STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BERT L. DAVIS, Charging Party, v. RIO HONDO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-486 PERB Decision No. 226 July 19, 1982

Appearances: A. Eugene Huguenin, Jr., Attorney (California Teachers Association) for Bert L. Davis; John J. Wagner, Attorney (Wagner & Wagner) for Rio Hondo Community College District.

Before: Jensen, Morgenstern and Jaeger, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by Rio Hondo Community College District (hereafter District) to the proposed decision of the hearing officer, which is incorporated by reference herein. The hearing officer found that the District violated subsection 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or the Act)[1] by denying

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[1]EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code, unless otherwise specified. Subsection 3543.5(a) provides as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals

Bert L. Davis (hereafter Davis or Charging Party) a requested unpaid personal leave of absence in retaliation for his protected activities.

To remedy the unfair practice, she ordered the District to allow Davis an unpaid leave of absence at his option for any one academic year or any two consecutive semesters during the seven-year period following the final date of this decision.

The District excepts to the finding of a violation on the grounds that the facts are insufficient to support the inference that Davis would have been granted leave but for the District's unlawful motive, to wit, retaliation against Davis for his outspoken and active participation in protected activities. The District further excepts to the recommended remedy on the grounds that it is unreasonable and that the need for or propriety of it is unsupported by any facts in the record.

On the basis of the record as a whole, we affirm the hearing officer's proposed decision in all respects, for the reasons set forth infra.

FACTS

We find the hearing officer's findings of fact to be accurate, concise, and amply supported by the record, and note

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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.

further that no exceptions were taken to any of her particular findings. Thus, we adopt her findings of fact as those of the Board.

DISCUSSION

The hearing officer applied the test enunciated by the Board in Carlsbad Unified School District (1/30/79) PERB Decision No. 89. She decided the case under the "but-for" prong of the Carlsbad test, which provides:

> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

Since issuance of the proposed decision in this case, the Board has clarified the test for alleged violations of subsection 3543.5(a) which involve discriminatory conduct by the employer. Simply stated, a violation will be found in cases of that nature in which it is demonstrated that the charging party was engaged in protected conduct and the employer's conduct was motivated thereby. Novato Unified School District (4/30/82) PERB Decision No. 210. We further explained in that case that the charging party may demonstrate circumstantially that the employer was motivated by his/her protected conduct to take adverse personnel action, recognizing that direct evidence of motivation is seldom available. (See Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].

As noted in Novato (in conformity with the decision of the National Labor Relations Board in Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]), once the charging party raises the inference that protected activity was a motivating factor in the decision to take adverse personnel action, the burden shifts to the employer to prove that its action would have been the same notwithstanding charging party's protected activity.

Applying the Novato test to the facts of this case, Davis has amply demonstrated facts from which the Board can fairly infer that his protected conduct was a motivating factor in the District's decision to deny his request for an unpaid year's leave of absence. We note that Davis served as president of the Rio Hondo College Faculty Association, CTA/NEA, (Association) from July 1, 1975 to July 1, 1977, and participated openly and actively in Association activities at all times from 1974 through the events at issue herein. In his role as Association president, he attended numerous meetings of the District's Board of Trustees, the body which denied his leave request, and consistently and vigorously challenged that board regarding employment-related matters of concern to faculty members. It is clear that the District had knowledge of his extensive protected activities, summarized here and detailed more fully in the proposed decision. Regarding his request for an unpaid one-year leave of absence, it is clear

from the record that every request for unpaid leave by certificated personnel made between July 6, 1977 and January 24, 1979, was granted by the District. In fact, no evidence was introduced to demonstrate that the District has ever denied an unpaid leave of absence request other than that made by Davis. At the time of his request, college administration had urged faculty to take unpaid leaves, due to declining enrollment in the District and concurrent reduced funds and staffing needs. College administration recommended to the board of trustees that Davis' request be approved. There was another photography instructor who could have taught the courses previously taught by Davis. The Board of Trustees offered Davis no reason for denial of his leave request, either at the time of denial or at any time thereafter. In light of the factors summarized above, we infer that the District's denial of Davis' request was connected to his exercise of protected activity. The burden thus shifted to the District to demonstrate that it would have denied his request for reasons unconnected to his protected activity. Novato, Wright Line, supra. However, the District introduced no evidence at all. Rather, it chose to move for summary judgment at the conclusion of Charging Party's case. Having introduced no evidence whatsoever, the District has clearly failed to meet its burden of demonstrating that it would have denied Davis' request notwithstanding his protected activity.

For the reasons set forth above, and in reliance upon the test set forth in Novato, we find that the District violated subsection 3543.5(a) by its refusal to grant Davis' request for unpaid leave.

Respondent excepts to the hearing officer's proposed remedy requiring the District to allow Davis leave without pay during any academic year or any two consecutive semesters at his option any time within the seven-year period following the final date of the decision. We note that Davis based his initial request for leave on unspecified "compelling personal reasons." We are unable to re-create the time period during which Davis had a compelling personal need for leave, and thus are unable fully to make him whole. It thus seems reasonable to at least provide him with an "option period," a span of seven years during which an opportunity for leave which is similarly advantageous to Davis may arise. The remedy proposed by the hearing officer is appropriate, and is well within the Board's power to fashion orders which effectuate the policies of the Act, pursuant to subsection 3541.5(c).[2]

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[2]Subsection 3541.5(c) provides as follows:

. . . . . .

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Rio Hondo Community College District has violated subsection 3543.5(a) of the Educational Employment Relations Act. It is hereby ORDERED that the District, its governing board, and representatives shall:

1. CEASE AND DESIST FROM discriminating against Bert L. Davis and interfering with the rights of Davis by denying Davis a one-year, unpaid leave of absence because of his participation in an employee organization of his own choosing.

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

   a. Upon the request of Bert L. Davis, grant him a one-year, unpaid leave of absence for any reason in any academic year up to and including seven years from the date this decision is final, or grant him any two consecutive or nonconsecutive semesters of unpaid leave of absence for any reason in any academic years up to and including seven years from the date this decision becomes final;

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reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

b. Within ten (10) workdays following the date of service of this decision, 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 ten (10) consecutive workdays. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material or reduced in size. Within ten (10) workdays following service of this decision, notify the Los Angeles regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on Charging Party herein.

By: /Virgil Jensen, Member/

John Jaeger, Member

Marty Morgenstern, Member

APPENDIX A

NOTICE TO CERTIFICATED 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. LA-CE-486, in which all parties participated, it has been found that the Rio Hondo Community College District violated subsection 3543.5(a) of the Educational Employment Relations Act (EERA) by interfering with the rights of Bert L. Davis to participate in the activities of an employee organization of his own choosing by denying Bert L. Davis a one-year leave of absence without pay because of his exercise of rights guaranteed under the EERA. As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

CEASE AND DESIST FROM discriminating against Bert L. Davis and interfering with the rights of Davis to participate in the activities of an employee organization of his own choosing by denying Davis a one-year leave of absence without pay because of his exercise of rights guaranteed under the EERA.

TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

Upon request from Bert L. Davis, grant him a one-year unpaid leave of absence for any reason in any academic year up to and including seven years from the date of this decision or grant him any two consecutive or nonconsecutive semesters of unpaid leave of absence for any reason in any academic year up to and including seven years from the date of this decision.

Dated:

RIO HONDO COMMUNITY COLLEGE DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TEN (10) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.