STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INGLEWOOD TEACHERS ASSOCIATION,	)	
	)	
Charging Party,	)	Case No. LA-CE-2503
	)	
v.	)	PERB Decision No. 792
	)	
INGLEWOOD UNIFIED SCHOOL DISTRICT,	)	February 15, 1990
	)	
Respondent.	)	
	)	

Appearances: Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg, Attorney, for Inglewood Teachers Association; Grant & Duncan by Artis C. Grant, Jr., Attorney, for Inglewood Unified School District.

Before Hesse, Chairperson; Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Inglewood Unified School District (District) to a proposed decision of a PERB administrative law judge (ALJ). Two issues were raised by the District in its exceptions. The first issue is whether certificated employees, Vincent Combs (Combs) and Robert Bankhead (Bankhead), were dismissed by Inglewood High School (IHS) Principal Lawrence Freeman (Freeman) from their extra-duty coaching assignments because of their concerted activity involving a dispute about coaching stipends. The District argues that the coaches should not have been represented by Inglewood Teachers Association (ITA or Association) in the unfair practice proceeding since coaches were not explicitly listed in the parties' collective bargaining agreement. A

connected procedural issue is whether the ALJ properly allowed the Association's complaint to be amended during the hearing. The second issue is whether Principal Freeman was acting as an agent of the District when he filed a civil lawsuit against ITA and various ITA members.

The ALJ found, as to the dismissal of the coaches and the filing of the civil lawsuit, that the District, through Principal Freeman, violated the Educational Employment Relations Act (EERA or Act), section 3543.5, subdivision (a).[1] He also found that the District violated section 3543.5, subdivision (c), and, derivatively, subdivisions (a) and (b), by unilaterally changing established practice for dismissing teachers from their extra-duty assignment as coaches without just cause. For the reasons

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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, subdivisions (a), (b) and (c) provide:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

set forth below, we affirm in part and reverse in part the decision of the ALJ.

DISCUSSION

Except as noted below, the ALJ's findings of fact are supported by the record. Many of the ALJ's factual findings rest on credibility determinations, to which the Board generally gives deference on appeal. (Anaheim City School District (1984) PERB Decision No. 364a, at pp. 3-4; Santa Clara Unified School District (1979) PERB Decision No. 104, at p. 12.) The following is our legal analysis applied to a capsulized version of the pertinent facts derived from the ALJ's proposed decision and our own review of the record.

The Coaches' Dismissal

Combs and Bankhead were teachers at IHS, members of ITA, and had both coached in IHS's athletic program during fall 1986, as an extra-duty assignment. They had both been approved by the school board to coach in the basketball program, which began in November, 1986. Those who participated in the coaching program were generally paid a stipend at the end of the pertinent season. Combs completed his coaching duties for the cross-country team the third week in October; Bankhead finished his football assignment the end of October or beginning of November. By the middle of November, none of the coaches had been paid. Both Combs and Bankhead went to the District employee, who generally processed the payment, and asked about their stipends. Both were told that the stipends would not be processed as usual because

Freeman had not submitted the coaching stipends as part of the school budget. Instead, the coaches were to be paid out of student body funds, or some other fund. However, there was apparently insufficient money in the student body fund in November to pay the coaches for the preceding season.

When Combs and Bankhead learned that they would not be paid in the usual way, they discussed the matter of pay with other current and past coaches. During one such discussion in the physical education office, Edward Brownless (Brownless), Athletic Director and Dean of Students, walked in. He was disturbed that the coaches would be discussing the matter among themselves and expressed his anger over what he viewed as criticism of Freeman's decision regarding pay. After a brief confrontation, Brownless reported the coaches' discussion to Freeman. Freeman immediately called all coaches to his office. During the brief meeting in Freeman's office, Freeman berated the coaches for discussing their salary questions with each other and forbade them from doing so in the future. He also relieved Combs and Bankhead of their basketball assignments for expressing concern over the timing of their pay for the previous season. The gist of his reasoning was that anyone who questioned the money, or needed the money, did not need to coach. It was not clear whether Freeman intended to dismiss Combs and Bankhead for the basketball season or just until they were paid. However, they were never offered reinstatement after being paid in the latter half of December. Following the meeting, Combs and Bankhead turned in all

basketball-related items and did not coach the rest of the basketball season.

The Association's initial charge on this issue alleged a unilateral change in District practice and policy by removing Combs and Bankhead from their coaching positions without cause. The original complaint only addressed this theory. During the first day of the hearing, the Association moved to amend the complaint to include a retaliation allegation arising out of the same facts surrounding the coaches' dismissal. The ALJ granted the request over the District's objection.

The ALJ found that the District, through Freeman, retaliated against Combs and Bankhead for acting in concert to determine the timing of their payment, in violation of section 3543.5, subdivision (a).[2] He also found that the District violated section 3543.5, subdivision (c), and, derivatively, subdivisions (a) and (b), by unilaterally changing established practice for dismissing teachers from their extra-duty assignment as coaches without just cause.

The District excepts to three areas of the proposed decision in regard to the coaches' dismissal.[3]

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[2]The ALJ also found that the District's conduct could be characterized as interference, thus, independently justifying a section 3543.5, subdivision (a) violation. This issue is not on appeal.

[3]The District does not except to the finding of retaliation, interference, or unilateral change except on procedural bases (jurisdiction, standing, etc.).

1. The motion to amend the complaint.

First, the District argues that the ALJ improperly granted the Association's motion to amend the complaint at the time of the hearing. The District argues that the amendment was untimely based on ITA's knowledge of the District's affirmative defense that, since the coaches were not covered by the parties' collective bargaining agreement, the District need not bargain over any change in the timing of payment. It asserts that ITA's motion to amend to assert a retaliation theory was an effort to defeat this affirmative defense. The District concludes that, "[d]ue to the late date of the request for amendment, it is clear that the amendment was only a sham."

The District nowhere discusses PERB Regulation 32648[4] which provides:

> During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

The District, furthermore, makes no showing of prejudice, other than to say that the late amendment "was clearly prejudicial to respondent and therefore, improper."

Since the new theory was based on the same set of facts alleged in the original complaint, it is difficult to determine

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[4]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

what, if any, prejudice resulted from the amendment. Furthermore, as argued by the Association, the District was on notice prior to the hearing that the amendment would be requested, the pertinent witnesses appeared two days later, and the witnesses were additionally recalled by the District two months later when the hearing was concluded. The Board, therefore, affirms the ALJ's granting of the motion to amend.

2. PERB's jurisdiction to hear the charge.

The District's second exception to the ALJ's findings involves its contention that PERB lacks jurisdiction to determine any alleged violation by the District of Combs' and Bankhead's rights because coaches are not included in the scope of representation in the parties' collective bargaining agreement. The District asserts that even though Combs and Bankhead are "employees" within the protection of EERA, ITA can represent them only as teachers, or some other classification listed in the parties' collective bargaining agreement. The District argues that ITA cannot represent them as coaches because coaches are not listed in the scope of representation clause. Without citing any authority, the District asserts that:

> [i]t is against public policy and established labor policy to force a party to a CBA [collective bargaining agreement] to deal with an exclusive representative in one forum, i.e., at PERB, when they are not required to do so pursuant to the terms of the agreement outside that forum.

(District's brief at p. 11.) The District concludes that if Combs and Bankhead were the charging parties, it would not be faced with this dilemma, but does not elaborate on the dilemma.

This argument is specious both from a factual and legal standpoint. Uncontroverted evidence in the record indicates that the coaches' salaries have regularly been negotiated by ITA in bargaining sessions with the District. In fact, the coaches' salary schedule was omitted from the parties' most recent agreement, at the Association's request, because the District refused to tie the coaches' salaries to the teachers' wage scale--a point which the District argues evinces ITA's determination that coaches should not be included in the unit. Furthermore, the District met with ITA leadership following the dismissal of Combs and Bankhead, and ITA agreed to process the Association's grievance.

