STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS OF LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4066-E PERB Decision No. 1469 November 29, 2001

Appearances: Geffner & Bush by Steven K. Ury, Attorney, for United Teachers of Los Angeles; Office of the General Counsel by Gregory L. McNair, Attorney, for Los Angeles Unified School District.

Before Amador, Baker and Whitehead, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles Unified School District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5 (a) and (b) the Educational Employment Relations Act (EERA)[1] by causing Carol Conner (Conner), an employee of LA's BEST,[2] to be terminated from her employment because of her protected activities.

[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 provides, in pertinent part:

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

After reviewing the entire record in this matter, including the ALJ's proposed decision, the statement of exceptions filed by the District, the response filed by the United Teachers of Los Angeles (UTLA), the hearing transcript and exhibits, and the briefs of the parties, the Board hereby affirms the ALJ's proposed decision and adopts it as the decision of the Board itself.[3] The Board writes separately to address the District's exceptions to the remedy and the allegation that ALJ Al Link (Link) was biased.

DISCUSSION

Included in the District's exceptions to the proposed decision of the ALJ is an exception to the proposed remedy and an allegation that the ALJ was biased against the District.

EXCEPTIONS TO THE REMEDY

The District argues that the proposed decision's award requires "a public school employer to pay the employee of a private entity back pay and future pay until the employee decides she wants to work for the private employer." The District argues that the award is

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> (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.

[2] LA's BEST is an after school enrichment program for certain District students. BEST is an acronym for Better Educated Students for Tomorrow.

[3] The ALJ found that the District and LA's BEST are neither a single nor a joint employer, but are two separate employers and that PERB has no jurisdiction over LA's BEST. (Proposed Dec., pp. 62-68.) This conclusion of law was not excepted to by either party therefore that portion of the decision is not before the Board and is not a part of the Board's decision in this case.

therefore excessive, speculative, punitive, and would require the District to make a gift of public funds. The District urges that if any remedy should be imposed, it should be limited to a cease and desist order. The District also suggests that the posting order is inappropriate.

Gift of Public Funds

The District argues "[t]here is no evidence that Ms. Conner would have kept her job as a Site Coordinator for any material length of time beyond the date she was terminated." The simple answer is no one will ever know how long she would have worked for LA's BEST because the District caused her to be terminated. The District placed no evidence in the record suggesting Conner would not have continued working, therefore the remedy is not speculative and the District must live with its actions. The District's argument that the remedy calls for a gift of public funds is made without support and is without merit.

Offer of Employment

The District claims it made an offer of reemployment to Conner the day she was terminated and Conner turned it down. This claim is made to extinguish the District's liability for Connor's wages. A review of the PERB hearing transcript reveals that Debe Loxton (Loxton), then a program director for LA's BEST, testified on direct examination as follows (questions are by the District's Counsel except as noted):

> Q At the November 13 meeting, was Ms. Conner offered a different position at LA's BEST?
>
> A Yes.
>
> Q What position was she offered?
>
> A It wasn't a position specifically stated, it was that we would try to make accommodations for her within the LA's BEST program.

Q Was she interested in that?

A No.

ADMINISTRATIVE LAW JUDGE LINK: So she actually wasn't offered a position, she was offered your good will as far as trying to get her another position.

THE WITNESS: We said we would find her something within the organization.

ADMINISTRATIVE LAW JUDGE LINK: You would or you would try?

THE WITNESS: We would.

ADMINISTRATIVE LAW JUDGE LINK: Okay.

(R.T., vol. II, pp. 163 – 164.)

Further on this point, LA's BEST Chief Executive Officer Carla Sanger (Sanger) testified that Conner was "advised that there would be other positions if she were interested" but that "[t]here was not a specific offer of one position." (R.T., vol. III, pp. 160-161.)

Conner's testimony regarding the November 13 meeting appears to indicate she was only given the choice to resign or be terminated. (R.T., vol. I, p. 147, lines 15-25.) Even though the ALJ has held that when the testimony of Conner conflicts with either Loxton or Sanger, Conner's testimony is credited, it is not necessary to make a credibility determination on this issue. A reading of the testimony of Loxton and Sanger in a light most favorable to the District does not support the District's assertion that it made an offer of employment to Conner.

Further, following the November 13, 1998 meeting, Conner received a document from Loxton with a regards line: "Notice of Termination of Employment as of 11/20/98." (Charging Party Exh. 35.) The notice of termination reflects that at the November 13 meeting Conner was given the opportunity to resign from her position or be terminated from the LA's BEST

assignment she held as site coordinator on November 20, 1998. The notice of termination states that, "Since you have expressed no interest in resigning, we will expect your last day with the program will be on November 20th." While it is not a certainty that a legitimate offer of continued employment would be reflected in this document if it were actually made, the fact that it is not reflected in the document, nor anywhere else in writing, is significant. When this fact is combined with the less than firm testimony of Loxton and Sanger, the Board does not find an offer of employment was made to Conner by LA's BEST.

Front Pay

Following the finding that an offer of employment was not made, we turn to the appropriate remedy. Frontpay is a monetary award for loss of anticipated future earnings had the employee not been subject to unlawful discrimination. There is a large volume of "frontpay" caselaw which has developed under Title VII, Section 706(g) of the Civil Rights Act of 1964. The remedial power language of Section 706(g) closely tracks Section 10(c) of the National Labor Relations Act (NLRA). Section 10(c) authorizes the National Labor Relations Board (NLRB) to issue an order requiring a respondent who has committed an unfair labor practice to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay." In applying Section 10(c), the NLRB had consistently made awards of what it called "backpay" up to the date the employee was reinstated, even if such event occurred after judgment (citations omitted). (Pollard v. E.I. du Pont de Nemours & Company (2001) ___ US ___ [121 S.Ct. 1946] (Pollard).)

The Board's statutory authority under EERA includes the ability to investigate unfair practice charges and "take any action and make any determinations in respect of these charges

or alleged violations as the board deems necessary to effectuate the policies of this chapter." (EERA sec. 3541.3(i).) This broad remedial power is parallel to the remedial power given to the NLRB and the remedial power in Title VII of the Civil Rights Act of 1964. For that reason, reliance on federal precedent regarding "frontpay" emanating from both the NLRA and Title VII of the Civil Rights Act of 1964 is appropriate. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 617 [116 Cal.Rptr. 507].)

The standard remedy for a discriminatory discharge is reinstatement. Reinstatement best effectuates the purposes and policies of the EERA because it restores the status quo prior to the unlawful action. As an order of reinstatement by the District is not an available remedy in this case, a frontpay award in lieu of reinstatement is appropriate. (See Maxfield v. Sinclair International (3d Cir. 1985) 766 F.2d 788, 796 [38 Fair Empl. Prac. Cas. (BNA) 442].) An award of frontpay is remedial, not punitive, and is well within the Board's statutory authority. (See EERA sec. 3541.3(i).) Frontpay is "the salary that an employee would have received had he or she not been subject to unlawful discrimination of his employer, subject to the employee's mitigating his or her damages." (Hudson v. Reno (6th Cir. 1997) 130 F.3d 1193, 1203 [75 Fair Empl. Prac, Cas. (BNA) 1001].) (Abrogated on different grounds by Pollard (121 S. Ct. 1946).); Downes v. Volkswagen of America, Inc. (7th Cir. 1994); 41 F.3d 1132, 1141 [69 Fair Empl. Prac. Cas. (BNA) 11].)

Duty to Mitigate

The District argues that the proposed remedy calls for the District to pay Conner future pay and benefits in perpetuity. This argument against the remedy is without merit.

The District's argument fails to consider that implicit in the Board's order in this case is a duty for Conner to mitigate her damages. In Fresno County Office of Education (1996)

PERB Decision No. 1171, the Board adopted the NLRB burden of proof in the mitigation context. Implicit in the adoption of the NLRB's burden of proof standard is the fact that mitigation is an element of this Board's orders.

The proposed order in this case, which is adopted as the order of the Board, calls for payments to continue to Conner until either LA's BEST or a successor organization ceases to exist, Conner terminates her employment relationship with the District, or "she secures substantially equivalent employment." While it may be difficult for Connor to find substantially equivalent employment, Conner has a duty to look for such employment. The duty to mitigate is the check which prevents the Board's order from becoming a windfall to Connor. If a controversy arises over mitigation or any other aspect of the remedy, a compliance proceeding is the proper forum to air the controversy. The District can argue that its liability should be extinguished and may present facts to support its claim in a compliance proceeding.

Posting Order

The District argues that the posting requirement is inappropriate because Conner is the only person affected. While it could be possible to limit the posting to either the Hillcrest site or to school sites with an LA's BEST program, it is appropriate to post the notice on a unit wide basis.

If a Board decision does not limit the posting requirement, the notice is to be posted on a unit-wide basis. (Trustees of the California State University (1988) PERB Order No. Ad-174-H.) In this case the activity found to be unlawful was the District's retaliation for an employees' protected activity. Other unit employees and District personnel would naturally be concerned to know that the employer's actions in this case have been found unlawful.

Despite a direct effect on only one employee, the posting provides guidance and can prevent the recurrence of the prohibited conduct on a unit-wide basis, therefore District wide posting is appropriate in the context of this multi-campus school district. (See Los Angeles Unified School District (1988) PERB Decision No. 659; The Regents of the University of California (1990) PERB Decision No. 826-H.)

ALLEGATION OF BIAS

The District claims that the outcome of the proposed decision and many of the ALJ's findings were tainted by bias. The District also founds its claim of bias "upon actions taken and statements made by the ALJ at the hearing which are reflected in the hearing transcript." (District's exceptions, p. 49.) Specifically, the District objected to three statements by the ALJ and to the fact that after two and one-half days of hearing, he contacted PERB ALJ, Jim Tamm (Tamm), the PERB agent that conducted the settlement conference in this case.

First, on the second day of hearing, after hearing from only two witnesses, Conner and Loxton, Loxton testified to the neutrality of a September 17, 1998 meeting. During the ALJ's questioning of Loxton, he stated, "I really don't think that was, you know, it was that neutral in September." (R.T., vol. II, p. 217, lines 25-26.)

Second, during a question to Sanger, the ALJ said, "All I know is, you know, if there's -- if the fur is flying, if there's something that isn't right, something that doesn't add up, and this doesn't add up, then why." (R.T., vol. III; p. 213, lines 18-21.)

Third, while Carole Gentry testified under cross examination, following her response, the ALJ stated, "I think that answer is incredulous." (R.T., vol. V; p. 73, lines 5-6.)

The District claims that the above statements "and other statements in the record"[4] clearly reflect the ALJ's bias against the District and LA's BEST.

The Board has held that "unless a judge makes statements indicating a clear predisposition against a party, no bias or prejudice is established." (Gonzales Union High School District (1985) PERB Decision No. 480.) As pointed out by UTLA in its response to the District's statement of exceptions, the District does not offer a shred of evidence showing the ALJ formed any opinion or conclusion which was not based upon the evidence before him. None of the above described statements or actions meet the PERB standard for finding bias or prejudice. Each "opinion" described above was arrived at after or in response to hearing evidence on the topic.

It appears from the record that ALJ Link contacted ALJ Tamm without notice to either party. The District characterized this conduct as an "ex parte communication." It appears from the record that ALJ Link contacted ALJ Tamm to assess ALJ Tamm's availability to continue settlement discussions. There is no evidence in the record that any other matter was discussed in this phone conversation. The Board finds this conversation was not a prohibited "ex parte communication."

ALJ Link informed the parties that it was in all of their interests to settle the case, but did suggest it was in LA's BEST's interest "primarily" to settle. (R.T., vol. III, pp. 55-64.) As

[4]While the Board has reviewed the entire record in this matter and did not observe any statements demonstrating bias, the Board nevertheless declines the District's implicit suggestion that the Board comb the record for other statements in the record which demonstrate the ALJ's bias. It is the burden of the excepting party to state specific issues of procedure, fact, law or rationale to which exception is taken and to adequately identify such. (PERB Regulation 32300; PERB regs. are found at Cal. Code Regs., tit. 8, sec. 31001 et seq. and available on PERB's Web site at www.perb.ca.gov.)

the Board properly urges voluntary settlements that are in the best interests of EERA , the Board does not find ALJ Link's urging the parties, and LA's BEST, to settle is an indicator of bias or prejudice.

The dissent in this case appears to be based upon the mistaken premise that the Board's decision has extended the Board's jurisdiction to cover the actions of LA's BEST or employees of LA's BEST. It does not. This is a case where the District has retaliated against its own employee. The District is clearly an employer within the Board's jurisdiction and Conner is clearly an employee within that jurisdiction. The ALJ cited, and the Board agrees with, the ample authority supporting the proposition that an employer can be held liable for its agent's acts that have an effect outside of the District. (Rim of the World Unified School District (1986) PERB Order No. Ad-161, Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228]; see also, Springfield Manner (1989) 295 NLRB 17 [133 LRRM 1105]; International Shipping Assn. (1990) 297 NLRB 1059 [134 LRRM 1035].

ORDER

It is found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b) by causing Carol Conner (Conner) to be terminated from her employment as a site coordinator at the District's Better Educated Students for Tomorrow (LA's Best) program.

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

A. CEASE AND DESIST FROM:

1. Influencing LA's BEST to terminate Conner, its site coordinator, at Hillcrest Elementary School (Hillcrest).

2. Denying to the United Teachers of Los Angeles (UTLA) the right to communicate with its members through its elected officials, without fear of retaliation.

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

1. Using its good offices to attempt to cause LA's BEST to reinstate Conner to her position as Hillcrest's site coordinator.

2. Pay to Conner, upon demand, the salary she lost as a result of her unlawful termination. Such retroactive salary award shall include interest at the rate of 7 percent per annum.

3. Make Conner whole, upon demand, for any other losses, such as benefits, seniority credit(s), leave credit(s) for example, and reasonably expected overtime salary opportunities she may have suffered as a result of the District's unlawful action.

4. Pay to Conner, upon demand, should it not be able to prevail upon LA's BEST to reinstate her to her previous Hillcrest site coordinator position, or a comparable position with LA's BEST that is acceptable to Conner, an amount equal to what she would have earned had she not been unlawfully terminated. These payments shall continue until either LA's BEST or any successor organization ceases to exist, Conner terminates her employment relationship with the District, or she secures substantially equivalent employment.

5. Within ten (10) workdays of this decision becoming final, post at all work locations where notices to bargaining unit members customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of

the District, indicating that the District 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

6. 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 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 UTLA.

