STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BELLEVUE EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. BELLEVUE UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2223-E PERB Decision No. 1561 December 8, 2003

Appearance: California Teachers Association by Ramon E. Romero, Attorney, for Bellevue Educators Association, CTA/NEA.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Bellevue Educators Association, CTA/NEA (Association) to a proposed decision (attached) of the administrative law judge (ALJ). The charge alleged that the Bellevue Union Elementary School District (District) violated the Educational Employment Relations Act (EERA) [1] by retaliating against two second-year probationary teachers because of their protected activity. Specifically, the charge alleged that the two second-year probationary teachers were denied permanent status because they participated in a work-to-contract campaign to protest the status of contract negotiations with the District. The ALJ found that the Association established a prima facie case of unlawful retaliation. However, the ALJ eventually dismissed the charge and complaint after finding that the two

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

teachers would not have been reelected even absent their protected activity because their job performance was not superior.

After reviewing the entire record in this case, including the proposed decision and the Association's exceptions, the Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

In its exceptions, the Association first argues that the ALJ erred by failing to follow the Board's precedential decision in Livingston Union School District (1992) PERB Decision No. 965 (Livingston). Livingston also involved a school district's refusal to rehire two second-year probationary teachers allegedly because of their protected activity. In Livingston, the Board concluded that the school district had retaliated against the two teachers because of their activism on behalf of other teachers. The Association argues that the facts in this case are indistinguishable from Livingston.

After analyzing all the evidence, the ALJ concluded that although there are similarities, the facts in Livingston differ substantially from those here. The Board agrees. One key difference is that in Livingston there was strong evidence that the school district targeted the two probationary teachers because of their activism. Specifically, the two probationary teachers in Livingston were immediately admonished and referred to as "bitchers" and "gripers" when they complained about workplace issues.

In contrast, there is no evidence that the District targeted, or had any motive to target, Lori Lemke (Lemke) and Debra Bramlett (Bramlett). It is undisputed that all the teachers in the District, including those on probation, participated in the work-to-contract campaign. There is no evidence that Lemke and Bramlett were leaders of the protest or especially active

in the campaign. The only theory offered by the Association for why Lemke and Bramlett would be targeted is that the District wanted to retaliate against Kawana Elementary School, which was the union stronghold. However, the Association presented no evidence to support this speculative theory and the ALJ properly rejected it.

Despite the fact that there did not appear to be any reason for why the District would target Lemke and Bramlett, the ALJ nevertheless concluded that the Association had established a prima facie case of retaliation. The ALJ's finding was based on the District's unsubstantiated and exaggerated justifications for their non reelection. In reviewing the record, the Board agrees that the Association has established a prima facie case, but just barely. Weighing heavily against such a finding is the lack of motive for why Lemke and Bramlett would be targeted and the fact that most of the probationary teachers were reelected even though all of them participated in the work-to-contract campaign. The weaker evidence of unlawful animus is one factor distinguishing this case from Livingston. Accordingly, the Board agrees with the ALJ that Livingston is not controlling.

The remainder of the Association's exceptions attack the justifications proffered by the District for the non-reelection of Lemke and Bramlett. The Association vigorously argues that the District's purported justifications are without merit. Because the District has not demonstrated good cause for Lemke and Bramlett's non reelection, the Association argues that an inference of retaliation must be sustained.

The Association's exceptions are unpersuasive because they fail to acknowledge that tenure can be denied to probationary teachers for any lawful reason regardless of the sufficiency of the cause. (Education Code sec. 44929.21; McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 166, 169 [279 Cal.Rptr. 26].) The mere lack of good cause for the non-reelection of Lemke and Bramlett does not, by itself,

support an inference of unlawful animus.[2] (Golden Plains Unified School District (2002) PERB Decision No. 1489.) To the contrary, the District was well within its rights to establish a policy of granting tenure only to those teachers receiving superior performance ratings, as opposed to merely satisfactory ones. Based on the record, the Board agrees that the District had such a policy in effect during the 2000-2001 school year.

Given that the District had a policy of granting tenure only to superior teachers, the Board agrees with the ALJ that the District met its burden to establish that it would not have reelected Lemke and Bramlett even absent any protected activity. The record establishes that Lemke and Bramlett were professionally competent. However, they were not rated superior, which was the District's standard for reelection. Most important, the record establishes that the performance ratings assigned to Lemke and Bramlett predate their participation in the Association's work-to-contract campaign. Given these facts, the Board finds that the District has met its burden to establish that Lemke and Bramlett would have been non reelected even absent any protected activities. Accordingly, the charge and complaint in this matter must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-2223-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.

[2] However, as the ALJ correctly found, an inference of discrimination may be supported when an employer offers justifications for an adverse employment action that are unsubstantiated, inconsistent, contradictory or exaggerated. (See State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.)

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BELLEVUE EDUCATORS ASSOCIATION, CTA/NEA, Charging Party, v. BELLEVUE UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2223-E PROPOSED DECISION (12/20/02)

Appearances: California Teachers Association by Ramon Romero, Attorney, for Bellevue Educators Association, CTA/NEA; School and College Legal Services of California by Robert Henry, Attorney, for Bellevue Union Elementary School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The Bellevue Educators Association, CTA/NEA (BEA), initiated this action on August 3, 2001, by filing an unfair practice charge against the Bellevue Union Elementary School District (District). On August 24, 2001, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the District denied two second year probationary teachers permanent status because of their protected conduct. Specifically, the complaint alleges that the teachers were denied permanent status because they participated in a work-to-contract campaign to protest the pace of negotiations with the District. By this conduct, it is alleged, the District violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a) and (b).[1]

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. In relevant part, section 3543.5 provides:

In its answer to the complaint, filed on September 12, 2001, the District denied that it violated the EERA and asserted a number of affirmative defenses. Denials and defenses will be addressed below, as necessary. A PERB agent conducted a settlement conference on October 11, 2001, but the matter was not resolved.

On October 31, 2001, the District moved to dismiss the complaint on the ground that the dispute is covered by a collective bargaining agreement. BEA opposed the motion. On January 14, 2002, the undersigned denied the motion and the matter proceeded to hearing.

A formal hearing was held on February 6-8, 2002. With the receipt of the final brief on August 16, 2002, the case was submitted for decision.

FINDINGS OF FACT

Jurisdiction

BEA is an employee organization within the meaning of section 3540.1(d), and the exclusive representative of an appropriate unit of the District's certificated employees within the meaning of section 3540.1(e). The District is a public school employer within the meaning of section 3540.1(k). It is located in Santa Rosa.

The District is comprised of three elementary schools, kindergarten through sixth grade. There are approximately 1800 students in the District and 120 teachers. The schools are

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> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

Meadowview, Bellevue and Kawana, the school where most of the events at issue here took place. At Kawana, approximately 85 percent of the student population is under the poverty level, about half of the students are bilingual and some of the students are known to have exhibited behavior characteristic of gangs.

The 1999-2000 Evaluations

Lori Lemke (Lemke) and Debra Bramlett (Bramlett), the probationary teachers alleged to have suffered discrimination because of their protected activities, taught at Kawana during the 1999-2000 and 2000-2001 school years. Bramlett was a resource specialist for the special education department, and Lemke taught a combination fourth/fifth grade class. Their employment was not renewed for the 2001-2002 school year.

Paula Sutherland (Sutherland), the principal at Kawana during the 1999-2000 school year, evaluated Bramlett and Lemke twice.[2] The evaluations followed meetings with both teachers to establish goals and objectives and classroom observations. Goals and objectives and classroom observations are more fully addressed below as necessary.

The first formal classroom observation of Bramlett was on December 15, 1999. Sutherland's written record of the session contained commendations that ranged from "good modeling of concept" to "lesson was well organized" to "pacing of the lesson was appropriate." Sutherland also provided several recommendations to Bramlett. These included, for example, suggestions that she use a poem or shorter piece of writing (rather than a book) to practice summarizing; assign students to read with a partner or alone rather than assigning one

[2] The evaluation form rated teachers in six areas: student progress; student control; learning environment; personal relations; professional growth; and other duties. Points were assigned in each area as follows: unsatisfactory (1); needs improvement (2); professionally competent (3); and superior (4). The evaluations also contained narratives in each area, evaluator comments and recommendations.

student to read to the class; involve the aide more in the reading exercises; assign more reading; and use charts to discuss material.

The observation was not discussed with Bramlett at that time. Prior to the Christmas holidays, Bramlett testified, she asked Sutherland for a conference to discuss her work and Sutherland responded that she had no concerns about Bramlett's performance.

On January 6, 2000, Sutherland evaluated Bramlett for the first time. She rated her professionally competent in three areas: student progress, student control, and personal relations. Bramlett was rated superior in professional growth and other duties. Sutherland commented on the evaluation that Bramlett had a "positive attitude" and was "flexible and willing to problem solve." The evaluation also included a series of commendations and a list of recommendations. Sutherland concluded with an overall recommendation that Bramlett continue "without reservation."

In May of 2000 Bramlett was observed in the classroom by Vice Principal Dawn Johnson (Johnson). The formal observation is not in the record, but Bramlett testified that it involved a math lesson and, in her view, went well. Johnson did not testify at the hearing.

By the end of the 1999-2000 school year, however, Sutherland had begun to view Bramlett's performance in a less favorable light. In an evaluation dated June 29, 2000, she rated Bramlett professionally competent in four areas: student progress, learning environment, professional growth and other duties. She rated Bramlett somewhere between professionally competent and needs improvement, a "2/3" rating, in student control and personal relations.

In the student control area, Sutherland wrote:

> It is important that you relate to students in a positive, calm manner. You need to be respectful of them so that they will respect you in return. Continue to have high expectations for students and to implement a consistent proactive behavior program. Students who have difficulty behaving appropriately respond well to an established routine.

