STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FALL RIVER EDUCATION ASSOCIATION, CTA/NEA,

Charging Party,

v.

FALL RIVER JOINT UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-1712

PERB Decision No. 1259

April 8, 1998

Appearances; California Teachers Association by Diane Ross, Attorney, for Fall River Education Association, CTA/NEA; Pinnell and Kingsley by Paul Nicholas Boylan, Attorney, for Fall River Joint Unified School District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fall River Joint Unified School District (District) and the Fall River Education Association, CTA/NEA (FREA) to a proposed decision by a PERB administrative law judge (ALJ). The ALJ found that the District retaliated against teacher John Lennon (Lennon) for his exercise of rights protected by the Educational Employment Relations Act (EERA), unilaterally changed its contractual policy governing involuntary transfers of teachers, and unilaterally implemented a teacher swap program without providing FREA with notice or the opportunity to bargain over the decisions or their effects, thereby violating EERA

section 3543.5(a), (b) and (c).[1]

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the filings of the parties.[2],[3] The Board concludes that the District

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

[2]FREA argues that the District's exceptions filed on June 25, 1997, were untimely. Following the granting of extensions of time, the PERB appeals assistant set June 20, 1997, as the final filing date for exceptions. Applying the five-day extension provided by PERB Regulation 32130(c) and established PERB practice and policy, the appeals assistant correctly accepted the District's June 25, 1997, exceptions as timely filed. FREA's argument is rejected.

[3]The District requests that PERB take judicial notice of the deposition of Donald Mason (Mason) in a separate proceeding. The Board may use its discretion to exclude evidence which adds nothing of probative value to the record. (The Regents of the University of California. University of California at Los Angeles Medical Center (1983) PERB Decision No. 329-H.) Mason testified at the PERB hearing in this matter, and the District has failed to adequately explain the probative value of Mason's deposition to the unfair practice proceeding. Therefore, the Board declines to take judicial notice of Mason's deposition.

did not retaliate against Lennon for his exercise of EERA-protected conduct, and did not unilaterally change its contractual policy governing the involuntary transfer of teachers in violation of the EERA. The Board further concludes that the District unilaterally implemented a teacher swap program without providing FREA with notice or the opportunity to bargain over the decision or its effects, and thereby violated EERA section 3543.5(a), (b) and (c).

BACKGROUND

The District is a public school employer within the meaning of EERA, and FREA is the exclusive representative of certificated employees within the District. The District and FREA are parties to a collective bargaining agreement (CBA) with a negotiated term of July 1, 1994 to June 30, 1997. The CBA provides for a grievance procedure which culminates in advisory arbitration. The CBA also contains a provision concerning transfer and reassignment procedures. Article 10.4 provides for involuntary transfers/reassignments and states:

> 10.4.1 A unit member who does not request a transfer/reassignment may not be transferred/reassigned until given an opportunity (written communication or a telephone call, if the unit member is not available for a personal interview) for a meeting with the Superintendent to discuss the reasons for the transfer/reassignment. The unit member shall also be given the opportunity to apply and be considered for any vacancy for which he/she is qualified which may be available at the time of the impending transfer/reassignment.
>
> 10.4.2 In making a transfer/reassignment not requested by a unit member, the District

shall apply the following criteria to the District-wide pool of unit members who meet the credential requirements: length of District service (seniority), major and minor fields of study, credentials, and experience. The least senior unit member would be so transferred/reassigned unless the District determines that the other cited factors outweigh the sole factor of seniority.

If the District determines to transfer/ reassign a unit member who is not the least senior District-wide, a written statement of reasons may be requested by either FREA and/or the affected unit member(s).

The District shall provide the written statement of reasons, if requested, for any voluntary transfer/reassignment.

10.4.3 Unit members who are to be involuntarily transferred/reassigned shall be notified by June 30, except in the event of such factors as stated in Section 10.3.7 above. [[4]]

10.4.4 An involuntary transfer/reassignment may be made for any reason that will be in the best interests of the District's educational program. No transfer/ reassignment may be made arbitrarily, capriciously, or discriminatorily.

Additionally, Education Code section 35035 provides, in pertinent part:

The superintendent of each school district shall, in addition to any other powers and duties granted to or imposed upon him or her:

(c) Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. This power to assign includes the power to transfer a teacher from one school to another at which the teacher is

[4]Article 10.3.7 lists factors "such as death, unexpected enrollment, or other circumstances."

> certificated to serve within the district when the superintendent concludes that the transfer is in the best interest of the district.
>
> (d) Upon adoption, by the district board, of a district policy concerning transfers of teachers from one school to another school within the district, have authority to transfer teachers consistent with that policy.

