011. Initially, the District provided the Association with several options reflecting different scenarios comprised of layoffs, increased class sizes and program reductions, and the corresponding savings for each option. The District sought input from the Association, asking if they preferred one option over another. The Association refused to indicate a preference for any option, stating they did not want to pick one group of members over another.

After the school board adopted the layoff resolution on March 3, 2012, more formal negotiations began. The Association asked how health services would be provided if the nurses were laid off, and whether teachers would have any additional responsibilities for student health. The District provided information and assured the Association that teachers' duties in this area would not change.[6]

[6] Scott testified she did not ask any questions about how the District would provide health services, or about increased responsibilities of teachers for student health, nor did she

The District decided to narrow the focus of health services to mandated services, and providing services to students who had identified health needs under the health services supervisor/LVN option. Di Regolo believed the health services staff needed more supervision by a person with a nursing background. Di Regolo was not an RN and she did not have a school nurse credential. At the bargaining table, the Association repeatedly stated it would not take a position on options pitting one group of employees against another. The Association did not demand to bargain any changes to the health services program.

In early May 2010, the administrative law judge in the RIF hearing issued a decision affirming the layoffs recommended by the District, including all school nurses. On May 7, 2010, final notices of layoff were issued. On May 19, 2010, the school board adopted a job description for the health services supervisor. Scott was present during this school board meeting.

Thereafter, in late May 2010, the Association agreed to accept six furlough days, hoping that would generate enough savings with other retirements and resignations to bring back all employees who received layoff notices.[7] Ultimately, 71 FTE certificated positions were restored. Further, as a result of increased student enrollment and the opening of a new

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recall anyone else asking these questions "in her presence." Scott testified she did not recall the "specifics" of discussions during negotiations about how health services would be provided. I credit the testimony of Brown and Lee; their recollections of discussions at the bargaining table were detailed and consistent. Scott was present at the school board meeting when Di Regolo described options for providing mandated health services. Scott's testimony that she did not recall the "specifics" of the discussions about health services indicates the subject of health services was raised at the bargaining table. It is simply not credible there was no discussion at the table about the provision of health services if the nurses were laid off, given the District's earlier presentations on health services at the RIF hearing and before the school board.

[7] Brown testified that the layoff of school nurses had been considered in the two prior years due to budget reductions. However, no employees were laid off in the two prior school years.

elementary school, the District hired 42 additional teachers and a health aide for the new school. The four school nurses, two counselors and two part-time teachers were laid off effective the end of the school year.

Health Services Supervisor and LVNs

On June 16, 2010, the school board adopted a job description for LVNs. Again, Scott was present at this school board meeting.

The health services supervisor is a management level position and must be an RN and have a school nurse credential. The supervisor is responsible for the day-to-day operation of the health services program. The position supervises the work of the LVNs and the health aides with input from the school principals. The LVN positions are classified positions.

The health services supervisor position was posted in June 2010. Firchau applied but was not selected. The District hired Bonnie Magnetti (Magnetti) and she started working for the District in August 2010. The District also hired three LVNs for the 2010-2011 school year.

Magnetti coordinates and schedules mandated health services such as vision and hearing screenings;[8] jointly supervises the LVNs and the health aides with the school principals; implements and monitors staff training; prepares initial IEP health assessments and individual student health care plans, although the LVNs assist in collecting information from parents and physicians; prepares required state and federal reports; and supervises first aid, medication, and specialized medical treatment.

The LVNs travel to assigned school sites and provide first aid; administer medication, including insulin; collect health and medication information from parents and physicians; maintain health records; and assist with training.

[8] The requirement that the District perform scoliosis screening was waived in 2010-2011.

In August 2010, Di Regolo contacted each of the four nurses and offered them limited hours to perform the annual vision screenings. Each of the nurses declined for various reasons. Thereafter, the District contracted with a retired school nurse and an optometrist to perform the vision screenings.[9] The nurses were also offered an on-call nurse position. After the District received a grant, Di Regolo also offered each of the nurses a part-time position, two half-days per week, in the preschool program. Each of the nurses declined these offers.