The District is also in error from a legal standpoint. As the ALJ correctly pointed out, whether or not the position of coach is listed in the recognition clause of the parties' contract is of no consequence in this proceeding because at issue is a change in a term and condition of employment for unit members. Coaching is an extra-duty assignment performed by bargaining unit members. Such an assignment offers unit members an opportunity to earn extra compensation, a matter squarely within the scope of bargaining.

In Mammoth Unified School District (1983) PERB Decision No. 371, the Board held that a district violated section 3543.5,

subsections (a), (b), and (c) by unilaterally changing its policy on the assignment of co-curricular coaching duties. (Id. at p. 12.) The parties in Mammoth had negotiated salary stipends for coaches, which were included in the parties' agreement. There is no indication in the Board's decision, however, that the inclusion of the stipend was critical to its determination that assignment of work beyond the normal workday to teachers is logically and reasonably related to hours and wages. (Id., proposed decision, at p. 21; see also, Lincoln Unified School District (1984) PERB Decision No. 465, proposed decision at pp. 11-14 (unilateral change found where district refused to bargain over assignment of volunteer drivers to work previously performed as overtime by district employees); Palos Verdes Peninsula Unified School District (1979) PERB Decision No. 96, at p. 35 (extra hour assignments are mandatory subject of bargaining).) Accordingly, the Board affirms the ALJ's ruling on this matter.

3. The inclusion of "Lawrence Freeman" as a heading.

The District also excepts to the ALJ's inclusion, as a heading in his proposed decision, "Lawrence Freeman." The District contends that:

> Lawrence Freeman is not himself an issue of fact in this case. Further, although there are some issues involving alleged conduct by Mr. Freeman, Mr. Freeman himself is not an issue.

(District's brief at p. 2.) This argument is frivolous. The ALJ merely set forth background information in the factual section of the proposed decision.

The Lawsuit

On March 9, 1987, Freeman filed a lawsuit against the California Teachers' Association (CTA), ITA, a CTA/ITA staff person, and nine District teachers who were active members of the Association. The lawsuit sought damages for: (1) the distribution of a circular which alleged that Freeman had threatened teachers; (2) the sending of a letter to the school board regarding safe working conditions; (3) the filing of a PERB charge; and (4) comments by the teachers about the working conditions at IHS under Freeman's administration. The original complaint had five causes of action: (1) libel and slander; (2) intentional infliction of emotional distress; (3) fraud; (4) interference with contract; and (5) conspiracy. Although the caption of the complaint did not identify Freeman by his title, in the first paragraph of the complaint Freeman identified himself as follows:

> Plaintiff is a resident of Los Angeles County and is employed by the Inglewood Unified School District . . . as an administrator, assigned as principal of Inglewood High School . . . .[5]

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[5]As a result of successive demurrers, the complaint was amended several times. By the time the ALJ's proposed decision issued, Freeman had filed a third amended complaint which did not contain the causes of action for fraud and intentional infliction of emotional distress and which added the following language to the identification paragraph quoted above: "Plaintiff is not, however, and at no time herein has he even been, given by IUSD the responsibility of representing IUSD in any labor dispute with any employee or an [sic] collective bargaining unit representing any employee of IUSD." As the record does not contain the first or second amended complaints, we cannot determine at what stage in the proceedings, or for what reason, the new language was added.

The defendants were identified as the bargaining agent and parent organization for the certificated unit, officers and directors in the Association, representatives of the Association, and teachers at IHS.

In mid-March, all nine of the teachers received copies of the complaint from the personnel office of the District. Eight of the complaints were delivered through inter-District mail in envelopes which indicated that the sender was "Personnel Services" of the District. The ninth teacher was sent a copy of the complaint through the United States mail, also in an envelope which identified the sender as "Personnel Services" of the District. Those who were sent the complaint through the inter-District mail system picked up the complaint in the corresponding teacher mail box at the appropriate school. Testimony revealed that a District employee accepted the copies of the complaint from a process server and routed them to the appropriate schools, where a District staff person placed the envelope in the teachers' boxes. Testimony also revealed that this was the only copy of the complaint received by the teachers. Two District school board members were made aware of the existence of the lawsuit by one of the affected teachers who contacted them after receiving a copy of the complaint.

On or about April 13, 1987, ITA filed its amended unfair practice charge in which it alleged for the first time that Freeman had filed the civil lawsuit against ITA and the teachers. On August 3, 1987, a PERB complaint issued based upon the amended

charge alleging, inter alia, that the District, through its agent Freeman, filed the civil lawsuit. On August 28, 1987, the District answered the PERB complaint denying, inter alia, the agency allegations.

At the time of the hearing on the unfair practice charge, in December 1987 and February 1988, the status of the lawsuit was not certain. ITA had filed three demurrers to all five causes of action. A superior court judge sustained each of the demurrers with leave to amend. A fourth demurrer to the third amended complaint was scheduled. Subsequent to the PERB hearing, the entire action was dismissed with prejudice by Freeman.

At the outset of the hearing before the ALJ, the District moved to exclude from the hearing room teachers who would be testifying about their receipt of the complaint. The Association represented that each would be testifying as to his or her own experience in receiving the document. The ALJ denied the District's motion. He held that if the witnesses were

> going to testify about the same event, in other words, they observed the same event and they're testifying about it, then they will be excluded. In cases where they're not going to be testifying about the same event then they may stay in the room . . . .

(Tr. Vol. II, at p. 14.) The ALJ concluded that if two witnesses, who had been present for testimony, were to give testimony as to the same event, he would exclude the testimony.

In his proposed decision, the ALJ concluded that Freeman was acting with the District's apparent authority when he filed the lawsuit. He relied on the following factors: (1) Freeman was

carrying out a threat made to one of the Association's members, on District premises, in his capacity as principal; (2) the complaint describes Freeman in his capacity as administrator of the District; (3) all of the allegations relate to Freeman's conduct as principal, the employees' conduct as employees, and ITA's conduct as a representative; (4) the conduct described related to working conditions at IHS; (5) the lawsuit was distributed through the school mail system, in district envelopes, and "served" on the employees through their school mailboxes; and (6) although the District was aware of the lawsuit and its contents, for many months, it did nothing to disavow or distance itself from the suit. The ALJ concluded that the teachers named in the complaint were justified in their belief that they were being sued by the District through Freeman. Thus, he found that the District violated section 3543.5, subdivision (a), by carrying out a threatened legal action and prosecuting that action without a reasonable basis.

The Agency of Freeman

The District excepts to the ALJ's finding that Freeman was acting with the apparent authority of the District when he filed the lawsuit.[6] The United States Supreme Court has held, and this Board has followed its lead, that it is an unfair labor practice

[6]The District filed four exceptions to the ALJ's finding that the District violated section 3543.5, subdivision (a) by prosecuting the civil lawsuit. Resolution of the agency issue, however, negates the necessity of dealing in detail with the remaining exceptions. They will be dealt with summarily.

for an employer to prosecute a baseless lawsuit with the intent of retaliating against employees for their exercise of protected rights. (Bill Johnson's Restaurants v. NLRB (1983) 461 U.S. 731 [113 LRRM 2647]; Rim of the World Unified School District (Corcoran) (1986) PERB Order No. Ad-161.) In the case currently before the Board, the District does not argue that the filing of the lawsuit is not a potential violation of the Act but only that the Association failed to demonstrate that Freeman was operating as the District's agent when he filed his suit.[7] We agree.