The District operates Fall River High School, Fall River Elementary School, Burney High School, East Burney Elementary School, Mt. Burney Elementary and Mountain View High School. In the 1993-94 school year, Earnest Graham (Graham) became superintendent of the District. Ed Traverso (Traverso) is the assistant superintendent who is responsible for the District's special education program, as well as its personnel function. Don Sandberg (Sandberg) became interim principal of Fall River High School in January 1992 and was formally designated as principal in May or June of that year. Dennis Riley (Riley) is principal of the Fall River Elementary School. For some four or five years prior to the 1995-96 school year, Mason was the resource specialist teacher at Fall River Elementary School. Lennon has been employed by the District since 1968. For six or seven years prior to 1995-96, he served as a resource specialist teacher in the special education department at Fall River High School.

Since Sandberg became principal at Fall River High School during the 1991-92 school year, the relationship between Sandberg and Lennon has become increasingly difficult and strained.

In 1991, a policy of "mainstreaming" special education students was implemented by Sandberg's predecessor as principal. Under this policy, special education students were moved into regular classes wherever possible, rather than assigned to classes consisting entirely of other special education students. Prior to this change, Lennon had up to 50 students in his special education classroom. After implementation of mainstreaming, he would go to regular classrooms to assist teachers in working with special education students.

This policy change was not in the school site plan nor had the site council been advised at the time of the change. As a result of his concerns with the new policy, Lennon complained to the California Department of Education (DOE). It was at approximately this time that Sandberg became the interim principal at Fall River High School. In connection with the DOE review which resulted from Lennon's complaint, Lennon accused Sandberg of altering the date of a document and of fabricating a memorandum. The report prepared by DOE, issued on March 12, 1993, found that the District had failed to include the high school site council in the policy change during the 1991-92 school year. The report indicated that the high school subsequently corrected the problem.

During the 1991-92 school year, Lennon received a letter of reprimand from Sandberg as a result of a parent complaint concerning the special education program at Fall River High School. Lennon filed a grievance, and the reprimand and related

documents were sealed in 1993 as a result of a settlement of that grievance.

In 1992, Lennon declined Sandberg's request to prepare a recommendation concerning an aide in the special education program. Lennon felt that he was not the aide's supervisor since the aide was primarily assigned to assist regular classroom teachers who had special education students in their classes. Sandberg wrote Lennon a note regarding his responsibility, and further wrote to Traverso regarding Lennon's refusal to prepare the recommendation.

Sandberg evaluated Lennon for the 1992-93 school year, rating him as "meets standards."

In late 1993 or very early 1994, Lennon met with Graham and related several concerns he had, including some regarding Sandberg. These concerns included Sandberg's participation in a football fantasy league at the high school. Sandberg had rebuffed efforts to have student raffles at the school, and Lennon thought that constituted a dual standard. Graham wrote to Lennon later informing him that he had instructed Sandberg to keep the football fantasy league activity off of the school grounds.

Lennon requested the installation of special door knobs for his classroom. Sandberg believed the door knobs were too expensive and unnecessary. Lennon was unhappy with Sandberg's response to his request.

Sandberg was concerned because he believed Lennon was working on establishing a charter school without consulting with Sandberg.

At approximately this point, Lennon's distrust of Sandberg reached the point that he decided not to talk to him unless another teacher and/or FREA representative was present. Also at approximately this time, Lennon indicated to Ron Roberti, a staff consultant for the California Teachers Association, that he intended to make things difficult for the District so that it might decide to "buy him out."

Lennon came to believe that he needed to take action to protect himself against the District. During the 1994-95 school year, Lennon was involved in filing six grievances. On September 20, 1994, Lennon and three other teachers filed a grievance on alleged involuntary extra duties assigned by Sandberg. The matter was settled in January of 1995 without Lennon's concurrence.

On September 29, 1994, Lennon filed a grievance on Sandberg's refusal to pay for a conference Lennon attended. Sandberg responded by allowing partial payment but denying the rest of the claim. Lennon appealed this ruling to Graham who sustained Sandberg.

On February 1, 1995, Sandberg issued a letter of reprimand to Lennon. The reprimand was for Lennon's alleged failure to properly execute his required duties as a resource teacher. The letter of reprimand indicated that Lennon had failed to ensure

compliance with provisions of a student's individual education plan (IEP) by failing to contact or have the student's teachers contact the student's mother to discuss his progress as required by the IEP. Sandberg's letter refers to a specific IEP meeting held on January 26, 1995. At that meeting, Sandberg testified, the parent stated that she believed that Lennon had failed in his responsibility to see that she was alerted to concerns about her child. Sandberg stated that District philosophy regarding special education teachers indicated that Lennon was responsible for insuring proper communication with the parent.