The District contracted with Maxim, a professional staffing agency, to provide substitute LVNs if the District LVNs were absent. Maxim also provided a substitute RN on days Magnetti was away from the District. At the beginning of 2010-2011, the District had difficulty locating health plan documentation, so some plans had to be recreated or updated. The District contracted with an RN to help Magnetti catch up with preparation of these health assessments.[10]

ISSUES

1. Did the District retaliate against the four school nurses for engaging in protected activity when it issued them final layoff notices?

2. Did the District transfer work out of the bargaining unit without providing the Association with notice and an opportunity to bargain?

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[9] For the 2011/12 school year, the District again offered the nurses temporary positions to conduct vision screenings. The nurses declined this offer as well.

[10] Firchau met Magnetti at meetings at the Placer County Office of Education in October 2010 and January 2011. Firchau testified that Magnetti said the new system of delivering health services in the District was not working, and she was overwhelmed and overworked. Firchau testified that Magnetti had asked Brown for more nurses, but Brown replied the District could not hire more RNs because they would have to rehire the laid off nurses. Firchau's testimony is uncorroborated double-hearsay and does not qualify under any exceptions for admissible hearsay evidence. It cannot therefore serve as the basis for a finding of fact under PERB Regulation 32176. (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

3. Did the District contract work out of the bargaining unit without providing the Association with notice and an opportunity to bargain?

CONCLUSIONS OF LAW

Retaliation

Public school employees have the right to "form, join, and participate in the activities of employee organizations of their own choosing." (EERA section 3543(a).) A public school employer violates this right when it imposes reprisals on employees because of their participation in protected activities. (EERA section 3543.5(a).) To demonstrate that an employer retaliated against an employee in 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; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

Protected Activity and Knowledge

Each of the four nurses engaged in multiple activities protected by the EERA. On several occasions the nurses jointly sought assistance from the Association by having Association representatives, primarily Scott, attend several of their meetings with Di Regolo, Lee, Brown, and school board members. (*County of Merced* (2008) PERB Decision No. 1975-M; *Los Angeles Unified School District* (1992) PERB Decision No. 957; *The Regents of the University of California* (1995) PERB Decision No. 1087-H [assistance from a union representative to address working conditions is protected activity].) In addition, with the assistance of a CTA staff representative, Hammond met with Lee and Di Regolo at the beginning of the 2009-2010 school year, seeking compensation for continuing to perform the duties of the lead nurse after the stipend was eliminated. Hammond also utilized the grievance

procedure with the assistance of the Association after receiving a letter of reprimand in January 2010. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H [filing grievance is protected].) Firchau and Bradley supported Hammond in the grievance procedure by accompanying her to grievance meetings.

Further, as a group, the nurses complained about workload and safety issues to Di Regolo, Brown, and school board members. Due to budget reductions, the District did not replace a full-time nurse who retired in June 2009. During a meeting with the nurses in February 2010, Brown acknowledged the nurses were understaffed based on workload. The nurses jointly expressed workload concerns, including complaining about taking on responsibility for completion of the field trip forms. In addition, the nurses reported safety concerns regarding appropriate health care. (*Los Angeles Unified School District* (1995) PERB Decision No. 1129 [reporting safety incident was protected].) For example, in August 2008, Hammond expressed to Di Regolo her belief it was unsafe to train a bus driver to suction a student's trachea tube. In late 2008, Bradley and Firchau each separately communicated to Di Regolo and Rooney concerns about the performance of the medical assistant students at their school sites. Furthermore, all of the nurses exercised their right to participate in the RIF process by attending the layoff hearing held in April 2010.

The District clearly had knowledge of these events as District managers and school board members were present at meetings where the nurses were accompanied by Association representatives. In the February 2010 meeting, Brown even commented on the presence of Association representatives at many of the nurses meetings. In addition, each of the complaints or safety concerns were made to managers.

Adverse Action

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) This element has also been met as the termination of an employee's employment through layoff has been held to be an adverse act. (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778; *County of Contra Costa* (2011) PERB Decision No. 2174-M.) Here, all four nurses received final layoff notices in May 2010 that were effective at the end of the school year.

