

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ALISAL TEACHERS ASSOCIATION,)
CTA/NEA,)
)
Charging Party,) Case No. SF-CE-1901
)
v.) PERB Decision No. 1248
)
ALISAL UNION ELEMENTARY SCHOOL)
DISTRICT,) January 28, 1998
)
Respondent.)
_____)

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Alisal Teachers Association, CTA/NEA; Lozano, Smith, Smith, Woliver & Behrens by Steven D. Mond, Attorney, for Alisal Union Elementary School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Alisal Union Elementary School District (District) and the Alisal Teachers Association, CTA/NEA (Association) to a Board administrative law judge's (ALJ) proposed decision (attached). In the proposed decision, the ALJ held that the District interfered with protected employee rights when it placed a disciplinary memorandum dated May 31, 1996, in Donna Leonard's (Leonard) personnel file. The ALJ found that the District's action violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).¹

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in relevant

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, and the Association and District's exceptions and responses to exceptions.² The Board finds the ALJ's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself, consistent with the following discussion.

FACTUAL SUMMARY

Although the ALJ's findings of fact are complete and free from prejudicial error, we find it appropriate to summarize the more salient of the ALJ's factual findings.

Leonard is a long term employee of the District. She has served as Association president and has been a party to a number of grievances and unfair practice charges against the District. In January of 1995, the District issued Leonard a memorandum of warning for acting in an unprofessional and disruptive manner

part:

It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

²The District's request for oral argument was denied on January 26, 1998.

during a confrontation with employees in the District's business office. The District placed a copy of the memorandum of warning in Leonard's personnel file and provided Leonard an opportunity to file a response.³ Leonard responded on January 25, 1995.

In April of 1996, Leonard requested, and was granted, an opportunity to file a second response to the memorandum of warning. This second response criticized the District's investigation of the business office incident and contended that the January, 1995 memorandum of warning was completely without merit. The District agreed to place Leonard's April 1996 response in her personnel file.

On May 31, 1996, Robert Mayfield (Mayfield), the District's director of personnel, answered Leonard's April 1996 response with a lengthy disciplinary memorandum chastising Leonard for her history of discourteous conduct and cited Leonard's April

³California Education Code section 44031 provides, in relevant part:

(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.

(d) Information of a derogatory nature, except material mentioned in subdivision (b), shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any derogatory statement, his own comments thereon. The review shall take place during normal business hours, and the employee shall be released from duty for this purpose without salary reduction.

response as evidence of her failure to recognize her misconduct or to mend her ways. Mayfield indicated that continuing this sort of conduct could lead to "more serious disciplinary action." Mayfield closed by noting that the disciplinary memorandum would be placed in Leonard's personnel file and informed Leonard that she had the right to respond. It is the May 31, 1996 disciplinary memorandum, not the January, 1995 memorandum of warning, that is the subject of the charge and complaint in this case.

DISCUSSION

We concur with the ALJ's conclusion that the May 31, 1996 disciplinary memorandum unlawfully interfered with employees' protected rights. In addition, we find that the disciplinary memorandum constituted unlawful discrimination against Leonard because of her exercise of protected rights.

In order to state a prima facie case for discrimination or reprisal, a charging party must show that: (1) the employee engaged in protected activity; (2) the employer had knowledge of that protected activity; and (3) the employer took adverse action against the employee because of that protected activity.

(Healdsburg Union High School District (1997) PERB Decision No. 1185, proposed dec. at p. 46 (Healdsburg); Novato Unified School District (1982) PERB Decision No. 210 at p. 6 (Novato).) The employer may, of course, rebut this inference through evidence showing that it would have taken the complained of action despite the employee's protected conduct. (Healdsburg,

proposed dec. at p. 47; Scotts Valley Union Elementary School District (1994) PERB Decision No. 1052 at pp. 4-5.)

Here, the Board finds that Leonard's April 1996 response to the District was an exercise of her right to represent herself individually in her employment relations with her employer.