Under personal relations, Sutherland wrote:

> Debra, you are a very friendly and outgoing person. However, you sometimes display a very blunt manner that could be misinterpreted by adults or more importantly students. Continue to maintain open, on-going communication with me and with your new principal. It is not OK to make decisions about your program, for instance, when to stop services to students, without consulting with me first. I am always available, either here at the office or by phone, if you need to speak with me. I also spoke to you in the past few months about your assertive nature with me. I try hard to treat staff members in a courtesy [sic] and respectful manner and I expect to be treated in the same way.

Regarding other duties, Sutherland noted that Bramlett was willing to participate in schoolwide activities, and that she had "adequately" facilitated student success team meetings during the past semester. However, she wrote,

> . . . It is important to remember that this process calls for a team approach and that everyone on the team needs to act in a supportive manner. I have noticed that you, again, can be rather outspoken at these meetings. This could have a negative effect on promoting positive parental support.

In a series of recommendations, Sutherland suggested that Bramlett "interact with students, parents and staff in a positive and supportive manner." She suggested further that Bramlett "maintain open, on-going communication with me and that you consult with me before making program decisions." Sutherland also noted that it was "important for [Bramlett] to use results from on-going assessments to plan effective lessons for all of [her] students." Sutherland wrote "even though it is important to support students with their classroom assignments, it is also vital that direct instruction, based on your on-going assessment, happens on a daily basis both in a group setting and with individual students." Lastly, Sutherland said Bramlett should continue to implement the techniques and strategies learned during in-service.

At the end of the evaluation, Sutherland recommended that Bramlett continue to the 2000-2001 school year, "with reservation." Sutherland testified, "as the year progressed, I

became more concerned . . . especially in the area of relationships with students and with me, and with staff members. Also, with differentiating curriculum and implementing a program that met with needs of each individual RSP student."

Bramlett said she was "shocked" when Sutherland presented the evaluation to her at a conference in June 2000. In response to Bramlett's questions about the evaluation, Sutherland cited the points outlined above as the basis for her recommendation. Bramlett agreed that Sutherland offered specific examples to support the evaluation. She responded that she would correct the deficiencies in the fall.

Sutherland also evaluated Lemke twice during the 1999-2000 school year. The first evaluation was based in part on a classroom observation on December 15, 1999. Sutherland's observation notes commend Lemke on several points. For example, Sutherland pointed out that the lesson was focused and students were attentive and engaged. She noted that Lemke used good brainstorming techniques to set the lesson, identified students who were "off track" and got them back to the task at hand, and moved around the room as a classroom management technique.

On the other hand, Sutherland made several recommendations. She suggested that Lemke secure the attention of all students before and during the lesson; the longer the lesson went the more students became disengaged. She indicated that Lemke should establish a comfortable learning environment, such as the rug or other area. She indicated that brainstorming went too long. She pointed out that Lemke sometimes did the work for students, and advised her to let the students do more. Sutherland noted that the lesson went too long and suggested better pacing. Sutherland pointed out that the aide and the reading teacher were not involved in the lesson, and suggested they conduct guided reading groups during the period.

Despite these written recommendations, Lemke testified that Sutherland did not communicate to her any concerns about her performance. In fact, Lemke said, she and Sutherland had a positive relationship.

On January 6, 2000, Sutherland evaluated Lemke for the first time. She rated her professionally competent in all categories, and the comments in most areas of the evaluation generally were positive. For example, under student progress, Sutherland noted Lemke's efforts in implementing a language arts program that meets the needs of each student. She also noted that Lemke was willing to try new techniques and methods of instruction that benefited students.

Other comments were less favorable. Under student control, Lemke was rated "3-". Sutherland wrote: "Continue to implement assertive discipline procedures in your classroom in a consistent manner. I liked the positive manner in which you interact with students. Students need to know what is expected of them so that they can respond accordingly." (Underlining in original.) At the end of the evaluation, Sutherland recommended that Lemke continue "without reservation."

At some point after the January 2000 evaluation, Sutherland observed Lemke again in a guided reading class. The formal observation record is not in evidence, but Lemke testified that the lesson went well. Lemke and Sutherland discussed the observation and Lemke testified that Sutherland was "very positive."

Sutherland evaluated Lemke again on June 9, 2000. Lemke was rated professionally competent in all areas, and comments in each category again were generally favorable. Sutherland noted that Lemke's "instructional program reflects strong personal commitment and enthusiasm. Continue to maintain open, on-going communication with me. You are a

contributing member of our Kawana Staff and the fifth grade team." At the end of the evaluation, Sutherland again recommended that Lemke continue "without reservation."

Nevertheless, Sutherland testified, by the end of the 1999-2000 school year she had concerns about Lemke. She testified, "my reservations were in the implementation. Lori had done, attended workshops, gone to in-services. I wanted to see more of the implementation of some of the strategies that she had learned in the classroom. I also had some concerns about classroom management, student discipline." In Sutherland's view, these concerns are reflected in the written evaluation.

At a meeting to discuss the evaluation, Sutherland said she told Lemke that the evaluation was generous and she needed to see improvement in the following year. According to Sutherland, Lemke became "upset emotionally" and began to cry. Sutherland testified, "I thought that she had potential . . . and if she implemented some of the strategies that she could possibly do well the following year."

Lemke, on the other hand, testified that she met with Sutherland to discuss the observation and the evaluation. She said the discussion was "very positive" and Sutherland "seemed very happy with my work." According to Lemke, Sutherland raised no significant concern during the discussion.

In addressing this dispute in the testimony, I find it unnecessary to determine whether Lemke became emotional during the meeting with Sutherland. The central issue here is whether Sutherland had concerns about Lemke at the end of the 1999-2000 school year, prior to any protected activity. I find that Sutherland, by the end of the 1999-2000 school year, had at least two of the key concerns included in her testimony. These issues are reflected in the written evaluations of Lemke, although not in the strongest wording.

First, she testified that she had reservations about Lemke's failure to implement strategies learned at various workshops and in-service training sessions. In Lemke's January 2000 evaluation, Sutherland rated her "3+" in professional growth and noted that Lemke's willingness to participate in training and workshops "is of great benefit to your students. Continue to put into practice in your classroom that which is learned during your in-service training." In Lemke's June 2000 evaluation, Sutherland noted that "you are willing to participate in our in-service workshops and to attend workshops that will enhance your curricular program. Your willingness to learn, grow and add to your language arts program as you gain additional information about the reading process is of great benefit to you and your students." However, the rating dropped from "3+" to "3."

Second, Sutherland testified that she had concerns about Lemke's classroom management. The January 2000 evaluation rated Lemke "3-" under student control and emphasized that Lemke needed to implement assertive discipline procedures in your classroom in a consistent manner so that students know what is expected of them. In the June 2000 evaluation, Lemke showed slight improvement. She was rated "3" under student control, but Sutherland noted that she should continue to use assertive discipline procedures in a consistent manner, set high expectations for students, and to monitor their behavior.

The Work-to-Contract Campaign

As the 2000-2001 school year began, BEA and the District were locked in a difficult set of negotiations. This was not the first time the parties had bargained to impasse. Over the past decade, the bargaining relationship between the District and BEA had been a contentious one. In the early 1990s, the parties reached agreement on contracts only after mediation. In 1995, the District hired a negotiator to replace Superintendent Armando Flores (Flores) as chief negotiator and the negotiations continued into 1996. In September 1996, the BEA

implemented a highly publicized work-to-contract campaign that lasted approximately six weeks before an agreement was reached. The 1996-97 negotiations carried into the next school year and agreement was reached only after a factfinder issued his report.

Throughout this period, Flores testified, the District had a "good" bargaining relationship with BEA. Although the parties were locked in an adversarial process, Flores explained, he did not believe they were "antagonistic and angry." However, he conceded it was "not a positive" relationship and he was critical of the work-to-contract campaign.

The most recent round of negotiations began in February 2000, and the 2000-2001 school year began without a contract. BEA requested that PERB certify an impasse and at the same time began another work-to-contract campaign. PERB certified the impasse in October 2000, and the parties went to mediation as the campaign continued. The campaign affected many activities, but not the professional services teachers were required to provide by contract.[3] As Flores testified, "I was saddened by the fact that those services were not extended to children, yet I reconciled that with the fact that the teachers were providing full professional services and doing their job." Nonetheless, Flores described the work-to-contract campaign as "probably not a good thing." The campaign continued until a new agreement was ratified on February 22, 2001, prior to a scheduled factfinding proceeding.

There is no dispute that the work-to-contract campaign was heavily promoted and monitored on a daily basis by BEA. Articles about the campaign appeared in local newspapers, the activity was brought to governing board meetings, and BEA picketed schools.

[3] As a result of the work-to-contract campaign, teachers refused to perform many duties. These were beyond those duties required by the expired collective bargaining agreement and included, among other things, participation in activities such as astronomy night, chess club, committees, field trips, coaching sports teams, meetings, science fair, student council, and the student study team. The impact of the campaign was obvious in other ways. For example, when a meeting between the faculty and the principal reached the allotted contractual time, teachers departed en masse even though the meeting was not over.

It was well known by District administrators and principals that BEA sponsored the campaign and all teachers in the three District schools participated. This included Bramlett and Lemke.

There similarly is little dispute that Lemke and Bramlett worked extra hours while at Kawana prior to the work-to-contract campaign. During the 1999-2000, for example, they participated in the student study team after school.[4] The student study team did not meet early in the 2000-2001 school year. After some discussion, meetings resumed in January 2001, during the day rather than after school. Bramlett continued her participation, but Lemke did not.

In addition, it is well known that teachers at Kawana have been among the most active in BEA through the years and in the most recent work-to-contract activity. Out of approximately 30-35 current teachers at Kawana, eight have been active in the BEA over the past nine years as officers and/or negotiators. Flores agreed that Kawana is the "union stronghold" in the District.