Unlawful Motive

Unlawful motivation is an essential element of a charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the

employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529), or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato Unified School District*, *supra*, PERB Decision No. 210).

The nurses engaged in protected activity dating back to February 2008, when they obtained the assistance of the Association president to meet with Brown and Di Regolo to request office space. The protected activity continued well into 2009-2010 with complaints about workload and student safety, and frequently seeking the Association's assistance in their communications with District managers. Finally, in February 2010, the nurses took their complaints directly to Brown. On March 4, 2010, the District issued the initial notices of layoff to the nurses and other certificated employees. The nurses' protected activity continued by participating in the RIF hearing held April 6-7, 2010. Thereafter, on May 7, 2010, the nurses received a final notice of layoff. Thus, the imposition of the adverse action close in time to the nurses' participation in protected activities satisfies the timing element.

The record also demonstrates evidence of other nexus factors. The evidence reveals disparate treatment of the nurses for participating in the RIF hearing. Brown notified the school board that the nurses would not be available to work because they planned to attend the RIF hearing. There is no evidence the District similarly identified teachers or counselors who

attended the layoff hearing. Furthermore, the tone of Brown's email suggests, at minimum, disappointment in the nurses' decision to attend the layoff hearing rather than forego the hearing to provide for student health care needs.

Brown also commented to Di Regolo that the nurses' plan to attend the layoff hearing might convince school board members to support the nurses' final layoff. Brown's email appears to have had the desired effect. One school board member read the nurses' email during the school board meeting and then stated the email solidified his support for an alternate health care system. These actions suggest union animus and support a finding of nexus. The Association therefore established a prima facie case of retaliation.

District's Burden

Once the charging party establishes a prime facie case of retaliation, the burden shifts to the employer to prove it would have taken the adverse action even if the employees had not engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721,729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers*.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

The District contends the layoff of the nurses was necessary for two reasons, due to a budget shortfall and to restructure a program that was not working well.

In negotiations with the Association, the District explained it was anticipating a $6-8 million shortfall. The District was seeking concessions from the Association to assist in bridging the gap between revenue and expenses. The goal was that concessions from the

Association combined with teacher retirements and resignations would be enough to cover all the laid off employees.

During the April 21, 2010 school board meeting, Di Regolo made a presentation about the provision of health services. Di Regolo described various options and the corresponding savings of each option to the District. For example, the option to restructure health services by replacing the nurses with a health services supervisor and LVNs, was projected to save the District approximately $100,000.

In late May 2010, the Association and the District reached an agreement on six furlough days. Thereafter, 71 of the 77 FTE certificated positions that were noticed for layoff were restored. In addition, 42 new certificated positions were added to accommodate increased student enrollment. The four school nurses, two counselors and two part-time teachers were not returned from layoff status. There is nothing in the record, however, to show where the District stood financially at this point. The evidence does not establish that following negotiations with the Association, the District still faced a revenue shortfall that necessitated the layoff of the nurses.

The District also claims the nurses were laid off for the purpose of restructuring health services to focus on mandated services. Yet, in the April 21, 2010 health services options presentation to the school board, Di Regolo concluded the best option for providing health services was "the status quo," maintaining the existing system with school nurses. Only if faced with reduced funding did Di Regolo's presentation recommend restructuring health services. Thus, the record does not support the District's claim that a fiscal shortfall or the desire to restructure health services precluded the nurses' return from layoff status. Thus, the District has not met its burden to show it would have laid off the nurses notwithstanding their participation in protected activity.

Timeliness of Transfer and Contracting Out Allegations

The District contends the removal of work allegations were untimely filed by the Association and should not have been included in the complaint.[11] EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

The Association filed its charge on July 9, 2010, and filed amended charges on November 18, 2010 and March 10, 2011. The District asserts the Association did not raise the removal of work allegations until filling the March 10, 2011 second amended charge. The District contends the Association knew or should have known by February 3, 2010, when Brown met with Scott and the nurses, that the District intended to remove the nurses' work from the unit. The District argues this is well outside the six month statute of limitations from the filing of the March 10, 2011 second amended charge.

