

when it discriminated and retaliated against Carol Peart (Peart), a District teacher, for her exercise of protected activities. Specifically, the ALJ found the District violated EERA by requiring Peart to obtain a doctor's excuse for four consecutive days of absence, when such verification had not been required of other bargaining unit members, and was imposed to harass and intimidate her for having filed and appealed a grievance.

The District filed seven exceptions to the ALJ's proposed decision, of which three were directed at legal conclusions, three at findings of fact, and one at a procedural statement in the decision.

We have carefully reviewed the entire record, including the proposed decision, the transcript, the District's exceptions, and the response by the Woodland Education Association, CTA/NEA (Association), and, finding the ALJ's findings of fact and conclusions of law to be free of prejudicial error, we adopt the ALJ's proposed decision as the decision of the Board itself consistent with the discussion below.²

DISCUSSION

The standard for determining whether a violation of section 3543.5(a) occurred is found in Novato Unified School District (1982) PERB Decision No. 210. To prove discrimination or reprisal, Peart must show: (1) she engaged in protected

²The ALJ in her conclusion refers to Peart being required to obtain a doctor's excuse for her absences of "October 5-9, 1989." (Emphasis added.) The rest of the decision, as well as the transcript and the parties' briefs, make it clear the correct dates should be October 6-9, 1987.

activity; (2) the District knew of this activity; (3) the District took adverse action against her; and (4) the adverse action would not have been taken but for engaging in the protected activity.

It was not disputed that Peart was engaged in protected activity when she filed and, later, appealed her grievance, or that the District knew of these events.

The District's primary exception is to the ALJ's finding that adverse action was taken against Peart when she was requested, pursuant to a provision of the collective bargaining agreement, to provide a medical verification of her absences. Relying on the Board's decision in Palo Verde Unified School District (1988) PERB Decision No. 689, the District argues an employee must suffer harm in his/her employment in order to find "adverse action" under section 3543.5(a). The District further argues that Peart did not suffer harm because she resumed her teaching duties without any change in her salary, benefits, or job assignment, nor did she suffer disciplinary action of any kind.

The District's argument is without merit. Discriminatory enforcement of a work rule for the purpose of harassing or intimidating an employee in retaliation for having engaged in

protected activity constitutes adverse action.³ (Hyatt Regency Memphis (1989) 296 NLRB No. 36 [132 LRRM 1130], and 296 NLRB No. 37 [132 LRRM 1158]; BMP Sportswear (1987) 283 NLRB No. 4; NLRB v. S.E. Nichols (2d Cir. 1988) 862 F.2d 952 [129 LRRM 3098], enf. 284 NLRB No. 55.)⁴ Thus, Peart suffered injury in that the medical verification was imposed to harass and intimidate her for having filed and appealed a grievance.⁵"

³The dissent claims Peart did not prove discriminatory enforcement. This conclusion, however, fails to recognize that several teachers in the past requested substitutes for more than three days at a time at Peart's school and that no verification had been requested. Also, that on three occasions dating back to 1981, Peart was ill for more than three days at a time and no verification had been requested. Finally, in the one instance Parker complained to Crawford of possible sick leave abuse or pursued a medical verification from a teacher, it was discovered the teacher also had filed several grievances against the District.

⁴While PERB is not bound by decisions of the National Labor Relations Board (NLRB), the Board will take cognizance of them where appropriate. (Carlsbad Unified School District (1979) PERB Decision No. 89; Los Angeles Unified School District (1976) EERB Decision No. 5.) (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.)

The dissent attempts to distinguish the NLRB cases cited by the majority on the grounds the discharge of employees constituted the adverse action. None of the decisions, however, limited harm to discharge. In fact the NLRB decision underlying NLRB v. S.E. Nichols, supra, held that verbal harassment of three employees at an employee meeting independently constituted a violation of the NLRA. (S.E. Nichols, Inc. (1987) 284 NLRB No.55 [127 LRRM 1298, 1302, fn. 7].)

⁵Peart applied for, but was denied, a transfer from her teaching assignment to another teaching assignment. She then initiated a step 1 grievance with her principal, Mike Parker (Parker), which was denied as untimely filed. Ten to fifteen minutes after receiving the response, Peart went to Parker's secretary and requested a substitute for the next four days, stating she was having severe back pains and needed to see a doctor. Parker, hearing only that she was requesting a substitute, contacted Ray Crawford (Crawford), the assistant

Peart also suffered harm when two letters were placed in her personnel file, one formalizing the District's request that she provide verification of her absences. Although placing correspondence between an employer and employee in a personnel file documenting their communication does not ordinarily constitute adverse action, it did so in this case. The logical and natural result of placing these letters in Peart's file, at the very least, draws a reviewer's attention to the fact she should be closely watched in the future for possible sick leave abuse, or, more significantly, that she is a problem employee and not to be trusted. Regardless of which message is conveyed by the letters, the message to Peart is clear: appealing grievances can result in the placement of letters in her personnel file.