(EERA sec. 3543.)⁴ Further, there is no dispute that the District knew of Leonard's April 1996 letter. Finally, the Board finds that Mayfield's May 31 disciplinary memorandum constituted adverse action under EERA section 3543.5(a). (See San Diego Unified School District (1980) PERB Decision No. 137 at p. 18 [noting that letters of commendation placed in non-strikers personnel files constituted harm to strikers]; see State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S at p. 14 [finding that written reprimand circulated to employee's superiors was adverse despite the fact that it was not placed in employee's personnel file].)

That leaves only the question of motive. This case presents an unfortunate situation wherein both parties bear some blame. However, the EERA does not empower the Board to right every

⁴EERA section 3543 provides, in relevant part:

Public school employees . . . shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

wrongful act. Here, the District had every right to make a measured response to Leonard's April 1996 letter. The District had no right, however, to escalate the conflict from disagreement to discipline. Although the District retains the right to discipline even the most active union members and officers for their misconduct in spite of the protected activity, the District may not discipline even the least active of its employees because they engaged in protected activity.

As both the ALJ and the dissent point out, direct evidence of unlawful motivation is rare. Accordingly, the Board ordinarily relies on circumstantial evidence to determine whether there is a sufficient connection between the employee's protected activity and the District's decision to impose adverse action.

(See, e.g., Novato at p. 7; cf., Yolo County Superintendent of Schools (1990) PERB Decision No. 838 at pp. 7-8 [finding direct evidence of anti-union animus vitiated need for circumstantial evidence].) Here, however, Mayfield issued the May 31 disciplinary memorandum, "in response to [Leonard's] letter, dated April 26, 1996." Because Mayfield issued the disciplinary memorandum as a direct response to Leonard's protected activity, we find it unnecessary to resort to circumstantial evidence to establish the requisite nexus between the two.

We note that the District has failed to provide evidence demonstrating that it would have issued the disciplinary memorandum to Leonard had she not engaged in protected activity. Accordingly, we find that the District violated EERA section

3543.5(a) and (b) when it issued the May 31, 1996 disciplinary memorandum to Leonard.

ORDER

Based on the findings of fact, conclusions of law, and the entire record in this case, it is found that the Alisal Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b) when it issued the May 31, 1996 disciplinary memorandum to Donna Leonard (Leonard).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM

1. Issuing a May 31, 1996, rebuttal to a letter submitted by Leonard in response to a previously received memorandum of warning.

2. Denying to the Alisal Teachers Association, CTA/NEA (Association) the right to represent its members.

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

1. Rescind and destroy all copies of the May 31, 1996, letter from Robert Mayfield to Leonard.

2. Delete from Leonard's personnel file any reference to the May 31, 1996, letter.

3. Within thirty-five (35) days following the date that this decision is no longer subject to reconsideration, post at all work sites where notices are customarily placed for

certificated employees, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

4. Written notice of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Member Johnson joined in this Decision.

Chairman Caffrey's dissent begins on page 9.

CAFFREY, Chairman, dissenting: The Alisal Union Elementary-School District (District) did not violate section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) when it issued a May 31, 1996, rebuttal to a letter submitted by Donna Leonard (Leonard) in response to a memorandum of warning she received from the District.

DISCUSSION

In order to establish that an employer has engaged in unlawful retaliation or discrimination in violation of EERA section 3543.5, the charging party must demonstrate that the employee engaged in protected activity; the employer was aware of that activity; the employer took action adverse to the employee; and the employer's conduct was motivated by the employee's protected conduct. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

The record in this case reveals that Leonard served as president of the Alisal Teachers Association, CTA/NEA (Association) in 1993-94. Leonard was given a memorandum of warning by the District on January 13, 1995, for unprofessional and disruptive conduct on December 9, 1994, in the District's business office. Leonard responded to the memorandum of warning on January 25, 1995, and included the assertion that it was issued because of a pending grievance filed by the Association. On February 17, 1995, the Association filed an unfair practice charge alleging that the District's memorandum of warning constituted unlawful retaliation.

After several days of formal PERB hearing, the Association and the District on February 27, 1996, discussed settlement of the unfair practice charge. The charge was not settled, but the Association withdrew the charge and indicated that Leonard would submit an additional response to the January 13, 1995, memorandum of warning. The District agreed that Leonard had the right to submit the additional response.

