

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



NORTH SACRAMENTO EDUCATION
ASSOCIATION, CTA/NEA,

Charging Party,

v.

NORTH SACRAMENTO SCHOOL DISTRICT,

Respondent.

Case No. S-CE-381

PERB Decision No. 264

December 20, 1982

Appearances; Diane Ross, Attorney for North Sacramento Education Association, CTA/NEA; Christian M. Keiner, Attorney (Biddle, Walters and Bukey) for North Sacramento School District.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the North Sacramento School District (District) to the attached proposed decision. The District excepts to the hearing officer's finding that it violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act) by retaliating against Kent Gaughenbaugh for filing a grievance pursuant to a negotiated grievance procedure. The hearing officer dismissed a further allegation that the District violated subsection 3543.5(d).1

¹The EERA is codified at Government Code section 3540

The Board has reviewed the hearing officer's findings of fact and, finding them free from prejudicial error, adopts them as the findings of the Board itself. We affirm the hearing officer's conclusions of law in part and reverse them in part in accordance with the discussion below.

DISCUSSION

The hearing officer found that the District retaliated against Kent Gaughenbaugh because of the exercise of rights

et seq. All references are to the Government Code unless otherwise indicated.

Section 3543.5 provides in relevant part:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

The dismissal of that portion of the charge alleging a violation of subsection 3543.5 (d) was not excepted to by the North Sacramento Education Association, CTA/NEA (Association) and is thus not before the Board.

protected by the Act. The District excepts to this finding, arguing that Gaughenbaugh's conduct was not protected by the Act and that, even if it was protected, the Association failed to prove that the District retaliated against Gaughenbaugh because he engaged in that conduct. In addition, the District contends that the hearing officer misapplied relevant Board precedent in reaching his conclusion that it violated the Act. Finally, the District excepts to several of the hearing officer's evidentiary rulings.

The Protected Nature of Gaughenbaugh's Conduct

The District contends that the hearing officer erred in finding that filing a grievance pursuant to a negotiated grievance procedure is a protected activity under section 3543 of the Act.² It argues that the language in the second

²Section 3543 provides:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may

paragraph of section 3543 guaranteeing employees "the right to present grievances . . . and have such grievances adjusted . . ." should be treated as equivalent to similar language in section 9(a) of the National Labor Relations Act (NLRA).³

meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

³The NLRA is codified at 29 USC section 151 et seq. Section 9(a) of the NLRA states in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a

Since that section has been held by the National Labor Relations Board (NLRB) and the federal courts to create only an affirmative defense to a refusal to bargain charge, and not a protected right to present grievances or have them adjusted,⁴ the District argues that the parallel provision of FEERA should be interpreted in a similarly narrow manner. While the District concedes that the NLRB has consistently held that it is protected conduct for an employee to file a grievance pursuant to a negotiated grievance procedure, it argues that that right is derived from the "concerted activities" language in section 7 of the NLRA, which, it maintains, has no equivalent in FEERA.⁵

collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

⁴see Black-Clawson Co. v. Machinists (1962) 313 F.2d 179 [52 IRRM 2038]; cited with approval in Emporium-Capwell v. Western Addition Community Organization (1975) 420 U.S. 50 [88 IRRM 2660].

⁵Section 7 of the NRA provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

The thrust of the District's argument is misplaced. The first paragraph of section 3543 guarantees employees the right to "form, join, and participate in the activities of employee organizations" (Emphasis added.) An employee's attempt to assert rights established by the terms of a negotiated agreement clearly constitutes "participation" in the activities of an employee organization and is, therefore, expressly protected by section 3543 of the Act. Were this not the case, an employer could freely retaliate against employees because of their assertion of contractual rights, thereby effectively undermining the collective negotiation process.

Our decision in this regard is consistent with past Board decisions concerning the rights of employee organizations to represent employees in grievance procedures. In Mount Diablo Unified School District et al (12/30/77) PERB Decision No. 44, the Board held that the grievance process is an "employment relation" within the meaning of subsection 3543.1 (a) and that, therefore, employee organizations have a statutory right to represent employees in the presentation of their

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3) .

grievances.⁶ In accord, Santa Monica Community College District (9/21/79) PERB Decision No. 103; Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192. As the hearing officer pointed out, it would be anomalous to guarantee employee organizations the right to represent employees in the grievance process while failing to guarantee employees the concomitant right to participate in the very same grievance process free from fear of discrimination or reprisal.⁷

Misapplication of Board Precedent

The District argues that the record fails to support the hearing officer's conclusion that it unlawfully retaliated

⁶Subsection 3543.1 (a) provides:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

⁷since we base our finding that participation in a negotiated grievance procedure is protected by the language contained in the first paragraph of section 3543, we need not address the District's contention that the second paragraph of section 3543 does not establish such rights.

against Gaughenbaugh because of his participation in the negotiated grievance procedure. In addition, it argues that the hearing officer applied relevant Board precedent incorrectly in resolving the charge before him.

The hearing officer based his determination that the District violated subsection 3543.5(a) on the test for resolving unfair practice charges enunciated by the Board in Carlsbad Unified School District (1/30/79) PERB Decision No. 89. in Novato Unified School District (4/30/82) PERB Decision No. 210, which was decided subsequent to the hearing officer's proposed decision, the Board clarified the test set forth in Carlsbad, supra. Under the Novato test, where an unfair practice charge alleges that an employer discriminated or retaliated against an employee for participation in protected activity, the charging party has the initial burden of establishing that the employee's protected conduct was a motivating factor in the employer's decision to discipline the employee. Since motivation is a state of mind which is often difficult to prove by direct evidence, a charging party may establish unlawful motivation by inference from the entire record. Carlsbad, supra; accord Republic Aviation Corp. (1945) 324 U.S. 793 [16 IRRM 620]. If the charging party makes such a showing, then the burden of proof shifts to the employer to demonstrate that it would have taken the same action in the absence of the employee's protected activity. (Wright Line, A

Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].)

Analyzed under the Novato test, the record fully supports the hearing officer's determination that the District retaliated against Gaughenbaugh because of the exercise of rights protected by the Act. Thus, the evidence indicates that although Gaughenbaugh had never been reprimanded by Sybil Brown during the five years that he had been under her supervision, he was repeatedly reprimanded by her in the months immediately after he filed his grievance. These reprimands closely followed Brown's threat that, because Gaughenbaugh had filed a grievance, she would "never give [him] a good evaluation" and her direction to Michael Contreras that he "document" Gaughenbaugh. A clear inference of unlawful motivation is raised when an employee with a previously good work record is repeatedly reprimanded or threatened with reprisal following his or her participation in protected activity. NLRB v. General Warehouse Corp. (3rd Cir., 1981) 643 F.2d 965 [106 LRRM 2799]; Wright Line, supra.

In addition, the evidence fully supports the hearing officer's findings that Brown issued these reprimands to Gaughenbaugh for engaging in conduct for which employees had not previously been disciplined and that she failed to make any meaningful investigation before imposing that discipline. Both disparate treatment of employees and cursory investigation of alleged misconduct prior to the imposition of discipline

have long been held to raise an inference of unlawful motivation. San Joaquin Delta Community College District (11/30/82) PERB Decision No. 261; Marin Community College District (11/19/80) PERB Decision No. 145; Wright Line, *supra*; Firestone Textile Company (1973) 203 NLRB 89; Shell Oil Co. v. NLRB (5th Cir., 1942) 128 F.2d 206 [10 IRRM 670]. Moreover, as the hearing officer pointed out, the District's pattern of obstructionist conduct with regard to Gaughenbaugh's grievance evidenced an intent to interfere with his contractual rights. Marin, *supra*; Caterpillar Tractor Co. v. NLRB (9th Cir., 1981) 638 F.2d 140 [106 IRRM 2853]. In sum, we find that there was more than sufficient evidence to establish a prima facie violation of subsection 3543.5 (a).

