STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID NAGLE, JAMES RICKMAN AND TIMOTHY LEE,	)	
Charging Parties,	)	Case No. SF-CE-1929
v.	)	PERB Decision No. 1393
PERALTA COMMUNITY COLLEGE DISTRICT,	)	June 30, 2000
Respondent.	)	

Appearances: Siegel & Yee by Hunter Pyle, Attorney, for David Nagle, James Rickman and Timothy Lee; Crosby, Heafey, Roach & May by Boyd E. Burnison, Attorney, for Peralta Community College District.

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal of an administrative law judge's (ALJ) proposed decision (attached) dismissing the unfair practice charge filed by David Nagle, James Rickman and Timothy Lee (Charging Parties). The charge alleges that the Peralta Community College District (District) retaliated against the Charging Parties because of protected activity related to the District's decision to contract out its safety and police services. This conduct was alleged to violate section

3543.5(a) of the Educational Employment Relations Act (EERA).[1] After a hearing, the ALJ dismissed the charge.

The Board has reviewed the entire record in this case, including the unfair practice charge, the ALJ's proposed decision, the Charging Parties' appeal[2] and the District's response. The Board hereby adopts the proposed decision up to page 35, line 9 as the decision of the Board itself, but it does not adopt the remainder of the proposed decision.[3]

DISCUSSION

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board held that EERA section 3541.5(a) establishes a jurisdictional rule requiring that a charge be dismissed and deferred to arbitration if: (1) the grievance machinery of the collective bargaining agreement (CBA) covers the matter at issue and culminates in binding arbitration;

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[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, 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.

[2]The request for oral argument is hereby denied.

[3]Because this charge is deferrable, the Board makes no ruling with regard to the merits of the discrimination allegations.

and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the CBA.

The Lake Elsinore deferral standard has been met in this case. First, the contractual grievance machinery provides for resolution of this dispute and culminates in binding arbitration. Second, the conduct complained of in the charge is arguably prohibited by section 3.2 of the parties' agreement. Accordingly, PERB is without jurisdiction over this matter and the unfair practice charge must be dismissed and deferred to the parties' contractual grievance and arbitration procedure. (See State of California (Department of Transportation) (1997) PERB Decision No. 1213-S at p. 10; see also, State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S at p. 6.)

ORDER

The Board hereby DISMISSES the unfair practice charge and complaint in Case No. SF-CE-1929 and defers it to the parties' contractual grievance procedure.

Members Dyer and Baker joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID NAGLE, JAMES RICKMAN AND TIMOTHY LEE, Charging Party, v. PERALTA COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1929 PROPOSED DECISION (8/16/99)

Appearances: Siegel and Yee by Dan Siegel and Jane Brunner, Attorneys, for David Nagle, James Rickman and Timothy Lee; Crosby, Heafey, Roach, and May by Boyd Burnison, Attorney, for Peralta Community College District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

David Nagle, James Rickman and Timothy Lee (charging parties) commenced this action on February 21, 1997, by filing an unfair practice charge against the Peralta Community College District (District). The charge, as amended, alleges that the District assigned charging parties to unacceptable positions in retaliation for their protected conduct. By letters dated April 10 and May 19, 1998, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) dismissed the charge on statute of limitations grounds. Charging parties appealed and on August 27, 1998, the Board reversed the regional attorney's dismissal. (Peralta Community College District (1998) PERB Decision No. 1281 (Peralta).)

On September 11, 1998, the Office of General Counsel issued a complaint alleging that the District, in implementing its

decision to contract out security services, reassigned charging parties to undesirable positions in retaliation for their protected activity in opposing the decision. The complaint alleges that the District's conduct violated the Educational Employment Relations Act (EERA or Act), section 3543.5 (a).[1]

The District answered the complaint on October 2, 1998, generally denying the allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below as necessary.

A settlement conference was conducted by a Board agent on October 22, 1998, but the dispute was not resolved. The undersigned conducted a formal hearing in San Francisco on May 12 and 13, 1999. With receipt of the final brief on July 20, 1999, the case was submitted for decision.

JURISDICTION

Charging parties are public school employees within the meaning of section 3540.1(j). The District is a public school

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[1]The Act is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. In relevant part, section 3543.5(a) states:

> 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.

employer within the meaning of section 3540.1(k). The District is made up of three colleges: Merritt College, Laney College, and College of Alameda.

FINDINGS OF FACT

Decision to subcontract and protected conduct

In January 1996, the District began to consider a proposal to eliminate its Safety and Police Services Department (Department) and subcontract its work to the Alameda County Sheriff's Department (Alameda County).[2] The proposal was discussed at the Board of Trustees (Trustees) meeting on February 13. At that time, David Nagle (Nagle), Timothy Lee (Lee) and James Rickman (Rickman) worked in the Department. Nagle and Lee were safety and police services officers; Rickman was a parking control attendant.

Charging parties learned of the proposal and discussed it among themselves and with other employees prior to the Trustees' meeting. They were opposed from the outset to subcontracting the Department's work, and they decided to address the Trustees at the February 13 meeting to present their views.

Rickman opposed the proposal as "flawed and concocted, based on misinformation." Rickman believed the proposal was, at least in part, connected to an incident where an officer, Lieutenant Herb Stovall (Stovall), was killed in the line of duty. Rickman accused the Trustees of being responsible for Stovall's death because he (Stovall) was not qualified to be in the field. Also

[2]Unless otherwise noted, all dates refer to 1996.

at the February 13 meeting, Nagle and Lee urged the Trustees to reject the subcontracting proposal.[3]

In attendance at the February 13 meeting were District Chancellor A.J. Harrison (Harrison) and Hilliard. Hilliard testified that the comments by the charging parties in opposition to subcontracting were typical of employee sentiment at the time. Most employees, Hilliard said, were not pleased with the concept. He said other employees spoke out at a series of meetings. Police officer Donald Tate (Tate) agreed. He testified that he opposed the decision to subcontract and "we all" spoke out against it in the presence of Hilliard.

The decision to subcontract went forward. As of late March, employees were being encouraged to apply to Alameda County for positions.

At an informal meeting on May 7, according to Rickman, Harrison was asked what would happen to employees who could not go to Alameda County as part of the subcontracting arrangement.[4]

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[3]Prior to the February 13 meeting, Vice Chancellor Clinton Hilliard (Hilliard) was informed that some officers intended to address the Trustees and asked what procedures should be followed to permit on-duty employees to do so. Pursuant to Hilliard's instructions, Nagle's supervisor Richard McLaughlin (McLaughlin) issued a memo informing on-duty employees that they were required to get authorization from their supervisor prior to addressing the Trustees. The memo also instructed officers that they were not to address the Trustees while in uniform. These requirements were new and affected only Nagle and Rickman because they were the only employees on duty at the time of the Trustees meeting.

[4]Rickman attended the meeting as a steward of Service Employees International Union, Local 790, (Local 790). At all relevant times, SEIU represented an appropriate unit of the District's classified employees, including charging parties.