The Association alleged in its original charge that in February 2010, Brown told Scott and the nurses the District was considering eliminating the nurses and obtaining nurses and LVNs from an agency. The original charge also alleged facts about the April 21, 2010 school board meeting when the health services supervisor/LVN option was presented. The charge

[11] On September 26, 2011, the District filed a motion to dismiss the transfer and contracting out allegations from the complaint as untimely filed. On November 15, 2011, the motion was dismissed without prejudice to reassert timeliness following the evidentiary hearing. The District reasserted this contention in its post-hearing brief.

alleged the nurses received their final layoff notices on May 7, 2010, and that the District advertised to hire the health services supervisor in June 2010. These facts address the layoff of the nurses and removal of bargaining unit work. In its first amended charge, the Association specifically cited EERA section 3543.5(c), asserting the District engaged in bad faith bargaining. The second amended charge supplemented the facts alleged in the original charge by providing more detail on the duties of the nurses and other employees.

The original charge focused primarily on the nurses' retaliation allegation. However, the charge provided sufficient factual allegations to raise the removal of work claims. Once timely raised, a charging party may supplement factual allegations and legal theories in subsequent amendments to the charge. PERB Regulation 32620 authorizes a Board agent assigned to investigate a charge to "make inquiries" and "assist the charging party to state in proper form the information" required in the charge. This authority includes asking a charging party for clarification of facts and assisting with identifying proper legal theories. (*Los Banos Unified School District* (2007) PERB Decision No. 1935; *SEIU-United Healthcare Workers West Local 2005 (Hayes)* (2011) PERB Decision No. 2168-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Accordingly, the claim that these allegations are untimely filed is dismissed.

Transfer of Bargaining Unit Work

To determine 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 by altering the parties' written agreement or established past practice; (2) the change was

implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; (3) the change was not merely an isolated breach of the contract or practice, but amounted to a change of policy that had a generalized effect or continuing impact upon bargaining unit employees' terms and conditions of employment; and (4) the change in policy concerned a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Unified High School District* (1982) PERB Decision No. 196.)

The transfer of work from bargaining unit employees to employees in another bargaining unit or to non-unit employees is a matter within the scope of representation. (*Rialto Unified School District* (1982) PERB Decision No. 209.) The Board has held, however, that not all transfers of bargaining unit work are negotiable. In *Eureka City Schools* (1985) PERB Decision No. 481, the Board concluded that a change in the distribution of duties between unit and non-unit employees, where there is an established practice of overlapping duties, does not always give rise to a duty to bargain. In *Eureka*, the Board stated:

> In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed <u>exclusively</u> by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

(Emphasis in original; footnote omitted.)

Here, the District has effected a transfer of work out of the bargaining unit to other District employees. There is evidence of overlapping work performed by school nurses, health aides and others. Once the school nurses were laid off, much of the overlapping work formerly

performed by the nurses ceased to be performed by bargaining unit employees. Some overlapping work did continue to be performed by unit employees. For example, other bargaining unit employees continued to participate in preparing IEPs, and acted as first responders in providing first aid, and administered medication. The work exclusively performed by the school nurses, however, was removed from the unit. The nurses' exclusively prepared initial student health assessments and individual student health care plans; performed vision screening and administered insulin. After the nurses were laid off, two of these tasks, preparing initial student health assessments and individual student health care plans, were transferred out of the unit to the newly created classification of health services supervisor. The LVNs, classified bargaining unit positions, were assigned to administer insulin, a task previously exclusively performed by the school nurses. Thus, the evidence establishes the District transferred work out of the bargaining unit to other District employees.

Contract Out Bargaining Unit Work

The Board has held that a decision to subcontract work formerly performed by bargaining unit members is a matter within the scope of representation when the decision would simply "substitute one group of employees for another performing the same work, [and] does not effect a change in the nature and direction of operations." (*Trustees of the California State University* (2006) PERB Decision No. 1839-H; *Lucia Mar Unified School District* (2001) PERB Decision No. 1440; *Redwoods Community College District* (1997) PERB Decision No. 1242; see also, *San Diego Adult Educators v. Public Employment Relations Board* (1990) 223 Cal.App.3d 1124.)