On February 5, 1995, Lennon filed a grievance regarding the letter of reprimand. The remedy he requested was that the harassment of him cease, and that letters of unprofessional conduct be placed in the guilty party's file, apparently in reference to Sandberg. The grievance was appealed to Graham and FREA settlement efforts did not satisfy Lennon.

Also, on February 5, 1995, Lennon filed a grievance regarding Sandberg's denial of Lennon's use of personal necessity leave to meet with his accountant.

On March 21, 1995, Lennon filed a grievance regarding the performance evaluation given to him by Sandberg for the 1994-95 school year. Sandberg rated Lennon "not meeting standards" in pupil progress and communication, both as a result of the parent complaint. Lennon met with Sandberg accompanied by two teacher representatives and pointed out a contract requirement of providing an employee with prior notice and opportunity to

correct performance before such a rating could be given. Sandberg agreed that he had failed to comply with the contractual requirement and changed the below standard ratings. When Sandberg presented Lennon with the revised evaluation, Lennon initially refused to sign it because he felt Sandberg would alter it after it had been signed. Lennon proceeded with the grievance over the evaluation, demanding an apology. Sandberg denied the grievance on April 4, 1995, and Lennon continued to pursue it. Lennon signed the revised evaluation on April 24, 1995, and sought to pursue the grievance to advisory arbitration. FREA believed a fair settlement had been reached and decided not to take the grievance to arbitration.

Finally, Lennon filed a grievance on class size on June 1, 1995. FREA determined that the contractual timelines had not been followed so it did not pursue that grievance.

Also, sometime during the 1994-95 school year, Sandberg asked Lennon if he wanted to move to a different classroom. Lennon told Sandberg he believed it would be inappropriate to make special education students go to that classroom to see him because he felt it was too far from their regular classrooms. He threatened Sandberg with a complaint to the DOE if the move was required.

Lennon testified that he did not believe that Sandberg properly used the special education department at Fall River High School. He expressed some disdain for Sandberg, indicating that there had been monthly department meetings when there was "a real

principal" at the school before Sandberg assumed that position. Lennon's summary appraisal of Sandberg as principal was "he has some shortcomings."

By letter dated June 26, 1995, Graham advised Lennon that:

> The District has determined that your assignment for the 1995-96 school year shall be as a Resource Specialist Program [RSP] teacher at Fall River Elementary School.

Also by letter dated June 26, 1995, Graham advised Mason that:

> The District has determined that your assignment for the 1995-96 school year shall be as a Resource Specialist Program teacher at Fall River High School.

Graham's letters referred to CBA Article 10.4, cited above, and notified Lennon and Mason that their transfer would not be effective until they had had the opportunity to meet with Graham to discuss the reasons for their transfer. Meetings were scheduled for both Lennon and Mason to discuss their 1995-96 assignments.

Mason learned of the possibility of his transfer before the June 26 letter was issued. He met with Graham and explained that he did not want to transfer to the high school. Because of Mason's previous statements about considering working at the high school, Graham believed that Mason would be pleased with the transfer. Mason testified that Graham told him that the District was considering a possible transfer because there had been some problems at the high school with Lennon and the special education program. He did not mention any other reasons for the transfer.

Through his attorney, Lennon indicated that he wanted a written statement of the reasons for the transfer. Graham responded to Lennon in an August 4, 1995, letter which indicated:

> Your transfer is part of a pilot program designed to integrate special education curriculum from the elementary grades through the junior high school and senior high school levels. The rationale is more clearly set forth in the attached memorandum to me from Ed Traverso dated June 27, 1995. As you can see, the two-year pilot program will first be implemented in the Fall River end. If that pilot program is successful, it will subsequently be implemented in the Burney end of the District.

Attached to Graham's letter was a June 27, 1995, memorandum from Traverso on the subject "Staffing for RSP for 1995-96 School Year." Traverso's memorandum states that he had "tentatively determined that the RSP program would benefit from teachers having experience at both the elementary and high school levels." Traverso indicates that "the RSP program would benefit from a two-year training and development assignment which would 'swap' an elementary RSP teacher with a high school RSP teacher" and replicate at the high school the Resource Specialist Program (RSP) in place at Fall River Elementary School.