The 2000-2001 School Year

Prior to the start of the 2000-2001 school year Sutherland became the District's curriculum coordinator and Nancy Rogers-Zegarra (Rogers-Zegarra) took over as principal at Kawana. Rogers-Zegarra was not a popular choice among the faculty, nor was she a stranger to the Kawana staff. Her work as a consultant for the Sonoma County Office of Education had brought her into contact with Kawana teachers. According to Steven Thiele (Thiele), a teacher at Kawana who served as BEA past president and chief negotiator, teachers at Kawana did not like Rogers-Zegarra. He said her reputation among teachers was such that many found her very "condescending and hard to work with" and "irritating." Basically, he said, teachers

[4] The student study team is designed to assist students who experience academic or other difficulties. Typically, teachers meet with students and parents to identify problems and establish a program of assistance. Meetings are held once or twice a week.

"didn't like her." Rogers-Zegarra was a friend of Sutherland, and, according to Thiele, many teachers disliked Sutherland as well.

According to District policy, a hiring panel that includes faculty members plays a role in hiring principals. Thiele testified that before the panel had begun the search for Sutherland's replacement, faculty members learned that Rogers-Zegarra already had been selected. He said, "it seemed like this was a done deal before the democratic process had happened." BEA demanded a meeting with the District to voice complaints about the decision to hire Rogers-Zegarra and the manner in which it was carried out. The situation became so heated that a school psychologist was selected to act as an intermediary between the faculty and Rogers-Zegarra as the school year began. By March 2001, the situation had not improved and BEA requested another meeting with Flores to discuss the situation. Thiele testified that BEA hoped the District would "let her go," but that didn't happen.

Meanwhile, as the 2000-2001 school year commenced, Bramlett's early encounters with Rogers-Zegarra were not positive ones. Bramlett testified that she encountered Rogers-Zegarra on the first day of school and introduced herself. She said Rogers-Zegarra responded, "I've heard about you." Bramlett's "perception" was that Rogers-Zegarra's comment "might have been negative."

About two weeks later, in September, Rogers-Zegarra entered Bramlett's classroom and asked for a list of students in the student study program and a list of resource students. According to Rogers-Zegarra, Bramlett "yelled at [her], and then she started to cry." Rogers-Zegarra described Bramlett's response as an "outburst" which showed a lack of respect in front of students. Rogers-Zegarra also testified that when she questioned Bramlett about her conduct, Bramlett said, "you know all about me and who I am." Rogers-Zegarra said she responded that she did not know Bramlett, she hadn't reviewed her personnel file, she hadn't

spoken to Sutherland about her, she was surprised at her inappropriate reaction, and she needed to use a "polite voice."

In her testimony, Bramlett flatly denied shouting at Rogers-Zegarra, asserting that Rogers-Zegarra's testimony is "totally false." According to Bramlett, she told Rogers-Zegarra that she had been instructed by the director of special education not to provide the list until it was complete, but she gave Rogers-Zegarra the list she requested anyway.

I find it unlikely that a probationary teacher such as Bramlett, upon being approached in her classroom by a new principal early in the school year, would respond to a simple request for a list of students with an "outburst" and tears. Also, Sutherland described Bramlett as "brusque." Bramlett concedes that she "can be direct and that can sometimes be misunderstood." And, as more fully discussed below, Rogers-Zegarra has demonstrated a tendency to exaggerate Bramlett's behavior as overly aggressive. Given these factors, I conclude that Bramlett most likely responded to Roger-Zegarra in a direct manner, explaining that the director of special education had instructed her not to provide the list until it was complete, and Rogers-Zegarra misconstrued her response as an outburst.

The incident prompted Rogers-Zegarra to initiate a discussion with Sutherland about Bramlett. Sutherland told Rogers-Zegarra that she didn't have "open communication" with Bramlett during the prior school year and her "voice tone" was not as positive as it could have been. Sutherland also told Rogers-Zegarra that Bramlett could be intimidating or brusque, and she suggested that Rogers-Zegarra review Bramlett's file to determine if progress was being made on recommendations from the previous year.

During the same conversation, Sutherland related concerns about Lemke and suggested that Rogers-Zegarra review her personnel file as well to determine if progress was being made. According to Rogers-Zegarra, Sutherland said Lemke needed to move around the classroom,

engage students, differentiate the instruction and "tailor the learning" to her combination class. Sutherland also told Rogers-Zegarra that she had concerns about Lemke's classroom management and her lack of ability to discipline students. Sutherland described Lemke to Rogers-Zegarra as "very emotional."

On December 11, 2000, after Bramlett had submitted her goals and objectives for the school year, Rogers-Zegarra observed her conducting a guided reading lesson. In the formal observation report, Rogers-Zegarra commended Bramlett in several areas. For example, she wrote that the lesson was well organized, students were interested and engaged, and Bramlett encouraged student participation.

Rogers-Zegarra also made several recommendations. For example, she wrote that Bramlett should use techniques to help students identify important points of the story; help students to understand the need to select only important facts for their summaries; use techniques to help students follow the reading; encourage students to read more; follow standardized instructions to help students understand the difference between a main idea and supporting details; provide more feedback so students understand what they got right and what they need to correct; and divide the reading into smaller groups to help with pacing of the lesson.

Shortly after the December 11 observation, Rogers-Zegarra and Bramlett met to discuss the observation. Bramlett testified that she received the commendations and recommendations and generally was pleased with the meeting.

On February 9, 2001, Bramlett received her first formal evaluation from Rogers-Zegarra. She was rated professionally competent in four areas: student progress, student control, learning environment, and other duties. She was rated somewhere between professionally competent and needs improvement in personal relations, a "2/3" score. The

evaluation contained several positive statements about Bramlett's performance. However, Rogers-Zegarra suggested ways for Bramlett to improve. Under student progress, Rogers-Zegarra wrote:

> It is also important that your plans are well thought out and that meaningful activities are implemented for more than one group at a time in your room. It is also important to provide more specific feedback to help students know how they are progressing. It is important that you use results from on-going assessments to plan effective lessons for all of your students.

Under personal relations, Rogers-Zegarra wrote:

> Debra, you can be a very affable person. On several occasions, however, you have displayed a brusque manner toward me, students and staff members. Continue to maintain open, on-going communications with me and other staff members.

At the end of the evaluation, Rogers-Zegarra wrote, "Recommend Non-Continuation." Bramlett was surprised at the recommendation because, she testified, at no time had Rogers-Zegarra criticized her performance.

Rogers-Zegarra and Bramlett met to discuss the evaluation. Bernadette Jones (Jones) accompanied Bramlett during the meeting. Bramlett's testimony and Jones' notes of the meeting establish that Rogers-Zegarra said her "recommendation had nothing to do with the evaluation. You're not a good partnership with the District." Bramlett asked what would make a good partnership, and Rogers-Zegarra responded, "attitude, I didn't feel you were professional with some of your decisions." Jones' notes also state that Rogers-Zegarra told Bramlett the District "needs someone who supports the school totally."

At the hearing, Rogers-Zegarra testified at some length about the basis for her recommendation. She said that she was meeting with a parent about the need to transfer students from Kawana to Bellevue to balance enrollment. The student wanted to remain at Kawana. Rogers-Zegarra said Bramlett entered the meeting and "advocated for the side of the

parent, and why the parent should stay at the school instead of being transferred." In Rogers-Zegarra's opinion, Bramlett's conduct "wasn't helpful." Hence, at the meeting with Jones, Rogers-Zegarra informed Bramlett that she wanted someone who supports the school totally.

In addition, Rogers-Zegarra testified that she was concerned about Bramlett's tone of voice when addressing parents in the student study team meetings. Rogers-Zegarra said she observed Bramlett on occasion addressing Hispanic parents in a student study team meeting by their first name and speaking to them in a "condescending tone." Although none of the parents from the study team meetings lodged complaints about Bramlett, Rogers-Zegarra concluded that Bramlett's manner of communicating with them was inappropriate based on her personal observation of the parents at the meetings in question.

Rogers-Zegarra also testified that she received numerous complaints about Bramlett from parents, staff and students. Aside from the two incidents discussed immediately below, Rogers-Zegarra identified no specific complaint received prior to the time she made the decision to recommend that Bramlett not be reelected.

In the first incident, Rogers-Zegarra claimed that Bramlett "intimidated" a secretary by raising her voice in connection with a truancy matter. According to Rogers-Zegarra, the secretary reported the incident to her in tears. Bramlett disputed Rogers-Zegarra's testimony. She testified that she did not intimidate a secretary, and, in fact, has no knowledge of the incident whatsoever. Bramlett testified "I can be direct and that can sometimes be misunderstood, but I've never had a cause for any I'll say bad words between teachers, I've never experienced that." She also testified that Rogers-Zegarra never mentioned this incident to her, and she heard of it for the first time at the hearing.

I credit Bramlett's testimony regarding this incident. If such an emotional incident occurred as described by Rogers-Zegarra, it seems likely that she would have at least

mentioned it to Bramlett. Rogers-Zegarra's failure to do so or to even identify the complaining secretary at hearing severely undercuts her testimony.

Another complaint described by Rogers-Zegarra involved Sherry Gregory (Gregory), a counselor. Rogers-Zegarra testified that in November 2000 Gregory informed her that Bramlett had spoken to an intern counselor in a "threatening" and "intimidating" manner, while addressing a student in the presence of other students. According to Rogers-Zegarra, Gregory reported that "her counselors were wondering what to do, because [Bramlett] was acting unprofessionally with the counselors." Rogers-Zegarra said she "probably didn't" speak to Bramlett about the incident directly, but she told the faculty on numerous occasions "not to talk about children in front of children."

Gregory did not testify at the hearing, but the parties stipulated that if called as a witness Gregory would testify as follows.