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

Member Whitehead joined in this Decision.

Member Amador's dissent begins on page 13.

AMADOR, Member, dissenting: I respectfully dissent from the majority's holding that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA) by "influencing" LA's BEST to terminate Carol Conner (Conner).

I would dismiss this unfair practice charge on any one of several grounds. First, the charge challenges conduct of a third-party employer, LA's BEST, an entity which, as the administrative law judge found, is outside the reach of the Public Employment Relations Board's (PERB or Board) jurisdiction. No exceptions were filed to this finding.

Second, Conner, as an employee of LA's BEST, is not an "employee" eligible for protection under EERA section 3540.1(j) or 3543.5(a).[1]

Third, Conner arguably lacks standing to file an unfair practice charge, since in order for a person to have standing to file an unfair practice charge, that person must have been an employee at the time the unfair practice occurred. A person's status as an employee is to be examined at the time that the alleged unlawful conduct occurred. (California Union of Safety Employees (Trevisanut) (1993) PERB Decision No. 1029-S, at p. 9.) (See also, Fremont

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[1] EERA section 3540.1(j) states:

> (j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

EERA section 3543.5(a) states, in pertinent part:

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

Union High School District (1987) PERB Decision No. 651; district teachers were not employees under the EERA while they were working as summer school teachers for a separate entity (the University of LaVerne), even though they were using district facilities and materials and teaching district students, as the teachers received compensation from, were considered for employment and selected by, and were supervised by LaVerne, not the district.)

Fourth, I would dismiss this charge on the grounds that United Teachers of Los Angeles has failed to prove a prima facie case of retaliation. Here, the adverse action is the allegedly unlawful termination of Conner, an LA's BEST employee, by LA's BEST. It was not the District that terminated Conner; in fact, there is no evidence to indicate that the District had the legal power or authority to terminate any person's employment with LA's BEST, any more than the District would have the power to terminate any type of outside employment of a District employee. As an example, I am confident that the Board would not hesitate to dismiss an unfair practice charge which asserted that "the District got me fired from my part-time job at Macy's." Even if the facts clearly showed that the District actually "influenced" Macy's to terminate an employee, the charge would be promptly dismissed because the cause of action does not lie under the EERA. Clearly, the Board lacks jurisdiction over Macy's, an entity that does not meet the statutory definition of "public school employer." Furthermore, such a charge would be dismissed because it failed to identify an adverse action committed against a public school employee by a public school employer. The status of LA's BEST in the instant unfair practice charge is akin to that of Macy's in this example, and dismissal is appropriate.

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purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

As a final note, a reading of the remedy gives an indication of the difficulty in righting an alleged wrong perpetrated by an entity outside the scope of the Board's statutory jurisdiction. The Board lacks the power to make Conner whole because the District lacks the power to compel LA's BEST to undo the termination. Because of this fact, the Board can only seek to compel a third party employer to do something by using the District as a tool. In fashioning a remedy, the Board is forced to resort to somewhat awkward phrasing because of the limitations on its remedial power in this fact pattern. For example, the order requires the District to "cease and desist from influencing LA's BEST to terminate Carol Conner" [a somewhat meaningless remedy, since she has already been terminated] and to "use its good offices to attempt to cause LA's BEST to reinstate Conner to her position" with LA's BEST. If the District is "not able to prevail upon LA's BEST" to reinstate Conner, the Board attempts to make Conner whole by ordering payment of money damages for a period of time which appears very difficult to ascertain.

Finally, as a matter of policy, it is inappropriate to find a violation on the theory that the District "influenced" a non-EERA employer to terminate a non-EERA employee because such a ruling improperly injects the Board into the labor relations of third parties.

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-4066, United Teachers of Los Angeles v. Los Angeles Unified School District, in which all parties had the right to participate, it has been found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b). The District violated EERA by causing Carol Conner (Conner) to be terminated from her employment as a site coordinator at the District's Better Educated Students for Tomorrow (LA's Best) program.

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

A. CEASE AND DESIST FROM:

1. Influencing LA's BEST to terminate Conner, its site coordinator, at Hillcrest Elementary School (Hillcrest).

2. Denying to the United Teachers of Los Angeles the right to communicate with its members through its elected officials, without fear of retaliation.

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

1. Using its good offices to attempt to cause LA's BEST to reinstate Conner to her position as Hillcrest's site coordinator.

2. Pay to Conner, upon demand, the salary she lost as a result of her unlawful termination. Such retroactive salary award shall include interest at the rate of 7 percent per annum.

3. Make Conner whole, upon demand, for any other losses, such as benefits, seniority credit(s), leave credit(s) for example, and reasonably expected overtime salary opportunities she may have suffered as a result of the District's unlawful action.

4. Pay to Conner, upon demand, should it not be able to prevail upon LA's BEST to reinstate her to her previous Hillcrest site coordinator position, or a comparable position with LA's BEST that is acceptable to Conner, an amount equal to what she would

have earned had she not been unlawfully terminated. These payments shall continue until either LA's BEST or a successor organization ceases to exist, Conner terminates her employment relationship with the District, or she secures substantially equivalent employment.

Dated: _____ LOS ANGELES UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS OF LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Charge No. LA-CE-4066 PROPOSED DECISION (9/13/2000)

Appearance: Geffner & Bush, by Steven K. Ury, Attorney, for United Teachers of Los Angeles; Gregory L. McNair, Staff Counsel, for Los Angeles Unified School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On May 19, 1999, the United Teachers of Los Angeles (UTLA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Los Angeles Unified School District (District or LAUSD). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).[1]

On August 6, 1999, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a) and (b) of section 3543.5.[2]

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[1]All section references, unless otherwise noted, are to the Government Code. EERA is codified at section 3540 et seq.

[2]Subdivisions (a) and (b) of section 3543.5 state:

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

On August 26, 1999, the respondent answered the complaint denying all material allegations and propounding various affirmative defenses. An informal conference was held on October 4, 1999, in an unsuccessful attempt to reach a voluntary settlement. Six days of formal hearing were held before the undersigned on February 14, 15, 16, 17, May 11 and 12, 2000. With the filing of briefs by each side,[3] the matter was submitted on August 22, 2000.

INTRODUCTION

Since 1989, or before, Carol Conner (Conner) has been a LAUSD elementary teacher assigned to Hillcrest Drive Elementary School (Hillcrest). She was also, for at least five school years, 1993-96 and 1998-2000, her site UTLA representative.

In addition to her teaching assignment, she had been employed as the Hillcrest site coordinator for LA's BEST program for nine years. This program is an after-school enrichment program for LAUSD students who have been identified as being at a higher risk of getting involved in gangs, drugs and violence.

> (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.

[3]In addition to those of the parties, an Amicus Curiae brief was filed by Riordan and McKinzie, by William Emer, Attorney, on behalf of LA's BEST. BEST is an acronym for Better Educated Students for Tomorrow.

In her role as UTLA's site representative, Conner became involved in a number of conflicts with Carole Gentry (Gentry), Hillcrest's principal. In November 1998, Conner was terminated from her duties as LA's BEST site coordinator. She alleges such termination was the result of her protected activities on behalf of UTLA.

LAUSD contends that it and LA's BEST are two separate organizations. Therefore, it insists, that Conner's termination from LA's BEST has nothing to do with LAUSD. It further contends that PERB lacks jurisdiction over LA's BEST; therefore, as this case concerns allegations against that organization, it should be dismissed.

FINDINGS OF FACT

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

I. Conner's UTLA Involvement

At the beginning of the 1993-94 school year, Conner became Hillcrest's UTLA chapter chair. Starting in 1995, she was involved in various UTLA activities, including the monitoring of Hillcrest's LEARN[4] program and the maintenance of the bilingual master plan. Gentry became aware that Conner was the school's UTLA chapter chair during this period.

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[4]LEARN is an acronym for a LAUSD project that selects specific schools and attempts to promote sharing of decision-making among all staff members.

A. Conner Files PERB Charge Against LAUSD

In late August 1996, Conner filed a PERB charge against LAUSD, alleging that it had retaliated against her, when in March and April of 1996 (1) Gentry (a) punitively transferred her to a non-teaching position and (b) kept her from renewing her mentor teacher position, and (2) a LAUSD official suggested she give up her UTLA chapter chair position, ostensibly to avoid further conflict with Gentry.

On March 4, 1996, Gentry and Conner, along with other Hillcrest staff, attended a LEARN seminar to improve intra-school communication. In response to comments by the moderator and other staff members, Conner said that it was problems in the area of poor communications that caused postal employees[5] to walk into their offices and start shooting. Gentry perceived this comment as threatening and, shortly thereafter, called LAUSD's staff relations office. She spoke to Yvonne Chavez, who told her to: (1) write a memorandum describing the incident; (2) tell Conner she would be transferred to the cluster area office;[6] and (3) call the District police to the campus, in case Conner resisted these instructions. Shortly thereafter, Conner was given a memo that told her to report to the cluster office, and

[5]The prior week a prominent news story told of a postal employee who walked into his office and shot a number of fellow employees.

[6]A cluster area is a District sub unit, supervised by an administrator called a cluster leader. In this case, Dr. Daniel Lawson (Lawson) is the cluster leader who has direct line authority over Hillcrest, along with a number of other LAUSD schools.

according to Gentry, the policeman "walked her out" of the school.

The next day, Gentry submitted an incident report describing Conner's statement. Attached to her report were six statements by various persons who were present when Conner spoke. All of the accompanying statements support Gentry's position that Conner's statement was threatening.

In the same general time frame, a "petition and Letters from Teachers," were also submitted. The petition expressed the employees' unified support for Conner with regard to this incident and decried what it believed was Gentry's unjustified reaction to it. The petition was signed by 29 teachers, one parent volunteer, and two special education personnel, all of whom were present when Conner made her statements. There were also eleven letters describing Conner's statement, and the writers' reaction thereto. The petition and letters uniformly agreed that Conner's comments were not a threat of any sort.

Ten days after the incident, on March 14, 1996, Lawson, Gentry, Conner, a UTLA representative, and a member of LAUSD's staff relations office met in Lawson's office. At the end of this meeting, Lawson returned Conner to her Hillcrest classroom the next day, but he strongly suggested she give up her UTLA chapter chair.

At the formal hearing in this case, Gentry denied that her actions were retaliatory. She claimed that she transferred Conner because she mentioned the post office shootings at a

meeting. There was also evidence that Conner, along with other Hillcrest staff employees, had gone to a shooting range to practice marksmanship. Conner stated that she went to the range one time. Gentry suggested this shooting range evidence, somehow, gave her fears about Conner's comments greater credibility.

Gentry explained that she failed to renominate Conner as a mentor teacher, because she did not think she was "that strong a teacher." However, during that period, Conner received an outstanding teaching evaluation, and Gentry had previously given her enthusiastic nominations for the mentor teaching position. In addition, Hillcrest's vice principal supported Conner's mentor teaching renomination.

The PERB case was eventually settled by written agreement, signed by the parties on July 10 and 15, 1997, which stated, in pertinent part:

> 1. Within 30 days following receipt of the executed copy of this letter, the Los Angeles Unified School District will pay to Ms. Carol Conner the sum of $2,500.00 and restore to regular pay six days of her illness leave balance with the District taken March 6, 7, 8, 11, 12 and 13, 1996.
>
> . . . . . .
>
> 6. The parties agree that any future recommendations regarding Ms. Conner's performance at Hillcrest Elementary School ("Hillcrest") will be prepared by either a Vice Principal at Hillcrest or the Cluster Leader for the group of schools that includes Hillcrest. In addition, any future employment inquiries from prospective employers regarding Ms. Conner's performance at Hillcrest must be handled by a Vice

> Principal at Hillcrest or the Cluster Leader for the group of schools that includes Hillcrest.

Conner, who signed the settlement agreement, understood paragraph 6 to mean that Gentry "would no longer be handling any of my job performances at Hillcrest or doing any recommendations regarding my future employment . . . ."

Gentry, on the other hand, said that her understanding of the settlement agreement was that it only limited her participation in mentor teacher recommendations for Conner. However, Gentry could not remember doing any regular teaching evaluations of Conner after the settlement agreement was executed.

B. Conner Resigns as Hillcrest UTLA Chair

Shortly after her conversation with Lawson and the execution of the settlement agreement, Conner resigned as Hillcrest's UTLA chapter chair, effective June 30, 1996.

C. Conner Resumes Hillcrest UTLA Activity

On February 4, 1998, Conner and another Hillcrest teacher wrote a letter to District Superintendent Ruben Zacarias, alleging several deficiencies in a number of specific educational areas at Hillcrest. The letter stated that they were "concerned about the decline in the quality of the educational program being offered to our students." A copy of the letter was sent to Gentry, who acknowledged receiving it. In April, the superintendent responded, noting that Gentry had been asked to respond in writing to Conner's allegations.

In July 1998, Conner again became Hillcrest's UTLA chair; Gentry became aware of this action. In this position, Conner distributed a newsletter dealing with class size reduction[7] and its relation to school budgets. On the side of this newsletter she wrote that fourth and fifth grade teachers should request copies of the budget and meet to discuss how school money was being spent. She placed copies of this newsletter in the teachers' mailboxes in Hillcrest's main office, next to Gentry's office.

In the second week of September 1998, Conner approached Gentry to discuss several issues. She told Gentry that Hillcrest's classes were too full, and teachers did not have enough supplies for the children in their classes. She suggested that Gentry alleviate these circumstances. Gentry told Conner that her suggested changes were not going to happen. On September 14, Conner followed up her comments with a note to Gentry, which requested a meeting.

On or about September 11, Conner met with Hillcrest's fourth and fifth grade teachers to discuss the overcrowding issue. The teachers determined that they needed more budgetary information. After the meeting, Conner went to the school office and requested

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[7]Conner was aware that the District prohibited grades K through third from having more than 20 students. However, all of these classes at Hillcrest had between 21 and 24 students. In addition, substitutes were often not available, so when a teacher was absent, the remaining teachers were assigned a proportionate share of the absent teacher's students.

the total budget from the office manager. During this period, Gentry knew that Conner was having meetings with the teachers.

D. Conner's Post-Termination UTLA Activity

After her November 1998 LA's BEST termination, Conner continued her UTLA activities. On January 17, 1999, she, along with UTLA representative James Duffy (Duffy), filed a Uniform Complaint Procedure form with LAUSD's Office of Specially Funded Programs, alleging funding discrepancies at Hillcrest.