On April 26, 1996, Leonard submitted a letter listing as its subject the withdrawn PERB unfair practice charge. The document is a seven-page "additional response" to the January 13, 1995, memorandum of warning. The letter makes extensive reference to the PERB formal hearing and indicates that the Association's withdrawal of the unfair practice charge should not be interpreted as an admission that Leonard acted in an unprofessional or improper manner during the December 9, 1994, District business office incident. Leonard's April 26, 1996, letter asserts that the memorandum of warning contains gross exaggerations and inaccuracies.

On May 31, 1996, the District sent Leonard an eight-page letter responding to her April 26 letter. The District rebuts the assertions included in Leonard's April 26 letter and chastises her for failing to acknowledge the problem with her conduct. The District informs Leonard that if her objectionable conduct recurs "more serious disciplinary action" could result, and indicates that the May 31, 1996, letter would be placed in Leonard's personnel file.

On July 19, 1996, the Association filed the instant unfair practice charge alleging that the District's May 31, 1996, letter constitutes unlawful discrimination against Leonard and interference with her EERA-protected rights. A PERB administrative law judge (ALJ) dismissed the discrimination allegation but found that the District interfered with Leonard's protected rights in violation of EERA section 3543.5(a) and (b).

After reviewing the District's appeal of the ALJ's decision, the majority concludes that the District unlawfully interfered with EERA-protected rights, and unlawfully discriminated against Leonard for her exercise of protected activity. While commenting that this case "presents an unfortunate situation wherein both parties bear some blame" and finding that the District "had every right to make a measured response to Leonard's April 1996 letter," the majority concludes:

The District had no right, however, to escalate the conflict from disagreement to discipline.

I disagree with the majority's conclusion.

Applying the Novato test to the circumstances of this case, the specific protected activity on which the unlawful discrimination allegation is based is Leonard's filing of the April 26, 1996, additional response to the memorandum of warning she received on January 13, 1995. It is undisputed that the District was aware of this conduct.

The District asserts that its May 31, 1996, rebuttal letter does not represent additional discipline or adverse action

against Leonard, but a continuation of the discipline process resulting from the December 9, 1994, incident. While the District's letter includes a reiteration of the concerns with Leonard's conduct, it also includes an admonition concerning possible future discipline and was placed in Leonard's personnel file. As was noted in Palo Verde Unified School District (1988) PERB Decision No. 689, the question of whether an employer took action adverse to an employee may be inseparable from the question of the employer's motivation for its conduct. (Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enforced (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]; NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857], revd. (1st Cir. 1982) 674 F.2d 130 [109 LRRM 3291].) That is the situation in this case which turns on the question of whether the District's action was motivated by Leonard's protected activity. If it was, the District's action was unlawful. If the District's action was not motivated by Leonard's protected activity, it was not unlawful even though it may have been adverse to Leonard.

As stated by the majority, an employer may take adverse action against an employee engaged in protected activity, but may not do so because the employee engaged in protected activity. While acknowledging this policy, the majority ignores it and fails to offer a specific analysis to support its conclusion that the District's motivation was unlawful. Instead, the majority considers the fact that the District's conduct was in response to a letter Leonard had the right to submit, sufficient to satisfy

the unlawful motivation element of the Novato standard. However, it is settled law that participation in protected activity does not insulate or immunize an employee against employment decisions made by the employer, including adverse actions. (Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 730-731 [175 Cal.Rptr. 626].) Therefore, the fact that the District's May 31, 1996, letter was in response to Leonard's April 26, 1996, letter does not, ipso facto, lead to the conclusion that the District was unlawfully motivated. The Board must fully apply the Novato standard to determine whether the District's action was motivated by Leonard's exercise of protected conduct.