Harrison stated that they would be "taken care of" and "given an offer [they] couldn't refuse." Harrison also said the District underestimated the number of employees that would not transfer to Alameda County. During the meeting, according to Rickman, Harrison singled out "one particular person" Alameda County and the District viewed as having a "a conflict of interest." The comment was an apparent reference to Nagle, who has maintained a private security business since 1986.

Nagle testified that he applied to Alameda County, but was informed that his private security business presented a conflict of interest. According to Hilliard, however, Alameda County merely asked Nagle for a list of his private clients so that the county could determine if a conflict existed, but Nagle refused. In any event, it appears that Nagle's private security business interfered with his applying to Alameda County.

At a second Trustees meeting, in July, Nagle and Lee again spoke out in opposition to subcontracting Department work. Nagle said he explained in detail his argument that the work should be kept in-house.[5]

Meanwhile, the subcontracting issue was being addressed on another track. On May 29, Hilliard gave Local 790 formal notice of the District's intent to subcontract Department work to Alameda County and invited the union to meet and confer regarding

[5]Immediately after the meeting, Booker Ealy (Ealy), director of safety and police services, approached Nagle, pointed out that he had addressed the Trustees while wearing his uniform trousers, and asked who had authorized him to attend the meeting. Ealy then directed Nagle to report back to work.

the impact of the decision. Effects bargaining began soon thereafter. Nagle and Rickman were members of the negotiating team, along with chapter president Laverne Stewart (Stewart) and Local 790 representative Michael Haberberger (Haberberger). Hilliard was the chief spokesman for the District.

The parties held several meetings during the summer of 1996. During these meetings, Nagle and Rickman protested the decision to subcontract Department work. They even were opposed to the agreement eventually reached by Local 790 and the District.

At a negotiating session on or about June 18, according to Nagle and Rickman, Hilliard said the District felt no responsibility for employees in the Department who did not apply to Alameda County. As of that time, Rickman said, only one employee other than charging parties had publicly announced he would not apply to Alameda County.

At another negotiating meeting on or about July 19, according to Nagle and Rickman, Haberberger raised the possibility of "back dooring" Local 790 employees into positions in another bargaining unit of District employees represented by Stationary Engineers, Local 39 (Local 39). In brief, Haberberger suggested the District create positions within Local 790's jurisdiction and fill them with employees performing Local 39 work. If Local 39 objected, the District could simply assign the positions to Local 39. Hilliard responded that he did not need to take a "back door" approach. Because of his good relationship with Local 39, he could do so merely by asking. Throughout the

negotiations and reassignment process, charging parties have strenuously objected to being placed in Local 39 positions or paying dues to that union.

The possibility of placing Local 790 employees into positions represented by Local 39 was also discussed at the next negotiating session on or about July 25. According to Nagle and Rickman, Hilliard was upset that someone had discussed the issue publicly. Nagle testified that Hilliard was angry because "somebody was discussing the previous meeting's business concerning about putting people into Local 39 positions," and announced, "if I find out whoever made those comments, that somebody is going to be in trouble." Rickman testified that Hilliard said "someone had opened their big mouth . . . talking about what we're attempting to do with Local 790 members placing them in Local 39 positions." Haberberger echoed Hilliard's sentiment, according to Nagle and Rickman. They testified as to their belief that the statements made by Hilliard and Haberberger were directed at them because they had opposed being placed in Local 39 positions.

In August, an agreement was reached on the effects of the subcontracting decision. The agreement became final when the parties initialed it on August 22 and 26, respectively. A key aspect of the agreement provides:

> 7. Placement/Training/Severance
>
> Safety and Police Services employees with classifications of Officer, Dispatcher and Parking Control Attendant who are not employed by the County under the Special

> "qualifying only" arrangement between Alameda County and the District and who do not retire, shall either:
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> a. be placed in a District position, retain permanent status and at least the pay rate in effect at the time of placement, including "Y" rate, and be retrained as necessary to meet the requirements of the new position, or
>
> b. have the option to accept severance pay pursuant to subsequent agreement between Local 790 and PCCD if placement is not mutually agreeable to all parties.
>
> Discussions regarding placement will be consultive and the District retains all rights under current statutes, regulations and the Local 790/PCCD Collective Bargaining Agreement.

Hilliard used three criteria in assigning employees under the agreement: need for the particular service, feasibility of the placement and cost.

Assignments

On August 12, the decision to subcontract Department work to Alameda County became effective.[6] On the morning of that day, Hilliard held a meeting with all employees who had not already been assigned a new position in the District or accepted a position with Alameda County. Present were officers William Box (Box), James Pfennig (Pfennig), Charles Martin (Martin), Tate, Nagle, and Lee. Also present were parking control attendants Douglas Banks (Banks) and Rickman.

[6]Although the agreement was not initialed by the parties until August 26, it became effective on August 12 because that date coincided with the end of the summer session and the beginning of the next semester at the end of August.

Hilliard announced that some reassignments to Local 39 positions had already been made and only custodial and food services positions remained. According to Rickman, when charging parties complained about the lack of opportunities, Hilliard responded that refusal of an assignment would be considered grounds for termination. Rickman further testified that Tate, Pfennig and Martin were then excused to go to their new assignments. Hilliard set up individual meetings for later that day with employees who had not yet received an assignment. The meetings with charging parties and their assignments are more fully discussed below.

Of the 20 employees affected by the subcontracting of police services, 7 were hired by Alameda County and 13 remained with the District. Other than the three charging parties in this case, employees who remained with the District were reassigned as follows.

Ealy was reassigned to an instructor position at Merritt College, although he would have preferred another assignment, according to Hilliard. Supervisory sergeant Lewis Williams (Williams) requested and was reassigned to a police liaison position. Dispatcher Gladys Henderson (Henderson) was reassigned to a clerical position in Local 790 at Vista College after asking Hilliard for a position. The scope of the position was unclear, she testified, but she needed a job. Parking control attendant Banks was open to any assignment. He was initially reassigned to a food services position at Laney College and later to a library

position in Local 790. Staff assistant Doris Kogo (Kogo) was reassigned to a Local 790 staff assistant position in the personnel office, a Local 790 slot. She asked Hilliard for the position and was assigned shortly before the Department was eliminated.

Other than charging parties, of those employees who testified, three did not apply to Alameda County. These are Box, Kogo, and Henderson.

There were five officers (in addition to Nagle and Lee) who were reassigned to positions in the District. Box was assigned to a split position in Local 790: audio-visual technician and evening supervisor at Laney College.[7] Box requested the audio-visual technician position, but not the evening supervisor position. Martin was assigned to a warehouseman/driver position in Local 39, a job he had held in the past. He requested the position. Tate and Pfennig were assigned to utility engineer positions in Local 39. Pfennig and Tate requested these positions, and their assignments came prior to the August 12 meeting. Pfennig later was assigned to the apprenticeship program for a building maintenance engineer position. John Lawry (Lawry) was assigned to perform computer-related duties in the student computer room at College of Alameda. This was not a position; it was an assignment. If the work had been officially classified, it would have been in Local 790's jurisdiction.