> I have weekly meetings with Nancy Rogers-Zegarra regarding current issues effecting the counseling program at Kawana School. Since I am there just part-time, it is important that I am briefed about the latest events so that we in the counseling department can respond in a timely and appropriate manner. I also inform Nancy of any critical situations or concerns that I might have along with a generalized assessment of how some students are progressing.
>
> During one of these meetings last year, I mentioned a situation that involved Debra Bramlett, an interning counselor and a student in the counseling program. The counselor had arrived at our weekly supervision meeting visibly upset. When I inquired about the upset she explained why she was feeling this way. My impression was that she had gone to Ms. Bramlett's classroom to get the student for his counseling appointment. It appeared that the student had been quite problematic that day during class. Ms. Bramlett appeared tired and frustrated. As the counselor was exiting with the student, Ms. Bramlett began talking about his behavior in front of the student and loud enough so others in the room could also hear. This included recommendations for what needed to be worked on in counseling. The counselor thought Ms. Bramlett's behavior was inappropriate and unprofessional. She felt it was embarrassing for the student and made her work in

> counseling with him more difficult. I do not recall that the counselor brought up the subject again.

The parties also stipulated that, if called as a witness, Gregory would testify that she "specifically denies" using the words "loud," "intimidating," or "threatening" when reporting the incident described above to Rogers-Zegarra. According to Bramlett, the Gregory incident was another complaint that was not communicated to her at the time it occurred.

The evaluation process involving Lemke proceeded along a similar path. On October 13, 2000, Rogers-Zegarra met with Lemke to develop her goals and objectives for the 2000-2001 school year, and on December 11, 2000, Rogers-Zegarra conducted a formal observation of Lemke in the classroom. The formal observation record, prepared by Rogers-Zegarra and presented to Lemke in a meeting, commends Lemke in several areas: the students were engaged and the lesson was organized; Lemke used a technique to activate the students' prior knowledge of the subject matter; Lemke had revised the lesson plan and handouts after a pre-observation conference with Rogers-Zegarra; and Lemke used an overhead projector effectively.

However, Rogers-Zegarra listed several recommendations. She suggested that Lemke call on different students rather than permit only a few students to offer answers. She suggested that Lemke encourage students to become independent learners by referring to their own directions rather than reading them with her. She suggested that Lemke check with students after they have been told to stop work. And she suggested that Lemke give more specific feedback to students, praise students more, and ask students to check their work to identify errors.

On February 8, 2001, Rogers-Zegarra evaluated Lemke for the first time. She rated Lemke professionally competent in five areas: student progress, student control, learning environment, personal relations and professional growth. Lemke was rated as needs

improvement in other duties. Lemke's evaluation contains many generally positive statements. However, Rogers-Zegarra included several recommendations for improvement.

Regarding student progress, she wrote, "try to use assessments more to inform your instruction and try to engage the student in more meaningful activities." Regarding student control, Rogers-Zegarra wrote, "continue to implement assertive discipline procedures in your classroom in a consistent manner. Continue to maintain high behavior standards. Students seem to know what is expected of them and respond accordingly." Regarding the learning environment, Rogers-Zegarra suggested that Lemke "try to display more student work in your classroom so students feel more ownership in the room," and "try to use graphic organizers etc. to help students become more independent learners." Regarding personal relations, Rogers-Zegarra wrote, "again, I want to remind you that it is important to maintain open, on-going communication with me regarding all aspects of your program. I am always available to answer questions and to discuss any part of the curriculum or a particular student." And, regarding other duties, Lemke received a needs improvement rating. Rogers-Zegarra noted that Lemke takes part in school-wide activities, and recommended that she "continue to support school-wide activities and programs. School wide activities are important in building a positive school climate."

The evaluation concluded: "Do not recommend Continuation." Lemke said she was "completely shocked" when she saw the evaluation. She testified that she was particularly surprised at the rating under other duties because she had participated in many activities, such as the student study team.

At the hearing, Rogers-Zegarra was questioned at length about specific concerns she had regarding Lemke's performance. According to Rogers-Zegarra, Lemke's class had multiple levels of learning abilities. However, she said Lemke called on only a few students

during class; she taught from the front of the class; she did not change her presentation to accommodate the various levels; she did not correct student mistakes in a math class; her teaching was more "activity-based" and not "focused to standards;" and she didn't use the District's "multiple measures to inform instruction." Rogers-Zegarra also reiterated that Lemke's classroom lacked discipline, and she questioned Lemke's judgement in failing to timely report a death threat by a student after being directed to watch the student carefully.

In response, Lemke testified that Rogers-Zegarra, throughout the 2000-2001 school year, never referred to the goals or objectives mentioned above, did not give her time to meet the goals and objectives, and never expressed concern about her performance prior to the hearing. In fact, as to the concerns reflected in Rogers-Zegarra's testimony, Lemke testified that she first time she heard them was at the hearing in this matter.

In addition, Lemke vigorously disputed the concerns stated by Rogers-Zegarra and Sutherland. She said she understood the curriculum and aligned the District standards with the curriculum in math, language arts and social studies and presented them to Rogers-Zegarra. Lemke said in-service training led her to a better understanding of math standards set by teachers at Kawana, and all fifth grade classes were taught in the same way. She said teachers at Kawana consulted among themselves in language arts and assigned students a Revolutionary War report involving social studies and language arts. Lemke said teachers worked together to obtain materials to help students prepare the report in accordance with District standards. Regarding the criticism that she did not "differentiate" her instruction, Lemke testified that she used a balanced language arts program that included anthology and guided reading, she used books geared to individual reading levels, she used a writing program that was geared to individual student levels, and she said she is trained in teaching to individual strengths.

Lemke disputed the assertion that she did not correct students in class, Lemke testified that she circulated in the classroom, gave students feedback and made sure students understood the lesson before proceeding. She said she used an overhead projector, gave each student written directions, posted directions on the board, and instructed the students to follow along on their sheet. Lemke agreed only with Rogers-Zegarra's testimony that she called on only a few students during the class, conceding that she was nervous about the observation and tended to focus on a few students.

Regarding the failure to report the death threat, Lemke testified that sometime in the early fall Rogers-Zegarra directed her to "watch" the particular student closely, but she did not tell her why. Rogers-Zegarra was aware that the student had made a death threat against another student, but she kept that information from Lemke because she claimed it was "confidential." On February 9, 2001, after Lemke received her evaluation and recommendation for nonreelection, a student informed Lemke that she had received a death threat that day. Lemke immediately removed the student who had made the threat from the room. Lemke could not contact Rogers-Zegarra that day for reasons unrelated to the incident. Before Lemke could speak to Rogers-Zegarra about the incident, the threatened student's mother on, February 10, sent Rogers-Zegarra a complaint letter.

Eventually, Lemke and Rogers-Zegarra met to discuss the evaluation. In explaining her decision to not recommend continuation, Rogers-Zegarra said Lemke had problems with Sutherland during the previous year, and she was "not a good match for the District." Lemke pressed Rogers-Zegarra on what it meant to be a good match, but got no answer that satisfied her. Lemke left the meeting without signing her evaluation.

Meanwhile, Rogers-Zegarra's recommendation not to reelect Bramlett and Lemke was submitted to Flores well before the February 2001 evaluations were issued. On January 11,

2001, she submitted the written recommendation to Flores, and he presented it to the District's governing board for a vote in February. In doing so, Flores said he followed Sutherland's and Rogers-Zegarra's recommendations that Lemke and Bramlett did not have the potential to be "superior or exceptional" teachers. The formal recommendation not to reelect Lemke and Bramlett was not the first time Flores became aware of concerns about their performance. The matter had been a topic of on-going discussions at the superintendent's cabinet meetings beginning in late fall 2000.

The Cabinet Meetings

The superintendent's cabinet is made up of the superintendent, principals at the three schools, a vice-principal and the director of curriculum. The cabinet meets weekly. Flores placed a great deal of importance on a "collaborative process" to monitor the progress of probationary teachers, and the topic frequently was discussed at these meetings. According to Flores, written evaluations are only one part of the decision to reelect a probationary teacher, and other factors such as the judgment of the principal are given weight. He said the District's practice is not to tell teachers the reasons they are not reelected. Flores instructs principals to tell teachers only that they were not a "good match" with the District, "so that if they left our district to go to another district, they would not have, quote, a bad record behind them."

Rogers-Zegarra and Sutherland testified that Flores asked about the status of all probationary teachers every week in cabinet meetings. "He asked me specifically," Rogers-Zegarra said, "In your opinion, are these excellent teachers. Because our school district is trying to improve and have quality and excellent teachers, and this is the time where you decide what kind of people you have in your district."

At cabinet meetings in November and December 2001, Rogers-Zegarra raised concerns about Lemke's performance in areas such as knowledge of curriculum, sequence for lesson

planning, and unsatisfactory classroom management. Sutherland expressed similar concerns during the same meetings. Flores testified that Rogers-Zegarra reported, in essence, that Lemke was "just satisfactory, and from her perspective would not go beyond the satisfactory to the superior or the exceptional."

At the same meetings, Rogers-Zegarra voiced concerns about Bramlett. According to Flores, the concerns were based largely on Bramlett's attitude toward students, parents and the administration. Specifically, he said Roger-Zegarra reported that Bramlett tended to be "argumentative," and this was a "real impediment to a working relationship." Evaluations issued by Sutherland to Bramlett the previous year reflected the same concern. Flores said he agreed with Rogers-Zegarra's perspective that Bramlett would not become a "superior" or "exceptional' teacher, and "if we don't have a strong, cooperative collegial relationship in the second year of probationary service, then it's likely not to continue, not to change in the future."

Statements by Jan Ferrin

On February 20, 2001, the governing board voted to not reelect Lemke, Bramlett and Alice Fitzwater (Fitzwater), another probationary teacher who has not challenged the decision. The meeting was well attended by teachers in a show of support for Bramlett and Lemke. After the meeting, board member Jan Ferrin (Ferrin) was approached in the parking lot by Heidi Kreklau (Kreklau) and Brenda Young (Young), both teachers at Kawana who believed the District's decision not to reelect Bramlett and Lemke was unfair. Kreklau testified that she knew Ferrin would not give her the specific reasons for the board's action, so she asked him if Lemke and Bramlett were not reelected for the same or for different reasons. Kreklau testified, "so he told me it was for the same reason, and I don't remember the segue, I don't remember if I asked for more or if he offered more, but he said that it was too bad that it was during a work-

to-contract year, it didn't give them an opportunity to show the extra things that they could do, to show that they were good teachers or excellent teachers." Kreklau also testified that Ferrin "made an analogy between the district and companies he's run, as the head of companies, and he was talking about that as the head of company you have to trust the people you put into certain positions, that you have to trust their judgments on recommendations and things like that."