Further, "where the decision to subcontract is related to overall enterprise costs, it is within the scope of representation regardless of whether the decision can be characterized as a decision 'at the core of entrepreneurial control.'" (*Ventura County Community College*

District (2003) PERB Decision No. 1547, quoting *Fibreboard Paper Products Corp. v. National Labor Relations Board* (1964) 379 U.S. 203.) "This is because subcontracting decisions motivated by an employer's enterprise costs are 'peculiarly suitable for resolution through the collective bargaining framework.'" (*Ventura County Community College District, supra*, PERB Decision No. 1547, quoting *First National Maintenance Corp. v. National Labor Relations Board* (1981) 452 U.S. 666, 680; see also, *Lucia Mar Unified School District, supra*, PERB Decision No. 1440, and *Otis Elevator Company* (1984) 269 NLRB 891, 900-901.)

Before the nurses were laid off, the District contracted out some of the work the nurses performed. The District contracted for hearing screenings; and training in CPR, use of a defibrillator, and administration of medication. The District also contracted for nursing services to accompany students on overnight field trips, and a substitute RN when the nurses attended the RIF hearing. As noted in the prior discussion, some of the nurses' work overlapped that of contractors, as well as other employees.

After the nurses were laid off, the District contracted with two individuals to conduct vision screenings. Vision screening is an assignment that was exclusively performed by the nurses. As a state mandated function, the District did not have the option to eliminate this work or change the "nature or direction" of this work. In essence, the District simply substituted contractors to perform the same work the school nurses previously performed.

The District also contracted with a professional staffing agency to provide substitute LVNs and RNs when necessary. However, the work performed by the substitute LVNs and RNs had already been transferred out of the unit to other District employees. As to this work, the District contracted out work that had already been transferred out of the unit to other employees.

Thus, the District contracted out bargaining unit work when it obtained a retired RN and an optometrist to perform mandatory vision screenings.

Waiver

The District asserts the Association waived the right to bargain the removal of work from the bargaining unit. First, the District contends the District Rights clause in the parties' CBA authorized its unilateral action, by granting the District the exclusive right to determine its organization; direct the work of its employees; determine the kinds and levels of services to be provided, and the methods and means for providing them; determine staffing patterns; determine the number and kinds of personnel required; and exercise the right to hire, classify, assign, reassign, and transfer employees.

An employer may take unilateral action if the exclusive representative waived its right to bargain. (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H.) A waiver of the right to bargain, however, will not be lightly inferred. (*Oakland Unified School District* (1982) PERB Decision No. 236.) Parties may waive the right to bargain by including a comprehensive provision in their CBA. (*Placentia Unified School District* (1986) PERB Decision No. 595.) But any waiver must be clear and unmistakable. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) A generally worded management rights clause will not be construed as a clear and unmistakable waiver of bargaining rights. (*Mammoth Unified School District* (1983) PERB Decision No. 371; *San Jacinto Unified School District* (1994) PERB Decision No. 1078.) Rather, such a waiver must specifically reserve to the employer the right to take certain action or implement specific unilateral changes. (*Lucia Mar Unified School District*, *supra*, PERB Decision No. 1440.)

The management rights clause in the parties' CBA describes the general authority of the District to manage its operations. The provision lacks the specific language to demonstrate

a clear and unmistakable waiver of the Association's right to bargain removal of work from the unit either by transfer or contracting out work. An employer's authority to act described in general terms, as here, does not support a clear waiver of the statutory right to bargain matters within the scope of representation. For example, in *Desert Sands Unified School District* (2004) PERB Decision No. 1682, the Board found the term "assign" did not authorize the unilateral transfer of work to a different classification. In *Lucia Mar Unified School District, supra*, PERB Decision No. 1440, the Board held the lack of any specific reference in the management rights clause to contracting out work precluded a finding the union "consciously yielded its right to negotiate." A waiver must specifically reserve to the employer the right to take certain action or implement specific unilateral changes. (*Lucia Mar Unified School District, supra*, PERB Decision No. 1440) As such, the term "transfer" in the District Rights clause in the present case, standing alone, does not demonstrate the Association's clear intent to waive the right to bargain the transfer of work out of the unit. Accordingly, the District Rights clause does not provide the District with the authority to unilaterally remove work from the bargaining unit.