An examination of Leonard's April 26, 1996, letter reveals that it was prepared by the Association's legal counsel. The letter makes extensive reference to the PERB proceeding relative to the withdrawn unfair practice charge. Leonard asserts that the District's memorandum of warning "contains gross exaggerations and inaccuracies." She also alleges that the District violated both a witness sequestration order during the PERB proceeding, and the terms of the settlement agreement in a previous unfair practice charge.¹

Not surprisingly, the District turned to its legal counsel to draft a rebuttal to Leonard's letter. The result is the

¹I note that the "escalation" of the conflict in this case, which is of concern to the majority, appears to have been initiated by Leonard with the introduction of allegations of District misconduct not directly related to the December 9, 1994, incident or District memorandum of warning.

eight-page May 31, 1996, letter which rebuts every assertion included in Leonard's letter, reiterates the District's concerns with Leonard's conduct, and warns her about further discipline if that conduct recurs.

The majority does not dispute that the District had the right to respond to Leonard's letter. Principles of personnel management may suggest that a somewhat more "measured response" from the District, in the words of the majority, would have been more appropriate. But PERB has declined to function as the evaluator of management practices, concluding that the fact that personnel practices have not been exemplary is insufficient to raise the inference that protected activity motivated the employer's action. (San Diego Unified School District (1991) PERB Decision No. 885.) Therefore, the adversarial nature of the District's response is not sufficient to support a finding that it was unlawfully motivated.

The ALJ applied the Novato standard and determined that there was insufficient evidence to support the conclusion that discrimination against Leonard for her exercise of protected conduct was the motive for the District's action. Direct proof of unlawful motivation is not often present. The Board reviews the record as a whole to determine if the inference of unlawful motive should be drawn. Factors that may support such an inference are the timing of the employer's adverse action in relation to the employee's protected conduct; disparate treatment of employees engaged in protected activities; the employer's

departure from established procedures; the employer's inconsistent or shifting justification for the conduct; and the employer's failure to investigate charges of improper activity before imposing a penalty against an employee engaged in protected conduct. (Novato: Riverside Unified School District (1987) PERB Decision No. 639.)

Timing cannot be a significant factor in this case since the District's letter, as a response to Leonard's letter, of necessity was issued in close temporal proximity. As noted by the ALJ, there is no evidence of disparate treatment of Leonard, inconsistent explanations by the District, departure from established procedures, or other indicators of unlawful motivation under Novato. On the contrary, the record reveals that the District acknowledged Leonard's right to file the additional response. Further, there is no assertion that Leonard's first response to the memorandum of warning, which she submitted on January 25, 1995, prompted any response from the District, adverse or otherwise. The evidence presented by the Association does not support the inference that the District's conduct was unlawfully motivated.

The totality of the record leads to the conclusion that the District was motivated, not by Leonard's exercise of her protected right to submit an additional response to the memorandum of warning, but by the desire to respond to the detailed and extensive arguments and allegations included in Leonard's letter. It was not Leonard's exercise of the right to

submit the letter which motivated the District, it was the assertions and allegations included within the letter which prompted the District to issue an aggressive rebuttal. While it can be debated whether the District could have chosen a more appropriate method of responding to Leonard's allegations, that debate does not lead to the conclusion that the District's conduct was unlawfully motivated.

In summary, because it has not been demonstrated that discrimination or retaliation against Leonard for her exercise of protected activity was the motivation for the District's action, the District did not violate EERA section 3543.5(a) and (b) when it issued the May 31, 1996, rebuttal letter.

Turning to the Association's interference allegation, the Board in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad) established its standard for considering charges that the employer's conduct interfered with protected rights. Under Carlsbad, the charging party must show that the employer's conduct tends to or does result in harm to protected employee rights. If the harm is slight and the employer's conduct is justified based on operational necessity, the competing interests of the employer and employee are balanced to resolve the charge. If the harm is inherently destructive of protected employee rights, the employer's conduct is excused only by showing that it resulted from circumstances beyond the employer's control and no alternative course of action was

available. Proof of unlawful employer motivation is not required in interference cases. (Novato.)

Applying this standard, the ALJ concluded that the District's May 31, 1996, letter harmed protected rights by causing a chilling effect on the submission by employees of responses to negative personnel memoranda. The ALJ found no significant business justification for the District's action and, therefore, concluded that the District unlawfully interfered with protected employee rights in violation of EERA section 3543.5(a) and (b). The majority concurs in this finding without comment. I disagree.