Later in the conversation, Kreklau testified, Ferrin "used the word dedicated teachers to talk about people who were able to stay late and do the extra things, that that's what showed what a dedicated teacher was."

Young testified at the hearing and generally corroborated Kreklau's testimony. According to Young, after an exchange of pleasantries, "the topic of work-to-contract came up, and I think - - I don't know how it segued. I do know that - - I remember Jan had said that it was unfortunate, it was too bad that the work-to-contract had happened, it had hurt the two teachers involved, that they didn't have the chance to really see them being dedicated within their classrooms."

Ferrin's testimony about the meeting in the parking lot varies somewhat from that given by Kreklau and Young. He testified that the governing board's decision was based on an "evaluation and recommendation point." In other words, he said, the principal had evaluated Lemke and Bramlett and recommendations were made on that basis. Asked by District counsel about the impact of the work-to-contract campaign on the decision not to reelect Bramlett and Lemke, Ferrin responded, "I think we spoke to the various conditions that all the teachers were working under, in regards to that, but I don't think that that had any impact on – and I was pretty clear on that when I spoke with [Kreklau], that it had no impact on our decision-making process." Asked by District counsel if he made a comment to Kreklau that Lemke and

Bramlett were not dedicated teachers, Ferrin first said, "I don't remember saying that." Later Ferrin said "I believe the discussion [at the governing board meeting] was whether the teachers would be a match for the district, and that's what we were focused on." Asked if there was any discussion at the governing board meeting about whether the teachers would be dedicated, Ferrin responded, "there may have been discussion of that."

Based on the testimony set forth immediately above, considered in the context of the overall record, I make the following findings.

I credit the testimony of Kreklau and Young to the extent that Ferrin said the governing board meeting included a discussion of the work-to-contract campaign. They testified credibly on this topic and their testimony was consistent. Also, Ferrin's testimony is not inconsistent with that of Kreklau and Young. He said that *we*, presumably governing board members, spoke to the various conditions that *all* teachers worked under that year. It is reasonable to infer in the context of this record that Ferrin's comment was a reference to the common conditions created by the work-to-contract campaign.

I also credit Kreklau's and Young's testimony to the extent Ferrin said it was unfortunate that the reelection decisions took place in a work-to-contract year, and Young's testimony that Ferrin said the work-to-contract campaign "hurt the two teachers involved, that they didn't have the chance to really see them being dedicated within their classrooms." Again, they testified credibly on this point and their testimony was consistent. However, their testimony in this regard cannot be construed as a statement by Ferrin that applies to the governing board. At most, their testimony establishes only that Ferrin made the comment attributed to him during the discussion in the parking lot.

Further, Kreklau testified that Ferrin "used the word dedicated teachers" to describe teachers who "stay late and do the extra things." Ferrin did not deny making comments about

whether Lemke or Bramlett were dedicated teachers. Rather, he said, "I don't remember saying that." Later, Ferrin said that there "may" have been discussion of this topic at the governing board meeting. Because Kreklau recalled the conversation on this point with more clarity, I find that Ferrin made a comment in the parking lot to the effect that dedicated teachers perform extra services.

I also credit Ferrin's testimony that he told Kreklau and Young that the nonreelection decision was based on the evaluation and recommendation of the principal and that he was "pretty clear" that the work-to-contract campaign had no impact on the decision. Kreklau and Young did not directly dispute Ferrin's testimony on this point. And Ferrin's testimony is supported by Kreklau's testimony about Ferrin's analogy regarding the need to trust recommendations of lower level employees. This suggests that he told Kreklau that the board accepted the recommendation of Rogers-Zegarra as presented by Flores.

Pattern of Reelecting Probationary Teachers

Prior to 1999, it was unusual for the District to reject a probationary teacher. In recent years, however, it has not been unusual for the District to reject probationary teachers or to request that they resign. In 1997-1998, one of 15 probationary teachers was not reelected. In 1998-1999, three of 12 probationary teachers were not reelected. In 1999-2000, all seven probationary teachers were reelected.

During the 2000-2001 school year the District employed 23 probationary teachers, ten of which were second-year probationary teachers. The increase in the number of probationary teachers in this school year was in part due to increased enrollment in the District. All probationary teachers participated in the work-to-contract campaign. Three were not reelected for the 2001-2002 school year: Lemke, Bramlett and Fitzwater. As noted earlier, Fitzwater taught at Meadowview and has not challenged the District's decision to not reelect her.

All second-year probationary teachers who were reelected for the 2001-2002 school year had evaluations higher than those of Lemke and Bramlett. In fact, with one exception, all probationary teachers who were reelected had substantially higher evaluations than Bramlett and Lemke.

As noted earlier, Bramlett was rated professionally competent in five areas and somewhere between professionally competent and needs improvement in one. Lemke was rated professionally competent in five areas and needs improvement in one. By contrast, Gina Cantarutti was rated superior in all areas. Josh Dies was rated superior in four areas and professionally competent in two. Carrie Cormire was rated superior in five areas and professionally competent in one. Tiffany Kampmann was rated superior in four areas and professionally competent in two. Steve Maldonado was rated superior in all areas. Roger Kim was rated superior in three areas and professionally competent in three. Even Fitzwater, who was not reelected, received a slightly better evaluation that Lemke and Bramlett. She was rated professionally competent in all areas.

Margaret Close (Close) was the only probationary teacher at Kawana who was reelected, and she received evaluations similar to those of Bramlett and Lemke. In her first evaluation during the 1999-2000 school year Sutherland rated Close as professionally competent in four areas and needs improvement in two. In the evaluation, Sutherland recommended that Close continue "with reservations." By the end of the 1999-2000 school year, Close's evaluation had improved. She was rated professionally competent in five areas and needs improvement in one. Sutherland recommended that Close continue with "some reservations." In her first evaluation during the 2000-2001 school year, issued in December 2000, Rogers-Zegarra rated Close professionally competent in all areas. Rogers-Zegarra recommended that Close continue with "some reservations."

Flores testified that Close was discussed at the cabinet meetings in November and December 2000. Despite the similarity between Close's evaluations and the evaluations of Lemke and Bramlett, Rogers-Zegarra recommended that Close be reelected for the 2001-2002 school year. By November 2000, Rogers-Zegarra testified, Close had demonstrated growth as a teacher and that she has the potential to be an excellent teacher. Sutherland participated in the discussions about Close. She testified that "my reservations were the implementation of the program, and it sounded like she was implementing many of the strategies, and had sought to ask for some guidance from the principal and from others, and had made changes in her program, yes. And I did agree."

Although Close's evaluations were similar to those of Lemke and Bramlett, Flores testified, "the mitigating circumstance was the judgment of the principal, does this individual have the potential of being a superior teacher, and the principal indicated that that person had the potential." "It's a judgment call," according to Flores, and the call went in favor of Close.

Close lives in the District, and her children attended Bellevue school. She had been active as a temporary aide in her children's classroom, in various committees, and in the Parent Teacher Association (PTA). Close did her student teaching in the District and was described in testimony as having made a mid-career switch to teaching. Flores has known Close for 13 years, and he encouraged her to apply for a position in the District. Also, Close and Ferrin have been friends since the mid-1990s when they were active in the PTA. Flores testified that he has had a good relationship with the PTA and the organization has honored him with awards over the years.

In contrast, Lemke and Bramlett do not live in the District, and they did not know Flores before the District hired them. At the time she became principal at Kawana, Rogers-Zegarra did not know Close, Bramlett or Lemke.

ISSUE

Was Bramlett or Lemke denied permanent status by the District because of their protected activity, in violation of section 3543.5(a)?

CONCLUSIONS OF LAW

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 matter of employer-employee relations." Section 3543.5(a) makes it unlawful for a public school employer to retaliate or discriminate against employees for their exercise of protected conduct.

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210, p. 6 (Novato).)

Unlawful motivation is essential to establish a prima facie case of discrimination. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Ibid.) In Novato and a number of subsequent cases, it has been recognized that a variety of circumstances may justify an inference of unlawful motive on the part of the employer. (See e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, p. 15; North Sacramento School District (1982) PERB Decision No. 264, pp. 9-11.)

Once an unlawful motive is established, the burden shifts to the employer to establish that it would have taken the action complained of even in the absence of protected activities. (Novato at p, 14; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626] (Martori).) The employer's action should not be deemed an unfair practice unless the Board determines that "but for" the employee's protected conduct she would have received permanent status. (Ibid.)

These principles have been applied where, as here, it is alleged that a probationary teacher has been denied permanent status because of her protected activity. (McFarland Unified School District (1990) PERB Decision No. 786, affirmed McFarland Unified School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405] (McFarland).) The District's power to deny tenure to a probationary employee for any lawful reason does not insulate its decision from PERB scrutiny when an unfair practice complaint alleges that the decision was made in retaliation for protected conduct. (McFarland at p. 168.)

BEA first argues that Lemke and Bramlett participated in the work-to-contract campaign, conduct protected by EERA, and that Flores and Rogers-Zegarra knew of their participation. BEA argues further that it has experienced "strained labor relations" in negotiations with Flores over many years, and the hiring of an independent negotiator did not improve the situation. In fact, BEA asserts, the situation deteriorated such that BEA entered into a work-to-contract campaign in the 2000-2001 school year that curtailed a number of activities like the student study team, tutoring and faculty planning sessions. BEA argues that the curtailment of these activities, in turn, led to lower test scores and a loss of performance-based income and awards, especially at Kawana.