LAUSD responded on June 9, 1999, stating that "some of the allegations regarding [fiscal] irregularities have been substantiated," i.e., contrary to District regulations, $300,000 had been spent without the knowledge or approval of the School Site Council. In May 1999, Gentry announced she would resign as Hillcrest principal, effective June 30, 1999. In her testimony at the formal hearing in this case, Gentry denied any wrongdoing.

E. LAUSD's May 1999 Discipline of Conner

On May 12, 1999, Conner received notice she would be disciplined, in her LAUSD teacher role, for alleged irregularities in proctoring the Stanford Nine standardized test. On June 3, she was charged with reading test instructions from the wrong booklet and not adhering to proper time limits. As punishment for her allegedly improper actions, Conner was given (1) a notice of unsatisfactory acts, (2) a ten-day suspension, and (3) a transfer away from Hillcrest.

Gentry was technically still the principal at Hillcrest at that time, although she had not been present at Hillcrest after

December 16, 1998, as she was on medical leave. Her resignation became effective May 30, 1999.

Conner grieved the discipline. The case went to arbitration. After LAUSD completed its case-in-chief, it withdrew its charges, thereby rescinding all of its disciplinary actions.

II. LAUSD/LA's BEST Relationship

LA's BEST program operates exclusively at LAUSD schools. All of its students are District students. The program is incorporated as a nonprofit public benefit corporation and is a tax exempt organization under section 501(c)(3) of the United States Internal Revenue Code. It receives financing from many sources, including federal, state and local grants, as well as private donors. It receives no operating funds from LAUSD, although it does receive a large amount of non-monetary or in-kind, support from the District. These LAUSD in-kind services include free office space, free use of school facilities and free use of payroll and personnel services.

LA's BEST's President and Chief Executive Officer (CEO) Carla Sanger (Sanger), who works out of the mayor's office, is responsible for the general administration of the agency. Chief Operating Officer Debe Loxton (Loxton), who works out of LAUSD's headquarters, is responsible for the daily management of its various after-school sites. Loxton was formerly a LAUSD employee in its Youth Service Department. She reports to Sanger and is

responsible for all of the school site employees, including traveling supervisors-playground (TSPs) and site coordinators.

Sanger insists that LAUSD is completely separate from LA's BEST; however, she admits they are often partners. She admits many of the services of LAUSD are provided "in kind to LA's BEST." She claims that LA's BEST has its own insurance and bank accounts. However, it was determined that much of this "separateness" was only applicable to its administrative staff in the mayor's office, not to the TSPs or the school site personnel. LA's BEST liability insurance does not cover on-site staff, students or third parties. They are covered by LAUSD insurance policies, although LA's BEST does reimburse LAUSD for its workers' compensation claims.

Sanger justified this policy by stating that the students are LAUSD students, even when they are LA's BEST program participants. She contends this is a part of the LAUSD/LA's BEST partnership. LA's BEST has neither a personnel nor an accounting department, although it does employ one accountant. These services are provided by LAUSD. LA's BEST does reimburse LAUSD for janitorial services at its school sites.

Unlike Sanger and her staff at the Los Angeles mayor's office, Loxton and her staff are paid by LAUSD payroll checks. The vans used by Loxton's office are owned by LAUSD, but purchased with LA's BEST grant funds. The computers used in its corporate headquarters in the mayor's office were purchased by

LA's BEST, but are owned by the City of Los Angeles. LA's BEST pays no rent for its District office space.

A state funding application for 1998-99 states that "[a]ll LA's BEST staff are LAUSD employees qualified by the LAUSD." During the 1997-98 school year, all TSPs were also employed by LAUSD, although one site coordinator was not a LAUSD employee.

LA's BEST employees receive the same salaries as comparable District employees in its youth services classifications, i.e., classifications of site coordinator, TSPs, and activities consultant. In addition to maintaining an interrelationship with LA's BEST salaries, LAUSD limits the number of hours that LA's BEST staff are permitted to work each week. When asked about this hourly limit, Loxton explained that LAUSD had a limit on the total number of hours its personnel in any class code could work in a week. As LA's BEST employees utilized this same class code, they fell under this same restriction. She believes this is a Fair Labor Standards Act (FLSA) limitation.

When reminded that there are, ostensibly, two separate employers involved, and therefore the FLSA limitation would not apply, she continued to reference LAUSD's class code system as justification for the limitation.

Loxton admits that her site employees are paid the same as comparable LAUSD employees, but claims that this occurs because LA's BEST chooses to do so. Loxton did not know whether LA's BEST employees received the same health and retirement benefits as LAUSD employees.

The LA's BEST letter of agreement (employment contract) requires all of its employees to "follow all L.A.U.S.D. policies and procedures." This document's letterhead suggests LA's BEST is a part of LAUSD's student auxiliary services branch. Almost all of the official information given to LA's BEST site employees is printed on forms which include the words, "Los Angeles Unified School District," at the top, above "LA's BEST."

Each school's LA's BEST program is supervised by a site coordinator, who develops, designs and implements his/her site-specific program. These site coordinators are supervised by TSPs, who report to Loxton.

III. Hillcrest's LA's BEST Program

Gentry hired Conner as the Hillcrest coordinator at the program's inception in 1989. The program's attendance has fluctuated between 150 and 175 students. When Conner started her LA's BEST duties, she did not have to submit her fingerprints or a W-2 form. She did have to fill out an "additional assignments" form required of all LAUSD employees who take on extra District assignments. She also signed a "Site Coordinator Letter of Agreement" listing twenty-four conditions of employment. Among these conditions was:

> 24. I understand my unclassified assignment is day-to-day, temporary, part-time, and as-needed employment.

Conner, and her staff, prepared time cards, had them approved by Gentry, and gave them to Hillcrest's office manager. The LA's BEST staff is paid with LAUSD paychecks, which

identifies them by their LAUSD employee identification numbers. For both her LA's BEST and LAUSD jobs, Conner was paid every four weeks, with separate LAUSD paychecks that she obtained from the Hillcrest office manager. At the end of the year, Conner received one W-2 from LAUSD, which combined her income from both jobs.

As a site coordinator, Conner was paid $15.00 per hour, amounting to an annual salary of approximately $15,000. She received LA's BEST salary raises at the same time and in the same percentages as those she received from LAUSD for her duties as a teacher.

LAUSD principals are an integral part of each site's LA's BEST program. Site coordinators are required to work closely with them.[8] The school principal coordinates all LA's BEST plans and must approve all written correspondence, i.e., letters to parents, etc. In addition, the principal is responsible for reporting on the site's progress.

Gentry exercised hiring power over Hillcrest's program, and on the occasions in which she refused to approve a new employee, that person was not hired. Principals must sign off on numerous, routine LA's BEST paperwork, including employee time sheets. The requirement of a principal's approval covers such mundane items

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[8]LA's BEST site coordinator duty statement, in pertinent part, states such employee

> Coordinates and plans the LA's BEST program in conjunction with the LA's BEST office and the school site administrator. [Emphasis added.]

as co-educational soccer rosters and excursion requests. Loxton stated that it was an LA's BEST objective for the principal to have "mutuality of agreement" with it.

At Hillcrest, Conner worked closely with Gentry. They consulted regarding the program, staff and the use of supplies. Gentry monitored, observed and occasionally took notes on Hillcrest's LA's BEST program. Essentially, her role with regard to the LA's BEST program was the same as her role during the regular school day. After Conner's termination, it was Gentry, not an LA's BEST administrator, who sent her a note asking for the return of LA's BEST supplies and equipment.

IV. Conner's LA's BEST Annual Evaluations

Each year, site coordinators are evaluated by their TSPs. These evaluations are then sent to Loxton for review. Sanger also reviews them. The evaluations are divided into three sections. The first includes thirty-five separate categories, such as attendance, work quality, work habits, relations to others, etc. In each category the site coordinator is rated as being in "Compliance" or "Non Compliance." The second section requires the TSP to give the coordinator a rating of "Below Standard," "Meets Standards" or "Exceeds Standard" in ten categories. The third section, entitled "Overall work performance," provides an area in which the TSP may insert general comments regarding the employee's performance.

A. 1994-95 School Year

At the end of the 1994-95 school year, Conner received an evaluation from her TSP, Eugene Hernandez (Hernandez), which showed her in compliance in all 35 categories[9] in the first section. In the second, her ratings showed she exceeded standards in nine of ten categories and met the standard in the tenth. In the third "Comments" section, the supervisor inserted a statement that Conner provides a "well-balanced program" with "an environment that is motivating for your students."

B. 1995-96 School Year

There was considerable conflict with regard to this evaluation. Both Conner and Hernandez agree that at an early July 1996 meeting at the El Chollo restaurant, Conner was given a written evaluation. The evaluation that Conner states she was given was designated Exhibit 23. She further states that Hernandez said nothing about its being a draft or that she would receive another evaluation at a later date.

Hernandez, on the other hand, states that at the restaurant he did not give Conner Exhibit 23, but rather a different evaluation, which was designated Exhibit C. He contends that Exhibit 23 was only a preliminary draft.

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[9]On the form there are 35 actual categories in the first section. However, at times Hernandez, and later his successor, failed to place check marks on all of the available category spaces. Whether this failure was due to inapplicability or inadvertence is unknown. The compilation of ratings reported in this proposed decision reflects actual check marks and not merely available spaces.

Exhibit 23, Conner's evaluation exhibit, has a full "Eugene S. Hernandez" signature on it, with a date of June 14, 1996. Exhibit C, Hernandez' evaluation exhibit, has a full "Eugene S. Hernandez" signature on it, with a date of June 1, 1996. Hernandez states that he never gave Conner his draft evaluation. Conner states that she was never given, nor, prior to the formal hearing, had she ever seen what Hernandez now insists is his final document.

1. Conner's Proffered Evaluation

Exhibit 23, although still positive, is somewhat less favorable than her prior year's evaluation.

It states that Conner was out of compliance in two of the twenty-nine applicable categories. These two categories were "Attends all trainings and staff development meetings" and "Compiles and submits all paperwork in a timely manner . . . ." Her ratings in six of the categories in the second section were lowered from "Exceeds Standard" to "Meets Standards," which gave her a final total of seven "Meets Standards" and three "Exceeds Standard."

In the third section, Hernandez stated that Conner does a good job in supervising, safety and maintenance. He also stated that she needs to get her reports in on time. At the end of the last page, below the signature, he inserted the following:

> There needs to be a wider variety of activities for students that are cognitive appropriate.

2. Hernandez' Proffered Evaluation

Exhibit C, in the first section, lists Conner as being in compliance in twenty-seven of twenty-eight applicable categories; the one noncompliance category is entitled, "Compiles and submits all paperwork in a timely manner." In the second section, she was rated as "Meets Standards" in six areas and "Exceeds Standard" in three areas and "Below Standards" in one area. The area in which she received this low rating was "Developmentally Appropriate Activities and Programs." In her evaluation for the previous year, 1994-95, she received an "Exceeds Standard" in this category.

In the third section, Hernandez commented on the necessity of her submitting reports in a timely manner and added:

> An interactionist, constructivist theoretical framework needs to be adopted. This approach emphasizes that children grow and learn through interactions with other students. When students are fully involved, they learn more and build more complex concepts and ideas through enriched experiences.

There was also a general statement regarding what constitutes an effective LA's BEST program. It is difficult to tell if this statement was meant to be a criticism of Conner's program or a "boilerplate" statement for all site coordinators under his supervision. The entire statement was as follows:

> To be effective, LA's BEST programs must be designed to meet the needs and interests of the children the program serves. There is a need for positive interpersonal interactions, staff members need to be aware of the tone of voice, facial expression, and body language they employ. Conversations with children

> contribute a great deal toward the students' growth.

Hernandez admits that Conner's performance did not change between the preparation of his draft and final evaluations. Rather, he claims that he changed the evaluation based on his site visitation notes. He states he reviewed these notes before revising the evaluation. However, after Hernandez completed his testimony, LAUSD, pursuant to a UTLA request, produced all of his Hillcrest visitation slips. Although there were three slips dated from 1995-96, none of these included any comments suggesting Conner or her program were in any way deficient. The only comments were (1) "students clustered to be picked up" -- July 6, 1995, (2) "observed various activities" -- July 31, 1995, and (3) "Personnel roster due" -- August 4, 1995.

Hernandez did not resume the stand to explain, or even discuss, the absence of the visitation notes that he claimed were so instrumental in lowering Conner's evaluation.

Conner refused to sign whichever evaluation Hernandez gave her at the El Chollo restaurant and appealed to Loxton and Sanger for a reconsideration of his evaluation.

C. Hernandez' Letter of Recommendation for Conner

In January 1997, Hernandez wrote Conner a letter of recommendation stating that during the time he worked with her, "she constantly demonstrated the traits of an exemplary scholar and an outstanding teacher."

D. 1996-97 School Year

This evaluation, prepared by Hernandez, showed compliance in all thirty-five applicable areas, but with a "minus" before the check mark in the area relating to "Compiles and submits all paperwork in a timely manner to the LA's BEST office." In the second section of the evaluation, Hernandez rated her as exceeding standards in eight of the ten areas and meeting standards in the other two. Hernandez' comments regarding her "Overall work performance" were equally positive. One comment dealt directly with an issue he raised the previous year. He said:

> 3) Continue to implement developmentally appropriate school-age child care programs.

When asked if he made a preliminary draft of this evaluation, Hernandez said that he does not recall. He does not keep copies of his preliminary drafts.

E. 1997 Hillcrest Parent Survey

In October 1997 parents responded to the annual LA's BEST survey about Hillcrest's program. Question 6 asked them to rate "the overall effectiveness of the LA's BEST Program" on a scale of one to five, with five being the highest. Out of thirty-eight relevant responses, twenty-three gave the program a five, one marked the space between five and four, six gave it a four and eight gave it a three.

F. 1997-98 School Year

In June 1998, Conner received an evaluation covering the period from March to June, from her new supervisor, Gilberto Samuel (Samuel).[10] Hernandez was transferred elsewhere in March 1998. In the first section, he rated her as in "Compliance" in all thirty-five categories. In the second section, Samuel told Conner that she was above "Meets Standards." However, because he had been her supervisor for such a short time (he made only five previous visits to Hillcrest), he could not rate her as exceeding standards. Therefore, he placed his check marks in between the "Meets Standards" and "Exceeds Standard" in all ten rating boxes.

Samuel included the following narrative at the bottom of the evaluation:

> Ms. Conner provides the student population at Hillcrest with a program that has a wide variety of activities and programs that encourage self selection and student choice which results in positive experience and enriched learning activities for all students at Hillcrest Drive LA's BEST Program. [Emphasis added.]