In the face of this evidence, the District failed to prove that it would have disciplined Gaughenbaugh in the absence of his protected activity. As the hearing officer found, the District's operational necessity argument, upon close scrutiny, simply "evaporates." Accordingly, we affirm the hearing officer's finding of a violation of subsection 3543.5(a) and, derivatively, subsection 3543.5(b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

Evidentiary Exceptions

The District's evidentiary exceptions are two-fold. First, it contends that the hearing officer admitted evidence

concerning an issue not encompassed by the charge and based his decision, in part, on that evidence. Second, it contends that the hearing officer erroneously admitted hearsay evidence. We reject the District's arguments.

The District argues that it was erroneous for the hearing officer to rely on evidence of its allegedly obstructionist conduct in the processing of Gaughenbaugh's grievance when that portion of the Association's original charge alleging intentional and arbitrary obstruction of the grievance process had been dismissed.

As the hearing officer pointed out, his purpose in using this evidence was not to determine whether the District's denial of Gaughenbaugh's grievance constituted an independent violation of the Act, but rather to ascertain whether that conduct evidenced a retaliatory motive towards Gaughenbaugh. We see no reason why the same conduct may not be relevant to the resolution of independent charges. The hearing officer drew an inference of unlawful motivation from Brown's rejection of Gaughenbaugh's grievance on the pretextual grounds that he used an "incorrect form." He drew a similar inference from the District's steadfast refusal to consider Gaughenbaugh's repeated discussions with Brown as completing the informal step in the contractual grievance procedure. In both instances, the inferences which the hearing officer drew were relevant to the charge at hand. That the same evidence might also have been

relevant to a charge not before the hearing officer does not render that evidence any less probative in the resolution of the charge before him.

The District's second evidentiary exception arises out of its contention that the hearing officer improperly considered hearsay evidence. The District focuses on two statements relied upon by the hearing officer: first, a statement made by Sybil Brown to Kent Gaughenbaugh, in which she stated that she "would never give [Gaughenbaugh] a good evaluation" as a result of his filing of a formal grievance; and second, a statement by Michael Contreras that Brown had ordered him to "document" Gaughenbaugh's "behavior." The District argues that neither of these statements is admissible over hearsay objection. The District's exception is unfounded.

Former PERB rule 32176 (a)⁸ governed the admissibility of hearsay evidence in unfair practice hearings at the time of the hearing in this case. That rule provided:

Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection

⁸PERB regulations are codified at title 8, California Administrative Code, section 31000 et seq.

On September 20, 1982, subsequent to the hearing in this case, PERB rule 32176(a) was replaced by PERB rule 32176.

in civil actions. Immaterial, irrelevant, unreliable, unduly repetitious evidence, or evidence of little probative value may be excluded. The rules of privilege shall apply. Evidence of offers of settlement shall be inadmissible.

Former PERB rule 32176(a) expressly provided that hearsay statements were admissible so long as they were not, by themselves, the basis of a finding. Both of these statements were offered as evidence of Brown's unlawful animus. Since Brown's animus was corroborated by other evidence of unlawful motivation, the statements objected to by the District were admissible even if hearsay not within any exception.

Subsection 3543.5(c) Violation

The hearing officer found, in addition to violations of subsections 3543.5(a) and (b), that retaliation against an employee for participation in the contractual grievance process constituted "interference in the day-to-day operation of a collective agreement," and was thus also a violation of subsection 3543.5(c). We disagree. There was insufficient evidence to establish that this isolated act of retaliation against an individual employee constituted an unlawful unilateral change in established policy or a repudiation of contractual obligations. Grant Joint Union High School District (2/26/82) PERB Decision No. 196. Accordingly, we reverse that portion of the hearing officer's proposed decision finding a violation of subsection 3543.5(c).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ORDERED that the North Sacramento School District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on Kent Gaughenbaugh for filing a grievance under a collective bargaining agreement negotiated by the Association and the District.

(b) Denying the right of North Sacramento Teachers Association, CTA/NEA, to represent unit members by retaliating against Kent Gaughenbaugh for filing a grievance under a collective bargaining agreement negotiated by the Association.

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

(a) Immediately remove and destroy all memos sent by District representatives to Kent Gaughenbaugh referred to in the attached statements of facts from Gaughenbaugh's official personnel file, as well as from the file kept on Gaughenbaugh by Sybil Brown.

(b) Within five (5) workdays after service of this decision, prepare and post copies of the Notice To Employees attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places

at the locations where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

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

That part of the Association's charge alleging violations of subsections 3543.5 (c) and (d) is hereby DISMISSED.

Chairperson Gluck and Member Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. S-CE-381, in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act by unlawfully reprimanding Kent Gaughenbaugh for participation in the negotiated grievance procedure.

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

1. CEASE AND DESIST FROM:

(a) Reprimanding employees for filing grievances pursuant to the negotiated grievance procedure.

(b) Denying the right of North Sacramento Teachers Association, CTA/NEA, to represent unit members by reprimanding employees for filing grievances pursuant to the negotiated grievance procedure.

2. TAKE THE FOLLOWING ACTIONS:

(a) Immediately remove and destroy all memoranda sent by District representatives to Kent Gaughenbaugh from his official personnel file and from the file kept by Sybil Brown relating to his unlawful reprimand.

Dated: _____

NORTH SACRAMENTO SCHOOL DISTRICT

By _____
Authorized Agent

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

NORTH SACRAMENTO EDUCATION ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	Unfair Practice Charge
)	Case No. S-CE-381
v.)	
)	
NORTH SACRAMENTO SCHOOL DISTRICT,)	PROPOSED DECISION
)	
Respondent.)	(8/24/81)
)	

Appearances; Diane Ross, for charging party North Sacramento Education Association, CTA/NEA; Christian Reiner, for respondent North Sacramento School District.

Before; Fred D'Orazio, Hearing Officer.

PROCEDURAL HISTORY

On December 8, 1980, the North Sacramento Education Association (hereafter Association, NSEA or Charging Party) filed an unfair practice charge against the North Sacramento School District (hereafter District or Respondent), alleging a violation of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act).¹ The substance of the charge is that the District refused to

¹The EERA is codified at Government Code section 3540 et seq. All references hereafter are to the Government Code unless otherwise noted.

participate in the negotiated grievance procedure and that such refusal constitutes interference with rights guaranteed both employees and employee organizations under the EERA.

The District filed an answer on December 23, 1980 wherein it denied violating the Act. As an affirmative defense, the District asserted that the charge represents only a contract dispute over which the Public Employment Relations Board (hereafter PERB or Board) has no jurisdiction.

On December 30, 1980, NSEA amended the charge to allege that the District had also retaliated against a grievant for use of the contractual grievance procedure. The amendment included the allegation that section 3543.5(d) had been violated.

On January 8, 1981 an informal conference was held which did not resolve the issues.

The District filed an answer denying the allegations in the amended charge and moved to dismiss on January 19, 1981. The basis of the motion to dismiss was two-fold. First, the District argued that the charge involves only a contract dispute and PERB has no jurisdiction to enforce contracts. Second, the District argued that the charge does not allege a nexus between the District's action and a protected right. The basis for the second argument is that filing a grievance is not activity protected by the Act. The Association filed a written opposition to the motion.

On February 10, 1981, Hearing Officer Ronald E. Blubaugh granted the District's motion to dismiss as to that portion of the charge filed on December 8.² The motion to dismiss the December 30 amendment to the charge was denied.

A hearing was conducted before the undersigned hearing officer on March 20, 1981. The briefing schedule was completed on June 9, 1981, and the case was submitted.

FINDINGS OF FACT

The parties stipulated that at all relevant times NSEA was the exclusive representative of certificated employees within the meaning of the EERA. The parties further stipulated that the District is a public school employer within the meaning of the EERA.

Kent Gaughenbaugh, has been a teacher in the District for approximately six years. At the time of the incidents which led to the filing of the charge Gaughenbaugh was working at the Ben Ali Children's Center (hereafter Ben Ali or the Center) and had

²Hearing Officer Blubaugh dismissed the charge filed on December 8 on the authority of Baldwin Park Unified School District (4/4/79) PERB Decision No. 92. Blubaugh held that the question of whether or not the District followed the steps in the contractual grievance procedure only presents an issue of contractual interpretation and does not rest upon an independent violation of EERA. The decision to dismiss the December 8 charge was not appealed by the Charging Party and is not at issue here. Thus, the only issues here are whether filing a grievance is protected under the Act and, if so, was there retaliation for exercising this right.

been for several years.³ During that time Sybil Brown was the program manager at Ben Ali.