Traverso provides three reasons for choosing Fall River Elementary and Fall River High School for implementation of the proposal:

> 1. At the Burney end of the District, John Calzia is the Special Education Department Chair and Vickie Mclntosh is very involved with non-RSP-related activities at Burney High School. Thus, for the 1995-96 year, a 'swap' of either Calzia or Mclntosh with Vickie Swope would present additional

> complications. If the 'pilot' program proves effective, we should plan for such an exchange in 1997-98.
>
> 2. John Lennon has experienced a series of confrontations and disagreements with the Fall River High School principal over the past 24 months. While this is affecting the educational program at Fall River Junior-Senior High, I would probably not urge a transfer if this were the only factor. It is, however, a factor in my decision as to whether the pilot 'swap' should occur first at the Burney end or at the Fall River end. On balance, as an added factor, I believe that the program would benefit if Lennon and Don Sandberg were not in a supervisor/ employee relationship for a period of time.
>
> 3. Similar to the rationale in #2, parents have lodged two complaints against Lennon's activities as an RSP teacher at Fall River Junior-Senior High School. The problem seems to be both festering and on-going since that child will remain in the RSP program for 1995-96. Again, on balance, I believe that the program, that child, and Lennon would benefit from a 'cooling-off' period.

Traverso's memorandum concludes with the following recommendation:

> Therefore, based on all the information discussed above, it is my recommendation that it would be in the best interest of the RSP program if the District were to exchange the assignments of John Lennon and Don Mason for the 1995-96 and 1996-97 school years.

Neither Graham or Traverso discussed the creation and implementation of the pilot swap program with Sandberg or Riley, the principal at Fall River Elementary School, or with others in the District. It was not discussed with the District curriculum committee, which normally reviewed teaching strategies and staff and subject matter resource issues. Additionally, while the

activities of other special education teachers were referenced in Traverso's memorandum, neither Graham or Traverso apparently-considered the other activities in which Lennon and Mason were involved.

An addendum to the August 2, 1995, personnel report to the District's board of trustees included reference to the involuntary transfers. The board of trustees approved the report in executive session. On August 21, 1995, Lennon wrote to the board of trustees complaining that the open meeting law had been violated with regard to the approval of the involuntary transfers. Lennon later filed a lawsuit against the District on this matter.

On August 10, 1995, Lennon and Mason filed grievances challenging the transfers on the grounds that they were arbitrary, capricious, discriminatory and retaliatory, in violation of the parties' CBA. Mason ultimately withdrew his grievance. Graham responded to Lennon's grievance, describing it as conclusionary and without sufficient facts to evaluate the basis of the alleged contractual violations. Graham indicated that Lennon's involuntary transfer was based on the reasons included in Traverso's June 27, 1995, memorandum, and denied Lennon's grievance.

On September 18, 1995, Graham responded to a September 12 request from Lennon for clarification and documentation concerning his transfer. Graham wrote that his decision to transfer Lennon was based upon the educational decision that the

RSP program would benefit from teachers having experience at both the elementary and high school levels. Graham wrote:

> Thus, absent any consideration of affected teachers, I determined that there would be a 'swap' of two teachers in 1995/96 and two other teachers in 1997/98. Only after arriving at this program decision was consideration given to the circumstances affecting each of the potential transferees. As you can see in the Memorandum from Ed Traverso to me dated June 27, 1995, the primary reason for selecting you and Don Mason is set forth in reason number one. The additional factors set forth in reasons two and three merely supplemented reason number one.

This appears to be the first definitive statement that the District had implemented a special education teacher swap program which would affect other teachers in future years as well.

In September of 1995, Lennon filed a lawsuit against the District contending that it had "engaged in a continuous course of harassment" against him since at least the 1991-92 school year.

During the 1995-96 school year, Lennon filed a complaint with the United States Department of Education alleging that his transfer was in retaliation for his having filed a grievance on behalf of students with disabilities.

The District's board of trustees held a meeting on August 7, 1996, which included an agenda item intended to cure the alleged open meeting law violation asserted by Lennon. The board adopted a resolution which affirmed Graham's authority to create pilot programs and involuntarily transfer teachers. The resolution also ratified Graham's transfer of Lennon.

Also on August 7, 1996, Constance Sebastian, president of FREA, wrote to the board stating:

> Before taking action to approve the Pilot Program and any related transfers, the District has an obligation to bargain its' [sic] effects with the Association. Therefore, the Association formally demands to bargain the decision to implement the Pilot Program and/or the effects of the changes relating to Article 10: Transfer Procedure/Reassignment Procedures of the collective bargaining agreement. Currently, Unfair Practice Charge Case No. S-CE-1712 deals with the above issues.