The ALJ's finding of an agency relationship is flawed in two respects. As explained below, his reliance on Antelope Valley Community College District (1979) PERB Decision No. 97 as a statement of PERB law on agency is misplaced. Furthermore, rather than placing the burden of proof as to the agency issue on the Association, the ALJ incorrectly placed the burden on the District to rebut an agency relationship. The ALJ shifted the burden of proof to the District based solely on the conclusory allegation in the complaint, derived from the second amended unfair practice charge, that an agency relationship existed. He then based his conclusion that the District was responsible for the lawsuit on his finding that the employees thought the District was responsible for the lawsuit.

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[7]The District also argued that the matter should have been stayed, pursuant to Rim of the World Unified School District, supra, PERB Order No. Ad-161.) However, that argument is moot because the underlying court action has now been dismissed.

In reaching his conclusion on the agency issue, the ALJ found that under Antelope, supra, it is a "settled labor law principle that employers can be held accountable for acts of supervisors and managers whether or not such acts are authorized by the employer." (Proposed decision, p. 53) He went on to state that:

> Although Respondent has offered some evidence suggesting the District did not expressly authorize Freeman to file the lawsuit, it has offered little else than argument to negate a finding that, in the eyes of the employees defendants, Freeman was acting with apparent authority.
> (Emphasis in original.)

Applying the facts of the case to the rationale set forth in Chairperson Gluck's opinion in Antelope, supra, he goes on to state his case for agency as follows:

> Several factors support the conclusion that Freeman was acting with the District's apparent authority in prosecuting the lawsuit. As the Charging Party points out, the civil action is an outgrowth of a threat Freeman made to an employee in his capacity as principal, while on District premises. The moving papers filed by Freeman describe him in his capacity as an administrator of the District. Indeed, all of the allegations in the complaint relate to Freeman's conduct as principal, the employees' conduct as employees, and the ITA's conduct as representative of those employees. Similarly, the allegations relate to subjects that can be characterized as being inherently related to working conditions of those employees.
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> The lawsuit was distributed through the school mail system and "served" on those employees (except one) through their school mailboxes. The markings on the envelopes containing the complaint indicated the contents were sent from the District's

> central personnel services office. None of the teachers were served at home or anywhere but their work sites. Employees testified they believed they were being sued by the District, through Freeman. All felt they were being sued because of their work-related union activities.
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> Finally, although the District's governing board and its superintendent were aware of the lawsuit for many months before the hearing in this matter, they did nothing to disavow any interest or connection with it. Neither did they instruct Freeman to do anything to dispel the notion that the District had any association with the legal action. In view of all the circumstances, the employees had just cause to believe Freeman was acting as an agent of the District in prosecuting the lawsuit.

The above quote is the ALJ's entire basis for finding that an agency relationship existed between Freeman and the District.

A close look at Antelope, supra, however, reveals that it was decided by two members of the Board, Chairperson Harry Gluck and Member Raymond J. Gonzales in 1979, when the Board consisted of only three members. Member Moore did not participate in the decision. While Members Gluck and Gonzales agreed that an agency did exist on the facts of that case, they disagreed on the rule that should determine agency in a labor relations situation under EERA. Chairperson Gluck wanted to follow NLRB precedent, which he stated as follows:

> In the subsequent application of section 2(2) and 2(13), the courts and the NLRB have held the question of agency authority should be resolved by determining whether the employees had just cause to believe the supervisor or manager was acting with the apparent authority of the employer. . . . (Id. at p. 10.)

Member Gonzales disagreed with this position and stated the rule he would adopt and his rationale as follows:

> I disagree with the Chairperson's assertion that "historically accepted labor relations principles of agency authority and principal liability must be applied to cases arising under the EERA." I believe that in some situations a public school employer, defined in section 3540.1(k) as "the governing board of a school district, a school district, a county board of education, or a county superintendent of schools," may be held liable for the unlawful acts of some of its subordinates. Governing boards are responsible for the overall direction of school districts, but day-to-day decisions and actions, which may directly affect the organizational rights of employees, are often made by subordinates without specific authorization or ratification by the governing board. It is reasonable that under some circumstances employees may perceive their employer as responsible for such decisions and actions, regardless of whether the governing board itself is directly involved. Under other circumstances, such a perception may be unreasonable, and it may thus be inappropriate to attribute these actions to the employer. The question is in what situations should the employer be held responsible for acts by subordinates which are unlawful under section 3543.5. (Id. at p. 32.)

Member Gonzales, noted the distinctions between the National Labor Relations Act (NLRA) and EERA that justify this Board's departure from NLRA precedent:

> . . . the NLRA contains two provisions specifically dealing with the agency relationship between an employer and its subordinates. Section 2(2) of the NLRA [Fn. omitted] states that the term employer "includes any person acting as an agent of the employer, directly or indirectly . . ." and section 2(13) provides that authorization or subsequent ratification of specific acts is not controlling in holding a person

> responsible for his agent's acts. The EERA contains no comparable provisions. To me, this indicates that the Legislature did not intend this Board to adopt the private sector rule without qualification, but rather intended it to consider carefully the situations in which it is reasonable to attribute to a public school employer responsibility for unlawful acts it has neither expressly authorized or ratified. (Id. at p. 33.)

We note that Antelope does not establish a precedent since the panel consisted of only two members who concurred in the result in that case, but disagreed on the basis for the decision. Subsequent cases have not discussed or distinguished between the different approaches set forth in Antelope. The relevant distinction between the two approaches lies in the difference in the readiness with which each is willing to adopt wholesale the private sector labor relations approach to the public sector labor law context. While Gluck takes the position that private sector labor relations principles "must be applied to cases arising under EERA," Gonzales recognizes that the statutory distinctions between the NLRA and EERA mandate a cautious application of the "apparent authority" doctrine in the public school labor relations context. We think that the Gonzales approach is more reasoned than that presented by Chairperson Gluck. We therefore exercise caution and restraint in our analysis of this case under the apparent authority doctrine. In any event, when the proper burden of proof is applied, the evidence in the record is insufficient to support a finding of agency under either the Gonzales or Gluck approach.

The burden of proof in unfair practice cases before PERB is set forth in Regulation 32178 (California Administrative Code, title 8, section 32178) as follows:

> The charging party shall prove the complaint by a preponderance of evidence in order to prevail.

Furthermore, it is established California law that:

> The burden of proving the existence of an actual or ostensible agency as well as the scope of the agent's authority and the principal's ratification of the agent's unauthorized acts, rests upon the party asserting the existence thereof and thereby seeking to charge the principal upon the representations of the agent.
> (3 Cal.Jur.3d, sec. 165, pp. 236-237)

Although Freeman, as principal of IHS, is an actual agent of the District, the Association did not prove, by a preponderance of the evidence, that he was acting within the scope of his authority when he filed the lawsuit. The Association produced no evidence to show that the District gave Freeman express authority to file a civil lawsuit. Furthermore, we are unwilling to find that such authority may be implied from the fact of Freeman's employment as principal.

Neither does the evidence in this case justify a finding that Freeman had ostensible authority to file the suit. Ostensible or apparent authority must be established through the acts of the principal; in this case, the District (Civil Code sec. 2317). To prove ostensible or apparent authority, the Association was bound to establish representation by the principal (the District) of the agency, justifiable reliance by

the party seeking to impose liability on the principal (the teachers); and a change in position resulting from that reliance. (Yanchor v. Kagan (1971) 22 Cal.App.3d 544, 549.) The only testimony offered as proof of the District's involvement was that of Ethel Murphy, an administrative secretary in personnel at IHS. She testified that she received copies of the complaint from an unidentified process server and put them in the regular school mail to the teachers whose names were on the complaint. Since one teacher was not at the school, but at home, she sent her complaint through the mail. In sending the complaints through school mail, Ms. Murphy was following her normal routine. She further testified she frequently handles legal documents in the same manner and that she informed no one at the school of what she had done with the documents, since she was following her normal procedure. Thus, the record reflects the entire extent of the District's involvement with the lawsuit to be the receipt and processing of mail for teachers in accordance with routine procedures.