Peart was also harmed when the request was made in the reception area of the assistant superintendent's office in front of other clerical employees, and implied misconduct on her part.⁶

superintendent of personnel, reported he denied Peart's grievance and believed she intended to appeal, that she was requesting a substitute, and suggested that some action should be taken against her. While the timing of Peart's absence might, in some instances, create a suspicion she was abusing sick leave, Parker made no attempt to determine that fact. The credited evidence is that he made no investigation as to the reason for Peart's request. Rather, he reported her request and suggested that some action be taken, thus indicating he, and later Crawford, was not concerned with the reason for her absence, but rather in using the verification process to harass her. The dissent's comments that these facts are not supported by the record is simply incorrect.

⁶The District, in its brief, excepted to the ALJ's finding that the request was made in front of other employees. The District argues Peart did not in fact know whether other employees overheard the request. Peart, however, testified that some clerical staff were present, although she could not

In reaching this conclusion we are not changing the objective test expressed by the Board in Palo Verde, supra, when finding harm. Rather, we have applied Palo Verde and find that Peart has suffered the above adverse consequences as a result of the exercise of her protected rights.⁷ Nor do we hold that the District, as a matter of course, is precluded from requesting absence verifications from employees. Moreover, such requests are not necessarily inappropriate because the District had not, in recent times, exercised its right to request a verification. What is prohibited, however, are requests imposed for the purpose of intimidating and harassing employees because they engage in protected activities.⁸

specifically identify them. Thus, despite the District's attempt to discredit Peart's testimony on this point, the ALJ found, and the record supports, she was more convincing on the issue of where the conversation occurred and whether anyone was present.

⁷Contrary to the dissent's conclusion, the majority did not rely on Peart's subjective reactions to obtaining further verification in finding harm.

⁸A similar analysis was applied by the Board in McFarland Unified School District (1990) PERB Decision No. 786. In McFarland, supra, the District declined to advance a probationary teacher to permanent status shortly after she filed several grievances, one disputing a change in class assignments for the spring semester. The Board held, despite the fact the District was exercising its statutory right under former Education Code section 44882(b), such a decision may not be exercised for a discriminatory purpose. (McFarland Unified School District (F013404, pet. for writ of extraordinary relief by the District, filed February 5, 1990).)

Similarly, in this case, although the collective bargaining agreement permits the District to request verification of absences, that right cannot be enforced for a retaliatory purpose.

With respect to the District's argument that Peart's harm must occur in her employment, we note such harm is not limited to suspension or discharge as suggested by the District. Injury may also occur by demonstrating harm to the exercise of an employee's protected rights.⁹

The District also excepted to the ALJ's conclusions that the verification request was made in retaliation for Peart's protected activity (i.e., appeal of her grievance). The District bases this argument on a lengthy restatement and characterization of the testimony of its witnesses and in a few instances of Peart's own testimony. The upshot of this recital was to show the District's request was not motivated by animus towards Peart, but rather that Parker and Crawford believed she was using the time to prepare for the appeal of her grievance.

The Board in Novato, supra, noted that direct proof of motivation is rarely possible since it is a state of mind which can only be known to the actor. As a result, it is often necessary to infer the employer's motive from circumstantial evidence. Such factors, as the timing of the employer's conduct

⁹In Novato Unified School District, supra, PERB Decision No. 210, the Board noted that:

A prima facie charge alleging interference was established in Carlsbad by facts showing there was a nexus (connection) between the employer's conduct and the exercise of a right protected by EERA. . . . (Emphasis in original.) A violation was found because the harm to employee rights outweighed the employer's proffered business justification. (Emphasis added.)

and the disparate treatment of the employee, bear on the employer's motive and are present in this case.

Whether the District was motivated by the unique circumstances of Peart's absence or by a desire to harass and intimidate her is ultimately a question of credibility. Based upon our review of the record and the credibility determinations of the ALJ, we do not find credible the reasons given by the District for its request. (Santa Clara Unified School District (1979) PERB Decision No. 104.)