In my view, there has been no showing of harm to employee protected rights by the Association. The "chilling effect" found by the ALJ is speculative and conjectural. As noted by the ALJ, there is no evidence that the District has ever, previously or subsequently, issued any other rebuttal to an employee's response to a memorandum of warning. The record indicates that Leonard's first response to the memorandum of warning did not elicit a response from the District. Additionally, the District acknowledges the right of employees to submit a response, including a second response, to a District memorandum of warning. I find no evidence to suggest that any employee has actually been dissuaded or discouraged from responding to a negative personnel memorandum as a result of the District's May 31, 1996, letter. With regard to Leonard, it is clear that she has not been dissuaded by the District's conduct from pursuing other protected

rights, including the right to file an unfair practice charge alleging that the District acted unlawfully.

Since the Association has not established that the District's conduct harmed or tended to harm protected employee rights, the Carlsbad test has not been met and the District's action did not interfere with protected rights in violation of EERA section 3543.5(a) and (b).

The unfair practice charge and complaint in Case No. SF-CE-1901 should be dismissed in their entirety.



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. SF-CE-1901, Alisal Teachers Association, CTA/NEA v. Alisal Union Elementary School District, in which all parties had the right to participate, it has been found that the Alisal Union Elementary School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b) when it issued a May 31, 1996 disciplinary memorandum to Donna Leonard (Leonard).

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

A. CEASE AND DESIST FROM

1. Issuing a May 31, 1996, rebuttal to a letter submitted by Leonard in response to a previously received memorandum of warning.

2. Denying to the Alisal Teachers Association, CTA/NEA the right to represent its members.

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

1. Rescind and destroy all copies of the May 31, 1996, letter from Robert Mayfield to Leonard.

2. Delete from Leonard's personnel file any reference to the May 31, 1996, letter.

Dated: _____ ALISAL UNION ELEMENTARY SCHOOL
DISTRICT

By: _____
Authorized Agent

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

On September 16, 1996, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint against the District alleging violations of the same subdivisions of section 3543.5. On September 25, 1996, the District answered the complaint, denying all material allegations and asserting affirmative defenses.

A formal hearing was held on December 6, 1996, before the undersigned. With the filing of the briefs by both sides, the case was submitted for a proposed decision on May 6, 1997.

INTRODUCTION

Donna Leonard (Leonard), a District teacher and an ex-Association president, received a written memorandum of warning, which was placed in her personnel file. She submitted a written response, as well as filing an unfair practice charge regarding, its issuance. After three days of formal hearing the charge was withdrawn and Leonard submitted an additional response to the memorandum of warning based on the evidence educed at the formal hearing. Shortly thereafter, the District submitted a rebuttal to her response. She contends this rebuttal was inserted in her personnel file in retaliation for her submission of a second response.

The District insists that its rebuttal was necessitated by a need to set the record straight and in the spirit of fair warning and progressive discipline. It belied this action was necessary

(b) Deny to employee organizations rights guaranteed to them by this chapter.

to insure that Leonard realized the original memo was still valid and not disproved by the formal hearing's evidence.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that the Association is both an employee organization and an exclusive representative, and the District is a public school employer within the meaning of the Act.

Stipulation

The parties stipulated that administrative notice should be taken of the entire file and transcript of PERB Case No. SF-CE-1757, a prior case between the parties.

Relevant Facts

Leonard served as the president of the Association and personally participated in the processing of at least eleven grievances during the 1993-94 school year. She was also the moving party in several unfair practice charges filed by the Association against the District.

On or about December 9, 1994, Leonard went to the District's business office to pick up her overload stipend paycheck. After examining the amount of the check, she believed she had been underpaid. She disagreed with the computation explanation given by the business office clerk and told her the Association would

be filing a grievance over the matter.² On December 12, 1994, the Association filed such a grievance.

On January 13, 1995, Leonard received a memorandum of warning from Assistant Superintendent Jim Michael (Michael). The memorandum stated that she conducted herself "in an unprofessional manner and disrupted the payroll office." He stated in that memorandum that "[i]n the future you are expected to conduct yourself as a professional in the Business Office. Failure to do so may be grounds for more serious personnel action." He ended the memorandum with the following paragraph:

A copy of this memorandum will be placed in your personnel file in 10 days. You have the right to respond and have that response attached to this document.