Neither do we find that the teachers had just cause to believe that the District was involved in the lawsuit based on the contents of the complaint and the mode of delivery. Under California agency law, persons dealing with assumed agents are bound at their peril to ascertain the nature and extent of the agency relationship. Mere surmise as to the authority of an agent is insufficient to impose liability on a principal based on

a theory of apparent authority. (Harris v. San Diego Flume (1891) 87 Cal. 526.)

In this case, the Association failed to prove that the teachers took reasonable steps to ascertain whether Freeman was in fact authorized to file a lawsuit on behalf of the District. Although one teacher, Robert Dillen (Dillen), testified he spoke to two District board members about the lawsuit, the record is devoid of any indication as to what he asked them.

Neither did the Association prove that the District had knowledge of the lawsuit,[8] proof of which was essential to a finding that the District condoned or ratified the filing of the lawsuit. Again, the only testimony proffered by the Association and relied upon by the ALJ to establish the District's knowledge of the lawsuit was that of Dillen, a teacher named in the lawsuit. The significance of Dillen's testimony lies in what it does not contain. Dillen testified only that he discussed the lawsuit with two school board members. The Association did not question Dillen as to the substance of the conversations he had with either of these board members. Nor did the Association call them as witnesses. Thus, there is nothing in the record to establish whether Dillen informed the board members of anything about the lawsuit other than its existence. There is no proof that they knew of the contents of the lawsuit or the specific

[8]The District had notice of the lawsuit when the unfair practice charge in this case was amended to allege agency. Once a complaint issued, the District, in its answer, denied its involvement in the lawsuit.

nature of the allegations. Neither is there testimony as to whether the school board members, who were allegedly contacted by Dillen, informed their fellow board members about the lawsuit.

The most important evidence required to be produced by the Association to prove a prima facie case of agency on a ratification theory was evidence that the District had official notice, either actual or implied, of the contents of the lawsuit. Proof of District's knowledge of the contents of the lawsuit was essential to finding the District liable for filing, condoning or ratifying it. Not only did the Association fail to call school board members as witnesses to establish that knowledge, it failed to ask Dillen the substance of the conversations he had with the two board members he contacted.

The other witnesses who testified said nothing that would justify imputing knowledge of the contents of the lawsuit to the District board. Rex Fortune, the superintendent of the District, testified he had seen a copy of the complaint at some point, but that he had nothing to do with the lawsuit nor had he informed the District board of its existence. This testimony is uncontradicted. Freeman, who initiated the lawsuit, testified he had not informed anyone on the District board or anyone else about the lawsuit. This part of Freeman's testimony is uncontradicted. Lynn Pineda, the lawyer for Freeman who prepared the suit and filed it, testified he informed no one in the District about the lawsuit. His testimony was uncontradicted.

In finding that an agency relationship existed, the ALJ emphasized that at some point the District board became aware that one of its employees filed a lawsuit and that the board thereafter failed to "distance itself" from or "deny" its involvement in it. Only if Freeman was holding himself out as an agent of the District in connection with the lawsuit, and the District was aware of that fact, would the District's silence be sufficient to confer ostensible authority. (See Waldteufel v. Sailor (1944) 62 Cal.App.2d 577, 581.) Notably, the third amended complaint contains the following language following the identification of the plaintiff Freeman as principal of IHS: "Plaintiff is not, however, and at no time herein has he ever been, given by IUSD the responsibility of representing IUSD in any labor dispute with any employee or an [sic] collective bargaining unit representing any employee of IUSD." Thus, at least by the third amended complaint, Freeman himself asserts a limitation on the scope of his authority.

Since we do not find that the Association proved that the District was involved in or had any knowledge of the filing of the lawsuit, we do not find that any duty arose on the part of the District to disavow the lawsuit. Once the unfair practice charge was filed and amended to allege an agency, the District had notice of the lawsuit. However, in its answer to the unfair practice complaint, the District denied any involvement in the superior court proceeding. That denial not only militates against a finding of ratification on the part of the school

board, but served the procedural function of casting the burden upon the Association to prove the existence of agency by a preponderance of the evidence.

In summary, there was a complete failure of proof by the Association on the issue of agency. The Association had the burden of proving and failed to prove that the District was actually involved in the lawsuit, that the teachers could reasonably believe the District was involved, or that the District had knowledge of and ratified the lawsuit. It did not meet its burden.

The facts that Freeman was the principal of the high school, that he was not getting along with the teachers or the Association, and that he filed a lawsuit against them are simply insufficient to support a finding of agency. The ALJ's conclusion that, because Freeman was principal of the high school, the teachers could reasonably assume the District was behind or in some way responsible for the lawsuit is untenable. The District did not have the burden of proving its non-involvement.

The dissent's approach to the agency question is internally inconsistent and its adaption of respondeat superior principles to the labor law context overly simplistic. As the dissent recognizes, both the Gluck and Gonzales opinions in the case of Antelope Valley draw on the traditional agency principles of apparent authority in looking to the reasonableness of the employee's perception of the employer's responsibility for the

agent's actions. Additionally, the private sector labor law cases and the Agricultural Labor Relations Board (ALRB)[9] cases cited by the dissent draw on traditional agency principles of apparent authority in imposing liability based on the acts of the employer and reasonableness of the employee's belief that the agent was acting or speaking on behalf of the employer. Having cited these cases with approval, the dissent then insists that the application of the doctrine of apparent authority is appropriate only in contract cases, and that the proper analysis should be under the tort doctrine of respondeat superior.

While the simplicity of application of the doctrine of respondeat superior to the labor law context is appealing, there are good reasons that the doctrine has not been applied in the past and for declining to apply it here. The rationale for application of the doctrine of respondeat superior was recently explained by the California Supreme Court as follows:

> "The principal justification for the application of the doctrine of respondent superior in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as a part of doing business." [citation] Although earlier authorities sought to justify the respondeat superior doctrine on such theories as "control" by the master of the servant, the master's "privilege" in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant or the masters "deep pocket" to pay for the loss,

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[9]Notably, the Agricultural Labor Relations Act (ALRA) contains language similar to the NLRA with respect to agency, and the ALRB is statutorily mandated to follow NLRB precedent. In contrast, PERB is not so mandated.

> "the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise are placed upon that enterprise itself as a cost of doing business . . ." John R. v. Oakland Unified School District 48 Cal.3d 438, 450.[10]

The facts of this case are unusual. Here, although the factual underpinnings of Freeman's lawsuit arise out of his employment, by his lawsuit he sought to vindicate purely personal interests based on theories of interference with contract, libel, slander, and conspiracy. No direct benefit would inure to the District by virtue of either Freeman's filing or winning of the lawsuit. The Association filed an unfair practice charge with PERB attempting to hold the District responsible for the filing of the lawsuit on an unfair practice charge theory, presumably seeking a cease and desist order against the District and damages consisting of the attorneys fees they incurred in defending Freeman's superior court action. In our view, unfair labor practice charges of this type are not within the normal range of risks for which costs can be spread and insurance sought. Thus, application of the respondeat superior doctrine is inappropriate.

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[10] In John R., the issue was whether the school district that employed a teacher could be held vicariously liable for the teacher's act of molesting a student under the doctrine of respondeat superior. The Court held that: ". . . the doctrine is not applicable in these circumstances and that while the school district may be liable if its own direct negligence is established, it cannot be held vicariously liable for its employee's torts." 48 Cal.3d at 441. See also Kimberly M. v. Los Angeles School District (1989) 215 Cal.App.3d 545.