[7]Box testified that initially Hilliard sent him to Laney College to perform custodial duties. Officials at Laney were responsible ultimately for his assignment to the split position.

Some of the assignments were made prior to August 12, and charging parties were aware of them. According to Rickman, Williams told him on July 10 of his assignment to a permanent position in Local 790. Pfennig told Rickman on July 17 of his assignment to a position in Local 39. Tate told Rickman on July 25 of his assignment to a position in Local 39. Martin told Rickman on August 12 that he too would be assigned to a position in Local 39. Rickman testified, however, that the comments by Williams and Tate about their new assignments were premature because negotiations had not been completed, he simply did not believe Tate, and he had no way of knowing if Pfennig's assignment was permanent. According to Rickman, he did not know with certainty of these assignments until September 6. Regarding Box and Kogo, Rickman said he learned of their assignments on September 6.

However, if Rickman had any doubt about what he had been told, that doubt was cleared up on August 12 when Williams, Tate, Pfennig, and Martin were excused from the meeting with Hilliard to report to their new assignments.[8] The precise time that charging parties learned of the other assignments is not established in the record. Thus, as of August 12, charging parties knew that at least four assignments had been made.

[8]In a February 24, 1998, letter to the chancellor of the California community college districts, Nagle conceded that he too knew on August 12 of assignments given to Pfennig, Tate, Martin and Williams.

In meetings with the charging parties on the afternoon of August 12, Hilliard explained the basic provisions in the Local 790 agreement. Hilliard asked the employees for some indication of their interests. He stated that the District would work with employees to secure positions for them in areas where the District had a need. According to Hilliard, he explained that they might be assigned temporarily to work in custodial and food service activities, but the District would continue to work with them in long range career planning. Hilliard said none of the charging parties presented a career plan or request for a specific position.

The individual meetings with charging parties on August 12 were not productive. A brief description of these meetings and subsequent attempts to reassign each charging party are set forth immediately below.

Nagle: On August 12, Nagle testified, he asked Hilliard what he had to offer and Hilliard repeated his earlier reference to custodial and food service positions. Nagle responded that such assignments were not acceptable. He testified that Hilliard said "if you're not satisfied with that, you know, we'll get you your severance and out the door." For his part, Hilliard interpreted Nagle's request as an attempt to negotiate. He felt that negotiations had already been concluded with Local 790 and he did not intend to negotiate further with Nagle. "We were not in negotiations," Hilliard testified, "we were simply trying to ascertain the interests of each individual in terms of their

long-range career goals and trying to find out if we could develop a program that would satisfy their goals and the District's needs." No mutually agreeable position was identified.

On August 26, Nagle was assigned to a custodial position at the College of Alameda, an assignment which lasted approximately three days before he went on vacation. Upon his return, Nagle was told to report to Helen Steinmetz (Steinmetz), business officer at the College of Alameda. Nagle began to work for Steinmetz performing "assignments as needed" and has continued to do so. On September 5, Nagle informed Hilliard in writing that he accepted the temporary custodial position involuntarily and without waiving any of his rights.

For the past three years, Nagle has worked as the evening administrator at College of Alameda for 22 hours per week. The remaining 18 hours have been spent performing various assignments by Steinmetz. For example, he has developed an evacuation exercise in fire drills. He has also developed a procedure for future disaster preparedness planning. In a subsequent letter to Hilliard, Nagle acknowledged that the assignments given him by Steinmetz call for "independent judgment and thinking." During this time, Nagle has been Y-rated; that is, he has received the same rate of pay as he had as a police officer.

Nagle testified that the position he now holds is considered staff assistant general, but it has no official job

classification or job description. Nagle testified that he has made several efforts to obtain a job classification but has been given the "runaround" by the District and Local 790. He filed a classification grievance under the collective bargaining agreement, but on September 27 Hilliard rejected it on the ground that an out-of-class grievance requires assignment to a higher paid classification.

Nagle continued to contest his assignment. By letter dated December 11, Hilliard reminded Nagle that the agreement with Local 790 requires placement in a mutually agreeable position. Because Nagle had disagreed with his placement and had refused to meet with Hilliard and Haberberger to discuss an assignment, Hilliard wrote, the alternative under the agreement is to offer severance pay and terminate employment. Hilliard informed Nagle that the temporary assignment would be extended to January 31, 1997. If there was no agreement on a mutually agreeable position by December 20, the letter said, Nagle would be given severance pay and laid off effective January 31, 1997.[9]

Nagle responded on December 16. Among other things, he asserted that Hilliard has not met with him in good faith about

[9]Hilliard sent charging parties several such letters in 1996-1997, and charging parties repeatedly objected to extension of their temporary appointments as a violation of the collective bargaining agreement between Local 790 and the District. While the contract precluded temporary assignments for more than 90 days, the District and Local 790 agreed to waive that provision until permanent positions were found. This actually worked to charging parties' advantage. Under the effects agreement, the alternative to extending the temporary assignments was severance pay and termination.

an assignment, attempted to force him into a position which has not been defined, and discriminated against him.

The dispute about Nagle's assignment continued into the summer of 1997. In a June 17, 1997, letter to Hilliard, Nagle addressed many disputed issues discussed during a meeting the previous day to negotiate unresolved classifications issues. In addition to charging parties, Box, Banks, Lawry, Haberberger, and Stewart attended that meeting. Among other things, Nagle wrote "during the course of your conversation [at the June 16, 1997 meeting] you stated that those of us who do not accept positions by the July 2, 1997 scheduled meeting, will be severed, and failing that, terminated." Nagle claimed his assignment violated the collective bargaining agreement, District policy, and the Education Code. He concluded, "why would I agree to a position that has no promotional opportunities, no fixed permanent established duties and not a budgeted slotted permanent position established by the Board of Trustees?"

In a June 24, 1997, response, Hilliard noted that Nagle had been assigned a temporary custodial position because he had not stated an alternative preference. Hilliard explained that the District and Local 790 had not agreed to provide positions with promotional opportunities. They had committed only to reassignments and retraining as necessary to pursue new career paths in the District. Hilliard stressed that, in reality, police and security work previously performed by District employees will be performed by Alameda County and those employees

who remain in the District will have to adapt to new situations. In closing, Hilliard wrote, "I have repeatedly advised you that I need to know what occupations would be acceptable to you. I have also advised you that if the assignment at College of Alameda is 'mutually agreeable,' I would have the duties formally classified to form the basis for a long-term, permanent assignment. Unfortunately, you have not been willing to meaningfully participate in the alternative placement process by providing any occupational preference information."