On May 9, 1980, Sybil Brown delivered a written evaluation to Gaughenbaugh covering his performance over the previous two years. Gaughenbaugh, who was unhappy with the evaluation, had approximately one week to comment on it before it was filed in his official personnel file. On the same day he received the evaluation he met informally with Brown in an unsuccessful attempt to resolve his objection. After a brief discussion, he signed off on the evaluation form and left Brown's office. Approximately one hour later, Gaughenbaugh returned to discuss the evaluation in depth. He complained about the lack of specificity and the inadequate amount of time spent by Brown observing his performance. During the course of the meeting, Gaughenbaugh asked Brown how she could substantiate his evaluation. She said, among other things, that that was "privileged information."

Unsatisfied with the results of his meeting with Brown, Gaughenbaugh filed a formal grievance on May 15, 1980, in which he alleged that the evaluation violated the collective

³The Center is made up of three programs, pre-school, kindergarten, and school age. The latter is also known as the extended day program. Gaughenbaugh teaches in the school age and kindergarten programs.

bargaining agreement between NSEA and the District. The grievance was filed under the negotiated grievance procedure on a form provided for in the agreement. Gaughenbaugh hand delivered the formal grievance form to Brown. He testified that, upon receiving the grievance form, Brown said:

Well, she said, she thought it was really unprofessional of me to get parent letters, because I had gotten about 18 parent support letters. And she said that she would never give me a good evaluation now.

On May 16 Brown returned the grievance to Gaughenbaugh via his attorney. She said it was filed on the wrong form and enclosed what she erroneously claimed was the correct form. In comparing the forms, it is obvious that they are almost identical. However, the contract shows that Gaughenbaugh had used the correct form. In any event, Gaughenbaugh refiled the grievance on the form suggested by Brown. Brown made no claim at this level that the grievance could not be processed because Gaughenbaugh did not exhaust the informal step of the negotiated grievance procedure. Her only objection was that he used the wrong form.

On May 20, 1980, the grievance as refiled was rejected at level one. This time, the grievance was rejected because the District contended Gaughenbaugh failed to meet informally with his supervisor (Brown) prior to filing the formal grievance. The contract between NSEA and the District requires the employee to meet informally with his/her immediate supervisor

prior to filing a formal grievance.⁴ The decision not to process the grievance was appealed through all of the remaining steps in the grievance procedure and was upheld at each level, the final denial by the District coming on June 18, 1980.

The disagreement about the proper procedure for processing a grievance and whether Gaughenbaugh satisfied the contractual requirements at the informal level was eventually discussed at a board of trustees meeting on October 8, 1980. That meeting will be discussed below.

Meanwhile, prior to the October 8 meeting, according to Gaughenbaugh, he was told by Michael Contreras, teacher in charge,⁵ that Brown had instructed him (Contreras) to document Gaughenbaugh soon after the grievance was filed. Gaughenbaugh described the conversation with Contreras as follows:

Well, he said basically that he had been asked by Sybil to document my behavior. And I asked him, well, when did this start. And

⁴The relevant portion of the grievance procedure states:

Before filing a grievance, the employee shall attempt to resolve any complaint by a conference with his/her immediate supervisor.

⁵The "teacher in charge" is the "designee" of the program manager. There is insufficient evidence in the record to conclude that Contreras was a supervisor. The record does show, however, that he was a "leadman" and in a "strategic position to translate to [his] subordinates the policies and desires of management." See Vista Verde Farms v. ALRB (1981) 29 Cal.3d 307, 318-319 [___ Cal.Rptr. ___], and cases cited therein.

he said after I had filed the grievance. It may have been the same day that I handed the grievance to them. He also said if I was right I didn't have anything to worry about.

Prior to Gaughenbaugh's filing of the grievance he had never received any memos from Brown regarding violations of work rules, nor had he received any written reprimands from Brown regarding improper behavior during the 4-5 years she had been his supervisor. Soon after the grievance was finally rejected on June 18, Gaughenbaugh began to receive negative work-related memos on a regular basis.⁶ Since these memos form the basis of the Association's charge, they will be examined in detail.

The Sick Leave Memo.

On July 9 and 10, 1980, Gaughenbaugh was absent from work on sick leave.⁷ On the morning of each absence Gaughenbaugh

⁶Copies of all memos to teachers from Brown go into the teacher's Children's Center file. Copies of some, but not all, of these memos are also forwarded to the District personnel files. Memos that are placed solely in the Children's Center file are used by Brown to remind her of any previous infractions of rules when evaluating a teacher. If infractions have occurred frequently, they are written into the evaluation. According to Brown, memos in the Children's Center files stay in those files "quite some time, depending on how [she] want[s] to use the file." Three of the five memos discussed herein were forwarded to Gaughenbaugh's District personnel file. These were the memos regarding the swimming pool incident, the memo regarding responsibilities of the closing teacher, and the memo regarding the unauthorized absence of October 8, 1980. All memos are discussed below.

⁷There is a conflict in the record as to the number of days Gaughenbaugh was absent. He testified that he was absent three consecutive days. Brown's memo to Gaughenbaugh, dated

notified the staff by telephone that he would be absent for the day. He did not notify the Center the day prior to each absence because he did not know with certainty that he would be sick the following day.

On returning to work, Gaughenbaugh received a memo from Brown dated July 10 informing him that if staff were to be absent for several consecutive days they were to call in the previous afternoon in order to give the District enough time to make arrangements for substitutes. Brown did not discuss this memo with Gaughenbaugh before issuing it.

The District's written policy on this point states in relevant part:

Except in emergency situations, prior approval for sick leave shall be secured from the Child Care Manager.

The collective bargaining agreement includes almost identical language.

Brown recognized in her testimony, as well as in her memo to Gaughenbaugh, that it is possible for a teacher to get sick the night before an absence and not be able to call in until the morning of the absence. Brown also testified that she had never sent a similar memo to any other employee because this problem had never occurred before.

July 10, indicates that Gaughenbaugh was absent for two consecutive days, July 9 and 10. It is unnecessary to resolve this conflict to decide the case.

Gaughenbaugh and two other teachers at Ben Ali, Rosalee Faulkner and Dorothy Dillon, testified that there have been occasions on which they were absent on consecutive days due to illness, but had called in each morning, rather than the previous afternoon, to notify the school of their absence. The fact that Faulkner called in on the morning of such an absence was recorded in the Center log. None had received reprimands for their behavior in the past.

The Swimming Pool Incident.

On July 24, 1980, Gaughenbaugh was reprimanded for buying Cokes for himself and two children on July 3, 1980 at a nearby refreshment stand while supervising a class outing to a swimming pool. The reprimand was based on three grounds. It stated:

I would remind you that you were in violation of three Center rules for teachers:

- 1) Children for whom you were responsible were left unsupervised when you went out to the chuckwagon.
- 2) Teachers are expected to model the rules set for children.
- 3) Children do not understand the discrimination you were showing in providing a "treat" for just two of some 30 children.

A copy of the reprimand was placed in Gaughenbaugh's official personnel file by Brown without discussion with Gaughenbaugh.

The District's written policy on this point is reflected in a May 24, 1976 memo from Sybil Brown to the staff. It states in relevant part:

Regarding money - There have been bulletins to parents in the past (and we shall put it into procedures for new enrollees) that children should not bring money, toys, candy or gum to the Centers since this causes many problems for the other children and the staff. Tell the children and the parents that we have lots of things to do and play with at the Center and that it is hard to share one thing with so many children so why don't they keep it to go home to.

Here again, there has to be a certain amount of flexibility. If, as a team in a room, you agree that certain items will be allowable under certain conditions - do your thing.