Other Exceptions

The remainder of the District's exceptions can be dealt with summarily. The District argues that the ALJ's failure to exclude witnesses from the hearing room was prejudicial error, contending that the witnesses in the hearing room "picked up the cue" that they should testify that they thought that the District, and not Freeman in his individual capacity, was suing them. Since we find in favor of the District on the agency issue, we need not address whether the ALJ's failure to exclude witnesses from the hearing room was improper.

The District argues that PERB lacks jurisdiction to hear an unfair practice charge based on the lawsuit prior to resolution of the civil suit. Since we are dismissing that portion of the unfair practice charge based on the filing of the lawsuit, having found no agency, we need not decide this jurisdictional question.

The District also excepts to the ALJ's conclusion that there was a gap in the evidence as to the financing of the lawsuit, arguing that the testimony revealed that the District did not finance the lawsuit. Since we find insufficient evidence in the record to establish agency, we need not address this exception.

CONCLUSION

We conclude that the District retaliated against Combs and Bankhead for engaging in protected activity; thus, violating EERA section 3543.5, subdivision (a). We also find that the District

violated section 3543.5, subdivisions (a), (b) and (c) by changing the policies and procedures of removing coaches from their extra-duty assignments without first bargaining with the Association. As we do not find that Freeman was acting as an agent of the District in prosecuting the civil suit, we do not find that the District violated section 3543.5, subsection (a) based on the lawsuit. Since we do not find the District responsible for Freeman's prosecution of the lawsuit, we reverse the ALJ's award to the Association of the legal fees incurred in defending that suit and need not decide if PERB has the authority to award fees incurred in a collateral proceeding.

REMEDY

PERB is granted broad remedial powers under EERA in order to effectuate the purposes of the Act. Section 3541.5, subdivision (c) provides:

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

The Board is permitted "[t]o take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter." (Section 3541.3, subdivision (n).) Pursuant to these powers and duties, we issue the Order that follows.

ORDER

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

A. CEASE AND DESIST FROM:

1. Engaging in the following forms of conduct in response to employees' protected activities: removing unit members from their extra-duty assignments and threatening employees.

2. Changing the policies and procedures governing the removal of unit members from extra-duty coaching assignments without first bargaining over the proposed changes with the Inglewood Teachers Association (Association).

3. Interfering with the Association's right to represent unit members in their employment relations with the District.

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

1. Make whole Robert Bankhead and Vincent Combs by compensating them in a monetary amount equalling what each would have been entitled to had they coached the entire 1986-87 basketball season, plus interest thereon at ten (10) percent per annum.

2. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all

work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by an material.

3. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Camilli joined in this Decision. Member Craib's dissent begins on page 31.

Member Craib, concurring and dissenting: I agree with my colleagues that the Inglewood Unified School District (District) violated the Educational Employment Relations Act (EERA or Act) by retaliating against Vincent Combs and Robert Bankhead for engaging in protected activity and by unilaterally changing the policies and procedures for removing coaches from extra-duty assignments. However, I must dissent from their agency analysis and, hence, from their conclusion that the District did not violate EERA when its principal, Lawrence Freeman, instituted a lawsuit against selected teachers, the Inglewood Teachers Association (Association), and an Association staff person. Although the majority purports to adopt the agency analysis proposed by Public Employment Relations Board (PERB or Board) Member Gonzales in Antelope Valley Community College District (1979) PERB Decision No. 97 and, in the alternative, to apply California agency principles, it does neither. Furthermore, while initially the majority properly frames the issue as whether Freeman was acting within the scope of his employment when he filed the lawsuit, the analysis actually employed is inapposite. As discussed below, under either of the approaches suggested by Member Gonzales or Chairperson Gluck, or under traditional agency principles, Freeman was acting within the scope of his employment with the District at the time he filed the lawsuit; therefore, the District is responsible for his actions.

Although the majority discounts the significance of the facts relied upon by the administrative law judge (ALJ) in

reaching the conclusion that Freeman was acting with the apparent authority of the District, it does not refute those facts. As even the majority recounts the facts, we are presented with a District principal who filed a lawsuit after threatening employees that he would do so.[1] In the complaint that he filed with the court, Freeman identified himself as a District administrator and principal. The allegations in the complaint relate to activities which took place at Inglewood High School involving teachers, in their capacity as employees, and the Association, in its capacity as the exclusive representative. The conduct complained of was intrinsically related to the teachers' working conditions and union activities. Freeman attributed his damages to the following conduct: the distribution of a circular which alleged that Freeman had threatened teachers; a letter sent to the school board concerning safe working conditions; the filing of a charge with PERB; and finally, complaining about working conditions at Inglewood High School under Freeman's administration.

DISCUSSION

Antelope Valley Community College District, supra, PERB Decision No. 97 is the only case in which the Board has specifically addressed the issue of an employer's responsibility for unfair labor practices committed by supervisory or managerial

[1]The District was also charged with another unfair practice which arose out of Freeman's threat to file a lawsuit. The ALJ found that threat to be a violation. The District has not excepted to that determination and it has become final.

employees. Although Chairperson Gluck and Member Gonzales relied on seemingly different analyses, each found that the District was responsible for the unfair practice. (Id. at pp. 13-16, 32-35.) In Antelope Valley, both Gluck and Gonzales found that a group of employees, subsequently designated as managerial and supervisorial by the district's board of trustees, were acting with the apparent authority of the district when they interfered with an organizing effort by an employee organization. At issue was whether the organizing efforts by the managerial and supervisorial employees were authorized by the district. In concluding that those employees were acting with the apparent authority of the district, both Gluck and Gonzales relied on the following facts:[2]

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[2]Although Gonzales differed with Gluck on the appropriate law to apply to the facts presented, nowhere in his concurrence does he dispute the facts relied upon by Gluck. He states:

> Under the facts in this case, the District can reasonably be held responsible for the actions of its designated management and supervisory employees, and cannot now seek to insulate itself by claiming that it could not interfere with the supervisory employees' organizational activities. The District had notice of these actions and not only took no steps to disassociate itself from them but actively created an impression of support by responding favorably on proposals made by the designated employees on behalf of all classified employees.

(Antelope Valley Community College District, supra, PERB Decision No. 97, at p. 34; emphasis added.)

> (1) The spectrum of actions engaged in by the designees[3] which go well beyond the statutory right of self-organization afforded supervisory personnel; (2) The open and notorious manner in which those actions were taken; and (3) The fact that the District at no time, and particularly after the CSEA [California School Employees Association] charge was filed, did anything to disabuse the wide-spread impression among classified employees that the designees indeed spoke for the District, which it could have done either by withdrawing the designations, by publicly acknowledging that the status of the designees was in dispute and that as a consequence of that dispute their actions were not authorized or ratified by the District, or by expressly disassociating itself from those actions in any manner.

(Antelope Valley Community College District, supra, PERB Decision No. 97, at p. 14.)

The difference between Gluck and Gonzales' approaches to the agency determination arose over whether to directly adopt the agency analysis utilized by the National Labor Relations Board (NLRB). As discussed by the majority at page 16 in the present case, Gluck applied the NLRB reasoning because

> . . . to exclude principles of agency from interpretation of the EERA would not only ignore long-established principles of law, but open the door to permitting employers (school boards) to engage in unfair practices through the actions of their administrators and subordinates but escape liability through an artificially narrow interpretation of the word "employer".

(Id. at p. 12.) Gluck applied the prevailing test utilized by the NLRB: whether employees have just cause to believe that the

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[3]Gluck used the term "designees" to refer to the employees designated managerial and supervisorial by the district who participated in the unlawful organizing.

supervisor or manager is acting with the apparent authority of the employer.