On January 25, 1995, she responded to the memorandum. She stated there were factual inaccuracies in Michael's memorandum and that he "left out several important details." She also stated that the Association's grievance over the alleged underpayment(s) reached the superintendent's level during the week of January 13, coinciding with the time Michael issued his warning. She concluded with a statement that Michael's memorandum was a result of the Association's grievance and therefore constituted an unfair practice.

²Although the parties have vastly different views as to Leonard's behavior in the business office, a resolution of such views is not necessary to resolve the issues in this case. A determination she was grossly disruptive will not justify the District's actions, if they were not otherwise legally authorized. Conversely, a determination no disruption occurred would not make the District's actions improper, if they were otherwise justified.

On February 17, 1995, the Association filed unfair practice charge SF-CE-1767 based on Michael's memorandum.

From November 20 through 22, 1995, PERB commenced the formal hearing in PERB case SF-CE-1767. It was then continued to February 27, 1996. On that date the parties entered into settlement discussions. The discussions did not result in a written agreement. However, during those discussions the Association's attorney stated that if the charge was withdrawn, Leonard would submit an additional response to Michael's memorandum. The District's attorney acknowledged that she had a right to such filing. That same day, the Association withdrew, without prejudice, its charge.

On April 26, 1996, Leonard submitted a seven page "additional response" to Michael's original memorandum of warning. She based it, in large part, on the record of the formal hearing. She referenced the testimony of several hearing witnesses to support her contention that Michael's memorandum was "totally without merit." She included a statement that the Association's withdrawal, without prejudice, of its unfair practice charge "should in no way be interpreted as an admission that [she] acted unprofessionally nor that [she] did anything improper in [her] interaction with District business office personnel." She requested this response be placed in her personnel file with Michael's memorandum.

On May 31, 1996, she received an eight page response to her letter from the director of personnel, Robert Mayfield (Mayfield), which stated:

. . . After reviewing your letter, the School District strongly disagrees with your view and apparent lack of recognition of the problem with your conduct. The factual basis and the reasoning behind the School District's position is once again set forth below.

.

Second, your failure to take responsibility for your actions and the adverse effect that they may have on other School District employees is deeply disturbing to the School District. The purpose of the Memorandum of Warning was to inform you that you had hurt employees of the Business Office by making them feel threatened, belittled and incompetent, and to encourage you to modify your behavior to avoid such negative consequences in the future. The School District is responsible for managing a large number of employees and takes very seriously its responsibility to create a pleasant and productive work environment. Unfortunately, you have consistently refused to admit to any wrongdoing on your part.

As established at the formal hearing, this was not your first conflict with another School District employee. Your history of confrontation with other employees is well known to school district administrators and employees alike. Furthermore, given your proclivity to take the offensive, it is not surprising that upon receipt of the Memorandum of Warning you chose not to apologize to the classified employees who filed the complaints, but chose instead to attack the School District and its administrators. The School District, however, believes that you acted inappropriately and that you should change your behavior in the future. Moreover, civility and good manners require that you

apologize to the employees of the business office. . . .

.

. . . we are deeply concerned that your failure to recognize the significance of your misconduct will prevent you from changing your behavior. Please understand that if this type of conduct recurs you may subject yourself to more serious disciplinary action. (Emphasis in original.)

Mayfield's response concluded with the following sentences:

A copy of this letter will be placed in your personnel file five days after receipt by you. You may respond and have that response attached to this letter.

Mayfield testified that there were a number of reasons he directed the District's attorneys to draft a response to Leonard's letter. He believed her letter had a number of misrepresentations and inaccuracies and that it was important to have an accurate record. The District also had a concern that she was trying to disprove that she had demonstrated misconduct in the business office. It wanted to make sure she realized that the initial warning was still in effect. Mayfield did not believe that his May 31, 1996, letter, in and of itself, imposed discipline in addition to that set forth in the original memorandum of warning.

ISSUE

Did the District violate subdivision (a) or (b) of section 3543.5 when Mayfield issued his May 31, 1996, letter to Leonard?