Money is really a "no no" since AFDC recipients are not supposed to pay for anything in the program and all the children in the program are to be treated alike as far as rules and regulations go. If a family wants to do something special for the Center, treats for everybody are always welcome. Each Center might get up a list of items parents could make provided we supply the materials.

The reprimand was prompted by a July 11, 1980 memo to her from Contreras, who reported that negative comments about the incident were subsequently made by students during a class meeting. Gaughenbaugh was not given an opportunity to explain his actions before the reprimand was issued.

Gaughenbaugh did not learn that these children were unable to swim until he arrived at the pool that day. He explained his reasons for buying the Cokes to the other children when they got out of the pool, and they voiced no objections.

In a letter dated July 29, Gaughenbaugh protested the reprimand on the grounds that the two children for whom he had

purchased Cokes were unable to swim due to injury or inability and therefore it was "fair" that they received Cokes while the other children did not. In the letter he said:

It is my professional belief that the purpose and intent of field trips is to enrich the lives and experiences of our students. The benefits to the children must be conferred in light of the totality of the circumstances. On the date in question, the children were taken to the pool to allow them to enjoy healthful exercise and camaraderie in a positive environment, which they look to with anticipation. On this occasion two of the children, either through injury or inability, were not able to engage in the swimming activity. It was apparent to me that they were feeling neglected and unhappy as they watched their classmates at play. I felt a responsibility to make the day a success for them as well as the others. It occurred to me that perhaps a simple gesture of support and caring would let them take home from the activities the same feeling of enjoyment as the other children. With this in mind, I bought each of them a Coke. My intent was not to show favoritism, but to fill the loss they suffered in being left out.

Gaughenbaugh further stated in the letter that, given the distance of the chuckwagon from the pool (approximately 30 feet) and the number of teachers (approximately 2 or 3) and lifeguards (approximately 6) present, there was no problem with supervision of the swimming children. Gaughenbaugh's response did not affect Brown's decision to reprimand.

The evidence showed that, in the past, Gaughenbaugh as well as other teachers have left students while on field trips to buy soft drinks for themselves without being reprimanded. The

evidence also showed that while on field trips teachers bought children snacks. For example, Gaughenbaugh took children to "a little cappicino (sic) place" and bought them hot chocolate. He testified that he thought this was a "good educational experience." On another occasion, he bought a child a milkshake for winning a pool tournament. Carole Liming similarly testified that she has bought children snacks while on field trips. She said she never heard of a rule prohibiting this.

The Closing Incident.

On July 30, 1980, the day after Gaughenbaugh responded to the swimming pool reprimand, Brown reprimanded Gaughenbaugh for failing to fulfill his responsibility as "closing teacher" by making sure all children had been signed out before he left. One child remained and substitute teacher Carole Liming saw to it that he was properly signed out. On the day in question it was Gaughenbaugh's responsibility to close the Center.

The District's written procedure for doing so states in relevant part:

Closing person/s should be contracted staff member/s unless only substitutes are available. Closing person/s should coordinate to make sure all items listed below are accomplished.

.....

At 5:45 p.m., assess remaining children and determine whether calls need to be made for pickup.

Sybil Brown testified that it has been the "general practice" for a regular staff member, as opposed to a substitute, to "assume the responsibility for making sure that everything is okay at the end of the day."

The Center is housed in an L-shaped building. The extended day program (where Gaughenbaugh taught) was housed in one wing. The pre-school and kindergarten programs were housed in the other wing.

Gaughenbaugh testified that on the day in question all his extended day children had departed as of 5:50 p.m. He stayed in his classroom until 6:00 p.m., at which time he, too, departed because no children had been brought from the other classrooms for him to supervise until closing. The workday at the Center ends at 6:00 p.m.

Carole Liming, a substitute teacher in pre-school, testified that at 6:00 p.m. she took a child from the pre-school area to the extended day care area.⁸ Upon arriving there, she found that Gaughenbaugh had gone, and no other teachers remained, so she stayed with the child until the child was picked up after 6:00 p.m. Liming testified that staying late was "no real

⁸Although Liming was a substitute, she had worked at Ben Ali for in excess of one year as of the date of the closing incident.

burden" to her. She said, "[I]ts a responsibility that happens sometimes."

According to Gaughenbaugh, the normal closing procedure was for teachers from other classrooms to bring remaining students to him as of 5:50 p.m.⁹ Some days, all students were picked up early and none were brought to him at closing time. Gaughenbaugh further testified that he was never told to check other classrooms, and his practice was not to do so. Gaughenbaugh's testimony about the closing procedure was corroborated by Michael Contreras, who also said that, as a closing teacher, he did not always check the other classrooms before leaving. The Center's written closing procedure does not require the closing teacher to check other classrooms.

Brown testified that prior to reprimanding Gaughenbaugh she investigated the closing incident. Her investigation, which did not include a discussion with Gaughenbaugh, revealed that on the day in question no other regular teachers were present late in the day towards closing time. This was contradicted by Rosalee Faulkner, a regular pre-school teacher, who testified that on the day in question she was at Ben Ali until 5:55 p.m.

After the incident in question a copy of the Brown reprimand was placed in Gaughenbaugh's District personnel file and he was

⁹Liming understood that the students remaining as of 5:45 p.m. should be brought to Gaughenbaugh.

instructed to check the other classrooms prior to leaving at 6:00 p.m. This instruction was reflected in a changed Center closing policy.

The District's desire to have a regular teacher close the Center stems chiefly from its concern that an unauthorized adult, unknown to a substitute teacher, may arrive to pick up a child. Apparently, children may only be picked up by adults who are listed with the Center. The District presumably feels that a regular teacher, as opposed to a substitute, will be more familiar with the list of authorized adults and therefore better able to identify an unauthorized adult in the event this should occur. But Contreras testified that even regular teachers may be unfamiliar with adults who pick up children. He said it has been necessary to ask for identification, such as a drivers license, in the event this situation occurs.

The Center Log Entries.

On August 7, 1980, Brown reprimanded Gaughenbaugh for his use of the Center log. The log is a notebook kept in a central location at Ben Ali and used by staff to communicate with one another. Two notes from Gaughenbaugh to Brown, entered in the log by Gaughenbaugh at about the time of the other reprimands, were the subject of the reprimand. The first note, dated July 28, stated:

Now that the CTA is involved with my grievance against you, Mr. Percel, CTA representative has advised me to have no

further contact with you unless I am represented by a union arbitrator.

The second note, dated July 30, stated:

I would like to inform you that under the circumstances your so called informal observations and memos are considered harassment by the union.

Brown considered these entries too "personal and confidential" for the log.

No formal rules regarding use of the Center log existed on the dates involved here. Contreras testified that the log is "strictly used for center purposes only, for matters concerning the center." Contreras further testified that it was used for informal communication among the staff regarding the operation of Ben Ali and that in the past it had been used for items such as "thank-you" notes.

The Personal Leave Incident.

On November 19, 1980, Gaughenbaugh received a memo from Dean Mansfield, District Superintendent, informing him that his pay would be docked for an unauthorized absence on October 8, 1980.

The facts leading up to this incident are as follows. On October 1, 1980, Gaughenbaugh asked Contreras for permission to be absent for one hour beginning at 5:00 p.m. on October 8. Contreras indicated he saw no problem with the absence. On October 8, prior to leaving, Gaughenbaugh again cleared the absence with Contreras, who again indicated that he saw no problem with the absence, since there were enough teachers to

cover the remaining students. Contreras testified that he assumed Gaughenbaugh had cleared the absence through Brown.

A factual dispute exists as to the procedure for approval of this absence. Gaughenbaugh testified that an informal practice existed whereby short absences were cleared through the teacher in charge (Contreras) who would approve or deny the request based on whether enough teachers were available to cover. In the past, when Gaughenbaugh served as the teacher in charge under Brown's supervision, he granted informal time off in short periods and Brown never voiced opposition to or criticism of the practice. Faulkner and Dillon both corroborated Gaughenbaugh's version of the procedure for getting short periods of time off. For example, Faulkner was excused to go to another school to watch her daughter perform in a talent show. Faulkner's absence was recorded in the Center log. Gaughenbaugh was granted time off to take care of "car trouble."