G. 1998 Hillcrest Parent Survey

In October 1998, the parents responded to the annual LA's BEST survey about Hillcrest's program. Question 11 of the evaluation asked them to put a check mark in a series of "Yes" or "No" boxes as to whether, as a result of the program, their child had improved in seven specified areas. Of the sixteen parents who responded to this question, thirteen reported that their

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[10]Samuel had been a LA's BEST TSP for five years prior to having Hillcrest added to his assignment.

child had improved in every category, one reported improvement in six of the seven, and two checked "Yes" in only one box. There were no check marks in any of the "No" boxes.

Positive comments on the evaluations included: "Keep up the good work;" "Great Program--Parents couldn't survive without it/children depend [on] it too;" "I am very pleased with the L.A. BEST program;" "We appreciate the controle [sic] and motivating qualities this program has to offer our children;" and "Great Program." There were no negative comments.

V. LA's BEST's Actions Regarding Conner

A. 1996 Sanger/Loxton Hillcrest Visit

On June 4, 1996, Sanger and Loxton came to Hillcrest. The evidence was conflicting as to why they came. Sanger said they came because there were concerns about the program expressed by:

> . . . a volunteer that we had sent to work there, concerns were expressed by individuals who had observed the program, and concerns were expressed by our staff who were there to supervise the program.[11]

In his opening argument, LAUSD's counsel stated that Sanger and Loxton met with Conner to discuss the problems Hernandez' noted in Conner's 1995-96 evaluation.[12] As there are two such evaluations in evidence, this statement must be evaluated in light of each of them.

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[11]Neither the volunteer, nor the "observing individuals" were ever identified.

[12]There was no evidence of any direct communication, written or spoken, between Hernandez and either Loxton or Sanger during this time, with regard to this or any other subject.

If Hernandez is correct and his final evaluation was signed on Saturday, June 1, he must have sent it to Loxton on Monday, June 3. She read it and forwarded it to Sanger the same day and then the two of them decided to visit Hillcrest the next day.

If Conner is correct and Hernandez' evaluation was not signed until June 14, Sanger and Loxton, on June 4, were responding to an evaluation that had not yet been prepared, or at least finalized with Hernandez' signature.

While they were there, they just walked around with Conner, observing the program. Sanger reduced her observations to writing.

1. Sanger's Written Observation

Sanger's observations, in their textual entirety, are as follows:

> The children's groups are well organized; snack distribution proceeds orderly and quickly.
>
> Several children interviewed reported how much staff care about them; and they generally like the program.
>
> Major Concerns:
> Children can become bored if the same activities are offered repeatedly. Children's needs often change as their home situation, health, developmental level or perceptions change. To meet the needs of the varied ages, personalities, background and preferences of kids in LA's BEST, it is critical to present a variety of activities and materials every day.
>
> There seems to be a reluctance by staff to vary the presentation of activities to children based on the response that "this is what the children want." There seems to be a reluctance by staff to arrange materials in

> advance so that children have access to a variety of equipment and materials for play. To meet the needs of the varied ages, personalities, background and preferences of kids in LA's BEST, it is critical to present a variety of activities and materials.
>
> The amount of discipline required is often directly proportionate to the depth of the program and variety of activities available for the child. More observed interactions between adults and children were about discipline than any other content area-across age gr.[sic] Children and staff need to be able to identify reasons tpr [sic] behaving in ways a teacher thinks is appropriate. What is the reason for single file? What is the reason for no talking? What is the reason for heads down? Do these reasons make sense in the after school environment? Why?
>
> There seems to be a lack of understanding by site coordinator that children at Hillcrest come from no greater poverty, no greater dysfunctional families, and have no greater emotional needs than children from other LA's BEST sites. This seems to have been held as an excuse for the need for such tight controls and such limited offerings to the children. Repeated visits of administrative staff have reported few varieties of experiences other than those imposed by LA's BEST administration. [Emphasis in original.]

Sanger admitted that she never discussed any of these concerns with Conner and that she never went to Hillcrest to investigate the answers to any of her questions. She described these questions as "a talk piece for, . . . Operations staff about how to approach the issues that were of concern." She states that she relies on her operations staff for the answers to those questions.

B. July 1996 Letter from Sanger to Conner

On July 26, 1996, shortly after Conner resigned her Hillcrest UTLA chair, in response to her request for a new 1995-96 evaluation, Sanger, Loxton and Hernandez wrote her a letter. They said that she would receive a reevaluation of her program, based on longer and more in-depth observations. They also stated:

> Your work has been indeed valuable to the children of LA's BEST and as said in our meeting of July 25, no one finds fault with your efforts. You have probably given as many hours to supporting this program as any of the LA's BEST staff.

She was also told that LA's BEST board members, supervisors, activities consultants and administrative staff would be regularly observing her program. However, there were no additional observers during that school year; nor was there another evaluation of the program until the one regularly scheduled for June 1997.

C. Gentry's Contact With LA's BEST Administration

In late August or early September 1998, two months after Conner resumed her position as Hillcrest's UTLA chair, Gentry called Loxton and Sanger. She told them that she had "serious concerns" about Conner's program and she "needed for them to come out and take a look at the program." She said that she "elicited their help . . . ."

When asked why she made that call, she said:

> A Because the program had steadily declined, and I had so many complaints I had some serious concerns about the safety of the

children and the fact that they need to have a variety of activities because of the low test scores.

ADMINISTRATIVE LAW JUDGE LINK: The test scores had to do with -- their academic test scores connected with Hillcrest. But there are no scores connected with LA's BEST, are there?

THE WITNESS: No, this had to do with them having activities that would enhance their (Hillcrest) test scores. [Emphasis added.]

D. September 1, 1998, Meeting of Gentry, Sanger and Loxton

On September 1, 1998, Gentry met with Loxton and Sanger[13] in her Hillcrest office. Gentry insists that even though the meeting was about Hillcrest's LA's BEST program, "we discussed the program, not particularly Carol Conner as a person, but the program." On this subject she was asked:

Q Did you mention Carol Conner's name in the entire meeting"

A I didn't. I don't know whether they did, I don't remember. We talked about the program, how it was being run, but not about Carol Conner.[14]

Later that same day, Loxton called Conner and told her that Gentry had called, stating she (Gentry) was concerned with the

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[13]Sanger, even after repeated questioning by UTLA's attorney, stated that did she not remember meeting with Gentry at Hillcrest. She stated that the meeting on September 17 was the first time she remembered meeting with Gentry and Loxton.

[14]Gentry also said Sanger came to her Hillcrest office in September 1996 to discuss concerns she had about the effectiveness and quality of Conner's program. Gentry said that Sanger told her that if the program did not improve she was going to replace Conner.

depth of the program. Loxton said they were going to send the director of staff development, Eric Gurowitz (Gurowitz), to observe her program. Conner told Loxton that she needed support from LA's BEST administration. Loxton said she was giving that support by letting her (Conner) know about Gentry's concerns. Conner told Loxton that LA's BEST should not be getting involved in the (UTLA) conflicts she was having with Gentry. Loxton said they were already involved. Conner stated that Loxton suggested she apply for another job with LA's BEST. Conner declined to do so. Loxton did not remember any discussion about another position.

Sanger stated that she sent Gurowitz to Hillcrest because she was getting verbal reports that were in conflict with the written evaluations Conner was receiving. There was no testimony or documentary evidence proffered regarding anyone, other than Gentry, communicating with Sanger about the Hillcrest program.

1. Gurowitz' Hillcrest Visits

Pursuant to Sanger's direction, Gurowitz paid three visits to Hillcrest in September, the first of which was the day after the Sanger/Loxton/Gentry meeting. With regard to these visits, he testified that he felt the program lacked variety. The cover letter to Sanger and Loxton that accompanied his site visit, in pertinent part, is as follows:

> . . . Overall, . . . this site lacks the programmatic depth that characterizes other LA's BEST sites. Children are well behaved and generally well supervised, but there is very little academic reinforcement. Additionally, there is not much evidence of

> programming that focuses on building cognitive skills, boosting self esteem, or developing critical thinking. It strikes me that the expectations of the children's abilities to focus and develop are too low.
>
> I want to emphasize that I spent a total of about six hours at the site, and my observations are mostly anecdotal. I would be happy to provide a more detailed and comprehensive analysis if needed.

He was not asked to provide any additional analysis. Conner was given neither his cover memorandum nor any of his three written site observations until after she was terminated--and then only as a result of UTLA making a demand for them.

E. September Meeting of Gentry/Sanger/Loxton/Conner

Gentry asked Conner to attend a September 17 meeting with her, Sanger and Loxton. The meeting took place at Hillcrest, at 11 a.m., during a school day. Gentry had someone cover Conner's classes. Norm Saatjian (Saatjian), a UTLA representative, also attended the meeting on Conner's behalf.

At the meeting, Gentry[15] told Conner that she called the meeting because she had "concerns" about the program which she felt used to be good, but was now declining. Gentry also said it used to offer more programs. Conner asked what programs had been deleted. Gentry said, "sewing." Conner stated that sewing had been offered only for a brief period, but not for six years. Sanger said that her written observations after her 1996 visit were still valid: (1) the program was too structured; (2) the

[15]At this meeting no one objected to Gentry's being involved in a meeting with Conner in a role as a supervisor or an evaluator.

homework room was too quiet; and (3) the children should be allowed to lay on the floor.

Loxton testified that Conner was told of three problems: (1) lack of quality--too much lag time; (2) lack of depth; and (3) a "certain harshness" from the staff when speaking to the students. Sanger believed that these problems had existed since at least June 1996, when she visited Hillcrest's program and wrote her memorandum about it.

Most of the discussion at this meeting was vague, but there were a few specific topics discussed. Sanger criticized the program's drill team leader and said she should be fired. She also told Conner that her entire staff had to attend a LA's BEST staff all-day development meeting on the following Saturday. Saatjian asked them to put their complaints in writing. Sanger said they did not have to provide such a document and they were not going to do so.

Sanger claimed she told Conner that she was on probation. In fact, in her testimony, Sanger called it a "probationary status" meeting. Sanger even went so far as to explain that certain "expectations" had been communicated to Conner prior to that meeting. There were no details given as to whom, where or when such "expectations" had been communicated. Neither Loxton nor Gentry said anything about "expectations" having been communicated at any time prior to this meeting. Conner insists that no statement regarding probation was made at that meeting.

Loxton states that Conner was given a month to improve the

quality of the program. Conner denies such a statement was made.

Sanger admits she did not give Conner a probation form, even though LA's BEST has such a form. This form explains to the employee the supervisor's areas of concern and/or noncompliance. It also clearly puts the employee on notice that "failure to comply" or correct the inappropriate action, "will result in the immediate termination" of his/her employment.

Loxton admits she told Conner that if she would leave Hillcrest, she (Loxton) would find something for her within LA's BEST. Conner was not willing to leave.

F. Post-meeting Changes in Hillcrest's Program

After the meeting, Conner attempted to follow Sanger's directions. She spoke to her staff about being less structured, letting the students talk more, and being more lenient. In addition, the drill team leader was fired.

Her staff, with the exception of two people, attended the Saturday meeting. After this September 17 meeting, many of Conner's staff left LA's BEST employment. There was no evidence proffered as to why they terminated such employment. Conner replaced them with teachers and teaching assistants from Hillcrest.

G. LA's BEST Increased Scrutiny

1. Gentry

After the September 17 meeting, Gentry increased her observation of the program. On September 27, she entered several LA's BEST classrooms and asked the children what they were doing. She had never previously entered those classrooms.

2. Samuel

a. Samuel's June to Mid-September Site Visits

Conner's TSP, Samuel, states that he began visiting Hillcrest more frequently. During Conner's site coordinator tenure, she received an average of one TSP visit per month. Between the completion of his June 1998 performance evaluation and September 21, Samuel states he prepared and submitted "probably more than ten visitation slips"[16] on which he listed areas of concern and observations on Hillcrest's program. He claimed that he forwarded these slips to Loxton's office, but after receiving a specific UTLA request for them, LA's BEST was unable to produce them. There were some Hillcrest slips produced, but they were prepared by Hernandez and dated from

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[16]A visitation slip is a five by eight inch card on which a TSP inserts "[a]reas of concern, what you observe, any comments, needs." Samuel stated that minor problems are not the subject of visitation slips. These are just discussed with the site coordinator. The slips are used only for major problems.

An examination of the fourteen Hillcrest slips entered into evidence, to the contrary, shows that they are used for routine observations.

Most of the slips included little more than an acknowledgement of the TSP's noting the various tasks being performed by students and staff while he was at the site.

September 21, 1994 to August 12, 1997. Loxton said that "there are some missing cards for the period of time that Gilberto Samuel supervised the site." Samuel did not prepare an evaluation using these visitation slips. This was strictly a period of observation.

Samuel states that these written visitation slips were supposed to be attached to his evaluation. The evidence is unclear as to which evaluation he was referring, the annual one he prepared in June 1998 or the Site Evaluation Report he prepared in October.

b. Samuel's September 21 to October 21 Visits

Samuel claimed that from September 21 to October 21 he visited Hillcrest three times per week and on each visit stayed from 3:00 to at least 6:00 p.m., the complete duration of each day's program. As there are twenty-three school days during this period, he had to have spent 13 or 14 three-hour periods at Hillcrest. He contends the LA's BEST activities consultant assigned to him, Karen James (James) accompanied him "[b]etween four and five times."[17] He also states that he spoke to Conner at the end of each visit.

c. Conner's Recollection of Visit Frequency

Conner does not believe Samuel was at Hillcrest anywhere near that amount of time. Conner remembers his visiting Hillcrest only three times between September 17 and her

[17]James said she went to Hillcrest once or twice by herself and twice with Samuel.

termination. The first visit lasted approximately one hour and consisted of his waiting for, speaking to, and terminating the drill team leader. The second was in early October. He spent a little less than an hour on campus that time. On his third trip, Samuel was joined by James. They spent approximately twenty minutes on campus.

d. Williams Recollection of Visit Frequency

Hillcrest LA's BEST staffer Elnora Williams (Williams) only recalls Samuel visiting once or twice during this period, and staying "about 30 minutes or so." She was a classroom teacher for LA's BEST, so from her classroom she would not have been in a position to observe all visitors to the site. However, if he spent thirteen or fourteen three-hour periods at Hillcrest, it is difficult to believe that Williams and the rest of the staff would not have been aware of his presence.

e. Samuel's Site Evaluation Report

After his September/October visits, Samuel wrote a Site Evaluation Report based on his visits. In that report he listed (1) areas of concern, (2) observations, (3) suggestions, and (4) recommendations.