In another letter to Nagle, dated July 3, 1997, Hilliard set out a detailed process for completing Nagle's transition from a temporary assignment to a permanent one. He wrote that Nagle's current assignment would be formally classified; following the classification process, Nagle would be appointed to the newly classified position; and the effective date of the appointment will be the day Nagle first was assigned to the position. In closing, Hilliard wrote, "please complete the enclosed Position Description Form in accordance with the instructions stated on the form and return the completed forms to the Personnel Office as soon as possible." Hilliard made a similar request of Nagle on August 14, 1997, but he received no information.

In an October 7, 1997, letter, Hilliard informed Nagle that the purpose of the position description form is to assist in determining the appropriate classification of assigned duties.[10]

[10]The collective bargaining agreement requires job audit forms and related information to be submitted as part of the classification process.

At that time, Nagle was still classified as a police officer, but he was not performing police officer work. Nor was he performing custodial work. The position description form, therefore, would have assisted in properly classifying the position that Nagle held. However, as of October 7, 1997, Hilliard had not received the information requested of Nagle three months earlier on July 3, 1997. Hilliard explained to Nagle in the letter that if Nagle failed to submit a position description form in one week, he would assume Nagle was no longer interested in a permanent position with the District. Nagle never submitted the form, nor did he identify a desired career path to Hilliard.

By letter dated January 7, 1998, Hilliard informed Nagle that because he had not submitted a position description form, the District had proceeded to classify his position based on information provided by Steinmetz. Nagle's new classification is staff assistant, range 51.[11]

Lee: On August 12, Lee met with Hilliard to discuss his reassignment. Hilliard informed Lee that he would be assigned to custodial duties in Local 39, but Lee regarded such work as menial and objected. Lee requested that he be reassigned to a position in purchasing. However, no such position was available.

In late August, Lee was temporarily assigned to a custodial position at Merritt College, pending agreement on a mutually

[11]In a February 24, 1998, letter to the chancellor of California community college districts, Nagle acknowledged that the Trustees had approved this classification at their meeting on January 30, 1998.

satisfactory position or severance. He protested the assignment to Hilliard on August 25 and filed an out-of-class grievance with the same result as achieved by Nagle; that is, such grievances are appropriate when working in a higher classification, but custodial work was in a lower classification.

Lee worked as a custodian from August to December. On December 11, Hilliard informed him that his temporary assignment would be extended to January 31, 1997. If no mutually acceptable agreement was reached by December 20, Hilliard wrote, Lee would be awarded severance pay and laid off.

Despite Hilliard's December 11 warning, Lee continued as a custodian at Merritt College until February 1997, when he was reassigned to a staff assistant position in the photocopy center. This was a Local 790 position.

At a July 1997 meeting, Lee indicated to Hilliard that he was interested in the computer field and Hilliard said he would look into it. On July 3, 1997, the process to transition Lee to a position in the District's data services department began. His skills and interest in the field of information technology were assessed, and a training plan was developed. Lee attended computer classes at Merritt College and College of Alameda for two semesters at District expense. The classes were held during work hours and Lee worked part-time for the District the remainder of the 40-hour work week. Although Lee testified that he had to study on his own time, Hilliard said that no other employee had been given comparable training. In July 1998, Lee

began work in the computer field for the District, but he still has no position description. His current classification is police services officer. His salary is still Y-rated.

Rickman: During his August 12 meeting with Hilliard, Rickman explained that he had experience in graphic arts, civil engineering, and clerical work. However, no positions were available in these areas. He stated again that he would not pay dues to a union other than Local 790.

On or about August 26, Rickman was assigned to perform food service work at Laney College, but initially he refused to do so in protest. He reported to Laney College after Hilliard informed him by letter that continued refusal to report could result in termination.

At about this time, Rickman testified, he informed Laney College President Ernest Crutchfield (Crutchfield) that he wanted to work in the instructional media department. Crutchfield asked Rickman to prepare a resume, but report to his food service assignment in the interim. Rickman worked for one week as a cashier in food service. On September 5, he was reassigned to the "back room" of the media center as a duplicating services technician II doing production, duplication, cutting, and other related assignments.

This was a position that Rickman had sought in the wake of the subcontracting decision, although apparently it was not his first choice. Rickman informed Dean of Instructional Services Hector Cordova (Cordova) that in accepting the position he was

not waiving his contractual or other rights. Rickman had several questions about classification, pay, hours, and whether the position was permanent. He informed Cordova of these concerns in a letter dated September 10.

At a meeting on September 19, Hilliard said Rickman's position as duplication services technician II was a promotional one and a question existed about whether Rickman could be placed there initially. Shortly thereafter, on September 24, Rickman was reassigned to the "front counter" in the media center doing duplication work as a duplication services technician I.

On December 12, Rickman received a letter from Hilliard similar to that received by Nagle and Lee. It stated that there had been no mutually agreeable position identified, and Rickman's temporary assignment would be extended until January 31, 1997. If no mutually agreeable position was identified by December 20, Rickman would be awarded severance pay and laid off.

In early 1997, Rickman agreed to accept the duplication technician I position in the media center if offered in accord with District policy and collective bargaining agreement provisions covering assignment to permanent positions. He requested that he eventually be moved to duplication services technician II, the "back room" position. On July 3, 1997, Rickman was reassigned as a permanent duplicating machine operator I, effective October 1, 1996, with seniority and

appropriate pay.[12] The position is in the Local 790 bargaining unit. Rickman testified he did not agree to be placed in the position. "It was just done," he said. In a lengthy letter to Hilliard on July 25, 1997, Rickman objected to the assignment on a number of grounds.

Charging parties' relationship with Local 790

The collective bargaining agreement between Local 790 and the District contains a no-discrimination clause for "membership in the union or exercise of rights to engage in union activity" and requires the District to comply with all applicable "state laws." As more fully discussed later in this proposed decision, the agreement covers the allegations in the instant complaint and deferral to arbitration is appropriate. Because the evidence raises the question whether it would be futile to defer to arbitration, the relationship between charging parties and Local 790 is of relevance.

Beginning with the announcement of the proposal to subcontract Department services, charging parties protested the District's decision in several ways and filed a number of grievances. Local 790 was not in agreement with most of the issues raised by charging parties.

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[12]The terms duplicating machine operator and duplicating services technician are used interchangeably in the record. Advancement from duplicating services technician I to duplicating services technician II is based, in part, on time-in-grade and a recommendation from the supervisor. There has been no recommendation that Rickman advance.

At a June 26 meeting with Ealy, Rickman complained in a grievance that subcontracting Department work would violate the parties then current collective bargaining agreement. He also complained to Ealy that any loss of permanent classification would constitute discipline without cause under the Education Code. The matter was pursued to Hilliard's office in step two of the grievance procedure, but it ended there with Haberberger eventually informing Rickman that there was no basis for the grievance.