In a series of arguments related to disparate treatment, BEA contends that the District identified Kawana as a "trouble spot" and targeted Lemke and Bramlett for retaliation. BEA contends that Close had virtually identical evaluations as Lemke and Bramlett, but was retained because of her prior connections to Flores, Ferrin and the District in general. The District's claim that it hires only "superior" or "potentially superior" teachers rests on an "amorphous and speculative" standard, BEA continues, and therefore is suspect. Moreover, BEA contends, the evaluations of Lemke and Bramlett are couched in "double-speak" and "euphemisms" that are further evidence of disparate treatment when compared with the evaluations given Close. As a final disparate treatment argument, BEA asserts that the District's record of seldom nonreelecting probationary teachers undercuts its claim that it promotes only superior or potentially superior teachers. BEA argues that in the three years from 1997 to 1999, no probationary teachers were nonreelected, and during Flores' 21-year tenure as superintendent only one or two probationary teachers have been rejected in the second year.

BEA next argues that the District has offered unjustified and unsubstantiated reasons for the nonreelection of Lemke and Bramlett. BEA points out that the incident involving the death threat occurred after the decision to recommend nonreelection for Lemke and thus could have played no part in the decision itself. Regarding relationships with parents and the alleged parental complaints about Bramlett, BEA asserts that no specific complaint was cited; Rogers-Zegarra's own testimony indicates that other teachers called Hispanic parents by their first names in student study meetings; no parent ever complained personally; Rogers-Zegarra never attempted to ascertain precisely what she perceived to be the parents' reaction; and any

response by parents in the student study meetings is as attributable to the sensitive subject matter of such meetings as it is to addressing parents by their first names.

In addition, BEA continues, there is no evidence to support the claim that Bramlett intimidated a secretary and made her cry, and Bramlett has credibly denied the incident ever occurred. Regarding the incident involving counselors, Gregory denied having used terms such as "loud," 'intimidating," or "threatening" to describe Bramlett's conduct. BEA points out, Rogers-Zegarra never brought the incident to Bramlett's attention, nor did she ever investigate it.

Lastly, BEA contends that it is no coincidence that this case arose at the school Flores agreed was a union stronghold. With no recourse to retaliate against the union's leadership, the District selected two vulnerable probationary teachers to vent its anger over the work-to-contract campaign. BEA concludes, "through Lemke and Bramlett, the District could exercise its union animus and send a clear message both to the BEA and to future probationary teachers that concerted activity will have dire consequences, that going along with BEA will get you fired."

In response, the District argues that BEA has failed to establish a critical element of the Novato test, a nexus between the protected conduct and the nonreelection decisions. The District argues that the timing of the nonreelection decisions does not support an inference of unlawful motive because timing is dictated by an Education Code requirement that decisions regarding probationary teachers must be made by March 15. The District also disputes BEA's claim of disparate treatment, arguing that all 23 probationary teachers participated in the work-to-contract campaign along with all permanent teachers; and the record is silent as to evidence showing any retaliatory motive for singling out Bramlett and Lemke. Lacking protected conduct unique to Lemke and Bramlett, the District continues, BEA relies on "nuances" in

evaluation comments in an attempt to overcome its right to not reelect a probationary teacher for any or no reason. But Sutherland had reservations as to both Bramlett and Lemke in the 1999-2000 school year when there was no job action. Thus, there has been no inconsistent or contradictory justification for the nonreelection decisions.

The District next contends that the number of probationary teachers who were not reelected in 2001 is consistent with prior years and any perceived increase simply reflects the larger probationary class, not retaliation for protected activity. The District concedes that the bargaining relationship here has been marked by "negotiation strife," but Flores testified without rebuttal that there has never been a grievance filed against him; prior to the instant case, there has never been an unfair practice charge filed against the District; and there has never been a grievance that reached arbitration. Thus, the overall record cannot support the claim of widespread anti-union animus advanced by BEA.

In the District's view, Ferrin's comments in the parking lot about the nonreelection decision deserve no weight when compared to the District's legitimate prerogatives to not reelect probationary teachers. Even assuming Kreklau's testimony is credited over that of Ferrin, the District argues, it does not include a reference to the content of the board's deliberations and it falls short of demonstrating retaliation for protected conduct.

Lastly, the District argues that the retention of Close does not suggest an unlawful motive, nor is it material to the issues presented here. Close's hiring was consistent with the District's practice of hiring its student teachers, she was evaluated under the same procedures used to evaluate Lemke and Bramlett, and she received a more favorable evaluation. Under these circumstances, retention of Close hardly shows disparate treatment, especially since she

too participated in the work-to-contract campaign. In sum, the District concludes, BEA has failed to meet its burden: "suppositions and inferences cannot trump the evidentiary record."[5]

Drawing a distinction between "discretionary" and "mandatory" duties, PERB has held that a refusal to perform purely voluntary duties is protected conduct, while the refusal to perform normally required or assigned duties is not. (See Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195 (Palos Verdes); Modesto City Schools (1983) PERB Decision No. 291 (Modesto); Los Angeles Unified School District (1990) PERB Decision No. 803 (Los Angeles).) Hence, in work-to-contract cases, the inquiry focuses on whether the activities which were not performed are voluntary or required. In support of its claim of protected conduct, BEA presented evidence that teachers performed duties required by the contract, while refusing to perform duties not covered by the agreement. Neither at the hearing nor in its brief, has the District contested BEA's assertion that the duties in question were not required or that the work-to-contract campaign was protected conduct under PERB precedent. Accordingly, I conclude that teachers who participated in the campaign engaged in protected activity.

It likewise is not disputed that Flores and Rogers-Zegarra at all relevant times were aware of the work-to-contract campaign. While Flores may have had no specific knowledge of conduct by Lemke and Bramlett, he was aware that all teachers participated. Similarly, Rogers-Zegarra knew that all teachers participated in the campaign, including Lemke and

[5] The District points out in its brief that Lemke and Bramlett previously had been released from employment in other school districts as probationary (Lemke) and temporary (Bramlett) teachers prior to being hired by the District. Although the District concedes that evidence of prior employment is not dispositive of the issues herein, it argues nevertheless that such evidence be considered insofar as the District should not be penalized for making the same decisions as was made by other districts. I find that the experiences of Lemke and Bramlett in other districts has little probative value regarding the issues presented in this case and therefore the evidence relating to their employment in those districts will not be considered.

Bramlett. Therefore, I find that the District was aware of the campaign at the time of the decisions to deny Lemke and Bramlett permanent status.

Having established that Lemke and Bramlett engaged in protected conduct known to District representatives and that they were not reelected as permanent teachers, BEA must next show evidence of an unlawful motive as a nexus between the protected conduct and the District's adverse employment decisions. Unlawful motive may be established by direct or circumstantial evidence and inferred from the record as a whole. (Novato at p. 6; Newark Unified School District (1991) PERB Decision No. 864, p. 14 (Newark).) For the following reasons, I conclude that the record contains sufficient evidence to support the inference that Rogers-Zegarra harbored an unlawful motive as a result of the work-to-contract campaign.

Reasons cited by Rogers-Zegarra in support of her nonreelection recommendation involved matters that were raised for the first time at the hearing. For example, Rogers-Zegarra testified about numerous parental complaints against Bramlett. Yet she did not discuss them with Bramlett or even bring them to her attention. Nor could Rogers-Zegarra identify a single parental complaint at hearing. Also, Rogers-Zegarra did not investigate the incident reported by Gregory or even inform Bramlett that Gregory had lodged the complaint. Accordingly, I find that Rogers-Zegarra's handling of these incidents constitute evidence from which an unlawful motive may be inferred. (See e.g., Livingston Union School District (1992) PERB Decision No. 965, at p. 4 (Livingston).)

Rogers-Zegarra testified that one reason for the recommendation to deny Lemke permanent status was her failure to report a death threat by a student. The evidence is that Rogers-Zegarra in November 2000 directed Lemke to monitor the student, the threat was made on or about February 9, 2001, and Lemke reported it as soon as possible. There was nothing Lemke could have done to prevent the threat. It is clear, moreover, that the threat was not

made until after Rogers-Zegarra's decision (in early January 2001) to recommend nonreelection for Lemke. Thus, Rogers-Zegarra could not have relied on the incident in making her recommendation. The failure to report the death threat is unjustified as a reason for the recommendation to deny Lemke permanent status. Offering unsubstantiated reasons to support an adverse employment decision is evidence from which an unlawful motive may be inferred. (See e.g., Newark at p. 17.)

Rogers-Zegarra testimony that Bramlett was loud, overly emotional and intimidating does not withstand scrutiny as a justification for the recommendation to deny her permanent status. I have already discredited Rogers-Zegarra's testimony that Bramlett intimidated a secretary in connection with a truancy matter, and her testimony about Bramlett's alleged outburst during an encounter in Bramlett's classroom early in the year. The stipulation that Gregory would deny using words like "intimidating" or "loud" or "threatening" to describe Bramlett's conduct in the counselor incident is consistent with this finding. There is a significant difference between communicating in a direct or blunt manner and intimidating or threatening fellow employees or others. While Bramlett concedes she may be direct and therefore misunderstood on occasion, I find that Rogers-Zegarra's testimony that she is loud, overly emotional or intimidating is exaggerated and thus supports an inference of unlawful motive. (See e.g., Novato at pp. 13-14.)

Although Rogers-Zegarra was not the person who made the final decision to deny Bramlett and Lemke permanent status, her recommendation was accepted by Flores, who passed it on the to the board for final approval. The factors noted above support the inference that Rogers-Zegarra harbored an unlawful animus against Lemke and Bramlett for their protected conduct. And it was Rogers-Zegarra who recommended that Lemke and Bramlett be denied reelection. Unlawful animus may be imputed to high management officials where, even

innocently, they rely on inaccurate and biased information of lower level management officials. (See e.g., State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S, p. 16; State of California (Department of Corrections) (2001) PERB Decision No. 1435-S, adopting proposed decision of administrative law judge at p. 32.) Therefore, I find that the animus harbored by Rogers-Zegarra seeped into the reelection process.