Contreras testified that, as teacher in charge, he had no authority to approve short absences. According to Contreras, he determined only that the remaining children could be covered by the remaining teachers, and he never approved an absence that wasn't cleared by Brown. But he later admitted to excusing teachers "15 minutes or so" early if enough teachers remained to supervise the children.

Gaughenbaugh requested the one hour off so he could attend a board of trustees meeting where his grievance was being

discussed by the board and Morris Schlessinger, a CIA staff representative. Although the grievance was not an agenda item, arrangements had been made with the District by Association representatives to present the matter during the "oral communications" portion of the meeting. The minutes of the meeting show that Morris Schlesinger, CIA representative, addressed the board on Gaughenbaugh's grievance.

Gaughenbaugh never informed Contreras as to why he wanted time off. Contreras never asked Gaughenbaugh for the reason he wanted the time.

ISSUES

1. Is the filing of a grievance under a collective bargaining agreement protected activity under the EERA?
2. Did the District discriminate or retaliate against Kent Gaughenbaugh because he exercised a right protected by the EERA?

DISCUSSION AND CONCLUSIONS OF LAW

The Grievance as Protected Activity.

The District advances the argument that Gaughenbaugh's use of the contractual grievance procedure is not a right protected by the EERA. Therefore, according to the District, there can be no violation of section 3543.5(a). In support of this position the District interprets the Board's decision in Baldwin Park Unified School District (4/4/79) PERB Decision No. 92, as impliedly holding that use of a contractual grievance procedure is not a protected right. This argument is without merit.

The Board's decision in Baldwin Park, supra, was based on the rationale that denial of a grievance because it failed to state facts constituting a violation of the collective bargaining agreement was a matter of contractual interpretation, not an independent violation of the EERA. A completely different issue is presented by the allegation that an employer has retaliated against an employee for filing a grievance, provided, of course, that filing a grievance is protected by the Act.

The processing of a grievance by an employee organization on behalf of employees clearly constitutes a matter of "employment relations" within the meaning of section 3543.1(a).¹⁰ Santa Monica Community College District (9/21/79) PERB Decision No. 103, pp. 14-15, citing Mount Diablo Unified School District, Santa Ana Unified School District, and Capistrano Unified School District (12/30/77) PERB Decision No. 44. It follows logically that an employee's right to process a grievance on his own behalf or in concert with an employee organization falls within the fundamental right to . . . participate in the activities of employee organizations of their own choosing

¹⁰Section 3543.1(a) states in relevant part:

Employee organizations shall have the right to represent their members in their employment relations with public school employers. . . .

for the purpose of representation on all matters of employer-employee relations. Section 3543.

An argument similar to that offered by the District in this case was adopted by the hearing officer in Baldwin Park Unified School District, supra. The hearing officer's decision in this respect was "expressly set aside" by the Board. Baldwin Park Unified School District, supra, p. 5.

Additionally, adoption of the District's argument would produce the anomalous result of recognizing the statutory right to negotiate, while refusing to recognize the corresponding right to enforce agreements via the negotiated grievance procedure. The negotiation and the administration of a collective bargaining agreement, including the filing of grievances, go hand in hand. It is well settled that

[t]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement. NLRB v. Acme Industrial Co. (1967) 385 U.S. 432, 436 [64 LRRM 2069].¹¹ See also Jefferson School District (6/19/80) PERB Decision No. 133, pp. 54-55, 115.

¹¹Comparable provisions of the federal Labor Management Relations Act (LMRA) 19 U.S.C. 151 et seq., may be used to guide interpretation of EERA. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.) Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

Refusal to process a grievance or retaliating against a grievant

. . . inevitably impedes and discourages the union and the employees from exercising their right to invoke the grievance procedure and thus defeats the very purpose of the Act to promote the orderly settlement of labor disputes. American Beef Packers (1971) 193 NLRB 1117, 1119 [78 LRRM 1508].

In this case, Gaughenbaugh's activity consisted of processing a grievance under the collective bargaining agreement negotiated by the Association and the District. Early in the procedure, Gaughenbaugh processed the grievance with the assistance of his attorney. Later in the procedure, he was represented by the Association. The hearing officer can conceive of no better example of a right encompassed by section 3543.¹² It remains to be determined if the District retaliated against Gaughenbaugh for exercising this basic right.
Application of the Carlsbad Test.

The Board established a single test for resolving alleged violations of section 3543.5(a) dealing with employer conduct.
Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

¹²This right is the same as that afforded employees under the National Labor Relations Act. See, Interboro Contractors, Inc. (1966) 157 NLRB 1295 [61 LRRM 1537], enf. (CA 2 1967) 388 F.2d 495 [67 LRRM 2083]; NLRB v. Selwyn Shoe Manufacturing Corp. (CA 8 1970) 428 F.2d 217 [74 LRRM 2474]. Compare, Kohler v. NLRB (D.C. Cir. 1980) 629 F.2d 173 [104 LRRM 3049]; NLRB v. Bighorn Beverage (CA 9 1980) 614 F.2d 1238 [103 LRRM 3008]. See also, Morris, The Developing Labor Law, Cumulative Supp., 1971-78, Ch. 5.

This test may be summarized as follows. Where there is a nexus between the employer's acts and the exercise of employee rights a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct the competing interests of the parties are balanced and the issue resolved accordingly. If the employer's acts are inherently destructive of employee rights, however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by inference from the record. Santa Monica Community College District (9/21/79) PERB Decision No. 103, p. 17.

The facts amply demonstrate the requisite nexus to protected activity in the instant case. Gaughenbaugh had been employed by the District and supervised by Brown for approximately 4-5 years when he filed his grievance in May 1980. During this entire period, Gaughenbaugh had never received any negative memos or reprimands from Brown regarding his performance. Yet, in the approximately six months following the filing of his grievance, Gaughenbaugh received five negative memos and/or written reprimands, three of which were placed in his official personnel file. All memos were placed in the file Brown kept, to be used

for future evaluations. Four of the five reprimands were received within three months of filing the grievance at Step 3 of the grievance procedure. The timing of the District's actions combined with the fact that Gaughenbaugh had never received any negative memos or reprimands prior to filing his grievance establishes the requisite nexus between the exercise of a protected right and the District's actions.¹³

In addition to constituting retaliation against and harassment of Gaughenbaugh, such memos have the natural and probable consequences of causing other employees reasonably to fear that similar action would be taken against them if they chose to file a grievance. This cannot help but have a chilling effect on the exercise of protected rights under the Act and constitutes at least "slight" harm to these rights. Carlsbad Unified School District, supra, p. 10. A prima facie case having been established, it was incumbent on the District to offer some justification for its acts based on operational necessity. Id.

It is recognized that, in an abstract sense, Brown may have

¹³In addition to establishing the required nexus, the timing of the memos and the fact that Gaughenbaugh had received no reprimands or similar memos during the 4-5 years he worked under Brown are themselves evidence from which an unlawful motive can be inferred. NLRB v. General Warehouse Corp. (CA 3 1981) 643 F.2d 965 [106 IRRM 2729, 2733-34], Wright Line, Inc. (1980) 251 NLRB 150 [105 IRRM 1169, 1175-76].

had a legitimate concern for the administration of the Center in those specific areas where she cited Gaughenbaugh. A school administrator is certainly justified in establishing and enforcing rules related to the daily closing of the Center, snacks for young children, short periods of time off from work, and sick leave call-in procedures. Although the filing of a grievance did not exempt Gaughenbaugh from having rule infractions corrected by his superiors, the evidence shows that there was more at work here than merely the desire of Brown or Mansfield to correct the so-called infractions. As the following discussion illustrates, the District has not shown that the so-called infractions committed by Gaughenbaugh violated any rule or policy. Indeed, in some instances his conduct was consistent with that of other teachers or past practice. Nor has it been shown that Gaughenbaugh's conduct presented any threat whatsoever to the operation of the Center or the well-being of children or teachers. They were minor in nature and in some instances they were totally without substance. Each reprimand will now be discussed.