Rickman's disagreements with Local 790 continued into 1998. He testified of filing numerous grievances in his attempt to secure a permanent position, but Local 790 declined to process any of them. In a February 14, 1998, letter to Haberberger about his assignment, Rickman accused Local 790 of being unwilling to enforce the collective bargaining agreement by allowing the District to, among other things, contract out work, assign him unfairly, and discriminate against him by not assigning him to the duplicating services technician II position.

Nagle testified that he too filed a number of grievances related to the decision to subcontract Department work. In 1996, for example, he filed a classification grievance stemming from his initial assignment to a custodial position. By letter dated December 10, Haberberger informed Nagle that there was insufficient grounds to appeal to arbitration. Haberberger also wrote: "we continue to attempt to find a permanent assignment in a classification that is acceptable to both you and the District.

Your continued failure to participate in such discussions will certainly make it difficult to achieve such a mutually acceptable permanent assignment, and failure to find you a permanent assignment will trigger negotiations regarding severance pay."

Lee filed a similar classification grievance contesting his initial assignment to custodial duties, but Hilliard rejected it and Local 790 did not pursue it. Lee testified that "essentially [Local] 790 was not working for me. I filed grievances and they wouldn't respond."

On June 16, 1997, Hilliard, Haberberger, Stewart, charging parties, and others met to negotiate unresolved classification issues. Nagle testified that Local 790 and the District were "playing footsie" during the meeting, and he was disappointed in Haberberger's willingness to permit Hilliard to control the discussion. In a follow-up letter to Haberberger, Nagle wrote that he would not let Local 790 "sell him out because it interferes with their timetable."

Sometime in late 1996 Lee met with Haberberger and Stewart to object to his assignment as a custodian in Local 39. He argued that the collective bargaining agreement precluded temporary reassignments for more than 90 days, and the effects agreement between Local 790 and the District effectively waived his rights in that regard. Lee said he informed the union that he wanted a Local 790 position. In at least one subsequent letter, Lee raised these concerns and stated, "I hope we can work together on this matter, but if you are unwilling to I have no

qualms about filing complaints with PERB or taking legal action against Local 790 and any of its agent(s) who aren't willing to help me in this matter." Lee testified, moreover, that the union was "flaky" and did not work in the best interest of its members.

On July 29, 1997, Nagle wrote to Haberberger again complaining that Local 790 was not responsive to his classification appeal and requesting the union take action. He accused Haberberger of avoiding him. In brief, Nagle also criticized Local 790's negotiations with the District, claimed that the union permitted his placement in a Local 39 position while students occupied Local 790 positions, and complained that the union denied his grievance and unilaterally waived his rights under the collective bargaining agreement.

On August 4, 1997, Haberberger responded:

> As you know, the Union negotiated a preferential hiring process for PCCD Police Service Employees to move to the Alameda County Sheriff's Department, which you chose not to avail yourself of. We also negotiated preferential placement for such employees within PCCD, which you have decided to participate in. Upon extensive review by both the Local and the California Public Employment Relations Board, there is no credible reason to state that anything has been "illegitimately taken away" from you regarding your employment at PCCD.

As discussed earlier, Nagle and Hilliard continued to exchange letters regarding the classification of Nagle's position, and Nagle was eventually classified. In a letter dated February 10, 1998, Haberberger informed Nagle that Local 790 had been notified by the District of his classification as a staff

assistant, range 51. Pursuant to the agreement between the District and Local 790, Haberberger stated, Nagle could agree to the placement or accept severance pay and end his employment relationship with the District. On July 13, 1998, Nagle filed a grievance over his classification. In the grievance, Nagle raised a number of statutory and contractual arguments, including the fact that he suffered discrimination as a result of his protected activity. This was the first grievance introduced into evidence containing an allegation that Nagle suffered discrimination as a result of his protected conduct. Local 790 has not responded to his request to pursue the matter.

Meanwhile, on January 30, 1997, charging parties filed an unfair practice charge against Local 790 alleging that the union breached its duty of fair representation in negotiating and implementing the agreement with the District, particularly the assignment of employees pursuant to the agreement. Banks and Lawry joined the charging parties in that charge. By letters dated April 1 and April 22, 1997, a PERB regional attorney dismissed the charge. The dismissal was not appealed.[13]

ISSUES

1. Should the complaint be dismissed on statute of limitations grounds?

2. Should the complaint be dismissed and deferred to arbitration?

[13]Nagle et al. v. United Public Employees, Local 790, Unfair Practice Charge No. SF-CO-519.

3. Were charging parties Nagle, Rickman and Lee given unacceptable assignments in retaliation for protected conduct?

CONCLUSIONS OF LAW

Statute of Limitations

The District argues that the underlying charge should be dismissed because it was not timely filed. Although the Board has found that the charge was timely filed, the District contends that decision was based only on the pleadings and evidence adduced at hearing compels a different conclusion. Charging parties have argued throughout this proceeding that the charge was timely filed and should not be dismissed on statute of limitations grounds. (See Peralta at p. 5.)

Under section 3541.5(a)(1), PERB may not "issue a complaint in respect of any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge." This requirement is jurisdictional. (California State University, San Diego (1989) PERB Decision No. 718-H.)

The statute of limitations begins to run on the date charging party acquires actual or constructive knowledge of the alleged unlawful conduct (The Regents of the University of California (1990) PERB Decision No. 826-H, pp. 7-8), or when the charging party knows or should know of the conduct underlying the charge. (University of California (1993) PERB Decision No. 1023-H; Regents of the University of California (1993) PERB Decision No. 1002-H.)

Even actual knowledge must "clearly inform" the charging party of the allegedly unlawful act. (Victor Valley Union High School District (1986) PERB Decision No. 565, p. 5.) And the Board has adopted the following view of constructive notice.

> . . . Absent actual notice, the limitations period begins to run when the persons affected have constructive notice of the violation. They are aware of the events which manifest the change and should reasonably be aware of the significance of the events. Certainly, a rule should not be endorsed which would toll the limitations period where the charging party knew that certain events occurred but did not realize that these events constituted an unfair practice. [Riverside Unified School District (1985) PERB Decision No. 522, adopting decision of regional attorney at 9 PERC Para. 16112, p. 608 (Riverside).1

The underlying unfair practice charge was filed on February 21, 1997. Thus, conduct which occurred prior to August 21, 1996, is outside the limitations period and is time-barred, provided charging parties knew or should have known of the conduct before that date.

In dismissing the charge as untimely the regional attorney concluded that the limitations period commenced with the assignment of charging parties to custodian and food service positions on August 16, 1996. The Board reversed that dismissal finding that the limitations period began to run on the date charging parties learned that other Department employees were given preferential treatment in job assignments. The Board set this date as September 6, 1996, and found the charge to be timely filed. (Peralta at pp. 6-7.)

The District argues, however, that Rickman and Nagle knew on August 12 (outside the limitations period) of assignments already given to Williams, Pfennig, Tate and Martin. The District asks in its brief: "how many allegedly preferable work assignments must be known in order to trigger actual or constructive knowledge of a clear intent to implement the allegedly discriminatory action"? The District concludes the "common sense" answer is four and this matter should be dismissed because charging parties have not met their burden of proof on the timeliness issue.