Crawford's request that Peart obtain medical verification of her absence came "on the heels" of her grievance hearing and was motivated, in part, by Parker's belief she was using sick leave to prepare her grievance, thus demonstrating their animus. The request was also discriminatory in that the District treated Peart differently than any other employee by requiring her to provide the verification, without any credible reason for questioning her veracity.¹⁰ Finally, Crawford's inquiry as to whether Peart was returning to school on October 9 was little more than an accusation she was not ill, and showed that he had already judged her guilty of sick leave abuse.

¹⁰Crawford testified that, aside from Peart, he had never required a doctor's verification from any teachers. In addition, Crawford and Parker both testified that Peart was a capable and conscientious teacher, that her use of sick leave was not extensive or beyond the ordinary use of any teacher in the District, and that they had no suspicion prior to October 5 that she might be malingering. They further testified Peart's use of sick leave in prior years was consistent with the sick leave usage for the District.

The District also excepts to factual determinations made by the ALJ based on statements attributed to Dr. Wong, Peart's physician, about her medical condition, and statements by Crawford as to whether she would be returning to school at the conclusion of the grievance appeal. The District further excepts to the finding that Crawford requested Peart to obtain the verification prior to returning to work, as not supported by the weight of the evidence.

With respect to Dr. Wong's statements, the District argues the findings relating to her diagnosis are hearsay evidence since Dr. Wong did not testify at the hearing.¹¹

It does not appear, however, that Dr. Wong's statements to Peart and referred to by the ALJ in her decision are offered for a hearsay purpose. (Evid. Code, sec. 1200.) Peart's testimony that she was having back spasms is based upon her personal perception of her own physical condition. Also, Peart's testimony concerning statements made by her doctor during the appointments appear to be a recital of events and not necessarily offered for the truth of her condition. Accordingly, the statements were properly noted by the ALJ. (Also, see PERB

¹¹The specific findings objected to are:

Dr. Wong confirmed Peart's belief that she was having severe back spasms and prescribed medication for anxiety, muscle relaxation, and pain. She told Peart to go home, get rest, and to 'take care of yourself; Wong seemed not to understand the purpose of the verification and evidently confused it with a worker's compensation claim.

Reg. 32176.) Further, the veracity of those statements is irrelevant to our inquiry. Instead, the focus is whether Peart, in fact, saw her physician, and whether she was sufficiently ill to be out all four days. The two notes from the clinic, signed by the doctor and eventually accepted by the District, are evidence of those facts. (Evid. Code, sec. 1271.) Moreover, even if the statements are hearsay, such findings constitute harmless error since our decision does not turn on Peart's diagnosis, but rather on whether the verification was imposed to intimidate and harass her. (Regents of the University of California (1983) PERB Decision No. 267a-H; Code Civ. Proc. sec. 475; Witkin, California Civil Procedure, Appeal, sec. 289.)

With respect to the statements attributed to Crawford, we find the ALJ's determinations on those issues adequately supported in the record.

The District's final exception is to a procedural statement appearing in the ALJ's proposed decision that the parties' [post-hearing] briefs were submitted on April 10 and May 15, 1989.

It appears from the appellate record the Association's post-hearing brief was received on April 10, 1989, and its reply brief on May 15, 1989. The District filed its post-hearing brief on May 1, 1989. Since neither party appears to be prejudiced by the ALJ's procedural statement, it is harmless error. (Regents, supra.)

We affirm, therefore, the ALJ's proposed decision finding that the District violated EERA section 3543.5(a) when it

discriminated and retaliated against Peart for the exercise of protected activities by requiring her to obtain a doctor's excuse, when such verification had been imposed for the purpose of intimidation and harassment.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to the Educational Employment Relations Act section 3543.5(a), it is hereby ORDERED that the Woodland Joint Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

Retaliating or discriminating against Carol Peart because of her exercise of protected activity.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE DESIGNED TO EFFECTUATE THE PURPOSE OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, defaced, altered or covered by any material.

B. Written notification of the actions taken to comply with the Order shall be made to the Sacramento Regional

Director of the Public Employment Relations Board in accordance
with his instructions. ;

Chairperson Hesse joined in this Decision.

Member Shank's dissent begins on page 13.

Shank, Member, dissenting: I respectfully disagree with the majority and would dismiss this case on the grounds that Carol Peart (Peart) did not suffer any adverse consequences as a result of the Woodland Unified School District (District) requesting verification for four consecutive days of absence under the objective test applied in Palo Verde Unified School District (1988) PERB Decision No. 689.