The evidence does not show that Gaughenbaugh violated any Center policy or rule by not calling a day in advance for sick leave. The written rule does require that prior approval be secured, but it includes an emergency exception. Even Brown conceded that a teacher could not call in the day before an illness if he or she did not know they would be sick the next

day. Thus, in order for Gaughenbaugh to be held in violation of the rule, the District would have to show that he actually knew on the day prior to each absence that he would be sick the following day. The District has failed to show this. To the contrary, the uncontroverted testimony of Gaughenbaugh shows that he did not know in advance that he would be sick on the days in question. He called in the morning of each absence to report his sickness. Furthermore, there was scant evidence to show that the District was understaffed due to Gaughenbaugh's absences or that the absences had any adverse impact on the District's mission.¹⁴ Therefore, it is concluded that there was no valid reason for the reprimand.

In addition, the evidence shows, contrary to Brown's testimony, that there were at least two other prior occasions where teachers called in to request sick leave on the morning of their absences. Both occurred during the course of two or more consecutive days of absence and the employees received no corrective memo. Brown was presumably aware of Faulkner's calling in on the morning of her absence since it was recorded

¹⁴The only evidence available to show that this absence affected the Center's operation was the unsubstantiated reference by Brown in her memo to Gaughenbaugh that the Center staffing on July 10, 1980 was out of ratio. But this can't be attributed to Gaughenbaugh. Even under the District's own procedure, there was presumably sufficient time after he called in to secure a replacement or make other arrangements to compensate for his absence.

in the Center log. Issuance of the corrective memo to Gaughenbaugh for the same conduct by others condoned in the past is evidence of disparate treatment and tends to show that an underlying unlawful motive prompted the memo. See NLRB v. General Warehouse Corp., *supra*, 106 LRRM 2729, 2334; Marin Community College District (11/19/80) PERB Decision No. 145, pp. 12-13.

Last, Brown issued this memo with no investigation or discussion with Gaughenbaugh as to whether he knew of his sickness in advance of the days in question. A discussion with Gaughenbaugh would obviously have established that he did not know on the preceding days that he would be sick on the days in question. Thus, Brown would have learned that he was not in violation of the policy. Her failure to make any attempt to investigate the facts surrounding this incident to discover Gaughenbaugh's explanation suggests that she was more concerned with issuing the memo than following the rule. This casts doubt on her reason for issuing the memo. TAMA Meat Packing Corp. (1977) 120 NLRB 116 [96 LRRM 1148], mod. (CA 8 1978) 575 F.2d 661 [98 LRRM 2339].

Much of the same can be said about the reprimand issued after Gaughenbaugh bought Cokes for two children at the swimming pool. Initially, it must be observed that the written policy with respect to prohibiting children from bringing money, toys, candy, etc. to the Center, does not expressly prohibit teachers

from purchasing treats for children. The rule only prohibits children from bringing their own treats or money. Moreover, the rule affords teachers a "certain amount of flexibility" to allow deviations from the general rule. The rule tells teachers to "do your thing" under certain circumstances determined by the teacher.

Thus, given the express language in the rule and the flexibility afforded teachers in this area, coupled with Gaughenbaugh's explanation as to why he purchased the Cokes presented in his July 29 letter to Brown, (see pp. 10-11, supra), no reasonable person could conclude that Gaughenbaugh abused his discretion in buying the Cokes. Accordingly, it is concluded that Gaughenbaugh did not violate either the letter or the spirit of the rule.

Additionally, the evidence shows that the children were not left unsupervised when Gaughenbaugh went to buy the Cokes. The refreshment stand was nearby and there were adequate teachers and lifeguards present to deal with any emergency which may have come up during his short absence. Thus, the District's mission was in no way jeopardized. All of these points would have been easily discovered by Brown had she made any attempt to investigate this incident, and there would therefore have been no need to issue the reprimand. Instead, she accepted the comments of children, transmitted to her by Contreras in the form of a complaint, as the sole basis for the reprimand. Once

again, her failure to more thoroughly investigate this matter casts doubt on her stated concern for following the rules cited in her memo and suggests that she was more concerned with reprimanding Gaughenbaugh than she was with the proper enforcement of the rule. TAMA Meat Packing Corp., supra.

Furthermore, it was established that teachers did not always model the rule set for children. There have been incidents in the past where teachers, including Contreras, the teacher in charge, left their posts to purchase drinks for themselves.¹⁵ And it was also established that teachers had purchased snacks for students while on field trips in the past. For example, some children were taken to a "little cappucino" place, while another received a milkshake for winning a pool tournament. In these circumstances, as in the pool incident, the purchase of the snacks seems a perfectly reasonable exercise of the discretion provided the teacher by the rule.¹⁶ Thus, the

¹⁵Regarding the teacher's responsibility to model rules set for children, Brown was asked if she saw a difference between a teacher buying a treat for a child as opposed to a teacher buying a treat for himself or another teacher. She responded that "maybe a cold drink, something of that sort" would be acceptable, but, in her view, it would not be acceptable "to go and buy a candy bar and sit there and eat it in front of a bunch of little children." This unpersuasive explanation suggests that there was no firm rule which required teachers to model the rules established for children, thus casting doubt on that part of the reprimand which is based on an infraction of such a rule.

¹⁶Brown objected to buying snacks for some children and

practice that emerges is one which accepts such conduct as falling within the discretionary authority and flexibility left to teachers to "do your thing" when circumstances permit. Therefore, it is concluded that no rule has been violated and there was no valid reason for the reprimand. To the contrary, snacks had been bought for children in the past by teachers without drawing a reprimand. A reprimand given for conduct previously condoned is indicative of an unlawful motive. NLRB v. General Warehouse Corp., supra, 106 LRRM 2729, 2334, V & V Castings (1977) 231 NLRB 912 [96 LRRM 1121] enf. (CA 9 1978) 587 F.2d 1005, [100 LRRM 2303].

Similarly, the evidence shows that Gaughenbaugh violated no Center rule or policy as closing teacher on July 29, 1980. The practice had been that remaining children were brought to the closing teacher by either 5:45 p.m. or 5:50 p.m., and the closing teacher would take the necessary steps to contact the responsible adult for pickup. There was no requirement, written or otherwise, for the closing teacher to seek out remaining

not others because it was a form of discrimination. According to Brown, the Center is federally funded and under an obligation not to discriminate. She said that, "If the Feds who supply the money for the center knew that two children had received something that the rest hadn't on that day, that could be a discrimination charge." Aside from the fact that there is no evidence that Gaughenbaugh used federal money to buy the Cokes, this explanation strikes the hearing officer as an exaggerated fear of an unlikely eventuality. Using contrived or exaggerated reasons to support the reprimand casts doubt on her explanation.

students in other parts of the Center before departing at 6:00 p.m. Gaughenbaugh testified that he never checked other parts of the Center before closing. Even Contreras, the teacher in charge, testified that it was not his practice as a closing teacher to check for children.

Further, on the day in question, Gaughenbaugh departed at 6:00 p.m., all of his students having left by 5:50 p.m. Liming brought a remaining student to Gaughenbaugh at 6:00 p.m., but found that he had gone and no other regular teachers remained. Apparently, Liming and Gaughenbaugh just missed each other at that hour. Nevertheless, Liming proceeded to take the necessary steps to have the child picked up. She did so without incident.

These undisputed facts, coupled with the absence of a requirement that the closing teacher either seek out remaining students or stay past 6:00 p.m., further support the conclusion that Gaughenbaugh did not violate any Center rule or policy. If anything, Liming may have been at fault for not bringing the remaining student to Gaughenbaugh by 5:50 p.m., as expected and as provided for in the written policy. But it would be senseless to point the finger at Liming for violating a Center closing policy when that very policy contemplates occasions when a substitute must serve as the closing teacher. The policy states that the closing teacher should be a regular contracted staff member "unless only substitutes are available." In this case, through no serious transgression on anyone's part, only a

substitute was available. She handled the closing without incident and viewed it as "no real burden."