Graham responded that FREA had been informed of his June 1995 decision to transfer Lennon and Mason, and that "[s]ince FREA never requested to bargain the impact and effects of the pilot program until today's date, I feel that my duty to negotiate has been waived." Nonetheless, he indicated a willingness to meet and discuss the issue.

There is no evidence that Graham specifically notified FREA of the creation of the pilot program or the involuntary transfers of Lennon and Mason. At the hearing, FREA stipulated that it became aware of the transfers of Lennon and Mason shortly after June 26, 1995, when FREA learned of Graham's letters. Prior to August 7, 1996, FREA made no demand to bargain over either the teacher swap program or the transfers of Lennon or Mason.

Neither Lennon or Mason experienced any change in pay or benefits as a result of their transfers. However, Lennon testified that he believed the transfer from the high school to the elementary school was a demotion. At the high school he had his own classroom. At the elementary school he shares a

classroom with another teacher. At the high school he was the department chair of the special education department, although that designation carried no additional compensation and few duties or responsibilities while Sandberg had been principal. There is no department chair at the elementary school. Lennon's work day is 30 minutes shorter at the elementary school than at the high school, although he has to drive an additional five miles to the elementary school.

Mason's work day is 30 minutes longer at the high school than at the elementary school and his driving time is 15 minutes more per day. Mason works 30 to 45 minutes more preparation time outside of the classroom than he did at the elementary school.

There is no difference in the pay and benefits of elementary and high school teachers within the District.

On December 20, 1995, FREA filed the instant unfair practice charge. The PERB Office of the General Counsel issued a complaint which, as amended on July 17, 1996, alleges that the transfer of Lennon to the Fall River Elementary School was in retaliation for his exercise of EERA-protected rights. The amended complaint also alleges that the District violated EERA by unilaterally changing its contractual policy on involuntary transfers, and by unilaterally implementing a special education teacher swap program. A PERB settlement conference did not resolve the dispute and a formal hearing was conducted by a PERB ALJ on September 10 and 11, and November 4, 1996. On May 1, 1997, the ALJ issued his proposed decision finding that the

District, by its conduct, had violated EERA section 3543.5(a), (b) and (c).

DISCUSSION

Retaliation Allegation

FREA alleges that the District unlawfully retaliated against Lennon for his exercise of EERA-protected conduct when it transferred him from Fall River High School to Fall River Elementary School. In order to establish that an employer has engaged in unlawful retaliation in violation of EERA section 3543.5, the charging party must demonstrate that the employee engaged in protected activity; the employer was aware of that activity; the employer took action adverse to the employee; and the employer's conduct was motivated by the employee's protected conduct. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

In this case, it is clear that Lennon engaged in extensive protected conduct of which the District was aware. However, the District asserts that the transfer of Lennon did not constitute adverse action against him. The Board applies an objective test to determine whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. (Palo Verde Unified School District (1988) PERB Decision No. 689.) The District argues that Lennon's subjective view that the transfer constituted a demotion fails to meet this standard. However, PERB has found retaliatory, involuntary transfers to be unlawful even when they

were not accompanied by any loss of pay or benefits. (Newark Unified School District (1991) PERB Decision No. 864.) This case turns on the question of whether the District's action was motivated by Lennon's protected activity. If it was, the District's involuntary transfer of Lennon was unlawful. If the transfer was not motivated by Lennon's protected activity, it did not represent unlawful retaliation against him even though it may have been adverse to Lennon.

Direct proof of unlawful motivation is not often present. As a result, the Board reviews the record as a whole to determine if the inference of unlawful motive should be drawn. Factors which may support such an inference include the timing of the employer's adverse action in relation to the employee's protected conduct (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); the employer's departure from established procedures (Santa Clara Unified School District (1979) PERB Decision No. 104); and the employer's inconsistent or shifting justification for the conduct (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S).

The record in this case supports the inference of unlawful motivation by the District. The involuntary transfer of Lennon occurred at the end of the 1994-95 school year, during which Lennon had filed six separate grievances and had been involved in numerous meetings with the District in pursuit of those

grievances. Clearly, there is significant demonstration of the temporal proximity of Lennon's protected conduct and the alleged retaliatory action by the District. Additionally, the justification offered by the District for transferring Lennon was inconsistent and suspect. Mason was told by Graham prior to the June 26, 1995, letter informing him of the transfer that the reason for the transfer was that there had been problems at the high school involving Lennon. He was given no other explanation. The pilot program to swap elementary and high school special education teachers was first offered as an explanation for the transfer in Traverso's June 27, 1995, memorandum to Graham. The "non-RSP-related" activities of some special education teachers are referenced in the memorandum as part of that explanation, but the similar activities of Lennon and Mason are not referenced. The pilot program was not discussed through the normal curriculum, subject matter, staffing or school site structures of the District. Instead, it appears to have been developed by Graham and Traverso subsequent to the decision to involuntarily transfer Lennon, at least in part as a means of providing additional support for that decision. The Board infers from a review of the record as a whole that the District's involuntary transfer of Lennon was motivated by Lennon's exercise of protected activity.