CONCLUSIONS OF LAW

Discrimination

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for charges alleging discrimination or retaliation. This test is based on the National Labor Relations Board decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in relevant part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. Novato requires proof of an unlawful motive to find a discrimination or retaliation violation. In addition, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right resulting in harm or potential harm to that right.

In order to establish a prima facie case, the charging party must first prove the subject employee engaged in protected activity.³ Next, it must establish that the employer had knowledge of such protected activity. Lastly, it must prove that the subject adverse action(s) were taken, in whole or in part, as a result of such protected activity.

Proving the existence of unlawful motivation can be a difficult burden. The Board acknowledged this when it stated the

³Section 3543 grants public school employees:

. . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

following in Carlsbad Unified School District (1979) PERB
Decision No. 89 (Carlsbad):

Proof of Unlawful Intent Where Offered or
Required

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board, in Novato, set forth examples of the types of circumstances to be examined in a determination of whether union animus is present and a motivating factor in the employer's action(s). These circumstances are (1) proximity of time between the participation in protected activity and the adverse action, (2) disparate treatment of the affected employee(s), (3) inconsistent explanations of the employer's action(s), (4) departure from established procedures or standards, and (5) inadequate investigation(s). (See also Baldwin Park Unified School District (1982) PERB Decision No. 221.)

There is no doubt that Leonard participated in protected activities. This was evident both from her tenure as an Association officer and her participation in various unfair practice charges, as well as her involvement in numerous grievances. The evidence clearly shows that both Michael and Mayfield were aware of her protected activities.

. Leonard's second response was submitted on April 26, 1996, shortly after the formal hearing in PERB case SF-CE-1767. Mayfield's response was dated May 31, 1996, thirty-five days after Leonard's response. Certainly, it is reasonable to assume any acrimony stirred up by the formal hearing had not yet dissipated. The fact that a year later these matters are still being litigated lends weight to that conclusion. However, the Board has determined that timing alone cannot support an inference of unlawful motivation. (Moreland Elementary School District (1982) PERB Decision No. 227.)

With regard to disparate treatment, there was no evidence as to whether the District had ever previously issued a rebuttal to an employee's response to a written warning. Therefore, in the absence of evidence showing the District's treatment of other employees in similar circumstances, there was no evidence of any disparate treatment of Leonard. Similarly, there was no evidence regarding inconsistent explanations of the employer's actions, departure from established procedures or standards, nor inadequate investigations.

Due to the submission of insufficient evidence to support an inference of unlawful motivation, it is determined that discrimination was not the motive for the issuance of the District's rebuttal.

Interference

The Board, in Carlsbad, set forth the test for an interference charge. Unlawful motivation is not a necessary

element of an interference charge. However, in order to prove interference, the charging party must show that the employer's conduct tends to or does result in some harm to employee rights under the Act. If that harm is slight and the employer is justified by operational necessity, the charge is resolved by balancing the competing interests of the employer and the employee. If the harm is inherently destructive of employee rights, the employer's conduct is excused only upon proof that it was due to circumstances beyond its control, and no alternative course of action was available.⁴

In Novato, the Board noted that:

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

In this case, Leonard received one letter of warning on January 13, 1995. In that letter she was told that she should modify her behavior and that "failure to do so may be grounds for more serious personnel action." She filed two responses to this letter. The second response, on April 26, 1996, was rebutted by a second letter that was similar but more extensive in that it

⁴The District, in its brief, contends that the facts of this case cannot support an interference charge as they affect only one employee. Irrespective of the questionable legal justification of this view, the District's action in issuing a rebuttal to an employee's response to a warning letter, could reasonably create a chilling effect on all employees, not just Leonard.

included several charges and negative comments not found in the first letter.

One such charge was that the District was "deeply disturbed" by her "failure to take responsibility for [her] actions and the adverse effect that they may have on other School District employees" This would suggest that, in addition to being disruptive, she is guilty of not admitting to such disruption.

A second charge is that her "history of confrontation with other employees is well known to school district administrators and employees alike." This would seem to add a charge of continual confrontation toward other employees to the charges set forth in Michael's initial memorandum.