Based on the foregoing, I conclude that BEA has established a prima facie case. Under Novato, the burden now shifts to the District to establish that it would not have reelected Lemke and Bramlett even if they had not participated in the work-to-contract campaign. (McFarland at p. 168.)

Although evidence of unlawful motive exists, the mere presence of such animus is not determinative. As the Board and the courts have held in mixed motive cases, when an employee suffers an adverse action because of a combination of valid business reasons and reasons based on unlawful animus, the question becomes whether the action would not have occurred "but for" the protected activity. (See Martori at p. 729-730; Novato at p. 20.) For the following reasons, I find that Bramlett and Lemke would not have been reelected even if they had engaged in no protected conduct.

The theory advanced by BEA is that the District singled out Kawana as a trouble spot and targeted Bramlett and Lemke for nonreelection to retaliate against the union's leadership and deliver a message that getting involved with BEA "will get you fired." In support of this argument, BEA points to evidence that a group of teachers at Kawana have been active in BEA over the years in contentious negotiations with Flores, in a work-to-contract campaign in 1996, and in the most recent campaign. At the hearing, Flores was questioned at length about the parties' bargaining history and his role as a central figure in the process. To prevail on its

theory, therefore, BEA must establish that Flores harbored an unlawful animus and that he targeted Lemke and Bramlett as an act of retaliation.

Even if Flores believed Kawana was a "union stronghold," the evidence falls short of establishing that the District unlawfully retaliated against BEA through Lemke and Bramlett. It may be true that the parties had a strained relationship over the years, and Flores was at the center of it as a result of his role as superintendent and negotiator. He conceded that the parties were locked in an adversarial process that was not positive, he was critical of the work-to-contract campaign, and he was "saddened" by the fact that services were not being extended to children during the campaign. On the other hand, he said he did not believe the parties were "antagonistic and angry," and he reconciled his criticism of the campaign with the fact that the teachers were providing full professional service and doing their job.

These are not comments that establish an unlawful motive. They are mere statements of opinion, including Flores' criticism of the work-to-contract campaign. A superintendent can hardly be expected to endorse such action and need not remain neutral, even in the face of protected conduct. An employer is permitted to hold and express its views on employment-related matters without violating EERA, provided the statements do not contain a threat of reprisal or force. (Rio Hondo Community College District (1980) PERB Decision No. 128, pp. 18-20.) Under this standard, PERB has found that an employer representative's comments that collective bargaining is a "shame" and that he did not like the "adversary climate" which collective bargaining created were permissible expressions of opinion. (Regents of the University of California (1983) PERB Decision No. 366-H, p. 11.)

Further, although negotiations between BEA and the District may have been contentious over the years, the parties always resolved their differences in the end. Evidence that the District may have engaged in hard bargaining and pushed negotiations to mediation or

factfinding is unremarkable. Indeed, the Act envisions use of such third party intervention when negotiations stall. In this regard, it is noteworthy that throughout the 1990's BEA has never filed an unfair practice charge against the District, nor has any grievance been taken to arbitration.

Therefore, I conclude that evidence of past negotiations, Flores' role in the bargaining process, and his opinion of the BEA-District relationship do not support BEA's theory that the District retaliated against the BEA leadership at Kawana by targeting Lemke and Bramlett. As more fully discussed below, this is especially true in light of evidence that Lemke and Bramlett engaged in the same protected conduct as every other teacher in the District and admittedly were not particularly active in BEA affairs.

The comments made by Ferrin after the February 20, 2001, board meeting do not compel a different conclusion. A discussion about whether to grant teachers permanent status cannot realistically be held in a vacuum. As Flores testified, such decisions are not made solely on the basis of written evaluations, and much is left to the judgment of the principal. It therefore would not be unusual or inappropriate for deliberations to include a discussion about whether teachers under consideration are dedicated teachers. Nor would it be unusual or inappropriate for the discussion to include the conditions under which the teachers worked during the years in question. For example, whether teachers refused to perform required duties would be a legitimate topic of discussions. The line between the refusal to perform purely voluntary duties, which is protected, and the refusal to perform normally required or assigned duties, which is not protected, is often blurred. (See e.g. Palos Verdes at pp. 10-13; Modesto at pp. 15-25; Los Angeles at pp. 3-5.) The governing board would not violate the Act merely by discussing the conditions under which employees worked as part of its deliberations.

Granted, a discussion of protected conduct in the context of reelection decisions would render the decisions themselves unlawful if the evidence supported the conclusion that decisions ultimately were made because of the protected conduct. But that is not what happened here. I have credited Ferrin's testimony that, although the conditions under which Lemke and Bramlett were discussed, the decisions to not reelect Lemke and Bramlett were not influenced by the work-to-contract campaign. Rather, Ferrin testified, they were based on Lemke's and Bramlett's performance, Rogers-Zegarra's recommendation, and the conclusion that the teachers were not a good match with the District.

Even if Ferrin made the statements attributed to him by Kreklau and Young, they would not tip the scale in favor of BEA. I have credited the teachers testimony to the effect that Ferrin said it was unfortunate that the reelection decisions occurred in a work-to-contract year and the campaign "hurt the two teachers involved, that they didn't have the chance to really see them being dedicated within their classrooms." However, as more fully discussed below, the opposite is true. Rogers-Zegarra's recommendations were based primarily on classroom performance and other factors that have nothing to do with performing extra duties. While Ferrin may have formed the opinion that the campaign worked to the disadvantage of Bramlett and Lemke, the evidence is otherwise. Therefore, when considered against the evidence supporting the District's decision, Ferrin's statements do not compel a finding that but for their protected conduct, Lemke and Bramlett would have been reelected by the governing board.

A key factor here is that the District employed twenty-three probationary teachers in 2000-2001, and Lemke and Bramlett were among a group of only three who were not reelected. While it is true that an employer may violate the Act by retaliating against certain employees for protected conduct, even where the employer does not retaliate against all employees who engage in such conduct, there must be some basis to find that those who

suffered the retaliation were targeted because of their protected conduct. (See e.g. State of California (Department of Transportation) (1984) PERB Decision No. 459-S, p. 7.) The record herein contains insufficient evidence to support such a finding.

There is no evidence of protected conduct that is unique to Lemke and Bramlett. In 2000-2001, all 23 probationary teachers participated in the work-to-contract campaign. Of these, 13 were first year probationary teachers who were advanced to the second year of probationary status, and there is no evidence of retaliation against them. Of the 10 second-year probationers, only three were not reelected. And one of the three has made no claim that she was denied permanent status because of her protected activity.

Nor is the number of second-year probationary teachers not reelected or asked to resign in lieu of nonreelection in 2000-2001 substantially inconsistent with the practice over at least the past four years, a period when the number of probationary teachers increased due to growing enrollment. In 1997-1998, one of fifteen probationary teachers was asked to resign. In 1998-1999, three of twelve were asked to resign. In 1999-2000, the District had only seven probationary teachers, and all were reelected. In the year in question, 2000-2001, three of ten were not reelected. Based on these statistics, it cannot be concluded that the number of teachers not reelected in 2000-2001 departed markedly from the pattern established since the 1997-1998 school year.

BEA's contention that the District deviated from its practice of reelecting most probationary teachers prior to 1997 is not persuasive. While evidence of the pattern of nonreelection decisions is not irrelevant as a general rule, absent more specific evidence such as the number of probationary teachers employed in a given school year, the number of teachers not reelected, evaluations of teachers, and reasons for nonreelection, it is difficult to

credit BEA's argument. This is especially true where evidence of the pattern during recent years points in the other direction.

The evaluations issued to the 10 second-year probationary teachers establish that Lemke and Bramlett, while rated as professionally competent teachers, nonetheless ranked at the bottom of the list. In fact, with one exception, all probationary teachers who were reelected received substantially higher ratings than Lemke and Bramlett. These evaluations need not be repeated in detail here. Suffice it to say that many of the teachers received "superior" ratings in several areas. Except for two superior ratings given Bramlett in her first evaluation during the 1999-2000 school year, she and Lemke received no such ratings. It bears repeating that even Fitzwater, the teacher who was not reelected and chose not to challenge the decision, received a slightly better evaluation than Bramlett and Lemke.

It is true that Close received an evaluation that is very similar to the evaluations received by Bramlett and Lemke, yet she was reelected. But even Close's most recent evaluation is slightly better than those of Lemke and Bramlett. Close was rated professionally competent in all areas, while Bramlett and Lemke were rated professionally competent in all but one area: Bramlett received a "2/3" rating in "personal relations," and Lemke received a "2+" rating in "other duties." While these evaluations admittedly are similar, Close had the edge. Also, her reelection was consistent with the District's practice of hiring its student teachers, and, unlike Lemke and Bramlett, Roger-Zegarra made the determination that Close had the potential to become a superior teacher.

BEA argues that, despite Close's participation in the work-to-contract campaign, she was "virtually untouchable" because of her ties to the District, friendship with Flores, and connection with Ferrin through the PTA. If Close was treated differently and reelected for these reasons, it might support the conclusion that the District favored her because of her

connections. But it does not follow that favoring Close for these reasons is evidence of retaliation against Lemke and Bramlett. Such favoritism, moreover, does not violate the Act. (See e.g., Moreland Elementary School District (1982) PERB Decision No. 227, p. 15 ["Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy."].)

In addition, Rogers-Zegarra and Sutherland had concerns about the performance of Bramlett and Lemke that pre-dated the work-to-contract campaign. While Rogers-Zegarra exaggerated Bramlett's tendency to be loud and intimidating, it is clear that she could be blunt or brusque in her communications. This issue was sufficiently noteworthy for Sutherland to make it part of Bramlett's evaluation the previous year, before the work-to-contract campaign. Thus, in reference to Bramlett's participation in the student study team meetings, Sutherland wrote in June 2000 "that this process calls for a team approach and that everyone on the team needs to act in a supportive manner. I have noticed that you, again, can be rather outspoken at these meetings. This could have a negative effect on promoting positive parental support." The same evaluation indicated that students or parents could misinterpret Bramlett's blunt manner. A similar concern was present in the following school year when Rogers-Zegarra witnessed Bramlett address parents in what she described as a condescending manner. And the concern is documented in Bramlett's February 2001 evaluation.