This test arose from language used by the United States Supreme Court in interpreting the National Labor Relations Act (NLRA), prior to its amendment in 1947.[4] The court stated that

> [t]he employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior. We are dealing here not with private rights [citation] nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible. Thus where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.

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[4]In 1947, the definition of "employer" was amended to substitute "acting as an agent of the employer" for the previous language which defined employer to include persons "acting in the interest of an employer." (2 Morris, The Developing Labor Law, 2d Ed. p. 1445.) Section 2(13) of the NLRA was also added, which provides:

> [i]n determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(International Association of Machinists v. NLRB (1940) 311 U.S. 72 [7 LRRM 282, 286] (employer found to have unlawfully interfered with organizing when it lent support, through its employees, to one union over another); emphasis in original; cited with approval by Chairperson Gluck in Antelope Valley Community College District, supra, PERB Decision No. 97, at pp. 9-10.) Even though the agency provisions of the NLRA have been amended, the Supreme Court's reasoning continues to be relied upon by both the NLRB and the courts. (See e.g., Minnesota Boxed Meat (1987) 282 NLRB 1208, 1213.) In Minnesota Boxed Meat, the NLRB succinctly stated its position on agency:

> The critical issue is "whether, under all circumstances, the employees would reasonably believe that the nonsupervisory employee was reflecting company policy and speaking and acting for management."

(Id., quoting Community Cash Stores (1978) 238 NLRB 265; emphasis added.) The NLRB has also stated that

> . . . a principal is responsible for the acts of its agent done in furtherance of the principal's interest and within the scope of the agent's general authority, even though the principal may not have authorized the specific act in question. It is enough if the principal has empowered the agent to represent it in the general area in which the agent acted.

(Hampton Merchants Assn. (1965) 151 NLRB 1307, 1308.) In recent cases interpreting the NLRA, the courts have found that acts of a supervisor may be attributed to the employer "if the listening employee reasonably would be justified in believing that the supervisor was speaking for the employer." (Ballou Brick Co. v.

NLRB (1986) 798 F.2d 339 [123 LRRM 2121, 2127] (employer liable for low-ranking supervisor's anti-union remarks where it submitted no evidence to show why the employees should not have believed that the supervisor was acting on behalf of the employer); emphasis added.)[5]

Although the majority contend that the tests set forth by Gluck and Gonzales were markedly different, in fact, their differences were primarily semantic. While Gluck's test focused on the employees' just cause for believing that the agent was acting for the employer, Gonzales emphasized whether the employees reliance was reasonable. He stated:

> It is reasonable that under some circumstances employees may perceive their employer as responsible for such decisions and actions, regardless of whether the governing board itself is directly involved. Under other circumstances, such a perception may be unreasonable, and it may thus be inappropriate to attribute these actions to the employer. The question is in what situations should the employer be held responsible for acts by subordinates which are unlawful under section 3543.5.

(Antelope Valley Community College District, supra, PERB Decision No. 97, at p. 32; emphasis added.)[6] Thus, Gonzales' test is not

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[5]Some of the United States' courts of appeal take a slightly different approach and presume that when supervisors act, they act on behalf of their employer. The employer is then required to rebut that presumption by some means, e.g. by demonstrating sufficient repudiation. (See NLRB v. Big Three Industrial Gas & Equipment Co. (1978) 579 F.2d 304 [99 LRRM 2223, 2226] and cases cited therein.)

[6]Member Gonzales was concerned, at least in part, by the organizational rights of supervisors under EERA which do not have a counterpart in the NLRA. He found that the independent interests of supervisors and rank-and-file employees may cause

significantly different from that applied by the NLRB. The focus of both is on the reasonableness of the employees' belief that the employer is responsible for the actions.

The California Supreme Court has also had occasion to apply agency principles in the labor arena. In Vista Verde Farms v. Agricultural Labor Relations Board (ALRB) (1981) 29 Cal.3d 307, the California Court, applying United States Supreme Court precedent, held that, under the Agricultural Labor Relations Act (ALRA), agricultural labor contractors, hired and compensated by the employer, were agents of the employer, who remained liable for the unfair practices of those contractors.[7] The Court applied a test similar to that set forth in International Association of Machinists v. NLRB, supra, 7 LRRM at p. 286: if the employees had just cause to believe that the supervisors were acting on behalf of management, or if the employer has gained an illicit benefit from the misconduct and realistically has the ability either to prevent a repetition of such misconduct in the future or to alleviate the deleterious effect of such conduct on

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some infringement by supervisors on the rank and file which would not necessarily be attributable to the employer. Therefore, he declined to "apply a presumption that supervisors generally act and speak for the employer." (Antelope Valley Community College District, supra, PERB Decision No. 97, at p. 34.) That concern is not applicable in the case currently before the Board.

[7]The Court so held despite language in the ALRA that seems to particularly exclude labor contractors from the definition of employer. (See discussion in Vista Verde Farms v. ALRB, supra, 29 Cal.3d at 321-24.)

the employees' statutory rights. (Vista Verde Farms v. ALRB, supra, 29 Cal.3d at 322.)[8]

Although the ALRA contains language mirroring the NLRA on the issue of agency and requires the ALRB to follow NLRB precedent, we must recognize that authority. The majority has not adequately explained why the Board should not be bound by either the approaches taken in Antelope Valley or NLRB precedent. I would find that, under either approach, the District is responsible for Freeman's actions because the Association and its affected members reasonably believed that the District was responsible. First of all, and most significantly, as principal, Freeman was the agent of the District. Secondly, all of the complained-of conduct arose out of the employment relationship. Finally, the District, by circulating the complaint to the

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[8]The Court recognized that an employer should not be bound in all instances, i.e., it is not "strictly liable" for the acts of its agents. The court stated that

> in exceptional circumstances an employer may be able to escape responsibility for misconduct of a labor contractor, just as it may occasionally escape responsibility for improper acts of a supervisor. [Citations.] Thus, for example, if an employer publicly repudiates improper conduct and takes action to reprimand the labor contractor and to insure that the conduct does not coerce or intimidate employees, the ALRB may find the employer not guilty of an unfair labor practice.

(Vista Verde Farms v. ALRB, supra, 29 Cal.3d at 328; see also, J.R. Norton Co. v. ALRB (1984) 162 Cal.App.3d 692, 696-99; Superior Farming Co. v. ALRB (1984) 151 Cal.App.3d 100, 122-23.)

teachers through its internal mail system, led the recipients to believe that the District authorized the actions.

Assuming, arguendo, that traditional labor law agency principles are inappropriate, we must then look to California agency principles to decide this case. While the majority attempts to apply California agency principles to the facts of the case, its disjointed agency analysis contains a discussion of a variety of agency principles, none of which are appropriate.

The majority contends that it bases its conclusion that Freeman was not acting within the scope of his employment on the Association's failure to satisfy its burden of proof. I, of course, agree that, pursuant to PERB Regulation 32178,[9] the burden of proving a case is on the charging party. However, retaining the ultimate burden of proving a case does not prohibit the burden from shifting after a threshold level has been met. The Board routinely applies this approach in discrimination cases. (See e.g., Novato Unified School District (1982) PERB Decision No. 210.) Thus, despite the majority's contention to the contrary, the ALJ did not improperly shift the burden to the District after the Association made the initial showing required under Antelope Valley and NLRB precedent. Furthermore, the majority does not restrict its analysis to the burden of proof required under Member Gonzales' agency analysis. Instead, the

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[9]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. For complete text of Regulation 32178 see majority opinion at page 19.

majority applies agency law which developed in the area of contracts.