In retaliation cases, once an inference of unlawful motivation is drawn, the burden shifts to the employer to establish that it would have taken the action regardless of the

employee's protected conduct. (Novato.) The Board will find the employer's conduct to be unlawful if it determines that the action would not have been taken but for the employee's protected conduct. (Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

The District argues that it would have transferred Lennon regardless of his protected conduct in order to implement the pilot special education teacher swap program. As noted above, however, the District's development of that program appears to have occurred subsequent to its decision to involuntarily transfer Lennon. However, that finding in and of itself does not lead to the conclusion that the District's motivation in transferring Lennon was retaliation against him for his exercise of EERA-protected conduct. The Board must examine the record to make a determination regarding the District's motivation.

The explanation of the transfers of Lennon and Mason included in Traverso's June 27, 1995, memorandum refers to Lennon's "series of confrontations and disagreements" with Sandberg which is "affecting the educational program" and indicates that "the program would benefit if Lennon and Don Sandberg were not in a supervisor/employee relationship for a period to time." Also, the parent complaints against Lennon are mentioned with the observation that the program, the child and Lennon would all benefit from a "cooling-off" period.

FREA points out that the District, when asked to describe this "series of confrontations and disagreements," specified the

dates of meetings held concerning Lennon's grievances. But the record reveals that Lennon and Sandberg experienced numerous confrontations outside of the grievance process as well. Shortly after Sandberg became principal at Fall River High School, Lennon accused him of altering a document relating to the mainstreaming of special education students. Lennon and Sandberg disagreed over Lennon's responsibility concerning the recommendation of a special education aide. Lennon complained to Graham about the football fantasy league Sandberg was allowing at the school. Lennon was unhappy with Sandberg's handling of his request for special door knobs. Sandberg was concerned that Lennon was not informing him relative to a charter school effort. Lennon threatened Sandberg with a complaint to DOE if Sandberg required him to move to another room. Clearly, the record indicates that Lennon and Sandberg experienced numerous confrontations and disagreements outside of the grievance procedure.

The Board has previously found that a significant failure of communications and deterioration of the relationship between a supervisor and subordinate represent lawful justification for an involuntary transfer despite the protected activity of the employee. (Scotts Valley Union Elementary School District (1994) PERB Decision No. 1052.) It is clear that communications and the supervisor/employee relationship of Sandberg and Lennon at Fall River High School had deteriorated significantly. Lennon felt that he needed to protect himself from the District; he indicated that he intended to make things difficult for the District; and

he decided not to meet or speak with Sandberg without a FREA representative or another teacher present. The relationship appears to have deteriorated to such a level of distrust that Lennon considered Sandberg capable of altering official District documents after Lennon had signed them so as to have a detrimental effect on Lennon's employment. The strained relationship also appears to have begun to affect the special education program as Lennon and Sandberg disagreed over Lennon's role in parent communications relating to special education students. Lennon clearly indicated his disdain for Sandberg when he testified that he did not consider him to be "a real principal."

It was in this climate of a severe breakdown in communications and significantly strained relationship between Lennon and Sandberg that the District decided to involuntarily transfer Lennon.

Both Education Code section 35035 and Article 10.4 of the parties' CBA provide that involuntary transfers may be made by the District to serve the best interest of the District's educational program. The recommendation to transfer Lennon included in Traverso's June 27, 1995, memorandum indicates that it "would be in the best interest of the RSP program." Based on consideration of all the evidence, the Board concludes that the involuntary transfer of Lennon resulted from the District's conclusion that it would be in the best interests of the special education program at Fall River High School because of the

deterioration of the relationship between Lennon and Sandberg. In view of that relationship, the transfer would have occurred regardless of Lennon's EERA-protected activity and was not motivated by the District's desire to retaliate against Lennon for that activity. Therefore, the District did not violate EERA section 3543.5 when it involuntarily transferred Lennon.