His areas of concern are:

* Too much death (sic) time in between activities.
* Too many fights during LA's BEST PROGRAM.[18]
* Lack of communication between program staff and site coordinator.

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[18]Although they disagree as to frequency, both Samuel and Conner admit that fights do occur on school, and therefore, LA's BEST, campuses.

* Lack of interaction between some staff member [sic] and students.
* Students to staff ratio.
* Differences in program objectives.

Samuel, in his "Observations" section, described examples of each of his areas of concern. In addition, he said that the "staff seems to lack organization or/and lacks motivation."

In this section, he commented favorably on Conner having implemented his recommendation to replace 60 to 70 percent of her staff. He also stated the majority of the staff complied with his request to increase their interaction with the students.

However, he also stated that he recommended Hillcrest's staff visit other LA's BEST sites and that Conner disagreed, citing lack of transportation and believing that she could do a better job of training her own staff.

The last paragraph of his "suggestions" section is as follows:

> The T.P.S. asked the site coordinator, Ms. Conner , to put a side [sic] her personal objectives on the best strategies of implementation to manage the LA's BEST PROGRAM from an administrator perspective and she was advised to adhere to the already established program goals and objectives that has [sic] used, by the current LA's BEST administrators. In the opinion of the T.P.S. changes are necessary at Hillcrest LA's BEST PROGRAM in order for the program to close the gap which exist [sic] between the site and other programs. It is the T.S.P. opinion that the <u>difference in strategies of implementation that exist</u> between the site coordinator, Ms. Conner and the LA's BEST administrators <u>is the major source of the problem that Hillcrest program is having</u>. [Emphasis added.]

When testifying in the formal hearing, Samuel did not explain what he meant by "difference in strategies of implementation that exist."

His recommendations were:

> It is the T.P.S. opinion that if the site coordinator does not changes [sic] her strategy views of the program implementation, the Hillcrest LA's BEST PROGRAM would continue to have the same problem. The LA's BEST administration should consider other possible solutions, should Ms. Corner [sic] decides [sic] to stay with her current program objectives. Program administrator may want to consider naming a co-coordinator/replacing Ms. Conner with a new site coordinator or any other possible solutions that comes out of a meeting between LA's BEST program administrators and school's principal. [Emphasis added.]

Samuel did not explain what Conner's "current program objectives" were. Nor did he explain, if the ultimate object was to improve Hillcrest's program, why Conner would not have been an essential participant in any meeting between LA's BEST and Gentry.

f. Conflict Between June and October Reports

Samuel was asked why these observations contrasted so sharply with his earlier evaluation. He said that it was because with these observations, he was able to take a more in-depth look at the program, and, therefore, was able to get a better picture of the entire program.

g. Loxton's Receipt of Samuel's Report

Loxton accepted Samuel's report, but never showed it to Conner or asked her to respond to it. In her testimony in the formal hearing, Loxton admitted she did not know how many days Samuel spent at Hillcrest, or the length of each visit. She also admits she never gave Samuel's report to Conner until after she was terminated, and then only after UTLA requested it.

3. James

James said she observed Hillcrest's LA's BEST program three to four times when Conner was the site coordinator, once or twice by herself and twice with Samuel. When asked to describe problems she observed, she answered:

> A Too many children assigned to one adult, children fighting with each other and staff not being aware of it. Children needing help with their homework and not being able to get the assistance because there were not enough adults to give them assistance that they needed.
>
> . . . . . .
>
> Lack of variety of enrichment; attendance, in terms of the numbers that were supposed to be at the site at certain times.
>
> . . . . . .
>
> Q Of students or of staff?
>
> A Students
>
> Q You mean, they just didn't have enough kids?
>
> A Yeah.

Both Samuel and Conner told James that Conner's job was in jeopardy.

H. Additional LA's BEST Monitoring

1. Staff Documented Observations

In addition to these increased site visits, members of Sanger's immediate staff monitored Conner at various District meetings and documented their concerns about her. At a September 26 staff meeting, four employees reported their criticisms of Conner to Sanger. After Sanger added her comments, she, or her assistant, summarized these comments into one report.[19] Sanger insists she did not ask the staff members to prepare and submit these comments about Conner.

Rather, she insists, that the staff said that Conner was difficult to work with. When asked who said this she said, "[f]rom staff members at -- I can't recall exact meetings and times and places." Because of this alleged personality trait, Sanger said there was a reluctance to discuss these improprieties with her face-to-face. Therefore, they all sent their complaints to Sanger.

Although the other staff members were not directed to observe Conner, Sanger does admit to asking Berenice Garcia (Garcia), regional recreation director, to observe Conner at an

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[19]The comments included (1) when attending a staff meeting Conner asked for the name tags for all of her staff, when "In reality two were missing," (2) "Constant talking to staff during speech", (3) "Hillcrest staff making point to speak to presenter after keynote," (4) Conner "closing eyes during individual activity of leadership training. Not on task," (5) "Constantly identifying what she already knew," (6) "Extremely verbal during Bain presentation-not adding new information, rather validating speaker per her experience," (7) "Interaction at level less meaningful than all others observed," and (8) "[T]alking to staff and getting parents to pick up children before 6:00 p.m."

October 3 science inservice meeting. This admission was made necessary as Garcia states in her report:

> During the course of the second session, Carla Sanger, CEO and President of LA's BEST, asked that I observe Site Coordinator Carol Conner. . . .

Garcia continues with the substance of her Sanger-directed observation, as follows:

> At the time of the observation, Carol Conner was sitting in the Science Manual Workshop; workshop explaining the contents of the manual and information on planning science fairs. I was instructed to identify the materials/paperwork that Carol Conner was doing while in the workshop. I identified it as Hillcrest's monthly CDD report, and reported this information to Carla Sanger. Carla Sanger's administrative decision was not to interrupt Carol Conner's behavior and document her actions. At this point, I removed myself from the scene.

These reports were not part of the regular evaluation process for site coordinators. Among those employees who took notes on Conner for Sanger were Operations Director Anna Rosenberg (Rosenberg), Administrative Assistant Sharon Yarbrough (Yarbrough), Gurowitz, James and Garcia. It was not a regular part of Rosenberg's, Yarbrough's, or Garcia's job to evaluate site coordinators.

2. Conner's Comments Regarding Monitoring Reports

a. Name Tags

The allegation that she asked for all of her name tags was perceived by Sanger, and her reporting subordinate, as an attempt to cover-up the fact that two staffers were missing. Conner states that she merely went to the sign-in desk and identified

herself as being from Hillcrest. She was given all of her school's name tags. She returned two of them, stating that one person was not coming as s/he had to attend a funeral and another had not shown up at the designated time and place for transport to the meeting. Later, it was determined that this absent employee was stopped by the police and had her vehicle impounded due to its expired license registration.

b. Paperwork

Conner admitted she was doing paperwork, but insisted that other participants were also doing paperwork, reading and completing assignments. No one at the meeting spoke to her about her completing paperwork.

VI. Conner's LA's BEST Termination

A. November 13, 1998, Meeting

On November 13, 1998, Sanger, Loxton and Gentry again met with Conner, who was accompanied by Duffy. The meeting began in Gentry's office, but Duffy pointed out that the prior PERB settlement agreement prohibited Gentry from evaluating Conner's job performance. At that point, the meeting was moved, without Gentry, to Conner's classroom.[20] Loxton told Conner that she would be terminated as of November 20. Sanger, in her testimony, stated that the termination decision was made by herself, Loxton, Samuel, James and Gentry. Loxton told Conner that the

[20]Despite Gentry's testimony that she believed the settlement only applied to mentor teacher evaluations, there is no evidence that Gentry or anyone else objected to her being excluded from this termination meeting.

termination decision was based on reports and observations from a variety of LA's BEST personnel.

When Duffy asked Loxton to produce this documentation, Loxton refused. Loxton said Conner was an employee-at-will.

Conner asked for a letter documenting the things they told her during the meeting. In response to this request, Loxton sent her a November 13, 1998, memo entitled "Notice of Termination of Employment as of 11/20/98." The memo stated that at the September 17 meeting, Conner had been told to improve in the following areas:

- Seeing to it that staff understand the goals of LA's BEST by ensuring children's use of a variety of materials, equipment and supplies and the scheduling of a variety of activities for children to self select
- Demonstrating leadership and staff motivation by, for example, maximizing staff planning time at a staff development day
- Identifying and recommending staff for specific content areas to improve the depth of the program

Conner insisted that at the September 17 meeting she was not given any of these three directions.

The memo further alleged that Conner had not "accomplished what is necessary to make sufficient changes to improve the quality" of the program. For this reason, Loxton wrote:

> . . . I am in agreement with the recommendations of Hillcrest Drive Principal, your direct supervisor, Gilberto Samual[sic], the director of staff development, Eric Gurowitz and the President & CEO of LA's

> BEST, Carla Sanger, that new leadership must be identified to ensure the quality of the program for children at Hillcrest Drive LA's BEST program. [Emphasis added.]

Sanger insisted Gentry did not request that she terminate Conner's site coordinator employment. She also stated that she (Sanger) was unaware Conner was a UTLA representative.

1. James

James testified that she was aware of one other LA's BEST site coordinator who had been on probation with similar problems. This occurred at one of her assigned schools. In that case, the probation period lasted approximately three semesters.

Due to her participation in district-wide staff meetings as an activities consultant, she was aware of other programs throughout the District that were under heightened disciplinary scrutiny. Although her memory of these events was not precise, she believed that this heightened scrutiny lasted approximately three semesters before the issue was resolved by the site coordinator being replaced or the problems being resolved. She spent approximately two and one-half years attending such staff meetings.

B. Post Termination Parent Petition

When he learned Conner was to be terminated, one of Hillcrest's LA's BEST staff members, William Celestine, Jr., who is also a Hillcrest teacher, circulated a petition among parents protesting her dismissal. Three hundred and one signatures were gathered at the program's sign-out location. Although these signatures were not independently verified, one hundred and

twenty-one were accompanied by telephone numbers and forty-six others included addresses, which would facilitate such verification.

C. UTLA's Request for Termination Documentation

On May 14, 1999, UTLA officials Terry Skotnes and Duffy sent Loxton a request for "[a]ll written materials" from Hillcrest site visits from July 1, 1998 through October 31, 1998 and all "other documents written" by Hillcrest "(staff, parents, students, administrators, etc.) relevant to Ms. Conner's last L.A. BEST Performance Evaluation."

The only LA's BEST documents received by UTLA, in response, were three reports: (1) Sanger's June 4, 1996, report, (2) Gurowitz' September 2, 11 and 14, 1998, site visit observations, but not his cover letter, and (3) Samuel's October 1998 site evaluation report. Conner had not seen any of these documents before Loxton produced them for UTLA at the hearing.

D. Additional Circumstances in Support of Termination

Sanger insists she had long-standing doubts about Conner and her program. She claims she had "concerns" about the program ever since 1996 and that the "program quality" had suffered for that long.

LAUSD points to an additional series of circumstances that it believes supports LA's BEST's decision to terminate Conner:

1. Gentry's 1994-1995 Concerns

Gentry said she first began to be concerned about the program in 1994-95. She described her concerns as follows:

> Q And what was it that you perceived that you considered a decline in the program?
>
> A It did not appear to be as well organized. Children were running all over the yard unsupervised. There were many more injuries, parent complaints. That's about it. And the lack of a structured program where they had activities, the lack of a variety of activities in the classroom. ([Emphasis added.)

2. Sanger's 1997 Concerns

Sanger stated that her concerns about the Hillcrest program continued into 1997, but she admitted she did not observe Conner's program that year. Rather, she claimed that her 1997 concern was based on one complaint from one parent. This single complaint focused not on Conner but on one of her teaching assistants. Despite this one complaint, Sanger admitted that in 1997 she knew that parents at Hillcrest generally approved of Conner's performance as site coordinator.

3. Conner's Pattern of Lateness

Sanger also claimed that Conner exhibited a "pattern of lateness" in coming to meetings and submitting documents. She complained, in particular, that Conner was often late to staff development meetings.

However, these meetings took place on school days at 3:30 p.m. at the District headquarters in downtown Los Angeles. Conner did not complete her teaching duties until 3:08 p.m. and

then it was a forty to forty-five minute drive to the District office. In addition, it often took up to twenty minutes to find a parking place.

4. Sanger Acknowledgment of Gentry/Conner Conflict

Sanger said that Conner told her that she and Gentry did not get along. Sanger advised Conner to go to another school. She did not talk to Gentry about her attitude toward Conner. However, Gentry told Sanger, a long time ago, that she should appoint a co-site coordinator because Conner had emotional problems and was not up to having the responsibility of the job on a full-time basis.

E. Explanation of Evaluation/Termination Inconsistencies

Loxton admitted she could not account for Conner's termination after such glowing evaluations, offering only that "[m]aybe something changed for her."

Sanger, near the end of her testimony, was asked to examine Conner's last four LA's BEST annual performance reports (school years 1994-98). After this examination, she admitted they were exemplary.

When asked why Conner's annual evaluations were diametrically opposed to the evidence she received from her operations staff Sanger answered:

> THE WITNESS: My explanation is that we had a lot of tightening up to do with our practices and supervision and that we have a staff that has taken corrective actions that, I would agree with you, there look to be inconsistencies; however, I look to June '96 to the evaluation which, by the way, for me represents a shift.

> I believe that Carol Conner was an exemplary employee until '96, and I believe something changed. I wasn't privy to everything that happened, but I know something changed. And I believe that change, Carol Conner and I have talked about informally, and there was a change. I believe there was a disconnect from what I know to be her background and experience and what was reflected in the program.
>
> The program suffered, the program quality as of 1996 was of concern. That concern was not reflected in the evaluations appropriately, and I believe LA's BEST is at fault for that if, in fact, these evaluations were not discussed appropriately with Ms. Conner. . . .
>
> . . . . . .
>
> THE WITNESS: I am suggesting to you that based on many conversations -- not one, not a few -- from people who have been at the site, there were serious concerns about the quality of the program and what was happening for children.

VII. Credibility Determinations

A. Hillcrest UTLA/LAUSD Conflicts

There is absolutely no doubt, that for an extended period of time, Gentry and Conner were engaged in an ideological, as well as a personal, battle over the manner in which Hillcrest was being run. Conner, on behalf of UTLA in her representation of the employees, was attempting to effect certain changes. Gentry, on behalf of LAUSD, defended the manner in which she was running the school and resisted those changes.