The majority requires that the Association prove the District represented that the agency existed, that the Association relied on that representation, and changed its position as a result of that reliance. These requirements are misplaced. Such requirements are appropriate in cases where the aggrieved party seeks to enforce a contract, made by an agent, with the principal. Here, the Association did not engage in negotiations with Freeman, such that it would rely in advance on his or the District's representation of agency. A discussion of the Association's reasonable reliance is inappropriate under the facts of this case. There was no reason for, or opportunity to "rely" on, any representation of agency. Freeman, after threatening to do so, filed a lawsuit.

The only authority cited by the majority arose out of a contract-type situation. (Yanchor v. Kagan (1971) 22 Cal.App.3d 544.) Yanchor is a case where an attorney executed an agreement, on behalf of his client, with a defendant. That agreement provided that his client, the plaintiff, would not execute any judgment obtained against that defendant. When the client later sought to execute the judgment against that defendant, who had not put on a defense because of the agreement, the defendant, relying upon the agreement, moved for an order to enter satisfaction of the judgment. The trial court granted the motion and the appellate court affirmed. The appellate court, relying

on California Civil Code section 2334,[10] reasoned that, although the attorney did not have expressed or implied authority to enter into the agreement, he did have ostensible authority to do so. The court found that the defendant's declaration adequately asserted all of the facts necessary to prove estoppel, to which the court analogized. It resolved contradictions in favor of the defendant, assuming that the trial court had done so in reaching its conclusion. (Yangor v. Kagan, supra, 22 Cal.App.3d at 548-551.)

The case currently before the Board is not analogous to that presented to the court in Yangor because the Association did not enter into a contract with Freeman which it sought to enforce with the District.[11] Rather, the instant case is akin to holding a principal responsible for the wrongful acts of its agents, e.g. its agent's torts. The proper analysis requires the application

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[10]Civil Code section 2334 provides:

> A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.

[11]Nor is this case analogous to Harris v. San Diego Flume Co. (1891) 87 Cal. 526, the only other authority relied upon by the majority for its assumed authority analysis. In Harris, the plaintiff sought to recover $5,000 as a brokerage fee for negotiating a contract. The question addressed by the court was the authority of the person who hired the plaintiff. The court concluded that the plaintiff failed to prove that he relied on any representations made by the principal sought to be charged. Like the situation in Yangor, this case involved a contract to which a party sought to bind the principal.

of principles of respondeat superior, not the contract principles relied on by the majority.

As the majority acknowledges, as chief administrator of Inglewood High School, Freeman is the actual agent of the District. Actual agency exists "when the agent is really employed by the principal." (Civil Code sec. 2299.) Generally, a principal is bound by,[12] and liable for, the acts of his agent within the scope of his authority, since such acts are considered to be the acts of the principal. (2 Witkin, Summary of California Law, Agency, at pp. 78-79; see also 3 Cal.Jur.3d, Agency, at p. 170.) Thus, the appropriate inquiry is whether Freeman was acting within the scope of his employment when he filed the lawsuit.

Civil Code section 2338 discusses the principal's liability for acts of its agent. Under section 2338,

> a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business . . . .

This is California's codification of the common law principle of respondeat superior. Under the doctrine of respondeat superior, a principal is responsible to a third person for wrongful acts committed by his agent in and as a part of the business of the

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[12]The cases which discuss the prima facie requirements and appropriate burdens of proof for actual and ostensible authority deal primarily with binding the principal for the acts of the agent, i.e., for contracts signed by the agent. Those cases do not discuss imposing liability on the principal for the acts of an agent.

agency, even if the employee acts in excess of his or her authority or contrary to instructions; such conduct is not inconsistent with a finding that the employee is acting within the scope of his employment. (Foss v. Anthony Industries (1983) 139 Cal.App.3d 794, 802; Alhino v. Starr (1980) 112 Cal.App.3d 158, 174; Clark Equipment Co. v. Wheat (1979) 92 Cal.App.3d 503, 520-21; 2 Witkin, Summary of California Law, Agency, at p. 109; see also Restatement 2d, Agency, secs. 219, 243 et seq.) If a duty of the employer is violated by an employee, the employer is liable the same as though he or she were guilty of the breach. (Transcontinental & Western Air v. Bank of America (1941) 46 Cal.App.2d 708, 713.) The act of the agent may be within the scope of his or her authority even though it is malicious or intentional. (Clark Equipment Co. v. Wheat, supra, 92 Cal.App.3d 503, 520.) The courts have interpreted this section to include both negligent and intentional acts of agents. (Id. at p. 520-521.)[13] The test for whether an employee was acting within the scope of his or her employment is whether the employee was engaged in some act or execution of some purpose which, while not within the actual duties of his or her employment, was an incident of his or her duties as an employee. (Curcic v. Nelson Display Co. (1937) 19 Cal.App.2d 46, 54.)

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[13]Courts have found employers liable for even felonious acts committed by their employees acting within the scope of their employment. (See, e.g., Transcontinental & Western Air v. Bank of America, supra, 46 Cal.App.2d at p. 713.)

The courts have justified respondeat superior by reasoning that the losses caused by the torts of employees, which are undoubtedly likely to occur, should be borne by the employer as a required cost of doing business. (Hinman v. Westinghouse Electric Co. (1970) 2 Cal.3d 956, 959-60.) The theoretical underpinnings and scope of respondeat superior were thoroughly reviewed by the California Court of Appeal in a case involving intentional fraud. (Rodgers v. Kemper Construction Co. (1975) 50 Cal.App.3d 608, 618-619.) There the court stated:

> The doctrine, which departs from the normal tort principle that liability follows fault, is an ancient one but its scope and stated rationale have varied widely from period to period. [Citations.] It has been aptly stated that "Respondeat superior has long been a rule in search of a guiding rationale." [Citation.]
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> . . . In some respects this rationale is akin to that underlying the modern doctrine of strict tort liability for defective products. [Citations.] . . . It is grounded upon "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities." [Citations.]
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> One way to determine whether a risk is inherent in, or created by, an enterprise is to ask whether the actual occurrence was a generally foreseeable consequence of the activity. However, "foreseeability" in this context must be distinguished from "foreseeability" as a test for negligence. In the latter sense "foreseeable" means a level of probability which would lead a prudent person to take effective precautions whereas "foreseeability" as a test for respondeat superior merely means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to

> include the loss resulting from it among other costs of the employer's business. [Citations.] In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer. [Citations.]
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> . . . [T]he test for determining whether an employer is vicariously liable for the tortious conduct of his employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of or in the course of employment. [Citation.] This must necessarily be so because the theoretical basis for placing the loss on the employer in both the tort and workers' compensation fields is the allocation of the economic cost of an injury resulting from a risk incident to the enterprise. [Citations.]

(Id.; emphasis in original; see also Witkin, Summary of California Law, Agency, at p. 110.)

Relying on these guidelines, California courts have found employers liable for the following employee conduct: fraud (Gift v. Ahrnke (1951) 107 Cal.App.2d 614, 621-22); assault (Rodgers v. Kemper Construction Co., supra, 50 Cal.App.3d 608, 621); libel (Draper v. Hellman Commercial Trust and Savings Bank (1928) 203 Cal. 26). The Restatement of Agency holds an employer liable for malicious prosecution. It states:

> A master is subject to liability for the tortious institution or conduct of legal proceedings by a servant acting within the scope of employment.