Unilateral Change Allegations

To prevail in a unilateral change case, the charging party must establish that the employer, without providing the exclusive representative with notice or the opportunity to bargain, breached or altered the parties' written agreement or established past practice concerning a matter within the scope of representation, and that the change has a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

FREA alleges that the District committed two distinct unilateral change violations. First, FREA alleges that the District committed an unlawful unilateral change by altering the policy governing involuntary transfers of teachers embodied in Article 10.4 of the parties' CBA. Specifically, FREA alleges that the District violated Article 10.4.1 by not discussing the transfer with Lennon prior to transferring him and by not allowing him to apply for vacancies for which he was qualified at the time of the transfer. FREA also contends that the District

breached Article 10.4.2 by using criteria other than seniority, fields of study, credentials and experience in deciding to transfer Lennon.

Article 10.4.1 provides that a teacher may not be transferred until given an opportunity "for a meeting with the superintendent to discuss the reasons for the transfer/ reassignment." FREA argues that Graham's June 26, 1995, letter violates Article 10.4.1 because by the time it was sent to Lennon the decision to transfer him was essentially irreversible and any opportunity to pursue alternative teaching assignments for 1995-96 no longer existed. However, Graham's letter to Lennon specifically references Article 10.4, and clearly states that the "transfer will not be effective until you have had an opportunity, if you wish, to meet with me to discuss the District's reasons for your transfer," Lennon did not pursue the proffered meeting with Graham. Given the clear wording of Graham's letter, the Board concludes that it has not been established that the District breached the policy embodied in Article 10.4.1 by failing to provide Lennon an opportunity to meet to discuss the reasons for the transfer.

Graham's letter also attached a "complete list of vacancies" within the District and indicated that Lennon could apply and be considered for the one position for which the District deemed him qualified. However, the record established that Lennon was qualified for more than the single vacancy referred to by Graham. FREA argues, therefore, that the portion of Article 10.4.1

providing Lennon with the opportunity to be considered for vacancies for which he is qualified has been breached by the District.

In Grant, the Board noted that a contract breach

> . . . must amount to a change of policy, not merely a default in a contractual obligation before it constitutes a violation of the duty to bargain.

Where the policy embodied in the contract is not denied by the employer and the dispute involves disagreement over the application of a contractual provision, the Board will not find that an unlawful unilateral change has occurred. (Trustees of the California State University (1997) PERB Decision No. 1243-H.) Here, it appears that the District acknowledges the policy that Lennon must be allowed to apply for vacancies for which he is qualified as required by Article 10.4.1, but due to error or disagreement as to Lennon's qualifications it may have failed to meet its contractual obligation. Since the dispute is over the application of the provision and not the underlying policy embodied in the contract, Graham's letter incorrectly indicating that Lennon qualified for only one of the vacant positions does not meet the Grant standard and does not constitute a unilateral change in violation of EERA.

FREA also alleges that the District breached Article 10.4.2 by not following the criteria within it in deciding to transfer Lennon. However, the Board notes that Article 10.4.4 specifically provides that the District may involuntarily transfer a teacher "for any reason" which it believes will be in

the best interests of the District's educational program. Article 10.4.4 does not give the District carte blanche authority to make wholesale teacher transfers without reference to the Article 10.4.2 criteria of seniority, fields of study, credentials and experience. But it appears that Article 10.4.4 authorizes the District to transfer a specific teacher when faced with the circumstances presented here, a breakdown of the teacher-principal relationship, in order to serve the best interests of the educational program. When taking such an action, it is unclear how seniority or the other Article 10.4.2 criteria apply. Since the District transferred Lennon to serve the best interest of the educational program at Fall River High School, the transfer was authorized by Article 10.4.4. Accordingly, the Board declines to find that the transfer constituted a breach of Article 10.4.2.

FREA's second unilateral change allegation charges that the District implemented a new special education teacher swap program without providing FREA with notice or the opportunity to negotiate over the decision and/or its effects.

Initially, the District responds that FREA waived its right to negotiate by not requesting bargaining until August 1996, more than a year after the District announced the program. A waiver of the right to bargain must be "clear and unmistakable." (Placentia Unified School District (1986) PERB Decision No. 595.) Prior to implementing a proposed change in a negotiable subject, the employer must provide the exclusive representative with

notice sufficient to allow a reasonable amount of time for the exclusive representative to decide whether to make a demand to negotiate. (Victor Valley Union High School District (1986) PERB Decision No. 565.) When the employer has clearly unilaterally implemented a change or made a firm decision to do so, the failure to request bargaining will not be considered a waiver of the right to bargain, because the request under these circumstances would be futile. (Arcohe Union School District (1983) PERB Decision No. 360.) Here the District asserts that FREA was aware of the decision to implement the special education teacher swap program shortly after June 26, 1995, when Graham sent transfer letters to Lennon and Mason. While it is by no means clear that the District provided FREA with adequate notice of its decision at that point, even if FREA had been notified, its failure to request bargaining would not constitute a waiver because the District had clearly made a firm decision to implement the special education teacher swap program. Therefore the District's argument that FREA waived its right to negotiate over this subject is rejected.[5]