I find that charging parties did not have sufficient actual or constructive knowledge of the allegedly unlawful conduct outside the limitations period. Because this case is largely one of discrimination or disparate treatment, full knowledge of the manner in which other employees were treated is essential. Yet charging parties did not have a complete picture of the assignments of other employees before August 21.

Aside from charging parties, there were ten assignments made by Hilliard after implementation of the subcontracting decision. Knowledge of only four assignments -- less than half -- is not a sufficient foundation upon which to base a finding of knowledge for statute of limitations purposes. This is especially true where, as here, the entire assignment process was a fluid one during August 1996, with Hilliard as well as employees actively searching for positions to implement the effects agreement. In these circumstances, such limited information does not adequately

confer actual or constructive knowledge of the events which form the theory of the complaint and thus could not "reasonably" have signaled the significance of the events to charging parties.[14] (Riverside.) Therefore, it is concluded that this matter is not time-barred.

Deferral

The District next contends that the complaint should be dismissed and deferred to arbitration because the instant dispute is covered by its collective bargaining agreement with Local 790 and the grievance procedure in that agreement ends in binding arbitration. The charging parties argue in response that not all of their protected activities are covered by the agreement. The agreement precludes discrimination for "union activity" and much of the protected conduct here involved individual protests that do not fall under this term, charging parties contend. In any event, charging parties argue, it would be futile to defer to arbitration under the circumstances presented here.

Section 3541.5(a)(2) provides that the Board shall not:

> Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract

[14]Charging parties learned on September 6 of assignments given to Kogo and Box, and there is no evidence that any charging party knew of the remaining four assignments (Early, Henderson, Banks and Lawry) prior to August 21, outside the limitations period.

> grievance procedure would be futile, exhaustion shall not be necessary. . . .

This provision establishes a jurisdictional limit. If the statutory requirements for pre-arbitration deferral are met, PERB has no jurisdiction and must dismiss the matter, provided that resort to contract grievance procedure would not be futile. (Lake Elsinore School District (1987) PERB Decision No. 646, pp. 25-26 (Lake Elsinore).)

The requirements for pre-arbitration deferral are that (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement. (San Francisco Unified School District (1998) PERB Decision No. 1250, adopting dismissal of regional attorney at 22 PERC Para. 29055, p. 243.) These requirements are met here. The grievance procedure in the agreement ends in binding arbitration and prohibits the complained of conduct.

The collective bargaining agreement contains a no-discrimination clause in section 3.2. In relevant part, it states:

> The employer agrees to comply with all applicable federal and state laws. Furthermore, the District agrees that there shall be no discrimination, interference, restraints or coercion by the District or any of its agents against any of its employees because of membership in the union or exercise of rights to engage in union activity.

Nagle and Rickman were members of the Local 790 bargaining team during negotiations about the effects of contracting out Department work to Alameda County. Plainly, this conduct falls within the meaning of "union activity" referred to in the agreement, and claims of discrimination against Nagle and Rickman based on such conduct are properly deferred to arbitration.

However, all three charging parties engaged in protected conduct that cannot be characterized as "union activity." As individuals, they opposed the decision to subcontract Department work in meetings before the Trustees, and they repeatedly disagreed with Hilliard about their assignments after the agreement was negotiated. PERB has held that individual complaints about employment matters are protected as part of an employee's right to self representation under the Act. (See Pleasant Valley School District (1988) PERB Decision No. 708 (Pleasant Valley); Livingston Union School District (1992) PERB Decision No. 965 (Livingston); San Ramon Valley Unified School District (1982) PERB Decision No. 230, pp. 17-19 (San Ramon).) The question, therefore, is whether discrimination for such conduct is covered by the agreement.

Section 3.2 states that the District agrees to comply with all applicable "state laws." EERA is a state law that prohibits, among other things, discrimination against employees because of their exercise of guaranteed rights. Individual protests about employment conditions is one such right. Therefore, the discriminatory conduct alleged here by charging parties is

covered by the collective bargaining agreement and properly deferred to the grievance and arbitration procedures agreement. (Los Angeles Community College District (1989) PERB Decision No. 761, adopting dismissal of regional attorney at 13 PERC Para. 20191, p. 682 (unfair practice charge alleging unlawful retaliation dismissed where agreement required district to "comply with state and/or federal laws").)

Charging parties introduced evidence to show that it would be futile to defer this matter to arbitration. The District responds that charging parties have not established that resort to the grievance procedure would be futile. According to the District, charging parties have shown, at most, that a rift exists between them and Local 790, and such a showing is insufficient to establish futility.

Section 3541.5(a)(2) provides that "when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary." To establish that resort to the contractual grievance procedure would be futile, charging parties must show that Local 790 has "committed itself to a position in conflict with the position of the [charging parties]" on the discrimination claim. (State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S, pp. 13-14 (Department of Developmental Services).) For the following reasons, I conclude that charging parties have not met their burden.

Although charging parties filed grievances about various aspects of their reassignments, they filed no grievances under the no-discrimination clause in section 3.2 of the agreement. The grievances primarily were aimed at contractual violations concerning issues such as improper classification and length of temporary assignments. Local 790 declined to pursue these grievances. The union felt the District was in compliance with the effects agreement and the collective bargaining agreement. At no time did charging parties present to Local 790 a timely grievance containing the precise issue raised here, i.e., discrimination for protected conduct.

It is true that Nagle, on July 13, 1998, filed a grievance alleging, among other things, a violation of section 3.2. The grievance was rejected by Local 790. But that grievance was filed approximately two years after his initial assignment and approximately six months after he was classified as a staff assistant. It is not surprising that Local 790 declined to process it.

Nor is it surprising that Local 790 did not respond to Rickman's passing reference to discrimination in a letter to Haberberger on February 14, 1998. In that letter, Rickman asserted that Hilliard discriminated against him by refusing to assign him to the duplicating services II position. The letter was not formal grievance that squarely presented the discrimination claim for arbitration. Moreover, Rickman's complaint was untimely as a grievance because the assignment in

question had occurred approximately one year earlier. It appears that Nagle's grievance and Rickman's complaint were advanced as mere after thoughts when all other arguments failed.

Therefore, it concluded that charging parties filed no timely grievance or other complaint regarding their allegedly discriminatory assignments which Local 790 could have taken to arbitration, but refused. As the District points out, charging parties, at most, have proven a rift between them and Local 790 concerning the proper approach to the subcontracting decision and implementation of the effects agreement. But even if the rift established a general union animosity toward charging parties, such animosity without more is insufficient to establish futility.