The third is a charge she has a "proclivity to take the offensive," hardly a desirable quality for any teacher, but especially an elementary school teacher.

A fourth negative comment states that she has displayed a failure of "civility and good manners" because she failed to apologize to the affected business office employees. Once again, not a desirable quality for a teacher.

Whether this constitutes "harm" by the District is determined by an objective standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) The second letter in her personnel file was eight single spaced pages. It contained a detailed rebuttal as well as additional charges and negative comments. It constitutes, by any objective standard, harm to her.

The only reason for the District's rebuttal was the submission of her April 26 letter, a letter she had every right to submit. The logical result of the placement of the second letter in her personnel file is to suggest to a reviewer that she committed improprieties over and above those referenced in the original letter. The fact that the second letter is longer, more detailed, and includes additional charges and negative comments supports this conclusion. Its effect is to make clear to Leonard that exercising her right to submit a rebuttal to a District memorandum of warning will cause her to receive a second letter, one more damaging than the first. The District's actions clearly demonstrate harm to an employee's protected rights under the Act. (See Woodland Joint Unified School District (1990) PERB Decision No. 808.)

The District insisted it issued its rebuttal because her letter had misrepresentations and inaccuracies in it. It also wanted to make sure Leonard realized that its initial warning was still in effect. With regard to the alleged misrepresentations and inaccuracies, the District has a right, - within the law, to issue whatever memoranda of warning it wishes to its employees. Similarly, Leonard has a right to submit whatever rebuttal she wishes. However, if the District's memorandum interferes with an employee's rights, it violates the Act.

The District's justification for an eight page detailed rebuttal is insufficient. If the District believed it was necessary to insure that Leonard knew that its initial warning

was still in effect, and there was no reason for her to believe it was not, it was not necessary to insert a detailed rebuttal into her personnel file. It merely had to send her a one sentence memo, that would not go in her personnel file, expressing that view.

A balancing of the rights of the parties leads to a clear conclusion that the harm to employee rights, i.e., a chilling effect on the submission of responses to a negative personnel memo, outweighs the employer's proffered business justification. Therefore, it is determined that the District's May 31, 1996, letter violates subdivision (a) of section 3543.5 in that it interferes with a protected employee right.

In addition, the evidence shows clearly that Mayfield's letter concurrently denied to the Association representational rights guaranteed to it by the Act. Therefore, it is also concluded that the District, with such letter, violated subdivision (b) of section 3543.5.

SUMMARY

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is concluded that the District has violated subdivisions (a) and (b) of section 3543.5 when it issued its May 31, 1996, letter to Leonard.

REMEDY

The PERB, in section 3541.5, is given:

. . .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.

In order to remedy the unfair practice of the District and prevent it from benefitting from its unfair labor practices, and to effectuate the purposes of the Act, it is appropriate to order it to cease and desist from (1) issuing a rebuttal to a letter submitted by Leonard in response to a previously received memorandum of warning, and (2) denying to the Association rights guaranteed to it by the Act.

It is also appropriate that the District be required to post a notice incorporating the terms of this Order at all sites where notices are customarily placed for certificated employees of the District. This notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeals approved a similar

posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Alisal Union Elementary School District (District) violated subdivisions (a) and (b) of Government Code section 3543.5 of the Educational Employment Relations Act (Act). Therefore, it is hereby ORDERED that the District, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Issuing a May 31, 1996, rebuttal to a letter submitted by Donna Leonard (Leonard) in response to a previously received memorandum of warning.

2. Denying to the Alisal Teachers Association, CTA/NEA, the right to represent its unit members.

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

1. Rescind and destroy all copies of the May 31, 1996, letter from Robert Mayfield to Leonard.

2. Delete from Leonard's personnel file any reference to such May 31, 1996, letter.

3. Within ten (10) workdays of service of a final decision in this matter, post at all sites where notices are customarily placed for certificated employees, copies of the notice attached hereto as an Appendix. The notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be

maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure, that the notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

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 at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See 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 sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" (See Cal. Code Regs., tit. 8,

sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs 32300, 32305 and 32140.)

Allen R. Link
Administrative Law Judge