The majority purports to apply an objective test in determining whether the District's request for absence verification actually resulted in injury to Peart, and cites the following reasons in support of its conclusion: (1) the verification was required in order to harass and intimidate Peart for having filed and appealed a grievance; (2) a letter was placed in Peart's personnel file; and (3) the request for the verification was made in front of other employees. The majority cites National Labor Relations Board cases in support of its contention that discriminatory enforcement of a work rule for the purpose of harassing or intimidating an employee in retaliation for having engaged in protected activity constitutes adverse action.

The District's request for verification was reasonable under the circumstances. Peart first responded by producing a note, dated October 6, 1987, which stated, "Excuse from work this day." (Respondent's Exhibit A.) Since Peart requested four consecutive days of sick leave, it was not unreasonable for the District to seek further verification to cover the entire four days that she was out.

The majority's reliance on NLRB law for the proposition that discriminatory enforcement of a work rule for the purpose of harassing or intimidating an employee in retaliation for having engaged in protected activities constitutes adverse action," is misplaced. In Hyatt Hotels, cited by the majority, an employee was discharged in part because he allegedly violated a company policy. Although there is no question that discharge constitutes harm, the Administrative Law Judge nevertheless dismissed the 8 (a)(3) (reprisal) allegation finding insufficient evidence as to the apparent policy and its actual application and insufficient evidence to demonstrate that the discharge was for the rule infraction alone. The BMP Sportswear case involved a layoff, clearly an adverse action. Finally, in the NLRB v. S.E. Nichols case, the employees in question suffered not only enforcement of previously unenforced rules, but also increased scrutiny and harassment, intentional ridicule at a meeting with co-workers, denial of a pay increase and written warnings placed in their personnel files.

Our case is clearly distinguishable from the NLRB cases cited by the majority. Most importantly, there is no showing of harm in this case. First, I do not agree with the majority that Peart even proved "discriminatory enforcement." Both the school principal and the secretary who was in charge of substitute requests testified that it is rare for a teacher to request a substitute four days in a row. I do not find the fact that the District seldom, if ever, requested sick leave verification to be determinative of the issue of whether the request in this

instance was reasonable. The mere fact that an employer has chosen not to enforce its contractual rights in the past does not mean that it is forever precluded from doing so. (See Marysville Joint Unified School District (1983) PERB Decision No. 314.) The contract gave the District discretion to request sick leave verification and it is reasonable that it would exercise that discretion in circumstances it considered unusual. Even assuming, arguendo, Peart could prove discriminatory enforcement, she did not, as a result, suffer any cognizable harm as did the employees in the NLRB cases. She was merely requested, pursuant to contract, to produce a verification of sick leave.

The majority states, generally, that the purpose of the required verification was to harass and intimidate Peart for having filed and appealed a grievance, but the record lacks any supporting testimony. Peart herself testified she recognized that the contract allowed the District to request sick leave verification.

I agree with the majority that placing correspondence between an employer and employee in the personnel file documenting their communication does not ordinarily constitute adverse action. However, the majority goes on to state that the October 9, 1987 letter (1) draws the reviewer's attention to the fact that Peart should be watched closely for possible sick leave abuse; (2) indicates that Peart is a problem employee and not to be trusted; and (3) sends a clear message to Peart that appealing grievances can result in the placement of letters in her

personnel file. These gratuitous assumptions are based upon the following language in the letter itself:

As a follow-up to our conversation on October 9, 1987, I have requested, as per contract Article X, A-4, verification from your doctor that you were unable to work from Tuesday, October 6, 1987 through whatever date you returned (Friday, October 9, 1987, or later). Thank you for your cooperation.

The letter simply requested verification for specific absence dates, citing the applicable section of the contract.¹ Nothing is said regarding Peart's veracity and there is no express or implied reference to her as being a problem employee or, to the grievance. Since Peart apparently misunderstood the first request and only provided a verification for one day of absence, it is not surprising that the District should clarify its request in writing.

The majority has determined that Peart suffered harm based on the fact that the verification request was made in front of other employees and implied misconduct. There is no evidence in the record to substantiate this determination. Not only was Peart unable to name a single employee present at the time the statements were made, but she testified, "I have no idea whether [any employee present] overheard it or not." (TR, Vol. I, p. 111.) When asked if she knew whether other people heard the request, Peart responded, "No I do not know." (TR, Vol. I,

¹Article X, A. 4. of the contract states:

Leaves of absence under this section will be automatic, although the District reserves the right to request verification from the proper medical authority.

p. 111.) Furthermore, Article X, A. 4. of the contract gives the District the right to request verification for absence. I am unable to determine how a request made pursuant to the contract, in front of unknown employees who may not have heard the request, can rise to the level of harm as stated by the Board in Palo Verde Unified School District, supra, PERB Decision No. 689.