Moreover, the District's chief concern was not that the closing teacher did not stay with the child, but that a substitute rather than a regular contract teacher was left with the child. The District's justified concern was that the child might be released to the wrong person. But this concern was grossly overstated as applied in this case. If the person who comes for the child is not the parent or other authorized adult, a regular teacher has no more advantage over a substitute in safeguarding the child. A regular teacher, like a substitute, might not be familiar with all persons on the list of people authorized to pick up the child. Both are left to the same devices - a check on the emergency card¹⁷ and a request for identification. Even Contreras, a regular teacher who has served as a closing teacher, testified that he was not familiar with all parents or guardians and might have to ask for identification under some circumstances. And, although Liming was a substitute, she had worked at the Center far in excess of one year at the time of the incident. Thus she presumably had some familiarity with the individuals authorized to pick up children. In addition, this was not the first time a

¹⁷ Adults authorized to pick up children are apparently listed on emergency cards at the Center.

substitute has been the only teacher available at closing time.¹⁸

Based on the foregoing, it is concluded that there was no real danger to the child or the District's overall mission. Liming, although a substitute teacher, stayed with the child at all times and closed the Center without incident. Thus, Gaughenbaugh was reprimanded for following an established practice. This is evidence of an unlawful motive. NLRB v. General Warehouse Corp., supra; V & V Castings, supra.

As to the next reprimand, a close examination of the record shows that the District's decision to dock Gaughenbaugh one hour of pay when he attended the school board meeting was inappropriate. Although the District attempted to establish at the hearing that Contreras had no authority to authorize the short absence on October 8, the evidence clearly shows that the well-established practice was otherwise. Gaughenbaugh and Faulkner testified that in the past the teacher in charge has approved short absences, provided, as here, enough teachers remained to supervise the children.¹⁹ For example, Faulkner

¹⁸Brown testified that she investigated the incident before issuing the reprimand and concluded that there was no regular teacher present late in the day toward closing time. However, Faulkner, a regular teacher in the pre-school was present in the pre-school until 5:55 p.m. This casts serious doubt on the amount of effort Brown put into the investigation before issuing the reprimand.

¹⁹Contreras also confirmed the existence of this practice,

was excused to watch her daughter perform in a talent show and Gaughenbaugh was excused to take care of car trouble.

Significantly, Gaughenbaugh convincingly testified that he approved such requests while acting as teacher in charge under Brown's supervision and she never objected. Presumably, Brown was aware of Gaughenbaugh's conduct in this regard, since she testified that it is her practice to move about the Center, observing the operation and establishing considerable contact with the staff.

Additionally, at the hearing the District elicited testimony regarding the procedures for requesting the various types of leave set forth in the contract, including which management official had the authority to approve a leave request. These various types of leave included sick leave, vacation leave, personal necessity leave, etc. The hearing officer finds this evidence to be irrelevant. The record shows that, in addition

although to a somewhat lesser degree. He testified that he had no authority to approve absences; his authority extended only to determining that the Center would be adequately staffed in the event of an absence. But Contreras also testified that he permitted teachers to leave work "15 minutes or so" early, provided staffing was adequate. This testimony suggests at least a limited authority on his part to approve short absences at the end of the day, the time of Gaughenbaugh's absence. Moreover, Contreras testified that there were enough teachers remaining on October 8 to cover the remaining children. Thus, the use of the leave presented no problem with respect to the District conducting its operation in the Center.

to the procedures for requesting and receiving these traditional types of leave, there existed a completely separate established practice whereby employees were permitted short absences by the teacher in charge. It was for taking one hour off under this latter practice that Gaughenbaugh was reprimanded and docked one hour of pay. The finding that this separate procedure existed is supported by the fact that, soon after Gaughenbaugh was docked one hour's pay, the District took steps to change the procedures governing the requesting and granting of the various kinds of leave. Thus, the informal procedure referred to above is no longer in existence and the teacher-in-charge no longer approves short absences.

Based on the foregoing, it is concluded that Gaughenbaugh's short absence, cleared through Contreras, was consistent with past practice. Disciplining employees for conduct accepted in the past is evidence of an unlawful motive. NRB v. General Warehouse Corp., supra, 106 IRRM 2729, 2334; V. & V. Castings, supra, 100 IRRM 2303, 2305.

Finally, the purpose for which Gaughenbaugh used the time cannot be overlooked. It is undisputed that he attended a board of trustees meeting where an Association representative discussed certain aspects of his grievance with the board. The discussion had been arranged with District representatives by the Association's president for the very purpose of discussing the grievance. Section 3543.1(c) provides:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

The October 8 meeting clearly falls within the meaning of the phrase "processing of grievances," thus entitling the employee representative to released time, even if it is not considered a formal part of the grievance procedure. It follows logically that the employee being represented is likewise entitled to a reasonable amount of released time. Also, the meeting unquestionably involved representation of Gaughenbaugh by his chosen representative on an employment-related matter, and the District was aware of this at the time it docked Gaughenbaugh's pay. Under such circumstances, the Association had a right to represent Gaughenbaugh (section 3543.1(a)) and Gaughenbaugh had the concomitant right to be represented (section 3543). Penalizing an employee for the exercise of such rights evidences hostility on the part of the District for Gaughenbaugh's engaging in protected activity.

The final matter at issue here, Brown's negative memo regarding Gaughenbaugh's use of the Center log, a means of communication not unlike a bulletin board, represents yet another example of harassment and retaliation. Gaughenbaugh's entries violated no Center rule or policy. In fact, none

existed. The entries were certainly consistent with the established practice, testified to by Contreras, that permitted entries on practically any subject related to the Center. Moreover, there was no showing that the language used or message conveyed demonstrated disloyalty or intemperate attitude toward the employer. Brown arbitrarily changed the established practice in mid-stream to bar specific entries related to employer-employee relations, describing them as "too personal or confidential."

Granted, the memo concerned a seemingly trivial matter. And, standing alone, it may well have been harmless. However, when considered in conjunction with the other memos and reprimands, it represents yet another component in an overall pattern of harassment and retaliation.

In addition to the memos and reprimands issued by Brown, the record contains other evidence which points to an unlawful motive. An employee's work record may be considered as a factor in weighing the validity of the District's reasons for the memos. The Huntington Hospital (1977) 229 NLRB 253 [95 IRRM 1062]. This series of memos is inconsistent with the treatment one would expect of an employee with a good work record, absent an unlawful motive. Marin Community College District, supra, p. 17.

It is also found that Brown directed Contreras to document

Gaughenbaugh soon after the grievance was filed.²⁰ This suggests a predetermined plan to discover a reason to discipline Gaughenbaugh. See Wright Line, Inc., supra, 105 LRRM 1169, 1176.

Brown also displayed an open hostility toward Gaughenbaugh during the grievance procedure. When Gaughenbaugh first presented the grievance, Brown told him that "she would never give [him] a good evaluation now." This statement, in essence, announces an intent to discriminate against Gaughenbaugh in

²⁰Gaughenbaugh testified he had been told by Contreras that, shortly after the grievance was filed, Brown directed him (Contreras) to document Gaughenbaugh. The charging party offered this testimony to show its effect on the recipient. Counsel for the District did not object to the testimony being offered for this purpose. He objected only to the testimony being offered for the truth of the matter stated. It is noted that Contreras did document Gaughenbaugh on the pool incident, thus demonstrating at least one example where Brown's statement affected Contreras. Moreover, even if the testimony had been offered for the truth of the matter stated it is nevertheless admissible as an admission of a party to the action. Calif. Evid. Code, sec. 1220; Jefferson, California Evidence Benchbook (1972), sec. 3.3, p. 59; Santa Clara Unified School District (9/26/79) PERB Decision No. 104, pp. 15-16, fn. 8. Thus, this testimony was properly admitted into evidence and may be used to support a finding that Brown told Contreras to document Gaughenbaugh. PERB's rules specifically provide that hearsay evidence may be sufficient in itself to support a finding if "it would be admissible over objection in civil actions." Cal. Admin. Code, tit. 8, sec. 32176(a). Additionally, both Contreras and Brown testified at the hearing but did not contradict Gaughenbaugh's testimony on this point. Under these circumstances, the hearing officer accepts the uncontradicted testimony of Gaughenbaugh. Such testimony may be accepted to support a finding where, as here, it is consistent with the overall pattern of harassment and retaliation. Martori Brothers Distributors v. ALRB (1981) ___ Cal.3d ___ [___ Cal.Rptr. ___].

future terms and conditions of employment because he filed a grievance. This clearly violates the Act, as it cannot help but have a chilling effect on the exercise of future protected activity.