(Restatement of the Law 2d, Agency, sec. 246, at p. 543 (1958).)[14]

Applying the doctrine of respondeat superior, as codified in Civil Code section 2338, the District is responsible for Freeman's filing of the lawsuit. Freeman's conduct is most analogous to the commission of a tort. While one may not feel that it is "fair" to hold an employer responsible for unauthorized tortious conduct, the courts have done just that. In the seminal case of Rodgers v. Kemper Construction Co., supra, 50 Cal.App.3d 608, the court held an employer responsible for an assault committed by one of its employers. The court stated

> the test applied [to hold an employer liable for assault] is virtually identical to that used for an employee's negligent torts. If the assault was motivated by personal malice not engendered by the employment, the employer is not vicariously liable; but otherwise, liability may be found if the injury results from "a dispute arising out of the employment." [Citation.]

(Id. at p. 621; see also Carr v. Wm. C. Crowell Co. (1946) 28 Cal.2d 652, 654.) Thus, if Freeman had assaulted teachers in a dispute arising out of their employment, the District would have

[14]Comment (b) to section 246, sets forth the analysis necessary to hold an employer liable:

> In order to cause the master to be civilly responsible for the conduct, the act must, of course, constitute a tort. Thus, in malicious prosecution, the prosecutor must have acted for a purpose other than that of promoting justice. This fact does not prevent the master from being liable, although he has authorized only conduct actuated by lawful motives. If, however, the servant, although purporting to act for him has no purpose of serving the purposes of the master or of acting on account of his business, the master is not liable.

been responsible. Likewise, the District is responsible for Freeman's unlawful prosecution of a lawsuit, which arose out of the employment. Nothing in the record suggests that Freeman harbored any personal malice against any of the teachers for their activities outside the employment arena. The evidence all suggests that Freeman filed his lawsuit against the teachers and the Association for employment-related activities which arose because of his position as principal of Inglewood High School. While the District prefers to distance itself from Freeman's conduct, it is nevertheless liable under Civil Code section 2338.[15]

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[15]Relying on a recent ruling by the California Supreme Court (John R. v. Oakland Unified School District (1989) 48 Cal.3d 438), the majority contends that an employer should not be vicariously liable for its employees' torts. (Majority opinion at pp. 25-26 and fn. 10.) The facts of John R. are markedly different from those presented the Board in this case. There, a school teacher lured a student to his home on the pretense of school work and then proceeded to sexually molest him. (John R. v. Oakland Unified School District, supra, 48 Cal.3d at 442-43.) The court in no way altered the law of respondeat superior which I have cited, nor expressed any disapproval of those cases which have held employers responsible for the torts of their employees. Quoting Rodgers v. Kemper Construction Co., supra, 50 Cal.App.3d 608, 619, the court in John R. stated:

> we think the teacher's acts here can only be characterized as "so unusual or startling" [citation] that vicarious liability cannot fairly be imposed on the district.

(John R. v. Oakland Unified School District, supra, 48 Cal.3d at fn. 9.)

The filing of a lawsuit over matters arising out of the employment relationship in no way compares nor is "so unusual or startling" as a teacher sexually molesting a student.

The majority contends that Freeman's lawsuit sought to vindicate purely personal interests and no direct benefit would inure to the District by filing or winning the lawsuit. (Majority opinion at p. 26.) The District benefits from this unfair labor practice in the same way it would benefit from any other unfair practice. Employee and employee organization rights which are expressly protected by EERA are violated. That violation has a chilling effect on any future exercise of protected activity. Here, the conduct complained of by Freeman, in his lawsuit, was conduct protected under the Act. The Association had to expend significant time and money to defend against this lawsuit. The District directly benefits from the burden imposed on the Association and its members because the Association and its members may not again engage in such protected activity without the risk of being sued by a District employee.

The majority also contends that the Association did not meet its burden of proving that Freeman was the agent of the District at the time he filed the lawsuit. The burden of proof in cases involving respondeat superior differs from that suggested by the majority. Initially, the plaintiff must establish that an employer-employee relationship existed at the time of the wrongful act and that the act was done within the scope of employment. (Adams v. American President Lines (1944) 23 Cal.2d 681, 688); see also Largey v. Intrastate Radiotelephone, Inc. (1982) 136 Cal.App.3d 660, 665, 29 Cal Jur 3d (Rev) sec. 122, at

pp. 785-86.) The plaintiff or injured party can meet that burden by introducing evidence from which the trier of fact can reasonably infer that the wrongdoer was acting within the scope of his or her employment. (Adams v. American President Lines, supra, 23 Cal.2d at 688.) The plaintiff is not required to negate any anticipated defense. (Id.) The burden then shifts to the employer to introduce evidence that the conduct was outside the scope of employment. (Id.) The employer's failure to produce evidence as to the terms of the relationship may justify an adverse inference. (Id.)

The Association introduced evidence that Freeman was an employee of the District. It also introduced evidence that the conduct complained of by Freeman all arose out of the employment relationship. Freeman had threatened to file the lawsuit while on campus, during school hours. Freeman identified himself as a District administrator in the complaint. The District circulated Freeman's complaint through its internal mail system, in envelopes which bore the District's personnel office's return address. Furthermore, despite the evidence that at least two of the District's board of trustees knew of the lawsuit, the District never repudiated Freeman's action, prior to the filing of the charge before PERB.[16]

Thus, since the Association provided evidence that Freeman was an employee of the District and presented evidence that his

[16]The majority makes much of the fact that the District denied participation in its answer to the PERB charge (see majority opinion at pp. 11, 20 at fn. 8), however, that answer is no evidence at all as to repudiation because it is not only untimely but is also not verified.

actions arose during the scope of his employment (the allegations in the complaint), the burden shifted to the District to introduce evidence that the conduct was outside the scope of employment. It failed to do so.

Since the Association has met its burden of proving that Freeman was acting within the scope of his employment under either traditional labor law principles of agency or under appropriate principles of California agency law, I would find that the District is responsible for Freeman's actions. It is an unfair labor practice to file a lawsuit without a reasonable basis for the purpose of retaliating against the exercise of protected activity. (Bill Johnson's Restaurants v. NLRB (1983) 461 U.S. 731 [113 LRRM 2647]; Rim of the World Unified School District (1986) PERB Decision No. Ad-162.[17]) Thus, by filing and prosecuting a lawsuit which lacked a reasonable basis, the District violated section 3543.5, subdivisions (a) and (b) of the Act. The District should therefore be ordered to cease and desist from such activity and to reimburse the Association and its members for the costs of defending against the lawsuit. (See Bill Johnson's Restaurants v. NLRB, supra, 113 LRRM at p. 2654.)

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[17]Bill Johnson's and Rim of the World each specifically addressed when, and if, a labor board must stay its proceedings in order to allow a state court claim to go forward. The Bill Johnson's court held that "although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis." (Bill Johnson's Restaurant v. NLRB, supra, 113 LRRM at 2655.)

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. LA-CE-2503, Inglewood Teachers Association v. Inglewood Unified School District, in which all parties had the right to participate, it has been found that the Inglewood Unified School District (District) violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (Act) by:

1. The conduct and statements of Principal Lawrence Freeman in removing Robert Bankhead and Vincent Combs from their coaching assignments.

2. Threatening, through Freeman, to take legal action against Eunice Curry and other employees.

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

A. CEASE AND DESIST FROM:

1. Engaging in the following forms of conduct in response to employees' protected activities: removing unit members from their extra-duty assignments and threatening employees.

2. Changing the policies and procedures governing the removal of unit members from extra-duty coaching assignments without first bargaining over the proposed changes with the Inglewood Teachers Association (Association).

3. Interfering with the Association's right to represent unit members in their employment relations with the District.

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

1. Make whole Robert Bankhead and Vincent Combs by compensating them in a monetary amount equalling what each would have been entitled to had they coached the entire 1986-87 basketball season, plus interest thereon at ten (10) percent per annum.

DATED: INGLEWOOD UNIFIED SCHOOL DISTRICT

By_____
Authorized Representative

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.