The majority has now replaced the objective test applied in Palo Verde with a test based upon the subjective reactions of the employee to actions taken by the employer which would otherwise be within the employer's contractual rights. I cannot agree that the Palo Verde case is precedent for such a test. Furthermore, I would hold in this case that the record does not support the majority's position that Peart's subjective reactions to obtaining further verification of her sick leave usage constituted harm sufficient to establish a violation under the Educational Employment Relations Act.

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-1211, Woodland Education Association, CTA/NEA v. Woodland Joint Unified School District, in which all parties had the right to participate, it has been found that the Woodland Joint Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (Act). The District violated the Act when it required Carol Peart to obtain a doctor's excuse for her absence of October 6-9, 1987.

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

1. CEASE AND DESIST FROM:

Retaliating or discriminating against Carol Peart because of her exercise of protected activity.

Dated:

WOODLAND JOINT UNIFIED
SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



WOODLAND EDUCATION ASSOCIATION,)
CTA/NEA,)
)
Charging Party,) Unfair Practice
) Case No. S-CE-1211
v.)
) **PROPOSED DECISION**
WOODLAND UNIFIED SCHOOL DISTRICT,) (10/12/89)
)
Respondent.)
_____)

Appearances; Diane Ross, Attorney, California Teachers Association, for Woodland Education Association, CTA/NEA; and Kronick, Moskovitz, Tiedemann and Girard by Jan Damesyn for Woodland Unified School District.

Before Martha Geiger, Administrative Law Judge.

I. INTRODUCTION

The Woodland Education Association, CTA/NEA (Association or Charging Party) brought this charge against the Woodland Joint Unified School District (District or Respondent), alleging that the District violated EERA section 3543.S(a)¹ when it required bargaining unit employee Carol Peart to obtain a doctor's verification of a four-day illness from October 6 through October 9, 1987. Following that charge, the formal hearing leading to

¹ EERA is codified at California Government code section 3540 et. seq. 3543.5(a) states specifically:

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.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

this decision was held on February 7 and 8, 1989, and testimony was taken upon which this decision is based.

II. PROCEDURAL HISTORY

An unfair practice charge was filed in this case March 15, 1988, and was amended by Charging Party on September 1, 1988. A complaint was issued by the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) on October 12, 1988. The formal hearing was held on February 7 and 8, 1989, and the briefs were submitted on April 10 and May 15, 1989.

III. FINDINGS OF FACT

The District is a public school employer and the Association is the exclusive representative of the District's certificated employee unit. Carol Peart is a special class teacher at Douglas Junior High School in Woodland, California. She has been employed by the District since 1981, spending most of that time at Douglas Junior High. She is currently department chairperson, and has served on a number of district-wide committees including the Principal's Advisory Committee, the Mentor Teacher Selection Committee, and various district committees responsible for implementing AB 551 and AB 501.

At the time this dispute arose, the principal at Douglas Junior High School was Mike Parker. Ray Crawford was the Assistant Superintendent for Personnel. Sometime during the summer of 1987, Peart became aware that there was an opening for a resource specialist in special education at Douglas Junior High. Peart applied for the position, but was not hired for the

job. Peart believed that there were several irregularities in the manner in which her application was handled. As a result, she inquired of her principal on August 21, 1987, as to why she did not receive the appointment. In Peart's view, her objections to the hiring process, and her belief that the contract procedures had not been followed in the selection of the new teacher were not resolved by this meeting with Parker.

Pursuant to the collective bargaining agreement, Peart held an informal conference on August 28, 1987, with Parker. There was no response or resolution of her grievance at that level, so Peart filed a formal grievance, Step 1, on September 29 or 30, leading directly to the events at issue in this unfair practice charge.

On Monday, October 5², Parker came to Peart's classroom to give her his response to the Step 1 grievance. He indicated he wanted to discuss his response to the Step 1 grievance, and Peart replied that she would like to have her Association representative present. Parker indicated he felt that was not necessary as he merely wanted to give her his written response. He then handed her a piece of paper that told Peart her grievance had been denied as being untimely filed. Parker then left the classroom and went immediately back to the front office because he was intending to leave the campus shortly thereafter. Within approximately five minutes, Peart went to the main office and spoke with Oleta Richardson, Parker's secretary and the person

² All dates are 1987 unless otherwise indicated.

whom teachers at Douglas Junior High were to tell if they needed a substitute teacher to take their classes because of absence. Peart told Richardson she would need a substitute for the rest of the week, and then Peart immediately left the office. She went to the -teachers' lounge, and from there she made a doctor's appointment for the earliest available time, which happened to be 1:30 p.m. on Tuesday, October 6.