A conflict between a school site administrator and a site union chair is hardly an unusual circumstance; however, this

particular conflict was taken to extraordinary lengths. In order to make knowledgeable credibility determinations, it is necessary to understand the underlying motivations of the parties.

This Gentry/Conner, LAUSD/UTLA conflict manifested itself in a number of incidents. Three of these incidents are discussed below.

1. Frustrated Postal Employee Comment

Gentry attempted to use Conner's comment to exact punitive action against her. The Hillcrest faculty lined up behind their respective champions, with six insisting Gentry was right, and 29 supporting Conner. There was insufficient evidence presented at the formal hearing in this case to support a finding as to which side was "correct."

However, LAUSD's ultimate action clearly favored Conner. She was reinstated to her Hillcrest teaching position, had six days of sick leave restored, was awarded $2,500, and had Gentry removed from the preparation of any of her future evaluations. There is little doubt that this District action humiliated Gentry.

2. Hillcrest's Alleged Fiscal Improprieties

Conner's initiation of a LAUSD investigation into Hillcrest SIP spending provides evidentiary support that the battle between Conner and Gentry was ongoing, even after Gentry was no longer on campus. Although chronologically post-termination, this evidence bears on Gentry's motivation and, therefore, her credibility at the formal hearing in this case.

3. Improper Testing Allegations

Shortly after Conner initiated the above described investigation, she was accused of giving a state-wide test to her students in an improper manner. Although this accusation was made after Conner's LA's BEST termination, it did occur prior to the formal hearing in this case. Therefore, it has a potential impact on the motivation, and consequently, the credibility of witnesses at the formal hearing in this case.

As a result of this accusation, LAUSD decided Conner was to be suspended for ten days, transferred from Hillcrest and given a notice of unsatisfactory acts.

It is difficult to understand why a transfer would be a proper response to an improper test-giving allegation, unless LAUSD had an interest in separating her from the other teachers at Hillcrest. The only other reason that comes to mind would be that Gentry, although not physically in charge of Hillcrest, still was able to exert some influence in an attempt to "punish" her antagonist. A transfer from Hillcrest would amount to an ultimate "victory" for Gentry over Conner.

As in the first incident, there was insufficient evidence proffered at the formal hearing to support a finding as to whether the charges and punishment were justified. However, once again, it is possible to rely on LAUSD's own actions to provide this justification. After LAUSD completed its case-in-chief, with its witnesses undergoing cross-examination by Conner's attorneys, it withdrew the allegations and negated all proposed

punishments. Even if Gentry was not involved in the prosecution or the quantum of the charges, it was undoubtedly irritating for her to see Conner escape punishment for a second time.

B. Gentry

The evidence presented a series of circumstances in which Gentry's testimony was in conflict with other evidence, both documentary and testimonial. Some of these circumstances are set forth below.

1. Gentry said that she failed to renominate Conner for mentor teacher status, insisting that Conner was "not that strong a teacher." However, during that same period Conner received an outstanding teacher evaluation and Gentry's vice-principal supported the mentor teacher renomination. This conflict provides an example of lack of credibility on the part of Gentry.

2. Gentry called Sanger and Loxton in September 1998 to complain about Hillcrest's LA's BEST program. At that meeting she insists that they never discussed Conner, only her program. There was no doubt that the two women were antagonists. Gentry would have PERB believe that two months after Conner resumed her UTLA chair, she (Gentry) complained about Conner's program and never discussed Conner herself. This testimony lacks the most basic level of credibility.

3. When asked, in September 1998, why she elicited Sanger and Loxton's help, Gentry explained she "had so many complaints I had some serious concerns about the safety of the

children." She also stated that she called for help because the students "need to have a variety of activities because of the low (Hillcrest) test scores."

(a) The persons registering these "many complaints" were never identified, but it is unlikely it was any of the children's parents. They overwhelmingly supported Conner, as evidenced by the 1997 and 1998 parental evaluations and the petition to have her termination overturned. If Gentry's "many complaints" comment had any validity at all, and if they had come from parents, there would have been some negative comments included in those evaluations. In essence, Gentry insists she had "many complaints," but none of these parents said anything negative, even though given two official anonymous opportunities to do so. If the "complaints" were from persons other than parents, they were not identified by either name or category, i.e., teacher, custodian, administrator, neighbor, etc. Gentry's testimony in this regard is not credible.

(b) If there was any validity to the "safety of the children" issue, there could have been some justification for a quasi-emergency call to LA's BEST administration for immediate action. However, there was neither statistical nor testimonial evidence proffered at the hearing that Hillcrest was any less safe than any other LA's BEST site.

(c) In essence, Gentry is saying that she asked Sanger and Loxton to come to Hillcrest to examine the program, after nine years with Conner at the helm, because it was not

providing sufficient assistance to Hillcrest's test scores. This contention is improbable.

This evidence dictates a finding that her entire explanation for her call to Sanger and Loxton is insufficiently credible to be given any weight.

4. Gentry said that she was concerned about Conner's program in 1994-95 because "children were running all over the yard unsupervised," "parent complaints" and "many more injuries." The issues of parent complaints and safety have already been discussed.

With regard to the "unsupervised" children, this testimony was in direct contradiction to that of Sanger, in 1996, insisted the program was too structured. She deplored Conner's insistence on "single files," having a "no talking" rule, and requiring "heads down." She also stated that "children's groups are well organized; snack distribution proceeds orderly and quickly."

To the extent that Gentry insists Conner was at fault for being too lenient, she is direct conflict with Sanger who insists Conner is at fault for being too structured. These two administrators were the primary architects of Conner's eventual termination. The fact that they express diametrically opposite views as to what she was doing wrong attacks both of their testimonial credibilities, as well as dictates a finding that a serious credibility gap exists with regard to why Conner's LA's BEST employment was terminated.

5. Gentry said that Sanger came to her office in September 1996 and said that if the program did not improve she was going to replace Conner. Sanger testified before Gentry. During her testimony she said nothing about having made such a statement. LAUSD's primary defense to the instant charge is that Conner's termination was justified as her program had been deficient for over two years. Therefore, it is inconceivable that both LAUSD'S attorney and Sanger would have forgotten to introduce this alleged 1996 comment into evidence when Sanger was on the stand.

Therefore, this unsubstantiated statement by Gentry is not credited and is another example of Gentry's lack of credibility.

Summation

Due to all of the above, it is found that when Gentry's testimony is in conflict with that of Conner, it is Conner's that will be credited.

C. Sanger

The evidence presented a series of circumstances in which Sanger's testimony was in conflict with other evidence, both documentary and testimonial. Some of these circumstances are set forth below.

1. When asked why she went to Hillcrest in June 1996 and wrote an observation report,[21] she said concerns were

[21]It must be noted that this observation is the only contemporaneous documentation that permits LA's BEST to contend Conner was doing a poor job for twenty-six months prior to her termination. If the objectivity of this document is tainted or discounted, due to Gentry being its genesis, LA's BEST's entire

expressed by (1) "a volunteer that we had sent to work there," (2) "individuals who had observed the program," and (3) "staff who were there to supervise the program."

The volunteer "who was sent to work there," was never identified. Nor do we know if this person was sent to observe or to work and just happened to comment on what s/he saw. The "individuals who had observed the program" were also not identified.

Given six days of hearing and the variety of people "observing" Conner and her staff, it is difficult to believe that neither the volunteer nor the "individual observers" were asked to testify or prepare written declarations on such observations.

LA's BEST's "staff who were there to supervise the program" consisted of TSP Hernandez who prepared two evaluations of Conner within a week or two of Sanger's visit. If his two evaluations are added together, Hernandez found Conner to (1) be in compliance in everything but attending staff meetings and submitting paperwork on time, (2) "exceed standards" in 6 areas, "meets standards" in 13 areas, and be "below standard" in the area of "Developmentally Appropriate Activities and Programs," and (3) need a wider variety of cognitively appropriate activities. In addition, he added some rather universal statements of what constitutes a good after-school program.

"24 months of concerns" argument fails. If this argument fails, the only support for the termination is (1) two months of subjectively documented, potentially serious, failures to conform, and (2) a Sanger-directed surreptitious assembling of "complaints" about Conner.

These evaluation(s), in toto, would not seem to call for a personal visit from the CEO of the district-wide program. This would seem to be especially true as Hernandez did not sign one of these evaluations until June 1, four days before Sanger's visit, and the other was not signed until June 14, ten days after her visit.

The only other possible supervisory input would have come from Hernandez' visitation slips. However, these slips contained no negative comments about either Conner or the Hillcrest program. There was no evidence of any conversation between Hernandez and either Loxton or Sanger during this period.

There was a total lack of evidence in support of "concerns" having been "expressed" by the unidentified "volunteer" or "individuals who had observed." Due to this, plus Hernandez' nonexistent negative documentation, it must be found that Sanger came to Hillcrest for a reason other than the one she expressed. This evidence supports finding a lack of credibility on her part.

2. After Sanger prepared her June 4, 1996, written observations, setting forth various problems she believed Conner was experiencing at Hillcrest, she never discussed her report with Conner, nor was there any evidence that she directed any of her staff to do so. If Conner was terminated, as LA's BEST insists, in an arms-length manner, solely because she was an ineffective site coordinator, Sanger, or someone at her direction, should have shown her this observation. This would

have enabled her to modify her program to bring it into compliance with LA's BEST's expectations.

Sanger justified her inaction by insisting it was just a "talk piece for, . . . Operations staff" on how to approach the issues. That may be true, but if it was serious enough to be used to support her eventual termination, it was serious enough to be discussed with her.

Sanger's failure to show and/or discuss her 1996 observation with Conner conflicts with her contention that Conner was terminated only because of deficiencies in her program. This demonstrates a lack of credibility.

3. Sanger said she sent Gurowitz to Hillcrest because she was getting verbal reports that were in conflict with the written evaluations Conner was receiving. The source of these verbal reports was not identified. There was no evidence proffered regarding anyone other than Gentry communicating with Sanger about the Hillcrest program. As this hearing concerned, to a large extent, Gentry's influence on LA's BEST decision-making procedures, Sanger's failure to either admit that it was Gentry or to otherwise identify who gave her such reports was a crucial omission. This omission is an example of a lack of credibility.

4. Sanger's failure to show and/or to discuss Gurowitz' report with Conner conflicts with her contention that Conner was terminated only because of deficiencies in her program. This is an example of a lack of credibility.

5. Sanger's insistence that Conner's program was deficient due to excessive structure was in direct conflict with Gentry's claims that the children were running rampant. (See VII.B.4, p. 50, for a further analysis of this point.)

As stated above, these circumstances lend support to a finding that a serious credibility gap exists concerning the reason Conner's LA's BEST employment was terminated. Therefore, this evidence supports finding a lack of credibility on Sanger's part.

6. Sanger claimed that she told Conner at the September 17 meeting that she was on probation. Conner denied such a statement was made. Sanger admitted no probation form was filled out and/or presented to Conner. Sanger even went so far as to describe the meeting as a "probationary status" meeting, which would suggest that Conner had been on probation even prior to this meeting. The only support for this "prior" probationary status was Sanger's statement that certain "expectations" had been communicated to Conner prior to that meeting. The person who communicated such expectations was not identified; nor were the circumstances under which such communication was effected described.

Sanger's assertion that specified events occurred with a concomitant failure to provide evidence in support of such assertion, in conjunction with her failure to prepare and transmit an organizational probationary form, support finding a lack of credibility.

7. At the September 26 staff meeting, various staff members monitored and reported their observations of Conner's behavior. These reports were compiled and used to support Conner's termination.

Sanger insists that she did not ask the staff members to prepare or submit such reports. However, she does admit to asking Garcia to secretly walk over to Conner, look over her shoulder, see what she was doing, and report what she saw to Sanger. Garcia's subsequent report was attached to the other staff reports.

It does not take an in-depth examination of these documented staff comments to support a finding that none of them would have initially been made, much less committed to writing, had Sanger not asked for such information. Her denial of directing her staff to make such observations and subsequent reports strongly supports a finding of a lack of credibility on Sanger's part.

8. Sanger initially claimed that her 1996 concerns about the Hillcrest program continued into 1997. However, upon cross-examination it was learned that these concerns were based on one complaint from one parent about one of Conner's teaching assistants. This attempt to use an incident that had little or nothing to do with Conner to perpetuate her own contention that Conner's program was deficient for two prior years, is an example of lack of credibility.

9. Sanger claimed that "there were statements that expressed that [Conner] was very difficult to work with." She

could not remember who made the statements or when they were made. She used these "statements" to justify the staff members' surreptitious note-taking of Conner's behavior, stating that they were afraid to confront her about her doing paperwork during the meeting.

These negative comments, allegedly made by unidentified person(s) with no credible supporting documentation, are in the same genre as the secret Hillcrest volunteer, and the unnamed individual observers. Due to the lack of evidence to support this "difficult to work with" comment, it must be found that Sanger made the statement for a reason other than the one she expressed. This provides one more example of evidence that supports a finding of lack of credibility on the part of Sanger.

10. LAUSD insisted, in its opening statement, throughout the hearing and in its closing brief that it is entirely separate from LA's BEST. In fact, it insists that PERB has no jurisdiction over the matter because of this separateness.

However, when discussing Conner's termination, Sanger states that the ultimate decision was made by her, Loxton, Samuel, James and Gentry. If LAUSD had nothing to do with Conner's LA's BEST termination, why is Sanger citing Gentry as being one of the termination decision-makers?

In addition, the evidence shows that Gentry told Conner that she (Gentry) called the September 17 meeting because of concerns she had about the program. Sanger acquiesced in Gentry's control of the meeting. If Gentry had nothing to do with a LA's BEST

termination, why was Sanger permitting Gentry to call a meeting to discuss her concerns with the LA's BEST program? It is understandable that Gentry would attend, and even be involved, in a peripheral manner. However, permitting her to actually call the meeting to discuss her concerns, is diametrically opposed to LAUSD's contention the two organizations were separate and LAUSD personnel had no influence on LA's BEST's employment policies.

These incongruities are examples of a lack of credibility on Sanger's part.

Summation

Due to all of the above, it is found that when Sanger's testimony is in conflict with that of Conner, it is Conner's that will be credited.

D. Loxton

The evidence presented a series of conflicts between Loxton's testimony and other evidence, both documentary and testimonial. Some of these conflicts are set forth below.