The record is devoid of evidence that Local 790, despite its differences with charging parties over implementation of the effects agreement, condoned the alleged discrimination or committed itself to a position in conflict with charging parties on that claim. While the record evidence may invite speculation as to how Local 790 might be inclined to treat charging parties in a legitimate discrimination grievance, such speculation is insufficient to establish futility. (Department of Developmental Services at p. 14.); (State of California (Department of Corrections) (1986) PERB Decision No. 561-S, adopting proposed decision of administrative law judge at 9 PERC Para. 16139, p. 534.) As the Board has observed, charging parties establish a valid futility claim upon a showing that they "properly pursued

their allegations through the grievance procedure and, through no fault of their own, have no mechanism available for resolution of the dispute." (State of California (Department of Parks and Recreation) (1995) PERB Decision No. 1125-S, p. 9.) Charging parties have not met this burden.

Based on the foregoing, the allegations in the instant complaint are dismissed and deferred to the grievance and arbitration procedures in the collective bargaining agreement between the District and Local 790.[15]

Discrimination

Assuming the complaint is not subject to deferral, charging parties have not prevailed on the merits of their claim. In order to prevail in a discrimination case, charging parties must establish they were engaged in protected activity, the activities were known to the District, and the District took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to establish a nexus between charging parties' protected conduct and the District's conduct. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, a

[15]Deferral is not rendered futile merely because an employer refuses to waive a procedural defense, such as the employee's failure to timely file a grievance, as in the instant case. (Desert Sands Unified School District (1995) PERB Decision No. 1102.)

variety of circumstances may justify an inference of unlawful motivation on the part of the employer. (See e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, p. 15.) Absent evidence of unlawful motive, an allegation of discrimination must be dismissed for failure to state a prima facie case.

Assuming unlawful motive is established, the burden of proof shifts to the District to establish that it would have taken the action complained of, regardless of the charging parties' protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) In the final analysis, the District's action will not be deemed an unfair practice unless the Board determines that "but for" the charging parties' protected conduct the allegedly wrongful conduct would not have occurred. (Ibid.)

There is no dispute that charging parties engaged in protected conduct and the District had knowledge of their activities. They publicly opposed the decision to subcontract Department work in meetings before the Trustees and in meetings with Hilliard. Individual employee complaints about employment matters are protected under EERA as an exercise of self-representation. (See e.g., Pleasant Valley; Livingston; San Ramon.) In addition, Nagle and Rickman served on Local 790's negotiating team, clearly a protected act.

To establish a prima facie case of discriminatory treatment, charging parties also must show under an objective standard that

employees suffered an adverse action in their employment conditions as a result of the allegedly unlawful conduct. (See Palo Verde Unified School District (1988) PERB Decision No. 689.) Under the Palo Verde standard, involuntary reassignments may constitute adverse action even when they are not accompanied by loss of pay or benefits. (See e.g., Fall River Joint Unified School District (1998) PERB Decision No. 1259; Newark Unified School District (1991) PERB Decision No. 864); Mountain Empire Unified School District (1998) PERB Decision No. 1298.)

Charging parties argue that several aspects of the District's conduct point to an unlawful animus that provides the requisite nexus between their protected conduct and the District's action. I find, however, that credible evidence of unlawful animus is lacking. Each of charging parties arguments in this regard are addressed immediately below.

Charging parties argue that the District displayed an unlawful animus early in 1996 after learning that Nagle and others intended to address the Trustees. They find an unlawful animus and an attempt to intimidate charging parties in McLaughlin's directive concerning attendance at Trustees meetings, and in Ealy's instruction that Nagle return to work after the meeting in July 1996. However, employees are not exempt from valid work rules merely because they engage in protected conduct. Granted, the policy was a new one, but there was a valid underlying basis for it. Nagle and Lee were security employees, and the policy merely required them to get

authorization from their supervisor before leaving their posts to attend a Trustees meeting. The directive to return to work after the meeting ended can hardly be construed as showing animus. In the final analysis, the directive was no more than a procedure to permit employees to address the Trustees in an orderly fashion while guaranteeing that their assignments would be covered, and charging parties were at no time precluded from leaving their posts to address the Trustees. On these facts, I decline to infer an unlawful motive.

Charging parties also argue that an unlawful motive should be inferred from statements by Hilliard that employees who publicly voiced concerns about being reassigned to Local 39 positions would be "in trouble." In my view, however, charging parties have misread the testimony. Nagle and Rickman did not testify that Hilliard said employees who opposed reassignment to Local 39 positions would be in trouble. As I understand their testimony, Hilliard was angry that employees had breached the expectation of confidentiality that surrounded the negotiations by discussing the Local 39 issue away from the bargaining table prematurely. Nagle, for example, testified that Hilliard and Haberberger were angry that "somebody was discussing the previous meeting's business concerning about putting people into Local 39 positions." Rickman similarly testified that Hilliard said "someone had opened their big mouth . . . talking about what we're attempting to do with Local 790 members placing them in Local 39 positions." Given this testimony, I do not view

Hilliard's comments as threats. Reassignment to Local 39 positions was a sensitive issue at the bargaining table, and if is understandable that Hilliard and Haberberger were less than pleased to learn the matter had been discussed publicly. In any event, as the District points out, Hilliard's comment was general in nature and it is not even clear that it was directed at Nagle or Rickman.

It is also alleged that Hilliard said the District felt no obligation to find positions for employees who did not apply to Alameda County. Assuming the comment was made, it does show an unlawful animus, as charging parties contend. At the time the comment was made, at least one other employee had indicated no desire to apply to Alameda County. In the end, at least three other employees -- Box, Kogo, and Henderson -- did not apply to Alameda County, yet they allegedly received favorable treatment. The statement, moreover, was general in nature. At most, it may indicate the District was less than enthusiastic about making efforts on behalf of employees who themselves made no effort to apply to Alameda County. This is not a statement that inherently displays an unlawful animus against charging parties for their protected conduct.

It is true, as charging parties argue, that the timing of an adverse action is a factor that may support an inference of unlawful motive, and the timing of the assignments in this case closely followed charging parties' protected conduct related to the subcontracting decision. (See North Sacramento School

District (1982) PERB Decision No. 264.) However, there are valid explanations for the timing of the District's action. The effects bargaining between the District and Local 790 was drawing to a close, and the agreement expressly provided for the assignment of employees who remained with the District. Charging parties were not singled out for assignment at this time. Almost all of the initial assignments, including those of charging parties, were made at or about this time. While the August 12 implementation date preceded the final initialing of the agreement on August 26, the actual implementation date was not an arbitrary one. It was tied to the end of the summer term and the beginning of the next semester for operational purposes. On these facts, I decline to infer an unlawful animus from the timing of charging parties assignments.

Charging parties point out that Hilliard repeatedly informed them that, absent mutual agreement on new positions, their temporary assignments would expire and they would be laid off with severance pay. This was not an unlawful threat, as charging parties suggest. The Local 790 agreement provides three options for employees: secure employment with Alameda County; accept a "mutually agreeable" position with the District; or, absent such an agreement, accept severance pay. It may be true that the agreement put the District in the driver's seat with respect to assignments. If an employee did not agree with an assignment offered by Hilliard, the negotiated option plainly envisioned severance pay and termination. While charging parties opposed

the agreement as a breach of the duty of fair representation, their challenge was rejected by the Board. Thus, Hilliard's statements in this regard cannot be construed as anything but a step in implementing the agreement. Hilliard had the right to take such action if mutually agreeable positions were not identified, yet he did not exercise that right and instead extended charging parties' temporary assignments pending establishment of agreeable positions. This is hardly evidence of unlawful animus.