While both Charging Party and Respondent concur that Peart asked for a substitute for the next four days, a dispute has arisen as to what exactly was said by Peart. Parker, who was nearby, testified he heard Peart say "Oleta, get me a sub, I'll be out the rest of the week." According to Parker, Peart did not appear to be ill or in any pain and she moved very quickly.

Peart's testimony, supported by that of Oleta Richardson, is that Peart said "My back is killing me, I need a sub for the rest of the week." Peart agrees that she was moving very quickly, but Peart states that she was in severe pain because of a back spasm, and that she did not engage in any social pleasantries with Richardson, or anyone else, because she was anxious to leave school and have her medical condition attended to.

In resolving this dispute, Peart's testimony is credited. She and Richardson, the two participants to this conversation, give identical accounts as to what was stated. Parker, on the other hand, was merely a bystander, and thus he may not have heard the entire conversation between Richardson and Peart. Indeed, except for the statement "My back is killing me," the two

versions of this conversation are almost identical. Thus, while Parker may not have heard that statement, I find that the statement was actually made to Richardson.

Parker telephoned Crawford on either October 5th or 6th and told him about Peart's reaction to the denial of the grievance. Parker indicated to Crawford he did not understand why Peart needed to be out for the remainder of the week. Both Crawford and Parker felt the request for a substitute for 4 days was unusual, as most teachers request a sub on a day-by-day basis, even when an illness may last more than one day.

Peart saw the doctor on the 6th. Dr. Wong confirmed Peart's belief that she was having severe back spasms, and prescribed medication for anxiety, muscle relaxation, and pain. She told Peart to go home, get rest, and "to take care of herself." While Peart did this for the most part, she did attend a department chairpersons' meeting between 3:00 and 3:45 on the 6th. Peart testified she did so because she was unable to cancel the meeting on such short notice. With that exception and the one noted below, Peart stayed home from work on October 6th, 7th, 8th and 9th.

During the same week, Association president John Pasanen arranged a level 2 grievance meeting for Peart. The meeting took place on Friday the 9th at Dr. Crawford's office with Crawford, Parker, Pasanen and Peart in attendance.

In the course of the meeting, Crawford conceded that the grievance had been timely filed, but the substance of the

grievance was still denied by the District. At the conclusion of the meeting, Crawford inquired of Peart whether she would be returning to school that day. Peart said "No," that she was "home ill under a doctor's care". Crawford then told Peart that he would like a doctor's verification for the time she had been out ill. Crawford did not ask Peart why she had been out, but Peart volunteered the information that she was having back problems. Peart inquired as to why she needed the doctor's verification when she had not exceeded her sick leave for the year. Crawford did not specifically indicate to her why he wanted the verification, but merely indicated that prior to her return to work, she would need to provide him with the verification. Peart agreed to do so.

After the meeting, Peart proceeded directly to the Woodland Medical Clinic where she attempted to obtain the required doctor's verification. The doctor was out of town, and would not be available until Monday, October 12. Peart then went home and telephoned Crawford's office to tell him that the required verification could not be obtained before Monday, but that she would bring it to Crawford as soon as possible.

Peart returned to work on Monday the 12th. During her lunch break, she again went to the doctor's office and picked up the verification that had been left by the doctor for Peart. The verification was dated October 6, the day that Dr. Wong had seen Peart, and stated "Excused from this day." Peart, who had not communicated directly with the doctor but had merely left

messages concerning her need for the verification, took this statement to Crawford's office on the 12th. Crawford, when he read the verification, stated that it was insufficient because it did not cover all of the days that Peart was out ill. Peart then returned to the medical clinic a third time, on either the 12th or the 13th, and actually spoke with Dr. Wong. Peart explained to Dr. Wong that she needed a verification that she had been ill for four days. Wong seemed not to understand the purpose of the verification, and evidently confused it with a workers' compensation claim³. Wong was reluctant to sign the verification because Wong felt that she was being required to state that she had seen Peart every day from the 6th through the 9th. As that was her understanding of what the verification was to be used for, Wong was reluctant to give such a statement because it was untrue. Peart successfully convinced Wong, however, that the verification was merely that Peart had seen Wong on the 6th, and that Peart was home ill for the remainder of the week. Wong then drafted a 2nd verification, which Peart then returned to Crawford's office. Crawford accepted this verification.