1. Loxton called Conner shortly after the September 1, 1998, meeting to tell her that Gentry had called about Hillcrest's program. Conner stated that Loxton suggested that she apply for another job with LA's BEST. Loxton states that she does not remember any discussion about another position.

Logically, this should have been a very stressful phone call for Loxton. If LAUSD's contentions are correct, Conner was doing a horrible job and Sanger and Loxton were going to have to do something about it. On the other hand, if UTLA's contentions are

correct, Gentry was pressuring them to get rid of Conner because she was a UTLA thorn in her side at Hillcrest. In either case, Loxton had to be very aware of what she was saying and the manner in which she said it. If her testimony had been that she did not suggest Conner apply for a different LA's BEST position, it would have been more credible than her statement that she did not remember any discussion about another position. The offering of an alternative LA's BEST position would not be surprising: Loxton admitted that later, at the September 17, 1998, meeting, she told Conner that she would provide such a position, if she (Conner) resigned her Hillcrest position. However, Loxton's testimony that she does not remember whether she even discussed this matter with Conner is not credited.

2. Loxton's failure to show and/or to discuss with Conner the reports from Sanger, Gurowitz, or Samuel directly contradicts her contention that Conner was terminated purely because of deficiencies in her program. This evidence supports a finding of a lack of credibility on the part of Loxton. (See VI.C.2 and 4, pp. 53-54, for further analysis.)

3. LAUSD insisted in its opening statement, throughout the hearing and in its briefs, that it is entirely separate from LA's BEST, and that the District had nothing to do with Conner's termination. In fact, it insists that due to such separateness, PERB has no jurisdiction over this matter.

However, Loxton's November 13, 1998, "Notice of Termination" letter to Conner stated that, "I am in agreement with the

recommendations of Hillcrest Drive Principal, . . . that new leadership must be identified . . . . " Loxton's use of Gentry's recommendations to support Conner's dismissal is in conflict with LAUSD's contentions it is not involved in LA's BEST's employment decisions.

This is an example of lack of credibility on Loxton's part.

4. When asked about the conflict between Conner's termination and her exemplary 1994-98 evaluations, Loxton stated only that "[m]aybe something changed for her." The LA's BEST staff spent over two months finding and documenting each and every Conner flaw, both real and perceived. In the face of this effort, testimony that dismisses nine years of employment and four years of documented positive evaluations with such a comment is another example of a lack of credibility on the part of Loxton.

Summation

Due to all of the above, it is found that when Loxton's testimony is in conflict with that of Conner, it is Conner's that will be credited.

E. Hernandez

The evidence presented a circumstance in which Hernandez' testimony was internally inconsistent. This circumstance is discussed below.

Hernandez' testimony with regard to the two 1995-96 evaluations was confusing, at best, and incredible, at worst. His "final" evaluation was dated earlier than his draft. He

insisted that he never gave his draft to Conner, and yet it was that document that she offered into evidence. He affixed his full signature to both evaluations. He insisted that he lowered his evaluation ratings due to his visitation slips. And yet the only chronologically appropriate visitation slips produced by LAUSD, after the completion of Hernandez' testimony, contained comments that proved nothing other than he visited Hillcrest on the specified dates. His failure to return to the stand to explain the absence of negative comments on his visitation slips added to the incongruity of his testimony.

This internal inconsistency in Hernandez' testimony supports a finding that it should not be given any credibility.

Summation

Due to the above example, it is found that when Hernandez' testimony is in conflict with that of Conner, it is Conner's that will be credited.

ISSUES

1. Are LAUSD and LA's BEST a single employer, or in the alternative, joint employers?

2. Did LAUSD, through its agent, Gentry, cause Conner to be terminated from her LA's BEST employment because of her protected activities, thereby violating subdivisions (a) or (b) of section 3543.5?

CONCLUSIONS OF LAW

ISSUE NO. 1

Charging party contends that the operations of LAUSD and LA's BEST are so interwoven, they are a single employer, or in the alternative, they are joint employers.

Single Employer

In support of its "single employer" argument, it cites Blumfield Theaters (1979) 240 NLRB 206 [100 LRRM 1229], enforced without opinion (9th Cir. 1980) 626 F.2d 865 [106 LRRM 2869]. In that case, the National Labor Relations Board (NLRB) cited Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc. (1965) 380 U.S. 255 [58 LRRM 2545] (Broadcast Service), in which the Supreme Court held that in determining whether enterprises constitute a single employer, the controlling criteria are:

> (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership.

In Hydrolines, Inc. and TNT Hydrolines, Inc. and Local 333, United Marine Division, International Longshoreman's Association, AFL-CIO (1991) 305 NLRB 416 [138 LRRM 1363] (Hydrolines), the NLRB held that

> No one of the four criteria is controlling nor need all be present to warrant a single-employer finding. The Board has stressed that the first three criteria are more critical than common ownership, with particular emphasis on whether control of labor relations is centralized, as these tend to show "operational integration." [Citation.] "[S]ingle employer status depends on all the circumstances of the case

> and is characterized by absence of an 'arm's length relationship found among unintegrated companies.'" [Citation; fns. omitted.]

There is little doubt that LAUSD and LA's BEST's operations have an extensive interrelationship of operations. Some examples of these are:

1. LA's BEST using LAUSD headquarters without paying rent.

2. School principal intricately involved in LA's BEST program.

3. LA's BEST personnel driving LAUSD vehicles, with exempt license plates, even though vehicles purchased with LA's BEST funds.

4. LAUSD performing all bookkeeping functions for LA's BEST, with the exception of one accountant.

5. LAUSD performing all personnel management functions for LA's BEST.

6. No separate new hiring procedures, i.e., no new W-2, fingerprint submission, etc.

7. LA's BEST's use of LAUSD's insurance for all of its operations, other than personnel located in mayor's office.

8. Integrated payroll procedures:

a. Use of LAUSD employee numbers as means of identification of LA's BEST employees.

b. Disbursal of one W-2 form for moneys earned from both organizations.

c. FLSA restrictions applied to total hours worked for both organizations.

9. LAUSD site administrator has control over hiring of new employees.

10. LAUSD site administrator has control over such things as soccer rosters and field trip requisitions.

11. LAUSD is LA's BEST's only client.

12. Requirement that LA's BEST employees adhere to all LAUSD rules and regulations.

13. Common salary structure, including increases.

14. With one exception, all site level supervisory personnel, i.e., site supervisors and TSPs, work for both organizations.

With regard to the centralized control of labor relations, the evidence in this case showed that:

1. Each LAUSD site principal has to approve the hiring of any new LA's BEST employee.

2. Gentry called a September 17, 1998, meeting to discuss with Sanger, Loxton and Conner deficiencies she perceived in Hillcrest's LA's BEST program.

3. Gentry was one of the persons that made the decision to terminate Conner's LA's BEST employment.

In addition, PERB has issued a decision regarding the relationship between LAUSD and LA's BEST.

In Los Angeles Unified School District (1995) PERB Decision No. 1129 (LAUSD (Davis)), the Board held that the principal of Alta Loma Elementary School terminated the LA's BEST employment relationship of an employee at her school.

There do not seem to be any issues regarding common management, other than at the site level, which has been described above in the discussion, supra, regarding the centralized control of labor relations criteria.

Nor does there seem to be any issue with regard to common ownership as LA's BEST is a private corporation and LAUSD is a public institution.

Joint Employers

With regard to LAUSD and LA's BEST being held to be joint employers, United Public Employees, Local 790, SEIU, AFL-CIO v. PERB (1989) 213 Cal.App.3d 1119 [262 Cal.Rptr. 158] (United Public Employees, overturned a PERB decision holding that the City and County of San Francisco (City) was the sole employer of specified classified employees working at the San Francisco Community College District (SFCCD). The court held that the City and SFCCD were joint employers of the employees, stating that the

> . . . Union will continue to bargain with the District over those matters in which the District exerts authority and control, and with the City over the areas within its purview.

The court in United Public Employees described in great detail, and relied to a large extent, on the manner in which the City and SFCCD divided the community college's personnel procedures, hiring practices, payroll responsibilities and grievance procedures. Each entity had a clearly defined role that was described and memorialized in written memoranda.

In The Regents of the University of California (1999) PERB Order No. Ad-293-H (Regents), on p. 12, the Board held that

> . . . applicable case law argues against granting the motion to amend on a joint employer theory. As a private nonprofit corporation USHC falls under the jurisdiction of the National Labor Relations Act (NLRA), even though some interrelationship with UC may exist. (Management Training Corporation (1995) 317 NLRB 1355, 1358, fn. 16 [149 LRRM 1313].) . . .

In continued, at p. 13:

> Also relevant here is PERB case law holding that PERB will not exercise jurisdiction over entities that do not fall within the definition of employer under HEERA.[22] Because USHC is a private entity that does not fall within the definition of employer under HEERA . . . PERB may not exercise jurisdiction over USHC or its employees. (Fresno Unified School District (1979) PERB Decision No. 82, at p. 5) . . .

Subdivision (k) of section 3540.1, defines a "public school employer" or "employer," for purposes of the EERA, as follows:

> . . . means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, or a charter school that declared itself a public school employer pursuant to subdivision (b) of Section 47611.5 of the Education Code.

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[22]HEERA is an acronym for the Higher Education Employer-Employee Relations Act, see Government Code, Title I, Division 4, Chapter 12 (commencing with section 3560 et seq.)

Summary

In order for PERB to assert jurisdiction over LAUSD and LA's BEST as a single employer, LA's BEST would have to fall within the above definition of an "employer." It meets none of the criteria of such definition. Therefore, PERB cannot assert jurisdiction on a single employer basis.

Even as a joint employer, there are difficulties with PERB's asserting jurisdiction.

Regents states that PERB cannot assert jurisdiction over a private corporation as it falls outside of EERA's definition of an employer.

However, United Public Employees states that it is possible to assert PERB's jurisdiction in a private/public partnership. However, in order to do so there has to be a clearly defined line between the two organizations with regard to labor relations. This line would have to clearly describe the rights and responsibilities of each organization. This would enable PERB to understand what part of LA's BEST's operations fell within the definition of a public school employer and what did not. In the absence of such a line, it is not possible to conclude that PERB may assert jurisdiction over LA's BEST or any organization that does not meet the definition in subdivision (k) of section 3540.1.

In the instant case, the labor relations responsibilities of the two organizations have no formal overlap at the institutional level. However, at the site level the LAUSD principal has labor

relations responsibilities, i.e., the right to absolute veto over hiring decisions and some undefined input into termination decisions. (See LAUSD (Davis) and Sanger's testimony regarding Gentry's part in LA's BEST's termination of Conner.)

However, this interrelationship is insufficient to bring LAUSD and LA's BEST within the scope of the holding in United Public Employee.

Due to the above, it is concluded that the two organizations are neither a single nor a joint employer, but are two separate employers. PERB, therefore, has no jurisdiction over LA's BEST.

However, this conclusion is not dispositive of the case. LAUSD may be held responsible for the acts of its agents, even though the "harm" occasioned by the employee is incurred outside the ambit of the District's usual authority.

Parameters of LAUSD's Responsibility for Gentry's Actions

In Rim of the World Unified School District (1986) PERB Order No. Ad-161 (Rim of the World), the Board discussed, at length, whether a school official could be held to have committed an unfair labor practice by filing a lawsuit against school employees. Although the case centered on other issues, the analysis made it clear that an employer could be held liable for its agent(s)' acts that had an effect outside of the parameters of the District.

In Inglewood Teachers Assn v. Public Employment Relations Board (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228], the District Court of Appeal discussed at length, the same question presented

by Rim of the World. Its analysis, although decided on other grounds, clearly assumed that an employer could be held liable for its agent's acts that had an effect outside the parameters of the District.

In HS Healthcare, Inc. d/b/a/ Springfield Manner et al. (1989) 295 NLRB 17 [133 LRRM 1105], an employer was found to have called other nursing homes in the area and explained that it had fired a specified employee for union organizing. This action prevented the employee from obtaining employment in this field in the area. The employer was ordered to reinstate the employee with back pay. In International Shipping Association (1990) 297 NLRB 1059 [134 LRRM 1035], an employer was also found to have directed a successor employer to decline to hire specified employees, due to protected activities. The NLRB's order directed the employer to

> . . . make them whole for any losses of earnings and other benefits suffered as a result of the discrimination against them from the date of the refusal to employ them in early December 1987 to the date they secure substantially equivalent employment with interest. [Emphasis added.]

ISSUE NO. 2: Did LAUSD, through its agent, Gentry, cause Conner to be terminated from her LA's BEST employment, because of her protected activities, thereby violating subdivision (a) or (b) of section 3543.5?

PERB has long held that principals are agents of their districts. (See Santa Clara Unified School District (1979) PERB Decision No. 104, California State University (CFA) (1990) PERB Decision No. 793-H.) In this case there would no question of

such agency as Gentry was interacting with Sanger's organization in compliance with the duties delegated to her by LAUSD.

Applicable Test

The Board, in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of an employer's duty regarding discrimination against or interference with employees:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board (NLRB) decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105

LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In both cases, 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, charging party must first prove that the subject employee engaged in protected activity.[23] Next, it must prove that the person(s) who made the decision that resulted in the harm were aware of such protected activity.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad, at page 11:

> 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

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[23]Section 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. . . .

whether union animus is present and a motivating factor in the employer's action(s). These circumstances are: (1) the presence of any disparate treatment of charging party; (2) the proximity of time between the participation in protected activity and the adverse action; (3) any inconsistent, contradictory or vague explanation of the employer's action(s); (4) any departure from established procedures or standards; and (5) any inadequate investigation. (See also Baldwin Park Unified School District (1982) PERB Decision No. 221.)

Explanatory Comments

1. The facts in this case are both varied and voluminous. In addition, many of the determining issues in this case have already been set forth twice, once in the initial findings of fact, and again in the credibility determinations at the conclusion of those findings. Therefore, when possible in the following analysis, specific events will be incorporated by reference to page and outline designation, rather than by a reiteration of the previous text.

2. In this case, most of the actors are not employees of LAUSD. Irrespective of this employment distinction, if the eventual harm was created by the acts of its agent, the District is still liable for such harm. In examining the types of circumstances set forth in Novato, the purpose of the analysis must be twofold.

First it must be determined whether unlawful motivation was the underlying reason for the harm, i.e., Conner's termination.

Second, it must be determined whether the District's agent was the source of that unlawful motivation. Each of these elements may be established by inference from the entire record.