The District also contends the Association waived its right to bargain by failing to demand to bargain once it learned of the proposal to restructure health services. The District argues it raised the matter with the Association multiple times, including at the bargaining table.

Notice and an opportunity to bargain over a matter within the scope of representation must be communicated sufficiently in advance to ensure a reasonable opportunity for meaningful negotiations. (*Victor Valley Union High School District* (1986) PERB Decision No. 565.) Where an employer does not provide formal notice, but the union has actual or constructive notice of the proposed change and does not request negotiations, the failure to

give formal notice has no legal consequence. (*Klamath-Trinity Joint Unified School District*, *supra*, PERB Decision No. 1778; *Sylvan Union Elementary School District* (1992) PERB Decision No. 919; *Regents of the University of California* (1987) PERB Decision No. 640-H.) Waiver can be established by an exclusive representative's inaction or acquiescence indicating a relinquishment of the right to bargain. (*Los Angeles Community College District* (1982) PERB Decision No. 252; *San Francisco Community College District* (1979) PERB Decision No. 105.)

In *Santee Elementary School District* (2006) PERB Decision No. 1822, the union learned of the district's proposal to modify its policy, internally discussed the proposed changes, and raised concerns with the district, but did not demand to bargain until after the district board adopted the changes. The Board found the union waived its right to bargain by clearly foregoing the right to bargain.

Similar circumstances are present here. The Association and the District engaged in negotiations to address the projected budget shortfall. During bargaining sessions, the District presented the Association with several options involving layoffs, increased class sizes and program reductions. The District sought input from the Association asking if they preferred one option over another. The Association refused to declare a preference for any option, indicating they did not want to pick one group of employees over another.

After the layoff notices were issued on March 4, 2010, negotiations with the Association became more formal. The parties expressly discussed at the bargaining table how health services would be provided without the school nurses. Although asking questions about how health services would be provided, the Association admitted it continued to refuse to bargain, stating it would not negotiate matters that would pit one group of employees over another. Negotiations continued after final layoff notices were issued on May 7, and after the

school board adopted the health services supervisor job description on May 19, 2010. The Association continued to refuse to negotiate any subject but furloughs. Finally, in late May 2010, the parties reached agreement on six furlough days.

The District repeatedly asked the Association for input, presented several options for reducing services and expenses, answered questions at the table about how health services could be provided, publicly presented options for the school board's consideration, issued final layoff notices to the nurses, and finally adopted a job description for a health services supervisor, all while negotiations with the Association continued. While aware of all these actions, the Association admitted it refused to negotiate over any subject but furloughs. The Association had ample notice and opportunity to bargain but admittedly declined to bargain over how health services would be provided. By this conduct, the Association waived its right to bargain the removal of work from the bargaining unit. Therefore, the transfer and contracting out of bargaining unit work allegations are dismissed.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) provides:

> The board shall have 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 this case, the District has been found to have violated EERA section 3543.5 when it retaliated against the four school nurses for engaging in protected activity by terminating their employment by layoff. It is appropriate to order the District to cease and desist from retaliating against its employees because of their protected activities and to make the employees whole for any losses suffered as a result of the District's conduct. Furthermore, it is

appropriate that the District be ordered to post a notice incorporating the terms of the order at all locations where notices to public employees are customarily posted. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner, it is required to cease and desist from such activity, and it will comply with the order. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Rocklin Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. The District violated the EERA by laying off Jennifer Hammond, Genevieve Sherman, Susan Firchau and Jennifer Bradley, because they engaged in activity protected by EERA. All other allegations are dismissed.

Therefore, pursuant to EERA section 3541.5(c), it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their participation in activities protected by the EERA.

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

1. Make whole Jennifer Hammond, Genevieve Sherman, Susan Firchau and Jennifer Bradley by offering them reinstatement, and provide back pay with interest at the rate of 7 percent per annum for wages lost from the date of layoff to the date the offer of reinstatement is made.

2. Within 10 workdays after service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies

of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135,

subdivision (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Robin W. Wesley
Administrative Law Judge