The parties have stipulated that the contract permits for the District to require a doctor's verification of illness, but the parties also stipulated that the District had never done so for certificated personnel with the sole exception of requiring a verification from a teacher who claimed to be ill while he was

³ Peart had no workers' compensation claim.

actually in Europe. This last incident was so remote in time that even Crawford was unaware of this instance, and he has been with the District for several years. Crawford testified that, aside from Peart, he has never required a doctor's verification from a certificated teacher. Crawford and Parker both testified that Peart was a capable and conscientious teacher. The District's witnesses admitted that they had no suspicion prior to October 5 that Peart was malingering, nor was Peart's use of sick leave extensive or even beyond the ordinary use by any teacher in the District. Further, in prior years her use of sick leave was with the norm for the District.

While Parker and Crawford both testified it was "unusual" for a teacher to take more than one day at a time for sick leave use, Peart's own attendance records since 1981 indicate that she has, on occasion, taken more than one day at a time for a given illness. Indeed, all the witnesses agree that while teachers make an effort to return to the classroom after only one day's absence, it is not unheard of for a teacher to take more than one day of absence at a given time, and to ask specifically for a substitute in advance for more than one day of illness.

Parker and Crawford both testified that, at the time these events occurred, they felt Peart might be abusing her sick leave. This belief was based on Crawford's and Parker's perception that Peart did not appear to be ill on October 9, and Parker's belief that Peart asked for a substitute on October 5 for the remainder of the week not because she was in pain but because she was angry

over the rejection of her grievance. Furthermore, Parker testified that when Peart asked for a substitute on October 5, Parker believed her real reason for her absence was "to prepare for some rebuttal to the denial of [the] grievance" and believed Peart was taking the rest of the week off to "prepare for a response to that grievance".

In addition to Parker's perception of Peart's medical condition on October 5, Crawford observed Peart on October 9. He also commented that she did not appear to be ill, nor did she move as if she were in pain. Because of this, and because of Parker's statements concerning Peart's appearance on the 5th, Crawford stated he felt sick leave was being abused, and thus he requested verification from her former doctor.

IV. ISSUES

In this case, the major issue to be decided, is whether the request for a doctor's verification was a violation of EERA section 3543.5(a) because such a request constituted discrimination or reprisal against Carol Peart for her participation in the grievance procedure. The District has raised as a specific sub-issue the question of whether the request for the verification was an adverse action in the meaning of Palo Verde Unified School District (1988) PERB Case No. 689.

V. CONCLUSIONS OF LAW

The standard for determining whether a violation of section 3543.5(a) occurred is found in Novato Unified School District (1982) PERB Decision No. 210. To prove discrimination or

reprisal, the Charging Party must show (1) Peart engaged in protected activity; (2) the District knew of this activity; (3) the District took adverse action against Peart; and (4) the adverse action would not have been taken but for Peart's engaging in protected activity.

In this specific case, that Peart engaged in protected activity is not in dispute. She filed a grievance under the collective bargaining agreement (CBA), an action that is protected. North Sacramento School District (1982) PERB Decision No. 264. The District's knowledge of Peart's protected activity is also not disputed, as she spoke directly to Parker and Crawford concerning her grievance.

A question has arisen, however, as to whether the District's action in asking for the doctor's verification was "adverse action." Here, the contract specifically permitted the District to request a doctor's excuse, but that clause of the contract had never been invoked in recent times.⁴

The imposition of the doctor's excuse requirement is discriminatory when it is not requested of all similarly situated employees, or when the reason for requiring it is a sham.

⁴ The District, in a separately filed Motion, sought to correct alleged omissions in the transcript. The undersigned rejected the Motion as untimely, but seeks here to clarify that any alleged omission is harmless error.

The evidence relied upon in reaching this decision is the testimony of Crawford, Parker, Richardson and Peart. The evidence of Peart's attendance in past years is relevant only insofar as it supports or rebuts the District's suspicion that she was abusing sick leave in this instance. Here, the evidence is that Peart did not abuse sick leave in past years, nor does the District so claim.

The National Labor Relations Board (NLRB) has held it unlawful to enforce work rules previously unenforced, when the purpose was to intimidate or discriminate in retaliation for an employee's protected activity. See Hyatt Regency Memphis (1989) 296 NLRB No. 36 and 296 NLRB No. 37, [____ LRRM ____]. This case resembles the situation where an employer increases supervision (a task normally performed by management without objection) but does so for purposes of harassment. The NLRB has held such close scrutiny or increased supervision to be unlawful, when the employer's actions are designed to hold the employee up to ridicule or to discredit a union advocate. See BMP Sportswear (1987) 283 NLRB No. 4; NLRB v. S.E. Nichols 862 F.2d 952 (2d Cir. 1988), 129 LRRM 3098, enf. 284 NLRB No. 55. In the latter case, the enforcement of previously unenforced rules, accompanied by increased supervision, occurred within earshot of other employees.