The District, in its defense, propounds two primary contentions. First, it insists that the two organizations are separate entities and therefore, PERB has no primary jurisdiction over LA's BEST. In this area, it has been concluded it was correct and it prevailed. See holding, supra, i.e., the two organizations were neither a single employer nor joint employers.

Its second contention is that Conner's program at Hillcrest was so deficient that LA's BEST, in an arms-length manner, was justified in terminating her employment. It called numerous after-school expert witnesses who provided testimony in support of this contention.

UTLA attempted to counter this contention with evidence that such alleged deficiencies were (1) insufficiently documented, (2) very subjective, (3) supported by inconsistent evidence, and (4) manifested for a relatively short period of time. This last deficiency was a crucial element in UTLA's case, in that it contended that Conner's alleged deficiencies did not justify LA's BEST's swift termination. UTLA insists that these four factors, acting in concert, prove that LA's BEST had insufficient justification to terminate Conner in November 1998. It further contends this lack of termination justification supports an inference of unlawful motivation.

As Conner was not involved in any protected activities vis-a-vis LA's BEST, UTLA contends that the genesis of such unlawful motivation came from LAUSD's agent, Gentry. It was her unlawful motivation that caused Sanger and her organization to terminate Conner.

Analysis

There is no doubt that Conner engaged in protect activities. Her tenure as Hillcrest's UTLA chapter chair, the PERB charge she filed, plus the various discussions she had with Gentry on behalf of her fellow teachers provides this element. (See I.A and C, pp. 4-9.)

Gentry admitted knowing of Conner's UTLA chair status. She also was aware of the PERB unfair practice charge and its eventual outcome. Therefore, the remaining element is whether Conner's termination was the result of these protected activities.

Presence of Disparate Treatment of Charging Party

1. LA's BEST observations and reporting of Conner activities at staff meetings. (See facts and analysis at V.H.1 and 2, pp. 37-39, as well as VII.C.7, pp. 56.) These types of trivial complaints are neither noticed nor reported unless the supervisor requests them. The very fact that they were requested, made and memorialized shows that Conner was treated in a disparate manner. It also is an example of a departure from established procedures. A supervisor using employees to spy on an a fellow employee in order to support a termination is hardly

an established personnel practice. This is especially true as the "reportable offenses" were de minimus. This behavior supports an inference of unlawful motivation.

2. Gentry's failure to renominate Conner for mentor teacher status. (See facts and analysis at I.A, pp. 4-7, as well as VII.B.1, p. 48.) This failure to renominate in the face of uncontested evidence to the contrary shows that Conner was treated in a disparate manner. This supports an inference of unlawful motivation.

3. Sanger and Loxton's failure to provide negative program information from Sanger (June 1996), Gurowitz (September 1998), and Samuel (October 1998) to Conner. (See facts and analysis at V.A, pp. 4-7; VII.C.2, pp. 53-54; VII.C.4, p. 54; VII.D.2, p. 59.)

This failure to give Conner an opportunity to respond to her critics and thereby improve her program shows that she was treated in a disparate manner. This evidence supports an inference of unlawful motivation. It is also an example of contradictory explanations of the employer's actions, and a departure from established standards and procedures, which provides further support for an inference of unlawful motivation.

Proximity of Time Between Protected Activities and Harm

1. Conner's return to the Hillcrest campus after Gentry's aborted attempt to remove her in March 1996 was closely followed by Sanger and Loxton's unexplained visit to Hillcrest in early June 1996. (See facts and analysis at I.A, pp. 4-7; V.A,

pp. 22-23; VII.C.1, pp. 51-53.) This provides evidence of the short proximity of time between Conner's participation in protected activity and the adverse action. This evidence provides support for an inference of unlawful motivation.

2. In 1994-95 there was little or no evidence of conflict between Conner and Gentry and her evaluation was outstanding. At the end of 1995-96, shortly after she was returned to her classroom after the "postal employee comment," she received two evaluations. The first was somewhat lower than that of the prior year, the second was markedly lower. Hernandez' explanation for the existence of two evaluations was not credited. (See facts and analysis at IV.B, pp. 16-19; VII.E, pp. 60-61.) This evidence provides evidence of the proximity of time between the participation in protected activity and the adverse action. It also provides evidence of an inconsistent explanation of the employer's actions, and a departure from established standards and procedures. This evidence provides support for an inference of unlawful motivation.

3. Shortly after Conner's resignation of her Hillcrest UTLA chair became effective, she received a letter from Sanger which included assurances that she would receive a new 1995-96 evaluation and that her work was valuable to the LA's BEST children. The fact that no reevaluation was forthcoming does not negate the effect of this letter. This assurance of support is in direct contradiction to Sanger's testimony that Conner's program was in trouble from 1996 to her termination. (See facts

and analysis at V.B, p. 25.) This evidence supports a nexus between the cessation of protected activity and the receipt of a promise of relief from an earlier evaluation. This supports an inference of unlawful motivation.

4. In 1996-97, after her resignation of the Hillcrest UTLA chair, she once again received an unblemished evaluation. More particularly, this evaluation stated that she had cured the only seriously negative comment contained in the 1995-96 evaluation(s), when it stated, "continue to implement developmentally appropriate school-age child care programs." (See facts and analysis at IV.D, p. 20.)

This evidence supports a nexus between the proximity in time between the cessation of a protected activity and the receipt of an improved evaluation. This supports an inference of unlawful motivation.

Inconsistent, Contradictory or Vague Employer Explanations

Additional examples of inconsistent, contradictory or vague employer explanations have been set forth, supra, under disparate treatment (para. 3) and proximity of time (para. 2).

1. When Gentry testified as to why she elicited Sanger and Loxton's help with Conner in 1998, she cited anonymous complaints, safety considerations and Hillcrest's low test scores. Her testimony is contradictory to the weight of the evidence produced at the hearing. These comments were unsupported by any other evidence and were found to have had no credibility. (See facts and analysis at V.C, pp. 25-26; and

VII.B.3(a)(b) and (c), pp. 48-50.) They support an inference of unlawful motivation.

2. Gentry alleged that she complained in 1994-95 about Conner's program due to unsupervised children, parent complaints and more injuries. These comments were unsupported by any other evidence and were found to have no credibility. More importantly, they were in direct contradiction to Sanger's June, 1996 observations and her (Sanger's) later statements that she found Conner's program too structured. (See facts and analysis at V.A.1, pp. 23-24; VI.D.1, pp. 42-43; VII.B.4, p. 50.) The inconsistency of Gentry's comments with those of Sanger's constitutes shifting explanations of the employer's actions. This supports an inference of unlawful motivation.

3. Sanger said she sent Gurowitz to Hillcrest because she was getting verbal reports that were in conflict with Conner's evaluations. The only person identified at the hearing that could have made such reports was Gentry. (See facts and analysis at V.D, pp. 26-27; VII.C.3, p. 54.) Her failure to admit it was Gentry or otherwise identify the source of such reports constitutes an inconsistent explanation of the employer's action. This testimony supports an inference of unlawful motivation.

4. Sanger's testimony that the September 17 meeting with Conner was a "probationary status" meeting was without support from either Loxton, Gentry or other evidence elicited at the hearing. (See facts and analysis at V.E, pp. 28-30; VII.C.6, p. 55.) This testimony constitutes an inconsistent explanation

of the employer's actions, which supports an inference of unlawful motivation.

5. Sanger initially claimed her concerns regarding Conner's program continued into 1997. However, the only support for this claim was one complaint from one parent about one teaching assistant. (See facts and analysis at VI.D.1, pp. 42-43; VII.C.8, p. 56.) This unsupported claim constitutes an inconsistent and vague explanation of the employer's actions as well as a departure from established procedures or standards. It also supports an inference of unlawful motivation.

6. Sanger claimed that "there were statements that . . . Conner was very difficult to work with." She was unable to support this claim with facts regarding when or by whom these statements were made. (See facts and analysis at V.H.1, pp. 37-38; VII.C.9, pp. 56-57.) This claim constitutes an inconsistent and vague explanation of the employer's actions.

In addition, both this and the preceding paragraph are violations of the most basic of supervisory practices, i.e., dealing with one's subordinates in an honest and forthright manner. This behavior on the part of a supervisor also constitutes a departure from established procedures and standards. It also supports an inference of unlawful motivation.

7. Sanger's admission that Gentry was a part of the termination decision-making process is in direct contradiction to LAUSD's entire defense theory, i.e., neither LAUSD, nor its administrators, have any responsibilities for LA's BEST

employment decisions. This admission constitutes an inconsistent explanation of the employer's actions. (See facts and analysis at VI.A, pp. 39-41; VII.C.10, pp. 57-58.) This admission supports an inference of unlawful motivation.

8. Loxton's November 13, 1998, notice of termination states, inter alia, that she was in agreement with the recommendation of Gentry that Conner should be terminated. (See comments in para. 7, supra, as well as facts and analysis at VII.D.3, pp. 59-60.) This statement supports an inference of unlawful motivation.

Departure from Established Procedures or Standards

Examples of departures from established procedures or standards have been set forth, supra, under disparate treatment (paras. 1 and 3), proximity of time between protected activities and harm (para. 2), and inconsistent, contradictory or vague employer explanations (paras. 5 and 6).

Summation

LAUSD insists that, as most of the evaluators of Conner's program were unaware of her UTLA affiliation, there could be no unlawful motivation on their part. This argument misses the point.

Gentry was in a battle with Conner. She attempted to get her removed from Hillcrest after the "postal" comment incident. She was unable to do so and suffered the additional humiliation of LAUSD's actually paying Conner $2,500 in settlement of the incident.

In 1998, Gentry called Sanger and Loxton and had them come out. There was no credible documentary or testimonial justification for this call. She elicited their help--not to improve the program, but to get rid of Conner. They agreed and began to inundate Conner with evaluations and surreptitious observations by fellow employees. They were faced with a problem regarding timing. In her uncontradicted testimony, James stated that when a LA's BEST site coordinator is in trouble it takes approximately three semesters before a termination occurs. In this case, Sanger and Loxton needed to retroactively create these three semesters. They initially used Sanger's June 1996 comments. However, an inconsistency diminished the impact of this report. If the comments in this report were so damning why were they not shared with Conner?

Their attempt to create "two years of concerns" over Conner's program was a failure. Even her two evaluations from Hernandez were not sufficiently negative to support their "two years of concerns" theory. The 1997 and 1998 parent evaluations provided additional contrary evidence to this theory. Although it occurred after the termination, the three hundred and one petition signatures to restore Conner to her position added additional evidence the "two years of concerns" theory had little support in the community.

In a attempt to support their "two years of concerns" theory, as well as the ultimate termination, they resorted to (1) unidentified (a) volunteers, (b) individuals who expressed

concerns, (c) (parental) complaints, (2) undocumented safety issues, (3) unsupported allegations that she was difficult to work with, (4) alleged patterns of lateness, (5) and a series of supervisor-inspired "observations" by fellow employees at staff meetings. Even if Conner's program was deficient in some manner, the very fact that Sanger and Loxton terminated her fifty-seven days after first putting her on notice of such deficiencies, clearly supports a conclusion their actions were not the result of a routine, arms-length personnel decision.

An examination of the record, as a whole, dictates a conclusion that the subject termination was the result of unlawful motivation. It is also clear that this motivation came from Gentry, who convinced Sanger to terminate Conner, due to her protected activities at Hillcrest. Therefore, it is concluded that LAUSD is responsible for Conner's termination from her position with LA's BEST. This action constitutes a violation of subdivision (a) of section 3543.5.

Subdivision (b) of Section 3543.5 Violation

To establish a violation of subdivision (b) of section 3543.5 the union must establish a denial of its rights separate and apart from the involved employee.

The union has a protected right to elect site leaders and have them communicate with their fellow employees. If one of these site leaders is subject to discrimination, in any manner, it thwarts the union's ability to have employees voluntarily step into leadership roles and communicate with its members. This

discrimination against one of its leaders constitutes a violation of subdivision (b) of section 3543.5.

SUMMARY

Based on all of the foregoing, it is concluded that LAUSD violated subdivisions (a) and (b) of section 3543.5 when it caused Conner to be terminated from her employment as a site coordinator at LA's BEST.

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 the District to (1) use its good offices to attempt to cause LA's BEST to reinstate Conner to her position as Hillcrest's site coordinator and (2) cease and desist from denying UTLA rights guaranteed to it by the Act.

It is also appropriate that Conner be made whole by receiving any salary lost as a result of her unlawful termination. Such retroactive salary award shall include interest at the rate of 7 percent per annum. She should also be made whole for any ancillary losses, such as benefits, seniority credit(s), leave credit(s) and reasonably expected overtime

salary opportunities, for example, that she would have received, but for the District's unlawful actions.

Should LAUSD not be able to prevail upon LA's BEST to reinstate Conner to her previous Hillcrest site coordinator position, or a comparable position acceptable to Conner, LAUSD will continue pay to Conner an amount equal to what she would have earned had she not been unlawfully terminated. These payments shall continue until either LA's BEST or any successor organization ceases to exist, Conner terminates her employment relationship with LAUSD, or she secures substantially equivalent employment.

It is also appropriate that the District be required to post a notice incorporating the terms of this order at all District sites where notices are customarily placed for certificated employees. The 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 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 Los Angeles Unified School District (District) violated subdivision (a) and (b) of 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. Influencing LA's BEST to terminate Carol Conner (Conner), its site coordinator at Hillcrest Elementary School (Hillcrest).

2. Denying to the United Teachers of Los Angeles (UTLA) the right to communicate with its members through its elected officials, without fear of retaliation.

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

1. Using its good offices to attempt to cause LA's BEST to reinstate Conner to her position as Hillcrest's site coordinator.

2. Pay to Conner, upon demand, the salary she lost as a result of her unlawful termination. Such retroactive salary award shall include interest at the rate of 7 percent per annum.

3. Make Conner whole, upon demand, for any other losses, such as benefits, seniority credit(s), leave credit(s)

for example, and reasonably expected overtime salary opportunities she may have suffered as a result of the District's unlawful action.

4. Pay to Conner, upon demand, should it not be able to prevail upon LA's BEST to reinstate her to her previous Hillcrest site coordinator position, or a comparable position with LA's BEST that is acceptable to Conner, an amount equal to what she would have earned had she not been unlawfully terminated. These payments shall continue until either LA's BEST or any successor organization ceases to exist, Conner terminates her employment relationship with LAUSD, or she secures substantially equivalent employment.

5. 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 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 twenty days of service of this Decision. the Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

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

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing, together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also placed the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

ALLEN R. LINK
Administrative Law Judge