Further, as counsel for the charging party states in her brief, the District's approach to the grievance can accurately be described as "obstructionist." Under the plain meaning of the relevant contractual clause (see footnote 4, supra), Gaughenbaugh needed only to "attempt" to resolve the complaint with Brown via a conference in order to comply with the negotiated grievance procedure.²¹ He satisfied this

²¹In considering this contractual clause, the hearing officer recognizes that under section 3541.5(b) PERB is prohibited from enforcing negotiated agreements unless the facts alleged constitute an independent violation of the EERA. Baldwin Park Unified School District, supra, PERB Decision No. 92. Hearing Officer Blubaugh stated in the earlier unappealed dismissal that the procedural dispute surrounding the processing of the grievance did not constitute an independent violation of the Act. It was for this reason that the charge as originally filed was dismissed. The Board may, however, interpret collective bargaining agreements to the extent it is necessary to decide unfair practice charges. NLRB v. C and C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 2065]; NLRB v. Strong (1969) 393 U.S. 357 [70 LRRM 2100]. In this case it is appropriate for the hearing officer to interpret this clause for the purpose of shedding light on the retaliation allegation in the amended charge, not for the purpose of enforcing the agreement or determining if the District's conduct in processing the grievance constituted an independent violation of the Act. The District's conduct in processing the grievance may be evidence of an unlawful motive. In order to determine if Gaughenbaugh suffered retaliation for filing the grievance, the hearing officer in this proceeding is obligated to "consider facts and incidents compositely and draw inferences reasonably justified therefrom." See Santa Clara Unified School District (9/26/79) PERB Decision No. ~~104, pp. 14-15.~~

requirement by meeting twice with Brown on May 9. The fact that the complaint was not resolved or that Brown was dissatisfied with the meetings does not translate into the conclusion that the contractual requirement was not satisfied. Thus, the informal level of the contractual grievance procedure having been exhausted, the District's persistent refusal to process the grievance beyond the informal level amounted to interference with the operation of the grievance procedure.

There are also other examples of the District's obstructionist approach to the grievance. Gaughenbaugh's uncontroverted testimony established that when he first asked Brown to substantiate the evaluation, she responded that it was "privileged information." This is hardly consistent with her testimony that she was anxious to meet with Gaughenbaugh to resolve the complaint. And, when Gaughenbaugh initially filed the formal grievance, Brown did not contend that he had not completed the informal step. Rather, she forced him to refile it on the wrong form. It was not until later that she claimed he had not met with her informally. Lack of cooperation in processing a grievance supports an inference of an unlawful motive. Marin Community College District, supra, p. 13; Caterpillar Tractor Co. v. NLRB, (CA 9 1981) _____ F.2d _____ [106 LRRM 2854].

Based on the foregoing, it is concluded that the District's reasons for issuing the reprimands to Gaughenbaugh were without

merit and were thus pretextual. The District's claim of justification based on the operational necessity to enforce reasonable rules, fairly applied, simply evaporates upon close scrutiny. The record is replete with evidence which strongly suggests that an unlawful motive was at work as the moving force behind the issuance of the reprimands and the related actions of the employer.

A portion of the Carlsbad test states:

[A] charge will be sustained where it is shown that the employer would not have engaged in the complained of conduct but for an unlawful motivation, purpose, or intent.

.

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted principles the presence of such unlawful motivation, purpose or intent may be established by inference from the record as a whole. Carlsbad Unified School District, supra, at p. 11.

In addition,

If [the trier of facts] finds that the stated motive for a [transfer] is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal - an unlawful motive - at least where, as in this case, the surrounding facts tend to reinforce that inference. Shattick Denn Mining Corp. v. NLRB (CA 9 1966) 362 F.2d 466 [62 LRRM 240, p. 2404].

Under the circumstances presented here, the hearing officer is

compelled to draw the inference of unlawful motive and conclude that the District's actions were taken in retaliation for Gaughenbaugh filing a grievance.

CONCLUSION

The District's retaliation against Kent Gaughenbaugh for filing a grievance violated section 3543.5(a). Under these circumstances, retaliation against an employee for filing a grievance under a collective bargaining agreement constitutes a concurrent violation of section 3543.5(b). Santa Monica Unified School District (12/10/80) PERB Decision No. 147. Additionally, retaliation for filing a grievance also constitutes interference in the day-to-day administration of a collective bargaining agreement and is therefore a refusal to negotiate in good faith in violation of section 3543.5(c).²² It is well settled that the administration of a contract, including day-to-day adjustments in the agreement and other working rules, as well as the resolution of new problems not necessarily covered by the agreement, is an essential part of the collective bargaining process and facilitates the ongoing purposes of the EERA. Jefferson School District, supra, PERB Decision No. 133, pp. 54-55, 115; Morris, *the Developing Labor Law*, Ch. 11, p. 340;

²²Even if the Association was not involved as Gaughenbaugh's representative in the grievance or named as charging party in this case, finding a section 3543.5(c) violation is appropriate. South San Francisco Unified School District (1/15/80) PERB Decision No. 112.

Conley v. Gibson (1957) 355 U.S. 41, 46 [41 ~~IRRM~~ 2089]; NLRB v. Acme Industrial Corp., supra.

There is no evidence to support a conclusion that section 3543.5(d) has been violated. Therefore, that part of the charge is dismissed.

REMEDY

Under Government Code section 3541.5 (c) PERB is given:

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

Under the circumstances presented here, it is appropriate to order the District to cease and desist from violating section 3545.5 (a), (b) and (c) by retaliating against employees for filing grievances under an agreement negotiated by the Association and the District.

In addition, it is appropriate to order the District to remove and destroy all memos sent by the District to Gaughenbaugh and referred to in this opinion from Gaughenbaugh's official personnel file, as well as from the file kept by Brown. This remedy is consistent with that imposed by the Board in other cases where documentation was unlawfully placed in an employee's personnel file. See San Ysidro School District (6/19/80) PERB Decision No. 134; San Diego Unified School District (6/19/80) PERB Decision No. 137; Santa Monica Unified School District, supra, PERB Decision No. 147.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to take the appropriate affirmative steps. It effectuates the purposes of the FERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 IRRM 415].

Finally, it is appropriate to dismiss that part of the charge which alleges a violation of section 3545.5(d).

PROPOSED ORDER

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

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on Kent Gaughenbaugh for filing a grievance under a collective bargaining agreement negotiated by the Association and the District.

(b) Denying the right of North Sacramento Teachers Association, CTANEA, to represent unit members by retaliating against Kent Gaughenbaugh for filing a grievance under a collective bargaining agreement negotiated by the Association.

(c) Refusing to negotiate in good faith with the Association, the exclusive representative of certificated employees in the District, in the day-to-day administration of a collective bargaining agreement by retaliating against a bargaining unit employee for exercising his right to file a grievance under the negotiated procedure in that agreement.

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

(a) Immediately remove and destroy all memos sent by District representatives to Kent Gaughenbaugh and referred to in this decision from Gaughenbaugh's official personnel file, as well as from the file kept on Gaughenbaugh by Sybil Brown.

(b) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least forty-five (45) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated

employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within twenty (20) workdays from service of the final decision herein, give written notification to the Sacramento Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

That part of the Association's charge alleging that section 3545.5(d) has been violated is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on September 14, 1981, unless a party files a timely statement of exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on September 14, 1981, in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be

filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended,

Dated: August 24, 1981

FRED DORAZIO
Hearing Officer