Applying these cases to the facts here, the verification request was both discriminating (no other employees similarly situated were so treated) and retaliatory, and the District's alleged suspicion of abuse merely a sham for its true purpose, harassment.

The effect of asking Peart for the verification was to, in essence, call into question her veracity in stating that she was ill. Yet there was no legitimate reason to question her veracity. Peart's use of sick leave was not excessive. Nor is the fact that she did not appear to be ill enough to justify the

alleged suspicion that she was abusing the sick leave. Parker admitted he believed on October 5 that Peart was using sick leave to prepare for her grievance. The District, by questioning Peart when it had no reason to and by requiring her to obtain a doctor's verification, treated her differently than any other employee. Further, this treatment in effect, acted to intimidate Peart.⁵

The District's argument that the request for verification was not adverse is rejected.

The request for the doctor's excuse was made in the reception area of Crawford's office, in front of other District employees, and implied misconduct. Further, even after Peart obtained the doctor's excuse, it was rejected as "inadequate." The rejection necessitated another trip to the medical clinic for the sole purpose of obtaining a doctor's excuse. Certainly the request for the excuse, while normally not adverse action, became so in this case because of its discriminatory imposition, and because of the lack of any reason for its imposition other than harassment or intimidation.

Finally, the evidence shows that the adverse action was taken in retaliation for Peart's protected activity. The request for the doctor's verification, coming on the heels of Peart's grievance, was not required of any other employee in recent memory. Further, Parker's statement that he believed Peart was

⁵ Indeed, this case might have been tried as an interference case instead of a reprisal case.

using her sick leave to prepare her grievance response indicates animus on his part. The disparate treatment of Peart, combined with the timing, are certain indicators that the adverse action occurred solely because of the exercise of protected activity.

In defending a charge of discrimination, an employer can argue that it would have taken the same action regardless of whether the employee had engaged in protected activity. In other words, can the District show it would have asked for the doctor's verification even if Peart had not filed the grievance? The District attempted to prove so by noting the unusual nature of Peart's request for a substitute for four consecutive days, along with its ignorance of her pre-existing back condition.

The problem with this argument, however, is that the request for a substitute for four days was perhaps out of the norm but not unknown at all. All of the witnesses were aware of instances, other than this case, when employees needed substitutes for more than one day. Hence, Peart's request was not all that unusual.

Further, the District's ignorance about Peart's back condition is irrelevant. The District argued that their lack of knowledge about Peart's back condition was understandable because nothing in her attendance records indicate such a chronic condition. This argument, however, misses the point. Past attendance records are indicative of the past only and are of limited value in assessing Peart's current medical status. If the District truly wanted to ascertain Peart's condition on

October 5 (when Parker says he first suspected Peart's abuse of sick leave), the most logical thing to do was to ask her what was wrong. At the very least he could have asked Richardson, his secretary, what Peart had said about why she needed a substitute. He did neither. Nor did Crawford ask Peart (although she volunteered the information). His question about whether she was returning to school on the 9th was little more than an accusation that she was not ill, and showed how he had already judged her guilty of sick leave abuse. Since simple, logical steps to investigate Peart's absence were not followed, the conclusion is drawn that the District was not interested in Peart's use of sick leave. It was instead interested in harassing her because she had filed a grievance. Thus the District failed to show it would have treated Peart the same in the absence of her protected activity.

VI. CONCLUSION and REMEDY

Based on the entire record in this case, it is hereby found that the Woodland Unified School District violated EERA section 3543.5(a) when it required Carol Peart to obtain a doctor's excuse for her absence of October 5 - 9, 1989.

With the finding of a violation, the Respondent is ordered to cease-and-desist its behavior, post a notice to employees, and to make the Charging Party whole. Here, since Peart complied with the request for verification, thus avoiding any disciplinary action, there is no need for a make-whole order. A cease-and-

desist order and the requirement of a posting are, however, appropriate.

VII. PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code section 3543.5(a), it is hereby ORDERED that the Woodland Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

Retaliating or discriminating against Carol Peart because of her exercise of protected activity.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS DESIGNED TO EFFECTUATE THE PURPOSE OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

A. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to certificated employees 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 the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

B. Upon issuance of a final decision, make written notice of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations

Board in accord with the director's instructions. Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. 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. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. 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 California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: October 12, 1989

MARTHA GEIGER
Administrative Law Judge