Charging parties' chief argument is that they were treated differently than the ten employees who remained with the District and chose not oppose the subcontracting openly. Charging parties contend that Hilliard found "acceptable positions" for each of these employees, while reassigning them to positions that were "anything but acceptable." The disparate treatment argument is not convincing.

Charging parties were not the only employees who openly opposed the subcontracting. Hilliard testified that other employees were not pleased with the decision to contract out the Department's work and they spoke out at a series of meetings. Even Tate, a witness called by charging parties, corroborated Hilliard's testimony. Tate testified that he opposed the decisions to subcontract and "we all" spoke out against it in the presence of Hilliard. It is difficult to argue successfully for a finding of disparate treatment when other employees who

allegedly received favorable treatment engaged in conduct similar to that of charging parties.

Charging parties were not the only employees who were assigned to custodial and food services. At least two employees (Box and Banks) initially received assignments similar to those of charging parties. There is no evidence that they engaged in protected conduct, yet Hilliard treated them the same as charging parties. He sent them to Laney College to perform custodial and food service work. It was only later, in connection with efforts by administrators at Laney, that they landed other positions. This is not evidence that tends to support a theory of disparate treatment.

Nor is charging parties' disparate treatment argument helped by unrebutted testimony that they never identified as acceptable a career path or available position for which they were qualified. Lee requested that he be assigned to purchasing, and Rickman told Hilliard he had experience in graphic arts, civil engineering, and clerical work. But there were no vacancies in these areas. As Hilliard testified, reassignment of employees under the agreement with Local 790 was based on the need to fill a position, feasibility of each request, and cost. There is no evidence that charging parties made a request that fell under these criteria. In contrast, Henderson, Kogo, Box, Martin, Tate, and Pfennig offered at least some indication of positions in which they were willing to work. And certain employees (Martin, Tate, and Pfennig) found Local 39 positions acceptable while

charging parties steadfastly objected to being assigned to positions in that unit.

Ten employees were assigned to positions that they accepted. These assignments were made after consultation with Hilliard, as the agreement requires. There is no evidence that charging parties were better qualified than any of these employees to fill these positions or that charging parties even preferred any of them. These factors, coupled with the finding that charging parties identified no available positions that were acceptable to them, argue against a finding of disparate treatment in the assignment process.

Contrary to the argument advanced by charging parties, it is difficult to see the individual assignments they received eventually as a form of disparate treatment. The facts surrounding each are summarized below.

Charging parties assert that Nagle was assigned to a position with no classification, specific duties, permanence, or budget. This assertion, however, conflicts with the evidence.

Soon after his assignment on August 26 to a custodial position at College of Alameda, Nagle began performing work assigned by Steinmetz and he has done so since that time. He also serves as the evening administrator. Moreover, he has not been given meaningless tasks. He has developed an evacuation exercise in fire drills and a disaster preparedness plan. By his own admission, the work given him by Steinmetz calls for "independent judgment and thinking." On January 30, 1998, the

Trustees officially classified Nagle as a staff assistant, range 51, and he has been Y-rated.

It is true that the classification Nagle now holds was late in coming. However, Nagle played a significant part in the delay. At no time did he inform Hilliard of an acceptable position or career path, and he resisted attempts to classify his position despite clear requests by Hilliard that he assist in doing so. In a June 24, 1997, letter, Hilliard asked Nagle to identify an acceptable position and indicated he would formally classify the position at College of Alameda if Nagle agreed, but Nagle did not follow through. In July, August, and October, 1997, Hilliard asked Nagle to complete a position description form so that his position at College of Alameda could be classified, but Nagle declined. Eventually, Nagle's position was classified based on information provided by Steinmetz. This is hardly the kind of evidence that adds up to discriminatory treatment.

Rickman's journey to a new classification was a little shorter. Beginning August 26, he worked for one week as a cashier at Laney College. On September 5, he was assigned to a duplicating technician II position in the "back room" of the media center after telling Crutchfield he wanted to work in the instructional media department. Because that position was promotional, on July 3, 1997, Rickman was reassigned to a duplicating technician I position at the "front counter" of the media center, effective October 1, 1996. Advancement from a

duplicating technician I to a duplication technician II is based on time-in-grade and a recommendation from a supervisor. There has been no recommendation that Rickman be promoted. In sum, Rickman worked in food services for about one week before his request to be assigned to the media center was granted. In the wake of the elimination of the entire Department, including Rickman's own testimony that Harrison said the District underestimated the number of employees who would not move to Alameda County, the assignment from a parking control attendant position to a Y-rated duplicating technician position does not suggest discriminatory treatment.

The process that resulted in Lee's reassignment similarly cannot be viewed as discriminatory. Like Nagle and Rickman, Lee did not initially identify an acceptable position or career path. There was no purchasing position available. He was assigned to a custodial position in August 1996 because that was the only position available. About six months later, in February 1997, he was reassigned to a job in the photocopy center. Lee worked at the center until July 1997, when he indicated to Hilliard an interest in the computer field. Almost immediately, Lee's transition into computer work commenced. He attended computer classes during the work day at District expense and began work in the computer field upon completion of the classes. Lee has been Y-rated. While Lee may not have found the assignments prior to his assignment to computer work acceptable, the alternative was severance pay and termination.

In sum, the charging parties have been Y-rated and reassigned to positions in the District rather than terminated with severance pay, an option available to Hilliard in view of the fact that charging parties insist they have not been assigned to mutually agreeable positions. It is true that the reassignments of Nagle and Lee took longer than the others, and Lee's position has not yet been classified officially. However, considered in the totality of the record, these factors do not tip the scale in favor of a finding that the District harbored an unlawful animus.[16]

Based on the foregoing, it is concluded that charging parties have not established a nexus between their protected activities and the District's conduct. Therefore, they have not established a prima facie case of discrimination.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, the complaint in Unfair Practice Case No. SF-CE-1942, David Nagle, James Rickman, and Timothy Lee v. Peralta Community College District, is hereby dismissed.

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[16]The record indicates that classification issues related to certain assignments existed long after the subcontracting decision was implemented and they were not confined to charging parties. For example, as late as June 16, 1997, Hilliard, Haberberger, Stewart, Box, Banks, Lawry, and charging parties were meeting to negotiate unresolved classification issues. While it might make sense to resolve such issues finally, under the totality of the circumstances presented here, the fact that this has not been accomplished does not establish an unlawful motive.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service,

in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c) .)

FRED D'ORAZIO
Administrative Law Judge