Rogers-Zegarra also concluded that Bramlett did not support her or at least "wasn't helpful" when the need to transfer students to another school was discussed in a meeting with a parent. And while Gregory may not have described Bramlett as loud, intimidating or threatening, the fact remains that she complained of an incident where Bramlett discussed

recommendations to deal with a student's behavior problems in the presence of other students, correctly describing it as unprofessional and inappropriate.

It was for these reasons that Rogers-Zegarra, with input from Sutherland, concluded that Bramlett had a questionable attitude, was unprofessional in some of her decisions, and didn't support the school totally. As a result, Rogers-Zegarra told Bramlett during a meeting to discuss the February 2001 evaluation that, the evaluation aside, she was not a good match with District.

Regarding Bramlett's classroom performance, by the end of the 1999-2000 school year, Sutherland had developed reservations about whether she should continue. The ratings in Bramlett's evaluation were lower, and Sutherland expressly noted her reservation in the evaluation. Again, this occurred before Bramlett participated in any protected conduct. Sutherland testified, "as the year progressed, I became more concerned . . . especially in the area of relationships with students and with me, and with staff members. Also, with differentiating curriculum and implementing a program that met with needs of each individual RSP student." Sutherland's opinion was carried into the following year. She told Rogers-Zegarra very early in the 2000-2001 school year, before any impact of the work-to-contract campaign reasonably could have been felt, that she should observe Bramlett to determine if recommendations from the prior year were being met.

The December 2000 observation of Bramlett's performance in the classroom, made at or about the time Rogers-Zegarra was formulating her reelection recommendation, was not an overwhelming success for Bramlett. While there were reasons for Rogers-Zegarra to commend Bramlett, there also were several recommendations for improvement. Among other things, Rogers-Zegarra suggested Bramlett assist students in identifying important points of a story, follow the reading, encourage students to read more, and follow standardized instructions.

Further, in Bramlett's February 2001 evaluation, Rogers-Zegarra wrote that "it is also important that your plans are well thought out and that meaningful activities are implemented for more than one group at a time in your room. It is also important to provide more specific feedback to help students to know how they are progressing. It is important that you use results from on-going assessments to plan effective lesson plans for all of your students."

It is noteworthy that Sutherland raised similar issues in her June 2000 evaluation of Bramlett, prior to the work-to-contract campaign. Sutherland wrote that Bramlett should "continue to use on-going assessment to inform your instruction. The implementation of guided reading, for instance, could be of real benefit to children. It is also important that your plans are well thought out and that meaningful activities are implemented for more than one group at a time in your room." In a series of recommendations attached to the evaluation, Sutherland suggested that Bramlett interact with students, parents and staff in a "positive and supportive manner." She suggested that Bramlett communicate with her openly "before making program decisions." She noted that Bramlett should use the results from on-going assessments to "plan effective lessons for all of [her] students." She said, "it is vital that direct instruction, based on your on-going assessment, happens on a daily basis both in a group setting and with individual students." Lastly, Sutherland said Bramlett should continue to implement the techniques and strategies learned during in-service training.

I agree with BEA's assessment that some of Sutherland's and Rogers-Zegarra's evaluation comments were less than clear directives and for that reason may be subject to criticism, but in substance Bramlett's 1999-2000 and 2000-2001 evaluations are substantially consistent. They indicate that Bramlett was professionally competent, but she was not outstanding in any area.

The record similarly supports the conclusion that Lemke was a professionally competent teacher rather than an outstanding teacher. A main concern, documented in the evaluations, was that Lemke's classroom lacked discipline. Sutherland's January 2000 evaluation of Lemke assigns her a "3" rating in student control and states: "Continue to implement assertive discipline in your classroom in a consistent manner. I liked the positive manner in which you interact with students. Students need to know what is expected of them so that they can respond accordingly." (Underlining in original.) Lemke's June 2000 evaluation in the same area again assigns a "3" rating and contains a similar comment: "it is important to have high expectations for students and to monitor behavior." The same concern carried over to the 2000-2001 school year. Assigning Lemke a "3-" rating under student control in the February 2001 evaluation, Rogers-Zegarra stated: "continue to implement assertive discipline procedures in your classroom in a consistent manner. Continue to maintain high behavior standards. Students seem to know what is expected of them and respond accordingly." Rogers-Zegarra's comment suggests that Lemke may have improved slightly in this area. However, it is substantially consistent with Sutherland's evaluation and reflects no more than professional competence.

The record also indicates that Lemke's classroom performance was rated no higher than professionally competent. Rogers-Zegarra's comments after observing Lemke's class in December 2000 suggest that she needed to involve more students in the class, encourage students to become independent learners, and give more feedback to students. She reiterated these concerns at the hearing in support of her recommendation for nonreelection, noting that Lemke called on only a few students during the class, taught from the front of the class, and did not change her presentation to accommodate the various levels of learning ability in the group. Lemke's February 2001 evaluation reflects a similar theme; that is, Lemke should "try

to maintain a focus on presenting a well-balanced program that meets grade level standards for each student and make sure students read and write on a daily basis. Try to use assessments more to inform your instruction and try to engage the student in more meaningful activities."

Observations of this type were not new. Sutherland's comments after she observed Lemke's class in December 1999 evidence a similar assessment. For example, she too suggested that Lemke needed to involve students by gaining their attention so that they remain engaged, noting that the longer the lesson went the more students became disengaged. She pointed out that Lemke sometimes did the work for students, and advised her to let the students do more. Sutherland said the lesson went too long and suggested better pacing. Sutherland observed that the aide and the reading teacher were not involved in the lesson, and suggested they conduct guided reading groups during the period. And Sutherland's January 2000 evaluation of Lemke in the area of student progress documents her opinion. It indicates that Lemke should focus on presenting a well-balanced program that meets grade level standards. And in both evaluations during the 1999-2000 school year, Sutherland rated Lemke no higher than professionally competent in student progress.

Lemke conceded that she may have called on only a few students during the class observed by Rogers-Zegarra. However, she vigorously disputed other assertions related to her interaction with students. She testified, for example, that she circulated around the room during the observation by Rogers-Zegarra, gave specific instructions, and used an overhead projector as a teaching aide. Nonetheless, it is difficult to conclude on this record that Lemke's performance was above that of a competent teacher or that Rogers-Zegarra's evaluation of her work was motivated solely by a desire to retaliate against BEA or Lemke because of the work-to-contract campaign. It cannot be overlooked that Sutherland evaluated her in a similar

manner twice during the prior school year, well before the work-to-contract campaign commenced.

Despite the concerns discussed above, it is clear from the overall record that Lemke and Bramlett were not unsatisfactory teachers. They were professionally competent, but the District chose to set the standard for reelection at a higher level. Relying primarily on Livingston, BEA argues that Lemke and Bramlett were never informed of the standard to which they would be held and thus it is pretextual. In that case, a school district defended its decision to not reelect two probationary teachers because they did not demonstrate the potential for excellence. There was no evidence explaining what standards the teachers failed to meet, nor were the teachers informed that satisfactory performance would result in rejection. The Board adopted the proposed decision of an administrative law judge that the alleged failure to demonstrate excellence as a reason for nonreelection was pretextual.

There are some similarities between Livingston and this case, but there are also significant differences. The probationary teachers in Livingston engaged in several acts of protected conduct that put them directly at odds with the principal. Indeed, the principal referred to a faction of the faculty which included the probationary teachers as "bitchers" or "gripers," a district official commended the principal for the way she dealt with the "malcontents," and the principal indicated who the teachers associated with was more important than their performance. In contrast, Lemke and Bramlett engaged in no protected conduct, which set them apart from other teachers. All teachers in this case engaged in precisely the same conduct; thirteen first-year probationary teachers and seven second-year teachers participated in the same conduct and were rehired. And there is no evidence of labels attached to Lemke and Bramlett such as "bitcher" or "griper."

In addition, the decision in Livingston was made in the context of a substantially different evidentiary record as far as performance is concerned. The administrative law judge found that the teachers' actual evaluations did not fall short of the standard required by the district for reelection. Primary reasons for the nonreelection decisions were not well documented in the evaluations and observation reports. In some areas where the teachers were criticized, they received ratings such as exceeding expectations or meeting district standards. The only teachers in the previous six years who had not received tenure were rated "needs improvement" or "unsatisfactory." Adopting the conclusion of the administrative law judge, the Board found that the teachers satisfied the standard set by the district: "there is no evidence that these two employees were only marginally satisfactory or otherwise weak when measured against the policy of excellence." (Livingston at p. 5.)

In contrast, Lemke and Bramlett did not meet the District's standard. Both Sutherland and Rogers-Zegarra evaluated them as professionally competent. Reasons cited by the District in support of the nonreelection decisions are documented in the observation reports, evaluations and testimony. Except for Close, every probationary teacher reelected in the 2000-2001 school year was rated substantially higher than Lemke and Bramlett. And the decisions to not reelect Lemke and Bramlett were not a departure from past practice.

Plainly, the circumstances underlying the Board's decision in Livingston are different from the record in this matter. While the failure to make the reelection standard absolutely clear may suggest an unlawful motive that leads to a finding that a nonreelection decision is truly pretextual, those circumstances are not present here. Thus, I find that Livingston does not compel a finding that the District violated the EERA when it decided to nonreelect Lemke and Bramlett.

Accordingly, it is concluded that BEA has not shown that but for their participation in the work-to-contract campaign Lemke and Bramlett would have been reelected.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-2223-E, Bellevue Educators Association, CTA/NEA v. Bellevue Union Elementary School District, 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 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 California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

FRED D'ORAZIO
Administrative Law Judge