The District's special education teacher swap program represents a specific policy to transfer special education teachers according to a defined timetable and program. There has been no established past practice of a similar policy within the

[5]The Board also notes that FREA timely filed the instant unfair practice charge on December 20, 1995, alleging that the District denied it "the opportunity to bargain the decision, effects, and impact of the implementation of the new program."

District. Because the policy potentially affects all special education teachers with a specific, mandatory transfer plan, it represents a substantial departure from the general transfer policy embodied in Article 10.4. As noted above, Article 10.4 authorizes the District to transfer teachers in the best interests of the educational program, but that authority does not extend to a policy of mandatorily transferring a class of teachers under a general "best interests" rationale. Therefore, unlike the specific transfer of Lennon to serve the best interests of the special education program at Fall River High School, the Board concludes that Article 10.4 does not authorize implementation of the special education teacher swap program announced by the District.

Transfer and reassignment policies are subjects within the scope of representation enumerated in EERA section 3543.2. A mandatory transfer policy affecting multiple teachers clearly has a generalized effect or continuing impact on the terms and conditions of employment of those bargaining unit members. Therefore, the District has the obligation to provide FREA with notice and the opportunity to bargain over the policy. It is clear that the District implemented the special education teacher swap program without providing FREA with notice or the opportunity to negotiate over the program or its effects. Therefore, in doing so, it committed a unilateral change in violation of EERA section 3543.5(c). By this same conduct, the

District denied employees and FREA their EERA rights, in violation of section 3543.5(a) and (b).

Summary

It has been found that the District did not retaliate against Lennon for his exercise of EERA-protected rights, and did not unilaterally change its contractual policy governing involuntary transfers of teachers. Therefore, the portions of the unfair practice charge and complaint relating to these allegations are dismissed.

The District violated EERA section 3543.5(a), (b) and (c) by unilaterally implementing a special education teacher swap program without providing FREA with notice or the opportunity to bargain over the policy or its effects.

REMEDY

Under EERA section 3541.5(c), the Board has 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.

It has been found that the District violated EERA by implementing a special education teacher swap program without providing FREA with notice or the opportunity to bargain over the program or its effects, and thereby denying FREA and employees their EERA rights. It is appropriate to order the District to cease and desist from this unlawful activity. It is also appropriate to order the District, upon request, to restore the status quo ante

by returning any teachers transferred under the special education teacher swap program to the teaching assignments they held prior to the unlawful transfer. (Compton Unified School District (1989) PERB Decision No. 784.) However, to avoid disruption, this order will be effective at the beginning of the 1998-99 school year. (San Leandro Unified School District (1983) PERB Decision No. 288.)

FREA seeks a backpay order for elementary school teachers unlawfully transferred to high school teaching positions under the special education teacher swap program, because the high school teacher workday is longer than the elementary school teacher workday and high school teachers spend more time in preparation outside of the workday. The Board notes that high school and elementary school teachers within the District receive the same pay and benefits. Under these circumstances, the Board does not believe that it would further the purposes of EERA to order a backpay remedy.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to the Educational Employment Relations Act (EERA), Government Code section 3541.5(c), it is hereby ordered that Fall River Joint Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Fall River Education Association, CTA/NEA (FREA) about the

implementation of a special education teacher swap program and/or its effects.

2 - Denying FREA its right to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members their right to be represented by their chosen representative.

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

1. Upon request by FREA, return to their former positions, teachers transferred under the special education teacher swap program effective at the beginning of the 1998-99 school year.

2. Within thirty-five (35) days following the date this decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily 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 ensure that this Notice is not reduced in size, altered, defaced or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Members Dyer and Amador joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SA-CE-1712, Fall River Education Association. CTA/NEA v. Fall River Joint Unified School District, in which all parties had the right to participate, it has been found that the Fall River Joint Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Fall River Education Association, CTA/NEA (FREA) about the implementation of the special education teacher swap program and/or its effects.

2. Denying the FREA its right to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members their right to be represented by their chosen representative.

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

1. Upon request by FREA, return to their former positions, teachers transferred under the special education teacher swap program, effective at the beginning of the 1998-99 school year.

Dated:______________________________ FALL RIVER 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.